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Hong Kong 31th March - 7th April 2019

RUHR-UNIVERSITY BOCHUM

MEMORANDUM FOR RESPONDENT

PHAR LAP ALLEVAMENTO v. BLACK BEAUTY EQUESTRIAN

Phar Lap Allevamento	v.	Black Beauty Equestrian
CLAIMANT		RESPONDENT
Rue Frankel 1		2 Seabiscuit Drive
Capital City		Oceanside
Mediterraneo		Equatoriana

COUNSEL FOR RESPONDENT

JESSICA ADJOYI • FERHAT ALSAÇ • JONA DONNER

CHRISTINA LUTHE • MAXIMILIAN SCHIKORRA • LENNART TOLLRIAN

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INDEX OF ABBREVIATION

%	Per cent
ab initio	From the beginning
ANoA	Answer to Notice of Arbitration
Art.	Article/Articles
C	CLAIMANT's Exhibit
cf.	Confer
CISG	United Nations Convention on Contracts for The International Sale of Goods
DDP	Delivered Duty Paid
ex aequo et bono	According to the right and good
f./ff.	Following
force majeure	Unforeseeable circumstances that prevent Someone from fulfilling a contract
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
ibid.	In the same place
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Letter Fasttrack	Letter Julia Clara Fasttrack 3 October 2018 p. 51 of the file
Letter Langweiler	Letter Joseph Langweiler 2 October 2018 p. 50 of the file
lex arbitri	The law at the seat of arbitration
MCL	Mediterranean Contract Law
MfC	Memorandum for Claimant of the Thammasat University
NoA	Notice of Arbitration
no.	Number
p.	Page
para.	Paragraph
pp.	Pages

PIA	Partial Interim Award
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
R	RESPONDENT's Exhibit
ratio (ratio decidendi)	Reason
sec.	Section(s)
supra	Above
The Rules 2018/2019	The competition rules for the 26th Willem C. Vis International Commercial Arbitration Moot
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law Principles of International Commercial Contracts
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2016
USD	United States Dollar(s)
v.	Versus

RULES AND LAWS

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna (11 April 1980)
HK-Rules	Arbitration Rules of the Hong Kong International Arbitration Centre, Hong Kong (1st November 2018)
HCCH	Hague Principles on Choice of Law in International Commercial Contracts (2015)
IBA Rules	IBA Rules on the taking of Evidence in International Arbitration (2010)
INCOTERMS 2010	INCOTERMS 2010 by the International Chamber of Commerce (ICC)
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1959)
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, Rome (2010)

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CISG-Online 1963	Hof van Cassatie van België/Cour de Cassation de Belgique June 19th 2009 Lorraine Tubes S.A.S. v. Scafom International BV Case No.: C.07.0289.N	**81**
	France	
Gaec v. Teso	Cour d'appel Grenoble/Appelate Court Grenoble October 23rd 1996 Gaec des Beauches v. Teso Ten Elsen Case No.: 94/3859	**114**
	Italy	
Nuova Case	Tribunal Civile di Monza January 14th 1993 Nuova Fucinati S. p. A. v. Fondmetall International A.B. Case No.: R.G. 4267/88	**87**
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Habas Sinai	High Court of Justice (Commercial Court) December 19th 2013 Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Coy Ltd [2013] [2013] EWHC 4071	**3, 4, 8, 9, 14, 15**
Shashoua	High Court of Justice (Commercial Court) May 7th 2009 Shashoua and others v. Sharma [2009] EWHC 957	**15**
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	United States of America	
Bible case	United States District Court, Southern District of Indiana, Indianapolis Division March 14th 2014 Bryana Bible v. United Student Aid Funds Inc. 1:13-cv-00575-TWP-TAB	**58**

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Abbreviation	Reference	Cited in para.:
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	Court of Arbitration of the International Chamber of Commerce	
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ICC 9117	ICC Court of Arbitration March 1998 ICC Arbitration Case No.: 9117/1998	**114**
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STATEMENT OF FACTS

The present dispute has arisen between Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"), collectively referred to as "**the Parties**".

CLAIMANT, located in Capital City (Mediterraneo), is renown as a leading company with expertise in all areas of equestrian sports. It owns hundreds of horses, including mares, offspring and stallions. Its research facility is a centre of excellence offering training and professional development courses on horse care, breeding and riding.

RESPONDENT is an Equatorianian business registered and located in Oceanside. It recently started a breeding programme for racehorses additionally to its profession in the dressage and show jumping sector. Its established broodmare lines have achieved a world renown reputation.

21st March 2017 RESPONDENT contacted and informed CLAIMANT about the lifting of the ban on artificial insemination for race horses and asked for an offer regarding the purchase of 100 doses of Nijinsky III's semen.

24th March 2017 CLAIMANT offered the semen for a price of USD 99,500 per dose.

28th March 2017 During the negotiations, RESPONDENT stated that it would consent to apply Mediterranean law, if the courts of Equatoriana had jurisdiction. Furthermore, it asked for "delivery DDP", due to CLAIMANT's prior experiences in the shipment of frozen semen.

31st March 2017 CLAIMANT objected to RESPONDENT's proposal and suggested to submit arising disputes to arbitration in Mediterraneo. It was willing to deliver the semen, however wanted to be exempted from some risks associated with the delivery.

12th April 2017 The main negotiators, Ms. Napravnik and Mr. Antley, had to be replaced due to a car accident before they had finalised the contract.

6th May 2017 The Parties concluded the Frozen Semen Sales Agreement ("**FSSA**"), stipulating the purchase of 100 doses of semen for USD 100,000 per dose. Both agreed on arbitration and submitted the sales agreement to Mediterranean law, including the CISG.

20th May 2017 CLAIMANT delivered the first shipment consisting of 25 doses of semen.

3rd October 2017 The second shipment of 25 doses arrived in Equatoriana.

19th December 2017 The Equatorianian government imposed 30 % tariffs upon all agricultural goods from Mediterraneo as a retaliation to the previous restrictions imposed by the president of Mediterraneo.

20th January 2018 CLAIMANT informed RESPONDENT that the newly imposed tariffs are applicable to the third shipment of 50 doses and that the Parties would have to find a solution in that regard.

21st January 2018 Mr. Shoemaker called Ms. Napravnik to discuss the issue regarding the tariffs.

23rd January 2018 CLAIMANT delivered the remaining 50 doses of semen.

12th February 2018 RESPONDENT refused to pay any additional amount for the tariffs after CLAIMANT accused it of breaching the contract.

2nd October 2018 CLAIMANT approached the Tribunal in order to submit a recently rendered Partial Interim Award ("**PIA**") from a different proceeding, RESPONDENT was involved in.

3rd October 2018 RESPONDENT denies the admissibility of the PIA as it had been obtained either through a breach of confidentiality or an illegal hack.

SUMMARY OF ARGUMENTS

A. No jurisdiction or power

The Tribunal does not have the jurisdiction and power to adapt the contract. Contrary to CLAIMANT's submission, the arbitration agreement and its interpretation are governed by Danubian law. The fact that the arbitration agreement is submitted to Danubian law results from the three stages doctrine, the UNCITRAL Model Law ("**UNCITRAL ML**") as well as the New York Convention ("**NY Convention**").

B. No right to submit evidence

CLAIMANT is not entitled to submit evidence from the other arbitration proceeding that RESPONDENT is involved in. In fact, it obtained the evidence in breach of the principle of good faith, which renders the award inadmissible. The evidence does not fulfil the general standards of admissibility, as reflected in the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") and international arbitration practices, since the disputed evidence is neither relevant nor material to the outcome of the case. In addition, it is not entitled to submit the PIA as its consideration would encourage lawbreaking in order to submit favourable evidence.

C. No additional payment

Contrary to CLAIMANT's submission, it does not have the right to ask for any additional payment, neither under Clause 12 FSSA nor under the CISG. As the Parties agreed on the delivery DDP in Clause 8 FSSA and hardship in Clause 12 FSSA, CLAIMANT is liable for the additional costs resulting from the imposition of tariffs. There is neither a case of hardship nor a comparable unforeseen event making the contract more onerous as required by Clause 12 FSSA. In addition, CLAIMANT has no right for additional payment under Art. 79 CISG since it is excluded by agreement according to Art. 6 CISG. Even if the Tribunal found that Art. 79 CISG was not excluded, it would not lead to contract adaptation as neither the article's requirements are met nor does it stipulate contract adaptation as legal consequence. This result is not changed by applying Art. 9 (2) CISG. Lastly, the Parties did not agree to modify the contract pursuant to Art. 29 (1) CISG.

ARGUMENTS

A. NO JURISDICTION AND POWER FOR CONTRACT ADAPTATION

1 The arbitration agreement and its interpretation are governed by Danubian law (**I.**). According to Danubian law, the Tribunal does not have the jurisdiction and power to adapt the contract (**II.**). Even if the Tribunal came to the conclusion that Mediterranean law governs the arbitration agreement, it still does not have the power to adapt the contract (**III.**).

2 Clause 15 FSSA does not contain an explicit choice of law governing the arbitration agreement but solely stipulates the Tribunal's competence, the seat of arbitration, the number of arbitrators and the language of the arbitral proceeding [*C5 p. 14*]. In Clause 14 FSSA, the Parties expressly included that Mediterranean law shall govern the FSSA [*ibid.*]. However, by arguing that the law of the FSSA has to be applied to the arbitration agreement, CLAIMANT violates the doctrine of separability [*MfC para. 13 f.*]. This doctrine, which follows from Art. 16 (1) UNCITRAL ML and is applicable in all potentially relevant arbitration laws [*PO2 p. 57 no. 14*], states that an arbitration agreement has to be considered as a legally separate agreement from the underlying contract in which it is included [*Art. 16 (1) UNCITRAL ML; Born, p. 475; Lew/Mistelis/Kröll, p. 102; Redfern/Hunter, p. 104 f.*]. This doctrine's *ratio* is firstly, to ensure the validity of the arbitration agreement even if the matrix contract is null and void and secondly, to respect the parties' autonomy when choosing arbitration agreements to be governed by a different law than the one governing their underlying contract [*ibid.*]. Therefore, the law governing the FSSA cannot be transferred to the arbitration agreement and the question which law governs the latter arises.

I. Danubian law

3 The arbitration agreement and its interpretation are governed by Danubian law. The applicable law resolves the question whether the Tribunal is entitled to decide on contract adaptation. In the case at hand, a governing law is not written down in the arbitration agreement [*C4 p. 14*]. Due to the fact that a choice of law clause is missing, the question how the governing law shall be determined arises. In absence of a choice of law clause, the law governing the arbitration agreement is the law with the closest connection to the case [*Born, p. 506; Lew/Mistelis/Kröll, p. 427*]. In order to identify the law with the closest connection to the case, the three stages doctrine has to be appliied [*Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai; Redfern/Hunter, p. 160*], with the result that the law governing the arbitration agreement is Danubian law (**1.**). This is underlined by the UNCITRAL ML (**2.**) and the NY Convention (**3.**).

1. Three stages doctrine

4 According to the three stages doctrine, the arbitration agreement is governed by Danubian law. When identifying the law with the closest connection to the case, it is commonly accepted by tribunals to follow a pattern of enquiry which is called "three stages doctrine" [*Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai; Redfern/Hunter, p. 160*].

