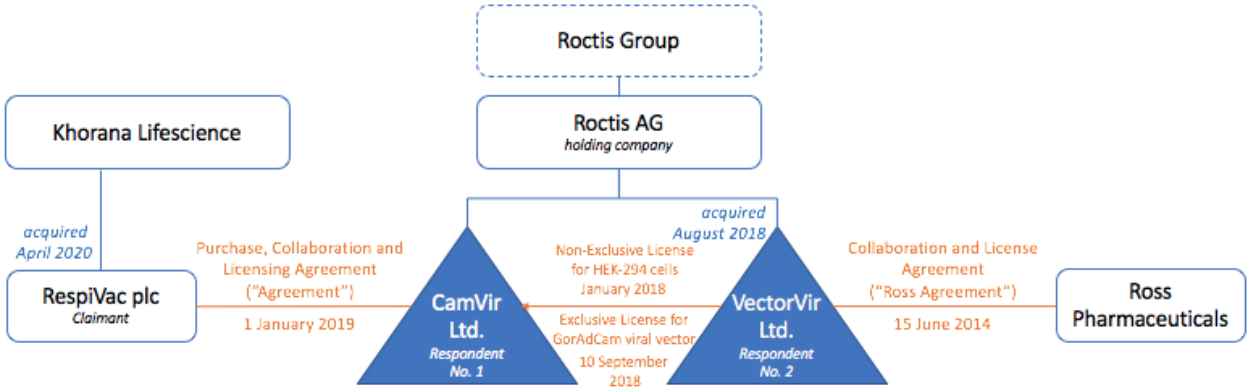
28th Annual Willem C. Vis International Commercial Arbitration Moot

FACTS



1. Parties, Jurisdiction and Applicable Laws

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

Respondents –

- ⇒ Respondent No. 1 – CamVir Ltd., a nEquatoriana company, is the Contract Manufacturing Organization for production and sale of monoclonal antibodies (carrier of vaccines) for the Roctis Group.
- ⇒ Respondent No. 2 – VectorVir Ltd., an Equatoriana company, is the owner of GorAdCam viral vector.
    - Between 2012 to August 2018, VectorVir Ltd. was an independent start-up company.
    - Roctis AG acquired VectorVir Ltd. in August 2018.

Seat of Arbitration – Vindobona, Danubia

Applicable Laws

- ⇒ UN Contracts for the International Sale of Goods (CISG)
- ⇒ New York Convention
- ⇒ UNIDROIT Principles on International Commercial Contracts
    - with 2006 amendments (Article 7 – Option 1)

Procedural law – 2012 Swiss Rules of International Arbitration of SCAI (2012 Swiss Rules)

Key Procedural Features

- ⇒ 3 appointed arbitrators

- Professor Francoise Sinoussi, Presiding Arbitrator
- Mr. Ilja Ehrlich, Co-Arbitrator
- Dr. Youtou You, Co-Arbitrator

⇒ Language – English

2. Key Background Information

- The GorAdCam viral vector is seen as key to a potential COVID-19 vaccine. For the virus to be produced in sufficient quantities to use in vaccines, it needs HK-294 cells. The cells are optimized for high virus production rates and can be used as "hosts" for the production and amplification of genetically modified viral vectors.
- Both parent companies of the Respondents and of the Claimant have access to the HK-294 cells.

3. Summary of the Facts of the Case

VectorVir Ltd. (Respondent No. 2) and Ross Pharmaceuticals

⇒ Respondent No. 2 is an independent start-up company founded in 2012. It is the legal intellectual property rights owner of the GorAdCam viral vector.

⇒ Ross Pharmaceuticals is a life science company and in 2014 wanted to acquire Respondent No.2. At the time of the signing of the Ross Agreement (defined below) Respondent No.2 did not want to be acquired.

⇒ Respondent No.2 has patents for two viral vectors, the ChAdCam viral vector and the GorAdCam viral vector.

⇒ At the time of the signing of the Ross Agreement (as defined below), the general expectation was that the ChAdCam vector would have high potential for all kinds of respiratory diseases, while the GorAdCam vector potential was in malaria.

