Sixteenth Annual

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31st March – 7th April 2019, Hong Kong

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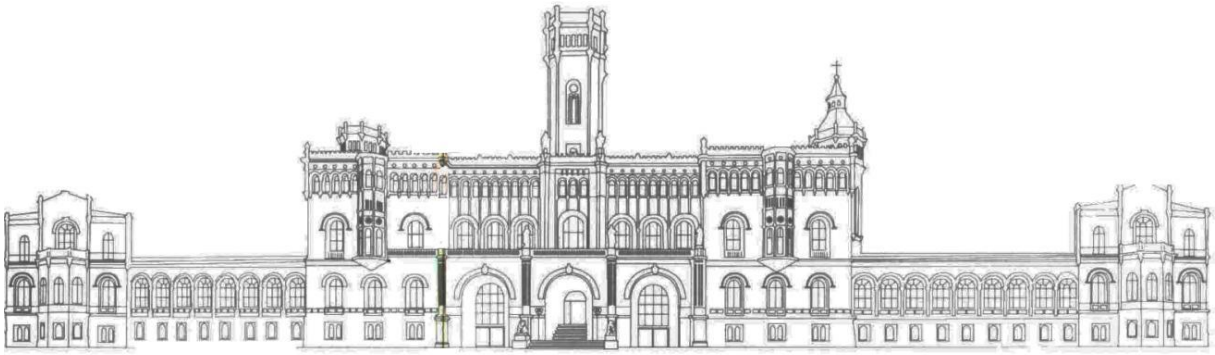
# MEMORANDUM FOR RESPONDENT



## LEIBNIZ UNIVERSITÄT HANNOVER

| **ON BEHALF OF:** | **AGAINST:** |
|---|---|
| Black Beauty Equestrian | Phar Lap Allevamento |
| 2 Seabiscuit Drive | Rue Frankel 1 |
| Oceanside | Capital City |
| Equatoriana | Mediterraneo |

**COUNSEL**

Friederike Bock • Lisbeth Kaufholz • Dennis Löher

Klara Nolting • Sophie Strohbecke • Alexander Wilhelmy

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| **§(§)** | paragraph(s) |
| **%** | percent |
| **Answ.** | Answer |
| **Arb.** | Arbitration |
| **Art.** | Article(s) |
| **App.** | Application |
| **Approx.** | Approximately |
| ***cf.*** | *confer* (see) |
| **CISG** | United Nations Convention on Contracts for the International Sale of Goods |
| **CEO** | Chief Executive Officer |
| **DAL** | Danubian Arbitration Law |
| **DCL** | Danubian Contract Law |
| **DDP** | Delivery Duty Paid |
| **ed.** | edition |
| **emph. add.** | emphasis added |
| ***et al.*** | et alli (and others) |
| ***et seq.*** | and the following |
| **Exh.** | Exhibit |
| **e.g.** | exempli gratia (for example) |
| **Exh. C** | Claimant's Exhibit |
| **Exh. R** | Respondent's Exhibit |
| ***fn.*** | footnote |
| **HKIAC 2013 Rules** | Hong Kong International Arbitration Centre 2013 Rules |

| | |
|---|---|
| **HKIAC Rules** | Hong Kong International Arbitration Centre 2018 Rules |
| **IBA Rules** | IBA Rules on the Taking of Evidence in International Arbitration |
| **ICC** | International Chamber of Commerce |
| **Inc.** | Incorporated |
| **INCOTERMS** | International Commercial Terms |
| ***Lex arbitri*** | Law of the seat of arbitration |
| **Ltd.** | Limited |
| **MAL** | Mediterranean Arbitration Law |
| **Mr** | Mister |
| **Ms** | Miss |
| **No** | Number(s) |
| **Not. Arb.** | Claimant's Notice of Arbitration |
| **NYC** | Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 7 June 1959 |
| **Ord.** | Order |
| **p./pp.** | Page/pages |
| **Para.** | Paragraph/section |
| **Proc.** | Procedural |
| **PIA** | Partial Interim Award |
| **PO1** | Procedural Order No. 1 of 5th October 2018 |
| **PO2** | Procedural Order No. 2 of 2nd November 2018 |
| **Req.** | Request |
| ***Supra*** | above |
| **UML** | UNCITRAL Model Law |
| **UNCITRAL** | United Nations Commission on International Trade Law |

| | |
|---|---|
| **UNIDROIT** | Institut International pour L'Unification du droit |
| **UPICC** | UNIDROIT Principles of International Commercial Contracts |
| **US$** | United States Dollar |
| **U.K.** | United Kingdom |
| **USA** | United States of America |
| **v** | *versus* (against) |

# TABLE OF AUTHORITIES

## Treaties, Conventions and Laws

| ABBREVIATION | TITLE |
|---|---|
| CISG | Convention on Contract of the International Sale of Goods, Vienna 1980 |
| New York Convention | Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1974 |
| UNICTRAL Model Law | UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments adopted in 2006 |
| UNIDROIT Principles | UNIDROIT Principles of International Commercial Contracts 2016 |
| Official Records | United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 April 1980), Official Records, New York, 1981 |
| EU Directive 2013/40/EU | Directive 2013/40/EU of the European Parliament and of the council of 12 August 2013 on attacks against information systems |

## Rules

| ABBREVIATION | TITLE |
|---|---|
| HKIAC Rules | Hong Kong International Arbitration Centre 2018 Rules |
| HKIAC 2013 Rules | Hong Kong International Arbitration Centre 2013 Rules |
| IBA Rules | IBA Rules on the Taking of Evidence in International Arbitration 2010 |
| Transparency Rules | UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration |
| INCOTERMS | International Chamber of Commerce Incoterm Rules 2010 |

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# STATEMENT OF FACTS

1 The Parties to this Arbitration are **Phar Lap Allevamento** [hereinafter: CLAIMANT] and **Black Beauty Equestrian** [hereinafter: RESPONDENT].

2 RESPONDENT is a company located in Oceanside, Equatoriana. It owns a famous and well-known broodmare line with excellent pedigrees and established a racehorse stable only three years ago. Its broodmare lines resulted into several world champion show jumpers and dressage champions.

3 CLAIMANT is the owner of a renown stud farm located in Capital City, Mediterraneo. It covers all areas of equestrian sport.

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| **21st March 2017** | RESPONDENT approached CLAIMANT for the purchase of 100 doses of frozen semen (p. 9). |
| **28th March 2017** | To ensure a swift delivery, RESPONDENT asked CLAIMANT for *Delivery Duty Paid* as the delivery condition [hereninafter: *DDP*] (p. 11). |
| **31st March 2017** | CLAIMANT accepted RESPONDENT's proposal for *DDP* (p. 12).<br>In return, RESPONDENT agreed to the inclusion of a hardship clause to exempt CLAIMANT from the liability associated with health and safety requirements (p. 12). |
| **10th April 2017** | RESPONDENT suggested arbitration seated in Equatoriana with the law of the seat governing the Arbitration Agreement (p. 33). |
| **12th April 2017** | CLAIMANT's wish to empower the Arbitral Tribunal to adapt the Agreement was not incorporated into the Frozen Semen Sales Agreement [hereinafter: Sales Contract] (p. 17).<br>The Parties' main negotiators were heavily injured during a car accident leading to their replacement for the finalization of the Sales Contract (p. 17). |
| **06th May 2017** | The Parties signed the Sales Contract including an Arbitration Agreement providing for arbitration seated in Vindobona, Danubia (p. 13). |
| **15th November 2017** | In accordance with its election program from January 2017, the newly elected President of Mediterraneo imposes a 25% tariff on agricultural products from Equatoriana (pp. 6, 58). |
| **19th December 2017** | Equatoriana's President announces a 30% tariff on agricultural products including frozen horse semen as a retaliatory measure for the second time in Equatorianian history (p. 15). |

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| **21st January 2018** | Contrary to its obligation under *DDP*, CLAIMANT urged RESPONDENT to pay the tariffs and threatened not to deliver the remaining 50 doses of frozen semen (p. 17). In response, RESPONDENT promised to fulfil all contractual obligations (p. 18). |
| **23rd January 2018** | CLAIMANT authorized the last shipment of 50 doses of semen (p. 6). |
| **31st July 2018** | CLAIMANT commenced arbitration to pursue its unfounded claims to adapt the Sales Contract (p. 4). |
| **24th August 2018** | RESPONDENT submitted its Answer to the Notice of Arbitration to pursue its rights to the HKIAC (p. 29). |
| **September 2018** | RESPONDENT's computer system got hacked and a considerable amount of data was stolen (p. 51). |
| **2nd October 2018** | CLAIMANT wants to submit a Partial Interim Award [hereninafter: PIA] recently rendered in RESPONDENT's second arbitration and was obtained either through a hack of RESPONDENT's computer system or a breach of confidentiality obligations by its former employees (p. 50). |

## SUMMARY OF ARGUMENTS

4 CLAIMANT as seller and RESPONDENT as buyer [hereinafter: the Parties] concluded a purchase agreement providing for the delivery of 100 doses of frozen horse semen for the purpose of equestrian horse breeding. The commercial relationship has got off to a good start and all contractual obligations were fulfilled. However, the relationship deteriorated when the tariffs imposed by the Equatorianian Government affected the last shipment of frozen horse semen. In attempting to restore its finances, CLAIMANT disregards the provisions of the contract and requests more than it is contractually entitled to.

5 CLAIMANT drags RESPONDENT into arbitration to have it pay the tariffs by requesting an increase of the purchase price by $1,250,000. To justify its exceptional demand, CLAIMANT artificially attempts to create the impression that Mediterranean Law governs the Arbitration Agreement. However, under the applicable law of Danubia, the Arbitral Tribunal [hereinafter: the Tribunal] lacks the jurisdiction and power to adapt the Sales Contract (**ISSUE I**).

6 CLAIMANT even goes one step further and pays money to obtain a copy of a Partial Interim Award [hereinafter: PIA] rendered in another of RESPONDENT's proceedings. CLAIMANT requests to introduce the PIA, obtained either by hacking RESPONDENT's computer system or by violating confidentiality obligations, as evidence in the current arbitration. Notwithstanding the fact that the

proceedings are difficult to compare given their diverging factual bases, the Arbitral Tribunal must not allow CLAIMANT to produce illegally obtained evidence (**ISSUE II**).

7 CLAIMANT seeks to justify its demand for an additional payment in the amount of US$ 1,250,000 by arguing that the tariffs constitute hardship within the ambit of the Hardship Clause contained in Clause 12 of the Sales Contract [hereinafter: Clause 12]. However, neither does Clause 12 embody the tariffs nor does it provide for contract adjustment as a legal remedy. In any case, CLAIMANT conceals that it assumed the obligation to pay the tariffs by agreeing on *DDP*. Thus, and for the reason that the CISG neither applies to the present hardship-scenario nor recognizes hardship-scenarios in general, there is no legal basis to increase CLAIMANT's remuneration (**ISSUE III**).

## ISSUE I: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWER TO INCREASE CLAIMANT'S REMUNERATION

8 Contrary to CLAIMANT's assertions [*Cl. Memo, para. 9*], the Parties did not assign the Arbitral Tribunal the jurisdiction and the power to compensate the consequences of the tariffs imposed by the Equatorianian Government by means of an adaptation of the Sales Contract.

9 At the end of long deliberations, the Parties agreed on the following narrowed version of the HKIAC Standard Arbitration Clause for the purpose of dispute resolution in a neutral venue: "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Vindobona, Danubia. The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English.*"

10 Though the Arbitration Agreement remains silent on the issue, CLAIMANT artificially attempts to create the impression that the Parties empowered the Tribunal to adapt the Sales Contract due to the imposition of the 30% tariff and an increase of delivery costs by 15%. In order to establish the Tribunal's jurisdiction and power, CLAIMANT relies upon a broad interpretation of the Arbitration Agreement under Mediterranean Law [*Cl. Memo, para. 10*].

11 However, these allegations are unfounded, not supported by evidence and against the facts of the case. As the Arbitration Agreement is subject to the Law of Danubia, the Tribunal lacks the jurisdiction and power to adapt the Sales Contract (**A.**). Contrary to CLAIMANT's assessment, the application of Danubian Law does not endanger the award (**B.**).

## A. INTERPRETED UNDER THE LAW OF DANUBIA, THE ARBITRAL TRIBUNAL LACKS THE POWER TO ADAPT THE SALES CONTRACT

12 The Arbitral Tribunal lacks the jurisdiction and the power to adapt the Parties' Sales Contract. According to both, Art. 16(1) Danubian Arbitration Law [hereinafter: DAL], a verbatim adoption of the UNCITRAL Model Law 2006 and Art. 19.1 HKIAC Arbitration Rules 2018 [hereinafter: HKIAC Rules] as the rules chosen by the Parties, the tribunal has the competence-competence and can rule on its own jurisdiction [*Balthasar, p. 20; Born, p. 1077; Feehily, p. 355; Moser/Bao, para. 9.129; Redfern/Hunter, para. 5.108*]. For the purpose of determining its own competence, the tribunal shall apply the law it deems most appropriate [*Born, p. 1399; Conrad/Münch/Black-Branch, para. 1.14; Lew/Mistelis/Kröll, para. 6-52*].

