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INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG

MEMORANDUM FOR RESPONDENT

WESTFÄLISCHE WILHELMS-UNIVERSITÄT MÜNSTER

MARKUS DIEKMANN | MAXIMILIAN EDINGER

DOMINIK MARCZOK | PEA SCHROVEN | JANA SCHUMACHER

On Behalf Of

RESPONDENT
BLACK BEAUTY EQUESTRIAN

2 Seabiscuit Drive
Oceanside
Equatoriana

Against

CLAIMANT
PHAR LAP ALLEVAMENTO

Rue Frankel 1
Capital City
Mediterraneo

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CISG AC No. 7	CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, Rapporteur: Garro, Alejandro M., Columbia University School of Law, New York 12 October 2007. Available at: www.cisg.law.pace.edu/cisg/CISG-AC-op7.html	221

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Jenkins	Jenkins, Sarah Howard, Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment In: Tulane Law Review, Vol. 72 (1998), pp. 2015-2030. Available at: www.cisg.law.pace.edu/cisg/biblio/jenkins.html	183
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Kröll	Kröll, Stefan Michael, Die Ergänzung und Anpassung von Verträgen durch Schiedsgerichte – Eine Untersuchung zum deutschen und englischen Recht, in: Internationales Wirtschaftsrecht, Band 16, Cologne 1998.	49

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Kröll, Arbitration	Kröll, Stefan Michael, Arbitration and the CISG, in: Schwenzer, Ingeborg/Atamer, Yesim M./Butler, Petra (eds.), Current Issues in the CISG and Arbitration, Netherlands 2014.	20, 23, 34, 44
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Lew/Mistelis/ Kröll	Lew, Julian/Mistelis, Loukas/ Kröll, Stefan Michael (eds.), Comparative International Commercial Arbitration, The Hague 2003.	20

Lindström	Lindström, Niklas, Changed Circumstances and Hardship in the International Sale of Goods, in: Nordic Journal of Commercial Law, No. 1 (2006), pp. 1-29.	182
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Lookofsky	Lookofsky, Joseph, Understanding the CISG in Scandinavia, Copenhagen 1996.	153
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Magnus, General Principles	Magnus, Ulrich, Die allgemeinen Grundsätze im UN-Kaufrecht, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 59 (1995), pp. 469-491. Available at: http://www.cisg.law.pace.edu/cisg/text/magnus.html	216
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PICC Official Comments	UNIDROIT Principles of International Commercial Contracts, International Institute for the Unification of Private Law (UNIDROIT), Commentary, Rome 2016.	226
Pirozzi	Pirozzi, Roberto, Developments in the Change of Economic Circumstances Debate?, in: Vindobona Law Journal of International Commercial Law and Arbitration, 2012, pp. 95-112.	164, 182
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Raeschke-Kessler	Raeschke-Kessler, Hilmar, Die Beweiserhebung in internationalen Schiedsverfahren, in: Beweiserhebung in internationalen Schiedsverfahren, Böckstiegel, Karl-Heinz (ed.), Köln 2001, pp. 41-76.	98

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Rimke	Rimke, Joern, Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT-Principles of International Commercial Contracts; in: Pace Review of the Convention on Contracts for the International Sale of Goods (1999-2000), Alphen aan den Rijn 2001, pp. 197-243.	164, 182, 202
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Russell	Sutton, David/Kendall, John/Gill, Judith, Russell on Arbitration, 21st ed., London 1997.	44
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Slater	Slater, Scott D., Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG, in: Florida Journal of International Law, Vol. 12 (1998), pp. 231-262. Available at: https://cisgw3.law.pace.edu/cisg/biblio/slater.html	182, 188, 210
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UNCITRAL Yearbook V	United Nations, Yearbook of the United Nations Commission in International Trade Law, Vol. V, New York 1974. Available at: www.uncitral.org/uncitral/en/publications/yearbook.html	182
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Vienna Official Records	United Nations Conference for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, New York 1991.	183
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Waincymer	Waincymer, Jeffrey, Procedure and Evidence in International Arbitration, The Hague 2012.	11, 119, 123
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INDEX OF ABBREVIATIONS

Abbreviation	Full Text
INCOTERMS	ICC rules for the use of domestic and international trade terms (Incoterms® 2010)
Art./Artt.	Article/Articles
cf.	confer (compare)
CISG	UN Convention for International Sale of Goods 1980
CLOUT	Case Law on UNCITRAL-Texts
DAL	Danubian Arbitration Law
DDP Delivery	Delivered Duty Paid (Incoterms® 2010)
ed.	Edition
ed./eds.	Editor/Editors
et al.	et alii/et aliae (and others)
et seq./ et seqq.	and following
Ex. C/Ex. R	Claimant's Exhibit/ Respondent's Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
i.e.	id est (this is to say)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	ibidem (at the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
No.	Number
Notice	Notice of Arbitration

p./pp.	Page/Pages
para./paras.	Paragraph/ Paragraph
PICC	UNIDROIT Principles on International Commercial Contracts 2016
PO	Procedural Order
supra	vide supra (see above)
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar
v	versus
vol.	Volume

STATEMENT OF FACTS

1 The parties to this arbitration are Phar Lap Allevamento [*hereinafter "**CLAIMANT**"*] and Black Beauty Equestrian [*hereinafter "**RESPONDENT**"*].

2 CLAIMANT runs a stud farm covering all areas of equestrian sports and is experienced in the sale of frozen semen. The company is based in Mediterraneo.

3 RESPONDENT operates a horse stable in Equatoriana. It strives to establish a business in the competitive market of racehorse breeding.

21 Mar 2017 CLAIMANT and RESPONDENT [*hereinafter "**the Parties**"*] start negotiating the Frozen Semen Sales Agreement [*hereinafter "**Sales Agreement**"*].

31 Mar 2017 The Parties agree on "Delivery Duty Paid" [*hereinafter: "**DDP Delivery**"*] for the shipment of frozen semen. In light of this, CLAIMANT increases the price.

12 Apr 2017 Mr Antley for RESPONDENT and Ms Napravnik for CLAIMANT, are involved in a car accident and replaced. This delays the conclusion of the Sales Agreement.

25 Apr 2017 Mr Bouckaert is elected as the new president of Mediterraneo. He advocates protectionist policies, in particular in relation to the agricultural sector.

05 May 2017 The new president appoints Ms Frankel as minister for agriculture, trade and economics. She is known as one of the most ardent critics of free trade.

06 May 2017 Mr Ferguson for CLAIMANT and Mr Krone for RESPONDENT conclude the final Sales Agreement. CLAIMANT sells RESPONDENT 100 doses of frozen semen for USD 100,000 per dose. They are shipped in three instalments.

15 Nov 2017 Mr Bouckaert imposes tariffs of 25 per cent on agricultural goods.

19 Dec 2017 Equatoriana announces retaliatory tariffs against Mediterraneo. These amount to 30 per cent and cover agricultural products including frozen semen.

15 Jan 2018 The previously announced tariffs take effect.

23 Jan 2018 CLAIMANT delivers the remaining 50 doses.

12 Feb 2018 The Parties meet to discuss the tariffs and renegotiate. They cannot find an amicable solution.

31 Jul 2018 CLAIMANT initiates arbitration against RESPONDENT at the Hong Kong International Arbitration Centre, requesting an adaptation of the price.

02 Oct 2018 CLAIMANT notifies the Arbitral Tribunal [*hereinafter "**the Tribunal**"*] that it intends to submit a Partial Interim Award [*hereinafter "**Award**"*]. This Award deals with another arbitration RESPONDENT is involved in. CLAIMANT obtained this Award from an intelligence company.

SUMMARY OF ARGUMENTS

4 By betting all its money on one horse, CLAIMANT played a daring game. Even though times were challenging for free trade, it assumed additional import obligations. Despite years of experience, it chose to resort to such risky business decisions in order to overcome its financial difficulties. CLAIMANT now attempts to evade its responsibilities. Instead of adhering to the terms the Parties agreed on, it resorts to the Tribunal to present its request for adaptation. In doing so, it does not even shy away from contacting dubious sources to purchase confidential information on its competitor, RESPONDENT.

5 In light of this, RESPONDENT makes the following three submissions:

1. The Tribunal has neither jurisdiction nor power to adapt the Sales Agreement.

   Danubian law governs the interpretation of the Arbitration Agreement. This Arbitration Agreement does not grant the Tribunal jurisdiction and power to adapt the Sales Agreement. Thus, CLAIMANT cannot rely on this Arbitral Tribunal to pursue its request.

2. The Award CLAIMANT seeks to submit is inadmissible.

   The Award that CLAIMANT tries to introduce as evidence has no significance to this proceeding. Amongst other grounds, the Award is barred from submission due to its inherent confidentiality. Its inadmissibility also stems from CLAIMANT's conduct: Although CLAIMANT is aware that the Award was obtained illegally, it is willing to purchase the information from a dubious intelligence company.

3. CLAIMANT is not entitled to an adaptation of the price.

   CLAIMANT has assumed responsibility for payment of the retaliatory tariffs under the Sales Agreement. Neither the Sales Agreement nor the CISG allows for an adaptation of the price. The imposition of tariffs does not lead to any obligations for RESPONDENT. Thus, CLAIMANT cannot request an adaptation of the price.

FIRST ISSUE: THE TRIBUNAL HAS NEITHER JURISDICTION NOR POWER TO ADAPT THE SALES AGREEMENT

6 RESPONDENT respectfully requests the Tribunal to find that it has neither the jurisdiction nor the power to adapt the Sales Agreement under the Arbitration Agreement. As a result of their negotiations, the Parties agreed on a particular set of terms for particular goods at a particular purchase price. Now that CLAIMANT faces financial difficulties, it attempts to depart from the contractual terms previously agreed upon. It does not only purport the need to revise the agreed upon purchase price. CLAIMANT further attempts to widen the scope of the Arbitration Agreement that the Parties deliberately "*narrowed down and streamlined*" [*Ex. R1, p. 33*]. It does so by relying on an unwarrantedly broad interpretation of the Arbitration Agreement under Mediterranean law [*cf. Cl. Memo., p. 18 para. 35*].

7 In light of this, RESPONDENT relies on the Tribunal to honour the initial contractual framework. It shall prevent CLAIMANT from utilising the Tribunal to solve CLAIMANT's self-inflicted business troubles. Whilst the Tribunal is entrusted with solving the Parties' legal disputes, it is not entrusted with rewriting the terms of the Sales Agreement.

8 Honouring the Parties' Arbitration Agreement, the Tribunal should, first, find that the seat of this arbitration is not Hong Kong [*cf. Cl. Memo., p. 12 para. 11*] but Danubia (**A**). Second, the Arbitration Agreement is in fact also governed by Danubian law (**B**). Third, the interpretation of the Arbitration Agreement evidences the Tribunal's lack of jurisdiction and power to adapt the Sales Agreement (**C**).

A. Danubia Is the Seat of Arbitration

9 The Parties chose Danubia as seat of their arbitration.

10 CLAIMANT asserts that the seat of arbitration is Hong Kong [*Cl. Memo., p. 12 para. 11*]. It assumes that the "seat" specifies the jurisdictional base of the arbitration [*Cl. Memo., p. 11 paras. 5 et seq.*]. In contrast, the "place" of arbitration shall only refer to its mere physical venue [*Cl. Memo., p. 11 para. 5*]. CLAIMANT assumes that the Parties chose Danubia only as place of arbitration [*Cl. Memo., p. 11 para. 10*]. In this purported absence of a designated seat, it then refers to Hong Kong as the default seat under Art. 14 (1) HKIAC Rules [*Cl. Memo., p. 12 para. 11*].

11 This distinction is, however, artificial. Both terms are used synonymously [*Born, p. 1540, Conrad et al., para. 2.3*]. Legal systems and arbitral institutions, including the HKIAC, understand both the terms "seat" and "place" to refer to the jurisdictional base of the arbitration [*Born, pp. 1540 et seqq.; Moser/Bao, para. 4.09; cf. C v D, para. 24; Redfern/Hunter, paras. 3.53 et seqq.; Scherer, p. 112; Waincymer, p. 168*].