⇒ On 15 June 2014, Respondent No. 2 and Ross Pharmaceuticals entered into the Collaboration and License Agreement ("Ross Agreement") whereby

- Respondent No. 2 granted to Ross Pharmaceuticals

> "an *exclusive*, royalty-bearing, worldwide, perpetual…, transferrable…, sublicensable…*license under the Licensed Technology* to research, develop, have developed, manufacture, have manufactured, use, have used, register, have registered, sell, have sold, offer to sell, have offered for sale, distribute, have distributed, import, have imported, export and have exported *products using GorAdCam vectors in the field of malaria and related infectious diseases*."

- Ross Pharmaceuticals paid 3 million USD upfront, and over the course of the negotiations, paid EUR 600,000 for the Ross Agreement to apply to "comparable infectious disease."

⇒ After signing the Ross Agreement, Respondent No.2 released a press release stating on that day Respondent No.2 had "concluded today a Collaboration and License Agreement with Ross Pharmaceuticals…. Concerning the exclusive right to use the GorAdCam vector and develop on this basis products in the field of vaccination against malaria and infectious disease."

Acquisition of Respondent No. 2 and Grant of Exclusive License of GorAdCam to Respondent No.1 .

- ⇒ In August 2018, Roctis AG acquired Respondent No. 2, thereby Respondent No. 2 became a wholly owned subsidiary of Roctis AG, a holding company for the Roctis Group.
- ⇒ Respondent No. 1 is a Contract Manufacturing Organization for production and sale of monoclonal antibodies (carrier of vaccines) for the Roctis Group. It is wholly owned by the Roctis AG.
- ⇒ On 10 September 2018, Respondent No. 1 and Respondent No. 2 entered into an exclusive licensing agreement whereby Respondent No. 2 granted to Respondent No. 1 an exclusive license of the GorAdCam viral vector.

Respondent No. 1 and Claimant

- ⇒ On 1 January 2019, Respondent No. 1 and Claimant entered into the Purchase, Collaboration and Licensing Agreement ("Agreement") whereby
  - Respondent No. 1 granted to Claimant

    "a ***non-exclusive***, royalty-bearing, worldwide, perpetual…transferrable, sublicensable…***license under the Licensed Technology*** to research, develop, have developed, manufacture, have manufactured, use, have used, register, have registered, sell, have sold, offer to sell, have offered for sale, distribute, have distributed, import, have imported, export and have exported ***Products using GorAdCam viral vector in the Field***."
  - Licensed Technology is defined as

    "***any*** Intellectual Property rights, including Background IP, which are ***owned or controlled by Licensor or its Affiliates*** as of the Effective Date, or which are ***generated by Licensor or its Affiliates*** thereafter during the term of the Research Plan, and which claim any of the Compounds, formulations with the Compounds, combinations with such Compounds and/or the intended medical use(s) of the Compounds…"
  - Field is defined as

    "the use of a Product for the diagnosis, treatment, palliation or prevention of a disease or medical condition in humans or animals relating to infectious and non-infectious respiratory diseases."
- ⇒ The Agreement contains a purchase option that is not standard in a typical viral vector license agreement. The purchase option in the Agreement provides that if a vaccine is successfully developed and produced by Claimant, Claimant has to buy HEK 294 cells as well as the necessary cell growth medium from Respondent No.1.
- ⇒ Claimant was acquired by Khorana Lifescience in April 2020. Khorana Lifescience is a leading life science companies and also develops HEK-294 cells.

Other notable events

- On December 6th, 2018, the Head of Contract and IP for Ross Pharmaceuticals emailed Director of Legal (at the time) of Respondent No.2 and mentioned that they considered the exclusive license for the GorAdCam virus vector to apply to "comparable infectious diseases."

- On January 19th, 2019, Biopharma Science magazine ran an article on the dispute between Ross Pharmaceuticals and Respondent No.1 regarding the scope of the Ross Agreement. The article also refers to a previous article that "the dispute was first mentioned by this journal in the issue of 14 December 2018."
- On January 13, 2020, the CEO of Roctis AG emailed the Head of Contract and IP for Ross Pharmaceuticals after the announcement by Ross Pharmaceuticals was about to start research on the COVID-19 vaccine. The CEO of Roctis AG stated in his email that the "claim as to the interpretation of the exclusive license granted to you by VectorVir is completely baseless".
- On May 2, 2020 the COO of Claimant read the abovementioned Biopharma Science article and emailed the CEO of Respondent No.1 on the claims made in the article. The CEO of Respondent No.1 told the COO of Claimant that there was no reason to worry about the Ross claims.
- Given the current pandemic, on September 4, 2020, the Arbitration Tribunal asked the Parties if they had an objection to conducting the oral hearings remotely, if necessary.

