



**ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL  
ARBITRATION MOOT**

# **Analysis of the Problem for Use of the Arbitrators**

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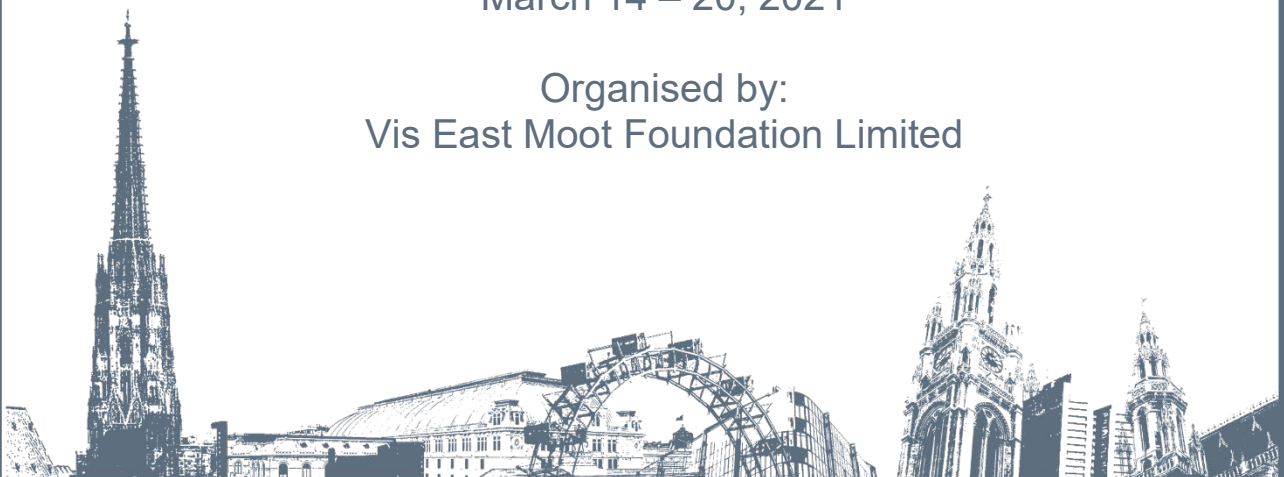
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# ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

If you do not already have a copy of the Problem, it is available on the Vis Moot web site, <https://>. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 (PO 2) and the Appendix.

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are ***strongly urged not*** to communicate any of the ideas contained in this analysis to their teams ***before*** the submission of the Memorandum for RESPONDENT.

The analysis will be sent to all teams after all Memoranda for RESPONDENT have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem, in particular not all possible interpretations of the various contractual provisions.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

## **INTRODUCTION**

This year's case arises from an unusual "Purchase, Collaboration and License Agreement" (RespiVac-Agreement), concluded between Claimant (RespiVac) and Respondent No. 1 (CamVir) for the development of a Covid 19 vaccine. The RespiVac-Agreement is a modified version of the type of Collaboration and License Agreements used in the life-science industry for the development of new drugs and compounds. In the RespiVac-Agreement several unusual purchase obligations supplement the typical grant of a license for the use of the underlying IP-rights and know how in form of the GorAdCam viral vector, developed by Respondent No. 2 and then licensed to Respondent No. 1. Those purchase obligations relate to the first batch of such viral vectors and additional materials for the production of the vaccine should the research be successful.

In substance the dispute concerns the question whether Respondent No. 1 has fulfilled its delivery obligation under the RespiVac-Agreement or whether the GorAdCam viral vectors were tainted by claims of a third party. Before granting Respondent No. 1 an exclusive license for respiratory diseases, Respondent No. 2 had given an exclusive license for the use of the GorAdCam viral vector to Ross Pharmaceuticals for "malaria and related infectious diseases" (Ross Agreement). Ross Pharmaceuticals had maintained in negotiations with Respondents No. 2 and Roctis AG (Roctis), the parent company of both Respondents, that due to the reference of "infectious diseases" the exclusive license given to it under the Ross Agreement by Respondent No. 2 also extended to research related to Covid 19.

The broad topics to be discussed by the students are the following:

1. In relation to arbitration:

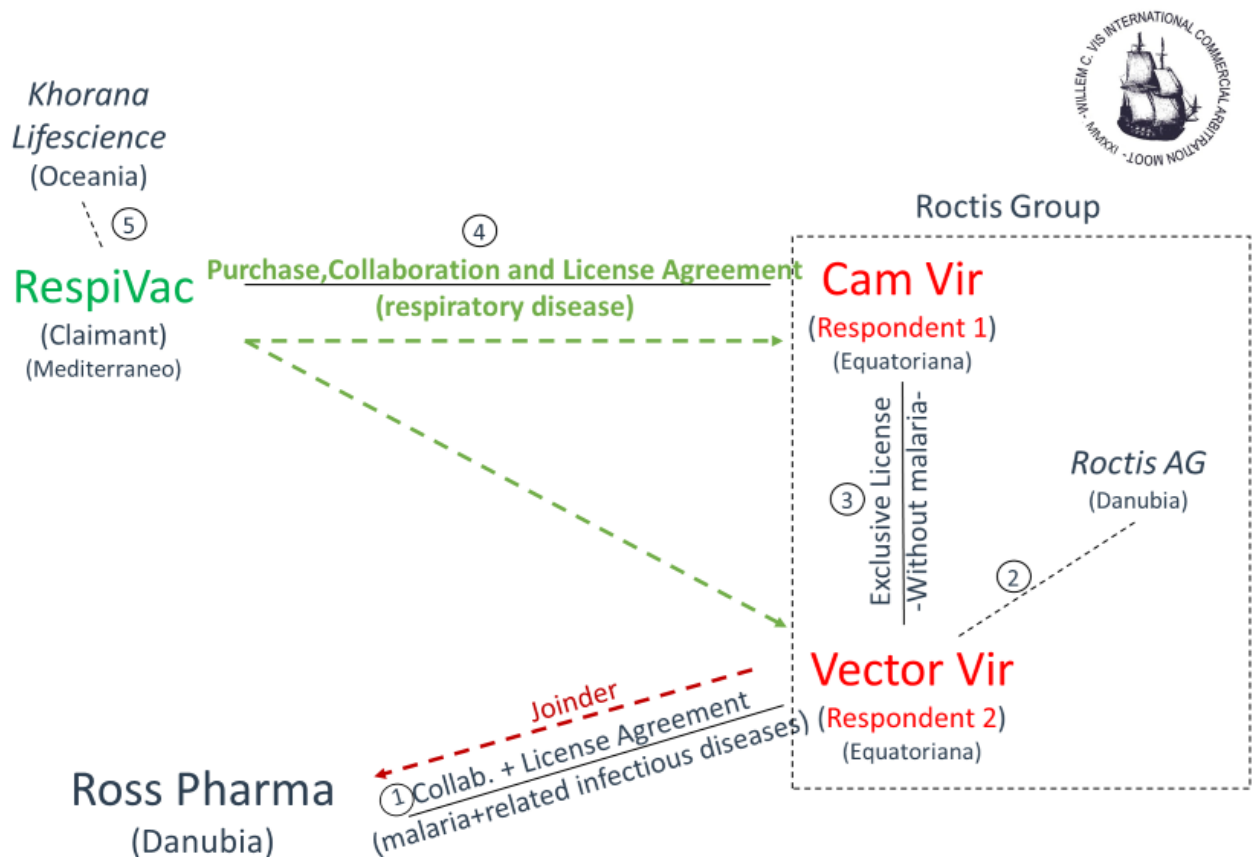
- a) Can (and should) the Arbitral Tribunal join Ross Pharmaceuticals under Article 4 (2) of the Swiss Rules upon Respondents' request and despite the objections from Ross Pharma and Claimant?
- b) Can (and should) the Arbitral Tribunal order a remote hearing for the examination of witnesses and experts in the 2<sup>nd</sup> Hearing of 3 to 7 May 2021, if a hearing in person is not possible or considered by the Arbitral Tribunal to be inappropriate?

2. In relation to the CISG:

- a) Is the CISG applicable to the "Purchase, Collaboration and License Agreement" concluded between Claimant and Respondent No. 1 due to the purchase elements or is the RespiVac-Agreement in essence a license agreement (or other agreement) not governed by the CISG?
- b) If the CISG is applicable: Has Respondent No. 1 breached its contractual obligations to deliver conforming goods pursuant to Article 42 CISG because Ross Pharmaceuticals has alleged in the negotiation with Respondents and Roctis that it is entitled to use of the GorAdCam viral vector due to the Ross-Agreement?

Several of the vaccines against Covid 19 presently developed use the technique of viral vectors. While the case tried to mirror the basic technique as close as possible, several changes were made deliberately to exclude as far as possible any reliance on facts outside the case. In particular, while the vaccines in practice either use a modified chimpanzee or a human adeno virus as viral vector, the case relies on a modified gorilla adeno virus. Furthermore, the HEK-294 cells are an invention for the Moot excluding any reliance in the discussion on the specific features of the HEK-293 cells used in practice. Consequently, while reliance in the discussion on information related to the general technique of viral vectors may be allowed, references to specific vaccines is in general not.

The following overview visualizes the relationship of the parties involved, the sequence of the contracts concluded, and the claims brought by Claimant (green) and Respondents (red):



**Agreements:**

- 1) 15 June 2014: Ross Agreement
- 2) August 2018: Acquisition of Respondent 2 by Roctis Group
- 3) August 2018: Exclusive License Agreement for GorAdCam viral vector
- 4) 1. January 2019: RespiVac-Agreement
- 5) April 2019: Acquisition of RespiVac by Khorana Lifescience

## **THE FACTS**

### **I. Parties and contractual history**

Claimant, RespiVac plc (“RespiVac”), is a start-up biopharmaceutical company engaged in the development of vaccines for respiratory diseases caused by viruses.

Respondent No. 1, CamVir Ltd, and Respondent No. 2, VectorVir Ltd, are both 100% subsidiaries of Roctis AG (“Roctis”), the holding company of the Roctis Group which is one of the biggest pharmaceutical companies in the world.

Respondent No. 1 is the Contract Manufacturing Organisation of the Roctis Group for the production of pharmaceutical base materials for various vaccines and drugs under the GMP-conditions. The production of these base materials normally occurs under licenses or sublicenses from other companies of the Roctis Group but also from outside companies.