5 According to the three stages doctrine, one firstly has to consider the law expressly chosen by the Parties [*ibid.*]. In the absence of an express choice, a contract is governed by the law impliedly chosen by the parties [*ibid.*]. Lastly, in the absence of an implied choice, the arbitration agreement is governed by the law with the closest and most real connection to the case [*ibid.*]. In the case at hand, there is, contrary to CLAIMANT's submission [*MfC para. 11 ff.*], no express choice of law (**a.**). The Parties have impliedly agreed on applying Danubian law (**b.**). Even if the Tribunal came to the conclusion that there is no implied choice, the arbitration agreement is still governed by Danubian law as it has the closest and most real connection to the case (**c.**).

a. Explicit choice

6 Contrary to CLAIMANT's submission [*MfC para. 11 ff.*], the Parties do not have expressly chosen Mediterranean law to govern the arbitration agreement. An explicit choice of law is an agreement where the parties' intention, which law governs the agreement, is clear, easy to identify and usually written down in the contract [*Lew/Mistelis/Kröll, p. 415*]. CLAIMANT argues that the arbitration agreement has to be interpreted by "taking into account all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense" [*MfC para. 11*]. Following CLAIMANT's argumentation and the doctrine of separability, it is the wording of the arbitration agreement regarding the choice of law that has to be interpreted [*ibid; Fiona Trust*]. However, there is no wording regarding any choice of law in the arbitration agreement that could be interpreted [*C5 p. 14 no. 15*].

7 Moreover, CLAIMANT incorrectly argues that due to the wording in Clause 14 FSSA, which stipulates that the "Sales Agreement shall be governed by the law of Mediterraneo", the arbitration agreement is also governed by Mediterranean law [*MfC para. 13 f.*]. By arguing in this way, CLAIMANT violates the doctrine of separability [*ibid.*]. The only explicit agreement that the Parties had reached was that the FSSA is governed by the law of Mediterraneo [*C5 p. 14*]. Therefore, there is no express choice of law contained in the arbitration agreement.

b. Implied choice

8 Contrary to CLAIMANT's submission [*MfC para. 15 ff.*], the Parties have impliedly chosen Danubian law as the law governing the arbitration agreement since they decided for Danubia

as venue for the arbitration. An implied agreement cannot be seen in the fact that the Parties chose the application of Mediterranean law for the matrix contract. In the absence of an express choice of law, a contract is governed by the law impliedly chosen by the parties [*Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai; Redfern/Hunter, p. 160*]. An implied choice of law is to be found in words or acts which manifest the parties' intention and expectation that a particular law governs their agreement [*Lew/Mistelis/Kröll, p. 415*].

9 CLAIMANT mentions the case *Sulamérica v. Enesa,* where the Court of Appeal stated that the express choice of law governing the substantive contract, offers a strong indication of the parties' intention to have the whole of their relationship to be governed by the same system of law [*MfC para. 20*]. However, the Court only came to this conclusion "in the absence of any indication to the contrary" [*Sulamérica v. Enesa*]. It decided in favour of the law governing the seat of arbitration and stated that the "choice of curial law is normally made by identifying the seat of the arbitration" [*ibid.*]. Therefore, the case held that the seat of arbitration is an indication to the contrary. The presumption that the law governing the matrix contract also governs the arbitration agreement is rebutted when the Parties intended a different result [*Lew/Mistelis/Kröll, p. 107*]. Additionally, according to *FirstLink,* it cannot always be assumed that parties on the one hand want the same system of law to govern their relationship of performing the matrix contract and on the other hand want the same law to govern the quite separate relationship of resolving disputes when problems arise. Thus, there cannot be a "natural inference that commercial parties would want the same system of law to govern these two distinct relationships" [*FirstLink*]. Quite the contrary: the natural inference would be that the "parties' desire for neutrality comes to the fore" and that therefore the law governing the matrix contract has to be considered subsidiary [*ibid.*]. In addition, the Court ruled that parties impliedly selected the *lex arbitri* of the seat to govern matters regarding the arbitration agreement [*ibid.*]. The "choice of a different country for the seat of the arbitration" is an indicator pointing out that the parties' intention was the law of the seat of arbitration to be the governing law of the arbitration agreement and not the law of the matrix contract [*Habas Sinai*]. Also, in *Abuja International* the court stated that the seat of arbitration construes an implied agreement on choice of law. This presumption prevails although the matrix contract is subjected to a different country [*Abuja International*]. In *Channel v. Balfour* the court decided in a comparable way by stating that in the absence of an explicit choice of the law governing the arbitration agreement, the parties, when contracting to arbitrate in a particular place, consented to having the arbitral process governed by the law of that place.

10 Contrary to CLAIMANT's submission, where it argues that the Parties have not chosen Danubia for neutrality reasons and that therefore the case *FirstLink* cannot be applied [*MfC para. 18*], it is undisputed that the Parties wanted a neutral venue when choosing Danubia as seat of arbitration [*C3 p. 11; C4 p. 12; R2 p. 34*]. By choosing the seat of arbitration being in a foreign country, the parties intended to impliedly submit the arbitration agreement to Danubian law as the fact that the seat is neither in Mediterraneo, nor in Equatoriana would not have any legal impact if the Parties still intended the arbitration agreement to be governed by Mediterranean law. Therefore, the Parties intended to deviate from the law governing the matrix contract. The demanded neutrality would not have been given, if the Parties agreed to the law of Mediterraneo or Equatoriana to govern the arbitration agreement due to the fact that they are the law of the home state of one of the Parties [*NoA p. 4 no. 1, p. 5 no. 4*]. Thus, when choosing Danubia as seat of arbitration, the Parties compromised and indicated Danubian law to be the governing law. This is also underlined by the fact that "commercial parties would not […] select a place to be the seat if they do not at least have the notional confidence that the supervisory court would recognise and give effect to the arbitration agreement in the first place" [*FirstLink*]. In the first draft of the arbitration agreement, the seat of arbitration and the law have been the same and connected. Therefore, the Parties intended to govern the arbitration agreement by the law of the seat of arbitration [*ANoA p. 30 no. 5; R1 p. 33*]. CLAIMANT changed the suggested place of arbitration in its draft but did not object to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement [*R2 p. 35*]. Thus, as CLAIMANT changed the place of arbitration to be Danubia [*ibid.*] and did not deviate from the initial clause that the seat and the law shall be congruent, the arbitration agreement can only be understood to be governed by the law of Danubia.

11 In addition, the Parties did not agree on Mediterranean law to govern the arbitration agreement as CLAIMANT stated that it would largely accept RESPONDENT's proposal "with an amendment as to the place of arbitration" [*R2 p. 34*]. The seat of arbitration is undisputedly Danubia [*C5 p. 14*]. Reconsidering now that there is a connection between the seat of arbitration and the law that governs the arbitration agreement [*supra para. 10*], it becomes obvious that not only the seat, but also the law governing the arbitration agreement changed to Danubia. Thus, CLAIMANT's statement that the Parties chose the law governing the FSSA for the arbitration agreement as well, given the missing objection [*MfC para. 19*], is baseless.

12 CLAIMANT might have argued that Ms. Napravnik would not have been authorised to change the governing law of the arbitration agreement due to CLAIMANT's internal policies requiring a special approval by the creditor's committee, when submitting a contract to foreign law or

providing for dispute resolution in the country of the counterparty [*R2 p. 34*]. However, the creditor's committee stated that there was no need to seek approval consenting to arbitration clauses, as long as the place of arbitration was in a neutral country with a functioning judicial system, which the creditor's committee had previously affirmed for Danubia [*PO2, p. 56 no. 14*]. Therefore, Ms. Napravnik had the authority to agree upon arbitration clauses in total.

13 Consequently, the Parties have impliedly chosen Danubian law as the law governing the arbitration agreement.

c. Closest and most real connection to the case

14 Even if the Tribunal came to the conclusion that there is no implied choice of law, the arbitration agreement is still governed by the law of Danubia as it has the closest connection to the case. In the absence of an implied choice, the arbitration agreement is governed by the system of law with which it has its most real and substantial connection [*Arsanovia Ltd.*; *Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai; Mak, p. 130; Redfern/Hunter, p. 160*].

15 CLAIMANT falsely submitted that the arbitration agreement has its closest and most real connection to the law of Mediterraneo, being the same system of law governing the substantive contract which it forms part of [*MfC para. 20*]. There is "no doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different" [*Sulamérica v. Enesa*]. More likely "it has its closest and most real connection with the law of the place where the arbitration is to be held" [*ibid; Arsanovia Ltd.; cf. Shashoua*]. Similarly, in *Habas Sinai* it has been stated that the law with the closest and most real connection is "likely to be the law of the country of the seat, being the place where the arbitration is to be held". In the case at hand, the seat of arbitration is Danubia [*C5 p. 14*]. An agreement to resolve disputes by arbitration in Danubia, and therefore in accordance with the Danubian arbitration law, does not have a close juridical connection with Mediterranean law, whose purpose is unrelated to the one of dispute resolution. Therefore, the law closest connected to the case is Danubian law.

2. UNCITRAL ML

16 The arbitration agreement is governed by Danubian law when considering the UNCITRAL ML. Although the UNCITRAL ML is applicable regardless of whether Danubian, Equatorianian or Mediterranean law applies [*PO2, p. 57 no. 14*], the UNCITRAL ML does not directly address the question which law is applicable to an arbitration agreement. However, Art. 34 (2) (a) (i) UNCITRAL ML and Art. 36 (1) (a) (i) UNCITRAL ML stipulate the rule that if the parties have not indicated which law governs an arbitration agreement, the seat of arbitration shall determine the governing law. This follows from the wording of both articles, stating that if an

arbitration agreement "is not valid under the law to which the Parties have subjected it or, failing any indication thereon, under the law of this State [country where the award was made]" an arbitral award may be set aside by the court. The interesting part thereof is the rule of precedence prescribing that if an indication on the chosen law is missing, the law of the state where the award was made has to be applied. This is the seat of arbitration, namely Danubia.

17 Even if CLAIMANT had suggested that the application of Art. 28 UNCITRAL ML led to the result that Mediterranean law governs the arbitration agreement, the Tribunal would have had to consider that Art. 28 UNCITRAL ML only applies to the substance of dispute, as stated in the heading ("Rules applicable to substance of dispute"). Therefore, it only applies to the merits of a case. In the case at hand, the Parties argue about the law governing the arbitration agreement which is a procedural question.

18 Consequently, the UNCITRAL ML does not lead to a different result.

3. NY Convention

19 By applying the NY Convention, the Tribunal would come to the conclusion that the arbitration is governed by the law of Danubia. The NY Convention is applicable, regardless of whether Danubian, Equatorianian or Mediterranean law applies [*The Rules 2018/2019 para. 24*]. Art. V (1) (a) NY Convention stipulates that if the parties have not indicated which law governs an arbitration agreement, the seat of arbitration shall determine the governing law. This follows from the wording, stating that that the agreement, under which the award is made, must be valid "under the law to which the Parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". Since the seat of arbitration is Danubia, Danubian law is applicable.

