SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG, MARCH 31 – APRIL 7, 2019

MEMORANDUM FOR RESPONDENT

PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

PHAR LAP ALLEVAMENTO	**BLACK BEAUTY EQUESTRIAN**
Rue Frankel 1	2 Seabiscuit Drive
Capital City, Mediterraneo	Oceanside, Equatoriana
CLAIMANT	RESPONDENT

COUNSEL FOR RESPONDENT

DARIO GLAUSER • TIM ISLER • EVELYNE JOEHRI • MARIUS KOCH

ANNA LAISHEVTSEVA • ANINA LINZ • PATRICK PLATTNER • ALESSIO ZOLPI

UNIVERSITY OF BASEL, SWITZERLAND

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TABLE OF ABBREVIATIONS AND DEFINITIONS

%	per cent
amiable compositeur	*amiable compositor* [*French*]
Answer	RESPONDENT's Answer to the Notice of Arbitration of 24 August 2018
Arbitration Agreement	Clause 15 of the Frozen Semen Sales Agreement dated 6 May 2017
BGer	Bundesgericht (Federal Court of Switzerland)
CIETAC	China International and Economic Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	CISG Advisory Council
CISG-online	CISG Database (http://www.cisg-online.ch)
Cl. Memo.	CLAIMANT's Memorandum (Handong International Law School)
CLAIMANT	Phar Lap Allevamento
Co.	company
Corp.	corporated
DAP	Delivered At Place
DDP	Delivered Duty Paid
DDP Clause	Clause 8 of the Frozen Semen Sales Agreement dated 6 May 2017
e.g.	*exempli gratia* (for example) [*Latin*]

ed./eds.	Editor/Editors
et al.	*at alii* (and others) [*Latin*]
ex aequo et bono	*according to the right and good* [*Latin*]
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
GmbH	Gesellschaft mit beschränkter Haftung
Hardship Clause	Clause 12 of the Frozen Semen Sales Agreement dated 6 May 2017, concerning hardship
HKIAC	Hong Kong International Arbitration Centre
HKIAC 2013 Rules	Administered Arbitration Rules of the Hong Kong International Arbitration Centre, Issue 2013
HKIAC 2018 Rules	Administered Arbitration Rules of the Hong Kong International Arbitration Centre, Issue 2018
i.e.	*id est* (that is) [*Latin*]
IBA	International Bar Association
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
ibid.	*ibidem* (in the same place) [*Latin*]
ICC	International Chamber of Commerce
ICC-Hardship Clause	ICC Force Majeure Clause 2003/ICC Hardship Clause 2003
ICSID	International Centre for Settlement of Investment Disputes
Inc.	incorporated

INCOTERMS	International Commercial Terms published by the ICC in 2010
infra	below [*Latin*]
inter alia	among others [*Latin*]
Letter Fasttrack	Ms. Fasttrack's letter of 3 October 2018
Letter Langweiler	Mr. Langweiler's letter of 2 October 2018
lex arbitri	law of the arbitration [*Latin*]
Ltd	limited
Model Clause	HKIAC Model Arbitration Clause
Mr.	Mister
Ms.	Miss
New York Convention	The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
No.	number/numbers
Notice	CLAIMANT's Notice of Arbitration of 31 July 2018
OLG	Oberlandsgericht
p./pp.	page/pages
pacta sunt servanda	agreements must be kept [*Latin*]
para./paras.	paragraph/paragraphs
PECL	Principles of European Contract Law
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018

Pty	Proprietary Limited Company
RESPONDENT	Black Beauty Equestrian
Sales Agreement	Frozen Semen Sales Agreement dated 6 May 2017
SCAI	Swiss Chambers' Arbitration Institution
supra	above [*Latin*]
the Evidence	the Partial Interim Award and the relevant submission from the Other Arbitration
U.S.	United States of America
UCC	Uniform Commercial Code (United States of America)
UEFA	The Union of European Football Associations
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Vienna, 7 July 2006
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts (2010)
USD	United States Dollars
USSR	The Union of Soviet Socialist Republics
v.	*versus* (against) [*Latin*]
vice versa	*conversely* [*Latin*]
Vol.	Volume

STATEMENT OF FACTS

The parties ("**Parties**") to the present arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"). CLAIMANT operates a renowned horse breeding farm and is based in Capital City, Mediterraneo. RESPONDENT operates in Oceanside, Equatoriana and is famous for its broodmare lines.

