

SIXTEENTH ANNUAL WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT HONG KONG

MEMORANDUM FOR CLAIMANT

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ON BEHALF OF
Phar Lap
Allevamento
CLAIMANT



AGAINST
Black Beauty
Equestrian
RESPONDENT

JULE BAYER
RAPHAEL REISS

THIMO HÄRTER

INGA HÖFEL
SIMON THOMAS

Tübingen • Germany

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INDEX OF ABBREVIATIONS

| | |
|----------------------|---|
| % | Per cent |
| \$ | US-Dollar |
| Answer to NoA | Answer to the Notice of Arbitration |
| Art. | Article |
| Artt. | Articles |
| BGH | Bundesgerichtshof |
| CEO | Chief Executive Officer |
| cf. | Compare with |
| CISG | United Nations Convention on Contracts for The International Sale of Goods |
| CISG AC | United Nations Convention on Contracts for The International Sale of Goods Advisory Council |
| Co. | Company |
| Contract | Frozen Semen Sales Agreement |
| Corp. | Corporation |
| DDP | Delivered Duty Paid |
| Ed. | Editor |
| et al. | Et alia: and others |
| Ex. C | CLAIMANT's Exhibit |
| Ex. R | RESPONDENT's Exhibit |
| f. | And the following page |
| ff. | And the following pages |
| HCCH-Rules | Hague Principles on Choice of Law in International Commercial Contracts |
| HKIAC-Rules | Hong Kong International Arbitration Center Administered Arbitration Rules 2018 |
| i.a. | Inter alia |
| ICC | International Chamber of Commerce Arbitration |
| ICSID | International Centre for Settlement of Investment Disputes |
| Inc. | Incorporated |

| | |
|---------------------|---|
| INCOTERMS | ICC International Commercial Terms |
| Ltd. | Limited |
| Model Clause | HKIAC Model Clause |
| Model Law | UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 |
| Mr. | Mister |
| Ms. | Miss |
| no. | Number |
| NoA | Notice of Arbitration |
| OLG | Oberlandesgericht |
| p. | Page |
| pp. | Pages |
| para. | Paragraph |
| paras. | Paragraphs |
| PICC | UNIDROIT Principles on International Commercial Contracts 2016 |
| PO1 | Procedural Order No 1 |
| PO2 | Procedural Order No 2 |
| supra | Earlier in this writing |
| UNCITRAL | United Nations Commission on International Trade Law |
| U.S. | United States of America |
| v. | Versus |

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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento (hereinafter: “**CLAIMANT**”) and Black Beauty Equestrian (hereinafter: “**RESPONDENT**”).

CLAIMANT is the operator of a racehorse breeding stud farm located in Mediterraneo.

RESPONDENT is the operator of a race horse stable based in Equatoriana.

21 March 2017 The parties enter into contract negotiations for “Nijinsky III semen”.

24 March – 12 April 2017 The contract negotiations are led by Ms. Napravnik (representative for **CLAIMANT**) and Mr. Antley (representative for **RESPONDENT**).

12 April 2017 Ms. Napravnik and Mr. Antley are severely injured in a car accident. They are not able to continue their negotiations.

6 May 2017 The Frozen Semen Sales Agreement (hereinafter: “**Contract**”) is concluded in Mediterraneo by the two new negotiators, Mr. Ferguson and Mr. Krone.

15 November 2017 Mediterraneo imposes a 25 % import tariff on agricultural products from Equatoriana including racehorses.

15 January 2018 Equatoriana imposes a 30 % retaliatory import tariff on all agricultural goods from Mediterraneo.

20 and 21 January 2018 Ms. Napravnik contacts **RESPONDENT** to renegotiate the contract after finding out that racehorse semen is also subject to import tariffs

23 January 2018 **CLAIMANT** delivers the last batch of semen.

12 February 2018 **RESPONDENT**’s CEO terminates the renegotiations.

29 June 2018 An award in another HKIAC proceeding is rendered, where **RESPONDENT** claims a reimbursement of 25 % from its contract partner in Mediterraneo which bought a mare. The claim is based on a contract adaptation due to the 25 % import tariffs. The arbitral tribunal in that proceeding confirmed its power to adapt the contract.

31 July 2018 **CLAIMANT** submits its Notice of Arbitration (hereinafter: “**NoA**”).

Shortly prior to 2 October 2018 At the annual breeder conference, a former employee of **RESPONDENT** informs **CLAIMANT** about **RESPONDENT**’s other arbitral proceeding.

2 October 2018 **CLAIMANT** notifies the arbitral tribunal that it wants to introduce the award from the other arbitral proceeding as evidence.

SUMMARY OF ARGUMENT

On 6 May 2017, CLAIMANT and RESPONDENT concluded the Contract about the delivery of 100 doses of horse semen. Each dose costs \$ 100,000. The Contract includes a hardship clause which protects CLAIMANT from bearing any delivery-related costs arising from unforeseen events. After the imposition of import tariffs by the Equatorianian government, CLAIMANT's delivery costs increased by 30 %. CLAIMANT already refrains from claiming all its costs and waives its profit margin of 5 %. Since RESPONDENT now refuses to pay for the tariffs, CLAIMANT even makes a loss of 25 %, which equates \$ 1,250,000. On the other hand, RESPONDENT made profit by successfully reselling the semen. This constitutes a breach of RESPONDENT's obligation to inform under the Contract. Since the hardship clause relieves CLAIMANT from all expenses, RESPONDENT must pay CLAIMANT its loss of \$ 1,250,000. CLAIMANT is entitled to that payment both under the hardship clause in clause 12 of the Contract and under the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: "**CISG**") (**ISSUE 2**).

CLAIMANT tried to resolve the dispute amicably via renegotiations, which RESPONDENT terminated. Therefore, CLAIMANT was forced to initiate arbitral proceedings to pursue its rights. The arbitral tribunal has both the jurisdiction and the power to adapt the Contract in the course of these proceedings. The Contract includes an arbitration clause that refers any *dispute arising out of the contract* to the arbitral tribunal. CLAIMANT requests the arbitral tribunal to adapt the sales price, thereby ordering RESPONDENT to pay the outstanding amount. The parties have conferred upon the arbitral tribunal the power to adapt the Contract which can be derived from an interpretation of the hardship clause (**ISSUE 1**).

Lastly, the arbitral tribunal shall admit a Partial Interim Award from another arbitral proceeding under the Hong Kong International Arbitration Centre Administered Arbitration Rules 2018 (hereinafter: "**HKIAC-Rules**") that RESPONDENT is involved in. In this proceeding, RESPONDENT is negatively affected by import tariffs and requests a contract adaptation in order to be compensated for its loss. Since this Partial Interim Award gives evidence for RESPONDENT's contradictory behaviour, which is relevant in the pending arbitral proceeding, it should be admitted as evidence (**ISSUE 3**).

ISSUE 1: JURISDICTION AND POWER OF THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

1 CLAIMANT and RESPONDENT are involved in an arbitral proceeding based on their Contract. As a result of an imposition of import tariffs, CLAIMANT demands from RESPONDENT an additional reimbursement amounting to \$ 1,250,000 from a contract adaptation. The arbitral tribunal has both the jurisdiction **(I.)** and the power to adapt the Contract under the arbitration clause **(II.)**.

I. The arbitral tribunal has jurisdiction to adapt the Contract

2 The arbitral tribunal has jurisdiction to adapt the Contract under the arbitration clause. Its jurisdiction can be derived from the arbitration clause which shall be interpreted broadly pursuant to the CISG, in particular Art. 8 CISG. The way the arbitration clause shall be interpreted depends on which country's law applies to said clause. The law governing the arbitration clause is in dispute between the parties.

3 The arbitral tribunal shall determine the applicable law in accordance with its competence-competence to rule on its own jurisdiction pursuant to Art. 19 (1) HKIAC-Rules. However, both the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: "**Model Law**") as well as the HKIAC-Rules lack provisions on the law applicable to the interpretation of an arbitration clause. Art. 28 Model Law and Art. 36 HKIAC-Rules are unsuitable since they only determine the law governing the merits of the dispute (*Moser/Bao, in: HKIAC-Rules, Art. para. 11.51; Holtzmann/Howard, in: Model Law, Art. 28 p. 764; Schwenger/Jäger, in: IWRZ 2016, p. 103*). Therefore, CLAIMANT kindly asks the arbitral tribunal to determine the applicable law in accordance with the three-stage inquiry. The three-stage inquiry is suitable for that purpose as it constitutes the international standard of determining the law governing the interpretation of arbitration clauses (*English Court of Appeal, Sulamérica CIA de Seguros v. Enesa Engenharia SA; Queen's Bench Division Commercial Court, Arsanovia Ltd and others v. Cruz City 1 Mauritius Holdings; Queen's Bench Division Commercial Court, Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v. VSC Steel Company LTD; Flannery, in: Applicable law, p. 10*).

4 According to the three-stage inquiry one must consider whether an express choice of law has been made by the parties. If no express choice can be discerned, one must determine whether an implied choice has been made. Finally – in the absence of an express or implied choice of law by the parties – the proper law would be the one with the closest and most real connection to the parties' arbitration clause (*English Court of Appeal, Sulamérica CIA de Seguros v. Enesa Engenharia SA; Redfern/Hunter, p. 158 para. 3.11*).

5 The parties have made an implied choice in favour of Equatorianian law which allows for a broad interpretation pursuant to Art. 8 CISG **(1.)**. Even if the arbitral tribunal did not find that the parties

made an implied choice, the arbitration clause shall be interpreted broadly pursuant to Art. 8 CISG under the law of Mediterraneo **(2.)**.

1. Equatorianian law governs the arbitration clause and provides for a broad interpretation pursuant to Art. 8 CISG

6 Equatorianian law is applicable to the arbitration clause since the parties have implicitly submitted said clause to the law of Equatoriana **(a.)**. Art. 8 (2) CISG shall be applied to construe the arbitration clause widely **(b.)**.

a. The arbitration clause is governed by the law of Equatoriana

7 Equatorianian law governs the arbitration clause since the three-stage inquiry in its second step leads to this conclusion. As correctly stated by RESPONDENT, the final version of the arbitration clause does not contain any express choice of law provision governing the arbitration clause [Ex. C5, p. 14, no. 15; Answer to NoA, p. 31, no. 14]. Contrary to RESPONDENT's allegation [Answer to NoA, p. 31, no. 14], the parties have rendered an implied choice in favour of Equatorianian law. When the parties have not chosen the law expressly, the general circumstances of the contract must be considered to determine an implied choice (*Black's law dictionary*, p. 873; *Garner, in: A dictionary of modern legal usage*, p. 280). This also includes the drafting history of the arbitration agreement. The formation of such an agreement requires an offer by one party which is accepted by the other party (*Fouchard/Gaillard/Goldman, Arbitration*, p. 193, para. 385).

8 Mr. Antley, the lawyer of RESPONDENT, proposed an arbitration clause which inter alia expressly stipulated the law of Equatoriana to govern said clause in his e-mail of 10 April 2017 [Ex. R1, p. 33]. This constitutes an offer. CLAIMANT "accepted the proposal with an amendment [only] as to the place of arbitration" [Ex. R2, p. 34] in his e-mail of 10 April 2017. The incorporation of this express choice has been merely overlooked afterwards due to the car accident on 12 April 2017 [PO2, p. 55 no. 6]. Because of this accident, both parties' original negotiators were no longer available which made it necessary for new negotiators to step in, albeit not being involved in the negotiations until that point. These new negotiators cannot remember why they did not include the choice of law for the arbitration clause rendered by their predecessors into the final Contract [PO2, p. 55 no. 6]. Therefore, the express choice of law during the contract negotiations translates into an implied choice of law in favour of Equatorianian law. The law of Equatoriana is hence applicable to the arbitration clause.

b. Art. 8 CISG applies to broadly interpret the arbitration clause

9 The arbitration clause shall be interpreted according to Art. 8 CISG **(aa.)**. As a result, the arbitration clause shall be interpreted broadly, thereby demonstrating that a contract adaptation due the imposition of tariffs is a *dispute arising out of the contract* **(bb.)**.

aa. The arbitration clause shall be interpreted pursuant to Art. 8 CISG

10 The pending dispute falls within the sphere of application of the CISG and Art. 8 CISG shall be applied to construe the arbitration clause.