12 According to their Arbitration Agreement, the Parties explicitly agreed that the "*seat of arbitration shall be Vindobona, Danubia*" [*Ex. C5, p. 14 para. 15*]. Following from this plain wording and its reflection of the HKIAC Model Clause, the Parties designated Danubia as the legal base of their arbitration. In light of the fact that the terms are used synonymously, it is immaterial that the Parties sometimes referred to a "place" of arbitration [*Ex. R2, p. 34*].

13 Consequently, the Parties understood Danubia to be the seat of arbitration.

B. Danubian Law Governs the Arbitration Agreement

14 Danubian law applies and subjects the Arbitration Agreement to an interpretation under Danubian Contract Law.

15 CLAIMANT alleges that the law governing the Arbitration Agreement is identical to that of the Sales Agreement, namely Mediterranean Law [*Cl. Memo., p. 13 para. 13 et seqq.*]. Mediterranean Law is said to provide for an extensive interpretation of arbitration agreements under the CISG [*Notice, p. 7 para. 16*].

16 In contrast, there is consistent jurisprudence in Danubia that not the CISG, but Danubian Contract Law applies to arbitration agreements [*PO2, p. 60 para. 36*]. The Danubian Contract Law, in turn, contains the *four corners rule* [*PO1, p. 52 para. II*]. The *four corners rule* limits the interpretation of an arbitration agreement to its wording [*ibid.*].

17 First, the doctrine of separability stipulates that the law of the Arbitration Agreement is to be regarded separable from the law of the Sales Agreement (**I**). Second, the law of the seat Danubia, *i.e.* Danubian Contract Law, governs the Arbitration Agreement (**II**).

I. The Law Applicable to the Arbitration Agreement Is Separable from the Law Applicable to the Sales Agreement

18 The doctrine of separability recognises the law applicable to the Arbitration Agreement as separable from the law applicable to the Sales Agreement.

19 CLAIMANT itself admits that the doctrine of separability "*has central importance […] especially related to the issues of choice of law*" [*Cl. Memo., p. 13 para. 15*]. However, it asserts that the doctrine does not demand the law governing an arbitration agreement to differ from the sales contract [*Cl. Memo., p. 13 para. 16*]. CLAIMANT then assumes that "*the law applicable for the [arbitration] agreement shall be decided based on that of [the] underlying contract*" [*Cl. Memo., p. 13 para. 14*].

20 In this regard, CLAIMANT refers to "*several international arbitration conventions*" [*Cl. Memo., p. 13 para. 15*]. It is, however, the *lex arbitri*, *i.e.* the Danubian Arbitration Law, that presently manifests the doctrine of separability [*cf. Binder, para. 4-003; Szurski/Cremades, p. 76*]. According to this doctrine, an arbitration agreement is treated as a contract separate to and autonomous of the

substantive contract [*Kröll, Arbitration, p. 76; Redfern/Hunter, paras. 2.101, 2.103; Svernlöv/Carroll, pp. 37 et seq.*]. Consequently, the law governing the arbitration agreement is not automatically identical to the law governing the substantive contract [*Bernardini, p. 201; Lew/Mistelis/Kröll, p. 107 para. 6.32*; *cf. Born, International Arbitration, p. 191*]. Based on this, the law of the arbitration agreement may well be distinct from that of the substantive contract [*Enercon (India) v Enercon, para. 63; Naviera v Compania International, p. 119; cf. Black Clawson v Papierwerke, p. 453; Kröll, Arbitration, pp. 77 et seq.; Nazzini, p. 683*].

21 Consequently, the law applicable to the Arbitration Agreement is separable from the law applicable to the Sales Agreement.

II. The Parties Subjected the Arbitration Agreement to Danubian Law

22 Contrary to CLAIMANT's assertion [*Cl. Memo., p. 16 para. 27*], the Parties submitted the Arbitration Agreement to the law of the seat in Danubia.

23 In light of the autonomy of the arbitration agreement [*supra para. 21*], its governing law is to be determined separately [*Kröll, Arbitration, p. 80; Nazzini, p. 683*].

24 It is undisputed between the Parties that the law applicable to an arbitration agreement is determined in a three-tier inquiry [*cf. Cl. Memo., p. 15 paras. 20 et seq.*] [*cf. Arsanovia v Cruz City, para. 8; BCY v BCZ, para. 40; Habas Sinai v VSC Steel, para. 101; Owerri v Dielle, pp. 705 et seq.; Petroleum v Ferell, para. 32; Sulamérica v Enesa, para. 9; Pearson, p. 117; Primrose, p. 139*]. The first stage of this three-tier inquiry examines the existence of an explicit choice of law by the parties. Second, in absence of such, the test assesses the existence of an implied choice of law. Only in the absence of any choice, the third and final stage refers to the law with the "*closest and most real connection*" [*Sulamérica v Enesa, para. 9; cf. Firstlink v Payment, para. 11; Habas Sinai v VSC Steel, para. 101; Petroleum v Ferell, para. 32; Dicey/Morris/Collins, para. 16R-001; Greenaway, para. 3*].

25 CLAIMANT submits that the Parties did not explicitly agree on a law governing the Arbitration Agreement [*Cl. Memo., p. 16 para. 24*]. RESPONDENT does not object to this contention. However, contrary to CLAIMANT's further submission [*Cl. Memo., pp. 16 et seq., paras. 24 et seq.*], the Parties implicitly agreed on Danubian Law to govern the Arbitration Agreement (**1**). Even if the Tribunal were to reject an implicit choice, Danubian Law would have the *closest and most real* connection to the Arbitration Agreement (**2**).

1. The Parties Implicitly Chose Danubian Law to Govern the Arbitration Agreement

26 Contrary to CLAIMANT's submission [*Cl. Memo., pp. 16 et seq. paras. 22, 24*], the Parties implicitly chose the law of the seat, Danubia, to govern the Arbitration Agreement.

27 CLAIMANT alleges that the Parties implicitly chose Mediterranean law to govern the

Arbitration Agreement [*Cl. Memo., pp. 16 et seq. paras. 24 et seqq.*]. It understands the law of the substantive contract to be the "*starting point*" for any implicit choice [*Cl. Memo., pp. 15 et seq. paras. 22, 24*]. Only if there were "*additional justifiable reasons*", this assumption for an implicit choice would shift in favour of an implicit choice of the law of the seat [*Cl. Memo., p. 15 para. 22*].

28 CLAIMANT omits to clarify that, presently, there are three reasons advocating an implicit choice in favour of Danubian law. First, the drafting history of the Arbitration Agreement does not leave room for any implicit choice of Mediterranean law (**a**). Second, the choice of a neutral seat favours an implicit choice of the respective law (**b**). Third, considerations in regard to the enforcement of any subsequent award equally favour an implicit choice of Danubian law (**c**).

a) The Drafting History of the Arbitration Agreement Contradicts an Implicit Choice of Mediterranean Law

29 First, the drafting history of the Parties' Arbitration Agreement rebuts an implicit choice of Mediterranean law.

30 Within the second stage of the three-tier-inquiry, reasons against an implicit choice of the law of the substantive contract may stem from the drafting history [*cf. Sulamérica v Enesa, para. 26*].

31 During early negotiations, the Parties had considered Mediterranean law to govern the substance of the Sales Agreement [*Ex. R1, p. 33*]. RESPONDENT only thereafter proposed the Arbitration Agreement. CLAIMANT clarified that the law governing the Sales Agreement remained unchanged despite the introduction of the Arbitration Agreement [*Ex. R2, p. 34*]. Additionally, RESPONDENT expressly rejected all proposals to subject parts other than the substance of the Sales Agreement to Mediterranean law [*cf. Ex. C3, p. 11; Ex. R1, p. 33; PO2, p. 55 para. 4*]. This evidences that CLAIMANT's clarification pertained only to the substance of the Sales Agreement. It does not relate to the law governing the Arbitration Agreement.

32 Consequently, the drafting history evidences that the Parties did not implicitly choose Mediterranean law to govern the Arbitration Agreement.

b) The Choice of Danubia as Seat Favours an Implicit Choice of Danubian law

33 Second, the Parties chose Danubia as seat of arbitration. This choice of a neutral seat favours an implicit choice of Danubian law to govern the Arbitration Agreement.

34 Another indicator favouring an implicit choice of the law of the seat as the law governing the arbitration agreement is the choice of a neutral seat [*Sulamérica v Enesa, para. 29; Kröll, Arbitration, p. 79; cf. Firstlink v Payment, paras. 13, 15; Habas Sinai v VSC Steel, para. 101*]. This is because parties from different countries are assumed to desire neutrality [*Firstlink v Payment, para. 13*]. Moreover, parties long for consistency between the law governing the arbitration agreement and the *lex*

arbitri [*Firstlink v Payment, para. 15*].

35 The Parties agreed on Danubia as the seat of arbitration [*supra para. 13*]. They did so because they considered Danubia to be a neutral country [*Ex. R2, p. 34; PO2, pp. 56 et seq. para. 14*].

36 Consequently, the seat in the neutral country Danubia advocates an implicit choice of Danubian law.

c) The New York Convention Favours an Implicit Choice of Danubian Law

37 Third, considerations in regard to the enforcement of any subsequent award under the New York Convention equally favour an implicit choice of Danubian law.

38 CLAIMANT disregards the fact that it is possible to draw conclusions from the New York Convention as to the applicable law [*cf. Cl. Memo., p. 14 para. 17*].

39 In fact, the New York Convention considers the law applicable to the arbitration agreement [*Miles/Goh, p. 389; Nacimiento, p. 219*]. This is particularly relevant if there is no explicit choice of law. In this case, an award is unenforceable if the arbitration agreement is "*not valid […] under the law where the award was made*" [*Art. V (1) (a) New York Convention*]. In other terms: the validity of an award then depends on the law of the seat [*Firstlink v Payment, para. 14; Girsberger/Voser, p. 440; Miles/Goh, p. 389; Nacimiento, p. 225*]. If the tribunal were to validate an arbitration agreement in a manner inconsistent with the law of the seat, the award may be unenforceable. Absent an explicit choice of law, it is thus advisable to subject the arbitration agreement to the law of the seat [*Girsberger/Voser, p. 440; Miles/Goh, p. 389; van den Berg, p. 127; cf. Firstlink v Payment, para. 14*]. This minimises the risk of unenforceability.

40 Danubia, Mediterraneo and Equatoriana are contracting states to the New York Convention [*Vis Moot Rules, p. 6 para. 24*]. The Parties did not explicitly subject their Arbitration Agreement to any law [*supra para. 25*]. At the same time they did choose Danubia as the seat of arbitration [*supra para. 13*]. In view of enforcement under the New York Convention, this favours an implicit choice of Danubian law.

41 In light of the above, the Parties implicitly chose Danubian law to govern their Arbitration Agreement.

2. In Any Case, Danubian Law Has the *Closest and Most Real* Connection to the Arbitration Agreement

42 Even if the Tribunal found that the Parties did not choose any law governing the Arbitration Agreement, Danubian law has the *closest and most real* connection to the Arbitration Agreement.

43 As a last step, the three-tier inquiry provides for the application of the law with the *closest and most real* connection [*supra para. 24*]. CLAIMANT alleges that, as a matter of principle, the law of the

substantive contract has the *closest and most real* connection to the arbitration agreement [*Cl. Memo., p. 13 para. 13*]. However, even the decision CLAIMANT relies on, *Sulamérica v Enesa*, held otherwise [*cf. Cl. Memo., p. 15 para. 20*]. In this case, the court instead found that the law of the seat had the *closest and most real* connection to the arbitration agreement [*Sulamérica v Enesa, para. 32*].

44 This finding is based on two fundamental reasons: First, the substantive contract settles the parties' substantive obligations [*Firstlink v Payment, para. 13; Kröll, Arbitration, p. 82*]. In contrast, the arbitration agreement addresses procedural matters [*ibid.*]. The law of the seat equally determines the procedural issues of the arbitration [*Naviera v Compania International, p. 119; Joseph, para. 6.46; Redfern/Hunter, paras. 3.48 et seqq.; Russell, para. 2-097*].