On **21 March 2017**, RESPONDENT contacted CLAIMANT with the intent of purchasing 100 doses of frozen horse semen from CLAIMANT's famous stallion, Nijinsky III. CLAIMANT appeared keen to enter such a profitable business relationship. Before an agreement on the terms of the sale was reached, the head negotiators, Ms. Napravnik and Mr. Antley, were involved in a severe car accident. They subsequently had to be replaced by Mr. Ferguson for CLAIMANT and Mr. Krone for RESPONDENT. On **6 May 2017**, the Frozen Semen Sales Agreement ("**Sales Agreement**") was signed. The Parties incorporated a hardship clause ("**Hardship Clause**") to address certain unforeseen events. The Parties agreed on the purchase of 100 doses of frozen horse semen, to be delivered in three instalments DDP ("**DDP Clause**"), for a total purchase price of USD 10,000,000.

On **15 November 2017**, Mediterraneo imposed a 25% tariff on all agricultural goods from Equatoriana. Equatoriana retaliated with a 30% tariff on selected products from Mediterraneo, effective from **15 January 2018**. Before the third shipment was due on **23 January 2018**, CLAIMANT received the unpleasant message that the Equatorianian tariff also applied to horse semen, which increased the costs of the third shipment. When the Parties discussed how to proceed considering this turn of events, RESPONDENT emphasised the importance of fulfilling the contract as agreed upon. CLAIMANT seemed to be of the same opinion, and duly authorised the last shipment alongside with payment of the additional costs. As to CLAIMANT's request, the Parties renegotiated the burden of the additional costs, but failed to find a consensus.

On **31 July 2018**, CLAIMANT filed a request for arbitration under clause 15 of the Sales Agreement ("**Arbitration Agreement**"). In **October 2018**, after arbitration had long been initiated, CLAIMANT announced its request to submit evidence relating to another arbitration in which RESPONDENT is involved ("**Other Arbitration**").

INTRODUCTION

1 *Pacta sunt servanda.* Postulated already in medieval times and one of the most fundamental legal rules for centuries, the principle that agreements must be kept is still true today, and not without reason. Particularly in these challenging times of trade wars and global transformation, such a principle of stability, on which one should be able to rely, is of great importance. In international trade, where trust and legal certainty are essential for efficient business transactions, this fundamental idea must hold true even more.

2 RESPONDENT believes that this principle should be upheld in international commerce. It had complied with its contractual obligations and had paid the full purchase price in advance. When it was CLAIMANT's turn to fulfil its part of the deal, problems arose. The imposition of new tariffs seemed to completely exceed CLAIMANT's expectations, although new tariffs are not unlikely in international trade, especially in these times. The Parties had agreed on delivery DDP and, thus, that all tariffs would be borne by CLAIMANT. There is no reason that RESPONDENT, not even engaged in the delivery process, should shoulder the imposed tariffs (**Issue 3**).

3 Now that CLAIMANT has realised that it has missed the right time for negotiations, it is trying to take another course: An arbitral tribunal shall provide for the desired result which CLAIMANT itself could not reach by negotiations. However, RESPONDENT never agreed to grant the Tribunal the power to adapt the Sales Agreement after all contractual obligations were fulfilled (**Issue 1**). It does not come as a surprise that CLAIMANT wants to use all possible, even unethical methods to put RESPONDENT in an unfavourable light. CLAIMANT wants to base its arguments on stolen or leaked documents from another, unrelated arbitration (**Issue 2**). This indicates how desperately CLAIMANT is trying to cover up its missed opportunities in order to initiate an unnecessary arbitration proceeding.