20 Thus, the NY Convention favours the applicability of Danubian law.

II. No power for contract adaptation under Danubian law

21 The Tribunal does not have the power to adapt the contract under Danubian law due to a narrow interpretation of the arbitration agreement (**1.**). Moreover, the required express conferral of powers to authorise the Tribunal to adapt the contract demanded by Art. 28 (3) UNCITRAL ML, is not given (**2.**). Additionally, the choice of law rules do not lead to a different result (**3.**).

1. Narrow interpretation of the arbitration agreement

22 The Tribunal does not have the power to adapt the contract under Danubian law due to a narrow interpretation of the arbitration agreement. According to Danubian law, which contains the four corner rule, all extraneous evidence is excluded for the interpretation of contracts [*PO1, p. 52 II. no. 3*]. Moreover, arbitration agreements have to be interpreted narrowly [*ibid.*]. CLAIMANT might have argued that due to the wording "arising out of" in the arbitration

agreement, the Tribunal is empowered to decide on contract adaptation. However, the wording of the FSSA itself does not provide for contract adaptation as the term "arising out of" only refers to substantive issues of the case. This is underlined by the high likelihood that the arbitration agreement would not be interpreted as authorising a contract adaptation by the Tribunal [*ibid.*].

23 Moreover, CLAIMANT might have argued that the four corner rule only applies to contracts which appear to be complete. As the Parties failed to designate a governing law, the arbitration agreement has to be deemed incomplete. By doing so, CLAIMANT would firstly neglect that the Parties impliedly agreed on an applicable law [*supra para. 13*] and secondly, that it is "unusual for them [the parties] to make an express choice of the law to govern any arbitration agreement" [*Sulamérica v. Enesa*] and also not necessary as otherwise the law of the seat governs the matters submitted to arbitration [*supra para. 15; Born, p. 500*]. Therefore, the four corners rule has to be considered with the result that the Tribunal should not consider extraneous evidence when ruling on its power.

24 Consequently, the Tribunal lacks power to adapt the contract due to a narrow interpretation.

2. Art. 28 (3) UNCITRAL ML

25 The application of Art. 28 (3) UNCITRAL ML does not lead to a different result. CLAIMANT argues that an express authorisation of the Parties regarding an empowerment of the Tribunal to adapt the contract is not necessary [*MfC para. 30 f.*]. However, CLAIMANT ignores that according to Danubian courts, Art. 28 (3) UNCITRAL ML contains a general standard to be applied to the conferral of exceptional powers to the tribunal [*PO2, p. 60 no. 36*]. Thus, while parties may authorise tribunals to adapt contracts, an express conferral of powers is required [*ibid.*]. The only source to take into consideration is the arbitration agreement due to the four corner rule [*supra para. 22*]. In Clause 15 FSSA, the Parties stated that "any dispute arising out of this contract" shall be resolved by the Tribunal [*C5 p. 14*]. However, this does not stipulate an express conferral of powers as the wording only refers to the FSSA and not to the arbitration agreement, given that the Parties usually referred to the FSSA as "contract" [*C3 p. 11; C4 p. 12; C8 p. 17; R3 p. 35; R4 p. 36; Letter Langweiler p. 50*] and to the arbitration agreement as "dispute resolution clause" [*C8 p. 17; R1 p. 33*]. The question, whether the Tribunal has the power to adapt the contract, does not arise from the FSSA. In addition, the broad wording of the Model Clause of the HKIAC, which usually also covers disputes related to the contract, has been explicitly reduced by deleting any reference which could be interpreted as an empowerment for contract adaptation [*R1 p. 33; ANoA p. 30 no. 13*].

26 Therefore, Art. 28 (3) UNCITRAL leads to the result that the Tribunal does not have the power to adapt the contract.

3. Choice of law rules

27 The choice of law rules do not lead to a different result. Firstly, the applicable Hague Principles on choice of law in International Commercial Contracts ("**HCCH**") do not address arbitration agreements (**a.**). Secondly, the Tribunal is not empowered to adapt the contract with regard to the CISG (**b.**) and the UNIDROIT Principles for International Commercial Contracts ("**UNIDROIT**") (**c.**).

a. HCCH

28 The HCCH rules do not lead to the result that the Tribunal has the power to adapt the contract. The general conflict of law rules in Danubia, Equatoriana and Mediterraneo are a verbatim adoption of the HCCH [*PO2, p. 61, cl. 43*]. Consequently, the HCCH are applicable. However, according to Art. 1 (3) (b) HCCH, these principles do not address the law governing arbitration agreements and agreements on choice of court.

29 Therefore, the HCCH cannot determine the law governing the arbitration agreement.

b. CISG

30 The CISG supports the lack of power. There is consistent jurisprudence in Danubia that due to the doctrine of separability the CISG does not apply to the arbitration agreement, as the latter is considered to be a procedural contract and not a sales agreement [*PO2, p. 60 no. 36*].

31 Consequently, the CISG is not applicable.

c. UNIDROIT

32 The application of the UNIDROIT confirms the aforesaid. Danubian law is a largely verbatim adoption of the UNIDROIT [*PO2, p. 61 no. 45*]. According to Art. 6.2.3 (4) (b) UNIDROIT, the tribunal has the power to adapt the contract with a view to restore its equilibrium if authorised [*ibid.*]. However, such an authorisation is not given [*supra para. 25*].

33 Consequently, the UNIDROIT confirm the Tribunal's lack of power.

III. Mediterranean law

34 Even in the unlikely event that the Tribunal came to the conclusion that Mediterranean law shall govern the arbitration agreement, the Tribunal still does not have the power to adapt the contract, contrary to CLAIMANT's submission [*MfC para. 22 f.*]. Firstly, the question whether the Tribunal has the power to adapt the contract does not result from an interpretation of Clause 15 FSSA (**1.**). Secondly, Art. 6.2.3 (4) (b) UNIDROIT does not regulate the empowerment of tribunals as the UNCITRAL ML is the relevant arbitration law in Mediterraneo (**2.**).

1. Interpretation of Clause 15 FSSA

The Tribunal does not have the power to adapt the contract under an interpretation of the FSSA. CLAIMANT wrongfully submits that the term "arising out of" in Clause 15 FSSA leads to an empowerment of the Tribunal in connection with Clause 12 FSSA (**a.**). In addition, an interpretation of Clause 15 FSSA does not empower the Tribunal (**b.**). Furthermore, the Parties did not impliedly agree on empowering the Tribunal (**c.**).

a. Clause 12 FSSA

35 The question whether the Tribunal has the power to adapt the contract does not result from an interpretation of Clause 12 FSSA. CLAIMANT argues that the wording " 'dispute arising out of this contract, including […] interpretation […] thereof' ", contained in Clause 15 FSSA [*C5 p. 14*], refers to disputes arising out of the content of provisions stipulated in the FSSA [*MfC para. 23*]. Therefore, according to CLAIMANT's opinion the question of empowerment for contract adaptation is one of the interpretation of Clause 12 FSSA [*ibid.*]. CLAIMANT states that the Parties' intention would be very well evidenced by the fact that the Parties allegedly included an adaptation clause into Clause 12 FSSA [*MfC para. 24*]. However, the wording of Clause 12 FSSA itself does not provide or give any hint regarding an empowerment of the Tribunal for contract adaptation as Clause 12 FSSA only deals with the merits of the case and gives requirements and legal consequences regarding liability issues [*C5 p. 14*]. The fact that the Parties wanted the Tribunal to be empowered for questions regarding interpretation does not lead to the empowerment of the Tribunal to adapt the contract. Even if the ICC hardship clause empowers the Tribunal, it has to take into consideration that the Parties consciously deviated from the wording of the ICC hardship clause, which finally resulted in a very narrowly worded clause [*ANoA p. 30 no. 9; R3 p. 35*]. At the time of the formation of the contract the Parties did not dispute whether Clause 12 FSSA would allow for any adaptation of the contract by the Tribunal as they agreed on a narrow wording. Therefore, the question whether the Tribunal has jurisdiction is no matter arising out of Clause 12 FSSA.

b. Clause 15 FSSA

36 Contrary to CLAIMANT's submission [*MfC para. 26*], the wording of the arbitration agreement is not broad enough to cover the dispute concerning the empowerment of the Tribunal as the Parties deviated from the broad version of the HKIAC model clause. The Parties reduced the wording of the model clause of the HKIAC, which usually also covers disputes related to the contract, by deleting any reference which could be interpreted as an empowerment for contract adaptation [*R1 p. 33; ANoA p. 30 no. 13*]. CLAIMANT argues that this is not true as the Parties only reduced the wording by deleting the reference "relating to this contract"

[*MfC para. 26*]. However, by arguing this way, CLAIMANT only tells half the story. The Parties also deleted the references to "controversy, difference or claim" arising out of the contract and the reference to "any dispute regarding non-contractual obligations arising out of or relating to it". Therefore, the Parties had the intention to largely deviate from the general HKIAC model clause. Moreover, the question whether the Tribunal has power to adapt the contract is not a dispute arising out of the FSSA, as the FSSA itself does not provide for contract adaptation [*supra para. 22*]. Therefore, the reduced wording leads to the result that the Tribunal does not have the power to adapt the contract.

37 Even if a broad understanding applied to the extent that the dispute arose out of the contract, the Parties' intention cannot be neglected as the Parties' agreement to deviate from the broad version has to be considered first. Therefore, the Tribunal still does not have the power to adapt the contract.

c. No implied agreement

38 The Parties have not impliedly agreed to provide jurisdiction for the Tribunal to adapt the contract under Mediterranean law. According to CLAIMANT, an implied agreement would be given due to the Parties' conduct [*MfC para. 27*]. However, CLAIMANT does not underline its submission with any legal evidence. CLAIMANT only mentions that Mr. Antley made a statement in a way that he accepted the jurisdiction for the Tribunal to adapt the contract, should the Parties be unable to reach a solution [*ibid.*]. By arguing this way, CLAIMANT flouts that this statement belongs to a shortly exchange of views and wishes between the Parties, where no amendments to the contract were made [*cf. NoA p. 7 no. 16; C8 p. 17*]. The only agreement that has been reached was RESPONDENT's promise to come back with a proposal regarding this topic the next morning [*C8 p. 17*]. Yet, due to the accident this never happened [*ibid.*]. Thus, given that there has only been a short discussion and both Parties were of the opinion that a draft still had to be drawn up, no agreement has been reached, especially when taking into consideration that the Parties' intention could largely differ and that therefore they would have never reached an agreement whatsoever.

39 Moreover, CLAIMANT argues that RESPONDENT has not objected to the aforementioned issue in its ANoA and that it therefore impliedly agreed to empower the Tribunal with jurisdiction to adapt the contract [*MfC para. 27*]. This solely happened as RESPONDENT is convinced that Danubian law is applicable [*supra para. 13, 15, 18, 20*].

40 Consequently, the Parties have not reached an implied agreement to provide jurisdiction for the Tribunal.

2. Art. 6.2.3 (4) (b) UNIDROIT

41 CLAIMANT wrongfully argues that the Tribunal would be entitled to adapt the contract as the Parties failed to renegotiate and therefore the requirements of Art. 6.2.3 (4) (b) UNIDROIT are fulfilled [*MfC para. 29*]. However, firstly, the relevant arbitration law of Mediterraneo is the UNCITRAL ML and not the UNIDROIT [*PO2, p. 57 no. 14*]. Secondly, even if the UNIDROIT were applicable, CLAIMANT neglects that Art. 6.2.3 UNIDROIT only refers to the merits of a case as it is a foundation of a claim [*cf. NoA p. 8 no. 20*]. In addition, the source CLAIMANT bases its argument on does not deal with the UNIDROIT [*AC No. 7, para. 40; MfC para. 29*]. Thus, CLAIMANT's statements regarding Art. 6.2.3 (4) (b) UNIDROIT are unfounded.

