

**INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE**

ICC CASE NO 21856/TO

IN THE MATTER OF AN ARBITRATION BETWEEN

GRANBIO LLC

and

BIOFLEX AGROINDUSTRIAL S.A.

Claimants

- and -

BETA RENEWABLES S.P.A.

and

BIOCHEMTEX S.P.A.

Respondents

**FIRST RESPONDENT'S ANSWER
TO THE REQUEST FOR ARBITRATION
AND JURISDICTIONAL APPLICATION**

19 May 2016

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I. INTRODUCTION

1. The First Respondent, Beta Renewables S.P.A. (**Beta**) hereby submits this Answer to the Request for Arbitration (the **Answer**) in accordance with Article 5(1) of the Rules of Arbitration of the International Chamber of Commerce (**ICC**), effective from January 2012 (the **ICC Rules**), in respect of the Request for Arbitration dated 7 April 2016 submitted on behalf of the Claimants, GranBio LLC (**GranBio**), and BioFlex Agroindustrial S.A. (**BioFlex**) (the **Request**). Except where inconsistent with terms defined below, defined terms in the Request are adopted for convenience but without making any admissions thereby.

2. The Request purports to allege claims under three separate contracts, namely:

- (a) A License Agreement between GranBio and Beta dated 15 May 2012 (the **License**);
- (b) A Basic Engineering and Technical Services Agreement (**Engineering Agreement**) between BioFlex and BioChemtex S.p.A. (**BioChemtex**) dated 15 May 2012; and
- (c) An Equipment Supply Agreement (**Equipment Agreement**) between BioFlex and BioChemtex dated 15 May 2012.

3. Although the Request purports to be on behalf of GranBio and BioFlex, for the reasons set out in the jurisdictional application below, this Answer is submitted on behalf of Beta only. For the same jurisdictional reasons, a separate Answer has been submitted on behalf of BioChemtex. Subsequent references to the 'Claimant' accordingly refer only to GranBio.

4. At the outset, Beta does not consent to the jurisdiction of any eventual tribunal constituted under the ICC Rules to hear and determine, in one single arbitration, claims raised under the License together with any alleged disputes arising under the Engineering and Equipment Agreements. This objection to jurisdiction is set out in detail further below. Beta's submissions going to the merits of the allegations raised in the Request are made entirely without prejudice to Beta's primary position that any eventual tribunal constituted under the ICC Rules does not have jurisdiction to hear, in one single arbitration, the alleged disputes arising out of the three separate contracts. For the avoidance of doubt, nothing in this Answer is intended to waive Beta's right to object to the jurisdiction of any eventual tribunal constituted under the ICC Rules on this issue.

5. As to the merits of the Claimant's claims, Beta's primary position is that no proper factual case has been set out that would substantiate any of the allegations made by the Claimant to

date. Without prejudice to that primary position, Beta rejects any allegations of actionable misrepresentations. Any representations given by Beta – the burden of proving the existence of which falls on the Claimant – were true or, at a minimum, were not made with knowledge of their falsity. In any event, the Claimant clearly did not rely on any such representations to its detriment. Further, allegations of gross negligence are specifically denied, and the Claimant has not even so much as attempted to demonstrate that its allegations go beyond basic wrongdoing and reach levels of egregiousness warranting the description of ‘gross’ negligence. The same point applies in respect of allegations of ‘gross’ incompetence.

6. The Claimant’s contrived tort claims must be placed into their proper commercial context – the Claimant took on a calculated commercial risk in investing in a technology that had not yet been put into industrial-scale operation. Now that the risks apparent in scaling up that technology have materialised, the Claimant has sought to resile from the bargain that it struck, despite at all times being aware of those risks. In short, the Claimant knew that when it entered into the License that the technology it was investing in was in its development phase. Indeed, the Claimant actively sought to benefit from that technology’s development by taking on risk in exchange for having an exclusive “first mover advantage” in the promotion of the technology in South America. Now that the Claimant has not seen an immediate reward from its commercial risk – because adjustments and changes are required to optimise the industrial scale operation of the technology at issue, consistent with the new and developing state of the technology and the shared understanding of such between the parties – it has attempted to eschew the contractual framework in the License that both parties negotiated to insulate themselves from the very risks that have now transpired.

7. Unsurprisingly, this is why the Claimant has avoided mentioning the fundamental contractual provisions germane to this dispute. In particular, the Claimant has avoided discussion of the liability caps and liquidated damages clauses in the License, which apply to all forms of dispute under the License. This is because those provisions have a significant limiting effect on the Claimant’s claims under the License.

8. Despite the Claimant’s misbegotten efforts to avoid the application of the liability caps and liquidated damages provisions by bringing unfounded claims sounding in tort, this is, in essence, a contract dispute. The parties freely and carefully negotiated the License and the Claimant purports to have grievances for breach of contract under that Agreement. Those allegations of breach of contract are denied, but where such claims are brought, the parties specifically negotiated for the application of liability caps and liquidated damages provisions. At all relevant times the Claimant was aware of this and, tellingly, has affirmed the continuing existence of the License on several occasions. Now the Claimant has conjured up allegations of ‘gross negligence’ and baseless tort

claims which must be seen for what they are – bald attempts to avoid the effects of the bargain they struck in the License.