4. Requests for Relief

⇒ Claimant

- To declare that Respondent No. 1 breached the Agreement by delivering GorAdCam viral vectors which were not free from third party rights or claims.
- To order Respondents No. 1 and No. 2 to bear the costs of the Arbitration Proceedings.

⇒ Respondents

- To join Ross Pharmaceuticals to the Arbitration Proceedings.
- 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.
- 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.
- To order Claimant to bear the costs of this arbitration.

ISSUES & ARGUMENTS

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 inappropriate?
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?

1. Should Ross Pharmaceuticals be joined to the Arbitration Proceedings?

APPLICABLE LAW

Article 4 (2) of 2012 Swiss Rules

(2) 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.

RESPONDENTS: Ross Pharmaceuticals should be joined to the Arbitration Proceedings.

Arguments listed in the Answer to the Notice of Arbitration

1. Claimant's case depends on claims which could eventually be raised by Ross Pharmaceuticals.
2. To rebut Ross Pharmaceuticals' claim, Ross Pharmaceuticals must be joined.
3. The arbitration clauses in the two Collaboration and Licenses Agreements are identical [note: one of these is a Purchase, Collaboration and License Agreement and the other is a Collaboration and License Agreement.]
4. All parties agreed to the Swiss Rules including its joinder provisions knowing that they could be joined in proceedings with other parties alleging conflicting rights.

Potential Arguments

1. Respondents requested that the tribunal order Ross Pharmaceuticals to refrain from making any further allegations that it holds an exclusive license for the use of the GorAdCam vector virus. The request cannot be granted unless Ross Pharmaceuticals is a party to the proceedings.
2. All parties to the Ross Agreement agreed to arbitration in accordance with Swiss Rules of International Arbitration of the SCAI in the same terms as the Agreement – 3 arbitrators, same seat of arbitration and to be conducted in English.
3. Pursuant to Section 14.1, on Dispute Resolution, of both the Ross Agreement and the Agreement allows for joinders to the arbitration. The parties agree to resolve "*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…" under Swiss Rules. (Note, "including," but not limited).
4. Consolidation of the two cases will save time and effort for the tribunal as well as reaching one consistent result when the cases are related to the same facts.
5. Joining Ross Pharmaceuticals is necessary to interpret the contested provision in the Ross Agreement regarding whether Ross Pharmaceutical holds an exclusive license for the use

of the GorAdCam virus in relation to any research into vaccines for respiratory diseases. Such fact is necessary to the case at bar with Claimant.

CLAIMANT: Ross Pharmaceuticals should not be joined to the Arbitration Proceedings.

Arguments listed in the email from Joseph Langweiler dated 10/02/2020

1. Claimant has no direct contractual relationship with Ross Pharmaceuticals and never signed an arbitration agreement with them.

Potential Arguments

1. Consolidating Respondents' request for order against Ross Pharmaceuticals is an unnecessary waste of Claimant's legal fees and arbitrators' fees, witnesses' time, preparation efforts and other expenses. Joining Ross Pharmaceuticals raises the cost of arbitration for Claimant at the benefit of the Respondents.
2. Multiparty arbitrations generally take longer time and delays arbitration results/enforcement. Here, the matter requires urgency for global public safety.
3. There is a potential gridlock for a case with three parties in a three-person tribunal.
4. Claimant has reasonable expectation of confidentiality in an arbitration and joining Ross Pharmaceutical breaches its right to confidentiality.

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 inappropriate?

APPLICABLE LAW

Article 25 (4) of the Swiss Rules

At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal. The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference).

Article 24 of Danubian Arbitration Law

Where parties have not agreed upon documents-only arbitration, the "arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party."

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

Arguments listed in the email from Joseph Langweiler dated 10/02/2020

1. Dispute is straightforward without the need to hear from any witnesses or experts on largely uncontested facts.
2. Arbitral Tribunal has the necessary powers under the Swiss Rules and all Parties are obliged under Article 15(7) Swiss Rules to "avoid unnecessary costs and delays".
3. Technical means for a remote hearing can be organized for all Parties involved.