45 Second, the law of the seat is closely related to the arbitral proceedings [*Habas Sinai v VSC Steel, para. 101; Sulamérica v Enesa, para. 32; cf. Naviera v Compania International, p. 120*]. That is because the domestic courts of the seat may intervene in these proceedings under certain circumstances [*ibid.*].

46 Presently, the seat of this arbitral proceeding is Danubia [*supra para. 13*]. Thus, Danubian law has the *closest and most real* connection to the Arbitration Agreement.

47 To conclude, the Parties implicitly agreed on Danubian law to govern the Arbitration Agreement. In any case, Danubian law has the *closest and most real* connection to the Arbitration Agreement.

C. The Arbitration Agreement Does Not Grant the Tribunal Jurisdiction or Power to Adapt the Sales Agreement

48 Contrary to CLAIMANT's assertions [*Cl. Memo., p. 17 paras. 28 et seqq.*], the Arbitration Agreement does not allow the Tribunal to adapt the Sales Agreement.

49 Jurisdiction and power describe the authority of a tribunal to decide the disputes conferred upon it by the parties and implement appropriate measures [*Fouchard/Gaillard/Goldman, para. 647; Jarvin, pp. 140, 149 et seq.; Redfern/Hunter, paras. 2.63, 5.06, 5.91; cf. Finizio/Speller, pp. 157 et seq.*]. The tribunal's jurisdiction and power to perform contract adaptation depends on multiple conditions. First, based on the principle of party autonomy, the arbitration agreement is a cornerstone to both jurisdiction and power [*ICC Case No. 7929, para. 15; Berger, Power, p. 7 et seq.; Finizio/Speller, p. 158*]. Second, the conferral of jurisdiction and power depends on the limits of the *lex arbitri* [*Redfern/Hunter, para. 5.14; Berger, Power, pp. 7, 10; cf. Kröll, p. 20*].

50 In the present case, the Parties based their Arbitration Agreement on the HKIAC Model Clause [*Ex. R1, p. 33*]. The Partied did, however, not merely mirror the HKIAC Model Clause. Instead, as CLAIMANT itself admits [*Cl. Memo., p. 18 para. 32*], they modified it in order to narrow it down [*Ex. R1, p. 33; cf. PO2, p. 60 para. 39*]. Compared to the HKIAC Model Clause, the

limited Arbitration Agreement reads as follows:

The Parties' Arbitration Agreement	HKIAC Model Clause
"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 […]." [*Ex. C5, p. 14 para. 15; emphasis added*]	"Any dispute, **controversy, difference or claim** arising out of **or relating** to this contract, including the existence, validity, interpretation, performance, breach or termination thereof **or any dispute regarding non-contractual obligations arising out of or relating to it** shall be referred to and finally resolved by arbitration […]." [*HKIAC Model Clause; emphasis added*]

51 Under Danubian law, this Arbitration Agreement does not allow the Tribunal to adapt the Sales Agreement (**I**). Even if the Tribunal found that Mediterranean law governed the Arbitration Agreement, it would still not be allowed to adapt the Sales Agreement (**II**).

I. Under Danubian Law, the Arbitration Agreement Does Not Allow the Tribunal to Adapt the Sales Agreement

52 The Arbitration Agreement does not provide for the Tribunal's jurisdiction and power to adapt the Sales Agreement under the applicable Danubian law.

53 The interpretation of the Arbitration Agreement evidences that the Parties did not grant the Tribunal the jurisdiction or power to do so (**1**). In any event, the Parties did not satisfy the requirement of an express agreement under the *lex arbitri* (**2**).

1. The Interpretation of the Arbitration Agreement Evidences that the Tribunal Does Not Have Jurisdiction and Power to Adapt the Sales Agreement

54 An interpretation of the Arbitration Agreement under Danubian Contract Law leads to the result that the Tribunal may not adapt the Sales Agreement.

55 CLAIMANT itself identifies the *four corners rule* [*Cl. Memo., pp. 18 et seq. para. 36*]. This rule is embedded in Danubian Contract Law [*PO2, p. 61 para. 45*]. CLAIMANT, however, maintains that the *four corners rule* is inapplicable [*Cl. Memo., pp. 18 et seq. para. 36*]. It bases this finding on a suspected conflict with the CISG [*ibid.*].

56 Quite to the contrary, there is in fact consistent jurisprudence in Danubia that Danubian Contract Law governs arbitration agreements, not the CISG [*PO2, p. 60 para. 36*]. The *four corners rule* thus applies. This rule prevents a tribunal from considering any extrinsic evidence [*Cantrell v Liberty; Hartell v Hartell; Phelps v Sledd; Riley v Riley*]. As a consequence, it limits the interpretation of a contract to its plain wording [*Riley v Riley; cf. Cantrell v Liberty; Hoheimer v Hoheimer; Phelps v Sledd*].

57 According to this Tribunal's finding in Procedural Order No. 1, there is "*a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation*" under the *four corners rule* [*PO1, p. 52 para. II*]. By virtue of contract adaptation, a tribunal reshapes the terms of the contractual relationship [*Beisteiner, p. 84; Berger, Adaptation, p. 1373; Berger, Power, p. 2; Paulsson, pp. 250 et seqq.*]. Therefore, every contract adaptation constitutes a creative legal decision [*ibid.*]. Such a creative legal decision goes beyond regular decisions in legal disputes. This is because a contract adaptation is not a typical "yes or no"-decision [*Berger, Adaptation, p. 1373*]. Instead, it leads to rather unpredictable results [*Berger, Adaptation, p. 1373; cf. Beisteiner, p. 84*].

58 As a consequence, the possibility of contract adaptation depends on a broad arbitration agreement [*cf. Beisteiner, p. 110; Redfern/Hunter, para. 2.73*]. In contrast, the term "*arising out of*" in an arbitration agreement indicates a particularly narrow scope of application [*LCC v USFP, p. 1101; Texaco v ATTCO, p. 1154; TRC v NESCO, p. 1295; Born, Arbitration Agreements, p. 40*].

59 Presently, the Parties only referred "*dispute[s] arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof*" to arbitration [*Ex. C5, p. 14 para. 15*]. The wording of the arbitration agreement thus indicates a narrow scope of application. Contrary to CLAIMANT's assertion [*Cl. Memo., p. 18 para. 33*], it is also immaterial whether this enumeration of disputes is exhaustive. Instead, the material common ground of any type of such disputes is the following: there is, in the end, a clear answer of yes or no. The envisioned disputes do thus not extend to creative legal decisions. Therefore, the decisive plain wording of the arbitration agreement does not provide for contract adaptation.

60 As a consequence, the interpretation of the Arbitration Agreement under Danubian Law shows that the Tribunal does not have jurisdiction and power to adapt the Sales Agreement.

2. In Any Event, the Arbitration Agreement Would Not Satisfy the Requirement of an Express Authorisation under the *Lex Arbitri*

61 Even if the Arbitration Agreement itself were to allow a price adaptation by the Tribunal, the *lex arbitri* presently precludes any adaptation. The requirement of an express authorisation under the *lex arbitri*, i.e. Danubian Arbitration Law, is not satisfied.

62 When conferring certain powers on a tribunal, parties must comply with the limits of the *lex arbitri* [*Berger, Power, pp. 7, 10 et seq.; Redfern/Hunter, para. 5.14*]. CLAIMANT relies on the Hong

Kong Arbitration Ordinance as *lex arbitri* [*Cl. Memo., p. 21 paras. 44 et seq.*]. It does so by understanding Hong Kong to be the seat of arbitration [*Cl. Memo., p. 12 para. 11*]. However, the seat of this arbitration is in fact Danubia [*supra para. 13*]. Thus, the *lex arbitri* is the Danubian Arbitration Law [*hereinafter* "***DAL***"].

63 In Danubia, it is possible to confer certain exceptional powers to an arbitral tribunal [*PO2, p. 60 para. 36*]. In light of the exceptional nature of these powers, it is paramount that parties are aware of such conferral [*cf. Binder, para. 6-016; Holtzmann/Neuhaus, p. 790 para. 8; Roth in Weigand, para. 14.456*]. For this reason, a conferral necessarily depends on an *express* agreement between the parties [*cf. PO2, p. 60 para. 36*]. This is consistent jurisprudence under Art. 28 (3) DAL in Danubia [*PO2, p. 60 para. 36*]. To guarantee the parties' awareness permanently, this express conferral must further be in writing [*cf. Agricultural Lease case, p. 309; Schulze, pp. 879 et seq.; Stauder, pp. 290 et seq.*].

64 Presently, the Arbitration Agreement does not contain any written reference to adaptation [*Ex. C5, p. 14 para. 15*]. Mr Krone, the negotiator for RESPONDENT, was not even aware that CLAIMANT considered enabling the Tribunal to adapt the Sales Agreement [*Ex. R3, p. 35*]. The standard of Art. 28 (3) DAL is not met.

65 Thus, the Parties did not expressly confer the power to adapt the Sales Agreement upon the Tribunal as required by the *lex arbitri*. Consequently, the Parties did not authorise the Tribunal to adapt the Sales Agreement.

II. In Any Case, the Arbitration Agreement Does Not Allow the Tribunal to Adapt the Sales Agreement under Mediterranean Law

66 Even if Mediterranean law governed the Arbitration Agreement, the Tribunal would not have the jurisdiction and power to adapt the Sales Agreement.

67 An interpretation of the Arbitration Agreement under Mediterranean law further evidences that the Tribunal is not allowed to adapt the Sales Agreement (**1**). In any event, the requirement of an express conferral of jurisdiction and power under the *lex arbitri* is not satisfied (**2**).

1. The Interpretation of the Arbitration Agreement Shows That the Tribunal May Not Adapt the Sales Agreement

68 If the Tribunal were to base its interpretation of the Arbitration Agreement on Mediterranean law, this interpretation would equally show that it has neither jurisdiction nor power to adapt the Sales Agreement.

69 Mediterranean law subjects the interpretation of arbitration agreements to the CISG [*PO1, p. 53 para. III 4*]. Art. 8 CISG provides for an instrument for the interpretation of contractual

terms, including arbitration agreements [*Schwenzer/Jaeger, p. 105*]. First, the subjective intent of the parties has to be assessed under Art. 8 (1) CISG [*Zuppi in Kröll et al., Art. 8 CISG, para. 1*]. Subsequently, if the parties' intent is not discernible, the parties' statements and conduct are interpreted following an objective standard pursuant to Art. 8 (2) CISG [*ibid.*].

70 The interpretation under both alternatives evidences that the Parties did not grant the Tribunal jurisdiction and power to adapt the Sales Agreement for three reasons. As shown above, the plain wording of the Arbitration Agreement does not indicate any adaptation mechanism in the first place [*supra para. 59*]. The drafting history of the Arbitration Agreement further evidences that the Parties did not allow the Tribunal to adapt the Sales Agreement (**a**). Finally, this is confirmed by the fact that no other clause of the Sales Agreement provides for adaptation as its legal consequence (**b**).

a) The Drafting History of the Arbitration Agreement Evidences That the Tribunal May Not Adapt the Sales Agreement

71 Contrary to CLAIMANT's assertion [*Cl. Memo., pp. 19 et seq. paras. 38 et seq.*], the drafting history of the Arbitration Agreement shows that the Tribunal may not adapt the Sales Agreement.

72 For both alternatives of Art. 8 CISG, Art. 8 (3) CISG mandates the consideration of prior conduct [*Farnsworth in Bianca/Bonell, Art. 8 CISG, para. 2.6*]. This includes negotiations.

73 In the end, Mr Krone concluded the Sales Agreement for RESPONDENT [*Ex. C5, p. 14*]. The initial negotiators were, however, Ms Napravnik and Mr Antley [*Ex. C8, p. 17*]. Both met on 12 April 2017 [*ibid.*]. CLAIMANT's negotiator Ms Napravnik briefly suggested the possibility of adaptation by an arbitral tribunal in this meeting [*ibid.*]. Shortly after, the initial negotiators were involved in a serious car accident [*Notice, p. 5 para. 8*]. Subsequently, Mr Antley, RESPONDENT's first negotiator, was in a coma for several weeks [*Ex. C8, p. 17*]. For this reason, Mr Antley was unable to inform his successor Mr Krone about the meeting.