Respondent No. 2 was founded in 2012 by the three leaders of a governmental funded research project into the possible use of viral vectors for the development of vaccines. It is the holder of several patents resulting from that research project and was acquired by Roctis in 2018. One of the patents relates to the GorAdCam viral vector which is based on a genetically modified adenovirus from gorillas, normally causing the common cold in gorillas.

To obtain the viral vector, the DNA of the adenovirus is genetically modified so that the genes responsible for the replication of the adenovirus (E1) are deleted. As a consequence, the viral vector constituted by the DNA of a harmless, replication-deficient adenovirus can form the basic structure for a vaccine. The viral vector can then be further genetically modified (be charged) by incorporating parts of the DNA/a gene of interest of the virus against which the vaccine is directed. This gene of the virus of interest will not replicate itself when inserted into the human body. 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 primarily interested in respiratory diseases, where the main expertise of its researchers lay, decided not to pursue any further own 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, based on the Chimpanzee adeno virus (ChAdCam), for which Respondent No. 2 also held a patent. 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 15 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”* (Respondent Exhibit R 3).

Due to the research done with the GorAdCam viral vector since 2014 by Ross Pharmaceuticals and two sublicensees, it became apparent that contrary to the initial expectations the GorAdCam vector might also be useful for vaccination and treatment of respiratory diseases. As a consequence, in summer 2018, after abandoning its malaria research for economic reasons, Ross Pharmaceutical made another offer to purchase Respondent No. 2 to acquire its patents to develop vaccines for respiratory diseases. At the time Respondent No. 2 was, however, already in negotiation with Roctis which finally acquired Respondent No. 2 and its patents in August 2018.

Immediately after the acquisition by Roctis, Respondent No. 2 entered into an exclusive license agreement with Respondent No. 1. The exclusive license granted Respondent No. 1 the permission for the production, sale and sublicensing of the GorAdCam viral vector for all applications with the exceptions of malaria (Claimant Exhibit C 2).

In January 2018 Respondent No. 1 had already acquired from a third party an exclusive license for the production of HEK-294 cells. These cells are needed to amplify the otherwise replication-deficient viral vectors in a specially prepared cell growth medium, which had been developed by Respondent No. 1. In principle, the specially developed HEK-294 cells take up the function of the removed replication gene outside the human body.

On 1 January 2019, Respondent No. 1 entered into the RespiVac-Agreement (Purchase, Collaboration and License Agreement – Claimant Exhibit C 3). The RespiVac-Agreement concerned the delivery and the use of GorAdCam viral vectors 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 by Respondent No. 2 for the Ross Agreement and on other occasions.

In addition to some minor other changes to the template, a new Section 16 was added in the RespiVac-Agreement. It contains additional purchase obligations for Claimant, resulting also in the amended title for the Agreement (Purchase, Collaboration and License Agreement), as well as an option to have the vaccine produced by Respondent No. 1. The purchase obligations arise if a vaccine is successfully developed and produced by Claimant. In that case Claimant has to buy the HEK 294-cells as well as the necessary cell growth medium from Respondent No. 1.

The purchase requirement is a very peculiar feature of the Agreement and deviates from the normal practice in the development and production of vaccines based on viral vectors. The prevailing practice is that the patent owner (“licensor”) sells and delivers a first batch of different genetically modified harmless viral vectors in the context of a collaboration and license agreement. This batch is produced by the licensor by adding the disease specific inserts requested by the licensee to its basic viral vector. These newly produced viral vectors with inserts (gene of interest) can then be used by the licensee for research to determine the most suitable insert for a subsequent vaccine production. Once an optimised gene of interest is defined, larger quantities of GMP-produced viral vector batches are delivered for clinical trial studies. In case these trials are successful and result in the development of a vaccine, the licensee itself produces the required quantities of viral vectors and pays royalties for the use of the viral vectors. There is, however, no obligation to buy the HEK-cells and the growth medium necessary for the production

from the licensor. Normally, HEK-293 cells are used for the amplification of the otherwise replication deficient viral vectors and there are standard growth media freely available on the market.

A particular feature of the GorAdCam vector is that it is best amplified in special HEK-294 cells. At the end of 2018, Respondent No. 1 was one of two producers which did not only deliver the HEK-294 cells, but also the growth medium required for their reproduction. Consequently, Respondent No. 1 could insist on including the additional purchase requirement for the HEK-294 cells and the growth medium. As Claimant was at the time not in the position to produce the quantities necessary for the production of a vaccine under GMP-conditions, it did not object to the additional purchase obligation.

According to the RespiVac-Agreement, Respondent No. 1 was obliged to deliver to Claimant a first batch of the GorAdCam viral vectors for research into vaccines against infectious respiratory diseases. For the delivery of that batch a price of EUR 2,5 million was due (Section 9.2, p. 13). Further license payments in the overall amount of EUR 3 Million were due upon the fulfilment of particular milestones (Section 9.4, p. 14). These milestones were the successful completion of the various clinical phases and the approval of the vaccine by the Regulatory Authorities.

Unlike other collaboration and License agreements, the present agreement did not merely provide for additional royalties for the production and sale of the vaccine. In addition, the Claimant was obliged under Section 16 of the RespiVac-Agreement, in case of the commercialization of the product developed under the Agreement, to purchase from Respondent No. 1 the HEK 294-cells as well as the culture medium which are needed for the amplification of the GorAdCam vectors required for the production of the vaccine.