Art. 1 (1a) CISG sets forth that the CISG applies to contracts of sale of goods between parties who have their place of business in two different signatory states to the CISG. Frozen semen is a good pursuant to Art. 1 CISG, thus making the Contract a “sale of goods” within the meaning of Artt. 1 and 3 CISG. Furthermore, CLAIMANT and RESPONDENT have their place of business in different states, Mediterraneo and Equatoriana, which have both ratified the CISG [PO1, p. 52 no. III. 4]. Therefore, the pending dispute falls within the sphere of application of the CISG. Art. 8 CISG thus governs the interpretation of the Contract since the CISG supplants national contract law within its sphere of application (BGer, CISG-online no. 770; Stoffel, in: Publication CEDIDAC 1991, p. 36). Art. 8 CISG further also governs the interpretation of the arbitration clause. It is broadly recognised that Art. 8 CISG applies not only to parties’ statements but also to contracts (HGer Aargau, CISG-online no. 1740; UN Conference on the CISG, OR, p. 18; Ferrari, in: MüKoHGB, Art. 8 para. 3). The contract interpretation is, however, not limited to the substantive issues addressed in the CISG. This is evidenced by Art. 19 (3) CISG which inter alia governs agreements on the settlement of disputes otherwise not addressed in the CISG (Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8 para. 5; Gruber, in: MüKoBGB, Art. 8, para. 6). The term settlement of disputes also includes arbitration clauses which are thus considered material terms pursuant to Art. 19 (3) CISG (U.S. District Court Southern District of NY, CISG-online no. 45; DiMatteo/Dhooge/Greene/Maurer, in: NWJILB 2004, p. 355; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8 para. 5). Since it is a provision regarding the formation of contracts, statements pursuant to Art. 19 (3) CISG are subject to an interpretation pursuant to Art. 8 CISG. Consequently, Art. 8 CISG applies to an interpretation of arbitration clauses.

bb. The contract adaptation due to the import tariffs is a dispute arising out of this contract

11 The pending dispute falls within the scope of the arbitration clause, as its wide interpretation pursuant to Art. 8 (2) CISG demonstrates that the contract adaptation is a *dispute arising out of the contract*. Generally, Art. 8 (1) CISG has precedence over Art. 8 (2) CISG. Under Art. 8 (1) CISG, the arbitration clause must be interpreted in line with the subjective and real intent of the declaring party, if the other party knew the real intent or could not have been unaware of it. However, the arbitration clause cannot be construed pursuant to Art. 8 (1) CISG in the present case as RESPONDENT’s true party intent cannot be discerned. If Art. 8 (1) CISG is inapplicable, Art. 8 (2) CISG stipulates an objective approach (OLG Köln, CISG-online no. 609; Huber, in: The

CISG, p. 12; *Gruber*, in: *MüKoBGB*, Art. 8 para. 12). Under Art. 8 (2) CISG, the arbitration clause must be interpreted according to the understanding that a reasonable person in the other party's shoes would have had (*Zuppi*, in: *Kröll/Mistelis/Perales Viscasillas*, Art. 8 para. 23; *Schmidt-Kessel*, in: *Schlechtriem/Schwenzer*, Art. 8 para. 20). The understanding of a reasonable person shall be determined by considering all relevant circumstances of the case including the negotiations, usages and any subsequent conduct of the parties, Art. 8 (3) CISG. The fact that negotiations can be considered illustrates that the CISG is opposed to the parol evidence rule (*U.S. Court of Appeals*, *CISG-online no. 342*; *U.S. District Court for the Northern District of Illinois*, *CISG-online no. 444*; *Huber*, in: *The CISG*, p. 13). Therefore, previous correspondence shall be taken into account in the course of the interpretation (*ICC*, case no. 11849; *Schmidt-Kessel*, in: *Schlechtriem/Schwenzer*, Art. 8 para. 34; *Huber*, in: *The CISG*, p. 13). The arbitration clause that the parties included into the Contract reads in its relevant part that *any dispute arising out of this contract* shall be settled via arbitration [*Ex. C5*, p. 14 no. 15]. A reasonable person of the same kind as RESPONDENT must understand the remedy of contract adaptation to constitute a dispute (i.). Moreover, a reasonable person of the same kind as RESPONDENT had to understand the words *arising out of* broadly (ii.).

i. Contract adaptation constitutes a dispute

12 A reasonable person of the same kind as RESPONDENT must have apprehended that the remedy of contract adaptation is a dispute in accordance with the arbitration clause.

In the scholarly discussion, it has been argued that a *dispute* would only exist if the arbitral tribunal was asked to make a 'yes' or 'no' decision (*Berger*, in: *ArbIntl 2001*, p. 2). Such a narrow interpretation of the arbitrators' role does neither reflect the practice nor the current needs of international trade (*Born*, p. 1348; *Fouchard/Gaillard/Goldman*, *Arbitration*, p. 25 para. 34). However, even if the arbitral tribunal construed the term dispute that narrowly, it would still have to assume a dispute in the present case: With the exchange of the NoA and the Answer to NoA, CLAIMANT and RESPONDENT have already entered adversarial proceedings. The aim of these proceedings is to receive an award ordering RESPONDENT to reimburse CLAIMANT with \$ 1,250,000. The contract adaptation is merely the remedy to achieve such an award. The arbitral tribunal is thus asked to make a 'yes' or 'no' decision. A reasonable person of the same kind as RESPONDENT could thus only understand the term dispute to also comprise contract adaptations.

ii. The imposition of tariffs is covered by the arbitration clause

13 The imposition of import tariffs is covered by the arbitration clause.

A reasonable person of the same kind as RESPONDENT had to understand the words *arising out of* broadly. General practice shows that the words *arising out of* are broad in scope (*Queen's Bench Division*, *Ethiopian Oilseeds and Pulses Export Corp v. Rio del Mar Foods*; *Born*, p. 1354; *Guest*, in: *Chitty on*

Contracts Vol. II, p. 136 para. 32-030). The rationale for this broad interpretation is to promote the pro-arbitration rule of interpretation (*Born, p. 1354*). Thus, an arbitration clause shall comprise any kind of claim, especially if closely connected with the contract (*English Court of Appeal, Astro Vencedor Compania Naviera S.A. of Panama v. Mabanafi GmbH; Guest, in: Chitty on Contracts Vol. II, p. 136 para. 32-030*). The Contract agreed upon by the parties deals with frozen semen [*Ex. C5, p. 13-14*]. Frozen semen is affected by the newly imposed tariffs [*Ex. C7, p. 16*]. Consequently, the imposition of import tariffs inter alia on frozen semen is closely connected with the Contract. A reasonable person of the same kind as RESPONDENT thus had to construe the words *arising out of* broadly.

14 This wide interpretation is further evidenced by the contract history. The wording of the arbitration clause comprised in the Contract deviates from the model arbitration clause suggested by the Hong Kong International Arbitration Center (hereinafter: “**HKIAC**”) [*Ex. R1, p. 33*]. In its relevant part, the HKIAC Model Clause (hereinafter: “**Model Clause**”) reads that *any dispute, controversy, difference or claim arising out of or relating to this contract shall be settled by arbitration* (*Moser/Bao, in: HKIAC-Rules, para. 4.24*). RESPONDENT only deviated from the wording of the Model Clause to “narrow down and streamline *the fairly broad wording* of [said] clause” [*Ex. R1, p. 33*]. RESPONDENT thus shortened the Model Clause to bring out its content more clearly. Therefore, a reasonable person of the same kind as CLAIMANT had to understand these changes in a way that RESPONDENT intended to rephrase the clause to make it more concise without any amendments to the scope of the arbitration clause. The contract history thus also supports the wide interpretation. Hence, the imposition of import tariffs is covered by the arbitration clause.

Therefore, an interpretation of the arbitration clause pursuant to Art. 8 (2) CISG demonstrates that the pending dispute lies within the scope of the arbitration clause. In conclusion, a wide interpretation under Equatorian law grants the arbitral tribunal jurisdiction.

2. Even if Mediterranean law is applicable, the arbitral tribunal has jurisdiction

15 Even if the arbitral tribunal did not find the law of Equatoriana to govern the arbitration clause, the arbitral tribunal’s jurisdiction stems from a wide interpretation pursuant to Mediterranean law. In the absence of an implied party choice, Mediterranean law and not Danubian law is applicable as the law of Mediterraneo has the closest and most real connection to the case **(a.)**. Art. 8 (2) CISG applies to interpret the arbitration clause widely, thus demonstrating that *disputes arising out of the contract* also comprise an adaptation due to import tariffs **(b.)**.

a. Mediterranean law is applicable instead of Danubian law

16 Mediterranean law is applicable instead of Danubian law since it has the closest and most real connection to the case in accordance with the last stage of the three-stage inquiry. The closest and most real connection is indicated by so called connecting factors like the law of the underlying

contract **(aa.)** and the law of the country where the arbitration clause was concluded **(bb.)**. The connecting factor seat of arbitration shall not be used to indicate the application of Danubian law according to the validation approach **(cc.)**.

aa. The Contract indicates the application of Mediterranean law

17 Mediterranean law applies to the arbitration clause as the parties have expressly chosen the law of Mediterraneo to govern the underlying Contract [*Ex. C5, p. 14 no. 14*]. This is in line with the practice of international commercial contracts. It is common practice to apply the law governing the main contract to the arbitration clause (*ICC, case no. 6752; ICC, case no. 11869; ICC, case no. 3572; ICC, case no. 9987; English Court of Appeal, Sulamérica CIA de Seguros v. Enesa Engenharia SA; Lew, in: ICCA Congress Series 1998, p. 143*). This practice stems from the natural connection between the law applicable to the main contract and the law applicable to the arbitration clause (*Redfern/Hunter, p. 160 para. 3.20; Born, in: SAcLJ 2014, p. 827 para. 33; Born, p. 517*). It would therefore be contrary to the expectations of business people to apply two different laws to the main contract and the arbitration clause. That, however, is RESPONDENT's demand when it asks for the application of Danubian law [*Answer to NoA, p. 31 no. 13*]. If Danubian law applied to the arbitration clause, its intimate connection with the underlying contract would be disregarded. Since the Contract provides for the application of Mediterranean law, it would be remote from everyday life if said law was not applied to the arbitration clause.

18 RESPONDENT cannot argue [*Answer to NoA, p. 31 no. 14*] that this approach violates the doctrine of separability pursuant to Art. 16 (1) Model Law and Art. 19 (2) HKIAC-Rules. According to the doctrine of a separability, an arbitration clause is to be treated as an agreement independent of the other terms of the contract. The arbitration clause may thus be governed by a different law than the one governing the underlying contract (*Final Award in ICC, case no. 3572*). However, that does not necessarily mean that the law governing the arbitration clause must differ from the law applicable to the underlying contract (*Glick/Venkatesan, in: Liber Amicorum Michael Pryles, p. 147*). The application of the law of the underlying contract does not violate the doctrine of separability. Therefore, the express choice in favour of Mediterranean law in the Contract also indicates its application to the arbitration clause.

bb. The place of contract conclusion indicates the application of Mediterranean law

19 The Contract was concluded in Mediterraneo which thus connects the arbitration clause with Mediterranean law. There is a traditional leaning in favour of applying the law at the place of contract completion (*Fouchard/Gaillard/Goldman, Arbitration, p. 224 para. 427; Lew, in: ICCA Congress Series 1998, p. 141*). Consequently, the law of the place of contract conclusion weighs in as a connecting factor (*ICC, case no. 5730; Garnuszek, in: Arbitration 2016, p. 352; Lew, in: ICCA Congress*

Series 1998, p. 141). The Contract was signed in Mediterraneo on 6 May 2017 [PO2, p. 56 no. 13]. The place of contract conclusion is thus another argument in favour of applying Mediterranean law to the arbitration clause.

cc. The seat of arbitration shall not be decisive

20 Pursuant to the validation approach, the connecting factor seat of arbitration shall not lead to the application of Danubian law in the present case. The seat of arbitration is a connecting factor (*Lew, in: ICCA Congress Series 1998, p. 141 f.*). However, the validation approach stipulates the application of the law which renders the arbitration clause valid if the applicable law is disputed (*English Court of Appeal, Sulamérica CIA de Seguros v. Enesa Engenharia SA; Swedish Supreme Court, Bulgarian Foreign Trade Bank Ltd v. Trade Finance Inc; Born, p. 494; Lew, in: ICCA Congress Series 1998, p. 140*). The validation approach's underlying rationale is to adhere the parties to their own decision to settle a dispute through arbitration preventing them from renegeing on the arbitration clause (*Redfern/Hunter, p. 162 para. 3.27*). While the validity of the arbitration clause is undisputed in the present case, the application of Danubian law for its interpretation would have the same effect as invalidity. As Danubian law mandates a narrow interpretation of arbitration clauses, the arbitral tribunal would lack jurisdiction to adapt the Contract under Danubian law [PO1 p. 51 no. II]. Consequently, RESPONDENT's demand to apply Danubian law to the arbitration clause [*Answer to NoA, p. 31 no. 13*] shows its intention to renege on said clause. The application of Danubian law would violate the rationale behind the validation approach. Therefore, Danubian law shall not be applied to interpret the arbitration clause in the present case.