74 Mr Krone only had one indication of Ms Napravnik's suggestion: a note Mr Antley wrote after negotiations and before the accident [*Ex. R3, p. 35*]. He compiled a "*list of issues for further negotiations*" [*ibid.*]. This note addresses the issue "*Connection of hardship clause with arbitration clause*" [*ibid.*]. It does so because Mr Antley considered drafting a proposal on the issue of adaptation in order to negotiate it later [*ibid.*]. This mere consideration was not and could not have been apparent to Mr Krone. Absent any other indication regarding Ms Napravnik's brief suggestion [*cf. PO2, p. 55 para. 6*], an objective third person would have been equally unaware of it.

75 Consequently, the drafting history evidences from both a subjective and an objective standard that the Parties did not implement an adaptation mechanism into their Arbitration Agreement.

b) Equally, No Clause in the Sales Agreement Establishes an Adaptation Mechanism

76 No clause within the Sales Agreement provides for contract adaptation as a remedy. This shows that the Tribunal has no power and jurisdiction to perform adaptation.

77 CLAIMANT itself points out that clause 12 of the Sales Agreement [*hereinafter "**Force Majeure Clause**"*] provides for nothing but the exemption from liability [*Cl. Memo., p. 20 para. 41*]. It nonetheless asserts that an adaptation is possible. CLAIMANT does so by immediate recourse to the domestic Mediterranean Contract Law [*ibid.*].

78 However, if the CISG governs a contract, national law will only play a subordinate role [*Mankowski in Schlechtriem/Schwenzer, Introduction Artt. 1-6 CISG, paras. 29 et seqq.; Magnus in Staudinger, Introduction Artt. 1 CISG, para. 1*]. When interpreting particular contractual clauses under Art. 8 CISG, regard is to be given to the whole contractual framework [*Russian Federation Arbitration No. 95, para 3.3.3; Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8 CISG, para. 29*]. Within this framework, the substantive contract may provide for an adaptation clause [*Beisteiner, p. 109; Berger, Power, p. 8*]. If such a clause refers to the arbitration agreement, a tribunal may be empowered to perform adaptation [*ibid.*]. In contrast, an adaptation is likely to be denied if the substantive contract does not provide for an adaptation clause [*Berger, Adaptation, p. 1353; Bernardini, p. 421; Kröll, Adaptation, p. 465*].

79 Both Parties to the Sales Agreement are seated in contracting states to the CISG [*PO1, p. 53 para. III 4*]. The Sales Agreement is thus governed by the CISG. As part of this substantive contract, the Force Majeure Clause stipulates that "*Seller shall not be responsible*" for certain liabilities. As acknowledged by CLAIMANT [*Cl. Memo., p. 20 para. 41*], the Force Majeure Clause thus merely exempts CLAIMANT from liability. In contrast, it does not provide for adaptation or any other legal consequence. As none of the other clauses provides for an adaptation mechanism, the whole Sales Agreement does not provide for adaptation. Finally, in view of the primacy of the CISG, immediate recourse to the domestic Mediterranean Contract Law is not possible.

80 In light of this, neither Mr Krone nor a reasonable third person would have understood the Arbitration Agreement to extend to the precluded remedy of contract adaptation.

81 The interpretation of the Arbitration Agreement and the Sales Agreement under Art. 8 CISG therefore demonstrates that the Tribunal does not have jurisdiction and power for adaptation.

2. In Any Event, the Parties Did Not Expressly Authorise the Tribunal to Perform Adaptation under the *Lex Arbitri*

82 In any event, a conferral of jurisdiction and power to adapt the Sales Agreement would not satisfy the requirement of an express conferral according to the *lex arbitri*.

83 Notwithstanding the law applicable to the Arbitration Agreement, the *lex arbitri* remains the DAL [*supra para. 62*]. The requirement of an express, written conferral under Art. 28 (3) DAL is not met [*supra para. 65*]. The Arbitration Agreement itself does not refer to an adaptation in writing [*supra para. 64*]. It equally does not do so in conjunction with the Sales Agreement [*supra para. 81*]. Therefore, the Parties did not authorise the Tribunal to adapt the Sales Agreement within the limits of the *lex arbitri*.

84 As a consequence, both under Danubian and Mediterranean law, the Tribunal may not adapt the Sales Agreement.

CONCLUSION TO THE FIRST ISSUE

85 Party autonomy gave the Parties the freedom to form the obligations in their Sales Contract and submit their disputes to an independent tribunal on neutral ground. Whilst the terms were freely chosen, the Parties are now bound by their commitments. Disputes are to be resolved under the laws provided for in the Arbitration Agreement and the Arbitration Agreement is to be construed under the law of the neutral seat, Danubia. Danubian law holds the Parties accountable for the commitments they make to others and demands a solution to be found within the four corners of the contract. The Tribunal is bestowed with the responsibility to do no less – but also no more – than to assess the law within the corners of the Parties' Contract. RESPONDENT thus respectfully requests the Tribunal to find that it has neither the power nor the jurisdiction to disregard the Parties' original commitments by adapting the Sales Agreement.

SECOND ISSUE: CLAIMANT IS PRECLUDED FROM SUBMITTING THE AWARD AS EVIDENCE

86 RESPONDENT respectfully requests the Tribunal to refuse CLAIMANT's submission of the Award as evidence to the present proceeding.

87 The Award was rendered in another confidential arbitral proceeding involving RESPONDENT, conducted under the HKIAC Rules [*PO2, p. 60 para. 39*]. CLAIMANT intends to submit this Award as evidence [*Cl. Memo., p. 26 para. 67*]. CLAIMANT acquired it from an intelligence company specialised in providing information about the horseracing industry for USD 1,000 [*PO2, pp. 60 et seq. para. 41*]. This company has a highly questionable reputation, especially with view to the sources of its information [*ibid.*]. An investigation into the source concluded that either two former employees of RESPONDENT or a hack could have caused the leak of the Award [*Letter Fasttrack, p. 60*]. CLAIMANT, however, disputes the results of this inquiry by branding them mere "*speculation*" [*Cl. Memo., p. 25 para. 63*]. This assertion is in contempt of the Tribunal's authority. At this stage of the proceedings, the Tribunal presumes the illegal origin of the Award [*PO1, p. 53 para. III; PO2, pp. 60 et seq. para. 41*].

88 When assessing the admissibility of the Award as evidence, the Tribunal has discretion and should exercise it in accordance with the IBA Rules on the Taking of Evidence [*hereinafter "**IBA Rules**"*] (**A**). Under the IBA Rules, the Award is to be excluded as inadmissible (**B**). Finally, the Prague Rules invoked by CLAIMANT offer no guidance for the assessment of the Award (**C**).

A. The Tribunal Has Discretion on the Taking of Evidence and Should Exercise It in Accordance with the IBA Rules

89 The Tribunal should exercise its discretion on the taking of evidence in accordance with the IBA Rules.

90 Art. 22.2 HKIAC Rules recognises a tribunal's discretion regarding the admissibility, relevance and materiality of evidence [*Moser/Bao, para. 9.153*]. The IBA Rules are acknowledged as an effective and predictable framework for arbitration under the HKIAC Rules [*Moser/Bao, para. 9.155*]. Even in the absence of an agreement of the parties, tribunals may resort to IBA Rules and other soft law [B*orn, p. 2212; Leisinger, p. 218; Schütze, p. 5*].

91 RESPONDENT agrees that the Tribunal has full discretion and may, as CLAIMANT states, "*apply strict rules of evidence*" [*Cl. Memo., p. 22 para. 49*].

92 Thus, the Tribunal should apply the IBA Rules as a framework for the taking of evidence.

B. Under the IBA Rules, the Award Is Inadmissible as Evidence

93 The Award CLAIMANT intends to submit as evidence is inadmissible under the IBA Rules.

94 Art. 9.2 IBA Rules stipulates several grounds for the exclusion of evidence. If the Tribunal

finds only one of these grounds to be fulfilled, it is held to bar the evidence from admission.

95 The Award fulfils several grounds for exclusion. First, it is immaterial to the outcome of the present proceeding (**I**). Second, it contains information of commercial confidentiality (**II**). Third and finally, its submission would violate the standard of good faith (**III**).

I. The Award Is Inadmissible as It Is Immaterial to the Outcome of the Case

96 The Award should be excluded as it is immaterial to the outcome of the present case.

97 CLAIMANT itself acknowledges that the Tribunal is not bound to the jurisprudence of other tribunals [*Cl. Memo., p. 24 para. 57*]. Nonetheless, it relies on the materiality of the Award for this proceeding [*Cl. Memo., p. 23 para. 53*]. It suggests that the Award is "*paramount […] on both 'arbitrability' and 'hardship'"* [*ibid.*]. In fact, it is anything but paramount and particularly not material to the questions addressed in this arbitration.

98 Art. 9.2 (a) IBA Rules demands the exclusion of evidence if it is immaterial to the outcome of the case. Evidence is immaterial if it has no impact on a tribunal's deliberations on the final award [*O'Malley, para. 9.13; Raeschke-Kessler, p. 60; Zuberbühler et al., p. 177 para. 36*]. Thereby, the IBA Rules safeguard the efficiency of the arbitral proceedings [*cf. Marghitola, p. 53*].

99 First, neither of the Parties invoked a lack of arbitrability at any stage of the proceedings. Thus, the Tribunal does not need to address arbitrability at all. Regarding the jurisdictional questions that are key to this proceeding, CLAIMANT does not rely once on the Award. The Award is thus not material to arbitrability or jurisdiction.

100 Second, CLAIMANT further deems the merits of the other proceeding to be comparable to the case at hand [*Cl. Memo., p. 24 para. 57*]. However, both the contractual framework and the law applicable to the arbitration agreement of the proceedings differ [*cf. PO2, p. 60 para. 39*]. In the present proceeding, the Parties narrowed down their Arbitration Agreement [*Ex. R1, p. 33*] and chose Danubia as seat [*supra para. 16*]. They also drafted an individual Force Majeure Clause [*PO2, p. 56 para. 12*]. In contrast, the parties in the other proceeding chose an HKIAC model arbitration clause and Mediterraneo as seat [*PO2, p. 60 para. 39*]. They implemented the ICC Hardship Clause [*ibid.*]. Finally, the two proceedings address questions concerning different tariffs imposed on different dates [*Notice p. 6 para. 9; Ex. C6, p. 15; PO2, p. 60 para. 39*]. Consequently, RESPONDENT's other proceeding is not comparable to this proceeding and thus immaterial.

101 Third, CLAIMANT refers to the Award when asserting that the tariffs were unforeseeable [*Cl. Memo., pp. 29 et seq. para. 77*]. However, the tribunal in the other proceeding merely confirmed its "*power to adapt the contract should the tariff result in hardship*" [*PO2, p. 60 para. 39*]. As it only rendered a partial interim award, the other tribunal only addressed the procedural issue of the case. In contrast, CLAIMANT suggests that the other tribunal went beyond that by "*admitting that*

an increase of tariff may result in hardship for Respondent" [*Cl. Memo., p. 24 para. 55*]. RESPONDENT objects to this submission. This substantive question is yet to be addressed in a final award.

102 Consequently, the Award will not affect the Tribunal's subsequent deliberations. The Tribunal should thus consider the Award inadmissible due to its immateriality.

II. The Award is Inadmissible as It Is Subject to Commercial Confidentiality

103 The Award should be excluded since it is subject to commercial confidentiality.

104 Art. 9.2 (e) IBA Rules excludes evidence on grounds of commercial confidentiality. Such commercial confidentiality is prominently found in documents covered by confidentiality agreements with third parties [*Merrill v Canada, Marghitola, pp. 93 et seq.; O'Malley, para. 9.86*]. Upholding commercial confidentiality becomes particularly relevant if the parties to arbitration are competitors [*Fouchard/Gaillard/Goldman, para. 1265; Marghitola, p. 91; cf. Sawang, p. 9*].