13 While the Parties chose Mediterranean Law to govern the Sales Contract, they did not specify the law applicable to the Arbitration Agreement [*Cl. Memo, para. 14*]. Whereas agreements to arbitrate are interpreted broadly under Mediterranean Law [*Not. Arb., p. 7 para. 16*], it is not possible to refer to any other circumstances but the contract itself under Danubian Law due to the applicability of the parol evidence and four corners rule [*Not. Arb., p. 7 para. 15*]. In order to substantiate its extraordinary request for contract adaptation, CLAIMANT wishes to rely on the negotiation history [*Cl. Memo, para. 28*]. Thus, it is not surprising that CLAIMANT tries to extend the choice of Mediterranean Law of the Sales Contract to the Arbitration Agreement. However, as Danubian Law governs the Arbitration Agreement (**I.**), the Tribunal lacks the jurisdiction and the power to adapt the Sales Contract (**II.**).

### I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

14 Contrary to CLAIMANT's argumentation [*Cl. Memo, para. 4*], Danubian Law applies to the Arbitration Agreement. In international arbitration, the determination of the law applicable to the arbitration agreement is a complex process not governed by a general rule [*Born, p. 473; Lew/Mistelis/Kröll, para. 6-52; Redfern/Hunter, para. 3.07*]. According to the three-step approach as a general principle of international private law, the starting point to determine the law governing the arbitration agreement is the parties' explicit choice [*BCY v BCZ; Sulamerica v Enesa; Born, pp. 495 et seq.; Art. 34(2)(a)(i) UML; Art 5(1)(a) NYC*]. Following as a second step, the tribunal shall give special notice to all circumstances in order to determine whether the parties have impliedly chosen the law applicable to their arbitration agreement [*BCY v BCZ; Sulamerica v Enesa*]. As a mean of last resort, if parties fail to indicate the applicable law, the law with the closest and most real connection to the arbitration agreement comes to the fore [*BCY v BCZ; Habas Sinai v VSC; Sulamerica v Enesa; Born, pp. 495 et seq.; Rauscher/Krüger, preface § 1025 para. 7; Art. VI(2) European Convention on International Commercial Arbitration; Art. 4 The Hague Principles; Art. 4 Rome I Regulation*].

15 CLAIMANT's proposal to treat the choice for Mediterranean Law in the Sales Contract as an implicit choice of law for the Arbitration Agreement [*Cl. Memo, para. 12*] violates the fundamental doctrine of separability (**1.**). Instead, CLAIMANT and RESPONDENT implicitly agreed that Danubian Law should govern the Arbitration Agreement (**2.**). In any event, the Tribunal should apply the law applicable at the seat of the arbitration, i.e. Danubian Law (**3.**).

### 1. CLAIMANT's assertion to apply Mediterranean Law as the law governing the Sales Contract violates the fundamental doctrine of separability

16 CLAIMANT's suggestion to apply Mediterranean Law as the law governing the Sales Contract to the Arbitration Agreement [*Cl. Memo, para. 10*] violates the fundamental doctrine of separability. Art. 19.2 HKIAC Rules and Article 16(1) DAL reflect this doctrine, stating that "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*" Accordingly, the arbitration agreement is legally separated from the main contract *[Beijing Jianlong v Golden Ocean; Bremer Schiffbau v South India Shipping; Bulgarian Bank v AI Finance; Fung Sang Trading Ltd. v Kai Sun Sea Products; Harbour Assurance Co. Ltd. v Kansa General International Insurance Co. Ltd.; Paul Smith Ltd. v H & S International Holding Co. Inc.; Sea Master v Arab Bank; Balthasar, p. 12 para. 20; Redfern/Hunter para. 2.101*]. The analysis of the choice of law governing the arbitration agreement should always begin with the separability presumption [*Born, p. 475*]. In consequence and as correctly pointed out by CLAIMANT, "*the law governing the arbitration agreement may be different from the law governing the main contract*" [*Cl. Memo, para. 10*].

17 Pursuant to CLAIMANT's argumentation, there is "*no indication contrary to the application of the Mediterranean Law in the contract*" [*Cl. Memo, para. 14*]. However, **first**, the negotiation history proves that CLAIMANT's assumption of an implied choice of Mediterranean Law cannot hold true (**a.**) and, **second**, CLAIMANT's internal policies are irrelevant when determining the applicable law (**b.**).

#### a. The negotiation history does not indicate the application of Mediterranean Law

18 The Tribunal should not extend the Parties' choice of Mediterranean Law for the Sales Contract to the Arbitration Agreement. Whereas CLAIMANT asserts that the application of Danubian Law was not mentioned during the contractual negotiations [*Cl. Memo, para. 21*], it fails submit any prove that the Parties intended to apply Mediterranean Law to the Arbitration Agreement.

19 **First**, the wording of the choice of law provision of the Sales Contract does not indicate an implicit choice as it limits the choice to the sales part of the contract. In Clause 14 of the Sales Contract, the Parties referred "*[t]his Sales Agreement*" to Mediterranean Law. However, CLAIMANT itself admits that the Arbitration Agreement is a contract different from the Sales Contract [*Cl. Memo, para. 11*]. Consequently, the wording chosen by the Parties evidences that the choice of Mediterranean Law was meant to be limited to the sales part. In addition, RESPONDENT proposed an Arbitration

Agreement containing a choice of law clause [*Exh. R1, p. 33*]. Accordingly, the Parties would have incorporated an explicit choice for Mediterranean Law if they have had the intention to apply Mediterranean Law. Given the fact that they deliberately omitted the inclusion of such an explicit choice, it is unreasonable to assume that the Parties impliedly chose Mediterranean Law to govern the Arbitration Agreement. Thus, the choice of Mediterranean Law within the Sales Contract cannot imply a choice of law governing the Arbitration Agreement.

20 **Second**, CLAIMANT's reference to the decision *Fiona Trust v Privalov* by the English and Welsh Court of Appeal [*Cl. Memo, para. 15*] does not deal with the issue of the law governing the arbitration agreement. The court merely found that the alleged bribery by one of the parties at the time of contract conclusion does not affect the validity of the arbitration clause given the doctrine of separability. Hence, the case is just another reason to treat the Arbitration Agreement as a separate agreement which is subject to a law different from the one governing the Sales Contract. For those reasons, the Tribunal should not extend the Parties' choice of Mediterranean Law for the Sales Contract to the Arbitration Agreement.

#### b. CLAIMANT's internal policies are irrelevant for the applicable law

21 CLAIMANT argues that it could not have agreed to any other law than Mediterranean Law due to its internal policies [*Cl. Memo, para. 4*]. However, these policies stem from CLAIMANT's internal sphere and cannot determine the legal relationship towards RESPONDENT. Pursuant to its literal meaning, the internal policy is a plan of what to do in particular situations within an organization [*Internal in Cambridge Dictionary; Policy in Cambridge Dictionary*]. CLAIMANT can internally change its policy without notifying RESPONDENT. If the internal policy could influence the choice of law, CLAIMANT would be able to change the applicable law by merely changing its internal policy – without being required to notify RESPONDENT. Thus, CLAIMANT's internal policies must not be relevant when determining the applicable law.

### 2. The Parties impliedly chose Danubian Law to govern the Arbitration Agreement

22 The Parties' choice for Vindobona, Danubia as the seat of arbitration is an implicit choice of Danubian Law as the law governing the Arbitration Agreement. In the absence of an express choice of law, the parties' implied choice gains in importance [*BCY v BCZ; Sulamerica v Enesa; Redfern/Hunter, para. 2.76*]. In order to identify the implied choice of law, one has to consider the parties' words, acts, particular facts of the case as well as other surrounding circumstances manifesting the parties' intention to choose a specific law to govern the arbitration agreement [*Habas Sinai v VSC; Bělohlávek/Cerný/Rozehnalova, para. 4-14.; Lew/Mistelis/Kröll, para. 17.13 et seq; Ormsby*].

23 CLAIMANT argues that "*Respondent all of a sudden asserted that the Law of Danubia would govern the Arbitration Agreement*" [*Cl. Memo, para. 17*]. However, CLAIMANT's own initiative led to Vindobona, Danubia as the seat of arbitration [*Exh. R1, p. 33*]. This choice constitutes an implicit choice of Danubian Law as the law governing the Arbitration Agreement for two reasons: **First**, the Parties agreed to link the applicable law to the place of dispute resolution (**a.**). **Second**, the Parties' choice for Danubia as the seat of arbitration indicates their intention to apply Danubian Law (**b.**).

**a. The Parties agreed to link the applicable law to the place of dispute resolution**

24 CLAIMANT's submission that the seat of arbitration has no legal impact on the applicable law [*Cl. Memo, para. 19*] is without any legal foundation as the Parties agreed to link the applicable law to the place of arbitration.

25 RESPONDENT proposed an arbitration agreement that provided for arbitration in Equatoriana and "*also submit[ted] the arbitration clause to the law of Equatoriana*" [*Exh. R1, p. 33*]. In response, CLAIMANT expressed its wish for a neutral dispute resolution mechanism and changed the venue of arbitration to Danubia under the condition that "*the law applicable to the Sales Agreements remains the law of Mediterraneo*" [*Exh. R2, p. 34; emph. add.*]. However, CLAIMANT did not change the uniformity between the seat of arbitration and the applicable law. Hence, the negotiations show that, **firstly**, the Parties wanted a synchronized arbitration set up with the law at the seat applicable and, **secondly**, that the Parties opted for a neutral forum – Vindobona, Danubia.

26 Accordingly, Mr Antley of RESPONDENT wanted to incorporate an express choice of Danubian Law into the Arbitration Agreement as shown by the last note he prepared after the meeting in which the Parties discussed the Arbitration Agreement [*Exh. R3, p. 35*]. In the end, the express choice of Danubian Law was not included into the contract only due to the severe car accident involving Ms Napravnik of CLAIMANT and Mr Antley. Nevertheless, the will of the Parties to link the applicable law to the seat of arbitration remained unchanged. Therefore, the choice of Danubia as the seat of arbitration implies the choice of Danubian Law for the Arbitration Agreement.

**b. The choice for Danubia as the seat indicates the intention to apply Danubian Law**

27 The choice for Danubia as the seat of arbitration indicates the Parties' intention to apply Danubian Law. One of the most important factors for parties to choose a specific place as their seat of arbitration is the applicable arbitration law since courts at the seat of the arbitration have "*supervisory powers to determine a jurisdictional dispute in relation to the arbitration agreement*" [*FirstLink v GT Payment; cf. Greenberg/Kee/Weeramantry, para. 2.103*]. In other words, parties would not choose an arbitral seat in case they do not want the courts of that place to have supervisory jurisdiction [*FirstLink v GT Payment*]. Accordingly, parties should reasonably be assumed to have impliedly chosen the applicable law when choosing the seat of arbitration in order to create consistency between the *lex*

*arbitri* and the governing law [*FirstLink v GT Payment; Friendly Arbitration (Hamburg); Slovenian company v Agent (Germany); Draetta/Luzzatto, para. 2.1; Hanessian/Newman, p. 22; van den Berg, Applicable Law, p. 404*].

28 CLAIMANT and RESPONDENT were equally reluctant to agree on a dispute resolution mechanism in the respective party's home jurisdiction. Hence, CLAIMANT rightfully acknowledges that the seat of arbitration particularly served the purpose of providing a neutral venue [*Cl. Memo, para. 19*]. As the application of any other law than Danubian Law circumvents the neutrality, the express choice of Danubia as a neutral venue is thwarted if it is not considered to be at least an implicit choice of Danubian Law.

29 The finding of the High Court of Singapore in the decision *FirstLink v GT Payment* rendered in June 2014 supports this view. In that case, the parties opted for arbitration at the Swedish Chamber of Commerce while the agreement was governed by the SCC Arbitration Rules without specifying the arbitral seat. Given the administration of the SCC, the arbitral seat was found to be Sweden. Accordingly, the court found, that the parties impliedly chose Swedish Law to govern the arbitration agreement as the express choice of substantive law was not sufficient to "*displace [the] parties' intention to have the law of the seat be the proper law of the arbitration agreement*" [*FirstLink v GT Payment, para. 16, 17*]. CLAIMANT does not establish any further indication for the application of Mediterranean Law except the explicit choice of Mediterranean Law limited to the Sales Contract. Therefore, CLAIMANT's and RESPONDENT's demand for neutrality evidences that they impliedly chose Danubian Law to govern the Arbitration Agreement.