Due to the research done with the GorAdCam virus during 2019, Claimant immediately recognized the potential of the GorAdCam virus as a vector for a future vaccine against the SARS-CoV-2 (formerly 2019-nCoV) causing COVID-19. 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 21 April 2020 Claimant was taken over by Khorana Lifescience, one of the leading life science companies in Danubia (Respondent Exhibit R 1, p. 29). Unlike Claimant, Khorana Lifescience has the know-how, the equipment and the financial means to produce the GorAdCam viral vector in its original as well as modified version (with the gene of interest) as the base product for any vaccine developed by Claimant.

On 1 May 2020, Claimant's COO, Mr. Paul Metschnikow, received from the CFO of Khorana an older article from the Biopharma Science, a local journal of the start-up scene published in Danubia. The article of 19 December 2019 reported about a dispute between Ross Pharmaceuticals and Respondent No. 2 as to the reach of the license granted in 2014 to Ross Pharmaceuticals under the Ross Agreement (Claimant Exhibit C 4 p. 18). According to the article the CEO of Ross Pharmaceuticals, Mr. Müller, confirmed at a press conference the continued existence of different views as to the scope of the Ross Agreement. According to the interpretation of Ross Pharmaceuticals the exclusive license granted under the Ross Agreement

was not limited to the field of malaria. Due to the reference to “*malaria and related infectious diseases*” Ross Pharmaceuticals interpreted the Ross Agreement

*“as covering also its most recent research in using the GorAdCam as a viral vector for its research into vaccines against several infectious respiratory diseases including that caused by the MERS-coronavirus.”*

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 4 May 2020 (Claimant Exhibit C 6, p. 20) assuring Mr. Metschnikow that Ross Pharma 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*”. She asked Mr. Metschnikow to confirm that with his CFO, Ms. Hübner, who had been working for Ross Pharmaceuticals at the time the Ross Agreement had been concluded with Respondent No. 2.

Ms Flemming informed Mr. Metschnikow that according to her information from the colleagues from Roctis, the interpretation put forward by Ross Pharma 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.*

*Before Ross Pharma stopped the production of their malaria vaccine for economic reasons, they had already set up the production facilities for producing the HEK-294-cells required for the amplification of the GorAdCam viral vectors. Thus, they did not want to purchase any quantity of those HEK-294-cells including the cell culture medium from CamVir. While we would not have insisted on such a purchase to solve the dispute, Ross Pharma was also not willing to pay the requested full license fees.”*

Ms. Hübner, was unable through her contacts to get hold of a copy of the Ross Agreement. Her contacts confirmed, however, that in June 2020 there were still ongoing discussions between Roctis 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 research for a vaccine against COVID-19 (Claimant Exhibit C 7, p. 21).

Notwithstanding these discussions between Roctis and Ross Pharmaceuticals, the latter never approached Claimant raising an IP claim.

## **II. Initiation of arbitration and Statement of Relief**

In light of these ongoing discussions between Roctis and Ross Pharmaceuticals, Claimant initiated the present arbitral proceedings by sending a Notice of Arbitration to the SCAI on 15 July 2020. It submitted that already the mere assertion of a right by Ross Pharmaceutical to use GorAdCam viral vector rendered the viral vectors delivered non-conforming in the sense of Article 42 CISG. For a small start-up like Claimant the uncertainty as to scope of the Ross Agreement and its



effects on Claimant's use of the GorAdCam viral vector was unbearable. As Claimant was not yet in the position to specify the exact remedy it asked the arbitral tribunal for the following orders:

- 1) To declare that Respondent No. 1 breached the Purchase, Collaboration and License Agreement by delivering GorAdCam viral vectors which were not free from third party rights or claims;
- 2) To order Respondents No. 1 and No. 2 to bear the costs of these arbitration proceedings.

On 14 August 2020 Respondents submitted a joint Answer to the Notice of Arbitration. They stated that "in the interest of speeding up the proceedings and to solve the dispute comprehensively" Respondent No. 2 would not contest the jurisdiction of the arbitral tribunal. The Respondents requested the following orders from the Arbitral Tribunal:

- a. To join Ross Pharmaceuticals to these arbitration proceedings;
- b. To order Ross Pharmaceuticals to refrain from making any further allegations that it holds an exclusive license for the use of the GorAdCam virus in relation to any research into vaccines for respiratory diseases;
- c. To reject Claimant's claim for a declaratory relief that the Respondents breached their contractual obligation to provide GorAdCam viruses which are free of any third party rights or claims;
- d. To order Claimant to bear the costs of this arbitration.

Respondents considered the claim to be unjustified and a

*"a thinly concealed effort to prepare for the termination or renegotiation of a contract which no longer appears to be favorable in light of the most recent developments."*

After the acquisition by Khorana Lifescience, Claimant has now sufficient technical and financial help to develop the vaccine and produce the viral vectors and the HEK-294 cells itself, at costs which are considerably lower than the price which would have to be paid for the material to Respondent No. 1. Consequently, Respondents assumed that the claim was an effort to avoid at least the purchase obligation which would otherwise arise under the Purchase, Collaboration and License Agreement once Claimant were to start producing a vaccine.