IV. Conclusion on A

42 The arbitration agreement is governed by Danubian law. According to Danubian law the Tribunal does not have the power to adapt the contract. Even if Mediterranean law shall govern the arbitration agreement, the Tribunal would still not have the power to adapt the contract.

B. SUBMISSION OF EVIDENCE

43 Contrary to CLAIMANT's statements [*MfC para. 34 ff.*], it is not entitled to submit evidence from the other arbitration proceedings. According to Art. 22.2 HKIAC-Rules 2018 ("**HK-Rules**"), the tribunal has broad discretion when deciding on the admissibility of evidence [*identical: Art. 19 (2) UNCITRAL ML; Art. 22.2 HKIAC-Rules; Lew/Mistelis/Kröll, p. 95*]. When addressing the question of submitting illegally obtained evidence, it is vital to consider the parties' choice of rules regarding evidence-taking [*Ortiz, para. 4*]. In the present case, the Parties did not negotiate the requirements that have to be met when submitting evidence. When no rules regarding the modes of evidence-taking have been specified, it is "highly unlikely that the parties would design a rule ex ante that explicitly allowed for the presentation of unlawfully obtained evidence" [*ibid.*]. Thus, the assumed breach of confidentiality or illegal hack render the evidence inadmissible. Therefore, the PIA cannot be considered in this arbitration as there are no legitimate grounds for the evidence to be admissible (**I.**). The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("**Rules on Transparency**") are not applicable (**II.**). Lastly, the Tribunal should not deem the PIA admissible under the assumption that it has been obtained through an illegal hack (**III.**)

I. No legitimate grounds

44 CLAIMANT states that there are legitimate grounds for the evidence to be admissible [*MfC para. 39 ff.*]. However, this is not true as CLAIMANT obtained the evidence in breach of the

principle of good faith (**1.**). Even if CLAIMANT obtained the evidence in good faith, the evidence does not fulfil the general standards of admissibility (**2.**).

1. Good faith

45 CLAIMANT obtained the evidence in breach of the principle of good faith rendering the evidence inadmissible. Tribunals ruled that a party cannot rely on the documents itself has obtained in breach of the principle of good faith as illegally obtained evidence would not comply with basic arbitration principles like procedural fairness and respect for confidentiality [*cf. Libananco v. Turkey*; *Methanex v. USA*]. CLAIMANT states that there are no reasons for the Tribunal to exclude the evidence as it did not obtain it by breaching the principle of good faith, since CLAIMANT has not been involved in any process of obtaining the evidence in dispute [*MfC para. 40*]. CLAIMANT neglects that it has arranged an opportunity to buy the document against a payment of USD 1,000 from a dubious company which provides intelligence on the horseracing industry and has a doubtful reputation as to where it gets its information from and refused to disclose its sources [*PO2, p. 60 no. 41*]. Due to this initial suspicion, CLAIMANT was obliged to enquire how the company obtained the evidence. Therefore, CLAIMANT should have been aware that the evidence has been illegally obtained and should have refused to buy it in order to act within the principle of good faith.

46 Moreover, one has to take into consideration that the PIA has been conducted under the HK-Rules [*PO2, p. 60 no. 39*], which provide for confidentiality. Therefore, it would contradict the institutions rules to allow the submission of the PIA as evidence at the same institution. Besides, the purpose of arbitration would be undermined, if the purchase of confidential evidence from doubtful sources led to the allowance of submitting it.

47 Consequently, CLAIMANT has obtained the evidence by breaching the principle of good faith.

2. General standards of admissibility

48 Even if the Tribunal came to the conclusion that CLAIMANT obtained the evidence in good faith, as submitted by CLAIMANT [*MfC para. 41 ff.*], the evidence does still not fulfil the general standards of admissibility reflected in the IBA Rules on the taking of Evidence in International Arbitration ("**IBA Rules**") and international arbitration practices. In fact, the disputed evidence is neither relevant nor material to the outcome of the case.

49 CLAIMANT wrongfully submits that the disputed evidence would be material to the outcome of the case [*MfC para. 44*]. Evidence is material when it is relevant to the outcome of the case and the tribunal is not provided with sufficient evidence to decide the case [*Pilkov, p. 149*]. CLAIMANT emphasises that the arguments established by RESPONDENT in the previous arbitration may imply the intention to allow for contract adaptation and that the evidence may

give rise to a precedent of the case or could be used to support the substantive issues [*MfC para. 44*]. However, by doing so, it neglects the fact that the core elements of the two proceedings are totally different. The Parties to this arbitration agreed on a narrow arbitration agreement [*supra para. 22*], whereas in the PIA, the parties used the much wider Model HKIAC-Arbitration Clause with all its additions [*PO2, p. 60 no. 39*]. Moreover, while in the case at hand the Parties used a narrow worded hardship clause [*supra para. 22*], in the other proceeding the Parties agreed on the wider ICC hardship clause [*PO2, p. 60 no. 39*]. Additionally, in the arbitration agreement of the other arbitration, the parties agreed that the place of arbitration shall be in Mediterraneo and that the law of Mediterraneo is applicable to the arbitration agreement [*ibid.*], while the seat in the case at hand is Danubia and no choice of law clause regarding the arbitration agreement is given [*C5 p. 14*]. Another and probably the most important point is that according to the PIA, RESPONDENT asked for a renegotiation of the price under the ICC hardship clause and Art. 6.2.3 of the Mediterranean Contract Law ("**MCL**") [*PO2, p. 60 no. 39*], while in the present case, CLAIMANT asks for contract adaptation under the narrower hardship clause and under the CISG [*NoA p. 7 no. 20*]. Moreover, in the case at hand, the Parties are affected by tariffs imposed by the government of Equatoriana [*C6 p. 15; C7 p. 16; C8 p. 17; NoA p. 6 no. 10*], whereas in the other arbitration the tariffs had been imposed by the government of Mediterraneo [*PO2, p. 60 no. 39*]. As Mediterraneo and Equatoriana have completely different reasons for imposing tariffs and an opposite history regarding these measures, the differences are tremendous [*C6 p. 15*; *NoA p. 7 no. 19; PO2, p. 58 no. 23, no. 25*]. Therefore, the cases and its surroundings are not comparable. The arguments and results of the PIA as well as the intention and interest RESPONDENT might have had regarding the other proceeding cannot be transferred to the present case. Thus, the evidence is not material to the outcome of the case.

50 Further, CLAIMANT has not mentioned any arguments why the disputed evidence is relevant to the case at hand [*MfC para. 43*]. Taking into consideration that the evidence is not material to the outcome of the case and the incomparability of the proceedings [*supra para. 49*]. Therefore, the evidence cannot be relevant at all.

51 Consequently, the evidence is neither relevant nor material to the outcome of the case and does not fulfil the general standards of admissibility.

II. Rules on Transparency

52 Contrary to CLAIMANT's submission [*MfC para. 45*], the Rules on Transparency do not lead to the admissibility of the evidence in dispute. The Rules on Transparency are only applicable in "Treaty-based Investor-State Arbitration" and not in commercial arbitration such as the case

at hand [*Art. 1 Rules on Transparency*]. CLAIMANT itself admits that the case at hand does not fulfil the requirements demanded by the Rules on Transparency [*MfC para. 45*]. Therefore, the Rules on Transparency cannot be taken into consideration.

53 Even if the Tribunal deemed that the Rules on Transparency could be considered as underlining the trend towards transparent arbitral conduct as a whole as stated by CLAIMANT [*MfC para. 45*], they would still not lead to the admissibility of the evidence in dispute. CLAIMANT argues, with reference to the *Aegis Case*, that no party should be able to exploit the principle of confidentiality for arbitrating the same point until they get the result they prefer [*MfC para. 45*]. This is not true as CLAIMANT's allegation would only be substantiated, when the present and the previous case would be the same. In the case at hand, however, the two alleged important cases are completely different [*supra para. 49*]. Furthermore, they have to be seen as completely independent from each other due to the fact that only one of the two Parties is involved in both proceedings [*PO2, p. 60 no. 39*].

54 Moreover, CLAIMANT states that the evidence has to be deemed admissible as RESPONDENT would behave contradictory, when rejecting extraneous evidence in the case at hand, while relying on it in the other arbitration, where such evidence was advantageous for it [*MfC para. 46*]. The Tribunal should take into consideration that there is certain proof that RESPONDENT did not rely on extraneous evidence in the other proceeding [*PO2, p. 60 no. 39*]. Thus, RESPONDENT's line of arguments is indeed straight and consistent.

55 Additionally, CLAIMANT states that RESPONDENT claimed the power of the Tribunal to adapt the contract in the other arbitration [*MfC para. 46*]. Following on this, CLAIMANT argues that due to the high similarity of the facts, claims and circumstances in the previous and the current proceeding, the evidence has to be deemed admissible to ensure that the same circumstances are determined in the same standards and to create a consistency and orderliness in the arbitral jurisprudence [*MfC para. 45 f.*]. Once again, CLAIMANT erroneously disregards the significant differences between the two proceedings [*supra para. 49*].

56 Moreover, CLAIMANT neglects that the tribunal has broad discretion, when deciding on the admissibility of evidence [*cf. Art. 19 (2) UNCITRAL ML; cf. Art. 22.2 HK-Rules; Lew/Mistelis/Kröll, p. 95*]. The broad discretion encompasses the tribunal's freedom to decide which evidential standards it applies. Therefore, even if precedents are generally binding on lower courts, in common law countries [*Pattinson, p. 146*], the Tribunal can decide to deviate from the doctrine of precedents.

57 Consequently, CLAIMANT's statements on the admissibility of the evidence in dispute with regard to the Rules on Transparency are unfounded. Therefore, the Rules on Transparency do not lead to the admissibility of the evidence.

III. Illegal Hack

58 CLAIMANT completely neglects the task regarding the submission of illegally obtained evidence to the extent that it fails to properly deal with this severe assumption [*PO1, p. 53 no.1 lit. b*]. It might have argued that some tribunals have ruled in favour of admitting illegally obtained evidence after the evidence became publicly available [*Caratube v. Kazakhstan*]. This reasoning, however, cannot be transferred to the present case as the information is not publicly available. In fact, CLAIMANT purchased the PIA from a company which refused to disclose the source of its information [*PO2, p. 60 no. 41*]. If the Tribunal admits this information, it promotes the disclosure and circulation of illicitly obtained information, making the information thus publicly available. However, the Tribunal has the ability to prevent further disclosure and limit the access as the hack of RESPONDENT's computer system occurred in September 2018 [*Letter Fasttrack p. 51*]. Contrary to the *Bible case* in which the information in question has already been publicly available online for five years [*Bible case*], the PIA has only been released a couple of months and is not publicly available online. The District Court in the *Bible case* had no possibility to protect the plaintiff's position after the publication of the information, whereas in the case at hand, the Tribunal can still protect RESPONDENT's legal position. Thus, the Tribunal still has the chance to disapprove the misconduct of breaking the law. For this reason, it has to deem the illegally obtained evidence inadmissible.