105 First, the other proceeding of RESPONDENT is conducted pursuant to the HKIAC Rules 2013 [*Letter Fasttrack, p. 51*]. By choosing these rules, RESPONDENT and the opposing party agreed to the confidentiality obligation in Art. 42.1 (b) HKIAC Rules 2013 [*ibid.*]. Consequently, the Award is a document covered by a confidentiality agreement with a third party.

106 Second, CLAIMANT runs a stud farm covering all areas of equestrian sport, a mare herd, a stallion depot and it sells frozen semen [*Notice, p. 4 paras. 1 et seq.*]. RESPONDENT operates a horseracing stable including a breeding programme and recently got into the market of selling frozen semen itself [*Ex. C1, p. 9; PO2, p. 57 para. 20*]. RESPONDENT sells its products in Mediterraneo [*PO2, p. 60 para. 39*]. CLAIMANT operates its business there as well [*Notice, p. 4 para. 1*]. Consequently, the Parties do not only compete in the same business but also on the same national market.

107 Therefore, the Award should be excluded as evidence from this proceeding on grounds of commercial confidentiality.

III. Good Faith Equally Mandates the Exclusion of the Award

108 In any case, the Award should be excluded for considerations of good faith.

109 Contrary to this, CLAIMANT asserts that its conduct was not "*unfair, unlawful, and in bad faith*" [*Cl. Memo., p. 24 para. 58*]. It uses this assumption to conclude the alleged admissibility of the Award as evidence [*Cl. Memo., p. 26 para. 67*]. CLAIMANT implies that, in any case, a lack of good faith would primarily affect the allocation of costs in the arbitration [*Cl. Memo., p. 24 para. 58*]. Quite to the contrary, the standard of good faith presently mandates the exclusion of the Award.

110 What CLAIMANT omits to clarify is that tribunals may exclude evidence for "*considerations of […] fairness or equality of the Parties*" under Art. 9.2 (g) IBA Rules. Both case law and scholars

acknowledge the need for fairness and equality in the taking of evidence [*Enron Annulment, para. 177; TCL v Castel, para. 111; Fouchard/Gaillard/Goldman, para. 188; Rubino-Sammartano, p. 716*]. Equally, considerations of good faith fall under Art. 9.2 (g) IBA Rules [*Ashford, p. 17 para. P-20; Moses; Segesser, p. 741*]. With these considerations, arbitral tribunals have excluded improperly obtained evidence [*EDF v Romania, para. 30; Methanex v USA, Part II Chapter I, paras. 53 et seq.*].

111 In the present case, good faith mandates the exclusion of the Award. To justify the submission of the Award, CLAIMANT suggests addressing RESPONDENT's right to due process in the future proceedings [*Cl. Memo., pp. 25 et seq. para. 64*]. However, in the present, its own behaviour is already of questionable nature. In fact, CLAIMANT contradicts the standard of good faith for three reasons. First, the Award's confidentiality has not become moot as the Award is not public knowledge (**1**). Second, CLAIMANT disregards its duty to honour RESPONDENT's confidentiality obligation in the other proceeding (**2**). Third, CLAIMANT does not act with *clean hands* when submitting the Award (**3**).

1. CLAIMANT Relies on Confidential Rather Than Publicly Available Information

112 As the Award has not become public knowledge, CLAIMANT does in fact rely on confidential information to the detriment of RESPONDENT.

113 Without any specific reference, CLAIMANT asserts that "*several*" cases have admitted evidence that was "*somewhat confidential but already known to [the] public*" [*Cl. Memo., p. 25 para. 60*]. It further alleges that presently, the Award is public knowledge [*Cl. Memo., pp. 24 et seq. paras. 59 et seq.*].

114 Contrary to this, even if arbitral awards are public domain, this by itself is not a reason to disregard their confidentiality [*UMS v Great Station, paras. 21 et seq.*]. If tribunals or courts nonetheless did so, this always concerned matters with a particularly broad scope of publicity [*Bible v USA, p. 8; Fusimalohi v FIFA, paras. 104 et seq.; Yukos v Russia, Hulley v Russia, Veteran Petroleum v Russia, para. 1223*]. In WikiLeaks cases such as *Bible v USA* and *Yukos v Russia,* any person using the internet had access to the documents in question. In cases relating to newspaper publications such as *Fusimalohi v FIFA*, the information was only one newsstand away. Thus, tribunals or courts only allowed the submission if the information was available to the public without additional barriers.

115 In contrast, CLAIMANT only learned about the other arbitration from Mr Velasquez at the annual breeder conference [*PO2, p. 60 para. 40*]. Mr Velasquez was formerly employed by the opposing party in RESPONDENT's other arbitration [*ibid.*]. Only this particular position provided Mr Velasquez with this information [*cf. PO2, p. 60 para. 40*]. But even Mr Velasquez cannot provide CLAIMANT with the Award [*PO2, pp. 60 et seq. para. 41*]. Instead, CLAIMANT approached an intelligence company to obtain it [*ibid.*]. If the Award had entered the public domain, there

would be no need for such an arrangement.

116 Consequently, there is no indication that the other arbitration, let alone the Award, is in the public domain. Thus, the Award CLAIMANT relies on remains confidential.

2. CLAIMANT Unjustly Interferes with RESPONDENT's Confidentiality Obligation from the Other Proceeding

117 CLAIMANT's duty to act in good faith bars it from interfering with RESPONDENT's confidentiality obligation from the other proceeding.

118 Whilst CLAIMANT acknowledges the other proceeding's confidentiality, it assumes that it does not need to consider this duty of confidentiality itself [*Cl. Memo., p. 25 para 61*].

119 Indeed, confidentiality agreements contained in arbitral rules primarily bind the respective parties [*Esso Australia v Plowman, p. 15 para. 33; Smeureanu, p. 133; cf. Shearson Lehmann Brothers v Maclaine, p. 29*]. Nonetheless, the principle of good faith bars parties from putting an unreasonable burden on another party [*Ashford, para. P-19; O'Malley, para. 7.52*]. In light of this, if one party is bound by a contractual duty of confidentiality towards a third party, this may well mandate the exclusion of evidence [*Mann v Dongwoo, para. 30; Marghitola, p. 94; Waincymer, p. 799*]. This is because tribunals should not require a party to breach third-party confidentiality obligations without additional predominant reasons [*Merill v Canada, para. 31; Marghitola, p. 94*].

120 RESPONDENT's other arbitration is conducted under the HKIAC Rules 2013 [*Letter Fasttrack, p. 51*]. Under Art. 42.1 HKIAC Rules 2013, the respective parties are subject to a confidentiality obligation. Thus, RESPONDENT has a confidentiality obligation towards a third party. Especially in view of the Award's immateriality [*supra para. 102*], there are no particular reasons advocating the submission of the Award. Consequently, CLAIMANT has to consider RESPONDENT's confidentiality obligation.

121 By submitting the Award, CLAIMANT would places an unreasonable burden on RESPONDENT, unduly interfering with RESPONDENT's confidentiality obligation.

3. CLAIMANT Does Not Act with *Clean Hands* If It Submits the Award

122 CLAIMANT further contradicts the standard of good faith because it will act with *unclean hands* when submitting the Award.

123 If evidence is obtained illegally, a party's good faith depends on the degree of its involvement in the illegal acquisition of evidence [*Methanex v USA, p. 26 para. 55; EDF v Romania, paras. 37 et seq.; Blair/Gojković, p. 256; Boykin/Havalic, pp. 33 et seq.; Waincymer, p. 797*]. If a party approaches a tribunal with *unclean hands*, this usually calls for the exclusion of the evidence [*Methanex v USA, Part II Chapter I, p. 26 para. 55; EDF v Romania, PO3, paras. 37 et seq.; Blair/Gojković, p. 256;*

Boykin/Havalic, pp. 33 et seq.].

124 CLAIMANT intends to purchase the Award for USD 1000 from an intelligence company [*PO2, pp. 60 et seq. para. 41*]. This company is known for its questionable reputation regarding the sources of its information [*ibid.*]. Moreover, RESPONDENT presented CLAIMANT and the Tribunal its inquiry regarding potential origins of the Award [*Letter Fasttrack, p. 51*]. This inquiry revealed that the Award originates from either an illegal hack or a breach of confidentiality agreements [*ibid.*]. At this point at the very latest, CLAIMANT had factual knowledge of the origin of the Award. Yet, it still intends to do business with the intelligence company [*PO2, p. 61 para 41*]. CLAIMANT thus would knowingly foster activities to the detriment of the equestrian market.

125 Therefore, CLAIMANT does not approach this discussion on the Award's admissibility with *clean hands*. In light of the above, the submission of the Award manifests CLAIMANT's lack of good faith. Consequently, the Tribunal should exclude the Award under Art. 9.2 (g) IBA Rules.

C. The Prague Rules Offer No Guidance for the Assessment of the Award

126 The Prague Rules do not have any effect on the assessment of the Award as evidence.

127 CLAIMANT invokes a second set of rules on the taking of evidence, namely the Prague Rules [*Cl. Memo., p. 26 para. 65*]. It alleges that all of the requirements of Artt. 4.3-4.5 Prague Rules are met [*ibid.*]. CLAIMANT concludes that it could request document production and, *a fortiori*, submit the Award as admissible evidence [*Cl. Memo., p. 26 para. 67*].

128 However, the Prague Rules neither give requirements for the admissibility nor for the exclusion of submitted evidence. The invoked provisions solely concern document production requests but not the submission of documents. In addition, these provisions follow a more restrictive approach to document production than the HKIAC Rules or IBA Rules. This is because they encourage a tribunal "*to avoid any form of document production*" according to Art. 4.2 Prague Rules. Finally, the Prague Rules state in their preamble that they "*are not intended to replace the arbitration rules provided by various institutions [but] designed to supplement the procedure*".

129 As the Prague Rules only offer a framework for production requests instead of submission of documents, they do not supplement the present proceeding. Consequently, their lack of guidance results in the inapplicability of the Prague Rules to this arbitration.

CONCLUSION TO THE SECOND ISSUE

130 RESPONDENT is highly concerned with regard to CLAIMANT's willingness to collaborate with questionable intelligence sources and purchase illegally obtained information on one of its direct competitors. What is even more disconcerting, however, is that CLAIMANT is openly attempting to introduce such information into the current proceeding in order to attack RESPONDENT's credibility. CLAIMANT is well aware that RESPONDENT is under a duty of confidentiality towards third parties that prevents RESPONDENT from disclosing information. What can be said, however, is that the proceeding in question is based on a totally different set of facts and is not material to the outcome of the case. Thus there are several provisions within the IBA Rules that render the pertinent Award inadmissible. RESPONDENT respectfully asks the Tribunal to disregard CLAIMANT's transparent attempts at sidetracking proceedings and to render the Award inadmissible in line with the IBA Rules.

THIRD ISSUE: CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE PRICE

131 RESPONDENT respectfully requests the Tribunal to reject CLAIMANT's demand for additional remuneration of USD 1,250,000.

132 Times are turbulent in international trade. Whether it is the headline of a newspaper or a resentful tweet: the threat of trade war is ever-present. For some time now, the atmosphere between Equatoriana and Mediterraneo has been particularly tense. Politicians have been pursuing more protectionist trade policies. Finally, these policies developed into a trade war when tariffs on agricultural products were imposed.

133 Now, CLAIMANT purports that the Sales Agreement shall be adapted due to these tariffs [*Cl. Memo., p. 27 paras. 68 et seqq.*]. It expects RESPONDENT to pay an additional amount of at least USD 1,250,000 [*Cl. Memo., p. 27 para. 68, p. 38 No. 3*]. However, it was CLAIMANT that accepted to bear the risk of any tariffs.