Respondents contested that Ross Pharmaceuticals has any claim to use the GorAdCam viral vector for research on respiratory diseases. The license under the Ross Agreement was only for the field of "malaria and related infectious diseases" but not for respiratory diseases based on viruses. Respondents submitted that Ross Pharmaceuticals did only allege a broader interpretation of the Ross Agreement to avoid being bound to pay royalties for the use of the GorAdCam viral vector for their research on respiratory diseases.

On 4 September 2020, following the constitution of the Arbitral Tribunal by SCAI, the Presiding Arbitrator, Professor Françoise Sinoussi, requested Claimant to reply to Respondents' request to join Ross Pharmaceuticals. The latter had already objected to a joinder in a letter of 25 August 2020 (not reproduced in the file). In addition, the Arbitral Tribunal wanted to know whether, in light of the uncertain development of the COVID-19 pandemic, the Parties have any objections to conduct the oral hearing as a remote hearing instead of in person hearings, if necessary.

In its submission of 2 October 2020 Claimant objected to the joinder due to the Tribunal's lack of jurisdiction over Ross Pharmaceutical. It agreed to remote hearings should the latter be necessary as in its view the "dispute is a fairly straight forward case involving primarily legal questions without the need to hear any witnesses or experts on the largely uncontested facts".

Respondents by contrast in their submission from the same day objected to remote hearings, in particular if they involve the taking of evidence. In their view the Swiss Rules as well as the applicable Danubian Arbitration law are based on the assumption, that a hearing in person will be held if the parties have not agreed on a document-only-arbitration. Furthermore, the arbitration agreement provided for a hearing in person in its sole addition to the Model Clause of the Swiss Rules.

## **THE ISSUES**

### **I. Overview**

In a telephone conference on 8 October 2020 the Parties agreed on some procedural issues, in particular, that the hearing on the joinder and certain legal questions should be held remotely. Following that, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 (PO 1) para. III (1). It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the following issues:

- a. Should Ross Pharmaceuticals be joined to the Arbitration Proceedings?
- 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 viruses?

### **II. General considerations**

While the Parties are in principle free to select the order in which they address the various issues (PO 1 para. III (1) last sentence), it makes sense to start with the procedural questions. Ross Pharmaceuticals would only be bound to a decision on the merits, if they had been joined before the merits are heard. In the written submission, few Parties may have opted for a different order, because the role played by Ross Pharmaceutical for the merits is a central argument for the joinder.

In relation to the merits, PO 1 states explicitly that beyond the two questions under c) and d) no further questions referring to the merits of the claims should be addressed, in particular no questions relating to the claim for damages.

The following remarks are merely intended to highlight the legal issues arising from the Problem. They follow the order of the questions posed by the Tribunal. It is for the Arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission and to suggest an order for the oral hearings should the Parties not have agreed upon an order.

### **III. The Joinder of Ross Pharma: Procedural Order No 1 para. III (1 a)**

#### **1. Background**

Claimant bases the arbitration on the following dispute resolution clause contained in Section 14 of the RespiVac-Agreement:

*Any dispute, controversy, or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.*

*The number of arbitrators shall be three. All arbitrators are to be appointed by the Institution and should have good knowledge in the field of intellectual property and the developments of vaccines.*

*The seat of the arbitration shall be in Vindobona, Danubia. 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.*

*The arbitral proceedings shall be conducted in English. (Emphasis added)*

The identical clause is contained in Section 14 of the Ross-Agreement concluded between Respondent No. 2 and Ross Pharmaceuticals. The clause is to a large extent the Model Clause for the Swiss Rules. Only the highlighted part concerning the hearings has been added already during the negotiation of the Ross-Agreement. It was then just copied into the RespiVac-Agreement between Claimant and Respondent No. 1, to which neither Respondent No. 2 nor Ross Pharmaceuticals are a party.

Notwithstanding that latter fact, Claimant brought its action not only against Respondent No. 1 but also against Respondent No. 2. Claimant justified this inclusion of Respondent No. 2 by the latter's ownership of the patent and the role played by Mr. Peter Doherty in the negotiations of the RespiVac-Agreement. At the time the RespiVac-Agreement was negotiated in December 2018, Mr. Doherty was still working for Respondent No. 2. Though his work as the head of the contracting department of Respondent No. 1 officially only started on 1 January 2019, he became the lead negotiator for Respondent No. 1 after his predecessor fell sick. In particular, he provided the template upon which the RespiVac-Agreement was finally based.

Respondents did not object to that inclusion, since they wanted to solve the dispute comprehensively, but in turn asked for a joinder of Ross Pharmaceuticals. Claimant's substantive claim, i.e. that the viral vectors delivered were "tainted" by third party rights, is based on the allegation by Ross Pharmaceuticals that the Ross Agreement through the

reference “malaria and related infectious diseases” also covers research into Covid 19 which constitutes an infectious disease. That allegation is contested by Respondents. In light of the ongoing discussions between Respondents’ parent company Roctis and Ross Pharmaceuticals about the same question Respondents have an interest in solving the question once and for all in the present arbitration proceedings.

Both Claimant and Ross Pharmaceuticals, however, object to the joinder which consequently would have to be ordered by the arbitral tribunal.