Potential Arguments

1. The tribunal is authorized to conduct hearings by videoconference or in other manners it sees fit. The manner in which witnesses and experts are examined would not fundamentally change the testimonies and evidence gathered from the hearing.
2. Lack of travel and accommodation expenses for witnesses and experts is a significant cost-saving expense for both parties. Additionally, coordination between parties will be easier when travel is excluded, especially between multiple time zones.

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

Arguments listed from Julia Fasttrack dated 10/02/2020

1. Swiss Rules are based on the assumption that a hearing in person will be held (Article 25 Swiss Rules).
2. Pursuant to Article 24 of the Danubian Arbitration Law, where the Parties have not agreed upon a documents-only arbitration, the "arbitration tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by the party."
3. The arbitration clauses contained in the Collaboration and License Agreements provide for a hearing in person. It is one of the few modifications added [in the contracts] to the model arbitration clauses of the Swiss Chambers' Arbitration Institution.
4. The potential witness examinations may entail difficult explanations as to the operating mode of viral vectors, their ways of production and the differences between the various application of the virus.

Potential Arguments

1. While the tribunal is authorized to conduct hearings in any manner it sees fit, remote hearings jeopardizes proper witness preparation and confidentiality, especially with lack of advanced staging or robust technology.
2. The cost of technology capable to ensure proper hearings may be more costly to all parties involved in comparison to in-person hearings.

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

APPLICABLE LAW

CISG Articles 1 to 6

Article 1
(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
(a) when the States are Contracting States; or
(b) when the rules of private international law lead to the application of the law of a Contracting State.
(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2
This Convention does not apply to sales:
(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

Article 3
(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.

Article 4
This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6
The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

CLAIMANT: CISG is applicable to the "Purchase, Collaboration and License Agreement" concluded between Claimant and Respondent No. 1.

Arguments listed in the Notice of Arbitration
1. The Agreement is governed by the CISG as it involves the sale of goods.

Potential Arguments
1. Parties are located in different States, and such States are contracting states to the CISG. Parties are nationalities of different States and the goods moved from the Respondent's State to Claimant's State. Thus, they meet the requirements of the CISG.
2. The Agreement specifically states under Section 15.2 that the Agreement "shall be construed in accordance with and governed exclusively by the laws of Danubia." Danubia recognizes the CISG, and since CISG is a treaty, it is superior to Danubia's law, if any, on the matter.
3. If the Parties are part of the CISG contracting States, the presumption is that CISG applies. Parties have a choice to contract out of CISG by expressly including disclaimer language to opt-out, but here, the parties did not do so. Thus, regardless of the intent of the parties, the parties are bounded by CISG
4. The Agreement, under Section 16, stipulates that Claimant must purchase HEK-294 cells and the GorAdCam vectors from Respondent No. 1 and provide all royalty scheme from the subsequent vaccine production. The good for sale is the HEK-294 cells and GorAdCam vectors, and as such, the Agreement is governed by CISG.

RESPONDENT: CISG is not applicable to the "Purchase, Collaboration and License Agreement" concluded between Claimant and Respondent No. 1.

Arguments listed in the Answer to the Notice of Arbitration
1. The Agreement falls outside of the scope of application of the CISG as defined by Article 1-6.
2. It is not a contract of sales, but instead a license agreement, since the transfer of no is the most important obligation for Respondent No. 1.

Potential Arguments

1. The Agreement expressly states that the contract is governed by the laws of Danubia, and as such, the parties agreed to contract out of CISG.

2. While the sale of HEK-294 cells may be governed by CISG under Section 16 of the Agreement, the GorAdCam viral vector is a grant of license under Section 5 of the Agreement. The Agreement grants to Claimant a non-exclusive license of the GorAdCam vector.
3. Article 3 (2) of CISG stipulates that CISG is not applicable to the Agreement because Claimant is providing a service to Respondent No. 1. Claimant is a research collaborator under Section 3 of the Agreement and Claimant is responsible for developing treatments and vaccines pursuant to the Research Plan with specific royalties and milestone payments to Respondent No. 1. The Research Plan includes contributions and activities by both parties, including Respondent No. 1.
4. Article 4 (a) of CISG does not govern contract interpretation under the Ross Agreement, which is necessary to resolve the dispute at hand.
5. Even if CISG is applicable, it is limited to the Section 16 of the Agreement, the purchase obligation.