134 Contrary to CLAIMANT's assertion [*Cl. Memo., p. 27 para. 68*], the CISG primarily governs the Sales Agreement [*supra para. 79*]. Besides the Tribunal's lack of jurisdiction and power on adaptation, neither the Force Majeure Clause (**A**) nor Art. 79 CISG (**B**) substantiate an adaptation. In any case, the Tribunal is held to drastically reduce the amount requested by CLAIMANT (**C**).

A. The Force Majeure Clause Does Not Provide for an Adaptation of the Price

135 Contrary to CLAIMANT's submission [*Cl. Memo., p. 27 paras. 69 et seq.*], the imposition of the tariffs does not entitle it to an adaptation under the Force Majeure Clause.

136 As opposed to CLAIMANT's assertion [*Cl. Memo., p. 27 para. 69*], the Force Majeure Clause deviates from a "*typical hardship clause*". In its relevant parts, it reads as follows:

> "Seller shall not be responsible […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Ex. C5, p. 14 para. 12*]

137 As the requirements of the Force Majeure Clause are not met, CLAIMANT has to bear the risk of the tariffs (**I**). In any event, the legal consequence of the Force Majeure Clause is exemption from liability, not adaptation (**II**).

I. CLAIMANT Has to Bear the Tariffs as the Requirements of the Force Majeure Clause Are Not Met

138 By agreeing to the INCOTERM DDP Delivery, CLAIMANT assumed the risk of tariffs. The Force Majeure Clause does not exempt CLAIMANT from this liability.

139 DDP Delivery allocates the risks of any additional costs for delivery to the seller [*Ramberg, p. 149; von Bernstorff, para. 643*]. It is in fact the only of eleven INCOTERMS which requires the seller to clear the goods for import [*von Bernstorff, para. 643; cf. Ramberg, pp. 32, 150*]. This includes the necessity to pay additional tariffs [*Ramberg, pp. 32, 150; cf. von Bernstorff, para. 643*].

140 The Parties agreed on DDP Delivery [*Ex. C5, p. 14 para. 8*]. This term requires CLAIMANT to pay all potential expenses to clear the goods for import, including the tariffs in question. Nevertheless, after "*long internal discussions*" CLAIMANT accepted DDP Delivery [*Ex. C4, p. 12*]. To reflect this shift in risk allocation, CLAIMANT increased the price of the semen [*ibid.*]. The price increase even went beyond the mere costs of transportation [*PO2, p. 56, para. 8*]. This evidences that CLAIMANT calculated this additional risk into the purchase price. Furthermore, any other INCOTERM would have exempted CLAIMANT from bearing the tariffs. Yet, the Parties deliberately chose DDP Delivery.

141 However, CLAIMANT asserts that it specifically excluded its responsibility for the tariffs by virtue of the Force Majeure Clause [*Cl. Memo., p. 27 paras. 69 et seqq.*]. This is, however, not the case as the tariffs do not qualify as *additional health and safety requirements* (**1**). Equally, the tariffs are no *comparable unforeseen events* (**2**). In any case, bearing the tariffs would not make *the contract more onerous* to perform (**3**).

1. The Tariffs Do Not Qualify as Additional Health and Safety Requirements

142 The tariffs imposed by Equatoriana are no *additional health and safety requirements*.

143 CLAIMANT argues that the tariffs constitute such requirements to fight the current foot-and-mouth disease crisis in Equatoriana [*Cl. Memo., p. 27 paras. 71 et seqq.*]. However, the tariffs constitute politically motivated retaliatory measures.

144 Contracts are interpreted in line with Art. 8 CISG [*supra para. 69*]. In this regard, Art. 8 (3) CISG requires consideration of all relevant circumstances including negotiations.

145 During negotiations, CLAIMANT requested amendments to address past experiences with health and safety requirements [*Ex. C4, p. 12*]. Such requirements had been intended to protect public health and had made expensive tests and quarantines necessary for CLAIMANT's deliveries [*Ex. C4, p. 12; PO2, p. 58 para. 21*]. The Force Majeure Clause was drafted in reference to these acts that go beyond mere additional expenses [*cf. Ex. C4, p. 12; PO2, p. 56 para. 12*]. Thus, the Parties intended the term "*health and safety requirements*" to encompass only acts that are meant to protect public health.

146 Even CLAIMANT realised that the tariffs are unlikely to counter the foot-and-mouth disease crisis [*Cl. Memo., p. 29 para. 76*]. Yet, it insinuates that the tariffs are caused by this crisis [*Cl. Memo., p. 27 paras. 71 et seq.*]. Quite to the contrary, Equatoriana announced the tariffs as a

retaliation to the tariffs enacted by the government of Mediterraneo [*Ex. C6, p. 15*]. This is demonstrated by the fact that the Equatorianian government imposed its tariffs following unsuccessful negotiations with Mediterraneo [*Notice, p. 6 para. 10*]. Thus, political turmoil is the motivation underlying the Equatorianian tariffs as opposed to health and safety concerns.

147 In light of these circumstances, the tariffs are no health or safety requirements under the Sales Agreement.

2. The Equatorianian Tariffs Are No Comparable Unforeseen Event

148 Contrary to CLAIMANT's assertion [*Cl. Memo., p. 28 paras. 74 et seqq.*], the tariffs imposed by Equatoriana are no *comparable unforeseen events*.

149 CLAIMANT itself admits that tariffs were "*not explicitly included*" within the Force Majeure Clause [*Cl. Memo., p. 28 para. 73*]. However, it argues that the tariffs were unforeseeable at the time of the conclusion of the Sales Agreement [*Cl. Memo., p. 28 paras. 75 et seqq.*]. According to CLAIMANT, this was the sole reason for not including tariffs into the Force Majeure Clause [*Notice, p. 7 para. 19*].

150 Quite to the contrary, the events before the conclusion of the Sales Agreement prove that the tariffs were foreseeable (**a**). Moreover, despite CLAIMANT's assertion [*Cl. Memo., p. 29 para. 77*], RESPONDENT did not admit in its other arbitration that the tariffs at hand were unforeseeable (**b**).

a) The Equatorianian Tariffs Were Foreseeable at the Time of the Conclusion of the Sales Agreement

151 The events before the conclusion of the Sales Agreement witness that the tariffs imposed by Equatoriana were foreseeable.

152 CLAIMANT alleges that "*historical records*" made it difficult to foresee the tariffs [*Cl. Memo., p. 29 para. 75*]. It additionally asserts that it is "*very unlikely to predict that frozen horse semen is included in the category of agricultural product[s]*" [*Cl. Memo., p. 29 para. 76*].

153 The determination of whether an event is unforeseeable under the Force Majeure Clause must be conducted through an interpretation pursuant to Art. 8 CISG. In general, parties in international business must consider increases of costs as foreseeable commercial risks [*Steel Ropes Case, para. V.3.3; Vital Berry v Dira Frost, para. 4; Lookofsky, p. 103*]. Furthermore, experienced sellers should be able to foresee both usual expenditures and difficulties in the sale of their goods [*cf. Dried Sweet Potatoes Case, para. II. 2.; Shirt Case; Lindane Case, para. (3) 3*]. They should also be able to classify their product within its respective trade category in order to assess specific requirements for import [*cf. Sanguinarine Case, para. II. 3. (3)*].

154 On 25 April 2017, Mr Bouckaert was elected president of Mediterraneo [*PO2, p. 58 para. 23*].

Throughout the course of his election campaign, he revealed his protectionist plans in the realm of international trade, especially for agricultural products [*Ex. C6, p. 15*]. Mr Bouckaert started to implement his protectionist ideology prior to the conclusion of the Sales Agreement. As a decisive step, he appointed Ms Frankel as minister for agriculture, trade and economics [*PO2, p. 58 para. 23*]. She was widely known as one of the most ardent critics of free trade [*ibid.*]. Ms Frankel even advocated "*limiting the access of foreign agricultural products to the Mediterranean market*" [*ibid.*]. At this point, it was apparent that the times of flourishing free trade in Mediterraneo with its former trading partners were over. In view of this, CLAIMANT should have expected severe restrictions in the international trade of agricultural products.

155 Furthermore, the Parties intentionally chose CLAIMANT to carry out the delivery due to its experience in shipping frozen semen [*Notice, p. 7 para. 18*]. It even used to operate a company specialised in the delivery of frozen semen and still cooperates with it [*PO2, p. 56 para. 9*]. Because of this experience, CLAIMANT should have anticipated possible difficulties in delivery such as the tariffs in question. CLAIMANT additionally emphasises that the categorisation of frozen semen as agricultural products was generally unlikely [*Cl. Memo., p. 29 para. 76*]. However, it had the necessary experience to correctly classify frozen semen as agricultural products.

156 Thus, due to the events preceding conclusion of the Sales Agreement and because of CLAIMANT's particular expertise the tariffs were in fact foreseeable.

b) RESPONDENT's Other Arbitration Does Not Indicate That the Tariffs in This Proceeding Were Unforeseeable

157 The conduct of RESPONDENT in its other arbitration constitutes no indication that the tariffs were unforeseeable.

158 CLAIMANT alleges that RESPONDENT agrees that the tariffs were unforeseeable in its other proceeding [*Cl. Memo., p. 29 para. 77*]. It tries to interpret RESPONDENT's claim of unpredictable hardship in the other arbitration as such consent [*ibid.*]. However, as the facts in the other arbitration are not comparable to this case, this cannot constitute an agreement.

159 The Award of the other arbitration that CLAIMANT relies on is inadmissible [*supra para. 130*]. Even if the Award were admissible, only the tariffs in that other arbitration can in fact be considered unforeseeable. Mr Antley arranged the contract underlying the other arbitration before his accident on the 12 April 2017 and before Mr Bouckaert was elected [*Notice, p. 5 para. 8; PO2, p. 58 para. 23, p. 60 para. 39*]. Therefore, the parties to the other arbitration could not have been aware that Mr Bouckaert could in fact implement his protectionist plans prefiguring the tariffs [*supra para. 154*]. As CLAIMANT correctly points out, at this stage there was no sign of any free trade restrictions [*cf. Cl. Memo., p. 29 para. 75*]. Thus, the tariffs in the other arbitration were

unforeseeable although they were not in this case [*supra para. 156*].

160 Consequently, RESPONDENT's conduct in the other proceeding cannot constitute an agreement regarding foreseeability in this proceeding.

161 Therefore, the tariffs in this proceeding do not constitute a *comparable unforeseen event* under the Force Majeure Clause.

3. In Any Event, the Tariffs Do Not Result in Hardship Making the Sales Agreement More Onerous to Perform

162 In any case, the tariffs in question do not result in *hardship making the contract more onerous*.

163 CLAIMANT asserts that the tariffs make the Sales Agreement more onerous considering its supposedly threatened solvency [*Cl. Memo., p. 31 para. 82*]. However, the tariffs do not meet the threshold for hardship.

164 Whether an event constitutes hardship and renders performance more onerous depends on the circumstances of the individual case [*Girsberger/Zapolskis, p. 129; Pirozzi, p. 107; cf. Rimke, p. 225*]. In one instance, the court found that a price increase of 300 per cent did not meet the threshold of hardship [*Iron Molybdenum Case, para. 2) d)*]. Others demanded a price increase of at least 100 per cent [*Enderlein/Maskow, para. 6.3; Schwenzer, Clausula, p. 731; Schwenzer, Force Majeure, pp. 716 et seq.; Brunner, Force Majeure, pp. 431 et seq.; cf. Azerdo Da Silveira, para. 524*]. A mere increase of 30 per cent, however, was found insufficient [*Nuova Fucinati v Fondmetall*]. In general, each party is responsible for its own shortcomings in business [*Aluminium Oxide Case, para. II (2); cf. Alimenta v Cargill, p. 652; Chinese Goods Case, para. 12*].

165 The Equatorianian tariffs that affect the last shipment only amount to 30 per cent of the purchase price [*Notice, p. 6 paras. 9 et seq.*]. Thus, these tariffs fall short of the threshold of hardship by far. CLAIMANT alone is responsible for the consequences of its own management. CLAIMANT sees the "*viability*" of its business threatened by the tariffs [*Cl. Memo., p. 31 para. 82*]. However, even if CLAIMANT's main credit line was terminated due to the tariffs, it could still operate its business [*PO2, p. 59 para. 29*]. Therefore, the performance of the Sales Agreement has not become more onerous to the extent of hardship.