In conclusion, the law of Mediterraneo has the closest and most real connection to the arbitration clause and shall therefore apply to its interpretation.

b. The broad interpretation pursuant to Art. 8 (2) CISG results in the arbitral tribunal's jurisdiction to adapt the Contract

21 The broad interpretation pursuant to Art. 8 (2) CISG demonstrates that the adaptation due to the imposition of tariffs is a *dispute arising out of the contract* and is therefore covered by the arbitration clause. Said clause shall be construed broadly pursuant to Art. 8 (2) CISG since the CISG applies to the interpretation of arbitration clauses in line with the consistent jurisprudence in Mediterraneo [PO1, p. 52 no. II para. 4]. As shown above, the interpretation pursuant to Art. 8 (2) CISG demonstrates that the arbitration clause must be understood broadly [*paras. 13 f.*]. A dispute about adaptation due to import tariffs is therefore a *dispute arising out of this contract* [*paras. 12 ff.*]. Consequently, the arbitral tribunal also has jurisdiction under Mediterranean law.

In conclusion, CLAMANT kindly asks the honourable tribunal to assume jurisdiction due to a wide interpretation of the arbitration clause under Equatorianian law as a result of an implied party

choice. Subsidiarily, the law of Mediterraneo shall apply in line with final stage of the three-stage inquiry which would lead to the same result. There is therefore no room for a narrow interpretation pursuant to Danubian law.

II. The arbitral tribunal has the power to adapt the Contract under the arbitration clause

22 The arbitral tribunal has the power to adapt the Contract under the arbitration clause. The arbitral tribunal is bound by contractual provisions such as the hardship clause. Therefore, the arbitral tribunal shall have the power to grant all remedies set forth in the Contract. Since the arbitration clause allows the arbitral tribunal to decide the case in its entirety, it therefore has the power under the arbitration clause to grant remedies stipulated in the Contract.

The parties agreed on granting the arbitral tribunal the power to adapt the Contract under the hardship clause. According to their mutual understanding, clause 12 constitutes a hardship clause **(1.)** which gives the arbitral tribunal the power of adaptation **(2.)**.

1. Clause 12 constitutes a hardship clause

23 Clause 12 of the Contract constitutes a hardship clause. A hardship clause is a clause providing a remedy for the occurrence of an unforeseen event rendering the performance more onerous (*ICC case no. 9029; ICC case no. 1512; ICC case no. 16369; BGer, 13. 01.1975*). Clause 12 reads that "hardship [is] caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C5, p. 14 no. 12*]. An interpretation of said clause pursuant to Art. 8 (1) CISG according to the parties' intention shows that they both intended to understand clause 12 as a hardship clause.

24 According to CLAIMANT's intention, clause 12 constitutes a hardship clause. CLAIMANT expressly outlined in the e-mail correspondence with RESPONDENT that it was not willing to take over any risks associated with unforeseen changes in customs regulation or import restrictions [*Ex. C4, p. 12*]. This reservation stems from the fact that such changes led CLAIMANT to be burdened by high additional costs in another contractual relationship [*Ex. C4, p. 12*]. In the present contractual relationship, CLAIMANT therefore wanted to be relieved from all financial risks related to the occurrence of unforeseen events. In order to ensure that, it insisted to include a hardship clause into the Contract [*Ex. C4, p. 12*]. CLAIMANT's intention is reflected in the wording of clause 12 which addresses the issue of unforeseen events. Therefore, CLAIMANT intended for clause 12 to be a hardship clause.

25 Since CLAIMANT outlined this intention in its e-mail correspondence with RESPONDENT [*Ex. C4, p. 12*], RESPONDENT knew or could at least not have been unaware of it. Additionally, it never objected to the interpretation of clause 12 as a hardship clause. Quite to the

contrary, RESPONDENT consented to CLAIMANT's understanding of clause 12 by expressly referring to it as hardship clause as well [*Answer to NoA*, p. 32 no. 19]. Therefore, it was the parties' common intention to understand clause 12 as a hardship clause. Lastly, this is evidenced by the wording of clause 12 itself, expressly comprising the word hardship. [*Ex. C5*, p. 14]. In conclusion, clause 12 of the Contract constitutes a hardship clause.

2. The hardship clause gives the arbitral tribunal power to adapt the Contract

26 The hardship clause grants the arbitral tribunal the power to adapt the Contract. This can be derived from an interpretation of said clause pursuant to Art. 8 (1) CISG **(a.)**. Even if the arbitral tribunal did not come to the conclusion that Art. 8 (1) CISG applies, an interpretation pursuant to Art. 8 (2) CISG leads to the same result **(b.)**.

a. The power can be derived from an interpretation pursuant to Art. 8 (1) CISG

27 The power of the arbitral tribunal to adapt the Contract follows from an interpretation of the hardship clause pursuant to Art. 8 (1) CISG, considering the parties' intent.

RESPONDENT suggested that the arbitral tribunal shall have the power to adapt the Contract [*Ex. C8*, p. 17]. It stated that in case the parties could not agree to amicably renegotiate the terms of the Contract to account for a change of circumstances, the arbitral tribunal shall step in and adapt that Contract [*Ex. C8*, p. 17]. RESPONDENT therefore intended for the arbitral tribunal's power to be expressly set forth in the Contract. CLAIMANT consented with this suggestion as it also wanted to include an express reference to the arbitral tribunal's power either into the hardship clause or the arbitration clause to clarify the issue [*Ex. C8*, p. 17]. The only reason for why the power is not expressly set forth in the Contract is the accident of the main negotiators [*NoA*, p. 7 no. 16].

Therefore, the interpretation of the hardship clause pursuant to Art. 8 (1) CISG according to the parties' intent shows, that it is within the power of the arbitral tribunal to conduct a contract adaptation.

b. In any case, the power of contract adaptation stems from an interpretation pursuant to Art 8 (2) CISG

28 Even if the arbitral tribunal came to the conclusion that its power to adapt the Contract does not ensue from an interpretation of the hardship clause pursuant to Art. 8 (1) CISG, the interpretation of said clause pursuant to Art. 8 (2) CISG leads to the same result.

29 According to general practice, the inclusion of a hardship clause into a contract indicates that the parties provided the arbitral tribunal with the power to adapt contracts under changed circumstances (*Bordacabar, The Rule*, p. 2; *Berger, in: ArbIntl 2001*, p. 8; *Horn, Adaptation*, p. 180; *Frick*, p. 190). Usually, a hardship clause leads to the duty to renegotiate with view to adapting the

contract (*Brunner, Hardship, p. 479; Papp, in: Acta juridica et politica 2014, p. 425; Da Silveira, in: International Sales, p. 327*). If the renegotiations fail, it is the arbitral tribunal's duty to adapt the contract (*Brunner, Hardship, p. 479; Papp, in: Acta juridica et politica 2014, p. 425; Da Silveira, International Sales, p. 327; Bordacabar, The Rule, p. 2; Berger, in: ArbIntl 2001, p. 8; Horn, Adaptation, p. 180; Frick, p. 190*). The parties included a hardship clause into their Contract [*paras. 23 ff.*]. A reasonable third person had to deduce from the inclusion of the hardship clause the parties' consent to grant the arbitral tribunal the power to adapt said Contract.

30 Additionally, an objective observer of the same kind as the parties must have concluded that they did not intend for the legal consequence of clause 12 to be applied strictly. Instead, they must have intended the legal consequence of clause 12 to be the arbitral tribunal's power of contract adaptation.

31 Clause 12 stipulates that it relieves the seller, CLAIMANT, from responsibility [*Ex. C5, p. 14*]. This wording must be construed in a way, that CLAIMANT's relief from responsibility exempts it from all additional costs. In turn, RESPONDENT would have to bear all additional costs related to hardship. This cannot have been RESPONDENT's understanding of clause 12 since this would be the worst-case scenario for it. RESPONDENT would always have to pay all costs related to unforeseen events if the prerequisites of the hardship clause were met. Instead, it would be more adequate for RESPONDENT to enter renegotiations which will not necessarily result in RESPONDENT bearing all costs. If these renegotiations fail, the arbitral tribunal shall assume the task of the parties by adapting the Contract. Contrary to the schematic exemption from all additional costs, an adaptation allows for a reasonable weighing of interests by the arbitral tribunal. Adaptation is a less schematic equivalent to the relief of responsibility. A reasonable person of the same kind as RESPONDENT thus had to deduce from the wording of clause 12 the arbitral tribunal's power to adapt the Contract. The same applies for CLAIMANT which expressly insisted on the inclusion of a hardship clause [*Ex. C4, p. 12*].

32 Consequently, the arbitral tribunal's power to adapt the Contract can also be derived from an interpretation of the hardship clause pursuant to Art. 8 (2) CISG.

In conclusion, the parties agreed on giving the arbitral tribunal the power to adapt the Contract under the hardship clause and thus also under the arbitration clause.

CONCLUSION TO ISSUE 1

In light of the aforementioned arguments, CLAIMANT requests the honourable tribunal to find that it has the jurisdiction and the power to adapt the Contract under the arbitration clause.

As the parties made an implied choice of law governing the arbitration clause in favour of Equatorianian law the arbitral tribunal has jurisdiction. Even if the arbitral tribunal does not find the law of Equatoriana to govern the arbitration clause, Mediterranean law applies since it has the closest and most real connection to the arbitration clause. Irrespective of which country's law applies, the arbitration clause must be interpreted widely pursuant to Art. 8 (2) CISG. In any case, the arbitration clause shall not be interpreted narrowly in accordance with Danubian law. Furthermore, the arbitral tribunal has the power to adapt the Contract since the Contract contains a hardship clause. This demonstrates that the parties agreed on granting the arbitral tribunal the power to adapt the Contract.

ISSUE 2: PAYMENT OF \$ 1,250,000 AS A RESULT OF CONTRACT ADAPTATION

33 CLAIMANT kindly requests the honourable tribunal to order RESPONDENT to pay the \$ 1,250,000 caused by the import tariffs imposed by the Equatorianian government. This payment results from an adaptation of the Contract under clause 12 **(I.)**. Alternatively, CLAIMANT is entitled to the payment under the CISG **(II.)**.

I. CLAIMANT is entitled to the payment of \$ 1,250,000 from an adaptation under clause 12

34 CLAIMANT is entitled to the payment of \$ 1,250,000 under clause 12 since said clause allows for the remedy of contract adaptation **(1.)** and its prerequisites are met **(2.)**. The additional price RESPONDENT shall pay resulting from an adaptation of the Contract amounts to \$ 1,250,000 **(3.)**.

1. Adaptation under clause 12 is possible

35 Clause 12 allows for a contract adaptation since it constitutes a hardship clause which provides the arbitral tribunal with the possibility to adapt the Contract [*paras. 26 ff.*].