### 3. In any case, the Tribunal should apply Danubian Law as the law applicable at the seat

30 The Arbitral Tribunal should resort to the law applicable at the seat of arbitration and apply Danubian Law. **First**, the law applicable at the seat applies since it has the closest and most real connection to the Arbitration Agreement (**a.**). **Second**, the application of the law of the seat of arbitration is the most feasible solution (**b.**).

#### a. Danubian Law has the closest and most real connection to the Arbitration Agreement

31 RESPONDENT respectfully requests the Tribunal to apply Danubian Law as the law with the closest and most real connection to the Arbitration Agreement. In the absence of a choice of law by the parties, the closest and most real connection test is accepted worldwide as a means of last resort to determine the applicable law [*BCY v BCZ*; *C v D; Habas Sinai v VSC; Sulamerica v Enesa*; *Born, pp. 495 et seq.; Hay/Rösler, p. 107; Leible, p. 212; Rauscher/Krüger, preface § 1025 para. 7; Art. VI(2) European Convention on International Commercial Arbitration; Art. 4 The Hague Principles; Art. 4 Rome I Regu-*

*lation*]. Likewise, Art. 34(2)(a)(i) DAL and Art. 5(1)(a) NYC refer to the law of the seat of arbitration as the designated applicable law following the principle of the closest and most real connection [*C v D*; *Wolff, p .277*].

32 The choice of Danubia as the seat of arbitration leads to the applicability of the Danubian Arbitration Law, the jurisdiction of Danubian Courts in order to assist the Arbitral Tribunal, Danubia as the country were the award will be made and, finally, to the application of Danubian standards when potentially reviewing the award during a set-aside procedure. Considering all those factors, there is no other option but to consider Danubian Law as the last piece that fits this puzzle.

33 The English Court of Appeal in the decision *C v D* rendered in December 2007 supports this finding. In that case, the parties' contract was subject to the law of New York while it provided for arbitration seated in London, England. The plaintiff commenced arbitration in London and was granted a partial-award. When the defendant wanted to commence a set-aside procedure in the US, the plaintiff applied for an anti-suit injunction. The court granted the injunction since the award could only be challenged under English Law. In the process of determining the applicable law, the court found that the "*agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.*" CLAIMANT and RESPONDENT submitted disputes which have arisen under Mediterranean Law to arbitration held in Danubia. Hence, Danubian Law is the law with the closest and most real connection to the Arbitration Agreement.

**b. The reference to the law of the seat is the most feasible connection**

34 The application of the law that applies at the seat of arbitration is the most feasible solution creating legal certainty. Whereas most arbitration clauses do not specify the law governing the arbitration agreement, the seat of arbitration is easy to determine as it is an element which commonly appears in a variety of arbitration model clauses [*American Bar Association; German Institution of Arbitration; International Chamber of Commerce; London Court of International Arbitration; Milan Chamber of Arbitration; Stockholm Chamber of Commerce*]. Until the phenomenon of delocalized arbitration finds international recognition, each arbitration necessarily has a seat, may it be chosen by the parties or selected by the arbitral institution, the arbitral tribunal or a national court [*FirstLink v GT Payment; Naviera v Compania International; Wind Farm v McAlpine; Born, p. 1678*]. However, the majority of cases is based on an arbitration agreement specifying the seat of arbitration [*Born, p. 1678*].

35 The Parties' choice for Danubia as the seat is determined within the Arbitration Agreement [*Exh. C5, p. 14 para. 15*]. Accordingly, the law applicable at the seat of arbitration is closely connected to

the Arbitration Agreement as well as easy to determine. Therefore, it is the most feasible solution for the Tribunal to take recourse to Danubian Law as the law applicable at the seat of arbitration.

## II. THE TRIBUNAL LACKS THE POWER TO ADAPT THE SALES CONTRACT UNDER DANUBIAN LAW

36 An interpretation of the Arbitration Agreement under Danubian Law reveals the Arbitral Tribunal's lack of power to decide on a claim for contract adaptation. The starting point for the determination of a tribunal's jurisdiction is the parties' arbitration agreement [*Girsberger/Voser, p. 90; Hanotiau, para. 66; Lew/Mistelis/Kröll, para. 6-1*]. Subject to an interpretation under the applicable rules of contract law, it specifies the tribunal's powers [*Born, pp. 635, 1397; Redfern/Hunter, para. 5.07*]. However, these powers must not exceed the limits set by the applicable arbitration law [*Redfern/Hunter, para. 5.07*].

37 CLAIMANT argues that the Tribunal has the jurisdiction and the power to adapt the contract and derives this conclusion from a reference to the applicable substantive law [*Cl. Memo, para. 29*]. Notwithstanding the fact that neither the Sales Contract nor the applicable law provide for contract adaptation, the questions of jurisdiction and power are of procedural nature [*Caltex Gas & Anor v China National Petroleum Corp; Schill, pp. 840*]. **First**, applying the Danubian Arbitration Law, the Tribunal lacks the power to adapt the contract since it was not expressly empowered by the Parties according to Art. 28(3) DAL (**1.**). **Second**, even in case the Tribunal was to follow CLAIMANT's assertion [*Cl. Memo, para. 32*] and qualified the question of power as a matter of substantive law, the Tribunal lacks jurisdiction as any claim for contract adaptation does not fall within the ambit of the Arbitration Agreement (**2.**).

### 1. The Parties did not expressly empower the Tribunal according to Art. 28(3) DAL

38 Contrary to CLAIMANT's argumentation [*Cl. Memo, para. 28*], the Parties did not expressly empower the Arbitral Tribunal to adapt the Sales Contract. Contract adaptation requires a tribunal to surpass its ordinary task of adjudicating pre-existing rights and rule on parties' future relationships [*Beisteiner; Lew/Mistelis/Kröll, para. 24-77*]. As a deviation from the generic purpose of dispute resolution and a severe enchroachment on the parties' autonomy, this measure requires special justification [*Beisteiner; Kröll, p. 166*]. Pursuant to Art. 28(3) DAL, "*[t]he arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*" According to Danubian Courts, Art. 28(3) DAL contains a general principle to be applied to the conferral of exceptional powers to the tribunal [*PO2, p. 60 para. 36*]. In particular, they need an explicit empowerment to exercise any types of adaptation of contracts [*PO2, p. 60 para. 36*].

39 Danubian contract Law [hereinafter: DCL] as part of the governing Danubian Law applies to the interpretation of the Arbitration Agreement [*cf. Born, pp. 635, 1397*]. According to Art. 4.3 DCL, the terms on which the parties agreed "*cannot be contradicted or supplemented by evidence of prior statements or agreements*" [*PO2, p. 61 para. 45*]. In consequence, the parties' intention has to be found within the four corners of the contract and any evidence "*of prior statements and agreements is inadmissible*" [*Vogenauer, Art. 2.1.17 para. 5; cf. Rosengren, p. 6*]. In fact, the tribunal is requested to fully base its argumentation on the "*four corners*" of the specific document [*Adkins v Texas; Hartell v Hartell; Louisana v Barrilleaux; Newton v Turpin; Pursue Energy v Perkins; Thompson v Sullivan*; *Mathias/Shugrue/Marrinson, para. 7.04(2)*]. In addition, the four corners rule is supplemented by the parol evidence rule [*Not. Arb., p. 7 para. 15*]. Accordingly, any evidence brought before the tribunal needs to be in writing [*Cameron v Slutzkin; Chartered Accountants v Securefin; Dexgroup v Trustco; Electricity Generation v Woodside Energy; Pacific Gas v Thomas Drayage; Leduc v Ward; Arroyo, p. 1446 fn. 12; Shore et al., p. 683; Otto et al., p. 57 fn. 64*].

40 **First**, the Sales Contract does not contain an explicit authorization. CLAIMANT relies upon the inclusion of the Hardship Clause and the choice of Mediterranean Law to govern the Sales Contract arguing that the Parties expressly authorized the Tribunal to adapt the contract [*Cl. Memo, para. 29*]. However, the four corners of the contract do not contain an express wording authorizing the Tribunal to increase the remuneration. If there is any intention to expressly authorize the Tribunal by including the Hardship Clause and the choice of Mediterranean Law, this intention is not in writing and, thus, not admissible according to the parol evidence rule. Therefore, the Sales Contract does not contain an explicit authorization.

41 **Second**, CLAIMANT cannot refer to the negotiation history to argue that the Tribunal has the power to adapt the Sales Contract. CLAIMANT asserts that both Parties intended to assign the Arbitral Tribunal the power to adapt the Sales Contract [*Cl. Memo, para. 28*] relying on the pre-contractual negotiations. However, CLAIMANT's argumentation is based on alleged indications found in the accompanying circumstances including preliminary negotiations [*Cl. Memo, para. 28*]. As these indications are intended to supplement the contractual Agreement without having a counterpart within the four corners of the Sales Contract, the four corners rule prohibits to rely on these indications. Thus, the overall Agreement cannot be interpreted as authorizing the Tribunal to adapt the contract.

### 2. CLAIMANT's demand for contract adaptation falls outside the scope of the Arbitration Agreement

42 Contrary to CLAIMANT's argumentation [*Cl. Memo, para. 31*], the Parties' Arbitration Agreement does not encompass a claim for contract adaptation. The starting point to determine the scope of

the arbitration agreement is the parties' intention reflected by the wording of their agreement [*Born, pp. 1317 et seq.*]. Whether a claim "*incidental to the main contract is within the scope of the arbitration agreement*" is the result of a case-by-case decision and not subject to an overall answer as suggested by CLAIMANT [*Cl. Memo, para. 31; Born, p. 1325*]. In general, arbitration agreements shall be liberally construed and interpreted in a way favoring the arbitration [*Fiona Trust v Privalov; Higher Regional Court Frankfurt, 5 U 167/84; Born, p. 1326; Fouchard/Gaillard, p. 289*]. However, this pro-arbitration presumption does not apply if there are "*good reasons to conclude otherwise*" [*Larsen Oil v Pretropod; cf. Born, p. 1337*]. It follows from the consensual nature of arbitration [*Elektrim v Vivendi; German Federal Court of Justice III ZR 78/73; ICC No. 7929; Born, p. 226; Lew/Mistelis/Kröll, para. 6-01; Redfern/Hunter, para. 2.01*] that good reasons are given in case the pro-arbitration presumption overrides the parties' true intentions [*cf. Born, p. 1341; Lew/Mistelis/Kröll, para. 7-67*].

43 CLAIMANT cites *Redfern* and *Hunter* and refers to the wording of the Arbitration Agreement as well as the Parties' intention to establish that the scope of the Arbitration Agreement encompasses a claim for contract adaptation [*Cl. Memo, para. 31*]. However, CLAIMANT omits to cite the most important part of the quote according to which the scope of the arbitration agreement also depends on the applicable law [*Redfern/Hunter, para. 2.67*]. In the light of the applicable Danubian Law, the Parties' narrowed version of the HKIAC arbitration clause does not encompass claims for contract adaptation. **First**, an adaptation of the Sales Contract is no dispute in the sense of the Arbitration Agreement (**a.**). **Second**, CLAIMANT cannot present a claim for increased remuneration that arises out of the Sales Contract (**b.**).

### a. Contract adaptation is no dispute in the sense of the Arbitration Agreement

44 CLAIMANT's request for contract adaptation is no dispute in the sense of the Arbitration Agreement. In general, a dispute concerns "*a disagreement on a point of law or fact, a conflict of legal views or interests between two persons*" in the sense of a "*yes-or-no decision*" [*Greece v U.K.; cf. Born, p. 1348; Berger, Gap Filling, p. 2; Brunner, Force Majeure, p. 476*]. However, contract adaptation cannot constitute such a decision in case the arbitration agreement is subject to a narrow interpretation [*cf. Berger, Gap Filling, p. 2; Brunner, Force Majeure, p. 476; Lew/Mistelis/Kröll, para. 34*].

45 The HKIAC standard clause establishes a broad scope by referring any "*dispute, controversy, difference or claim*" to arbitration [*Moser/Bao, para. 4.06*]. However, the Parties narrowed the Arbitration Agreement by only referring "*any dispute*" to arbitration. Nevertheless, CLAIMANT argues that the Parties disagree on the fact whether the Tribunal has the jurisdiction to adapt the contract or not [*Cl. Memo, para. 33*]. Whereas the question of whether the remuneration shall be increased at all might be answered with yes or no, it is not possible to fix the amount by simply saying yes or no. Hence, given the narrow version of the Arbitration Agreement, contract adaptation is no dispute.

### b. Any claim for contract adaptation does not arise out of the Sales Contract

46 In any case, CLAIMANT's request for contract adaptation is no contractual claim and does not arise out of the Sales Contract. Parties to international arbitration agreements commonly use the phrase "*arising out of this contract*" [*IBA Guidelines, para. 13; Molitoris/Welser, p.18*]. This phrasing may only extend to other than contractual claims if it is subject to a broad pro-arbitration interpretation [*Ashville v Elmer contractors; Chimimport v D'Alesio; Born, p. 1352*].