9. The Claimant's fall back claims of contractual breach are also denied. For the reasons set out below, Beta has not breached its obligations set out in the License.

10. In addition to the denials in respect of the Claimant's unfounded claims, Beta also brings a counterclaim for unpaid invoices under the License, which is set out further below.

II. JURISDICTIONAL APPLICATION

11. The Claimant has sought impermissibly to commence these proceedings to determine alleged claims in respect of all three agreements cited above. At the outset, it is noted that the Claimant has not even attempted to engage with the ICC Rules¹ concerning determination of disputes under multiple arbitration agreements in a single arbitration. Rather, the Claimant has simply assumed that claims arising under all three agreements may be heard in one proceeding. For the reasons given below, this assumption is false.

12. On 12 May 2016, counsel for GranBio and BioFlex wrote to Beta's (and Biochemtex's) counsel regarding this question of jurisdiction (the **12 May 2016 Letter**).² Therein, the Claimant pre-emptively defended its efforts to bring a single arbitration proceeding in respect of claims originating from three different agreements. Where appropriate below, reference is made to the 12 May 2016 Letter. This letter was in response to a letter from Beta's counsel dated 5 May 2016 in which Beta invited the Claimant to consent to separate proceedings in respect of the disparate disputes under the three agreements. As can be seen from the 12 May 2016 Letter, the Claimant rejected Beta's proposal, a decision which should be considered in the allocation of costs emanating from this jurisdictional application.

13. Beta does not consent to have claims arising under the License heard along with claims arising under the Engineering and Equipment Agreements in one single arbitration proceeding. For the avoidance of doubt, it is common ground that there is no single arbitration agreement binding all four of the parties to the three agreements listed above. Whilst the three separate arbitration agreements in the agreements noted above are, in substance, identical there is no 'umbrella' arbitration agreement pertaining to all three agreements. Nor do the arbitration agreements contain express joinder provisions or otherwise refer to one another. Accordingly, the Claimant's suggestion

¹ Specifically, Articles 6(3), (4), and 9 of the ICC Rules, which are set out below.

² Letter from Wilmer Cutler Pickering Hale & Dorr (**WilmerHale**) to Quinn Emanuel Urquhart and Sullivan (**Quinn Emanuel**) dated 12 May 2016, **R1-1**.

in the 12 May 2016 Letter that “the text [...] of the Agreements show that the parties intended and consented to all claims under the Agreements being determined in the same arbitration proceeding...” is specifically rejected.³

14. Article 9 of the ICC Rules does *allow* for the hearing of claims arising under different arbitration agreements in one proceeding, subject to important exceptions:

Subject to the provisions of Articles 6(3)-(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.

15. Article 6(3) of the ICC Rules, however, allows a party to challenge attempts to hear disputes arising from multiple agreements in one arbitration proceeding:

If any party against which a claim has been made [...] raises one or more pleas [...] concerning whether all the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

16. Article 6(3) of the ICC Rules does not specify when the Secretary General should refer such a jurisdictional question to the ICC Court. However in order for the Secretary General to decide *not* to do so, the Secretary General must determine that the party objecting to jurisdiction does not have a reasonable possibility of obtaining a ruling in its favour from the ICC Court.⁴ For the reasons set out below, there is a clear reasonable possibility that Beta’s jurisdictional challenge would be accepted by the ICC Court.

17. If the Secretary General decides not to refer the jurisdictional question to the ICC Court, the issue will be considered and determined by the tribunal constituted under the ICC Rules. Similarly, if, after a reference by the Secretary General to the ICC Court on such a jurisdictional question, the ICC Court decides not to prevent the arbitration from proceeding, a tribunal will make a decision on jurisdiction. If and when a tribunal comes to consider the question, it will take into account the same criteria under Article 6(4) as the ICC Court would. Beta specifically maintains the arguments set out above and below should the Secretary General and/or the ICC Court allow the arbitration to proceed as currently pled by the Claimant, and expressly reserves the right to make additional arguments concerning this jurisdictional objection to any eventually-constituted tribunal.

³ Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R1-1**, para. 3.

⁴ T. Webster and M. Bühler, *Handbook of ICC Arbitration*, (3rd ed., 2014), **R1LA-1**, para. 6-33.

18. In determining whether jurisdiction to conduct a single arbitration exists in the face of multiple arbitration agreements, the ICC Court will have reference to Article 6(4) of the Rules, which states:

In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:

[...]

(ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

19. Thus, the ICC Court will be required to decide whether the three arbitration agreements here, even if “compatible”, were, in fact intended to permit consolidation of disputes under different contracts in a single arbitration.⁵ In other words, the key question is simply whether, as a matter of interpretation, the parties agreed to a single arbitration. This process of interpretation is a question of English law, since the issue of jurisdiction is subject to the law of the arbitration agreement⁶ (here, English law). As such, the question for the ICC Court will be whether a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract,⁷ would understand the contractual framework to mean that the parties agreed to have disputes arising under the disparate agreements to be heard in a single arbitration. For the reasons set out below, it is submitted that a reasonable person in the position of the parties in the present case would not find the existence of such an agreement.

20. Although there is little to suggest that the three arbitration agreements at issue here are “incompatible” under Article 6(4)(ii)(a), the *four* parties to the *three* agreements at issue here clearly did not agree that any disputes under the various agreements would be determined together in a single arbitration as required by Article 6(4)(ii)(b). As a matter of interpretation, that was clearly not the parties’ intention under the arbitration agreements. The first and most fundamental point in this respect is that the parties collectively entered into three separate agreements, with different entities, each agreement containing its own distinct arbitration clause.

⁵ G. Born, *International Commercial Arbitration*, (2nd ed., 2014), **R1LA-2**, p. 2613.

⁶ See T. Webster and M. Bühler, *Handbook of ICC Arbitration*, (3rd ed., 2014), **R1LA-1**, para. 6-42.

⁷ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, **R1LA-3**.

21. The closest the Claimant comes in the Request to addressing the substantive criteria for the single hearing of disputes arising under separate arbitration agreements under the ICC Rules is at paragraph 28 where it states: “[t]ogether, the Agreements comprise a single transaction...”. This statement is wrong. Though related, each contract represents its own transaction. In truth, had the four parties intended to agree that claims under the three agreements could be determined together in a single arbitration, as a single transaction, they could have:

- (a) agreed this expressly in a separate document, to which all four entities were a party, such as master agreement;
- (b) agreed this expressly in the wording of the three arbitration clauses; and/or
- (c) agreed this expressly by way of an ‘umbrella’ arbitration clause in one or more of the agreements.

22. The above options, none of which are uncommon in commercial contracts, reflect the fact that there does not need to be a single agreement to which all the relevant entities are party, provided each party’s arbitration agreement demonstrates their consent to the chosen mechanism for dealing with disputes.⁸ As it was, the parties chose none of these options. Where this is the case, the *prima facie* position should be that the disputes ought to be heard separately, in separate proceedings, to reflect the intentions of the parties.

23. In the 12 May 2016 Letter, the Claimant argues⁹ that the Supplemental Agreement¹⁰ demonstrates an agreement on the part of all four parties to the three agreements to have disputes arising under the separate and distinct agreements heard together. This is incorrect for several reasons. Firstly, there are no claims brought under the Supplemental Agreement and, notably the Claimant does not even mention it in the Request. Secondly, the Supplemental Agreement does no more than highlight an example of the four parties contracting together in one single agreement, which is in stark contrast to the parties entering into the three separate agreements noted above, which are between different parties, have different subject matter and distinct and different rights and obligations. For the avoidance of doubt, the Supplemental Agreement is not a form of master agreement, which is clear on its face.

⁸ D. Sutton, J. Gill QC and M. Gearing QC, *Russell on Arbitration*, (24th ed., 2015), **R1LA-4**, para. 3-53.

⁹ Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R1-1**, para. 4.

¹⁰ Supplemental Agreement between Beta Renewables S.p.A., Chemtex Italia S.p.A., Graal Bio LLC and BioFlex Agroindustrial Ltda dated 15 May 2012, **R1-2**.

24. Further, the substantially different ownership structure of Beta and Biochemtex (as set out by the Claimant itself at paragraphs 7 and 8 of the Request and by Beta below) means that each entity has different obligations to different shareholders from each other. Almost a third of the equity in Beta is held by two separate companies who are unrelated to Beta or BioChemtex and are not parties to these proceedings. Namely, TPG ESCH S.a.r.l (**TPG**) holds 22.51%, and Novozymes Bio-Industrial Holdings A/S (**Novozymes**) holds 9.95% of the equity in Beta. This alone is a compelling reason, with clear commercial logic,¹¹ why Beta and Biochemtex demonstrably did not choose to be bound under the same arbitration clause for each of their respective agreements so as to allow disputes arising under the different agreements to be resolved in a single arbitration. Put briefly, the Respondents have disparate identities and should not be forced to defend claims against them jointly.

25. The Claimant has suggested in the 12 May 2016 letter that it would be “commercially illogical and entirely artificial for the parties to have agreed that [disputes] must be determined in one arbitration proceeding under the Supplemental Agreement [but not in the other agreements].”¹² This overstates the point. The Supplemental Agreement effects uncontroversial amendments to separate agreements. The function of the Supplemental Agreement is therefore procedural in nature and does not have the substantive function of the other agreements. Its fundamentally different nature from the other agreements makes it entirely reasonable for there to be four-way agreement to arbitration in the Supplemental Agreement but not in the other agreements. The parties were aware of this difference and expressly demonstrated their consent to a single arbitration in the Supplemental Agreement but chose not to consent in this way in the other agreements. Finally, as noted above, the Claimant has opted against bringing claims under the Supplemental Agreement in any event, so it is irrelevant for purposes of this jurisdictional application.