166 Consequently, no requirements of the Force Majeure Clause are met. The underlying risk allocation of DDP Delivery prevails. Under this allocation of risks, CLAIMANT bears the tariffs.

II. In Any Case, the Legal Consequence of the Force Majeure Clause Is Exemption from Liability Rather Than Adaptation

167 In any event, the Force Majeure Clause's legal consequence is not adaptation of the Sales Agreement but exemption from liability.

168 The Parties agree that exemption is the consequence provided by the Force Majeure Clause [*Cl. Memo., p. 31 para. 83*]. However, contrary to CLAIMANT's allegation [*Cl. Memo., p. 31 paras. 84*] exemption does not include adaptation [*supra para. 79*].

169 To substantiate its allegation, CLAIMANT takes recourse to the General Mediterranean Contract Law [*Cl. Memo., p. 31 para. 84*]. However, the exemption from liability provided by the Force Majeure Clause is its exhaustive legal consequence [*supra para. 79*]. In light of this, it is neither necessary nor possible to take recourse to the General Mediterranean Contract Law.

170 Consequently, the Force Majeure Clause does not provide for adaptation. In view of the above, the tariffs do not entitle CLAIMANT to an adaptation under the Force Majeure Clause.

B. Art. 79 CISG Does Not Entitle CLAIMANT to an Adaptation of the Price

171 Art. 79 CISG equally does not allow for price adaptation.

172 CLAIMANT alleges to be entitled to payment not only under the Force Majeure Clause, but under Art. 79 CISG as well [*Cl. Memo., p. 32 para. 85*].

173 In fact, CLAIMANT's assertion is unfounded as it cannot derive any rights from said provision. The Parties derogated from Art. 79 CISG (**I**). Even assuming that Art. 79 CISG were not derogated from, it is inapplicable to the alleged case of hardship (**II**). Even if it were applicable, the requirements of Art. 79 CISG are not met (**III**). At the very least, Art. 79 CISG does not provide for adaptation (**IV**).

I. The Parties Derogated from Art. 79 CISG with Their Force Majeure Clause

174 By including the Force Majeure Clause into the Sales Agreement, the Parties derogated from Art. 79 CISG.

175 CLAIMANT alleges that because of the Parties' express choice of the CISG, they could not have derogated from singular provisions of this framework [*Cl. Memo., p. 33 para. 91*]. However, the Parties only chose the CISG as the basis of their Sales Agreement and then modified it.

176 Under Art. 6 CISG, parties can in fact derogate from singular provisions and not just from the CISG in its entirety [*Russian Federation Arbitration No. 129, para. 3.3*]. Derogation under Art. 6 CISG can be also implied [*Gasoline and Gas Oil Case, reasoning para. 2; Ferrari, Derogation, p. 741; Mistelis in Kröll et al., Art. 6 CISG, para. 16; Lohmann, pp. 248 et seq.*]. Such implied derogation requires that an interpretation pursuant to Art. 8 CISG indicates the parties' clear intent to derogate [*Ferrari, Specific Topics, p. 87; Mistelis in Kröll et al., Art. 6 CISG, paras. 16 et seqq.*].

177 Parties may derogate from Art. 79 CISG [*Saenger in Ferrari et al., Art. 79 CISG, para. 1; cf. Bonell in Bianca/Bonell, Art. 6 CISG, para. 2.4*]. This provision not only allows for an exemption from liability in cases of non-delivery, but also in cases of non-conformity of goods [*Brunner/Sgier in*

Brunner, Art. 79 CISG, para. 24; Magnus in Staudinger, Art. 79 CISG, para. 12; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 6].

178 Contrary to that, the Parties' Force Majeure Clause only exempts the seller from liability in cases of non-delivery, but not in cases of non-conformity of goods. Its wording only encompasses "*lost semen shipments or delays in delivery*" [*Ex. C4, p. 14 para. 12*]. Thus, the Parties never intended to limit CLAIMANT's liability for non-conformity of goods. Therefore, compared to Art. 79 CISG, the Sales Agreement provides a narrower solution to the issue. This, however, would be rendered moot if the broader Art. 79 CISG could also be applied. Consequently, the Force Majeure Clause reflects the Parties' implied intent to exclude this provision.

179 Thus, although the CISG is the legal basis for the Sales Agreement, the Parties derogated from Art. 79 CISG.

II. Even If the Parties Had Not Derogated from Art. 79 CISG, It Does Not Regulate Cases of Hardship

180 Even if the Parties had not excluded Art. 79 CISG, it only applies to cases of impossibility, not hardship.

181 CLAIMANT alleges that "*there is no evidence in Art. 79 CISG that hardship was supposed to be excluded within its scope of application*" [*Cl. Memo., p. 33 para. 96*]. However, the drafting history of Art. 79 CISG, reflected in its wording, contradicts this.

182 In the Uniform Law on the International Sale of Goods, there was a corresponding provision preceding Art. 79 CISG [*cf. Art. 74 ULIS; Lindström, p. 4; Hoyer/Posch, p. 19; Honnold, Documentary History, p. 1*]. However, this provision was criticised for being too broad [*UNCITRAL Yearbook V, p. 39; cf. Rimke, p. 211*]. Consequently, the wording of Art. 79 CISG was changed from "*circumstances*" to "*impediment*" [*Brunner, Force Majeure, p. 216; Pirozzi, p. 97*]. This evidences a narrower scope of application of Art. 79 CISG [*Fischer, pp. 55 et seq.; Slater, p. 258*].

183 The drafting history of Art. 79 CISG also records a proposal to include hardship [*Honnold, Art. 79 CISG para. 432.2; cf. Vienna Official Records, p. 381 para. 52*]. Notably, the drafters explicitly rejected this proposal [*Honnold, Documentary History, p. 603 para. 68*]. Consequently, Art. 79 CISG only reflects the concept of impossibility [*Beer Case, para. III. 3.; Sunflower Seed Case, para. 2.2; Bund, p. 386; Jenkins p. 2024; Saenger in Ferrari et al., Art. 79 CISG, para. 7; cf. "Femo" Alloy Case; Russian Federation Arbitration No. 255, para. 3.3; Steel Ropes Case para. 3.3; Flechtner, Exemption Provisions, p. 97*]. Thus, an impediment under Art. 79 CISG requires impossibility rather than hardship.

184 CLAIMANT merely experienced an increase of costs and never invoked impossibility.

185 Consequently, Art. 79 CISG does not apply to the present case.

III. Even If Art. 79 CISG Regulated Hardship, Its Requirements Are Not Met

186 Even if Art. 79 CISG were applicable to hardship, the case at hand does not fulfil its requirements.

187 CLAIMANT alleges that the requirements of Art. 79 CISG are met [*Cl. Memo., p. 33 para. 93*]. Moreover, it submits that an alleged gap within the provision should be filled with the PICC "*to interpret or supplement*" the CISG [*Cl. Memo., p. 34 para. 97*]. However, recourse to the PICC as general principle to fill a gap within the CISG is not possible.

188 Art. 7 (2) CISG allows the filling of gaps through application of the general principles of the CISG. Because of significant differences between the CISG and the PICC regarding hardship, the application of the PICC is inappropriate [*Gillette et al., p. 101; Slater, p. 259; cf. Flechtner, Gap-Filling, p. 199*]. The PICC came into effect years after the CISG [*Azerdo Da Silveira, para. 515; Flechtner, Gap-Filling, p. 199; Herber, p. 9*]. Thus, the PICC are not general principles that underlie the CISG [*Ferrari, Gap-Filling, p. 230; Ferrari, Unidroit, p. 16; Flechtner, Gap-Filling, p. 198; Gillette et al., p. 99; Paal, p. 83; Schwenzer, Gap-Filling, pp. 117 et seq.*]. In consequence, the requirements of Art. 79 CISG must be scrutinised without recourse to the PICC.

189 Parties invoking Art. 79 CISG have the burden of proof to show that the provision's requirements are met [*Achilles, Art. 79 CISG, para. 15; Herber/Czerwenka, Art. 79 CISG, para. 26; cf. Milling Equipment Case, para. 7; Powdered Milk Case, para. I.; Russian Federation Arbitration No. 406, para. 3.4.1*]. Moreover, all requirements of Art. 79 CISG must be met cumulatively [*Russian Federation Arbitration No. 2, para. 3.9; Atamer in Kröll et al., Art. 79 CISG, para. 43*].

190 In fact, the requirements of Art. 79 CISG are not met: The tariffs do not lead to an impediment beyond CLAIMANT's control (**1**). Additionally, CLAIMANT could reasonably have taken them into account (**2**) and could have avoided them (**3**).

1. The Tariffs Do Not Constitute an Impediment beyond CLAIMANT's Control

191 The tariffs do not qualify as an impediment beyond CLAIMANT's control under Art. 79 CISG.

192 CLAIMANT alleges that there was such an impediment [*Cl. Memo., p. 34 para. 104*]. It bases this assumption on a fundamental alteration of the equilibrium of the Sales Agreement due to the tariffs [*Cl. Memo., p. 34 paras. 98 et seq.*]. CLAIMANT further points out that it did not assume the risk of tariffs [*Cl. Memo., p. 35 para. 103*].

193 However, hardship may only constitute an impediment if it renders performance excessively more onerous [*Atamer in Kröll et al., Art. 79 CISG, para. 81; Azerdo Da Silveira, para. 488; Girsberger/Zapolski, p. 123; Schwenzer, Force Majeure, p. 714*]. Whether an event renders performance excessively more onerous depends on the parties' risk allocation [*Chinese Goods Case, para. 12; Liu,*

p. 693; Schwenzer, Force Majeure, p. 716]. Generally, awards and scholars are cautious to qualify hardship as an impediment under Art. 79 CISG [*ICC Case No. 8486; Uribe, p. 243*].

194 In its reasoning, CLAIMANT relies on *Scafom v Lorraine* [*Cl. Memo., p. 33 para. 95*]. However, in *Scafom v. Lorraine*, there was a cost increase of 70 per cent [*Scafom v Lorraine, para. II*]. Besides, the majority of authorities establishes a distinctly higher threshold [*supra para. 164*].

195 By agreeing on DDP Delivery, CLAIMANT bears the risk of increased tariffs [*supra para. 166*]. The tariffs can thus not render the performance excessively more onerous. Besides, the cost increase presently only amounted to 30 per cent [*Notice, p. 7 para. 18*]. Therefore, it falls short of the threshold for hardship, even according to CLAIMANT's own authority.

196 As a consequence, the tariffs do not constitute an impediment beyond CLAIMANT's control.

2. CLAIMANT Could Have Taken the Tariffs into Account When Concluding the Sales Agreement

197 Contrary to CLAIMANT's allegation [*Cl. Memo, p. 34 para. 100*], it could have taken the impediment into account when concluding the Sales Agreement.

198 Under Art. 79 CISG the impediment must have been unforeseeable to a reasonable third person in the parties' position when concluding the contract [*Achilles in Ensthaler, Art. 79 CISG, para. 7; Schwenzer in Schlechtriem/Schwenzer Commentary, Art. 79 CISG, para. 14*].

199 However, a reasonable person in CLAIMANT's position and with its special knowledge could have foreseen the tariffs and their applicability to frozen semen [*supra para.* ***155***].

200 Thus, CLAIMANT could have foreseen the tariffs when concluding the Sales Agreement.

3. CLAIMANT Could Have Avoided the Impediment and Its Consequences

201 Contrary to CLAIMANT's assertion [*Cl. Memo., p. 35 para. 104*], it could have avoided the impediment and its consequences.

202 Art. 79 (1) CISG requires that a party could not reasonably be expected to have avoided the impediment. An impediment is unavoidable if a party could not have successfully averted it before the respective event took place [*Atamer in Kröll et al., Art. 79 CISG, para. 54; Enderlein/Maskow, Art. 79 CISG, para. 6.1; Rimke, p. 251; Tallon in Bianca/Bonell, Art. 79 CISG, para. 2.6.4; cf. Radiated Spices Case, para. 10.5.3*].