ISSUE 1: THE TRIBUNAL LACKS THE POWER TO ADAPT THE SALES AGREEMENT

4 After the Parties' renegotiations failed, CLAIMANT decided to try to achieve a higher price through arbitration. It asserts that the Parties agreed to empower the Tribunal to adapt the price of the Sales Agreement. However, such an authorisation of the Tribunal would need to be expressly included in the Arbitration Agreement. To determine whether an express authorisation was included or not, the law that governs the interpretation of the Arbitration Agreement is decisive. CLAIMANT asserts that the law governing the Arbitration Agreement

and its interpretation is the law of Mediterraneo [*Cl. Memo., p. 4, para. 5*]. On that basis it claims that the Tribunal has the jurisdiction and the power to adapt the contract [*ibid.*]. RESPONDENT disputes these claims since regardless of the applicable law the Tribunal lacks the power to adapt the Sales Agreement.

5 RESPONDENT agrees with CLAIMANT that the Tribunal has the authority to decide on its own jurisdiction [*PO2, p. 61, para. 48; Cl. Memo., p. 4, para. 7*]. However, the Tribunal is requested to exercise this discretion to decline its power to adapt the contract. RESPONDENT will thus show the following. First, the Parties did not expressly authorize the Tribunal to adapt the Sales Agreement as required by Danubian Arbitration Law (**I**). Second, Danubian Contract Law applies to the interpretation of the Arbitration Agreement, which implies that the Tribunal lacks the power to adapt the Sales Agreement (**II**). Third, even if Mediterranean law applied, the Tribunal would lack the power to adapt the Sales Agreement (**III**).

I. The Parties did not expressly authorize the Tribunal to adapt the Sales Agreement as required by Danubian Arbitration Law

6 CLAIMANT only addresses the issue whether the law governing the Arbitration Agreement is Mediterreanan Contract Law or Danubian Contract Law [*Cl. Memo., pp. 6-9, paras. 14-27*]. However, CLAIMANT did not consider the requirements of Danubian Arbitration Law. Danubian Arbitration Law requires an express authorisation to adapt contracts, regardless whether Mediterranean Contract Law or Danubian Contract Law governs the Arbitration Agreement. RESPONDENT will show that the Parties did not expressly authorise the Tribunal to adapt the Sales Agreement as required by Danubian Arbitration Law.

7 The arbitration law at the seat of the arbitral tribunal, the *lex arbitri*, governs the arbitral proceedings [*MOSES, p. 68*]. The *lex arbitri* is a procedural law containing mandatory provisions that regulate, among other things, the formal validity of the arbitration agreement and the jurisdiction of the tribunal [*ibid.*]. In the present case, the seat of arbitration as per the Parties' agreement is Vindobona, Danubia [*Exh. C5, p. 14, para. 15*]. Therefore, the *lex arbitri* is Danubian Arbitration Law which is a verbatim adoption of the UNCITRAL Model Law [*PO2, p. 57, para. 14; p. 60, para. 36*]. Pursuant to Danubian Arbitration Law 28(3), an arbitral tribunal shall "*decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*". Acting *ex aequo et bono* or as *amiable compositeur* provides the tribunal with a broad authority to decide in light of general principles of fairness, without being bound by any applicable law [*BORN I, p. 2771; KIFFER, p. 626; KRÖLL, p. 222; MOSES, p. 77; REDFERN/HUNTER, p. 218; TRAKMAN, p. 624*]. The courts in Danubia are of the

view that Danubian Arbitration Law 28(3) contains a general standard to be applied to the conferral of exceptional powers to arbitral tribunals [*PO2, p. 60, para. 36*]. If a tribunal has an exceptional power, such as the power to adapt contracts, it can form a new contract by changing the original allocation of duties and rights of the parties. [*VUILLARD/VAGENHEIM, p. 650*]. Therefore, the power to adapt a contract is considered an exceptional power which has to be transferred to the tribunal should this be the parties' intentions [*KRÖLL, pp. 139-140*]. Thus, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of such power is required [*KRÖLL, pp. 139-140; PO2, p. 60, para. 36*].

8 If an arbitral tribunal decides with exceptional powers exceeding the scope of authority granted by the parties, it exposes its award to annulment and non-recognition [*BORN I, pp. 2773-2774; WOLFF, p. 321*]. Under the New York Convention V(1)(c), recognition of an award may be denied on the grounds that "[*t*]*he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration* […]".