26. The License to which Beta is a party is also different in nature from the BioChemtex agreements, namely the Engineering Agreement and the Equipment Agreement. Whilst the Engineering Agreement and Equipment Agreement are concerned with the supply of basic engineering and some equipment relevant to the design by the Claimant of a second generation bioethanol plant, the License is concerned with the licencing of intellectual property. Thus, at the time the parties entered into the different agreements, it is entirely reasonable to assume that they may have preferred to have different proceedings pertaining to such different subject matters.¹³ Had their intentions been to the contrary, they could have easily chosen to expressly link the arbitration clauses

¹¹ Contrary to the suggestion of commercial illogicality and/or artificiality in paragraphs 5 and 6 of the 12 May 2016 letter.

¹² Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R1-1**, para. 5.

¹³ See footnote 11, *supra*.

by reference, but they opted not to. Clearly, a dispute concerning the licencing of technology, the payment of royalties and performance guarantees related to that technology is substantively different from disputes concerning engineering or the supply of equipment. The parties recognised this in opting to include three distinct arbitration agreements in the various agreements listed above.

27. Further to that point, it would have been possible for the parties to have entered into the License Agreement independently of the Engineering Agreement or the Equipment Agreement. There is no material inter-dependence between the License Agreement and either of the other two agreements. Although the three agreements may have been entered into pursuant to a common end goal, that was an end goal involving other legal entities and is not the same as saying that they comprised a single transaction.¹⁴ In short, it would have been possible for Beta to provide the intellectual property licencing of PROESA independently of contracts regarding materials or engineering.

28. All the above points reflect a fundamental principle of international arbitration: that parties agree to arbitrate with particular other parties, according to specified procedures – not to arbitrate with just anyone in any set of proceedings.¹⁵ In other words, the consensual nature of arbitration will usually prevent the introduction into proceedings of claims or parties which were not within the scope of what the contracting parties agreed to.¹⁶

29. Beta understands that Biochemtex has chosen not to pursue two separate arbitration proceedings under the Engineering and Equipment Agreements, respectively. This is for precisely the reasons set out above that GranBio purports to ignore – the parties subject to those two agreements are identical and their subject matter is roughly similar. This is to be contrasted with the position of Beta and the License Agreement – the parties to that agreement are different from the Engineering and Equipment Agreements and their subject matter is markedly different. As such, splitting the dispute related to the License from disputes under the Engineering and Equipment Agreements is both justified as matters of principle and practicality, and as a matter of Beta’s contractual right under the arbitration agreement in the License.

30. As set out above, the License and the other two agreements concern intellectual property and the equipping and design of a plant, respectively. In these circumstances, the Claimant’s

¹⁴ Accordingly, the Claimant’s reliance on the contracts being the “same economic transaction” (paragraph 6 of the 12 May 2016 letter) or reference to the “structure” of the Agreements (paragraph 3 of the 12 May 2016 letter) does not advance its position.

¹⁵ G. Born, *International Commercial Arbitration*, (2nd ed., 2014), **R1LA-2**, p. 2569.

¹⁶ D. Sutton, J. Gill QC and M. Gearing QC, *Russell on Arbitration*, (24th ed., 2015), **R1LA-4**, para. 3-049 and fn. 160.

suggestion in its 12 May 2016 Letter that there is a risk of conflicting or otherwise inconsistent¹⁷ arbitration awards should there be separate proceedings under the different agreements is baseless. Awards rendered under the three separate agreements will address fundamentally different issues and relate to distinctly different obligations on the part of separate parties. Accordingly, there is no risk of inconsistency between them. Furthermore, even if (which is denied) the agreements were part of the same economic transaction, the agreements dealt with fundamentally different aspects of the transaction. An award dealing with one part of the transaction would not conflict with an award on a different part of the transaction. Moreover, to the extent that it is possible for there to be any inconsistency (which is denied), the differing identities of the parties makes it difficult to see how any inconsistency could have any substantive consequences in any event.

31. In truth, the Claimant's attempt to pigeonhole all four parties into a single arbitration is an enforcement-driven ploy to drive a coach and horses through the careful separation of the parties between the various agreements. Such a tactic should not be entertained, and the ICC Court and/or tribunal should be alive to this commercial impetus of the Claimant. To allow the Claimant to ignore this careful separation of parties would undermine the fundamental English law principle of separate legal personality in respect of companies and impute agreement where there is none. Further to this point, the Claimant's attempt (without explanation) to assign joint and personal liability to Beta and Biochemtex (which is rejected below) is a further effort to disguise the Claimant's enforcement strategy in the unlikely event it is able to obtain an award in its favour.