203 It was CLAIMANT's responsibility under DDP Delivery to carry out all formalities regarding import [*supra para. 140*]. Thus, CLAIMANT was obliged to obtain the necessary information regarding the import of the frozen semen. In the case at hand, the tariffs were announced on 19 December 2017 [*PO2, p. 58 para. 25*]. Yet, they took effect not before 15 January 2018 [*ibid.*]. CLAIMANT was aware of the announcement regarding the imposition of tariffs [*PO2, p. 58*

para. 26]. However, it did not draw the correct conclusions from this announcement [*cf. Ex. C7, p. 16*]. Nevertheless, it was obliged to make the necessary inquires whether frozen semen was covered by the tariffs. This followed from its obligation of DDP Delivery. Additionally, there is nothing indicating that CLAIMANT could not have made its final delivery before 15 January 2018.

204 In light of this, CLAIMANT could have avoided the tariffs if it had taken the necessary precautions. Consequently, the requirements of Art. 79 CISG are not met in the present case.

IV. Even If the Requirements of Art. 79 CISG Were Fulfilled, It Does Not Provide for Adaptation

205 Even if the Tribunal were to find that the requirements of Art. 79 CISG are met, its legal consequence is not adaptation.

206 CLAIMANT states that the legal consequence of Art. 79 CISG is adaptation of the price [*Cl. Memo., p. 35 paras. 106 et seq.*]. Quite to the contrary, under the wording of Art. 79 CISG a party is not liable for a failure to perform any of its obligations. The provision does not provide for any other legal consequence.

207 There is no gap within Art. 79 CISG as exemption from liability is its exhaustive legal consequence (**1**). Even if there were a gap, general principles would only allow for renegotiation, but not adaptation (**2**). Moreover, CLAIMANT cannot rely on the PICC to claim adaptation (**3**).

1. Exemption from Liability Is the Exhaustive Legal Consequence of Art. 79 CISG

208 As exemption from liability is the exhaustive legal consequence of Art. 79 CISG, there is no gap within the provision.

209 CLAIMANT alleges that adaptation is consistent with Art. 79 CISG [*Cl. Memo., p. 36 para. 107*]. It argues that the provision is meant to restore the equilibrium of contracts [*ibid.*].

210 However, the purpose of Art. 79 CISG is to excuse parties from non-performance under exceptional circumstances [*Bund, p. 395; cf. Gabriel, p. 307*]. This legal consequence is sufficient for cases of hardship [*Honnold, pp. 626 et seqq.; Slater p. 260*]. The drafters of the CISG discussed whether the limitation of liability is the only adequate legal consequence [*UNCITRAL Yearbook VII, p. 56*]. However, the drafters rejected proposals that would have provided for other legal consequences than exemption from liability [*UNCITRAL Yearbook VII, p. 56; A/CONF.97/C.1/L.190, L.191/ Rev.1, L.208, L.217, para. 25*]. As the CISG does not include a mechanism for adaptation, it is impossible to perform adaptation under the CISG [*Tallon in Bianca/Bonell Art. 79 CISG, para. 3.1; cf. Draetta/Lake/Nanda, p. 192*]. Furthermore, even the authority CLAIMANT relies on [*Cl. Memo., p. 35 para. 106*] states: "*I reject the (for me outlandish) proposition that the CISG itself provides authority for a court or arbitrator to order renegotiation and/or*

adjustment of a CISG contract" [*Lookofsky, CISG, p. 161*]. Thus, the exemption from liability is the only suitable legal consequence for the provision.

211 Consequently, the exhaustive legal consequence of Art. 79 CISG is exemption from liability.

2. Even If There Were a Gap within Art. 79 CISG, General Principles of the CISG Would Provide for Renegotiation Rather Than Adaptation

212 In case of a gap within Art. 79 CISG, gap-filling with the general principles of the CISG would result in renegotiation rather than adaptation. As the Parties have already renegotiated, they have exhausted all legal consequences.

213 By balancing the principles of *pacta sunt servanda* and good faith, CLAIMANT derives a duty to renegotiate [*Cl. Memo., p. 36 para. 108*]. CLAIMANT further alleges that an adaptation of contracts is necessary if renegotiations fail [*Cl. Memo., pp. 36 et seq. para. 112*]. However, the general principles of the CISG do not allow for adaptation.

214 Art. 7 (2) CISG is the legal basis to fill gaps arising from issues that are governed by the CISG but are not expressly settled in it. Under the first alternative of Art. 7 (2) CISG, these gaps are to be filled in line with general principles of the CISG.

215 It is undisputed between the Parties [*Cl. Memo., p. 36 para. 110*] that general principles can make renegotiations of contracts mandatory [*Schwenzer, Force Majeure, p. 723; cf. Azerdo Da Silveira, pp. 342 et seq., para. 519; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 54*]. However, the duty to renegotiate is not the duty to find an agreement [*Berger, Adaptation, p. 1367; Schwenzer, Force Majeure, p. 723; cf. Lookofsky, CISG, p. 164*].

216 With regard to adaptation, RESPONDENT welcomes that CLAIMANT invokes the principle of *pacta sunt servanda* [*Cl. Memo., p. 36 para. 110*]. Under this principle, contracts are to be fulfilled in their original shape as far as possible [*Pfeiffer in Herberger et al., Sec. 313 para. 10*]. Additionally, party autonomy is another core principle of the CISG [*Herber/Czerwenka, Art. 29 CISG, para. 2; Magnus, General Principles, p. 480; Ferrari in Schlechtriem/Schwenzer, Art. 7 CISG, para. 48*]. Under this principle, the parties are responsible to shape the terms of their contract [*Honnold, Overview of the CISG, para. 2*]. Adaptation, however, is a change of the contract through a third party [*Beisteiner, p. 78; cf. Peter, p. 233*]. Thus, adaptation is inconsistent with both core principles of the CISG, *pacta sunt servanda* and party autonomy. Therefore, gap-filling with the general principles only allows for renegotiation but not for adaptation as a legal consequence.

217 Contrary to CLAIMANT's allegation [*Cl. Memo., p. 36 para. 111*], RESPONDENT never made any concessions [*cf. Ex. R4, p. 36*]. While the Parties attempted to renegotiate their contract, they did not find an equitable agreement [*Ex. C8, p. 18*].

218 In light of this, CLAIMANT has already benefitted from all remedies it could request under the general principles of the CISG. It cannot request adaptation under these principles.

3. CLAIMANT Cannot Take Recourse to the PICC for Its Claim of Adaptation

219 Contrary to CLAIMANT's assertion [*Cl. Memo., p. 37 para. 113*], it cannot take recourse to the PICC to fill the alleged gap within the CISG.

220 Under the first alternative of Art. 7 (2) CISG, general principles of the CISG are the primary method of gap-filling. However, in this regard, the PICC are not accepted as general principles of the CISG.

221 The second alternative of Art. 7 (2) CISG allows recourse to the law applicable by virtue of the rules of private international law. However, the provision requires the absence of any general principles of the CISG in order to fill the gap. Recourse to national law contradicts the underlying aim of the CISG which is the unification of law [*CISG AC No. 7, para. 36*; *Gruber, p. 25; Paal, pp. 65, 78; cf. Construction Materials Case; Flechtner, Gap-Filling, p. 198; Flechtner, Homeward Trend, pp. 29 et. seqq.*]. Therefore, recourse to national law is the last resort and should be avoided if possible [*Ferrari, Gap-Filling, p. 230; Schwenzer/Hachem in Schlechtriem/Schwenzer Commentary, Art. 7 CISG, para. 42; Flechtner, Gap-Flling, p. 198*].

222 As seen above, general principles of the CISG can be sufficiently used to fill the alleged gap of Art. 79 CISG through renegotiation [*supra para. 216*]. Thus, recourse to the Mediterranean Contract Law, a verbatim adoption of the PICC, is not permitted in the present case.

223 Therefore, CLAIMANT cannot base its request of adaptation on the PICC. Consequently, Art. 79 CISG does not provide for the legal consequence of adaptation. In conclusion, CLAIMANT is not entitled to an adaptation under Art. 79 CISG.

C. In Any Case, the Tribunal Should Reduce CLAIMANT's Request Significantly

224 Even if the Tribunal allowed adaptation, it should drastically reduce CLAIMANT's demand.

225 CLAIMANT asks for an additional payment of at least USD 1,250,000 [*Cl. Memo., p. 27 para. 68*]. This amounts to more than 80 per cent of the total additional costs of USD 1,500,000 [*cf. Notice, p. 6 para. 10; Ex. C5 p. 14 para. 6*]. However, such an excessive payment is unwarranted considering the circumstances of the case.

226 Contract adaptation has to live up to general considerations of fairness [*Brunner, Force Majeure, pp. 498 et seq.; Horn, pp. 138 et seq.; PICC Official Comments, Art. 6.2.3 PICC, para. 7; cf. Fucci, p. 38*]. A key factor for a fair distribution of additional costs is the risk assumption between the parties [*McKendrick in Vogenauer/Kleinheisterkamp, Art. 6.2.3 PICC, para. 7; PICC Official Comments, Art. 6.2.3 PICC, para. 7*].

227 The Sales Agreement allocates the risks between the Parties [*Ex. C5, p. 14*]. For instance, clauses 9, 10 and 13 of the Sales Agreement specifically stipulate costs and risks RESPONDENT "*is responsible for*" [*Ex. C5, p. 14 paras. 9, 10, 13*]. In fact, RESPONDENT is not responsible for tariffs. Quite to the contrary, the risk for tariffs was explicitly assumed by CLAIMANT through DDP Delivery [*supra para. 140*]. CLAIMANT even demanded a higher price for the additional costs associated with DDP Delivery [*Ex. C4, p. 12*]. Because of this, RESPONDENT made an additional payment exceeding the mere costs of transportation [*cf. Ex. C2, p. 10; Ex. C4, p. 12; PO2, p. 56 para. 8*]. Thus, RESPONDENT remunerated CLAIMANT for its voluntary assumption of additional cost. In light of this it seems disproportionate that RESPONDENT should now bear the majority of the additional cost.

228 As a consequence of this risk assumption between the Parties, if the Tribunal were to adapt the price, it is held to drastically reduce CLAIMANT's demand.

CONCLUSION TO THE THIRD ISSUE

229 When CLAIMANT assumed the risk of tariffs it demanded additional compensation through an increase of the purchase price. To RESPONDENT's surprise, CLAIMANT demands even further compensation through a further increase of the purchase price, now that the risk has materialised. What is more, CLAIMANT is not suggesting an equal distribution of this financial burden but wants RESPONDENT to assume practically all of it. While RESPONDENT acknowledges that CLAIMANT's business decisions have led it into severe difficulties, it is not RESPONDENT's responsibility to solve CLAIMANT's financial problems. Not only could it have foreseen the tariffs in the light of recent political events. It could have avoided them entirely through earlier delivery. Shifting the consequences of this mismanagement to RESPONDENT finds no bases in the Parties' Contract or Art. 79 CISG. Most strikingly, the extent of the additional burden caused by the tariffs does not even come close to the threshold of hardship. Therefore the Tribunal shall dismiss CLAIMANT's desperate attempts to evade responsibility for its own business decisions and find in favour of RESPONDENT.

STATEMENT OF RELIEF SOUGHT

For the reasons stated in this Memorandum, RESPONDENT respectfully requests the honourable Arbitral Tribunal to find that:

- The Tribunal does not have jurisdiction and power to adapt the Sales Agreement (**First Issue**).

- The Award brought forward by CLAIMANT is inadmissible as evidence in this arbitration (**Second Issue**).

- CLAIMANT is not entitled to an adaptation of the purchase price under the applicable law (**Third Issue**).

Respectfully submitted on behalf of RESPONDENT, *Black Beauty Equestrian,* on 24th January 2019

MARKUS DIEKMANN | MAXIMILIAN EDINGER | DOMINIK MARCZOK

PÉA SCHROVEN | JANA SCHUMACHER