## 2. Discussion

The Arbitral Tribunal’s power to join third persons is regulated in Article 4(2) of the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution. It provides:

*“Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances.”*

While the provision contains a broad procedural power for arbitrators to join third persons, such power has to be distinguished clearly from the additional requirement, that the arbitral tribunal has jurisdiction over such a third person. The present arbitration proceedings are based on the arbitration clause contained in the RespiVac-Agreement, concluded between Claimant and Respondent No. 1 to which neither Respondent No. 2 nor Ross Pharmaceuticals are a party. Both have, however, signed an identical clause referring also to the Swiss Rules in the Ross-Agreement. That raises the question whether by signing an arbitration agreement referring to arbitration rules containing a wide joinder provision the Parties to the Ross-Agreement, also submit to the jurisdiction of a tribunal constituted on the basis of a different but identical arbitration clause, if the other conditions for a joinder are met. In addition, also the Parties to the RespiVac-Agreement must have submitted to an arbitration with parties from a different agreement.

If jurisdiction over all Parties concerned can be established, it has to be determined whether “taking into account all relevant circumstances” Ross Pharmaceuticals should be joined.

For both questions the following considerations may be relevant:

- Claimant has brought an action against Respondent No. 2 who is not a party to the Purchase, Collaboration and License Agreement
- Claimant’s claim is exclusively based on claims by Ross Pharmaceuticals under a provision which contains a far reaching allocation of the litigation risk to Respondent No. 1 (claim sufficient under Art. 42 CISG) so that it may be contrary to good faith (inherent obligation of the RespiVac-Agreement?) to prevent Respondents from joining Ross Pharmaceuticals as the dispute can only be solve comprehensively if Ross Pharmaceuticals is bound by the decision

- The confidentiality obligation in Clause 10 of the RespiVac-Agreement
  - not clear to what extent it would be affected by a discussion about the interpretation of the Ross Agreement
  - interplay of the identical clauses in both Agreement and confidentiality agreement in Article 44 (1) Swiss Rules reduces the threat of unwanted disclosures

#### **IV. Order to hold remote evidentiary hearing: Procedural Order No 1 para. III (1 b)**

##### **1. Background**

In light of the pandemic the Arbitral Tribunal wanted to know from the Parties whether they would have any objections to conduct the oral hearing as a remote hearing instead of an in person hearing, if necessary.

In their submissions of 2 October 2020 (p. 48-49) the Parties expressed opposing views as to the admissibility of oral hearings. Claimant had no objections against such hearings and was of the view that the Arbitral Tribunal had the necessary powers under the Swiss Rules and that all Parties are obliged under Article 15(7) Swiss Rules to “avoid unnecessary costs and delays”. Respondents “strongly” objected to holding any hearing remotely, in particular if they involve the taking of evidence. As a justification Respondent stated that notwithstanding the procedural discretion of the Arbitral Tribunal:

*“the Swiss Rules are based on the assumption that a hearing in person will be held as it is evidenced by Article 25 Swiss Rules. Furthermore, pursuant to Article 24 of the Danubian Arbitration Law, in cases like the present, where the Parties have not agreed upon a documents-only arbitration, the “arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party””*

In their telephone conference of 8 October 2020, the Parties agreed, that the hearing on legal issues, in particular the procedural questions, should be held remotely and it should be decided whether the examination of witnesses and experts in the 2<sup>nd</sup> Hearing of 3 to 7 May 2021 should be conducted remotely.

Any remote hearing would have to address the time differences between the different countries involved. There is a time difference between Mediterraneo and Danubia of 3 hours and a further time difference of 8 hours between Danubia and Equatoriana (p. 47). The time for Danubia is UTC, while Mediterraneo is UTC-3 and Equatoriana is UTC+8 (PO 2, p. 57).

##### **2. Discussion**

The issue involves first a determination of whether the Arbitral Tribunal has the power to order a remote hearing under the arbitration clause, the chosen arbitration rules and the applicable arbitration law. If such power exists, the question arises whether the Arbitral Tribunal should exercise it in the present case.

The relevant provisions were all drafted before the start of the pandemic and thus did not anticipate the need for remote hearings. Moreover, it appears that they were drafted on the

basis of an assumption that a hearing would take place in person. There is, however, in none of the provisions a clear statement that a “hearing” in the sense of the relevant provisions cannot be held remotely.

The existing case law relating directly to arbitration considered remote hearings to be admissible and not to infringe on the Parties’ right to be heard or to a fair hearing. There are decisions by the Austrian Supreme Court of 23 July 2020 (Docket 18 ONc 3/20s) and the US District Court for the Northern District of Illinois Eastern Division from 12 August 2020 in *Legaspy v. Financial Industry Regulatory Authority* which decided that way. In both cases the legal setting with the exception of the arbitration clause was comparable.

There are, however, also decisions in the connection with state court proceedings where the courts denied a power to order remote hearing at least for proceedings in the state courts (e.g. Swiss Supreme Court of 6 July 2020 – 4A\_180/2020).

In the present case the interpretation of the arbitration clause may also play a central role. The only addition made to the Model Clause for the Swiss Rules is the one relating to hearings highlighted above. It is clearly based on the assumption of a hearing in person. It was, however, concluded before the pandemic and explicitly refers to the discretion of the arbitral tribunal, but probably more in relation to the location of the hearing.