32. For all the reasons set out above, the Secretary General is requested to present this application to the ICC Court for determination and the ICC Court is requested to grant this jurisdictional challenge, dismissing this arbitration reference. Beta (and its shareholders) do not and never have agreed to have disputes between GranBio and Beta determined in the same arbitration as any disputes between Bioflex and Biochemtex. A decision to grant this jurisdictional objection would be entirely consistent with the parties' intentions and expectations under the Agreements that there was to be separate arbitrations on the disputes raised between the different parties.

III. THE PARTIES

33. The Claimant is GranBio. As an aside, Beta specifically rejects the use of "GranBio" in the Request to refer to *both* GranBio and BioFlex. Not only is this unhelpful and confusing, there is no sound reason for doing so. GranBio and BioFlex are separate and distinct legal entities, just as is the case with Beta and BioChemtex. Any suggestion that GranBio and BioFlex are one and the same, or should at any time be treated as such, is accordingly rejected.

¹⁷ Letter from WilmerHale to Quinn Emanuel dated 12 May 2016, **R1-1**, para. 4.

34. For its part, the Claimant, GranBio is a company incorporated in Delaware, United States of America. Its parent company is GranInvestimentos S.A. By its own description,¹⁸ GranBio is therefore part of a Brazilian biotechnology group that is in the business of creating solutions to transform biomass into renewable products such as biofuels, biochemicals, nano-materials and nutrients. It operates at every level of the biotechnology production process. GranInvestimentos S.A. has been recognised as one of the most innovative companies in the whole of South America. It is a highly sophisticated and experienced operator in the field of Bio-Sciences.

35. GranInvestimentos S.A.'s Chief Executive Officer and Founder, Bernardo Gradin, holds a Civil Engineering Degree and MBA and has a business background in Bio-Sciences. Bernardo Gradin was formerly Managing Director of Braskem, a well-established and sophisticated Brazilian company in the "bio-tech" sphere.¹⁹ Mr Gradin formed GranInvestimentos S.A. (as it is now called) with Alan Hiltner, the former Planning and Development Vice-President at Braskem, and Goncalo Amarante, a professor of genetics at the Unicamp university in Brazil. The object of GranInvestimentos S.A.'s formation was to develop industrial biotechnology business in Brazil, specifically looking to take advantage of the availability of cheap feedstock in Brazil as well as utilising the significant experience that Mr Gradin and Professor Amarante in particular had in this industry. In short, GranInvestimentos S.A.'s founders and executive were and are highly knowledgeable, experienced businessmen in the bio-tech sector.

36. The Respondent, Beta, is a leading company in the field of advanced biofuels and the development of biochemical compounds at competitive costs. Beta's full corporate name is Beta Renewables S.p.A and is a company incorporated under the laws of Italy. As noted above, Beta is majority owned by Biochemtex (67.54%), with minority stakes held by TPG (22.51%), and Novozymes (9.95%). TPG is part of the TPG Capital private equity firm. Novozymes is a bioinnovation firm that produces and sells enzymes and microorganisms for industrial applications.

37. Beta's contact information is:

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15057, Tortona (AL), Italy
Tel: +39 0131 810 1
Fax: +39 0131 811 759
Attn: Dario Giordano

¹⁸ GranBio website, 'Who we are', available at <http://www.granbio.com.br/en/conteudos/who-we-are/>, R1-3.

¹⁹ In around 2010 Braskem had entered into a joint venture with Novozymes for production of polyethylene using ethanol from fermentation of sugarcane.

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38. Beta is represented in this arbitration by:

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39. All communications to Beta in this arbitration should be made to Beta's representatives at the addresses set out above. Quinn Emanuel is empowered to act for Beta in these proceedings.²⁰

40. Beta's membership of the Mossi Ghisolfi Group (**M&G Group**), as raised in paragraph 9 of the Request, is irrelevant. The M&G Group is not a party to any of the arbitration agreements that GranBio and BioFlex seek to rely upon, and accordingly the M&G Group has no relevance to this arbitration.

IV. THE ARBITRATION AND GOVERNING LAW CLAUSES

41. It is common ground between the parties that the License Agreement contains the Dispute Resolution and Governing Law clause set out at paragraph 11 of the Request and that the allegations brought against Beta by GranBio fall within the scope of that clause.

42. It is further common ground that the Dispute Resolution and Governing Law clause provides for ICC arbitration in London, to be conducted in English.

²⁰ Power of Attorney dated 18 May 2016, **R1-4**.

43. As set out above in Beta's jurisdictional application, the parties dispute that the arbitration agreement contained in the License allows for claims brought under other agreements to be heard in a single proceeding with claims brought under the License.

V. CONSTITUTION OF THE TRIBUNAL

44. The parties continue to hold negotiations concerning the constitution of a 3-member tribunal. Beta's counsel will update the ICC in this regard in due course. Further, Beta does not waive its right, as Respondent, to appoint its party-appointed arbitrator *after* Claimant has appointed its arbitrator.

VI. NATURE OF THE DISPUTE

45. Much of the Request is severely lacking in detail and particularity. Beta will require full particularisation of all allegations in due course.