47 To ensure this broad interpretation, the HKIAC Standard Arbitration Clause explicitly refers to any dispute in relation to the contract as well as all non-contractual claims [*Moser/Bao, para. 4.07*]. The fact that the Parties deleted the explicit reference to non-contractual claims from the HKIAC Standard Arbitration Clause proves that they incorporated a narrow version into the Sales Contract [*Exh. R1, p. 33*]. Consequently, "*arising out of this contract*" must be interpreted narrowly and should only embody the original contractual claims.

48 Nonetheless, CLAIMANT asserts that the claim for contract adaptation is "*incidental to the hardship clause in the contract*" without any further explanation [*Cl. Memo, para. 32*]. However, the fact that CLAIMANT resorts to the UPICC in an attempt to establish the legal consequence of the hardship clause [*Cl. Memo, para. 32*] already proves that CLAIMANT itself is of the opinion that there is no claim "*incidental*" to the contract. Rather, the literal sense of contract adaptation shows that the contract has to be adapted in order to assert CLAIMANT the right to additional payments. Observing the Parties' intentions and narrowly interpreting the Arbitration Agreement, CLAIMANT's request to increase its remuneration does not arise out of the Sales Contract.

## B. THE APPLICATION OF DANUBIAN LAW TO THE ARBITRATION AGREEMENT DOES NOT ENDANGER THE AWARD

49 CLAIMANT asserts that the application of Danubian Law endangers the award [*Cl. Memo, para. 16*]. However, this does not hold true. According to Art. 34(2)(a) DAL, an award might be set aside if the arbitration agreement was not valid under the law "*to which the parties have subjected it, or, failing any indication thereon, under the law of [Danubia]*". Thereby, the Danubian Arbitration Law recognizes the parties' freedom to choose the law governing their arbitration clause [*Born, p. 536*]. If the parties did not specify the applicable law, the law of the seat of arbitration applies [*C v D; Berger, Re-Examining, p. 333; Waincymer, pp. 126 et seq.*].

50 CLAIMANT threatens that the award would be "*prone to set aside*" if the Tribunal did not follow its argumentation to apply Mediterranean Law [*Cl. Memo, para. 16*]. However, the Tribunal is free to find that the Parties chose a law, either Mediterranean or Danubian, to govern their Arbitration Agreement without endangering the award. In case of doubt, the Tribunal might refer to Danubian

Law in accordance with Art. 32(2)(a) DAL. Hence, the award will not be prone to be set aside if the Tribunal applies Danubian Law.

### CONCLUSION ISSUE I

51 The Arbitral Tribunal lacks the jurisdiction and the power to increase CLAIMANT's remuneration. The interpretation of the Arbitration Agreement is subject to Danubian Law, either impliedly chosen by the Parties or as the law applicable at the seat of arbitration. Given the strict rules of interpretation under Danubian Law, the Sales Contract does not contain any indication that expressly authorizes the Tribunal to adapt the contract. In any case, CLAIMANT's demand for an increased remuneration falls outside the scope of the Arbitration Agreement.

## ISSUE II: CLAIMANT MUST NOT BE ALLOWED TO PRESENT THE ILLEGALLY OBTAINED EVIDENCE

52 Allegedly left with no other option to prove its case, CLAIMANT requests to present a copy of a Partial Interim Award [hereinafter: PIA] recently rendered in another arbitral proceeding involving RESPONDENT [*Cl. Memo, para. 36, 46*]. However, the only way CLAIMANT could have received the PIA is either by a hack of RESPONDENT's computer system or a breach of contractual or statutory confidentiality obligations. Thus, the PIA must not be admissible in the present proceeding.

53 CLAIMANT relies upon the PIA to prove that RESPONDENT allegedly considers contract adaptation as an appropriate mean to solve the case at hand [*Cl. Memo, para. 48*]. In doing so, CLAIMANT fails to recognize that the legal questions in both proceedings differ immensely: Not only did CLAIMANT and RESPONDENT agree on a narrower Hardship Clause and a narrower Arbitration Agreement, they also subjected their Arbitration Agreement to a different governing law.

54 Only three weeks before CLAIMANT informed the Tribunal about the results of its investigations, a considerable amount of data was stolen from RESPONDENT's computer system through an illegal hack [*PO2, p. 60 para. 41*]. At the same time, RESPONDENT was forced to dismiss two employees who were part of the other arbitral proceedings but under both, the obligation of confidentiality under Art. 42 HKIAC 2013 Rules and a contractual confidentiality agreement. CLAIMANT leaves unspoken that it was most likely its payment of US$ 1,000 to a shady company providing intelligence on the horse breeding industry that set the incentive to either way of unlawful behavior in order to deliver the PIA to CLAIMANT [*PO2, p. 60 para. 41*].

55 In respect of a fair conduct in international commercial arbitration, RESPONDENT requests the Tribunal to dismiss CLAIMANT's request to present the PIA since, **first**, the PIA does not meet the requirements to be presented as evidence in the arbitral proceedings (**A.**) and, **second**, the Tribunal can dismiss CLAIMANT's request without violating its right to be heard (**B.**).

## A. CLAIMANT IS NOT ENTITLED TO PRODUCE THE PARTIAL INTERIM AWARD ACCORDING TO ART. 22.3 HKIAC RULES

56 CLAIMANT is not entitled to produce the PIA under the Parties' choice of arbitration rules. Pursuant to Art. 22.2 HKIAC Rules, *"the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence*". Within the boundaries of the applicable law, tribunals have a broad discretion when determining the admissibility of evidence [*Balthasar, p. 426; Born, p. 2153; Moser/Bao, para. 9.153*]. Contrary to its submission [*Cl. Memo, para. 37*], CLAIMANT is not entitled to present the PIA since, **first**, it is neither relevant for the case nor material to its outcome (**I.**); and, **second**, the illegal acquisition of the PIA renders it inadmissible as evidence (**II.**).

### I. THE PARTIAL INTERIM AWARD IS NEITHER RELEVANT FOR THE CASE NOR MATERIAL TO ITS OUTCOME

57 CLAIMANT's attempt to determine that the PIA is relevant for the case and material to its outcome [*Cl. Memo, para. 45*] is unfounded. According to Art. 22.3 HKIAC Rules, a party that wishes to submit evidence has to establish the materiality to the case and the relevance for its outcome [*VIAC Handbook, Art. 29 para. 12; Moser/Bao, para. 9.161*]. These requirements are not fulfilled as, **first**, the PIA is not relevant to the case (**1.**) and, **second**, not material to its outcome (**2.**).

#### 1. The Partial Interim Award is not relevant to the case

58 CLAIMANT fails to establish the PIA's relevance for the case [*Cl. Memo, para. 45*]. According to Art. 22.3 HKIAC Rules, evidence is only relevant to the case when it is useful to establish the truth of factual allegations made by one party [*ABB v Hochtief Airport; Born, p. 2364; Kaufmann-Kohler/Bärtsch, p. 18; Marghitola, pp. 48; Moser/Bao, para. 9.163; O'Malley, para. 9.09; Reaschke-Kessler, para. 11.1*].

59 The PIA does not provide any aid for the proceedings at hand. The two proceedings have nothing in common since the legal questions differ immensely and the factual bases are not comparable. In addition, the other tribunal did not decide whether there is a hardship situation due to the tariffs or a right to an increased remuneration as there has not been any decision on the merits yet. Hence, the PIA can by no means add any value to the merits of the present case.

60 Rather, the other tribunal only accepted its jurisdiction based on the broad HKIAC Standard Arbitration Clause interpreted in line with the broad pro-arbitration approach under Mediterranean Law chosen by the parties [*PO2, p. 60 para. 39*]. To the contrary, CLAIMANT and RESPONDENT agreed on a narrowed arbitration clause subject to the strict rules of interpretation of Danubian Law. Consequently, the PIA has no legal value for the proceeding and, thus, is not relevant.

### 2. In any case, the Partial Interim Award is not material to the outcome of the case

61 Opposing to CLAIMANT's assertion [*Cl. Memo, para. 45*], the outcome of the case does not depend on the PIA. Evidence is material to the outcome of a case if it is vital to complete the consideration of all legal issues [*Kaufmann-Kohler/Bärtsch, p. 18; Lotfi, p. 102; Pilkov, p. 149*].

62 CLAIMANT argues that the submission of the PIA is material to the outcome of this case as the Tribunal might otherwise face "*a risk of conflicting awards*" [*Cl. Memo, para. 51*]. However, it is not necessary to submit the PIA to complete the legal considerations of the present dispute as the PIA neither has any legal effect on this proceeding (**a.**) nor does RESPONDENT's legal position in the other proceeding amount to relevant inconsistent behavior (**b.**).

#### a. A dismissal of CLAIMANT'S request to present the Partial Interim Award creates no danger of conflicting awards

63 CLAIMANT's allegation that the Tribunal would run into danger of conflicting awards if it excludes the PIA as evidence [*Cl. Memo, para. 51 et seq.*] misses any legal basis. To the contrary, the Tribunal is not facing any risk of rendering conflicting awards since the PIA does not determine the legal evaluation. Arbitral decisions have binding effect only *inter partes* [*Lew/Mistelis/Kröll, para. 24-17; Sheppard, p. 222*]. In consequence, they do not have a precedential value on questions of law [*Sacor Maritima v Repsol; Berger, Precedents, p. 11; Girsberger/Voser, p. 35; Schütze, p. 69*]. Rather, the answer of two tribunals to the same legal question may differ since every arbitration is adapted to the needs and intentions of the parties involved [*Lew/Mistelis/Kröll, para. 1-14; Redfern/Hunter, para. 2.67*]. In any case, the factual circumstances and legal aspects of two disputes have to be comparable for one case to influence the other [*Born, p. 3735*].

64 Notwithstanding the fact that the PIA has no precedential effect on this matter *per se*, the factual backgrounds of the two cases have to be distinguished. The two proceedings tremendously differ on various factual and legal points [*PO2, p. 60 para. 39*]. Consequently, the PIA can by no means determine the legal evaluation in this matter. For this reason, it is not necessary to present the PIA to complete the legal considerations and, thus, the PIA is not material to the outcome of this case.

#### b. RESPONDENT's legal position in the other arbitration does not amount to legally relevant inconsistent behavior

65 RESPONDENT does not behave inconsistently and, thus, the PIA is not material. A party's inconsistent behaviour only becomes relevant if it results in estoppel or preclusion [*Higher Regional Court Munich, 34 Sch 13/09; MacFarlane v Manly; Born, p. 3735*]. Whatever doctrine applies, it requires at least that "*there has been a final judicial judgment, by a tribunal of competent jurisdiction, on the merits of a claim,*

*involving the same […] parties*" [*Born, p. 3735; Brekoulakis, p. 185*]. A mere change of mind regarding the legal point of view is of no relevance [*Allen v Zurich Insurance; Schreiber, p. 327*].

66 CLAIMANT argues that RESPONDENT relies upon a hardship situation in the second arbitration and in consequence, cannot argue against the existence of hardship in the present case [*Cl. Memo, para. 81*]. However, RESPONDENT's claim in the second proceeding does not involve the same parties. In fact, the *Partial Interim* Award does not even constitute a *final* judgement. Hence, the PIA would by no means bar RESPONDENT from arguing against the findings within the PIA. Instead of relying upon legally irrelevant evidence, CLAIMANT should rather focus on proving its own case. Without any legal impact, the PIA does not provide any aid when considering the legal issues and, therefore, is not material to the outcome of this case.

## II. THE ILLEGAL ACQUISITION OF THE PARTIAL INTERIM AWARD RENDERS IT INADMISSABLE AS EVIDENCE

67 RESPONDENT requests the Tribunal to dismiss the PIA as evidence given its illegal acquisition. The HKIAC Rules as well as the DAL and the IBA Rules on the Taking of Evidence [hereinafter: IBA Rules] are silent on the matter of the admissibility of illegally obtained evidence [*Hwang/Boo/Han, p. 26*]. Rather, tribunals have broad discretion when determining the admissibility of evidence limited by the applicable law and subject to general principles, such as equal treatment [*Balthasar, p. 426; Binder, para. 27-023; VIAC Handbook, Art. 29, para. 14*].

68 The illegal hack of RESPONDENT's computer system or the leak by its two former employees against statutory and contractual confidentiality obligations led to CLAIMANT's possibility to purchase the PIA [*PO2, p. 60 para. 41*]. Either way, the applicable law and general principles impede the presentation of the PIA given its illegal acquisition for three reasons. **First**, the Tribunal should not become an accomplice of CLAIMANT's violation of confidentiality obligations (**1.**). **Second**, CLAIMANT's right to fully present its case cannot justify evidence gathering by illegal means (**2.**) and, **third**, CLAIMANT endorsed the illegal acquisition of the PIA (**3.**).