9 The Parties agreed on the following arbitration clause ("**Arbitration Agreement**"): "*Any dispute arising out of this contract* […] *shall be referred to and finally resolved by arbitration* […]. *The seat of arbitration shall be Vindobona, Danubia*" [*Exh. C5, p. 14, para. 15*]. At no point does CLAIMANT allege that the Parties had expressly empowered the Tribunal to adapt the contract. On the contrary, CLAIMANT states that the contract "*does not include such an express reference in the arbitration agreement*" [*Cl. Memo., p. 5, para. 8*]. The Arbitration Agreement therefore lacks an express authorisation to adapt the contract, as required by Danubian Arbitration Law. If the Tribunal adapted the Sales Agreement, it would exceed the authority granted by the Parties. An award rendered under these circumstances would not be enforceable under New York Convention V(1)(c). In conclusion, the Parties did not expressly authorise the Tribunal to adapt the contract as required under mandatory Danubian Arbitration Law.

II. Danubian Contract Law governs the interpretation of the Arbitration Agreement which implies that the Tribunal lacks the power to adapt

10 The *lex arbitri* and the law that applies to the Arbitration Agreement must be strictly distinguished [*MOSES, p. 67*]. The law governing arbitration agreements regulates, among other things, the interpretation of the arbitration agreement [*MOSES, p. 69*]. In certain aspects, the *lex arbitri* and the law governing the arbitration agreement can overlap. In the case at hand, the issue whether the Tribunal was granted an exceptional power is addressed by both

laws. Independent of the *lex arbitri* also the law governing the Arbitration Agreement addresses this issue. Therefore, RESPONDENT will show in the following that also by arguing only under any Contract Law, as CLAIMANT wants to, the Tribunal lacks the power to adapt the Sales Agreement.

11 The Parties agreed in a telephone conference "*that according to Danubian Contract Law, which contains the alleged "four corners rule" excluding all extraneous evidence for the interpretation of contracts and where arbitration agreements are interpreted narrowly, there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal*" [*PO1, p. 52, para. I.*]. At no point does CLAIMANT argue that the Tribunal would have the power to adapt the Sales Agreement if Danubian Contract Law applied to the Arbitration Agreement [*Cl. Memo., pp. 6-9, paras. 14 -27*]. To avoid this undesired result, CLAIMANT alleges that Mediterranean law governs the Arbitration Agreement [*Cl. Memo., p. 6, para. 14*].

12 The law of an arbitration agreement has to be determined according to a three-stage test – namely whether the parties made an explicit choice, if not whether an implicit selection can be determined, or finally, which law has the closest connection [*BCY v. BSZ; Sulamérica; Cl. Memo., p. 16, para. 15*]. Accordingly, RESPONDENT will demonstrate that Danubian Contract Law applies to the Arbitration Agreement for the following reasons. First, the Parties made no explicit choice of Mediterranean law (**A**). Second, the Parties made no implicit choice of Mediterranean law (**B**). Third, Danubian law has the closest connection with the Arbitration Agreement (**C**).

A. The Parties did not explicitly choose Mediterranean law to govern the Arbitration Agreement

13 Parties can expressly agree on the law that shall govern an arbitration agreement [*REDFERN/HUNTER, p. 158*]. The Parties in the present case based the Arbitration Agreement on the HKIAC Model Arbitration Clause ("**Model Clause**") which foresees an express choice of law clause [*Exh. R1, p. 33*]. This choice of law clause reads "*The law of this arbitration clause shall be* […]*"*. RESPONDENT proposed in its first draft of the Arbitration Agreement that Equatorianian law should apply [*ibid.*]. CLAIMANT, however, removed the reference to Equatorianian law [*Exh. R2, p. 34*]. Furthermore, it excluded the entire choice of law clause in the draft of the Arbitration Agreement before the Sales Agreement was signed [*ibid.*]. Consequently, the choice of law clause was missing in the final Arbitration Agreement [*Exh. C5, p. 14, para. 14*]. The Arbitration Agreement therefore does not contain any explicit

choice of law.