59 Secondly, ruling in favour of the admissibility might encourage law breaking by publishing necessary evidence which will later on be brought forward in arbitral proceedings. Therefore, illegally obtained evidence can only be allowed in arbitral proceedings when the parties have agreed upon the admissibility [*Ortiz, para. 16*]. In the present case, RESPONDENT objects to CLAIMANT's request to introduce outside evidence from the other proceeding. Thus, the Parties do not agree on that matter.

60 Thirdly, the PIA is an arbitral award whose content is primarily made known to the parties of the arbitration. Since the Parties opted for an arbitral proceeding, it is their inherent wish to keep the whole arbitration proceeding confidential. CLAIMANT might have countered that the content of an arbitral award may potentially become public during enforcement proceedings. Following this reasoning would lead to the result to publish every award which clearly undermines the parties' interest in confidentiality. Consequently, tribunals should pursue the aim to keep proceedings completely confidential.

61 Therefore, the Tribunal cannot declare evidence admissible that has its origin in an illegal hack.

IV. Conclusion on B

62 CLAIMANT cannot submit evidence from the other arbitration proceedings due to the fact that there are no legitimate grounds for the evidence to be admissible. The illegality of the hack renders its submission inadmissible.

C. NO RIGHT FOR ADDITIONAL PAYMENT

63 Contrary to CLAIMANT's submission [*MfC para. 47 ff.*], it does not have the right to ask for any additional payment, neither under Clause 12 FSSA (**I.**) nor under the CISG (**II.**).

I. Clause 12 FSSA

64 CLAIMANT has no right to ask for an adaptation of the price under Clause 12 FSSA. Therein, the Parties agreed on a number of cases in which the seller should not be held responsible [*C5 p. 14*] with the result that it is relieved from any additional costs arising out of the mentioned cases. The additional costs of USD 1,250,000 result from the imposition of tariffs by the Equatorianian government. Clause 12 FSSA deals with lost semen shipments, delays not within the control of the Seller, acts of God and hardship [*ibid.*]. However, the Parties did not mention the imposition of tariffs. CLAIMANT incorrectly argues that the imposition of tariffs is a case of hardship [*MfC para. 48 f.*]. In fact, the additional costs resulting from the imposition of tariffs are related to CLAIMANT's obligation to deliver the semen. As the Parties agreed on the delivery DDP in Clause 8 FSSA and as no hardship in the sense of Clause 12 FSSA is given, CLAIMANT is liable for the tariffs (**1.**). Even if the Tribunal came to the contrary conclusion, the legal consequence of Clause 12 does not provide for a contract adaptation either (**2.**).

1. Clauses 12 and 8

65 The agreement on a delivery DDP in Clause 8, which clearly shifts the liability towards CLAIMANT, encompasses the tariffs (**a.**). In addition, no case of hardship is given (**b.**).

a. Clause 8

66 Regarding its lack of responsibility, CLAIMANT bases its whole argumentation solely on the hardship clause and completely fails to address the agreement on delivery DDP [*cf. MfC para. 48 ff.*]. The Parties' intent regarding the agreement on delivery DDP in Clause 8 FSSA has to be ascertained pursuant to Art. 8 (1) CISG. According to Art. 8 (1) CISG, statements are to be interpreted according to the parties' intent. By doing so, the Tribunal also has to take into consideration Art. 8 (3) CISG which states that all relevant circumstances of the case including negotiations are to be taken into account, when identifying the Parties' intent.

67 In Clause 8 FSSA, the Parties agreed on a Delivery Duty Paid [*C5 p. 14*]. This means that the seller is responsible for arranging carriage and delivering the goods at the named place, cleared for import and all applicable taxes and duties paid [*ICC Explanation*]. The seller bears every risk arising during the export.

68 In the present case, when the Parties agreed on delivery DDP as well as on the INCOTERMS 2010 edition [*PO2, p. 56 no. 10*], they considered CLAIMANT's detrimental experiences in the past [*C4 p. 12*]. Therefore, the Parties intended that the latter has to bear risks and costs during the delivery except the cases contractually specified in Clause 9, 10 and 12 FSSA. However, there is no exemption for cases of imposed tariffs included. Given that the Parties clearly defined the scope of delivery DDP, the imposition of tariffs is a risk CLAIMANT has to bear.

69 RESPONDENT solely requested for delivery DDP in order to profit from CLAIMANT's expertise in keeping the frozen semen cool as well as its expertise in import related matters [*C3 p. 11*]. When CLAIMANT falsely denies liability for the new tariffs arguing that it falls under Clause 12 FSSA [*cf. MfC para. 59*], it neglects the Parties' intent for delivery DDP. Thus, one can only conclude that the imposition of tariffs is a risk that CLAIMANT has to bear.

70 Finally, CLAIMANT acts in bad faith when accepting DDP and later requests to be exempted from risks that are typically encompassed in DDP. If CLAIMANT really sought to be exempted from every possible risk associated with delivery DDP, it would have requested a different term since the very beginning of the negotiations, as this is not CLAIMANT's first performance with delivery DDP [*C1 p. 9*]. Granting CLAIMANT this exemption empties the scope of delivery DDP making it absolutely pointless.

71 Therefore, CLAIMANT is liable for the newly imposed tariffs under Clause 8 FSSA.

b. Clause 12

72 The newly imposed tariffs do not constitute a case of hardship (**aa.**). Even if the Tribunal were to rule that a case of hardship is given, the event is neither comparable (**bb.**) nor unforeseen (**cc.**) to the mentioned events in Clause 12. Lastly, the imposition of tariffs does not make the contract more onerous (**dd.**).

aa. No hardship

73 CLAIMANT failed to deal with the question whether the imposition of tariffs constitutes a case of hardship and simply assumed that the case at hand constitutes such an event [*cf. MfC para. 49 ff.*]. As the requirement "hardship" is the core element of Clause 12 FSSA, it is crucial to analyse whether a case of hardship is given. In order to determine what the term "hardship" encompasses, the term has to be interpreted according to the Parties' intent using Art. 8 (1) (3)

CISG. CLAIMANT once experienced a severe loss due to additional health and safety requirements resulting in a price increase of 40 % [*C4 p. 12*] that subsequently jeopardised CLAIMANT's solvency [*PO2, p. 58 no.21*]. CLAIMANT, therefore, insisted to include a hardship clause into the FSSA that addresses such subsequent changes in order to clearly regulate cases when the commercial basis is destroyed [*ibid.*]. According to CLAIMANT's statement, a case of hardship should already be given when an event leads to a price increase of at least 40 % [*ibid.*]. Taking, however, the whole sales contract into account, CLAIMANT did not make a loss of 25 %. As a matter of fact, since the tariffs of 30 % only affected the third shipment (50 doses from 100 requested doses) [*C7 p. 16*], the whole sales contract increased in price by 15 %. Given that CLAIMANT made its calculated profit for the first and second shipment, it solely suffers loss regarding the third shipment. The tariffs caused additional costs in the amount of USD 1,500,000. Subtracting CLAIMANT's planned profit of 5 % (USD 500,000) [*C8 p. 17*], it made a total loss of 10 % (USD 1,000,000) which is far below its detrimental experience that nearly led to its insolvency [*PO2, p. 58 no.21*]. In consequence, a case of hardship is not given.

bb. No comparability

74 Even if the Tribunal ruled that the imposition of tariffs constitutes a case of hardship, it is not comparable to the mentioned ones in Clause 12 FSSA. Clause 12 FSSA requires that hardship has to be "caused by additional health and safety requirements or comparable […] events" [*C5 p. 14*].

75 In order to determine whether the requirement of comparability is met, the Tribunal again has to consider the Parties' intent according to Art. 8 (1) (3) CISG. CLAIMANT rightfully argues in its memorandum that the Parties' mutual intention has to be taken into account, but wrongfully refers to RESPONDENT's other arbitral proceeding in which it demanded for a price adaptation [*MfC para. 54*]. This argument is not convincing as these are completely different proceedings [*supra para. 49*]. Furthermore, RESPONDENT's intention when contracting with the party in the other arbitral proceeding does not draw any conclusion to its intent when contracting with CLAIMANT.

76 Contrary to CLAIMANT's submission, it is not necessary to use the understanding of a reasonable person in order to analyse whether the imposition of tariffs is a comparable event [*cf. MfC para. 55*]. Since, pursuant to Art. 8 (2) CISG, the Parties' intent is primarily decisive, there is no need to rely on the understanding of a reasonable person.

77 Besides, CLAIMANT points out that the *Premium Nafta Products Case* gave guidance as reasonable businesspersons would not subject themselves to risks of an extreme price change

[*MfC para. 56*]. Firstly, these elaborations do not explain why the imposition of tariffs is a comparable event as the case only deals with price changes. Secondly, CLAIMANT's submission is not true in the case at hand, as it clearly took over all risks associated with delivery except the ones specified in the FSSA [*supra para. 66-71*]. Therefore, the result of that case cannot be transferred.

78 In addition, CLAIMANT incorrectly states that the Parties acknowledged hardship as being caused by health and safety requirements when the costs are affected by a margin of 40 % [*MfC para. 56*]. Given that the imposition of tariffs led to the same effect, the case is comparable. In doing so, CLAIMANT recklessly ignores why it only accepted DDP under the condition to be exempted from certain risks [*C4 p. 12; ANoA no. 4 p. 30*]. It was crucial for CLAIMANT to burden RESPONDENT with risks that may most likely arise [*C4 p. 12*]. Since the Parties concluded a contract about frozen semen, there is a high likelihood that, when delivering the semen, additional health and safety provisions regarding semen may enter into force. RESPONDENT reached out to CLAIMANT when the Equatorianian government restricted the transportation of living animals due to the foot and mouth disease [*C1 p. 9*]. This health and safety provision resulted in permitting the artificial insemination [*ibid.*]. Moreover, CLAIMANT had already made a harmful experience with additional health and safety requirements that subsequently nearly resulted in its insolvency [*PO2, p. 58 no. 21*]. Thus, health and safety requirements regularly occur, when delivering animal products. Consequently, Clause 12 FSSA exempts CLAIMANT from this risk. In contrast, the imposed tariffs do not constitute a risk that may high likely arise, when delivering semen and therefore, the Parties excluded the aforementioned health and safety requirements. In fact, tariffs affect the import of goods in general without considering the nature of the imported goods. Health and safety requirements, opposed to tariffs, specifically arise when semen is imported. Given these facts, the Parties solely intended to exclude health and safety requirements and similar risks that may arise.

79 When following CLAIMANT's reasoning, it becomes clear that CLAIMANT only seeks to strengthen its already improved position. It profits from a lighter burden of risks and still demands to be exempted from the imposed tariffs [*MfC para. 48*]. In requesting this exemption, CLAIMANT empties the scope of risks associated with a delivery DDP as tariffs constitute the most typical risk of a delivery DDP. Consequently, there is clearly no comparability between the case at hand and health and safety requirements.

80 Additionally, the difference between health and safety requirements is particularly obvious when comparing both purposes: Health and safety requirements serve as a mean to prohibit any

negative effect arising out of the import for the importing country whereas tariffs complicate economic relationships in order to make them less attractive. Those different purposes do not align. In consequence, the imposition of tariffs does not fit into the list of exempted cases in Clause 12 FSSA.