### 1. The Tribunal should not become an accomplice of CLAIMANT's violation of confidentiality obligations

69 The Tribunal should not become an accomplice of the violation of confidentiality obligations. Evidence which was obtained in violation of confidentiality must be considered as illegal and, therefore, as inadmissible [*Klamas, p.172; Noth/Haas, p. 1551*].

70 **First**, the PIA is subject to statutory as well as contractual confidentiality obligations (**a.**). **Second**, it is of no legal relevance that the PIA was publicly available after it has been stolen (**b.**) and, **third**, the appointment of an expert does not overcome the violation of confidentiality obligations (**c.**).

### a. The Partial Interim Award is subject to statutory and contractual confidentiality obligations

71 The PIA was obtained under the violation of statutory as well as contractual confidentiality obligations. CLAIMANT argues that the PIA was not subject to any duty of confidentiality, as it does not contain any trade secret or sensible business information [*Cl. Memo, para. 56*]. Whereas it is true that the PIA does not comprise such information, the IBA Rules do not contain any provision dealing with illegally obtained evidence [*Hwang/Boo/Han, p. 26*]. That is why CLAIMANT's recourse to the confidentiality provision contained in Art. 9.2(e) IBA Rules is of no guidance for the Tribunal [*Cl. Memo, para. 54*]. Rather, the Tribunal should uphold the confidentiality obligations which the PIA was subject to in a two-fold manner.

72 **First**, the PIA was to be kept confidential according to Art. 42.1 HKIAC 2013 Rules. Pursuant to this article, the proceedings are subject to a statutory confidentiality obligation prohibiting any publication of awards or information regarding the arbitration [*Moser/Bao, para. 12.30*]. This prohibition also includes third parties [*Moser/Bao, para. 12.30*]. Contrary to CLAIMANT's assertion [*Cl. Memo, para. 42*], it is of no relevance whether CLAIMANT or the intelligence company were a party to the arbitration. As the HKIAC 2013 Rules governed the second proceeding, the leak of the PIA violates the statutory confidentiality obligation.

73 **Second**, RESPONDENT's two former employees leaked the PIA against an explicit contractual duty to keep it confidential. A violation of contractual confidentiality taints the evidence [*Alexander, p. 259; Goeler, p. 320; Marghitola, .94*]. As the former employees were witnesses in the second proceeding and signed an agreement to keep all information about proceedings confidential [*PO2, p. 61 para. 41*], the leak of the PIA violates this agreement and taints the evidence as illegally obtained. Therefore, the PIA was obtained in violation of a contractual confidentiality obligation.

### b. The subsequent publication of the Partial Interim Award cannot serve as a retroactive validation

74 The fact that the PIA was made publicly available after it has been stolen is of no legal relevance and cannot retroactively validate the improper acquisition. CLAIMANT could have argued that the Tribunal should deem the PIA admissible since it was publicly available. However, the publication must not justify the use of illegally obtained evidence [*Woon v HT; Huang, p. 101*]. Rather, the tribunal might deem the evidence admissible only in very rare circumstances if exceptional predominant interests of public access render it unjust to maintain the confidentiality [*ConocoPhilipps v Venezuela; Woon v HT; Huang, p. 101*].

75 The PIA is not publicly available as CLAIMANT has not bought it from the intelligence company yet [*PO2, p. 60 para. 41*]. However, even after the acquisition, the PIA remains unlawfully obtained.

The admissibility of the PIA due to its public availability would offer an easy mean to justify unlawful behaviour and, consequently, constitute an incentive for more parties to obtain evidence illegally. To prevent CLAIMANT from further improper behaviour, the Tribunal should maintain the confidentiality. Therefore, the subsequent publication of the PIA cannot serve as a retroactive validation of the unlawful acquisition.

**c. Appointing an expert does not overcome the violation of confidentiality obligations**

76 A party or tribunal appointed expert does not overcome CLAIMANT's violation of confidentiality obligations. Appointing an expert does not exempt the parties from adhering to confidentiality obligations and leads to a delay of the proceedings and an increase of costs [*Derains/Schwartz, p. 285; Moser/Bao, para. 9.195; Smeureanu, p. 70*].

77 CLAIMANT proposes to appoint an expert for the assessment of the PIA according to Art. 25 HKIAC Rules and argues that the appointment of an expert would provide a more sensitive way to deal with RESPONDENT's confidential documents [*Cl. Memo, para. 59*]. However, it is not the content of the PIA but rather the illegal acquisition tainting it with wrongdoings and, thus, renders it inadmissible as evidence. Whether the Tribunal appoints an expert or not – the PIA remains obtained by unlawful means. Thus, the appointment of an expert does not overcome the violation of confidentiality obligations. To the contrary, it delays the proceeding and increases the costs.

**2. CLAIMANT's right to fully present its case cannot validate the illegal acquisition**

78 Contrary to CLAIMANT's assertion [*Cl. Memo, para. 38*], its right to fully present its case must not justify the illegal acquisition of evidence. Pursuant to Art. 13.1 HKIAC Rules and Art. 18 DAL, each party has the right to fully present its case [*Abu Dhabi Investment v Citigroup; Schultz, p. 109; Waincymer, p. 750; Wolff, p. 298*]. However, this right is subject to various restrictions since it cannot justify the presentation of evidence at any cost [*Swiss Federal Court, 4A.528/2011; Higher Regional Court Munich, 34 – Sch 28/10; Saenger, § 1042 para. 7*]. In case of illegally obtained evidence, the tribunal has to consider whether the submitting party's right to present the case is able to outweigh all interests of the other party [*Enron v Argentina; O'Malley, para. 9.119*].

79 RESPONDENT requests the Tribunal to find that the PIA is inadmissible as, **first**, improperly obtained evidence is generally inadmissible (**a.**) and, **second**, allowing CLAIMANT to present the PIA results in a violation of procedural fairness (**b.**).

**a. The infringement of RESPONDENT's computer system renders the Partial Interim Award inadmissible *per se***

80 The PIA is the product of the hack of RESPONDENT's computer system and, therefore, generally inadmissible. Cyber intrusion is recognized as a crime and a violation of the constitutional right of

privacy in jurisdictions all around the world, [*EU Directive 2013/40/EU; § 303b German Criminal Code; Singapore Computer Misuse Act; 18 US Code § 1030; Fasching/Konecny, Pre §266 para. 73*]. While common law jurisdictions generally do not admit any evidence that has been unlawfully obtained, civil law jurisdictions dismiss evidence in case its acquisition violated one party's constitutional rights [*Fasching/Konecny, Pre §266 para. 73; Rauscher/Krüger, § 284 para. 21; Stein/Jonas, § 286 para. 51*]. Accepting such evidence leads to the incentive of further relying on unlawfully obtained evidence [*O'Malley, para. 9.119; Reismann, p. 752*]. Therefore, any illegally obtained evidence is inadmissible [*cf. Methanex v US; O'Malley, para. 9.119; Reismann, p. 753*].

81 The hack of RESPONDENT's computer system violated its right of privacy. With the request to submit the PIA, CLAIMANT seeks to benefit from this violation. If the Tribunal admitted the PIA it would accept illegal means as a common method to gather evidence and allow CLAIMANT to profit from its wrongdoings. For these reasons, the PIA being the product of the infringement of RESPONDENT's computer system must not be admissible.

**b. The presentation of the Partial Interim Award violates procedural fairness**

82 The admission of the PIA as evidence amounts to a violation of the prevailing principle of procedural fairness. Pursuant to Art. 13.5 HKIAC Rules, *"[…] all parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration*". It reflects the internationally recognized principle of procedural fairness and requires all parties involved to ensure fair proceedings [*ICC 1434; ICC 3896; Nanhai Oil v Gee Tai; Woon v HT; Born, p. 1257; Hanotiau, p. 374; Moser/Bao, para. 9.48; Rauscher/Krüger, § 1042 para. 20; Saenger, § 1042 para. 3; Veeder, p. 440*]. An important aspect of procedural fairness is the equality of arms between the parties [*O'Malley, para. 9.116 et seq.*]. As both parties have to be given the same opportunity to present their case, restrictions are particularly appropriate in case of illegally obtained evidence [*EDF Services v Romania; Aceris; Marghitola, p. 94; Ortiz, p. 3; Veeder, p. 435; Waincymer, pp. 789, 793 & 797; Zuberbühler, p. 168*].

83 While CLAIMANT explicitly demands procedural fairness and equality of the proceedings for itself [*Cl. Memo, para. 39, 43*], it tramples all over these principles at the same time when it attempts to submit tainted evidence. According to Art. 22.1 HKIAC Rules, CLAIMANT is under the obligation to prove its case. The presentation of the PIA shifts the burden of proof onto RESPONDENT forcing it to deny all facts contained within the evidence. Whereas CLAIMANT was able to rely on illegally obtained evidence in that case, RESPONDENT has to exonerate itself by using lawful means. Therefore, the only way to maintain the equality of arms is to uphold the burden of proof and, for this purpose, to dismiss the request to submit the PIA.

84 This view is supported by the decision of an UNICTRAL tribunal in the matter of *Methanex v US* rendered in August 2015. In that case, the plaintiff trespassed the head office of a lobbying organization and searched internal dumpsters, thereby obtaining several personal notes. The tribunal refused to introduce the unlawfully obtained evidential material. Instead, it held that it had a general duty to respect the equality of arms between the parties and that the plaintiff had "*offended basic principles of justice and fairness*". Though CLAIMANT did not physically trespass RESPONDENT's premises, the hacker at least virtually invaded the computer system and equally stole confidential material. Hence, RESPONDENT respectfully requests the Tribunal to use the decision as guidance and to dismiss the submission of the PIA.

### 3. CLAIMANT endorsed the unlawful acquisition of the Partial Interim Award

85 The PIA is inadmissible as CLAIMANT was involved in its illegal acquisition. As it allegedly did not participate in the unlawful behavior, CLAIMANT opposes the PIA's inadmissibility [*Cl. Memo, para. 44*]. However, CLAIMANT's payment to the intelligence company was the incentive for any illegal actions. It is generally recognized that in cases concerning unlawfully obtained evidence the party presenting the evidence must not be involved in the illegal acquisition [*ConocoPhillips v Venezuela; Methanex v US; Yukos v Russian Federation; Art. 9(7) IBA Rules; Mirzayev, p. 99; Zuberbühler, p. 167*]. This principle is also reflected by the doctrine of unclean hands stating that a party which presents a claim must come with clean hands [*van den Berg, Vol. XXIX, p. 508; Heermann/Schlingloff, § 11 para. 278*]. In case a claim was subject to prior illegal conduct, the party is barred from presenting that claim [*van den Berg, Vol. XXIX, p. 508; Heermann/Schlingloff, § 11 para. 278*].

86 CLAIMANT's allegation that it "*has not initiated […] any unlawful activity that has led to the disclosure*" [*Cl. Memo, para. 42*] and "*has his hands clean in the means of obtaining evidence"* [*Cl. Memo, para. 44*] are unfounded and do not reflect the facts of the case. CLAIMANT approached the intelligence company in full knowledge of its doubtful reputation [*PO2, p. 60 para. 41*]. Accepting the possibility that the company committed illegal actions, CLAIMANT – despite its alleged financial difficulties – was willing to pay US$ 1,000 to receive a copy of the award [*PO2, p. 60 para. 41*]. By providing the financial incentive to obtain the PIA unlawfully, CLAIMANT got involved in the illegal acquisition.

87 CLAIMANT cannot rely on the decision rendered in July 2014 in the matter *Yukos v Russian Federation* [*Cl. Memo, para. 44*]. Whilst it is true that the plaintiff was allowed to submit illegally obtained evidence in that case, the factual background differs. The plaintiff merely got access to the documents via WikiLeaks and was not involved in the unlawful acquisition at all. To the contrary, CLAIMANT directly contacted the intelligence company, accepted the risk of an illegal acquisition

and set the financial incentive for the unlawful behavior. As both cases are not comparable, RESPONDENT requests the Tribunal not to consider the *Yukos-Award* as guidance. CLAIMANT was involved in the illegal acquisition of the PIA, it remains inadmissible.

## B. THE TRIBUNAL CAN DISMISS CLAIMANT'S REQUEST TO SUBMIT THE PARTIAL INTERIM AWARD WITHOUT VIOLATING ITS RIGHT TO BE HEARD

88 CLAIMANT falsely asserts that denying the submission of the PIA violates its right to be heard [*Cl. Memo, para. 39*]. Pursuant to Art. 34(2)(a)(ii) DAL, the award might be set aside in case one party was "*unable to present his case*" [*Abu Dhabi Investment v Citigroup; Menaker, p. 120; Schultz, p. 109; Waincymer, p. 750; Wolff, p. 298*]. However, it is widely recognized that "*[t]he arbitral tribunal may refuse to admit evidence without violating the right to be heard*" [*Cour Civile, 4P.196/2003; Karaha v Perusahaan; Swiss Federal Court, 4P.26/2005; Swiss Federal Court, 4A.669/2012*]. This holds particularly true if the requested evidence is not relevant and material [*Karaha v Perusahaan; Swiss Federal Court, 4P.26/2005; Swiss Federal Court, 4A.669/2012; Kaufmann-Kohler/Rigozzi, para. 6.33*].