B. The choice of law for the Sales Agreement does not extend to the Arbitration Agreement

14 CLAIMANT argues that the choice of Mediterranean law for the Sales Agreement is an implied choice for the Arbitration Agreement [*Cl. Memo., p. 8, para. 24*]. To support its argument, CLAIMANT states that parties normally intend the same law to govern the two contracts [*Cl. Memo., p. 8, paras. 22-25*]. This holds not true in the case at hand. The Parties' selection of Danubia as the arbitral seat indicates a rejection of Mediterranean law to govern the Arbitration Agreement.

15 According to the doctrine of separability, an arbitration agreement and a main contract are considered to be two separate contracts [*Channel Tunnel Case; Sojuznefteexport v. JOC Oil, Ltd; BORN I, p. 464; BORN II, pp. 190-191*]. Contrary to CLAIMANT's assertion [*Cl. Memo., p. 7, paras. 20-21*], the doctrine of separability is not only aimed at cases of an invalidity of the main contract [*Black Clawson v. Papierwerke; Channel Tunnel Case; BORN I, p. 646*]. The separability presumption also means that an arbitration agreement can be governed by a law different from that of the underlying contract [*ibid.*]. CLAIMANT alleges that the choice of law for the main contract may sometimes be seen as an implied choice of law for the arbitration agreement contained therein [*Cl. Memo., p. 8, para. 24*]. However, as CLAIMANT itself admits [*Cl. Memo., p. 8, para. 25*], this holds true only if there is no indication of an "*intention to the contrary*" [*Award in ICC Case No. 7373; NTPC v. Singer Company; Sulamérica*].

16 In *Sulamérica*, the main contract was governed by Brazilian law. The arbitral seat was London. In the absence of an express choice of law, the English Court examined whether the parties implicitly chose the law of the main contract to govern the arbitration agreement. The Court assumed that in the absence of any contrary indication, the parties intended the law of the main contract to extend to the arbitration agreement. However, it held that seating the arbitral tribunal in London indicated that the parties did not implicitly choose the law of the main contract. Rather, the parties intended English law, the law of the seat, to govern the arbitration agreement. The choice of a specific seat thus is an indication that the parties did not implicitly opt for the law of the main contract to govern the arbitration agreement.

17 In the present case, the Parties agreed on Vindobona, Danubia as the seat of the arbitration [*Exh. C5, p. 14, para. 15*]. Consequently, Danubian Arbitration Law, as the *lex arbitri*, governs the proceeding of the arbitration. The Parties chose this particular arbitral seat

because Danubia is a neutral country as neither CLAIMANT nor RESPONDENT are based in Danubia [*Exh. R2, p. 3; Exh. C5, p. 13*]. The Parties thus chose Danubia not by chance, but rather with the clear intention to provide for arbitration under neutral conditions. It follows that the Parties intentionally chose Danubian Arbitration Law to govern the arbitral proceedings. Arbitration agreements are considered to be procedural contracts [*PO2, p. 60, para. 36*]. If Mediterranean Contract Law governed the Arbitration Agreement, as CLAIMANT alleges, the arbitral proceedings would be governed by the law of two different countries. Furthermore, RESPONDENT initially proposed that the arbitral seat shall be Equatoriana and the law governing the Arbitration Agreement shall be Equatorianian law [*Exh. R1, p. 33*]. RESPONDENT thus intended from the beginning the *lex arbitri* and the law governing the Arbitration Agreement to be parallel, and not diverging.

18 CLAIMANT's assertion that the Parties implicitly chose Mediterranean law to govern the Arbitration Agreement must therefore be rejected. It may have been CLAIMANT's point of view, but there is clear indication that RESPONDENT did not share this opinion. The Parties therefore did not intend Mediterranean Law to govern the Arbitration Agreement.