81 Any hypothetical argument by CLAIMANT on the basis that the Belgium Supreme Court ruled a price increase of 70 % after the contract conclusion is enough to destroy the contractual equilibrium [*CISG-Online 1963*] would not be convincing. This case cannot be taken into consideration as it is commonly accepted that the fundamental alteration demands a price increase of well over 100 % [*CISG-Online 436; CISG-Online 694; CISG-Online 870; ICC 6281*]. Parties naturally associate more risk in international transactions which explains the high hurdle [*Arroyo, p. 10 f.*]. The Belgium Supreme Court's decision is an exception that has never been confirmed by any other judgement. Therefore, there is no comparability.

82 To conclude, CLAIMANT falsely contends that the imposition of tariffs is a comparable event.

cc. Foreseeability

83 Moreover, the imposition of tariffs by Equatoriana's government was also foreseeable. CLAIMANT starts with a definition of the term "foreseeability", however, that does solely apply in the context of Art. 79 CISG [*MfC para. 50*]. Instead, CLAIMANT should have first interpreted the term according to the Parties' intent. Pursuant to Art. 8 (1) CISG, the stating party's intent has to be considered. In the case at hand, however, none of the Parties ever addressed the foreseeability of a case. Even if the Parties had talked about it, they would have had different views what the term "foreseeable" encompasses. Thus, the objective standard stated in Art. 8 (2) CISG has to be taken into account.

84 The standard is the hypothetical understanding of a reasonable person of the same kind as the other party, and who also is in the same external circumstances [*Schlechtriem/Schwenzer, Art. 8 para. 20*]. When parties agree on cross-border transaction, they naturally assume more risks, especially the risk of changes [*Arroyo, p. 10 f.*]. If these risks arise, a party cannot be exempted from its liability for non-performance due to these risks [*ibid*]. In the present case, Equatoriana has imposed new tariffs affecting the import of semen. This is a risk of change that is common in cross-border transactions.

85 CLAIMANT furthermore alleges in its memorandum that the change of regulation is unforeseeable as it was neither predictable that tariffs would be imposed, nor that racehorse semen would be categorised like other farm animals [*MfC para. 50*]. The tariffs were imposed in Equatoriana after the newly elected president of Mediterraneo imposed tariffs in its country [*C6 p. 15*]. Generally, when a state imposes new tariffs, the affected state on its turn imposes

tariffs for products of the first state. Equatoriana usually solves disputes amicably, however, it once imposed retaliatory tariffs [*NoA p. 7; C6 p. 15; PO2, p. 58 no. 25*]. Equatoriana's peaceful reaction cannot be an indicator as it does not reflect the standard state's approach. Therefore, after the Parties had known about Mediterranean's newly imposed tariffs in April 2017 [*C6 p. 15; PO2, p. 58 no. 26*], they had to assume that Equatoriana could impose tariffs on its turn.

86 Consequently, the imposition of tariffs is foreseeable.

dd. Onerousness

87 CLAIMANT alleges that the contract is more onerous after the imposition of tariffs. In order to prove that, it relies on the *Nuova Case* providing that a 30 % price increase was deemed onerous [*MfC para. 57*]. If CLAIMANT had properly read the *Nuova Case*, it would have known that the tribunal did not deal with the question whether the price increase for the purchased item made the contract more onerous. The tribunal came to the conclusion to reject the request for dissolution based on supervening excessive onerousness as the CISG does not contain that remedy [*Nuova Case*]. CLAIMANT once more failed to interpret the Parties' intent according to Art. 8 (1) (3) CISG.

88 CLAIMANT subsequently tries to explain the onerousness of the imposition of tariffs by referring to a destruction of the commercial basis due to its 25 % loss [*MfC para. 58*]. However, it lacks criteria that have to be met in order to assume when in principle the commercial bases is affected resulting in a heavy burden for a party. Moreover, when taking a look at the whole sales contract, CLAIMANT only made a loss of 10 % and not 25 % [*supra para. 73*]. Therefore, this allegation is unsubstantiated.

89 In conclusion, the imposition of tariffs cannot be deemed making the FSSA more onerous.

2. No contract adaptation

90 CLAIMANT alleges that the request for contract adaptation results from Clause 12 FSSA, general principles as well as the Tribunal's choice to decide *ex aequo et bono* [*MfC para. 60 ff., 67 f., 69 f.*]. However, there is neither contract adaptation resulting from Clause 12 FSSA (**a.**) nor from general principles (**b.**) nor *ex aequo et bono* (**c.**).

a. No adaptation from the contractual clause

91 CLAIMANT does not properly substantiate its claim that Clause 12 FSSA stipulates for contract adaptation [*MfC para. 60*]. It elaborates that, after being informed about the newly imposed tariffs, RESPONDENT accepted the contract adaptation when demanding delivery for the remaining semen as it aimed a long-term relationship [*MfC para. 63*]. CLAIMANT wrongfully concludes from that conduct that RESPONDENT agreed on an adaptation clause as legal consequence from Clause 12 FSSA [*ibid.*]. In doing so, CLAIMANT tries to interpret

Clause 12 FSSA with a behaviour that has occurred after the contract conclusion without mentioning Art. 8 (3) CISG in that part. However, a statement's meaning has to be clear with its effectiveness [*Schlechtriem, para. 57*]. Any subsequent conduct of the parties that can be considered pursuant to Art. 8 (3) CISG has to clarify an already existing intent, and not express a modified one [*ibid.*]. In the present case, CLAIMANT relies on subsequent conduct to falsely establish a new common intent for contract adaptation under Art. 8 (1) CISG.

92 When interpreting Clause 12 FSSA, CLAIMANT should have referred to the ICC Hardship Clause, as it was its suggestion to rely on it [*R2 p. 34*]. The original ICC Hardship Clause 2003 provides for the possibility to "negotiate alternative contractual terms which reasonably allow for the consequences of the event" [*ICC Hardship Clause 2003 no. 2 lit. b*]. In other words, the parties can renegotiate when a case of hardship is given; there is no direct consequence that the contract may be adapted. Since the Parties did not include that part in the final clause, one has to conclude that they did not want to have that possibility as legal consequence.

93 Thus, Clause 12 FSSA does not stipulate for contract adaptation.

b. No adaptation from general principles

94 Contrary to CLAIMANT's submission [*MfC para. 67*], the contract adaptation does not derive from general principles. The requirements for a revision of contract are an alteration of equilibrium and unforeseen changes [*ibid.*]. As stated above, the imposition of tariffs does neither affect the contract's equilibrium nor constitutes unforeseen changes [*supra para. 81, 86*].

95 Even if the equilibrium was altered, general principles do not lead to a contract adaptation. As a matter of fact, the Tribunal should adapt the contract according to Mediterranean law. CLAIMANT, however, points out that the Tribunal should resort to trade usages pursuant to Art. 28 (4) UNCITRAL ML. Yet, Mediterraneo did not adopt the UNCITRAL ML as its general contract law which means that these rules are not applicable to the merits [*cf. PO1 p. 53 III no. 4*].

96 Thus, it cannot reasonably claim that general principles lead to the conclusion that the Parties have agreed on contract adaptation.

c. No adaptation ex aequo et bono

97 Lastly, CLAIMANT contends that the Tribunal can freely adapt the contract on the basis of equity and decide what is reasonable [*MfC para. 69*]. This argument is completely baseless as CLAIMANT does not at all refer to Clause 12 FSSA or the contract in this submission, even though it tries to convince why its claim for contract adaptation is substantiated under that clause. For this reason, CLAIMANT's argument is unfounded.

3. Conclusion on C. I.

98 In conclusion, contrary to CLAIMANT's submission, it does not have the right to ask for any additional payment in the amount of USD 1,250,000 or any other amount under Clause 12 FSSA. The imposition of tariffs is a risk included in the delivery DDP that has to be borne by CLAIMANT. Thus, the imposition of tariffs do not constitute a case of hardship. This leads to the result that CLAIMANT is not entitled to request contract adaptation under Clause 12 FSSA.

II. CISG

99 Contrary to CLAIMANT's allegations, the provisions of the CISG do not lead to contract adaptation. CLAIMANT cannot rely on Art. 79 CISG as its application has been excluded by the Parties according to Art. 6 CISG (**1.**). Even if the Tribunal found that Art. 79 CISG has not been excluded, this article does not provide for contract adaptation (**2.**). Furthermore, Art. 9 (2) CISG does not constitute a claim for contract adaptation (**3.**). Lastly, CLAIMANT could not argue that the Parties reached an agreement pursuant to Art. 29 (1) CISG which would lead to contract modification (**4.**).

1. Art. 6 CISG

100 Although the Parties have implemented a conclusive mechanism dealing with changed circumstances, CLAIMANT requests additional payment under Art. 79 CISG [*MfC para. 72*]. However, the Parties excluded Art. 79 CISG pursuant to Art. 6 CISG. Art. 6 CISG prescribes that parties may exclude the application of the convention. It thereby recognises some of the core elements of the CISG: the principles of party autonomy and freedom of contract [*Digest, p. 22; Kröll/Mistelis/Perales Viscasillas, Art. 6 para. 1*]. Consequently, parties may expressly or impliedly derogate from provisions of the convention via individual regulations within their contract [*Schlechtriem/Schwenzer Art. 6 para. 3; Kröll/Mistelis/Perales Viscasillas, Art. 6 para. 1*]. In particular, parties opt out of specific parts of the CISG when drafting a very detailed agreement [*Kröll/Mistelis/Perales Viscasillas, Art. 6 para. 11, 13*].

101 CLAIMANT demanded a hardship clause during the preliminary negotiations, due to past experiences with health and safety requirements that lead to increased costs [*C4 p. 12*]. Therefore, the Parties agreed on Clause 12 FSSA which applies to "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*C5 p. 14*]. Thus, to invoke the hardship clause, it is necessary that a sufficiently severe change of circumstances subsequent to the contract formation occurs. This correlates with Art. 79 CISG which addresses initial impossibility as well as subsequent impossibility [*Staudinger, Art. 79 para. 17; MüKo, Art. 76 para. 7*]. Similar to the hardship clause, subsequent impossibility would be based on a severe change of circumstances after the contract

has been concluded [*ibid.*]. Therefore, when interpreting the Parties' conduct and statements in accordance with Art. 8 (1) (3) CISG, one has to conclude that the Parties amicably and in knowledge of the consequences agreed to replace Art. 79 CISG with Clause 12 FSSA. As the Parties agreed on a specific and detailed regulation dealing with changed circumstances in their contract, they deviated from Art. 79 (1) CISG since it has a broader scope of application. The Tribunal should take into consideration that applying Art. 79 CISG regardless of the Parties' intention would disregard the principles of freedom of contract and party autonomy.