89 CLAIMANT requests to submit illegally obtained evidence to prove its case. This evidence is neither relevant to the case nor material to its outcome. Its submission violates duties of confidentiality and RESPONDENT's right of procedural fairness. Hence, CLAIMANT's right to be heard does not hinder the Tribunal from dismissing the submission.

### CONCLUSION ISSUE II

90 CLAIMANT must not be allowed to submit the PIA as evidence pursuant to Art. 22.2 HKIAC Rules since it is neither relevant to the case nor material to its outcome. In addition, the illegal acquisition of the PIA impedes its admissibility as CLAIMANT's right to present its case it limited by RESPONDENT's right of procedural fairness. In any event, CLAIMANT's right to be heard does not prevent the Tribunal from denying the submission.

# ISSUE III: THE TRIBUNAL SHOULD NOT INCREASE CLAIMANT'S REMUNERATION BY US$ 1,250,000

91 CLAIMANT is not entitled to an additional payment of US$ 1,250,000 or any other amount resulting from an adaptation of the purchase price. The Parties concluded the Sales Contract in May 2017 obliging CLAIMANT to deliver 100 doses of frozen horse semen in return for the payment of US$ 100,000 per dose [*Exh. C5, p. 13*]. Prior to the delivery of the last 50 doses of frozen semen, the Equatorianian Government was forced to impose a 30% tariff on agricultural products as a retaliatory measure due to an equal imposition of tariffs by the Mediterranean Government.

92 As RESPONDENT had already transferred the total purchase price of US$ 10,000,000, it expected CLAIMANT to deliver the remaining 50 doses of frozen semen in time. Accordingly, RESPONDENT was caught off guard when CLAIMANT – in what turns out to be an attempt to take advantage of RESPONDENT's need for timely delivery – threatened to withhold the delivery unless RESPONDENT would bear the additional costs that arose due to the tariffs [*Exh. R4, p. 36*].

93 However, the Parties discussed possible transportation risks including the imposition of tariffs during the contractual negotiations [*Exh. C4, p. 12*]. Given RESPONDENT's lack of experience in the business of racehorse breeding, CLAIMANT promised to take care of all transportation and import matters by accepting *Delivery Duty Paid*, the most extensive delivery obligation for the seller including the duty to clear the goods for import [*PO2, p. 56 para. 8; Ebenroth et al., §346 para. 108*]. In return, RESPONDENT agreed to pay a higher purchase price [*PO2, p. 56 para. 8*].

94 CLAIMANT now requests the Tribunal to disregard the balanced basis of the Sales Contract by increasing its remuneration in the amount of US$ 1,250,000 [*Cl. Memo, para. 61*]. Relying on the Hardship Clause contained in Clause 12, CLAIMANT argues that the Sales Contract offers the legal basis for contract adaptation. However, CLAIMANT is not entitled to any additional amount as neither Clause 12 (**A.**) nor Art. 79(1) CISG (**B.**) provide a legal basis for an adaptation of the Sales Contract.

## A. CLAUSE 12 OF THE SALES CONTRACT DOES NOT ENTITLE CLAIMANT TO ANY ADDITIONAL PAYMENTS

95 CLAIMANT erroneously claims that Clause 12 contains a legal basis to adjust the contract and order RESPONDENT to pay additional US$ 1,250,000 [*Cl. Memo, para. 61*]. However, neither do the tariffs amount to hardship in the sense of Clause 12 nor does Clause 12 provide for the remedy of contract adaptation. Pursuant to Clause 12, the "*Seller shall not be responsible for lost semen shipments or delays in deliver not within the control of the Seller […] neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exh. C5, p. 14, emph. add.*].

96 Considering the overall contractual agreement and the Parties' allocation of risks, **first**, the tariffs do not amount to a comparable unforeseen event in the sense of Clause 12 (**I.**) and **second**, the contractual performance has not become more onerous for CLAIMANT (**II.**). In any event, the Tribunal should not order RESPONDENT to make additional payments based on Clause 12 (**III.**).

### I. THE TARIFFS DO NOT AMOUNT TO A COMPARABLE UNFORESEEN EVENT IN THE SENSE OF CLAUSE 12

97 As CLAIMANT correctly pointed out, "*hardship may arise due to certain events in the course of the performance of contract*" [*Cl. Memo, para. 71*]. However, the tariffs do not belong to those certain events as they

are no comparable unforeseen events in the sense of Clause 12. **First**, the negotiation history evidences the Parties' intention to exclude the risk of tariffs from the scope of Clause 12 (**1.**). **Second**, a reasonable third person has to understand Clause 12 to not embody the tariffs (**2.**).

### 1. The contractual history indicates that Clause 12 does not encompass the tariffs

98 An interpretation of Clause 12 under Art. 8(1), (3) CISG reveals the Parties' intention not to have Clause 12 encompassing the risk of tariffs. According to Art. 8(1) CISG, "*statements made by and other conduct of a party have to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*". Pursuant to Art. 8(3) CISG, in order to determine the intent "*due consideration is to be given to all relevant circumstances of the case including the negotiations […] and any subsequent conduct of the parties"*. Art. 8 CISG serves as the main instrument to interpret an agreement's content [*Franklins v Metcash; German Federal Court of Justice, VIII ZR 154/95; ICC NO. 8324; Roland Schmidt v Blumenegg; Huber/Mullis, p.12; Kröll et al., Art. 8 para. 2; Säcker et al., Art. 8 CISG para. 1*]. In particular, special importance needs to be given to the draft, former correspondence as well as any pre-contractual behavior [*Canton Appellate Court Thurgau, ZB 95 22; Brunner, CISG, Art. 8 para. 16; Honsell, Art. 8 para. 3; Säcker et al., Art. 8 CISG para. 20*].

99 Contrary to CLAIMANT's assertion that "*there is hardship under clause 12*" [*Cl. Memo, para. 8*], the negotiation history reveals that, **first**, CLAIMANT and RESPONDENT limited the number of possible hardship events covered by Clause 12 (**a.**); and, **second**, the Parties explicitly excluded tariffs from the scope of Clause 12 (**b.**).

#### a. The Parties' narrowed version of the Hardship Clause does not include the tariffs

100 The Parties agreed to include a narrow hardship clause excluding the risk of tariffs. In general, hardship clauses aim at preventing one party from being obliged to fulfill its obligation though the circumstances devaluate the performance [*Schlechtriem/Schwenzer, Art. 79 para. 57*]. Within the hardship clause, parties are free to specify and limit the circumstances which determine the existence of hardship [*Brunner, Force Majeure, p. 516; Obeid, p. 204*]. Both Parties indented to limit the scope of Clause 12 excluding the risk of tariffs for two reasons:

101 **First**, Clause 12 was meant to apply in rare and special circumstances only. CLAIMANT initially proposed to include the ICC hardship clause [*Exh. R2, p. 34*] excluding a party from liability if an "*event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that it could not reasonably have avoided or overcome the event or its consequences*" made the contract more onerous. As the Parties' negotiators considered it to be too broad, they limited the variety of possible hardship events to "*health and safety requirements or comparable unforeseen events*" [*Exh. R3, p. 35*]. Accordingly, the Parties intended Clause 12 to apply only in very special and rare circumstances.

102 **Second**, CLAIMANT falsely asserts that its intention to encompass the tariffs shall prevail according to RESPONDENT's silence [*Cl. Memo, para. 65*]. However, RESPONDENT argued against the fairly broad phrasing of the hardship clause without any legal obligation to do so [*cf. Higher Regional Court Jena, 7 U 303/10; Bamberger/Roth, Art. 8 para. 5; Schmidt, Art. 8 para. 17*]. Mr Krone of RESPONDENT discussed the issue with Mr Ferguson of CLAIMANT in a meeting prior to the incorporation of the narrowed version of the hardship clause [*Exh. C4, p. 12; Exh. R3, p. 35*]. Therefore, CLAIMANT's intention cannot lead to an interpretation of Clause 12 covering the tariffs.

**b. The Parties intentionally excluded tariffs from the scope of Clause 12**

103 The Parties' email exchange reveals that they deliberately decided to exclude tariffs from the scope of the Hardship Clause. CLAIMANT asserts that Clause 12 was intended to "*temper some of the additional risks taken [by CLAIMANT]*" [*Not. Arb., p. 5 para. 7*]. CLAIMANT takes recourse to an email of the 31st March 2017 trying to prove the Parties' intention to include tariffs [*Cl. Memo, para. 88*]. However, in that email CLAIMANT asked to be relieved from all risks "*associated with changes in customs regulation or import restrictions*", or at minimum to incorporate a hardship clause [*Exh. C4, p. 12*]. As both Parties decided on a hardship clause, it gets clear that they chose the second option and decided not to relieve CLAIMANT from the risk of tariffs. Accordingly, the Parties considered tariffs and deliberately decided not to include them into the scope of the Hardship Clause.

**2. A reasonable third person would not have understood Clause 12 to cover the imposition of tariffs according to Art. 8(2), (3) CISG**

104 Applying the reasonable third person test, the wording of Clause 12 does not cover the tariffs. The aforementioned clause requires the cause of "*hardship*" to be either additional health and safety requirements or a "*comparable unforeseen event*" [*Exh. C5, p. 14 para. 12*]. Pursuant to Art. 8(2) CISG, one party's intent is determined "*according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances"* [*cf. Kröll et al., Art. 8 para. 23; Lautenschlager, p. 259; Staudinger, Art. 8 para. 17*].

105 A reasonable third person in the shoes of CLAIMANT and RESPONDENT would not have understood the Hardship Clause to cover the tariffs. **First**, CLAIMANT assumed the risk of tariffs by changing the delivery terms to *DDP* (**a.**). **Second**, the Parties could have foreseen the tariffs (**b.**).

**a. CLAIMANT assumed the risk of the imposition of tariffs by agreeing to *DDP***

106 CLAIMANT assumed the risk of the tariffs by accepting *DDP*. *Delivery Duty Paid* represents the maximum obligation for the seller indicating that the seller has to bear all costs and risks associated with shipping the goods to the place of destination [*German Federal Court of Justice, VIII ZR 108/12*; *Piltz/Bredow, para. 501; Ramberg, p. 149*]. In particular, the seller has to pay all taxes and clear the goods for import [*Brunner, Force Majeure, p. 131; Piltz/Bredow, para. 501; Ramberg, p. 153*]. To be able

"*to recover such costs from the buyer*", a party has to include a phrase like "*not cleared for import*" [*Ramberg, pp. 149 et seq.*]. CLAIMANT argues that "*Respondent shall be responsible for that price*" [*Cl. Memo, para. 77*]. However, it conceals the fact that it accepted the risk of the tariffs by agreeing on *DDP*.

107 **First**, the Parties would have agreed on *DAP* or *DAT* delivery terms if they had wanted to exclude the risk of tariffs. Whilst *DAT* or *DAP* equally require the seller to deliver the goods to the premises of the buyer, they explicitly exclude the obligation to clear the goods for import [*Piltz/Bredow, para. 501; Ramberg, p. 153*]. Commentaries even urge parties to use *DAP* or *DAT* instead of *DDP* if they do not want to be responsible for any kind of taxes or tariffs [*Piltz/Bredow, para. 501; Ramberg, p. 153*]. As *DAP* and *DAT* in contrast to *DDP* only differ with regard to the responsibility for clearing the goods for import, CLAIMANT and RESPONDENT would have used the more suitable *DAP* or *DAT* delivery term if they have had the intention to exclude the tariffs. Therefore, CLAIMANT accepted the obligation to clear the goods when agreeing on *DDP*.

108 **Second**, RESPONDENT remunerated CLAIMANT for the assumption of the additional risk by increasing the purchase price. In general, CLAIMANT's standard terms provide for delivery *EXW*, the least demanding obligation for the seller [*Incoterms 2010*]. Subject to delivery *EXW*, the price per dose was US$ 99,500 [*PO2, p. 56 para. 8*]. With the change of delivery terms, RESPONDENT was willing to pay US$ 100,000 per dose in order to compensate the increase of risks [*Exh. C 5, p. 13*]. The change of delivery terms without such an increase of risks would render the change useless. In consequence, CLAIMANT accepted all risks associated with *DDP*, including the tariffs.

**b. The tariffs do not amount to a comparable unforeseen event in the sense of Clause 12**

109 Contrary to CLAIMANT's argumentation [*Cl. Memo, para. 66*], CLAIMANT could have foreseen the imposition of the tariffs. An event is foreseeable if it is not completely outside the bounds of probability [*Da Silveira, p. 323; Perillo, pp. 128 et seq.*]. In particular, the normal risks generally associated with international Sales Contracts such as import restrictions are foreseeable [*ICC No. 9978; Da Silveira, p. 323; Ramberg, p. 149; Trebilcock/Howse, p. 260*].