2. The prerequisites of clause 12 are met

36 The prerequisites of clause 12 are met. Said clause reads that "hardship [is] caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C5, p. 14 no. 12*]. First, the imposition of import tariffs is an unforeseen event **(a.)** which is comparable to additional health and safety requirements expressly listed in clause 12 of the Contract **(b.)**. Second, the tariffs render the performance of the Contract more onerous **(c.)**. As a consequence, CLAIMANT faces hardship despite the Delivery Duty Paid (hereinafter: "DDP") delivery term in the Contract **(d.)**. RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship due to the fact that it already complied with its delivery obligation **(e.)**.

a. The import tariffs are an unforeseen event pursuant to clause 12

37 The import tariffs on agricultural products imposed by the Equatorianian government constitute an unforeseen event pursuant to clause 12. An event is unforeseen if it was not expected by the parties (*Black's Law Dictionary*, p. 1761; *Oxford Dictionary*, p. 1686). An event that no one could have foreseen is unforeseeable, thus also making it unforeseen by the parties. Consequently, every event that is unforeseeable also constitutes an unforeseen event for the parties. The imposition of import tariffs by the Equatorianian government was unforeseeable **(aa.)**. Moreover, the specific classification of frozen horse semen as an agricultural product was also unforeseeable **(bb.)**.

aa. The imposition of import tariffs was unforeseeable

38 The imposition of import tariffs on agricultural products by the government of Equatoriana was unforeseeable.

These tariffs “came as a big surprise even to informed circles” [*Ex. C6*, p. 15]. Already the introduction of import tariffs of 25 % by the newly elected government of Mediterraneo “went beyond the worst expectations” [*Ex. C6*, p. 15]. Despite the Mediterranean government rather leaning towards agricultural protectionism, import tariffs, especially in this magnitude, had never been part of strategy papers published [*NoA*, p. 6 no. 9]. Furthermore, the retaliatory measures of the Equatorianian government were unprecedented since Equatoriana had always been a keen advocate of free trade [*NoA*, p. 6 no. 9; *Ex. C6*, p. 15]. Never before has the government of Equatoriana imposed retaliatory import tariffs when the presidency was held by the Progressive Liberals, like it currently is [*NoA*, p. 7 no. 19].

Hence, the imposition of import tariffs on agricultural products by the Equatorianian government was unforeseeable.

bb. The classification of frozen semen as agricultural product was unforeseeable

39 Moreover, it was unforeseeable that frozen semen of racehorses would be categorized as an agricultural product.

Agricultural products are typically associated with the science or practice of farming (*Oxford Dictionary*, p. 31). Horses used for agricultural work substantially differ from those participating in equestrian sports. The former are farm animals while the latter are endowed with special skills as high speed and long endurance. Race horses, and in particular their semen, are therefore very sophisticated and expensive. This is demonstrated in the case at hand, where the price of one dose of frozen semen amounts to \$ 100,000 [*Ex. C5*, p. 13]. Considering the above, race horse semen is thus typically categorized differently from semen of pigs, sheep and cattle [*NoA*, p. 6 no. 11]. However, all animal products were supposed to be covered by the tariffs according to the

understanding of the Equatorianian government [Ex. C7, p. 17]. Therefore, the categorization of frozen racehorse semen as an agricultural product was also unforeseeable.

Thus, the imposition of import tariffs was unforeseeable and therefore constitutes an unforeseen event pursuant to clause 12.

b. The import tariffs are a comparable unforeseen event in terms of clause 12

40 The imposition of the tariffs is a comparable unforeseen event pursuant to clause 12. The parties have expressly incorporated additional health and safety requirements into the Contract [Ex. C5, p. 14 no. 12]. Both additional health and safety requirements on the one hand and import tariffs on the other hand are imposed by the government [PO2, p. 58 no. 21] and increase the price of performance [Ex. C4, p. 12].

41 The classification of import tariffs as a comparable unforeseen event also follows from an interpretation of clause 12 according to the parties' intent pursuant to Art. 8 (1) CISG.

CLAIMANT pointed out from the beginning of the contract negotiations that it was unwilling to bear further risks associated with import restrictions [Ex. C4, p. 12] which comprise import tariffs. RESPONDENT had to be aware of this understanding since CLAIMANT made that statement in the course of the e-mail correspondence [Ex. C4, p. 12].

42 Furthermore, the additional health and safety requirements stipulated in clause 12 are non-exhaustive. To understand the events expressly set forth in clause 12 as exhaustive would contradict the intention of the parties who clarified the non-exhaustiveness of the list by including *comparable* events. It lays within the nature of an unforeseen event that no one could have taken it into account when drafting a contract. It is consequently impossible to predict all possible or even probable unforeseen events that could impede the performance of contractual duties.

Thus, construing import tariffs as a comparable unforeseen event is in line with the parties' intention.

In conclusion, the import tariffs are a comparable unforeseen event according to clause 12.

c. The import tariffs render the contractual performance more onerous

43 The import tariffs cause the contractual performance to be more onerous. The performance is more onerous if it entails legal obligations that exceed the benefits of the contract (*Collins English Dictionary*, p. 1384). When CLAIMANT complied with its delivery obligation, it bore the import tariffs amounting to \$ 1,500,000. These additional costs add up to the regular expenses associated with the procurement and delivery of the frozen semen [PO2, p. 59 no. 31] and thereby change CLAIMANT's cost-benefit calculation. As a result, the agreed price does not correspond with CLAIMANT's increased costs. Therefore, the imposition of the import tariffs renders the shipment of the frozen semen more onerous.

d. The imposition of import tariffs causes hardship despite the DDP delivery

44 The import tariffs rendering the contractual performance more onerous lead to hardship for CLAIMANT **(aa.)**. The parties did not preclude the assumption of hardship by agreeing on DDP **(bb.)**.

aa. The import tariffs cause CLAIMANT hardship

45 As a result of the import tariffs that render the contractual performance more onerous, CLAIMANT faces hardship. The parties' understanding of the term hardship shall be interpreted in accordance with Art. 8 (1) CISG.

46 First, it was CLAIMANT's understanding to allow the assumption of hardship where the Contract performance under changed circumstances endangers its solvency. CLAIMANT's understanding of hardship at the time of the contract negotiations was influenced by its prior experiences with hardship cases [*Ex. C4, p. 12*]. In another contractual relationship, CLAIMANT was struck by additional health and safety requirements connected with its delivery obligations [*Ex. C4, p. 12*]. This financial burden destroyed the commercial basis of that deal [*Ex. C4, p. 12*] and led CLAIMANT to the edge of insolvency [*PO2 p. 58 no. 21*]. Consequently, it was CLAIMANT's understanding to assume hardship where the performance of the Contract under changed circumstances would ruin it financially.

47 Second, RESPONDENT cannot have been unaware of CLAIMANT's understanding and impliedly consented to it. RESPONDENT's unawareness of CLAIMANT's understanding can be deduced from the following reasons:

48 CLAIMANT expressly outlined that it wanted to include the hardship clause in light of its previous experiences with the aforementioned changes in customs regulations or import restrictions [*Ex. C4, p. 12*]. Additionally, CLAIMANT's struggle with the additional health and safety requirements in the other contractual relationship was reported widely in the press [*PO2, p. 58 no. 21*]. Moreover, RESPONDENT was aware of rumours in the market that CLAIMANT was still struggling financially at the time of the contract negotiations [*PO2, p. 58 no. 22*].

Hence, RESPONDENT cannot have been unaware of CLAIMANT's understanding of hardship. Moreover, it has not presented an alternate definition of hardship in the course of the contract negotiations. Instead, RESPONDENT agreed upon the inclusion of the hardship clause into the Contract although it must have had knowledge of CLAIMANT's understanding. Therefore, RESPONDENT impliedly consented to CLAIMANT's understanding to assume hardship when a party is in danger of insolvency.

49 Finally, CLAIMANT's current financial situation is in line with the parties' aforementioned understanding of hardship. CLAIMANT is currently on the verge of insolvency due to the import

tariffs by the Equatorian government. CLAIMANT was able to avert bankruptcy when it faced import restrictions in the other contractual relationship by raising new loans. However, it did already then have difficulties to convince its creditors to authorize said loans [PO2, p. 58 no. 21]. The creditors only granted them on the condition that CLAIMANT would be profitable again from 2017 onwards [PO2, p. 58 no. 29]. If CLAIMANT must bear the \$ 1,250,000 in import tariffs it will probably be unable to meet that condition, thus needing to take out new loans [PO2, p. 58 no. 29]. As CLAIMANT's creditors are now also involved with RESPONDENT, the authorization of new loans is unlikely [PO2, p. 58 no. 29]. In case CLAIMANT is not provided with new loans, it would be on the verge of insolvency once more. Therefore, CLAIMANT's dire financial situation allows for the assumption of hardship according to the parties' common intent.

Consequently, CLAIMANT faces hardship due to the import tariffs which render the performance more onerous.

bb. The parties did not preclude the assumption of hardship by agreeing on DDP

50 RESPONDENT cannot argue that the parties' agreement on a DDP delivery precludes the assumption of hardship.

51 The parties did not refer to the International Commercial Terms (hereinafter: "INCOTERMS") provision when they included DDP delivery into the Contract [Ex. C5, p. 14 no. 8]. According to a regular DDP under the INCOTERMS, the seller must bear all costs related to delivery and clearance of goods (ICC, INCOTERMS 2010, p. 73; Da Silveira, *International Sales*, p. 228 para. 872). In the present case, CLAIMANT would thus have to bear the costs resulting from the imposition of import tariffs.

52 However, both parties did not understand the term DDP in the sense of the INCOTERMS. A parties' common understanding of standardized delivery terms like the INCOTERMS can supplant the usual meaning of such terms (*falsa demonstratio non nocet*) pursuant to Art. 8 (1) CISG (BGH, *CISG-online no. 225*; Schmidt-Kessel, in: *Schlechtriem/Schwenzger, Art. 8 para. 23*). The parties did not intend to allocate the risk of the imposition of import tariffs to CLAIMANT.

53 CLAIMANT stressed from the beginning that it was not willing to bear any additional costs and risks associated with DDP delivery [Ex. C4, p. 12]. If it had to pay the expenses related to the imposition of the import tariffs, CLAIMANT would have to bear additional costs resulting from a change in the delivery terms - contrary to its unequivocal intention.

Furthermore, when RESPONDENT proposed a DDP delivery, it did not want to allocate any risks to CLAIMANT. Instead, RESPONDENT only proposed a DDP delivery to benefit from CLAIMANT's superior experience in the shipment of frozen semen [Ex. C3, p. 11] since the experience is very valuable considering the shipment in terms of the handling and customs.

54 Lastly, the parties' intention to not agree on a DDP delivery in the common sense of the term is shown by the fact that they only budgeted \$ 200 per dose for price increases associated with DDP [PO2, p. 56 no. 8]. Price increases related with import tariffs will typically exceed that amount many times over, especially in view of the price of \$ 100.000 per dose. With only \$ 200 budgeted for price increases associated with the DDP delivery, the parties only accounted for import tariffs up to 0,002 %. This is a way too small amount to cover the risks CLAIMANT would be relieved from under the hardship clause.

55 Therefore, both parties did not understand the term DDP in the sense of the INCOTERMS. Hence, RESPONDENT cannot argue that the parties' agreement on a DDP delivery precludes the assumption of hardship.

In conclusion, the import tariffs are an unforeseen event causing hardship in spite of the parties' agreement on DDP.

e. RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship

56 RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship due to the fact that it already complied with its delivery obligation.

It lies within the very nature of hardship, that it only renders the performance more burdensome but not impossible (*Brunner, Hardship, p. 487; jonas link*). Thus, the relevant point in time to invoke hardship is when the event causing hardship occurs. When the import tariffs were imposed, CLAIMANT had not yet delivered the last batch of semen. CLAIMANT only delivered after contacting RESPONDENT and asking for renegotiations [Ex. C7, p. 16; Ex. C8, p. 18]. CLAIMANT thereby did everything that could have been reasonably expected from it, especially considering that CLAIMANT could not be certain whether it had a right to hold back its performance. Due to its dire financial situation, CLAIMANT could not risk being exposed to damage claims pursuant to Art. 45 (1b) CISG. Furthermore, RESPONDENT gave CLAIMANT the false impression that a solution to the price increases related to the import tariffs could be found [Ex. C8, p. 18; Ex. R4, p. 36]. It thus confirmed CLAIMANT's impression that it had done everything that could be reasonably expected from it to avoid bearing the additional costs. Therefore, RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship due to the fact that it already delivered.