46. Unhelpfully, the Claimant pleads a misrepresentation claim without setting out in any particularity what the alleged misrepresentations were, by whom they were made or when they were made. In any event, the Respondent denies that it made any misrepresentations. During the course of negotiations over the License, Beta was forthcoming about the fact that its PROESA technology²¹ was new and had yet to be put into commercial application. Indeed, PROESA was not put into commercial or industrial application until *after* the parties executed the License. The Claimant knew this. For the avoidance of doubt, any representations Beta made concerning the PROESA technology were given with the full belief of their truth.

47. Specifically, the Claimant entered into the License with the knowledge that the PROESA technology was new and in its development phase insofar as it had not been trialled on a commercial or industrial scale. The Claimant, being an expert in this area of technology, understood the magnitude of the scaling up process yet wished to benefit economically from being a 'first mover' in this area of technology. It is for this reason that the Claimant wanted to participate as an investor in the 'pioneering' stage of the technology. As indicated below, the Claimant was to be additionally rewarded for its investment at this pioneering stage by sharing in royalties in respect of future sales of the technology in Brazil. Further, as set out below and as will be detailed in subsequent submissions, the pricing of the License reflected the Claimant's desire to partner in the commercial and technical development of PROESA.

²¹ The PROESA technology is a pioneering method of biomass pre-treatment and enzyme hydrolysis that facilitates breakdown of the biomass and eventual fermentation into ethanol without the use of acids or other chemical reactions. Further details of the process will be set out in subsequent submissions.

48. Even if there were any misrepresentations, which is denied, GranBio did not rely on them in entering into any of the agreements in any event. At all relevant times, the Claimant, a sophisticated commercial party with a background in biotechnology and bioethanol fuels, had full access to the Beta laboratories and the pilot plant that BioChemtex had developed in Rivalta-Scrivia, Italy (the **Pilot Plant**), as well as to the the PROESA technology and was able to form its own assessment of it and Beta's capabilities. In fact, the parties executed a binding Non-Disclosure Agreement providing GranBio full and direct access to the Pilot Plant. Thus, at the time that the parties negotiated the License, the Claimant was independently able to verify Beta's description of PROESA and Beta's capabilities.

49. Insofar as the PROESA technology was in the process of being scaled up from the Pilot Plant to an industrial sized plant, improvements were continuously being made to the PROESA process but the fundamental aspects of the technology remained the same. For the avoidance of doubt, this does not amount to "experimenting" with the technology as alleged at paragraph 20 of the Request. For that matter, the PROESA technology is not, as the Claimant alleges, "fundamentally flawed" and it is denied that Beta ever represented that the Crescentino plant was working at full capacity without issue. Indeed, Beta did not even complete construction of the Crescentino plant until January 2013, well after the execution of the License and even then it was not formally opened until October 2013. As the Crescentino plant is a "demonstration" plant, it is frequently undergoing development, modifications and improvements. Again, the Claimant knew this as it visited the Crescentino plant several times before it was officially commissioned and thereafter.

50. The implication that Beta represented (and GranBio expected) the License to be representative of a 'turn-key' contract is not only denied, but it is wholly inconsistent with, *inter alia*, the side letter agreement between GranBio and Beta dated 15 May 2012 (the **Side Letter**).²² In particular, the Side Letter permitted GranBio to construct a Pilot Plant to develop and experiment with the utilisation of PROESA technology. The License also entitled GranBio to royalties from the licensing of PROESA to others in Brazil, in recognition of the "*pioneering value*" of GranBio's investment in production of a commercially-sized plant in Brazil. An entitlement to royalties is reflective of the level of risk shared between the parties in developing the industrial application of PROESA. Here, the relevant risk was the investment in a new and as then commercially unproven technology on an industrial scale, as set out above. The pricing structure of the Licence (*viz.* the price, liquidated damages, and royalties) reflected the pioneering characteristic of the Claimant's investment.

²² Letter from Graal Bio Investimentos S.A. to Beta Renewables S.p.A. dated 15 May 2012, **R1-5**.

51. It is denied that Beta provided grossly incompetent and/or deficient performance under the License. For the avoidance of doubt, it is therefore denied that there were any breaches of the License. The PROESA technology was and is conceptually sound. In fact, the Alagoas plant started ethanol production in September 2014, i.e., only a few weeks after the plant's mechanical completion (a few weeks being typically required for the commissioning of a plant). The novelty of the PROESA technology and the risks associated therewith should not be confused with alleged flaws. Until particularised, Beta cannot comment further on the allegation that the technology was not mature, effective, or ready for commercial-scale operations apart from denying that the allegation is true. Pending the necessary further particularisation, it is denied the design plans for the Alagoas facility were in any way deficient. For the avoidance of doubt, if (which is presently denied) they were deficient, this did not amount to a gross deficiency and/or gross negligence. Further, to the extent that the references to such design plans are to plans provided under the Engineering Agreement, discussion of any alleged deficiencies thereunder are not the subject of these proceedings, for the reasons set out above.