110 **First**, the political situation in both Parties' countries of origin made the imposition of tariffs appear likely. Only four months prior to the conclusion of the Sales Contract, the later elected Mediterranean President had announced a protectionist approach to international trade in its election program that he started to implement in April 2017 [*Exh. C6, p. 15*]. Given the fact that the Equatorianian Government has taken measures of retaliation before and that such measures are common in international trade [*Princen, para. 4.6.2; Zeng, pp. 249 et seq.*], CLAIMANT should have taken the imposition of tariffs into consideration when concluding the Sales Contract. This holds especially true since the Government of CLAIMANT's country of origin triggered the tariffs [*Exh. C6, p. 15*]. Thus, CLAIMANT could have foreseen the tariffs due to the political situation.

111 **Second**, the tariffs are not of an unpredictable natural origin. The Hardship Clause was designed to prevent CLAIMANT from "*safety and health requirements*" comparable to the ones it had faced due to the foot and mouth disease [*PO2, p. 58 para. 21*]. In fact, safety and health requirements are implemented as a reaction to naturally caused events that are impossible to foresee. To the contrary, tariffs are man-made decisions of mere political nature. Whereas the cause of tariffs lies within the control of the politicians, the cause of diseases lies outside their sphere of control. For this reason, the tariffs are not comparable to safety and health requirements.

112 **Third**, CLAIMANT unfoundedly tries to rely on Equatoriana's and Mediterraneo's membership of the World Trade Organization [hereinafter: WTO] in order to assert that the tariffs were unforeseeable [*Cl. Memo, para. 66*]. However, the addressees of the WTO-laws are only the member states [*Ipsen, § 49 para. 4*]. The fact that they implemented a dispute resolution mechanism even proves that the member states expected the WTO-laws to be violated [*Ipsen, § 49 para. 26*]. In addition, CLAIMANT fails to prove that the Parties considered the WTO-membership when concluding the Sales Contract. To the contrary, CLAIMANT only cared about the imposition of health and safety requirements such as the ones following the foot and mouth disease [*Exh. C4, p. 12; Not. Arb., p. 5*]. However, the WTO-laws allow import restrictions if they concern the risks to *"human, animal or plant life or health"* [*Art. 5.1 SPS; cf. Prieß/Berrisch, B.I.3. para. 88*]. Hence, the WTO-membership has no influence on the foreseeability of the tariffs.

## II. THE CONTRACTUAL PERFORMANCE HAS NOT BECOME MORE ONEROUS FOR CLAIMANT

113 CLAIMANT cannot establish that the tariffs meet the Parties' threshold for hardship requiring an unforeseen event that "*makes the contract more onerous*" [*Cl. Memo, para. 67*]. In general, every party bears the risk of its performance becoming more expensive or burdensome [*Brunner, Force Majeure, p. 423; Patocchi, p. 35*]. Only under extreme circumstances going hand in hand with a fundamental alteration of the contractual equilibrium, hardship clauses serve as an exception of this general liability [*American Trading v Shell Marine; ICC No. 8486; Tsakiroglou v Noblee Thorl; Brunner, Force Majeure, p. 423*].

114 The tariffs are far from fundamentally altering the contractual equilibrium as, **first**, the tariffs do not meet the agreed threshold for hardship (**1.**); **second**, CLAIMANT's financial situation is irrelevant when determining the existence of hardship (**2.**); and, **third**, the vanishing of CLAIMANT's profit cannot justify the finding of hardship (**3.**).

### 1. The tariffs do not meet the agreed threshold of making the contract "*more onerous*"

115 Pursuant to Art. 8(1), (3) CISG, both Parties agreed on a threshold making the contract "*more onerous*", thereby surpassing the imposition of 30 % tariffs. As CLAIMANT rightfully states, the

Parties' definition of "*more onerous*" requires an event that "*fundamentally alters the equilibrium of a contract resulting in an excessive burden*" [*Cl. Memo, para. 67*]. However, the imposition of the tariffs does not result in an excessive burden for CLAIMANT.

116 **First**, the Parties deliberately agreed on a high threshold as they included their Hardship Clause into the existing Force Majeure Clause. Events, which fall under force majeure are beyond the obligor's sphere of control, such as acts of God, industrial disasters or men-made catastrophes [*Brunner, Force Majeure, p. 206*]. Thus, a high threshold applies for an event to be considered as a force majeure situation. By including the Hardship Clause into the existing Force Majeure Clause, the Parties' will for a similarly high threshold applying to the Hardship Clause becomes apparent.

117 **Second**, the price increase of merely 15% does not fundamentally alter the contractual equilibrium. It is widely accepted that an increase of the costs of performance has to be at least 100% in order to fundamentally alter the contractual equilibrium [*Publicker Industries v Union Carbide Corp.; Brunner, Force Majeure, p. 431*]. The original purchase price was US$ 10,000,000 whereas the price including the tariffs amounts to US$ 11,500,000. Thus, the price increased by only 15%. Given the fact that the Parties incorporated a narrow version of the Hardship Clause providing for a high threshold, the price increase of 15% does not fundamentally alter the equilibrium.

118 This view is supported by the decision *American Trading v Shell Marine* rendered by the US Court of Appeals for the 2nd Circuit in January 1972. In that case, the plaintiff promised to transport the defendant's cargo on a tank vessel from Texas to India. When the plaintiff was on its way to India, the Suez Canal was closed due to a war. The additional shipping costs amounted to approx. US$ 132,000. The plaintiff sued the defendant to bear these additional costs, claiming that the contract was fundamentally altered. The court dismissed the claim as the increase of less than one third from the agreed approx. US$ 420,000 was not sufficient to make the contractual performance more onerous. Likewise, the tariffs did not even increase the price by one sixth of the original purchase price. Thus, the tariffs do not fundamentally alter the contractual equilibrium.

119 **Third**, assuming but not conceding that a lower threshold applies, the Tribunal should not find that the contract has become more onerous as the Parties at least agreed on an alteration of 40%. The negotiation of the Hardship Clause was based on CLAIMANT's previous experience with the foot and mouth disease [*PO2, p. 58 para. 21*]. In that case, CLAIMANT was forced to undertake with additional medical tests due to health requirements that increased the price by 40%. When CLAIMANT proposed the Hardship Clause to address "*such subsequent changes*", RESPONDENT could have reasonably assumed that the threshold when agreeing on "*more onerous*" should remain the same. As a matter of fact, the tariffs only increased the price by 15% but do not amount to 40%. Thus, the tariffs do not meet the threshold to make the contract more onerous.

120 **Fourth,** in the unlikely event that the Tribunal admits the PIA as evidence, the PIA does not justify the finding that the tariffs fundamentally alter the equilibrium of the Sales Contract. CLAIMANT argues that RESPONDENT itself considers the tariffs to constitute hardship [*Cl. Memo, para. 48*]. Notwithstanding the fact that the circumstances of the other proceedings fundamentally differ, RESPONDENT incurred higher costs in the amount of 25% of the original costs. Thus, even if CLAIMANT submits the PIA, its increase in costs by 15% does not meet the threshold of hardship in the second proceeding. Hence, the PIA cannot justify the finding of hardship under Clause 12.

### 2. CLAIMANT's financial situation is irrelevant when determining the threshold of hardship under Clause 12

121 CLAIMANT artificially attempts to create the impression of a hardship situation by referring to its financial situation [*Cl. Memo, para. 73*]. However, CLAIMANT itself refers to a general rule [*Cl. Memo, para. 73*] determining that the financial capacity of a party lies within its own control and does not authorize the concerned party to invoke hardship [*CISG-online 187; Brunner, Force Majeure, p. 436; Da Silveira, p. 220; Girsberger/Zapolskis, p. 131; Säcker et al., § 313 para. 223*]. The mere existence of financial difficulties does not constitute a fundamental alteration of the contractual equilibrium [*Da Silveira, p. 220; Girsberger/Zapolskis, p. 131*]. This holds especially true if the impending ruin results from a lack of managerial skills or resources [*Girsberger/Zapolskis, p. 131*].

122 Whereas it might be true that CLAIMANT's financial situation is difficult [*Exh. C8, p. 17*], the Hardship Clause was not meant to save CLAIMANT's commercial basis. Rather, it should only ensure the commercial basis of the deal [*Exh. C4, p. 12*]. In consequence, CLAIMANT has to stick to the contract and keep its internal financials within its own sphere of business. Thus, CLAIMANT's financial situation is not relevant when determining the threshold of hardship under Clause 12.

### 3. The vanishing of CLAIMANT's profit does not lead to hardship

123 Allegedly left without any profit, CLAIMANT tries to invoke hardship to gain a benefit from the Sales Contract [*Cl. Memo, para. 67*]. However, CLAIMANT's profit margin cannot classify the tariffs as hardship. "*A party cannot invoke hardship in performance simply because the contract turns out to be unprofitable*" [*ICC No. 8486*]. Rather, the threshold for making contractual performances "*more onerous*" only depends on the increase of the costs of the performance irrespective of the profit margin [*Swiss Federal Supreme Court, BGE 104 II 314*]. In fact, the net profit refers to the benefits regarding the whole business relationship between the parties including financial profit but also a reliable business partnership [*Berger, p. 238; Reynolds, p. 44*].

124 CLAIMANT alleges that the Sales Contract contained a mutual benefit agreement stating that "*the key to the mutually beneficial agreement is to gain net profit on both sides*" [*Cl. Memo, para. 105*]. Both Parties stressed in their emails that they intended to establish a long-term business relationship [*Exh. C2,*

*p. 10; Exh. C3, p. 11*] being beneficial not only at the moment but also in the future. Accordingly, it was not the Sales Contract *per se* but rather the whole relationship that was meant to constitute the net profit for both Parties. If one followed CLAIMANT's argumentation, hardship clauses would become an instrument to avoid contracts as soon as subsequent changes prove them to be unfavorable. That is why CLAIMANT's lack of profit cannot be taken into account when determining whether hardship exists.

## III. THE TRIBUNAL SHOULD NOT ORDER ADDITIONAL PAYMENTS PURSUANT TO CLAUSE 12 OF THE SALES CONTRACT

125 The Parties' Hardship Clause does not provide for the remedy of contract adaptation. **First**, the Hardship Clause does not provide any hint towards contract adaptation (**1.**). **Second**, RESPONDENT did not commit to further payments (**2.**); and, **third**, an increase of CLAIMANT's remuneration violates the Parties' freedom of contract (**3.**).

### 1. The Hardship Clause does not contain any hint towards contract adaptation

126 CLAIMANT falsely argues that RESPONDENT has to bear the tariffs as Clause 12 reads that "*the seller shall not be responsible*" [*Cl. Memo, para. 77*]. However, Clause 12 does not contain the legal basis to force RESPONDENT to an additional payment as, **first**, its wording does not provide for contract adaptation (**a.**) and, **second**, the Parties had no intention to include contract adaptation (**b.**).

#### a. The right to adapt the Sales Contract does not follow from the wording of Clause 12

127 The wording of Clause 12 does not refer to contract adaptation. Hardship clauses generally do not provide for price adaptation [*Brunner, Force Majeure, p. 479*]. Rather, they only offer the legal consequences expressly stipulated within the clause [*ICC Hardship Clause 2003; Horn, p. 175*]. Hence, the question whether a hardship clause provides for contract adaptation depends on the legal consequence stated within the clause [*Brunner, Force Majeure, p. 390*]. CLAIMANT itself acknowledges "*the lack of a specific contractual provision on adaptation*" [*Cl. Memo, para. 70*]. Therefore, Clause 12 does not contain a legal basis to increase CLAIMANT's remuneration.

#### b. The Parties did not intend Clause 12 to give the right to adapt the Sales Contract

128 The Parties did not intend Clause 12 to allow for contract adaptation. CLAIMANT relies upon its proposal to include an express reference to contract adaptation into the hardship clause to prove the Parties' intention to include it as a remedy into Clause 12 [*Cl. Memo, para. 70*]. However, parties' intentions during the negotiations of a contract are only relevant if they were also present at the time the contract was concluded [*van den Berg, Vol. XIII, p. 599; Enderlein/Maskow, Art. 8 para. 3.1; Staudinger, Art. 8 para. 15; Voser, p. 164*].

129 Even though, the Parties' negotiators talked about the incorporation of an express reference allowing for contract adaptation into the Hardship Clause, the final negotiators decided on abandoning the idea [*Exh. C8, p. 17*]. RESPONDENT's final negotiator, Mr Krone, did not even know about the intention to include an adaptation reference since it was not mentioned in the note of RESPONDENT's previous negotiator Mr Antley which served as guidance for the following negotiations [*Exh. R3, p. 35*]. Thus, when signing the Sales Contract, the Parties did not intend to include the remedy of contract adaptation.