3. The additional price RESPONDENT must pay amounts to \$ 1,250,000

57 The additional price RESPONDENT shall pay resulting from an adaptation of the price under clause 12 amounts to \$ 1,250,000.

58 First, this can be deduced from the risk allocation set forth in clause 12. It reads that "[CLAIMANT] shall not be responsible [...] for hardship [...] making the contract more onerous" [Ex. C5 p. 14 no. 12]. The performance is more onerous if the fulfilment of the contract entails legal

obligations that exceed its benefits (*Collins English Dictionary*, p. 1384), thereby making the contractual performance costlier for CLAIMANT. Therefore, clause 12 stipulates that CLAIMANT shall not be responsible for any additional costs, allocating all costs with RESPONDENT. Consequently, the parties intended for all hardship-related costs to be borne by RESPONDENT.

- 59 Second, RESPONDENT's liability to pay the additional \$ 1,250,000 stems from the principle of good faith pursuant to Art. 7 (1) CISG. The parties must preserve that general principle when conducting business (*Hungarian Chamber of Commerce and Industry Court of Arbitration*, UNILEX Case 1995-16; *Cremades*, in: *Am. U. Int'l L. Rev.* 2012, p. 777; *Lüderitz/Fenge*, in: *Soergel*, Art. 7 para. 8; *OLG Hamburg*, CLOUT-Case no. 279, para. 38; *Magnus*, in: *Staudinger*, Art. 7 para. 4, 10). Hence, renegotiations aiming at contract adaptation must also be conducted in accordance with good faith (*Perillo*, in: *Universidad Panamericana 1998*, pp. 129 f.). While the renegotiations have failed [*Ex. C8*, p. 18], the arbitral tribunal can still step in and fulfil that duty. Only a contract adaptation which obligates RESPONDENT to pay \$ 1,250,000 complies with the principle of good faith since RESPONDENT acted in bad faith while CLAIMANT did the contrary.
- 60 RESPONDENT acted in bad faith. It urged CLAIMANT to deliver the last shipment despite the import tariffs and gave the impression that a solution to the price increase related to the import tariffs could be found [*Ex. C8*, p. 18]. CLAIMANT acceded on that request since it relied on the trustworthiness of RESPONDENT and was interested in a mutually beneficial long-term relationship [*Ex. C3*, p. 11]. RESPONDENT took advantage of that trust since it only insisted on the delivery of the semen to be able to uphold commitments to third parties, to whom it had obligated to resell the semen. The resale of semen violates the Contract since RESPONDENT did not comply with its obligation to inform CLAIMANT set forth in the Contract [*Ex. C5*, p. 13]. From that violation of its contractual obligations, RESPONDENT gained a profit of \$ 300,000 [*PO2*, p. 57 no. 20]. RESPONDENT's profits starkly contrast CLAIMANT's dire financial situation. Moreover, RESPONDENT obstructed the possibility of an amicable solution. The renegotiations were terminated by the rude behaviour of its representatives. When CLAIMANT tried to amicably settle the dispute through renegotiation, RESPONDENT's CEO got "very angry and aggressive [...] and shouted" at CLAIMANT's representatives [*Ex. C8* p. 18]. Consequently, RESPONDENT acted contrary to the principle of good faith.
- 61 CLAIMANT on the other hand complied with the principle of good faith. Despite its dire financial situation and as a gesture of its goodwill, CLAIMANT only demands \$ 1,250,000 and refrains from claiming its profit margin amounting to \$ 250,000. CLAIMANT thus waives its profits from the Contract, while it only asks RESPONDENT to bear the expenses related to the delivery. CLAIMANT is not forced to show that much goodwill. Even now, it could still demand \$ 1,500,000 – to which

it is generally entitled – since Art. 18 (1) HKIAC-Rules allows a party to amend its claim during the course of the arbitration. CLAIMANT’s restraint in that respect therefore evidences that it is acting in good faith.

62 Therefore, the principle of good faith also supports CLAIMANT’s demand for a reimbursement of \$ 1,250,000. Hence, RESPONDENT shall pay an additional price of \$ 1,250,000 resulting from an adaptation of the price under clause 12.

The payment of the additional \$ 1,250,000 is the legal consequence of clause 12. In conclusion, CLAIMANT is entitled to the payment of \$ 1,250,000 under clause 12.

II. Alternatively, CLAIMANT is entitled to the payment of \$ 1,250,000 from an adaptation under the CISG

63 Alternatively, if the arbitral tribunal came to the conclusion that the Contract shall not be adapted under clause 12, CLAIMANT is entitled to a payment of \$ 1,250,000 from an adaptation of the Contract under the CISG. The parties have not waived the possibility of adaptation under the CISG by including clause 12 into the Contract **(1.)**. Adaptation is possible under Art. 79 CISG **(2.)**. Alternatively, adaptation is feasible under Art. 9 (2) CISG in conjunction with Art. 6.2.3 UNIDROIT Principles on International Commercial Contracts (hereinafter: “**PICC**”) **(3.)**. Even if the arbitral tribunal did not adapt the Contract under those legal bases, it shall adapt the Contract under Art. 7 (2) CISG in conjunction with the contract law of Mediterraneo **(4.)**.

1. The parties have not waived the possibility of adaptation under the CISG

64 The wording of clause 12 of the Contract demonstrates the parties’ intention to not derogate from the possibility of adaptation under the CISG with the inclusion of said clause. A derogation from provisions of the CISG pursuant to Art. 6 CISG requires an agreement (*Saenger, in: Ferrari/Kieninger/Mankowski/Otte/Saenger/Schulze/Staudinger, Art. 6 CISG para. 2*). In the present case there is neither an express nor an implied agreement on derogation.

65 RESPONDENT draws the wrong conclusion by inferring from the inclusion of clause 12 into the Contract that there has been an implied agreement on derogation [*Answer to NoA, p. 32 no. 20*]. An implied agreement on derogation pursuant to Art. 6 CISG requires that both parties intend to derogate from the CISG since the exclusion of the CISG is governed by its contract formation provisions (*U.S. District Court for the Southern District of New York, Hannha Corporation v. Cedar Petrochemicals, Inc; OLG Frankfurt, CISG-online no. 2165; Schroeter, in: Schlechtriem/Schwenzer, Intro to Arts 14-24 para. 30*). The parties’ consent to waive the CISG in its entirety or individual provisions shall be interpreted pursuant to Art. 8 CISG (*OLG Linz, CISG-online no. 1377, para. 2.2*). The parties’ consent shall stand out “very clearly” since the CISG does not expressly provide any provisions on how waiver agreements are concluded or interpreted (*U.S. District Court for the Southern*

District of New York, St. Paul Guardian Insurance Company and Travelers Insurance Company v. Neuromed Medical Systems & Support, GmbH; U.S. Court of Appeals, *CISG-online 730*; Magnus, in: *Staudinger, Art. 6, para. 20*). It shall therefore be impossible to misunderstand the parties' intention (OGH, *CISG online no. 1560*). RESPONDENT stated in its Answer to NoA, that it intended to exclude the application of Art. 79 CISG by "providing for a special regulation of the problem of changed circumstances" [*Answer to NoA, p. 32 no. 20*] in clause 12. That might have been RESPONDENT's intent at the time of contract formation. However, Art. 8 (1) CISG stipulates that a party must have known or could not have been unaware of the other parties' intention. CLAIMANT did not have knowledge of that intention since none of RESPONDENT's e-mails indicated such an opinion [*Ex. C1, p. 9; Ex. C3, p. 11; Ex. R1, p. 33*]. Moreover, there was no further communication between the parties regarding the topic. Consequently, CLAIMANT could also not have been aware of RESPONDENT's intention regarding the inclusion of clause 12 into the Contract. Therefore, the parties did not come to an implied agreement to waive the possibility of adaptation under the CISG pursuant to Art. 6 CISG.

2. The Contract shall be adapted under Art. 79 CISG

66 The Contract shall be adapted under Art. 79 CISG. Art. 79 CISG allows for a contract adaptation (a.). The prerequisites of Art. 79 CISG are met (b.).

a. Adaptation is possible under Art. 79 CISG

67 Art. 79 CISG allows for a contract adaptation. First, that can be derived from the general principle of good faith pursuant to Art. 7 (1) CISG (aa.). Even if the arbitral tribunal did not come to that conclusion, it shall deduce the opportunity of contract adaptation from a gap-filling pursuant to Art. 7 (2) CISG (bb.).

aa. The possibility of contract adaptation under Art. 79 CISG stems from the principle of good faith pursuant to Art. 7 (1) CISG

68 A contract adaptation is possible under Art. 79 CISG since that provision shall be interpreted observing good faith pursuant to Art. 7 (1) CISG.

The legal consequence of Art. 79 CISG is set forth in Art. 79 (1) CISG. The party invoking that provision shall be exempted from its liability to perform. This legal consequence shall not be applied strictly (*CISG AC Opinion no. 7, para. 40; Lookofsky, CISG, § 6.14 p. 138; Brunner/Sgier, in: Brunner, Art. 79 para. 33*). The parties must abide by the principle of good faith pursuant to Art. 7 (1) CISG when they conduct business (*Hungarian Chamber of Commerce and Industry Court of Arbitration, UNILEX Case 1995-16; OLG Hamburg, CLOUT-Case no. 279, para. 38; Cremades, in: Am. U. Int'l L. Rev. 2012, p. 777; Lüderitz/Fenge, in: Soergel, Art. 7 para. 8; Magnus, in: Staudinger, Art. 7 para. 4, 10*). The rationale of good faith is to rebalance the value of the performances where one

party's performance is impeded by hardship (*CISG AC Opinion no. 7, para. 40*). Therefore, the parties shall restore the equilibrium of the contract via renegotiation, thereby restoring the balance of performances they originally agreed upon.

69 At the time of contract conclusion, CLAIMANT had calculated with expenses of \$ 95,000 per dose since it already factored in a profit margin of 5 % into the price of \$ 100,000 per dose [*cf. NoA, p. 7 no. 18; cf. Ex. C5, p. 13*]. Consequently, the import tariffs of 30 % increase CLAIMANT's expenses by \$ 30,000, thereby resulting in final expenses of \$ 125,000 per dose of semen. These exorbitant additional expenses destroy the equilibrium of the Contract. Considering the binding nature of contracts (*pacta sunt servanda*), which is a general principle pursuant to Art. 7 (2) CISG (*DiMatteo, International Sales Law, p. 184; Perales Viscasillas, in: Kröll/Mistelis/Perales Viscasillas, Art. 7 para. 64*), the contract cannot be terminated if the parties' renegotiations fail (*Magnus, in: Staudinger, Art. 79 para. 24b*). Instead, the milder and therefore appropriate remedy is an adaptation of the contract, thereby abiding by the principle of *pacta sunt servanda* (*Magnus, in: Staudinger, Art. 79 para. 24b; Brunner, Hardship, p. 218*). The renegotiations of the parties failed [*Ex. C8, p. 18*], thereby making an adaptation by the arbitral tribunal appropriate. That applies especially since CLAIMANT could also terminate the Contract pursuant to Artt. 25, 49 (1a) CISG since RESPONDENT breached the Contract by reselling the semen [*para. 60*]. The resale of goods contrary to contractual stipulations constitutes a fundamental breach pursuant to Art. 25 CISG (*OLG Frankfurt, CISG-online no. 28*). Consequently, the arbitral tribunal can step in instead of the parties to restore the equilibrium of the contract via adaptation, thereby upholding the principle of good faith pursuant to Art. 7 (1) CISG. Therefore, an interpretation of Art. 79 CISG in good faith pursuant to Art. 7 (1) CISG demonstrates that contracts can be adapted under Art. 79 CISG.

bb. In any case, a gap-filling pursuant to Art. 7 (2) CISG allows contract adaptation

70 Even if the arbitral tribunal did not come to the conclusion that adaptation is possible as a result of an interpretation of Art. 79 CISG in good faith pursuant to Art. 7 (1) CISG, it shall deduce the possibility of contract adaptation from a gap-filling pursuant to Art. 7 (2) CISG. Art. 7 (2) CISG can be used to open up the possibility of a contract adaptation via gap-filling. (*Cour de cassation de Belgique, CISG-online no. 1963; Veneziano, in: UnifLRev 2010, p. 138*).