The file gives some information (PO 2 paras. 31 and 32) about the background of the inclusion of the clause into the Ross Agreement. At the time Mr. Doherty had suggested a documents-only-arbitration which was not acceptable to Ross Pharmaceuticals and had then insisted on hearings taking place in Equatoriana. Thus, there was the idea of a hearing in person underlying the wording of the clause, without, however, explicitly stating so. Whether that constitutes an agreement by the Parties also of the RespiVac-Agreement, into which the clause was included without any further discussion, has to be discussed by the parties.

Relevant points in relation to the discussion of the two issue could be:

- Existence of an agreement of the Parties on an oral hearing?
- Relevance of changed circumstances?
- Suggestion of documents-only-arbitration by Mr. Doherty during the negotiation of the Ross-Agreement – but in a different situation and only for Respondent No. 2
- Technically possible to hold remote hearings – but different time zones
- Costs of remote hearing may be higher if an outside provider has to be hired and it cannot be excluded with 100% certainty that no third party may interfere (PO2, para. 35 p. 58).

## **V. The applicability of the CISG to the Purchase, Collaboration and License Agreement: Procedural Order No 1 para. III (1 c)**

### **1. Background**

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 new

vaccines and compounds. 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 the production of the new vaccines or drugs.

The RespiVac-Agreement also contains as part of the compensation due by Claimant a typical royalty scheme for the licenses granted and the first batch of viral vectors delivered. It starts with first an up-front payment of EUR 2,5 Mio for the delivery of the first batch of viral vectors (Section 9.2, p. 13), followed by several additional milestone payments upon the achievement of certain development steps of up to EUR 3 Mio in case of an acceptance of the vaccine by a Regulatory Authority (Section 9.3, p. 14) and then supplemented by regular staged royalty payments in case of a production and the sale of the vaccine (Section 9.5, p. 14).

For the production of the vaccine Section 16 of the RespiVac-Agreement – under the heading of “Purchase Obligations for Vaccine Production” – supplements this royalty compensation scheme by the following purchase obligation generating additional revenues:

**16.1 Purchase Obligation.** *In case of a commercialization of the Product, Licensee will acquire its need of HEK-294 cells and cell culture medium for the production and the amplification of the GorAdCam vectors for the production of a vaccine from Licensor at a price of two million Euro (EUR 2,000,000) per 2,000 l batch.*

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:

**16.2 Production Option.** *Licensee has 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.*

The production option brought with it also a slightly reduced royalty fee for revenues generated with the vaccine (Section 16.3, p. 17).

The exact financial effects the various options would have for the Parties involved are evidenced by excerpts from their internal calculation added as Appendix 1 to PO 2.

## 2. Discussion

According to Claimant these obligations to deliver the first batch of the GorAdCam vector (mentioned in Section 9.2) and – in case of a vaccine production – the HEK-294 cells and the cell culture medium justify the classification of the RespiVac-Agreement as a Contract of the Sale of Goods in the sense of Article 1, 3 CISG.

Respondents consider the RespiVac-Agreement to constitute a license agreement, as the transfer of know how is by far the most important obligation for Respondent No. 1.

Article 3 CISG regulating to what extent the CISG applies to contracts going beyond a mere sale of standardized goods provides as follows:

*(1) 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.*

*(2) 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*

The provision does not fit squarely for the RespiVac-Agreement under which an important part is the permission to use know-how embodied in the viral vectors delivered. Irrespective of that, it provides the relevant factors for balancing the importance of the different obligations arising for Respondent No. 1 under the RespiVac-Agreement. In determining whether certain obligations are the preponderant part one may either rely on quantitative or qualitative factors. In that context the following considerations may play a role:

- the (mere) production costs for the viral vectors, the HEK-294 cells and the growth medium in relation to the price charged for the first batch and the following milestone payments; detailed analysis in Appendix 1 to PO 2; know-how element in price charged;
- the conditional nature of the further milestone payments (dependent on reach of milestone) as well as of the further delivery obligations (dependent on production of vaccine);
- the importance of the know-how element in the performance of the contract; direct regulation of obligation to grant a license (Section 5) but not of delivery obligation (mentioned only in context with payment obligation in Section 9.2);
- the name of the RespiVac-Agreement (Purchase, Collaboration...) and the description of Respondent No. 1 in the recitals;
- the industry practice;
- the negotiation history.

## **VI. Breach of delivery obligation under Art. 42: Procedural Order No 1 para. III (1 d)**

### **1. Background**

The above question as to the application of the CISG is important as Article 42 CISG contains a very specific provision as to the treatment of third party' rights or claims which are based on intellectual property. Art. 42 CISG provides:

*(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other 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 industrial property or other intellectual property:*

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

*(b) in any other case, under the law of the State where the buyer has his place of business.*



*(2) The obligation of the seller under the preceding paragraph 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; or*  
*(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.*

The provision is in one aspect broader than many national rules as it not only covers third party rights but even the existence of a claim is sufficient to trigger its application. It is, however, also narrower than national rules due to several limitations, including the relevant IP-laws (territorial limitation) and the various knowledge requirement (buyer's constructive knowledge about existence of third party right or claim).