**2. RESPONDENT has not agreed to further payments after the imposition of the tariffs**

130 Contrary to CLAIMANT's argumentation [*Cl. Memo, para. 78*], RESPONDENT did not commit to any further payments subsequent to the imposition of the tariffs. CLAIMANT artificially tries to create the impression that RESPONDENT agreed to further payments relying upon the statement of RESPONDENT's Mr Shoemaker from a phone conference on 21st January 2018 stating that "*if the contract provides for an increased price […] [the Parties] will certainly find an agreement on the price*" [*Exh. R4, p. 36; emph. add.*]. However, this results in a circular argument. As the statement requires an existing legal obligation to bear the tariffs arising out of the Sales Contract, it cannot constitute said obligation at the same time.

131 In addition, the statement merely clarified what should have been clear to CLAIMANT anyway – had the Sales Contract contained an obligation to pay the tariffs, RESPONDENT would have adhered to its obligation. As Ms Napravnik of CLAIMANT constantly threatened RESPONDENT to withhold the urgently needed delivery of the last 50 doses of frozen semen, Mr Shoemaker felt the need to clarify the issue [*Exh. R4, p. 36*]. As Mr Shoemaker even stated that he is not a lawyer and that he was not authorized to admit to further payments [*Exh. C8, p. 18*], CLAIMANT could not have been unaware of the fact that the statement was not meant to be a commitment to any further payment. Thus, contrary to CLAIMANT's assertion, RESPONDENT did not agree to pay the tariffs.

**3. An adaptation of the Sales Contract violates the Parties' freedom of contract**

132 An adaption of the Sales Contract results in a violation of the Parties' freedom of contract. According to the principle of *freedom of contract*, parties are free to negotiate their own contracts [*Printing v Sampson*; *Frick, p. 191; Fridman, p. 1; Hasan, p. 11*; *Zimmermann, p. 576*]. Allowing a third party to alter a contract without explicit permission results in forcing an agreement upon the parties that they never reached and enables one party to receive more than it was able to negotiate [*Brunner, Force Majeure, p. 506; Momberg, p. 258*]. Hence, the unknown result of an alteration leads to great uncertainties [*Brunner, Force Majeure, p. 506*]. For that reason, the ICC hardship clause only allows for a renegotiation or the termination of the contract [*Da Silveira, p. 335; Ferrario, p. 138*].

133 During the negotiations of the Sales Contract, RESPONDENT rejected CLAIMANT's proposal to pay US$ 100,500 per dose [*PO2, p. 56 para. 8*]. However, an increase of CLAIMANT's remuneration in the amount of US$ 1,250,000 would lead to a price of US$ 112,500 instead of US$ 100,000 per dose and, hence, would force RESPONDENT to pay a price CLAIMANT was not able to negotiate when concluding the Sales Contract. Thus, an adaptation of the Sales Contract violates the Parties' freedom of contract.

## B. CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT UNDER THE CISG AND THE UPICC

134 RESPONDENT requests the Tribunal to refrain from increasing CLAIMANT's remuneration under Art. 79 CISG in line with Art. 6.2.2, 6.2.3 UPICC as the additional burden of an extra payment is without any legal basis within the CISG. **First**, Art. 79 CISG is not applicable to the case at hand at all (**I.**). **Second**, the tariffs do not amount to hardship in the sense of Art. 6.2.2 UPICC (**II.**).

### I. ART. 79 CISG DOES NOT APPLY TO THE PRESENT CASE WHILE EXCLUDING THE REMEDY OF CONTRACT ADAPTATION

135 CLAIMANT cannot rely on Art. 79 CISG to justify its demand for additional payments as, **first**, the Parties derogated from Art. 79 CISG by including the Hardship Clause (**1.**); **second**, the CISG does not govern hardship (**2.**); and, **third**, in any event, the CISG does not provide for the remedy of contract adaptation (**3.**).

#### 1. The Parties derogated from the CISG in cases of changed circumstances

136 Art. 79 CISG is not applicable as the Parties derogated from it due to the inclusion of the Hardship Clause. Pursuant to Art. 6 CISG, parties are empowered to exclude the application of the CISG in total or to derogate from certain provisions [*Olivaylle v Flottweg; Plaza Oviedo v Agricola Sacor; CISG, Art. 6 para. 1; Huber/Mullis, p. 60; Schlechtriem/Schwenzer, Art. 6 para. 12; Schmidt, Art. 6 para. 22*]. Contrary to CLAIMANT's assertion [*Cl. Memo, para. 86*], the derogation can also be made implicitly [*Rheinland Versicherungen v Atlarex; Bonell, p. 55; Official Records II, pp. 249 et seq*]. In general, parties implicitly exclude the application of certain provisions whenever they include detailed provisions concerning one issue into their agreement [*Honsell, para. 9; Kröll et al., Art. 6 para. 13; Winsor, p. 86*]. Accordingly, the inclusion of a hardship clause usually amounts to a derogation from Art. 79 CISG [*Born, p. 422; Kröll et al., Art. 6 para. 25*].

137 CLAIMANT and RESPONDENT negotiated a narrow-worded Hardship Clause that includes various specifications, adjusting the contractual hardship provision to their specific needs. As CLAIMANT only relies upon Art. 79 CISG in case these specific requirements are not met, the application of

Art. 79 CISG circumvents the agreement contained in the Sales Contract. Hence, in order to give full effect to the agreement, the Parties impliedly excluded the application of Art. 79 CISG.

### 2. In case of its application, the CISG does not recognize the concept of hardship

138 Even if the Parties did not derogate from the CISG, it does not govern hardship. **First**, Art. 79(1) CISG does not contain the legal concept of hardship (**a.**). **Second**, the UPICC must not be used to read the concept of hardship into Art. 79(1) CISG (**b.**).

#### a. Art. 79(1) CISG does not provide for a legal remedy in cases of hardship

139 The CISG does not recognize the legal concept of hardship. CLAIMANT bases its claim for hardship on Art. 79(1) CISG [*Cl. Memo, para. 86*]. Pursuant to this article, "*a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account […] or to have avoided or overcome it […].*" In fact, it does not contain a single word suggesting that it applies to hardship [*Ferrari et al., p. 97; Kröll et al., Art. 79, para. 78; Rimke, p. 217*]. Several proposals to expressly include hardship into the CISG were rejected during the drafting of the convention [*DiMatteo, p. 274; Rimke, p. 219*]. As Art. 79(1) CISG merely sets definite limits to the obligor's responsibility for a breach of contract [*Bianca/Bonell, Art. 79 para. 3.1.2.; Rimke, p. 219*], hardship was deliberately omitted in order to leave no room for any gap-filling mechanisms [*Rimke, p. 219*].

#### b. The UPICC must not be used to construe the concept of hardship under Art. 79 CISG

140 CLAIMANT refers to the UPICC *"in order to reach the desirable result"* of adapting the contract on the grounds of hardship [*Cl. Memo, para. 94*]. However, the UPICC do not provide any reason for the alteration of the contractual risk allocation. CLAIMANT bases its argumentation on Art. 7(2) CISG [*Cl. Memo, para. 94*], according to which "*[q]uestions concerning matters governed by this Convention […] are to be settled in accordance with the general principles on which it is based […]*" [*emph. add.*]. Only *in case* the concerned issue is governed by the CISG, general principles might be taken into account. However, they must not serve as guidance to determine whether or not said issue is covered by the convention *at all* [*Ferrari et al., p. 100*]. To the contrary, the CISG needs to be interpreted autonomously without guidance of external principles [*Bianca/Bonell, Art. 7 para. 2.3; Ferrari et al., p. 101; Schlechtriem/Schwenzer, Art. 7 para. 62*]. Therefore, the Tribunal should not refer to the UPICC to construe the concept of hardship under Art. 79 CISG.

### 3. Neither does the CISG provide for the remedy requested by CLAIMANT

141 In any event, Art. 79(1) CISG does not provide for a price adjustment. Trying to create a legal basis for its remedy by any means, CLAIMANT relies on Art. 79(1) CISG [*Cl. Memo, para. 95*]. Even if one affirms hardship under Art. 79 CISG, the CISG still does not provide for contract adaptation [*Kröll et al., Art. 79 para. 86; Säcker et al., Art. 79 para. 21*]. Given the lack of clear rules in order

to determine whether an adaptation is appropriate, price adjustments are known to lack certainty and clarity [*Momberg, p. 250*]. As parties allocate the risks by the means of an express provision or silence, any adjustment to their agreement is a threat to the freedom of contract and a restriction of the parties' autonomy [*Brunner, Force Majeure, p. 506; Momberg, p. 243*]. The "*classical approach to the effect of unexpected circumstances [under the CISG]*" [*Momberg, p. 258*] is the right of the disadvantaged party to terminate the contract [*Kröll et al., Art. 79 para. 83; Momberg, p. 258; Säcker et al., Art. 79 para. 21*]. Even if hardship is confirmed under Art. 79 CISG, CLAIMANT cannot demand an adaptation of the purchase price as this remedy is alien to Art. 79(1) CISG.

## II. THE TARIFFS ARE NO HARDSHIP IN THE SENSE OF ART. 6.2.2 UPICC

142 Even if one followed CLAIMANT's argumentation and applied Art. 79(1) CISG in line with Art. 6.2.2 UPICC [*Cl. Memo, para. 84*], the mere imposition of 30 % tariffs does not amount to hardship. According to Art. 6.2.3(4)(b) UPICC, hardship is an indispensable requirement for the adjustment of the price. Hardship exists "*where the occurrence of events fundamentally alters the equilibrium of the contract […] because the cost of a party's performance has increased […]*" (Art. 6.2.2 UPICC). This is under the strict condition that the event was not known to the parties at the time of contract conclusion (6.2.2(a) UPICC), the events could not reasonably have been taken into account by the disadvantaged party (6.2.2(b) UPICC), the event arose beyond the parties' control (6.2.2(c) UPICC) and that the disadvantaged party did not assume the risk of the events (6.2.2(d) UPICC). If only one of these conditions is not fulfilled, one cannot assume hardship [*Bonell, p. 327*; *Keilhack, p. 2; Vogenauer, Art. 6.2.2 para. 1*].

143 **First**, the tariffs do not amount to hardship under Art. 79(1) CISG and Art. 6.2.2 UPICC. **Firstly**, the political situation prior to the conclusion of the Sales Contract was tainted with protectionist notions and, thus, CLAIMANT knew about the high probability of newly imposed tariffs at the time of contract conclusion (6.2.2(a) UPICC). **Secondly**, the more protectionist approach of the Mediterranean President equally proves the imposition of tariffs to be an event which could not have been ignored by CLAIMANT as the disadvantaged party (6.2.2.(b) UPICC). **Thirdly**, CLAIMANT assumed the risk of tariffs by accepting *DDP* as the most extensive obligation for the seller including the explicit duty to clear the goods for import (6.2.2.(d) UPICC). Hence, the tariffs do not constitute hardship in the sense of Art. 6.2.2 UPICC.

144 **Second**, CLAIMANT's assertion that RESPONDENT acted against good faith [*Cl. Memo, para. 80*] is irrelevant when determining the existence of hardship. CLAIMANT relies upon RESPONDENT's alleged breach of contract to justify hardship [*Cl. Memo, para. 80*]. However, neither Art. 79(1) CISG nor Art. 6.2.2 UPICC mention the contractual partner. Rather, they focus on the "*disadvantaged party*" and the objective circumstances concerning the affected performance. Hence, CLAIMANT's

allegation of RESPONDENT's bad faith behavior does not find any legal recognition within the applicable law and, thus, is not relevant when determining the existence of hardship.

**CONCLUSION ISSUE III**

145 RESPONDENT requests the Tribunal not to grant CLAIMANT an additional payment of US$ 1,250,000. Neither does Clause 12 encompass the tariffs nor does it provide for contract adaptation as a legal consequence. Given the fact that the tariffs increased the price by only 15% and that CLAIMANT assumed the risks by agreeing on *DDP*, the tariffs do not fundamentally alter the contractual equilibrium. Likewise, CLAIMANT cannot rely on Art. 79(1) CISG to justify its request as either Art. 79(1) CISG is not applicable or its requirements are not met.

## REQUEST FOR RELIEF

In the consideration of the above submissions RESPONDENT requests the Tribunal to

**I.** dismiss CLAIMANT's claim due to its lack of jurisdiction and power to increase CLAIMANT's remuneration;

**II.** dismiss CLAIMANT's request to submit the Partial Interim Award as evidence;

**III.** reject CLAIMANT's demand for an additional payment of US$ 1,250,000 or any other amount since

- neither Clause 12 of the Sales Contract
- nor Art. 79(1) CISG

provide for contract adaptation;

**IV.** to order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Respectfully submitted on 24th January 2019

Friederike Bock | Lisbeth Kaufholz | Dennis Löher

Klara Nolting | Sophie Strohbecke | Alexander Wilhelmy