71 Art. 7 (2) CISG stipulates that matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which the CISG is based on. Adaptation in cases of hardship is a matter governed by the CISG which is not expressly settled in it **(i.)**. The possibility of contract adaptation can be deduced from the general principles on which the CISG is based on **(ii.)**.

i. Adaptation in cases of hardship is a matter governed by the CISG not expressly settled in it

72 Adaptation in cases of hardship is a matter governed by the CISG, although it is not expressly settled in it. First, adaptation in cases of hardship is a matter governed by the CISG. For a matter to be governed by the CISG, it must fall within the scope of application of the CISG set forth in Art. 4 CISG (*Wagner, in: Brunner, Art. 7 para. 7; Schwenzler/Hachem, in: Schlechtriem/Schwenzler, Art. 7 para. 30*). Pursuant to Art. 4 CISG, the CISG governs only the formation of the contract of sale and the rights and obligations arising from such a contract. Every contract with multiple performance obligations or long-term contract has a risk of being impaired by a change of circumstances. This risk is inherent in the contract itself. In these cases, contract adaptation is the most reasonable remedy. Therefore, contract adaptation is a right arising from a contract pursuant to Art. 4 CISG. Second, the CISG does not expressly settle this matter. Art. 79 CISG provides the right of relief of responsibility and only governs cases in which the parties have yet to perform. Since CLAIMANT had already fulfilled its contractual obligations, an exemption of responsibility does not remedy its issues. This can only be achieved by a contract adaptation. Therefore, the CISG does not expressly settle the matter of adaptation in cases of hardship.

ii. The possibility of contract adaptation can be derived from the general principles of the CISG

73 The possibility of contract adaptation can be deduced from the general principles on which the CISG is based on. The general principle that contractual obligations may be subject to changes even after the contract conclusion can be derived from Art. 50 CISG and the PICC.

74 First, the contract adaptation can be derived from a general principle underlying Art. 50 CISG (*Schlechtriem's statement, in: Flechtner in: Journal of Law & Commerce 1999, p. 236*). Art. 50 CISG allows for a price reduction when the goods are not in conformity with the contractual stipulations. Consequently, the contractual equilibrium can be adjusted under Art. 50 CISG. In hardship cases, the contractual equilibrium is also disrupted. Therefore, Art. 50 CISG allows the conclusion that contractual obligations may be adapted in accordance with the circumstances of each case.

75 All the more, this principle is underlined by the PICC, expressly providing for contract adaptation in cases of hardship. The PICC are general principles pursuant to Art. 7 (2) CISG (*ICC, CISG-online no. 526; Bridge, Sale of Goods, p. 607 para. 10.50; Wagner in: Brunner, Art. 7 para. 10; Garro, Tul. L. Rev Vol. 69, p. 1156; Bonell, in: UnifLRev 1996, p. 36*). Art. 7 (2) CISG must be interpreted extensively in light of Art. 7 (1) CISG which stipulates that the international character of the CISG must serve as guidance in the course of the interpretation (*Felemegas, Art.7, chapter 4, no. 3c; Wagner, in: Brunner, Art. 7 para. 10*). The CISG was relied upon as basis for drafting the PICC (*Farnsworth, in:*

Am.J.Comp.Law 1992, pp. 700 f). As a result, the preamble of the PICC reads that the principles may be used to interpret or supplement international law instruments. Thus, the PICC are a general principle according to Art. 7 (2) CISG and can be relied upon to fill gaps in the CISG. Art. 6.2.3 PICC stipulates that a contract adaptation is possible in cases of hardship, thereby making it another argument in favour of a general principle that contractual obligations may be amended after the conclusion of the contract.

76 Therefore, the possibility of contract adaptation under Art. 79 CISG can be derived from a gap-filling pursuant to Art. 7 (2) CISG.

In conclusion, Art. 79 CISG allows for a contract adaptation.

b. The prerequisites of Art. 79 CISG are met

77 The prerequisites of Art. 79 CISG are fulfilled. CLAIMANT's case of hardship constitutes an impediment **(aa.)**. The cost increase borne by CLAIMANT meets the threshold required for hardship **(bb.)**. Furthermore, the tariffs are beyond CLAIMANT's control **(cc.)** and it could not have reasonably taken them into account at the time of conclusion of the Contract **(dd.)**. Additionally, CLAIMANT could not reasonably be expected to have avoided or overcome the tariffs or their consequences **(ee.)**. Lastly, RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship due to the fact that it had already delivered **(ff.)**.

aa. CLAIMANT's hardship case is an impediment pursuant to Art. 79 CISG

78 CLAIMANT faces a case of hardship which constitutes an impediment pursuant to Art. 79 CISG. Hardship constitutes an impediment according to Art. 79 CISG (*Bulgarian Chamber of Commerce and Industry, CISG-online no. 436; CISG AC Opinion No. 7, Opinion 3.1; Nehf, in: Corbin on Contracts, § 74.12, p. 78; Brunner, Hardship, p. 397; Magnus, in: Honsell, Art. 79 para. 14; Honnold, Uniform Law, pp. 627 f. para. 432.2*). The term impediment cannot be construed narrowly, only comprising events making the performance absolutely impossible since absolute impossibility diminishes in light of rapid technological advancements (*CISG AC Opinion No. 7 para. 3.1; Magnus, in: Staudinger, Art. 79 para. 24*). Therefore, hardship – aka economic impossibility - shall also constitute an impediment pursuant to Art. 79 CISG in line with the aim of the CISG to uniform international sales law (*Andersen, Uniformity, p. 19*). Economic impossibility is characterized by a financial difficulty rendering the performance practically impossible (*Honnold, Uniform Law, p. 628 para. 432.2*). It is an impediment under Art. 79 CISG as long as the costs are unreasonable and disproportionate (*Cour de cassation de Belgique, CISG-online no. 1963; Bach, in: BeckOGK CISG, Art. 79 para. 35*). Therefore, hardship always constitutes an impediment, when the economic existence of debtor is threatened (*Spaic, in: DiMatteo, International Sales Law, p. 262*). An alternate approach would contradict that aim since courts and arbitral tribunals would be able to apply different national principles pursuant to

Art. 7 (2) CISG (*Mazzacano, Article 79, p. 103; Mazzacano, in: NJCL 2011, p. 48; Magnus, in: Staudinger, Art. 79 para. 24a*). Hence, in order for Art. 79 CISG to cover all issues related to a disrupted contract equilibrium, absolute impossibility and economic impossibility must be equated.

79 It is economically impossible for CLAIMANT to ultimately bear the additional costs related to the imposition of import tariffs since they threaten its financial situation, bringing it to the verge of insolvency [PO1, p. 59 no. 29]. RESPONDENT cannot argue that CLAIMANT assumed the risk of the imposition of tariffs in the course of the parties' agreement on a DDP delivery [paras. 50 ff.] Therefore, CLAIMANT faces hardship which constitutes an impediment pursuant to Art. 79 CISG.

bb. The threshold of hardship is met

80 Since the tariffs exceed the ultimate limit of sacrifice CLAIMANT can bear, the threshold for hardship is reached.

The threshold for hardship under Art. 79 CISG must be determined on the individual facts of the given transaction (*Nehf, in: Corbin on Contracts, § 74.12, p. 79; Schwenzler, in: VUWLR 2008, pp. 715 f.; Nagy, in: N.Y. Int'l L. Rev. 2013, p. 32*). It is met, if the party invoking hardship is not able to withstand the additional costs since these costs exceed its maximum ability to perform (*CISG AC Opinion No. 7, Comment 38; Schwenzler, in: Schlechtriem/Schwenzler, Art. 79 para. 31*).

81 The tariffs imposed by the government of Mediterraneo increase the delivery costs for CLAIMANT by 30 %. CLAIMANT currently is in a dire financial situation since it is on the brink of insolvency [PO1, p. 59 no. 29]. Therefore, it cannot shoulder the exorbitant additional costs related to the imposition of import tariffs. The height of the additional costs is outlined by the fact that the parties only calculated with \$ 200 of price increases per dose related to the DDP delivery [PO2, p. 56 no. 8]. At a unit price of \$ 100,000 [Ex. C5, p. 13], the import tariffs of 30 % thus caused CLAIMANT additional costs amounting to \$ 30,000 per dose. In light of the above, the import tariffs exceed CLAIMANT's ultimate limit of sacrifice.

82 RESPONDENT cannot argue that there should be fixed rates to determine the threshold for hardship, referring to the Scafom case, where the Belgian Court of Cassation determined a 70 % increase to not be high enough (*Cour de cassation de Belgique, CISG-online no. 1963*). As set forth above, schematic solutions are prohibited when determining the threshold for hardship (*Nehf, in: Corbin on Contracts, § 74.12, p. 79; Schwenzler, in: VUWLR 2008, pp. 715 f.; Nagy, in: N.Y. Int'l L. Rev. 2013, p. 32*). Therefore, RESPONDENT cannot argue that there are fixed rates to determine the threshold for hardship.

83 Additionally, in cases where the party invoking hardship is in danger of insolvency, the threshold must be lowered (*cf. Canton Court of Vaud. at Lausanne, Alsing Trading Co. and Swedish Match Co. v. Greece, pp. 343 f., where the doctrine "rebus sic stantibus" was only considered if the contract threatened to financially*

ruin the party; Brunner/Sgier, in: Brunner, Art. 79, para 31; Brunner, Hardship, pp. 435-438). As stated above, CLAIMANT is on the brink of insolvency [PO2, p. 59 no. 29]. In conclusion, the threshold for hardship under Art. 79 CISG is reached.

cc. The tariffs are beyond CLAIMANT's control

84 Since governmental decisions can never be controlled by the parties (*Macromex Srl v. Globex International Inc*, CISG-online no. 1645), the import tariffs imposed by the government of Equatoriana are CLAIMANT's control.

dd. CLAIMANT could not have reasonably taken the tariffs into account at the time of Contract conclusion

85 CLAIMANT could not reasonably be expected to have taken the import tariffs into account at the time of the conclusion of the Contract. The tariffs even astonished informed circles [Ex. C6, p. 15]. They were announced on 19 December 2017 [Ex. C6, p. 15] whereas the Contract was concluded on 6 May 2017 [Ex. C5, p. 13]. Therefore, the Contract was concluded a long time before the tariffs were announced. Hence, CLAIMANT could not have reasonably considered the imposition of import tariffs at the time of Contract completion.

ee. CLAIMANT could not reasonably be expected to have avoided or overcome the tariffs or their consequence

86 CLAIMANT could not have reasonably been expected to have avoided or overcome the tariffs or their consequence. CLAIMANT's area of expertise is horse breeding for equestrian sports [NoA, p. 4 no. 1]. Trading with frozen semen from CLAIMANT's awarding-winning racehorses is thus a crucial part of its profession [NoA, p. 4 no. 2-3; PO2, p. 57 no. 15]. When CLAIMANT exported the frozen semen, it could not circumvent the import tariffs imposed by the Equatorianian government [PO2, p. 58 no. 27]. Additionally, CLAIMANT tried to overcome the consequences of the imposition of import tariffs by renegotiating the price. RESPONDENT terminated these renegotiations [Ex. C8, p. 18]. Consequently, CLAIMANT could not have avoided or overcome the tariffs or their consequence.

ff. RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship due to the fact that it had already delivered

87 RESPONDENT cannot argue that CLAIMANT may not invoke hardship due to the fact that it already delivered the frozen semen [para. 56].