52. In any event, even if there were breaches of the License or any non-contractual wrongdoing, which is denied, any such breaches fall within the liability exclusions or liquidated damages caps in the License set out at Articles 11 and 13.

53. Further and for the avoidance of doubt, even if (which is denied) there were breaches (contractual or non-contractual) of any duties on the part of Beta, any characterisation of said breaches as "gross" is misconceived and false. The characterisation of such as "gross" is nothing more than an attempt to circumvent the liability exclusions and liquidated damages provisions in the License. The tribunal should be alive to this attempted (but futile) linguistic manoeuvre when considering the Claimant's submissions.

A. Alleged Gross Negligence in Connection with the Design and Engineering of the Plant

54. Beta did provide GranBio with the Process Design Package (**PDP**) as required under the License. It is denied that Beta's PDP provided was inadequate, unsuitable or flawed.

55. Further, it is denied that the Plant was not completed until November 2014. The Plant had already begun producing ethanol product in September 2014. It is also denied that Beta did anything in a grossly incompetent manner and any suggestion of the same is denied. In fact, the Claimant's own performance of the plant construction was deficient in various respects, as will be elaborated on below.

B. Alleged Repeated Misrepresentations after Execution of Agreements

56. Pending further particularisation, it is denied that Beta made any assurances with regard to problems with the PROESA technology or the Crescentino plant. The PROESA technology was and remains sound. As with any of its technology, but particularly one in the development phase, Beta strives for constant improvements. This is to be expected. The Claimant was aware of this and, in fact, contracted to be a partner in the development and distribution of the PROESA technology. There was even provision in Article 15 of the License dealing with the intellectual property consequences of improvements to the PROESA technology. Insofar as any assurances were made, which is presently denied, they were true, as explained above.

57. In the Request and in its open correspondence predating these proceedings the Claimant has continually and, it must be said, conveniently alluded to alleged representations or “admissions” made by Beta’s former Chief Executive Officer, Guido Ghisolfi, who passed away in March 2015. This is unfortunate as Mr Guido Ghisolfi is regrettably no longer able to speak to these alleged representations or otherwise challenge them. In any event, these so-called “admissions” are denied. Alternatively, even if they were representations (which is denied), GranBio did not rely on them for the reasons provided above and they did not cause GranBio any loss.

C. The Plant Allegedly Fails to Achieve Stable Operations

58. Insofar as a Performance Test has not taken place, this failure is attributable to the Claimant. Even if that were not the case, which is denied, GranBio’s claim is, at best, limited to liquidated damages in any event under the terms of the License. Pending further particularisation, the Claimant’s allegations in respect of this issue are denied.

59. The Claimant was responsible for the construction of the Plant and the purchase of most of the materials and equipment necessary for that purpose, which it failed to carry out competently or in accord with the designs provided. As such, the problems encountered by the Plant amount to contributory negligence on the Claimant’s part, including (without limitation) the utilities problems encountered with maintaining uninterrupted power supply to the Plant and the regular steam supply necessary for PROESA to work properly. For the avoidance of doubt, Beta is not responsible for the Plant’s failures, if any, to meet any performance requirements.

60. A Performance Test could not take place at any time after 26 November 2014 when the Claimant declared that it would be ready to conduct one, because the Plant was not in a state of stable operation that would allow such a test to be conducted. No Performance Test was requested thereafter either. The instability of operation was attributable to the Claimant as indicated above. Accordingly, pursuant to Article 10.9 of the License, the Claimant is deemed to have accepted the

Plant as of 18 May 2015. In any event, the Claimant deliberately chose not to pursue a Performance Test.

61. For the avoidance of doubt, the combined effect of Articles 10.9 and 11.6 of the License is that Beta has no liability under the guarantees where any underperformance is due to factors for which the Claimant is responsible, as is the case here.

62. Moreover, in the absence of a Performance Test having taken place, the guarantees in Article 11 were not breached because a condition precedent to the guarantees' application is that a Performance Test has taken place. It follows that the Claimant is not entitled to any liquidated damages in relation to the Performance Test.

D. GranBio's Alleged Losses Suffered

63. It is denied that Beta has exhibited wrongful conduct, whether under the Agreements or otherwise.

64. Pending proper particularisation of the alleged representations, it is denied that Beta made knowingly any false representations to GranBio. If, which is denied, there were any misrepresentations, they did not induce GranBio to enter into the License and/or did not cause GranBio any loss.

65. Further, even if there were breaches of the License, which is denied, then GranBio's losses are excluded in accordance with the provisions contained at Article 13 of the License and/or limited in accordance with the liquidated damages provisions contained at Articles 11 and 13 of the License. For the avoidance of doubt, if there were any breaches (which is denied), then they did not amount to "gross deficiencies" or any other characterisation as "gross". Moreover, and in any event, even if there were any breaches (which is denied), GranBio would be required to show that such breaches caused recoverable losses, something that GranBio has not even attempted to do.