2. Art. 79 CISG

102 Even if the Tribunal should find that Art. 79 CISG has not been excluded, it would not apply to this case. Firstly, the imposed tariffs do not constitute an impediment in the sense of Art. 79 CISG (**a.**). Secondly, CLAIMANT performed its contractual obligations and could also be expected to do so (**b.**). Lastly, even under the assumption that the requirements of Art. 79 CISG were fulfilled, its legal consequences would nevertheless not amount to contract adaptation (**c.**).

a. No impediment

103 The imposed tariffs do not constitute an impediment beyond the party's control as alleged by CLAIMANT [*MfC para. 74*]. When interpreting the term "impediment", one first has to consider the drafting history of the article. The predecessor of Art. 79 CISG was Art. 74 ULIS which was criticised for excusing parties too easily for failure to perform [*Flambouras, p. 4*]. The drafters of the CISG agreed on a stricter version in the revised convention to exclude situations of economic grievances [*ibid.*]. This shows that the drafters expressly decided against the implementation of economic obstacles into the convention. Thus, mere economic disadvantages affecting one party cannot be considered to fall under Art. 79 CISG.

104 Furthermore, only objective, external circumstances that are not within the sphere of influence of the obliged party can create impediments within the meaning of Art. 79 CISG [*Schlechtriem/Schwenzer Art. 79 para. 12*]. When determining which circumstances have to be borne by the parties and therefore are deemed to be internal, the contractual allocation of risks is decisive [*Schlechtriem/Schwenzer, Art. 79 para. 12*]. The sphere of risk borne by the seller is generally understood widely [*Huber/Mullis, p. 259*]. Both parties to these proceedings amicably agreed on delivery DDP for each of the three shipments [*C5 p. 14*]. The DDP allocates the risk of increased delivery costs to CLAIMANT [*supra para. 71*]. Therefore, tariffs that are encompassed by the DDP cannot constitute an impediment in the sense of Art. 79 CISG.

105 CLAIMANT could have argued that the imposition of tariffs nearly resulted in its insolvency and therefore the additional tariffs would constitute an impediment in the sense of Art. 79 CISG. However, the seller generally bears all risks that result from the organisation of its business

[*Huber/Mullis, p. 260*]. Due to the broad responsibility of the debtor, it is also responsible for its financial ability to fulfil the contract [*MüKo, Art. 79 para. 7; Staudinger, Art. 79 para. 18*]. Whether a party is endangered with insolvency by the changed circumstances cannot be of any means, otherwise the subjective financial liquidity would be decisive for the determination of the term "impediment" [*Enderlein/Maskow, p. 325*]. Consequently, it is not to be taken into account if CLAIMANT's business is endangered by the increased costs.

106 RESPONDENT does not deny CLAIMANT's argument that governmental measures, such as export and import bans or embargos, could create an impediment [*MfC para. 76; Huber/Mullis, p. 259*]. However, these governmental measures have in common that they would render any delivery impossible. Tariffs, on the contrary, merely increase the delivery costs. Nonetheless, the delivery itself is still possible. For an event that does not make performance impossible, at least 100 % price increase are demanded for constituting hardship [*supra para. 81*]. The price increase in the case at hand was only 15 % [*supra para. 73*]. Since the requirements for an impediment are even higher than for hardship, 15 % price increase is too insignificant to constitute an impediment.

107 Thus, the imposed tariffs cannot be qualified as an impediment under Art. 79 CISG.

b. Overcome the tariffs

108 Despite the fact that CLAIMANT delivered the semen and thereby clearly overcame the economic obstacle [*C8 p. 18*], it nevertheless argues that it could not have been expected to do so, since it is unable to bear the financial consequences [*MfC para. 81*]. According to Art. 79 (1) CISG, an impediment is not given, if the promisor can reasonably be expected to overcome it. The promisor can generally be expected to overcome an impediment, if it is necessary to fulfil its contractual obligations, even though this greatly increases its costs [*Schlechtriem/Schwenzer Art. 79 para. 15*]. Contrary to CLAIMANT's allegations [*MfC para. 81*], not even a loss for the promisor renders the impediment unavoidable [*Schlechtriem/Schwenzer Art. 79 para. 15*]. In *Tsakiroglou v. Noblee,* the defendant failed to deliver due to the blockade of a canal. The blockade had left no alternative than to ship the goods around the Cape of Good Hope, increasing the distance by more than double. Additionally, 100 % surcharges were imposed on goods. Nevertheless, the tribunal held the defendant liable for failure to deliver the goods and ruled that these impediments could have been overcome. If 100 % price increase is not deemed to be an impediment that cannot be overcome, this has to apply *a fortiori* in the case of a 15 % cost increase.

109 Therefore, CLAIMANT can be expected to overcome the comparably small increase of 15 % import costs.

c. Legal consequences

110 CLAIMANT finds in its memorandum that the requirements of Art. 79 CISG are met [*MfC para. 75 ff.*], even though this is clearly not the case [*supra para. 107*]. However, under the assumption that the requirements were fulfilled, the problem arises that Art. 79 CISG does not provide for contract adaptation as a legal consequence. If one considered Art. 7 (1) CISG, the outcome of contract adaptation would contravene the principle of uniformity (**aa.**). Further, contract adaptation could neither be based on the general principles of the CISG nor the subsidiary applicable domestic law according to Art. 7 (2) CISG (**bb.**).

aa. Art. 7 (1) CISG

111 When CLAIMANT falsely deduces a claim on contract adaptation from interpreting Art. 79 (5) CISG with regard to Art. 7 (1) CISG, it does not only misunderstand the principles laid down in Art. 7 (1) CISG, but also acts contrary to the principles which the article actually establishes [*MfC para. 91*]. Contrary to CLAIMANT's opinion, Art. 7 (1) CISG does not establish the principle of good faith [*Schlechtriem/Schwenzer Art. 7 para. 32; Lindström, pp. 15-16*]. Furthermore, adaptation of the contract is not expressly allowed by the convention and therefore must be deemed as generally impossible [*Bianca/Bonell, Art. 79 para. 3.1*]. Any application of the principle of good faith, instead of applying Art. 79 CISG, circumvents the provisions which have deliberately been included into that article [*Bianca/Bonell, Art. 79 para. 3.1.2*]. As the principle of good faith does not provide for specific criteria, the danger arises that judges might erroneously apply national instruments which would clearly contravene the principle of uniformity stipulated in Art. 7 (1) CISG [*ibid.*]. The CISG has been established as an international tool that shall be applied and interpreted uniformly in all legal systems around the world [*Komarov, pp. 79 ff.*]. Therefore, when CLAIMANT tries to apply the good faith principle it unnecessarily jeopardises the convention's uniform application, since the legal consequences of changed circumstances are exhaustively regulated in Art. 79 CISG.

bb. Art. 7 (2) CISG

112 Even if the Tribunal came to the conclusion that the 15 % increase of costs for CLAIMANT constitutes an impediment, the contract still could not be adapted based on gap filling principles of Art. 7 (2) CISG, contrary to CLAIMANT's submission [*MfC para. 83 ff.*]. CLAIMANT argues that the convention's lack of mentioning hardship should be regarded as gap which should be filled by applying Art. 7 (2) CISG [*MfC para. 83 ff.*]. However, it is neither possible to apply the UNIDROIT as "general principles on which it is based" (**i.**) nor would the application of domestic laws result in a different outcome (**ii.**).

i. UNIDROIT

113 CLAIMANT further tries to rely on the UNIDROIT, while deeming them to be "general principles on which it is based" [*MfC para. 83*]. However, the wording of Art. 7 (2) CISG can only mean the principles deriving out of the CISG itself and not any external tool [*Schlechtriem/Schwenzer, Art. 7 para. 36*]. Consequently, the UNIDROIT are not principles in the sense of Art. 7 (2) CISG and therefore inapplicable *ab initio*.

114 Since the UNIDROIT reflect commonly accepted customs, CLAIMANT would be correct, when using the principles as guidelines for the interpretation of the convention. Yet, they cannot be applied directly, if the parties did not expressly agree on their application in the contract [*ICC 9117*]. The UNIDROIT merely substantiate the result that was found when applying the CISG, if their approach is consistent with the convention [*Gaec v. Teso*]. On the one hand, the UNIDROIT seek to support an international understanding of particular issues, but on the other hand, they are not a binding international treaty and therefore lack legal force [*Slater p. 238; Flechtner p. 95*]. According to the Preamble of the UNIDROIT, they might be of use to "interpret or supplement international uniform law instruments". Given that the UNIDROIT shall be used primarily for interpretative purposes, it cannot create any claims on its own, leading to the result that the basis of the claim has to be stipulated within the uniform instrument.

115 In consequence, no claim for contract adaptation which could be supplemented by the UNIDROIT exists on which CLAIMANT could rely upon.

ii. Domestic law

116 In the absence of uniform principles that would promote CLAIMANT's opinion, CLAIMANT wants to rely on the applicable domestic law which are determined by the rules of private international law [*MfC para. 84 ff.*]. According to Art. 2 (1) HCCH, which are the applicable conflict of laws rules [*PO2, p. 61 no. 43*], the relevant domestic law is the law stipulated in the parties' contract. This is the MCL [*C5 p. 15*]. Despite the facts that gap filling through domestic laws undermines the purposes of the convention [*Flechtner p. 93*] and that the principle of uniformity should prevail against domestic laws [*Komarov, p. 82*], the application of Mediterranean law as last resort nevertheless does not lead to contract adaptation.

117 CLAIMANT states that it does not have to bear the imposed tariffs under the delivery DDP [*MfC para.* 89]. However, the terms of a contract must be respected by a party under the CISG as well as under Art. 6.2.1 MCL, even if the party experiences heavy losses instead of the expected profits [*UNIDROIT Comment 2016, p. 217*]. The terms of the FSSA explicitly provided for delivery DDP in its Clause 8 [*C5 p. 14*]. It has already been outlined that the

delivery DDP encompassed the risk for CLAIMANT to bear potentially imposed tariffs [*supra para. 71*]. If CLAIMANT now seeks to adapt the contract with regard to risks it has agreed to bear, it would not only disregard its own prior agreement on DDP, but also Art. 6.2.1 MCL.

118 Furthermore, opposing to CLAIMANT's submission, the requirements for hardship in the sense of Art. 6.2.2 MCL are not fulfilled [*MfC para. 85 ff.*]. A change of circumstances must not be invoked, unless the alteration of the equilibrium of the contract is fundamental [*UNIDROIT Comment 2016, pp. 218-219*]. A fundamental alteration of the equilibrium is characterised by a substantial increase of costs for one party [*UNIDROIT Comment 2016, p. 219*]. In the past, an increase of costs was held substantial, when it exceeded 50 % [*UNIDROIT Comment 1994, p. 147; Rimke, p. 239*]. Even though nowadays a specific number is not contained in the official comment anymore, the comparison with other authorities, which sometimes even demand 150 - 200 %, shows [*Schwenzer, p. 717*] that at least 50 % are required, presumably even more. Therefore, a 15 % cost increase cannot substantiate hardship under MCL.

119 Additionally, since the definition of hardship in the MCL is a rather general one, it is left to the parties to adapt the content of the article to the specific needs in the transaction concerned [*UNIDROIT Comment 2016, p. 222*]. The parallels of these provisions to Art. 6 CISG are obvious. The parties thoughtfully regulated the risks in Clause 12 FSSA, thereby defining what was deemed to constitute hardship [*supra para. 73*].