In the present case, Ross Pharmaceuticals had been granted an exclusive license in the Ross-Agreement for the field "malaria and related infectious diseases" by Respondent No. 2 in 2014 (Respondent Exhibit R 3, p. 32). Originally, Respondent No. 2 only wanted to grant a normal license for the field of malaria. Against the payment of an additional Eur 600.000 the field was extended to malaria "and related infectious diseases" and exclusivity for this field was granted.

While Covid-19 is an infectious disease it is not one which is in any way "related" to malaria. The outside reporting about the Ross Agreement has not been completely accurate as to its field of application. The Press Release issued by Respondent No. 2 refers to the "field of vaccination against malaria and infectious diseases" (Claimant Exhibit C 1, p. 9), while the article in Biopharma Science of 19 December 2019 (Claimant Exhibit C 4, p. 18) reports about a license for malaria and "comparable infectious diseases".

Ross Pharmaceuticals has relied upon the extension to "related infectious diseases" in its negotiations first with Respondent No. 2 and then Roctis to justify its use of the GorAdCam viral vector in its research for respiratory diseases. Ross Pharmaceuticals is generally known in the industry to vigorously enforce its IP-rights (Claimant Exhibit C 7, p. 21). In the present case, they have, however, never asserted any claim against Claimant. Equally, in the discussions with Roctis they have been willing to renounce any claim to exclusivity in return for a grant of a license without purchase obligations and a reduced license fee. While Roctis would not have insisted on the purchase obligation they were not willing to reduce the license fee (Claimant Exhibit C 6, p. 20), so that no agreement on the issue has been reached so far.

## **2. Discussion**

The RespiVac-Agreement contains in Section 11.1 several representations by Respondent No. 1 as to third party rights. Unlike Article 42 CISG the warranties given in Section 11.1 upon a closer reading seem to relate to existing rights of Third Parties and not mere claims. Also, the reference in Section 11.1.4 seems to refer to "claims" raised in proceedings. Section 11.1 may, however, also be interpreted differently. In both cases the question arises, to what extent the rules in Section 11.1 constitute a derogation of Article 42 CISG. Open to discussion is equally whether Respondent No. 1 had the knowledge required under Section 11.1.4. Mr. Doherty, who was officially not yet working for Respondent No. 1, was informed by Ms. Bordet about the interpretation by Ross Pharma on 6

December 2018, who at the time already made an offer to accept a different interpretation against “a non-exclusive no-royalty bearing license” (Respondent Exhibit R 4, p. 35).

In the context of Article 42 CISG is it controversial whether any claim is sufficient or whether at least frivolous claims are excluded from the scope. It is doubtful whether a claim by Ross-Pharmaceuticals could be considered to be frivolous. As becomes clear from the Witness Statements of Mr. Doherty (Respondent Exhibit R 2, p. 31) and Ms. Hübner (Claimant Exhibit C 7, p. 21) the primary focus of the license was research in the field of malaria. Covid-19 is not a “related infectious disease” if emphasis is put on the word “related”. The extension of the original scope of the license, which was limited to malaria, to additionally “related infectious diseases” was, however, very important to Ross Pharmaceuticals, as is evidenced by the EUR 600.000 that were additionally paid inter alia for this extension. That could speak for a considerably broader scope of the license granted, with an emphasis on the notion of “infectious disease”. In addition, the reporting about the Ross-Agreement in the Press Release of Respondent No. 2 (Claimant Exhibit C 1, p. 9 “infectious diseases”) as well as in the relevant journals (Claimant Exhibit C 4, p. 18 “comparable infectious diseases”) seems to put mere emphasis on the issue of an “infectious disease”. In the end, it is, however, the wording of the Ross-Agreement itself which is relevant for the existence of a claim.

In the present case Ross Pharmaceuticals has never asserted any third-party IP claim directly against Claimant. It has only raised its interpretation of the scope of the Ross-Agreement in its discussion with Respondent No. 2 and Roctis. Whether that is sufficient or not is one of the issues which may be of relevance for the case. In this context, the fact that Ross Pharmaceuticals is generally enforcing its IP-rights vigorously will be one of the factors which may be used in the discussion as will be the behaviour of Ross Pharmaceuticals (start of research; willingness to renounce exclusivity in return for license) and Roctis (no insistence on purchase obligation / insistence on royalties) in their negotiations.

The second possible issue is whether Claimant could not have been unaware of the claim. There are a number of possible sources of information about the Ross-Agreement and the potential claim. Claimant was not positively aware of one of them at the time of entering into the RespiVac-Agreement which is the relevant time at which Claimant ought to have been aware. Thus, the former work of Ms. Hübner for Ross Pharmaceuticals is irrelevant as she only started to work for Claimant after the contract had been concluded. For the same reason, the article in Biopharma Science of 19 December 2019 (Claimant Exhibit C 4, p. 18) is irrelevant. It mentions, however, an earlier article from 14 December 2018 which appeared before the conclusion of the contract. Furthermore, the badly drafted Press Release by Respondent No. 2 (Claimant Exhibit C 1, p. 9) according to which Ross Pharmaceuticals obtained an exclusive right “in the field of vaccination against malaria and infectious diseases” contained information which could have made Claimant aware of the potential claim. Whether that is sufficient to assume that Claimant could not have been unaware of the claim at the time of contracting is, however, doubtful.