66. Beta is not responsible for any alleged breaches of the Engineering or Equipment Agreements because it was not a party to those agreements.

67. It is denied that Beta has been negligent, let alone grossly negligent. The Claimant has not explained why a separate duty of care exists (the existence of which is denied) outside of the parties' contractual arrangement. Even if, which is denied, Beta was negligent in its representations concerning, or performance of the License, such negligence was not gross, and GranBio has not even attempted to explain why any such negligence was so egregious as to be "gross" within the meaning of the License.

E. Friendly Consultations between the Parties

68. The parties have engaged in friendly consultations pursuant to Article 19.1 of the License. As the parties disagree fundamentally as to the nature of GranBio's complaint, the consultations were unsuccessful.

VII. COUNTERCLAIM

69. In accordance with Article 5(5) of the ICC Rules, Beta submits a counterclaim against GranBio.

70. Under the terms of Article 3 of the License, several outstanding invoices to GranBio from Beta remain due and owing **(the Invoices)**²³ in the sum of US\$4,108,578.00. In a letter dated 17 May 2016, the Claimant stated that it did not believe that Beta was entitled to this amount and signalled its intent not to pay the Invoices.²⁴ Therefore, Beta hereby claims the sums due under the Invoices.

71. In its 17 May 2016 Letter, the Claimant alleges that, pursuant to Article 3.2(iii) of the License, the Invoices could only be issued "two (2) months after the Date of Start-Up", which is defined as the "date of first introduction of Biomass into the Plant for the purposes of making Ethanol for commercial sale". The Claimant went on to contend that no such "Date of Start-up" has ever occurred at the Plant. Further, the Claimant argues that even though GranBio intended that such start up would take place in November 2014, that was impossible because, *inter alia*, Beta's technology failed. These arguments are baseless, as explained below.

72. As a matter of fact, the Claimant has previously acknowledged that the Date of Start up had taken place in November 2014. Further, it is denied that Beta's technology and equipment was subject to repeated failures. Accordingly, the sums owing under the Invoices are due and Beta respectfully requests that a tribunal eventually constituted to hear this matter issue an order to this effect.

VIII. RELIEF SOUGHT

73. The relief requested by the Claimant is accordingly rejected in its entirety as against Beta for the reasons set out above.

²³ Invoices from Beta Renewables S.p.A. to GranBio LLC dated 27 Apr 2016, **R1-6**.

²⁴ Letter from WilmerHale to Quinn Emanuel dated 17 May 2016, **R1-7**, para.1.

74. The Claimant has not even attempted to explain why any alleged losses of should be borne “jointly and severally” by Beta and BioChemtex, the latter of whom, as noted above, is not a party to the License.

75. Further, the Claimant’s request for relief is speculative and baseless as a matter of law. As a matter of any losses said to flow from breach of contract in particular, the Claimant ignores the fact that Beta and BioChemtex are separate legal entities. This is problematic for the Claimant’s case because it has not sought to identify which party has suffered loss in what amount, or set out even a basic case on causation.

76. Accordingly, Beta seeks the following relief:

- (a) A declaration that Beta has complied with its contractual obligations under the License;
- (b) A declaration that Beta owes no liability in any amount to GranBio, whether contractual or non-contractual;
- (c) An award requiring GranBio to pay all costs and expenses of the present arbitration and to reimburse all of Beta’s reasonable legal fees, arbitration costs, expenses and other costs incurred in connection with the arbitration, including all internal costs, on a full indemnity basis;²⁵
- (d) Alternatively, if Beta is liable to GranBio, a declaration that such liability is limited in accordance with the liquidated damages provisions set out in the Articles 11 and 13 of the License and an award reflecting that limitation.

77. Accordingly, Beta further seeks by way of counterclaim the following relief:

- (a) A declaration that GranBio is obliged to pay the outstanding amounts under the Invoices to Beta;

²⁵ It is noted with some irony that the Claimant has reserved the right to claim all its costs in respect of Beta’s jurisdictional application (see paragraph 7 of the 12 May 2016 Letter) when it was the Claimant itself who presumed to start a single arbitration in respect of three separate agreements containing no common arbitration agreement between the parties. Needless to say, Beta’s rights are similarly reserved on costs pertaining to the jurisdictional application.

- (b) An award requiring GranBio to pay the outstanding sums under the Invoices to Beta, net of all banking charges and fees save for any payable by the recipient, on a Net Present Value basis;
- (c) Interest on those sums at a rate of 0.5% per month calculated from the date the relevant sum became due for payment, in accordance with Article 3.1(iii) of the License.

78. Insofar as any monetary award is made against Beta in respect of liability to GranBio, Beta requests the sums awarded under the Counterclaim be set off against that primary liability.

IX. CONCLUSION

79. Beta reserves the right to amend or supplement this Answer or to supplement the relief requested under the primary claim or the counterclaim.

Respectfully submitted,

19 May 2016



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QUINN EMANUEL URQUHART & SULLIVAN, LLP

Counsel to the First Respondent