120 In the unlikely event that the Tribunal deemed the imposed tariffs to constitute hardship under the MCL, its effects would not lead to contract adaptation under Art. 6.2.3 MCL. According to this provision, CLAIMANT was obliged to request renegotiations without undue delay [*UNIDROIT Comment 2016, p. 224*]. However, it failed to do so in a timely manner: on 19th December 2017, CLAIMANT gained knowledge of the raised tariffs [*PO2, p. 58 no. 26*]. CLAIMANT, however, did not take any measure whatsoever, until it was told about the tariffs by the customs officials on 20th January 2018, two days before the scheduled delivery, only then asking for renegotiation [*PO2, p. 58 no. 26; C7 p. 16*]. The INCOTERMS 2010 oblige the party that has to deliver the good to enquire about custom clearance requirements [*Kröll/Mistelis/Perales Viscasillas, Art. 66 para. 35*]. The parties agreed on delivery DDP in the sense of the INCOTERMS 2010 [*PO2, p. 56 no. 10*] and therefore shifted the risks regarding the obtainment of customs clearance from buyer to seller. Thus, it was CLAIMANT's obligation to enquire whether the tariffs are applicable to the shipment. Instead, CLAIMANT requested renegotiations one month later which obviously exceeds the requirement of "undue delay".

121 RESPONDENT agrees that it would be the court's turn to decide on contract adaptation after the renegotiations have failed [*MfC para. 93; C8 p. 18*]. Art. 6.2.3 (4) (b) MCL gives the court discretion to adapt the contract if reasonable, to maintain the agreed contractual terms or to terminate the contract [*UNIDROIT Comment 2016, p. 226*]. In the case at hand, contract adaptation is clearly not reasonable. The Tribunal should take into consideration that CLAIMANT neglected its duty to ask for renegotiations in a timely manner [*supra para. 120*]. If CLAIMANT negligently fails to request renegotiations in due time it is reasonable that it has to bear the consequences [*UNIDROIT Comment 2016, p. 224*]. This outcome is just as CLAIMANT would solely be obliged to bear an insignificant price increase of 15 %. The fact that the price increase had such enormous impact on CLAIMANT results solely from its own mismanagement in the previous years [*PO2, p. 58 no. 21, p. 59 no. 29*]. RESPONDENT should not be burdened with the obligation to ensure CLAIMANT's solvency. Therefore, the only convincing solution regarding the Parties' relationship and the cases circumstances, is the confirmation of the contract terms.

3. Art. 9 (2) CISG

122 CLAIMANT might, furthermore, try to rely on Art. 9 (2) CISG under which the UNIDROIT are considered as international trade usages [*Kröll/Mistelis/Perales Viscasillas, Art. 9 para. 36*]. However, this does not change the result that the UNIDROIT do not allow for contract adaptation in this case [*supra para. 11*]. Furthermore, the INCOTERMS 2010 also establish a trade usage under Art. 9 (2) CISG [*BP Oil*]. Thus, the delivery DDP the Parties had agreed upon in line with the INCOTERMS 2010 is also applicable, shifting the delivery risks to CLAIMANT [*supra para. 68*]. Consequently, CLAIMANT cannot rely on Art. 9 (2) CISG.

4. Art. 29 (1) CISG

123 CLAIMANT might have argued that the Parties agreed on contract adaptation in the sense of Art. 29 (1) CISG. However, such an agreement had never been reached. The interpretation of CLAIMANT's statements does not lead to a valid offer (**a.**). Furthermore, Art. 55 CISG cannot be applied to determine the distribution of the tariffs (**b.**). Finally, even under the assumption of a valid offer, RESPONDENT would not have accepted that offer with its statements (**c.**).

a. No offer

124 The interpretation of CLAIMANT's statements does not lead to a valid offer. The rules of contract formation determined by Art. 14-24 CISG offer guidance, when examining if the parties had agreed on a modification of the contract [*Kröll/Mistelis/Perales Viscasillas, Art. 29 para. 5; Perales Viscasillas, pp. 170-171; MüKo, Art. 29 para. 4*]. Whether CLAIMANT's statements or conducts constitute an offer in the sense of Art. 14 (1) CISG is to be analysed by

applying Art. 8 (1) (3) CISG [*Kröll/Mistelis/Perales Viscasillas, Art. 14 para. 2*]. An offer has to be sufficiently definite [*Schlechtriem/Schwenzer, Art. 14 para. 2*], which is generally the case, if its minimum characteristics such as the goods, their quantity and the price are determinable [*Schlechtriem/Schwenzer, Art. 14 para. 12*]. For a valid offer it is, consequently, necessary that CLAIMANT's behaviour results in a legally binding declaration to alter the contract.

125 CLAIMANT, however, does not explicitly propose a new price for the semen, but solely states that the costs for the shipment would increase by 30 % and that a solution should be found [*C7 p. 16*]. Yet, "we will have to find a solution in that regard" cannot be seen as a compelling statement to modify the contract as it does not define the legal consequences in the case of acceptance. A broad span of possible solutions, varying from an obligation for CLAIMANT to bear all tariffs to the obligation of RESPONDENT to bear the total amount, exists. Additionally, the fact that Ms. Napravnik admitted to have authorised the shipment, even though the Parties have not reached an agreement on contract adaptation yet, supports the aforesaid [*C8 p. 18*]. Therefore, CLAIMANT's statement is not sufficiently definite to create a valid offer.

126 Furthermore, the interpretation in the light of Art. 8 (1) (3) CISG does not lead to the result desired by CLAIMANT. The tariffs naturally should be borne by the party which is obliged to deliver DDP, as agreed upon [*supra para. 71*].

127 Consequently, CLAIMANT's vague expressions cannot be interpreted as offer for contract modification with the content of shifting all tariff costs paid to RESPONDENT.

b. Art. 55 CISG

128 The Parties would not even have concluded a valid agreement, in the case the Tribunal finds that an offer can exist despite the missing price. If the price cannot be determined by interpretation of the agreement, it has to be determined by applying Art. 55 CISG [*Schlechtriem/Schwenzer, Art. 14 para. 24*]. When even under Art. 55 CISG the price cannot be determined, no agreement was reached [*ibid.*].

129 The interpretation of CLAIMANT's statements did not lead to any determined price [*supra para. 128*]. Therefore, Art. 55 CISG would have to be applied. While one must distinguish between agreements on contract modifications and sales contracts, Art. 55 CISG does solely apply to the latter [*Digest, p. 268*]. Thus, Art. 55 CISG could not be applied to the proposed offer for contract modification. Consequently, no valid offer for contract modification exists.

c. No acceptance

130 Even if the Tribunal found a valid offer in CLAIMANT's expressions, RESPONDENT would not have accepted that offer. Whether a party's declarations amount to acceptance has to be

judged by applying Art. 8 CISG [*MüKo, Art. 18 para. 2; Schlechtriem/Schwenzer, Art. 18 para. 4; CISG-Online 2438*].

131 There are three conceptions that where mutually understood by RESPONDENT's as well as CLAIMANT's representative. First, Ms. Napravnik was aware that Mr. Shoemaker has not been involved in the negotiations of the FSSA and thus was not familiar with the drafting history of the FSSA itself [*C8 p. 18; R4 p. 36*]. Therefore, he told Ms. Napravnik that they would find an agreement "if the contract provides for an increased price" [*R4 p. 36*]. This conditional clause made clear, that the aforesaid requirement had to be fulfilled for "an agreement on the price". It is inherent to conditional sentences, that the event depends on the condition and would only occur if the condition is fulfilled. The requirement, that the contract provides for price adaptation, however, was not yet scrutinised by the Parties at this time. Although Mr. Shoemaker was introduced as person responsible for the FSSA [*PO2, p. 59 no. 32*], this does not mean that he would never have to clarify the situation with his superiors. Consequently, Mr. Shoemaker's statement could not have been understood as agreeing on contract adaptation.

132 Second, demanding the third shipment does not amount to an agreement. Ms. Napravnik knew about the urgent need of the insemination doses for RESPONDENT [*C8 p. 18; R4 p. 36*]. Since both Parties are familiar with the horse breading business, Ms. Napravnik must be aware of the importance of timely delivery prior to the breeding season, when insemination is urgently needed [*R4 p. 36*]. Moreover, RESPONDENT had already strengthened the importance of timely delivery for its purposes during the contract negotiations [*NoA p. 6 no. 12*]. RESPONDENT's insistence on the last shipment merely shows its interest in timely delivery. Consequently, demanding for delivery cannot be seen as an acceptance of contract modification.

133 Third, Ms. Napravnik knew that Mr. Shoemaker cannot authorise any additional payment [*C8 p. 18; R4 p. 36*]. Therefore, CLAIMANT cannot argue that the Parties have modified the contract during the phone call as he told her that he was not in the position to make any legally binding statements. Consequently, even if one construes an offer to modify the contract, RESPONDENT has never accepted it.

5. Conclusion on C. II.

CLAIMANT cannot rely on Art. 79 CISG since the Parties excluded this article. Even if the Tribunal came to the conclusion that Art. 79 CISG has not been excluded, it would not substantiate a claim for contract adaptation. The same result could be reached by applying Art. 9 (2) CISG. Lastly, an agreement on contract modification pursuant to Art. 29 (1) CISG has not been reached. Thus, all claims for contract adaptation under the CISG are meritless.

PRAYER FOR RELIEF

RESPONDENT respectfully requests the Tribunal to declare that:

A. The law of Danubia governs the arbitration agreement and that the Tribunal does not have jurisdiction to adapt the FSSA [**Issue A**].

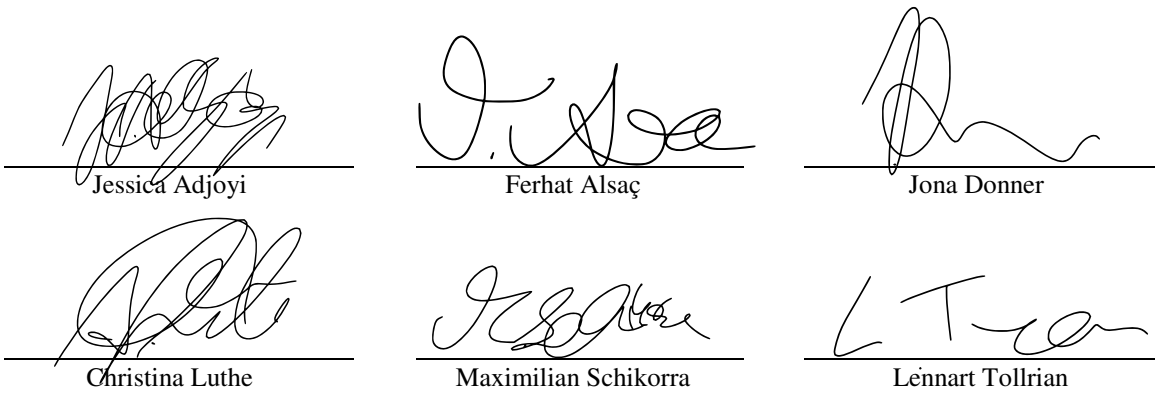
B. CLAIMANT is not entitled to submit evidence from the other arbitration proceeding [**Issue B**].

C. CLAIMANT is not entitled to any payment resulting from an adaptation of the price under Clause 12 FSSA and/or under the CISG [**Issue C**].

DECLARATION OF INDEPENDENCE

We hereby confirm that this Memorandum was written only by persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Bochum, 24th January 2019



Jessica Adjoyi | Ferhat Alsaç | Jona Donner

Christina Luthe | Maximilian Schikorra | Lennart Tollrian