Since adaptation is possible under Art. 79 CISG and the prerequisites of that provision are met, the Contract shall be adapted pursuant to Art. 79 CISG.

3. Alternatively, the Contract shall be adapted pursuant to Art. 9 (2) CISG in conjunction with Art. 6.2.3 PICC

88 As an alternative, an adaptation of the Contract shall be based on Art. 9 (2) CISG in conjunction with Art. 6.2.3 PICC. The PICC constitute a usage pursuant to Art. 9 (2) CISG **(a.)** and the prerequisites of Art. 6.2.3. PICC are fulfilled **(b.)**.

a. The PICC qualify as a usage under Art. 9 (2) CISG

89 The PICC are a usage pursuant to Art. 9 (2) CISG since they are widely known of and regularly observed by parties to contracts of the type involved in the particular trade concerned and the parties in the present case knew or ought to have known that usage.

90 First, the PICC are widely known of and regularly observed by parties to contracts with international elements. The term usage pursuant to Art. 9 (2) CISG must be interpreted in the widest way possible (*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 9 para. 12; Viscasillas, in: Kröll/Mistelis/Perales Viscasillas, Art. 9 para. 21; Graffi, in: Belgrade.L.Rev. 2011, p. 104*). The overarching connection between RESPONDENT and CLAIMANT is that they conduct international business [*Ex. C5, p. 13*]. Consequently, they can be typified as participants in international trade. The PICC are widespread and regularly observed in international trade (*ICC, case no. 9333; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, no. 229/1996*). Hence, parties of the same type as CLAIMANT and RESPONDENT know of and regularly observe the PICC.

91 Second, CLAIMANT and RESPONDENT knew or ought to have known the PICC. The contract law of Equatoriana and Mediterraneo is a verbatim adoption of the PICC [*PO1, p. 53 no. 4*]. Hence, the parties use the legal provisions of the PICC in their daily life. While the contract law and the PICC differ dogmatically, their provisions are exactly alike, thus making the parties familiar with the PICC.

92 Furthermore, both CLAIMANT and RESPONDENT ought to have known the PICC since they conduct business internationally.

The PICC are regularly used on international level (*Michaels, in: UnifLRev 2014, pp. 647 f.*) and are applied in a large variety of cases (*with further references Agrò, in: UnifLRev 2011, pp. 719 f.*).

CLAIMANT is a large company that covers all areas of equestrian sports [*No.A, p. 4 no. 1*] and has conducted international business before [*Ex. C4, p. 12; PO2, p. 58 no. 21*]. RESPONDENT's knowledge of the PICC also stems from the fact that it conducts business besides the pending case. It is involved in a second arbitral proceeding in which RESPONDENT exported a mare to a buyer in Mediterraneo [*PO2, p. 60 no. 39*]. Therefore, CLAIMANT and RESPONDENT must have known the PICC.

In light of the above, CLAIMANT and RESPONDENT knew or ought to have known the PICC. In conclusion, the PICC constitute a usage pursuant to Art. 9 (2) CISG.

b. The prerequisites of Art. 6.2.3 PICC are fulfilled

93 The prerequisites of Art. 6.2.3 PICC are met. The imposition of tariffs results in hardship **(aa.)** and the parties failed to reach an agreement through renegotiations within a reasonable time **(bb.)**. Furthermore, the adaptation of the Contract is reasonable **(cc.)**.

aa. The imposition of import tariffs results in hardship

94 The imposition of import tariffs by the Equatorian government results in hardship for CLAIMANT. The prerequisites of hardship under Art. 6.2.3 PICC are outlined in Art. 6.2.2. PICC. Art. 6.2.2 PICC firstly stipulates an alteration of the equilibrium of the contract. The equilibrium of the Contract has been fundamentally altered due to the cost increase CLAIMANT suffered. While CLAIMANT bore the import tariffs amounting to 30 %, RESPONDENT had no additional costs. Furthermore, the tariffs occurred after the conclusion of the Contract, thereby meeting the requirement of Art. 6.2.2 (a) PICC [*para. 85*]. Additionally, the tariffs were unexpected pursuant to Art. 6.2.2 (b) PICC, thus making it impossible for CLAIMANT to take them into account [*para. 38*]. The tariffs were also beyond CLAIMANT's control [*para. 84*] and CLAIMANT did not assume the risk of the imposition of import tariffs [*para. 38*], thus meeting the requirements of Art. 6.2.2 (c) and (d) PICC.

95 RESPONDENT cannot argue that CLAIMANT is precluded from invoking hardship due to the fact that it already complied with its delivery obligation. First, this is the case in line with the arguments set forth above [*para. 87*]. In addition, Art. 6.2.1 and Art. 6.2.3 (2) PICC expressly state that the request for renegotiation does not in itself entitle CLAIMANT to withhold its performance. Considering CLAIMANT's financial situation, it could not risk any damage claims for delayed performance pursuant to Art. 7.4.1 PICC.

Therefore, the imposition of import tariffs causes CLAIMANT hardship.

bb. The parties failed to reach an agreement within a reasonable time

96 The parties did not come to an agreement through renegotiations within in a reasonable time according to Art. 6.2.3 (3) PICC. These negotiations shall be conducted in good faith (*Perillo, in: Universidad Panamericana 1998, pp. 129 f.*). As set forth above, the renegotiations failed [*Ex. C8, p. 18*].

97 They also failed within reasonable time. What constitutes a reasonable time will depend upon the facts and circumstances of the case (*McKendrick, in: Vogenauer, Art. 6.2.3 para. 5*). CLAIMANT's representatives immediately contacted RESPONDENT after they got notice of the import tariffs on 20 January 2018 [*Ex. C 8, p. 18*]. The renegotiations failed on 12 February 2018 [*Ex. C8, p. 18*].

Considering the fact that CLAIMANT and RESPONDENT have their seat in different countries and the seriousness of the situation, the renegotiation process was not unnecessarily prolonged. Therefore, the parties failed to reach an agreement within reasonable time pursuant to Art. 6.2.3 (3) PICC.

cc. The adaptation is reasonable

98 The arbitral tribunal shall adapt the Contract with a view to restoring its equilibrium since adaptation is reasonable pursuant to Art. 6.2.3 (4b) PICC.

Adaptation is reasonable if it is fair (*PICC, Art. 6.2.3, Comment No. 7*). However, fairness does not mean that the costs shall be distributed equally (*McKendrick, in: Vogenauer, Art. 6.2.3 para. 7*). Instead, the parties' risk allocation shall be taken into account. Contract adaptation thus aims at making the performance bearable for the party seeking relief (*McKendrick, in: Vogenauer, Art. 6.2.3 para. 7*). The performance is only bearable for CLAIMANT if RESPONDENT is ordered to reimburse CLAIMANT with an additional \$ 1,250,000. The parties allocated the risk of the imposition of import tariffs with RESPONDENT [*para. 3*]. By bearing the additional costs related to the imposition of import tariffs, CLAIMANT exhausted its financial leeway. RESPONDENT on the other hand could pay the additional costs without being financially endangered [*PO2, p. 59 no. 30*]. Therefore, the adaptation of the Contract is fair. The arbitral tribunal shall thus adapt the Contract with a view to restoring its equilibrium according to Art. 6.2.3 (4b) PICC.

In conclusion, an adaptation of the Contract can not only be based on Art. 79 CISG but also on Art. 9 (2) CISG in conjunction with Art. 6.2.3 PICC

4. In any case, the arbitral tribunal shall adapt the Contract under Art. 7 (2) CISG in conjunction with the contract law of Mediterraneo

99 Even if the arbitral tribunal did not come the conclusion that contract adaptation is possible under the aforementioned legal bases, it must assume a gap in the CISG. However, even this gap can be filled. The gap shall be filled in accordance with Art. 7 (2) CISG in conjunction with Mediterranean contract law **(a.)**. The prerequisites of Art. 6.2.3 Mediterranean contract law are met **(b.)**.

a. A gap-filling pursuant to Art. 7 (2) CISG with Mediterranean contract law leads to the possibility of contract adaptation

100 The assumed gap in the CISG concerning contract adaptation in cases of hardship can be filled with Mediterranean contract law according to Art. 7 (2) CISG. First, a gap-filling pursuant to Art. 7 (2) CISG requires that hardship is a matter governed by the CISG not expressly settled in it **(aa.)**. Second, if the arbitral tribunal did not fill the gap in accordance with the general principles, it shall fill the gap in conformity with the law applicable by virtue of the rules of private international law **(bb.)**.

aa. Hardship is a matter governed by the CISG not expressly settled in it

101 Hardship and its consequences are governed by the CISG pursuant to Art. 4 CISG, although not expressly laid out in the latter. The CISG intends to regulate the rights and obligations of parties in cases of changed circumstances which can be deduced from Artt. 79, 80 CISG. Hardship also fundamentally alters the circumstances of the contract performance. Under the assumption that the aforementioned legal bases [*paras. 66 ff.*] do not cover contract adaptation in cases of hardship, hardship is not expressly settled in the CISG. Therefore, hardship and its consequences are matter governed by the CISG but not expressly settled in it.

bb. The assumed gap can be filled in conformity with Mediterranean law

102 The assumed gap in the CISG can be filled in conformity with Mediterranean contract law. If the arbitral tribunal came to conclusion that the gap in the CISG cannot be filled with general principles, the gap is to be filled in conformity with the law applicable by virtue of the rules of private international law pursuant to Art. 7 (2) CISG.

103 The applicable law by virtue of the rules of private international law is the law of Mediterraneo. The private international law in Mediterraneo, Danubia and Equatoriana is a verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts (hereinafter: “**HCCH-Rules**”) [*PO2, p. 61 no. 43*]. The requirements of the scope of application of the HCCH-Rules are met. Pursuant to Art. 1 (1) HCCH-Rules, the contracting parties must act in the exercise of their trade or profession. Both CLAIMANT and RESPONDENT are involved in horse breeding for equestrian sports and own horse stables [*NoA, p. 4-5 no. 1-4*]. Hence, trading with frozen semen is a part of their profession. Since the parties expressly submitted the Contract to the law of Mediterraneo [*Ex. C5, p. 14*], the HCCH-Rules lead to the application of Mediterranean law pursuant to Artt. 2 (1), 4 HCCH-Rules. Therefore, the applicable law by virtue of the rules of private international law is Mediterranean law.

In conclusion, the assumed gap in the CISG concerning contract adaptation in cases of hardship can be filled with the law of Mediterraneo pursuant to Art. 7 (2) CISG.

b. The prerequisites of Art. 6.2.3 Mediterranean contract law are met

104 The prerequisites of Art. 6.2.3 Mediterranean contract law are fulfilled. Mediterranean contract law is a verbatim adoption of the PICC [*PO1, p. 52 no. III para. 4*]. Since the prerequisites of Art. 6.2.3 PICC are met [*paras. 77 ff.*], the prerequisites of Art. 6.2.3 Mediterranean contract law are met as well.

Therefore, even if the arbitral tribunal did not adapt the Contract neither under Art. 79 CISG nor under Art. 9 (2) CISG in conjunction with Art. 6.2.3 PICC, it shall adapt the Contract under Art. 7 (2) CISG in conjunction with the contract law of Mediterraneo.

In conclusion, an adaptation of the price under the CISG results in RESPONDENT's obligation to reimburse CLAIMANT with \$ 1,250,000 [*paras. 57 ff.*].

Therefore, CLAIMANT is entitled to a payment of \$ 1,250,000 from an adaptation of the Contract under the CISG.

CONCLUSION TO ISSUE 2

CLAIMANT kindly requests the arbitral tribunal to order RESPONDENT to reimburse it with \$ 1,250,000 resulting from an adaptation of the Contract. The Contract shall be adapted either under clause 12 or under the CISG. An adaptation is possible under clause 12 and its prerequisites are met. Alternatively, the honourable tribunal shall adapt the Contract under the CISG. The parties have not waived the possibility of adaptation under the CISG. Therefore, both Art. 79 CISG and Art. 9 (2) CISG in conjunction with Art. 6.2.3 PICC provide a legal basis for contract adaptation. Even if the arbitral tribunal did not adapt the Contract under the aforementioned legal bases, it shall adapt the Contract through a gap-filling pursuant to Art. 7 (2) CISG. As a last resort, this gap shall be filled with Art. 6.2.3 Mediterranean contract law.