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?

APPLICABLE LAW

CISG Article 42

(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 C.I.S.G. imposes a much stricter standard for rejection and cancellation, which it refers to as "avoidance." Under the Convention's provisions, effectively, a buyer cannot reject defective goods and cancel unless a non-conformity substantially deprives the buyer of what it was entitled to expect under the contract and, even then, only if the seller foresaw, or a party in its position

would have foreseen, such a result. This follows from Article 49(1) which permits a buyer to avoid the contract only if the seller's failure to perform amounts to a "fundamental breach," as that term is defined in Article 25. The buyer cannot even demand substitute goods unless the non-conformity constitutes a fundamental breach. (Article 46(2)).[1]

CLAIMANT: Respondent No. 1 breached its contractual obligations to deliver conforming goods existing pursuant to Article 42 CISG by providing Claimant with batches of GorAdCam viruses.

Arguments listed in the Notice of Arbitration

1. Respondent granted an exclusive license to Ross Pharmaceuticals for all malaria related usages and "comparable infectious diseases."
2. According the interpretation of the Ross Agreement by Ross Pharmaceuticals, the license covers the research into a vaccine against Covid-19. Whether that is actually the case or not is irrelevant. The mere claim of a third party which is not completely baseless is sufficient to render the goods non-conforming in the sense of Article 42(1) CISG.

Potential Arguments

1. Claimant, at the time of contracting the Agreement, was unaware of the existing conflicts under the Ross Agreement with regard to the interpretation of the use of GorAdCam vectors for malaria and "related infectious diseases." Claimant only became aware of the conflict between Respondent No. 2 and Ross Pharmaceuticals in May 2020, after the contract was executed.
2. Respondent No. 1 and Respondent No. 2 are wholly owned subsidiaries of Roctis AG and work concertedly with each other. It is reasonable to believe that Respondent 1 was aware of Respondent No. 2's conflict with Ross Pharmaceutical. The conflict is neither a new matter nor an unforeseeable matter because the exclusivity of the license for use for malaria and other infectious diseases was a highly negotiated provision in the Ross Agreement. Despite the knowledge, Respondent No. 1 entered into the Agreement with Claimant and delivered the GorAdCam viruses.
3. Section 11 of the Agreement states that Respondent No. 1 is "not a party to or otherwise bound by any oral or written contract or agreement that will result in any person or entity obtaining any interest in, or that would give to any entity or person any right to assert any claim in or with respect to, any of the [Claimant's] rights granted under this Agreement."
4. Article 34 allows Respondent to remedy; however, the Claimant would be unreasonably inconvenienced as the matter to develop a coronavirus vaccine is time sensitive for both the Claimant and the general public.

RESPONDENT: Respondent No. 1 did not breach its contractual obligations to deliver conforming goods existing pursuant to Article 42 CISG by providing Claimant with batches of GorAdCam viruses.

Arguments listed in the Answer to the Notice of Arbitration

[1] https://www.cisg.law.pace.edu/cisg/biblio/mcmah.html

1. There is no IP right of Ross Pharmaceuticals nor has such right ever formed the basis of a claim raised against Claimant.

Potential Arguments

1. To breach the Agreement under Claimant's theory, the Ross Pharmaceutical must hold an exclusive license for the use of the GorAdCam virus in relation to any research into vaccines for respiratory diseases under the Ross Agreement. Here, no such interpretation of the Ross Agreement has been established. Claimant merely makes a claim based on an unfounded assumption.
2. The Ross Agreement was entered into by Respondent No. 2 prior to acquisition of Respondent No. 2 by Roctis AG. Respondent No. 1 was unaware of the negotiations and on-going discrepancies in interpretation of the exclusivity of the license for malaria and "related infectious diseases" under the Ross Agreement when Respondent No. 1 entered into the Agreement with Claimant. Upon notice from Claimant of the possible conflict, Respondent No. 1 took action immediately to clarify with Respondent No. 2. Respondent No. 2 gave assurance that the interpretation of the contested provision under Ross Agreement is in favor of Claimant.