ISSUE 3: ADMISSIBILITY OF EVIDENCE

105 CLAIMANT kindly asks the arbitral tribunal to find the evidence from the other arbitral proceeding in the form of the Partial Interim Award admissible. The arbitral tribunal enjoys broad discretion on determining the admissibility of evidence pursuant to Art. 22 (2) HKIAC-Rules (*Moser/Bao, HKIAC- Rules, para. 9.153*). Since the parties have not agreed upon the arbitral tribunal to decide the admissibility "ex aequo et bono" according to Art. 36 (2) HKIAC-Rules, it shall apply any legal criterion it finds adequate. The Partial Interim Award is admissible since it is relevant to CLAIMANT's case **(I.)**. Furthermore, the admissibility of the evidence can be derived from a weighing of interests in favour of CLAIMANT **(II.)**.

I. The evidence is admissible because of its relevance

106 The Partial Interim Award from the other arbitral proceeding is admissible as a result of its relevance to the pending case. When evidence is relevant, it is admissible without respect to its procurement history (*Privy Council, Kuruma v. The Queen; High Court of Kenya, 7 May 2008; Morgan, Problems of Evidence, p. 234*). Evidence is relevant if it tends to prove or disprove one of the legal elements of the case (*Ontario Court of Justice, R. v. Sammy*). The evidence from the other arbitral proceeding is relevant as it gives testament of RESPONDENT's contradictory behaviour. Inconsistent behaviour (*venire contra factum proprium*) is acknowledged as a general principle

pursuant to Art. 7 (2) CISG (*Vienna International Arbitration Centre no. SCH-4318; Born, p. 1473; Ferrari, in: MüKoHGB, Art. 7 para. 48; Felemegas, in Pace L. Rev. 2001, p. 402; Magnus, in: RabelsZ 1995, p. 481*). If a party sets itself in contradiction to its previous behaviour vis-à-vis another party that the latter has relied on, the first party is precluded from invoking said contradictory behaviour (*Ad hoc Award, Benteler v. Belgium; Magnus, in: RabelsZ 1995, p. 481*). CLAIMANT was led to believe by RESPONDENT's representatives that the parties could find an amicable solution by renegotiating the price [*Ex. R4 p. 36*]. However, RESPONDENT later rudely ended the renegotiation process [*Ex. C8 p. 18*]. This constitutes inconsistent behaviour since RESPONDENT claimed the opposite in another arbitral proceeding held concurrently. In this other proceeding, the tables are turned: RESPONDENT sold a mare to a buyer in Mediterraneo and was then affected by the import tariffs, now seeking a higher remuneration as remedy [*Notice from Mr. Langweiler, p. 49; PO2, p. 60 no. 39*]. These two proceedings are alike. The issue that gave rise to the respective disputes was the imposition of import tariffs [*No. A, p. 7 no. 18; PO2, p. 60 no. 39*] and both underlying sales contracts contain hardship clauses and are governed by Mediterranean contract law [*Ex C5, p. 14; PO2, p. 60 no. 39*]. By comparing the two arbitral proceedings, it is shown that RESPONDENT is acting inconsistently. If CLAIMANT can sufficiently substantiate that argument, RESPONDENT might be precluded from objecting to the contract adaptation under the *venire contra factum proprium* doctrine. CLAIMANT can support its claim of contradictory behaviour by means of the Partial Interim Award from the other proceeding. The award outlines the aforementioned factual basis of the other arbitral proceeding and might also give an insight into RESPONDENT's arguments in favour of contract adaptation [*PO2, p. 60 no. 39*]. Additionally, the arbitral tribunal in the other proceeding confirmed its power to adapt the Contract in the Partial Interim Award [*PO2, p. 60 no. 39*]. The underlying reasoning might be of interest to this arbitral tribunal and should be taken into consideration. Consequently, the award from the other proceeding helps to prove that RESPONDENT is acting inconsistently. Therefore, the Partial Interim Award is relevant and thus admissible irrespective of its procurement history.

II. A weighing of interests also results in the admissibility of the evidence

107 Additionally, the admissibility of the evidence stems from a weighing of interests in favour of CLAIMANT. The arbitral tribunal is free to weigh up the competing interests **(1.)** and in the course of that, CLAIMANT's interests in favour of admissibility prevail **(2.)**.

1. The arbitral tribunal can conduct a weighing of interests

108 The arbitral tribunal is not bound by any rules of evidence and is thus free to determine the admissibility of the Partial Interim Award by weighing the interests of the parties. While judges in domestic litigation may be bound by rules of evidence, arbitral proceedings are not governed by

such technicalities (*CAS, Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*, p. 19 para. 99; *U.S. Supreme Court, Bernhardt v. Polygraphic Co; Moser/Bao, HKIAC-Rules*, para. 9.154). Rules of evidence are not suitable to govern arbitral proceedings since they were originally designed to compensate for the deficiencies of jury trials (*Redfern/Hunter*, p. 377 para. 6.81). As stated above, Art. 22 (2) HKIAC-Rules grants the arbitral tribunal broad discretion in determining the admissibility of evidence [para. 105]. This discretion is best exercised by weighing the interests of the parties involved, in order to adequately balance their competing interests and prevent the omission of material interests (*High Court of Australia, Bunning v. Cross; Peiris, in: Ottawa L. Rev. 1981*, p. 344; *Werner, in: NJW 1988*, p. 997). Therefore, the arbitral tribunal is free to conduct a weighing of CLAIMANT's and RESPONDENT's interests to determine the admissibility of the Partial Interim Award.

2. CLAIMANT's interests prevail in the weighing of interests

109 The interests of CLAIMANT to admit the Partial Interim Award outweigh RESPONDENT's interest of non-admission. CLAIMANT has an interest for the proceedings to be conducted effectively **(a.)** and needs to be granted the opportunity to present its case **(b.)**. RESPONDENT cannot argue that its interest of keeping the Partial Interim Award confidential hinders its admission **(c.)**. Lastly, RESPONDENT is less worthy of protection as it did not take the necessary steps to prevent the disclosure of said award **(d.)**.

a. The effectiveness of the proceedings can be ensured by admitting the award

110 It is in both CLAIMANT's and RESPONDENT's interest to conduct the proceedings in the shortest possible time. The admission of the evidence will serve to ensure the speed and effectiveness of the proceedings. Conducting arbitral proceedings in a time-efficient manner is a cornerstone of international arbitration (*Craig/Park/Paulsson, ICC Arbitration §1.07*). One of the underlying principles behind that is, that the fees and expenses of the arbitral tribunal substantially increase as time passes (*ICSID, Caratube International Oil Company LLP v. Republic of Kazakhstan, para 89.3*). That applies in particular where the parties have agreed on an hourly rate of remuneration for the arbitrators. In the present case, the arbitrators are entitled to an hourly rate pursuant to Art. 10 (1a) HKIAC-Rules [*Notice from Mr. Langweiler*, p. 25; *Notice from Ms. Fasttrack*, p. 39; *Notice from Ms. Fasttrack*; p. 43]. A delay in the procedure from an in-depth evaluation of the admissibility of the Partial Interim Award would render the proceedings more expensive. These monetary aspects are emphasised by the fact that CLAIMANT is on the brink of insolvency [PO2, p. 59 no. 29].

111 Additionally, RESPONDENT cannot argue that this violates procedural fairness. The fact that an arbitral tribunal has admitted a certain kind of evidence has no effect on how much weight it later attributes to that evidence (*Cook/Garcia, Arbitration*, p. 201; *Brower, in: Int. Lawyer 1994*, p. 48). In the

present case, this means that the honourable tribunal shall admit the evidence but can take into account its procurement history when rendering its decision on the weight of the award. Therefore, the principle of time-efficient arbitral proceedings can be abided by – without detriment to procedural fairness. Consequently, it is in the interest of both parties to admit the award to accelerate the proceedings.

b. The award shall be admitted to give CLAIMANT the opportunity to present its case

112 CLAIMANT's interest to admit the Partial Interim Award shall prevail because CLAIMANT needs to be granted the opportunity to present its case. Pursuant to Art. 18 Model Law and Art. 13 (1) HKIAC-Rules each party shall be given a full opportunity of presenting their case. The importance of this legal doctrine is outlined by the fact that Art. 18 Model Law is a mandatory provision (*Holtzmann/Neubaus, Model Law, Art. 4 p. 198; Baykitch, in: Arbitration Australia, p. 72*). As stated above [para. 106] CLAIMANT depends on the Partial Interim Award from the other proceedings to fully substantiate its claim of contradictory behavior. Consequently, the admission of the Partial Interim Award from the other proceedings is necessary for CLAIMANT to fully present its case.

c. RESPONDENT cannot argue that confidentiality of the arbitral proceedings hinders the admission of the award

113 RESPONDENT cannot argue that the confidentiality of the other proceedings prevents the admission of the award. CLAIMANT acknowledges the fact that confidentiality is one cornerstone of international arbitration (*De Saint Marc, in: Journal of International Arbitration 2003, p. 211; Fouchard/Gaillard/Goldman, Arbitration, p. 773 para. 1412*). However, the interests of RESPONDENT are sufficiently protected by Art. 45 HKIAC-Rules which stipulates the parties' obligation to keep the arbitral proceedings confidential. There is no indication that CLAIMANT is going to break said confidentiality obligation. Quite to the contrary, CLAIMANT has an interest to not receive negative headlines connected with the pending arbitral proceeding and will consequently refrain from disclosing any information related to it. Since RESPONDENT does not have to fear a violation of its interest to keep the existence of the other arbitration secret, it cannot object to the admission of the evidence on these grounds.

d. RESPONDENT is less worthy of protection because of its negligence

114 Lastly, RESPONDENT is less worthy of protection as it did not take the necessary steps to prevent the disclosure of the Partial Interim Award. Said award became publicly available by either of two means: Either two employees provided the award to the company, thus breaking their confidentiality obligation or there was a hack of RESPONDENT's computer system [PO2, p. 61 no. 41]. Based on the assumption that the employees provided the award to the

company, this breach must be attributed to RESPONDENT. At the time of the leak, the two employees were still working with RESPONDENT, but were laid off shortly after [PO2, p. 61 no. 41]. It was thus RESPONDENT's obligation to control its employees since they were in its sphere of influence. Consequently, RESPONDENT should have taken the necessary precautions to prevent a disclosure of the evidence by its employees. Its worthiness of protection is thus lowered.

115 This also applies if the award was made publicly available through a hack of RESPONDENT's computer system. RESPONDENT used an outdated firewall to protect its computer system which made it easy for the hackers to enter said system [PO2, p. 61 no. 42]. As a multinational company [para. 90], RESPONDENT did thereby not take sufficient precautions to prevent the publication of the award. Therefore, in any case, RESPONDENT is less worthy of protection as it did not adequately protect its interests.

In conclusion, CLAIMANT's interests of admitting the Partial Interim Award outweigh RESPONDENT's interest of non-admission.

CONCLUSION TO ISSUE 3

CLAIMANT respectfully requests the honourable tribunal to admit the Partial Interim Award as evidence irrespective of its procurement history. The award is relevant for the pending case and CLAIMANT's interest to admit the award outweighs RESPONDENT's interest of non-admission.

REQUEST FOR RELIEF

According to the arbitral tribunal's Procedural Order and in light of the submissions above, CLAIMANT respectfully requests the honourable tribunal to assess CLAIMANT's submissions as follows:

- The arbitral tribunal has jurisdiction to adapt the Contract under the arbitration clause **(ISSUE 1)**.
- CLAIMANT is entitled to the payment of \$ 1,250,000 from a contract adaptation under clause 12 of the Contract as well as the CISG **(ISSUE 2)**.
- The Partial Interim Award from the other arbitral proceedings is admissible as evidence **(ISSUE 3)**.

CERTIFICATE

Tübingen, 06. December 2018

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.



Jule Bayer



Thimo Härter



Inga Höfel



Raphael Reiss



Simon Thomas