C. Danubian Contract Law should govern the Arbitration Agreement because it has the closest connection to the Arbitration Agreement

19 In the absence of an explicit or implicit choice of law, both common and civil law jurisdictions apply the substantive law of the arbitral seat to arbitration agreements [*James Miller v. Whitworth Street Estates; BORN I, p. 509; MANN, p. 159; PAULSSON, p. 295; REDFERN/HUNTER, p. 120*]. This is due to the fact that the law of the seat normally has the closest connection to the agreement [*ICC Case No. 6162; Peruvian Insurance Case; Preliminary Award in ICC Case No. 5505; BĚLOHLÁVEK, p. 262; BORN I, p. 511; MOSS, pp. 41-42; POON, pp. 121, 126*]. This is consistent with the New York Convention. New York Convention V(1)(a) stipulates a default choice-of-law rule that provides for application of the law of the seat to the arbitration agreement absent contrary agreement by the parties [*BORN I, p. 518*]. The law of the arbitral seat suits best due to the procedural character of arbitration agreements [*C v. D; BORN I, p. 512*], which is particularly evident in the case at hand.

20 CLAIMANT asserts that Danubian Arbitration Law should apply to the proceedings and Mediterranean Contract Law to the arbitration agreement [*supra para. 6*]. Such a stance, however, produces contradictory results. This is due to different requirements needed in order to empower a tribunal to adapt the contract. Usually, a standard arbitration agreement does not contain an explicit authorisation to adapt a contract [*e.g. HKIAC Model Arbitration*

Clause; ICC Model Clause; SCAI Model Arbitration Clause; UNCITRAL Model Arbitration Clause]. However, according to the courts of Mediterraneo, a standard arbitration agreement can be sufficient to authorize a tribunal, despite the lack of an express wording [*PO2, p. 60, para. 39*]. Contrary to that, mandatory Danubian Arbitration Law 28(3) stipulates that a tribunal must be expressly authorized in order to be empowered to adapt a contract [*PO2, p. 60, para. 36; supra para. 7*]. Consequently, the same arbitration agreement would be qualified differently by these two laws. Therefore, applying Mediterranean law to the Arbitration Agreement alongside with mandatory Danubian Arbitration Law would lead to irreconcilable contradictions concerning the empowerment of the Tribunal. Danubian Contract Law, on the other hand, is well compatible with Danubian Arbitration Law. According to the four corners rule principle of Danubian Contract Law, an explicit authorization would also be required [*PO1, p. 52, para. II.*]. It is therefore favourable to submit the Arbitration Agreement and the arbitration proceedings to the same system of law.

21 Thus, Danubian Contract Law should govern the Arbitration Agreement. As shown above [*supra para. 11*], the Parties agreed if the Tribunal were to decide that Danubian Contract Law applies to the Arbitration Agreement, it would lack the power to adapt the contract.

III. Even under Mediterranean law, the Tribunal would lack the power to adapt the Sales Agreement

22 Although under Mediterranean Law, arbitration agreements are interpreted broadly [*Notice, p. 7, para. 16*], the parties' intentions do take priority. Various national jurisdictions hold firmly that the parties' intent is paramount for determining the scope of an arbitration agreement [*AT&T Case; BGer 4C.40/2003; Louis Dreyfus v. Blystad; United Steelworkers Case; BORN I, pp. 1330-1334*]. A party cannot be forced to submit a dispute to arbitration it did not agree to in the arbitration agreement [*ibid.*]. Therefore, a decisive factor is the parties' intent at the time of contract conclusion [*ibid.*].

23 RESPONDENT will show that it was the Parties' intent to exclude contract adaptation from the scope of arbitrable disputes. First, RESPONDENT's conduct prior to and at the time of contract conclusion could only have been understood as excluding the power to adapt the contract (**A**). Second, at the time the Arbitration Agreement was concluded, the Parties had no intent to empower the Tribunal to adapt the contract (**B**).

A. The Parties excluded the power to adapt the contract by narrowing down the HKIAC Model Clause

24 The Model Clause which the Arbitration Agreement was based on contained "*any dispute, controversy, difference or claim arising out or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it*". CLAIMANT argues that the remaining wording of the Arbitration Agreement being "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof* […]" [*Exh. C5, p. 14, para. 15*] unambiguously includes the power to adapt the contract [*Cl. Memo., p. 5, para. 10*]. Such a claim is unsubstantiated and misrepresents the facts at hand. RESPONDENT will show that the wording of the Arbitration Agreement does not include the power to adapt the contract. Further, eliminating certain phrases from the originally proposed Model Clause limited the scope of the Arbitration Agreement.

25 Whether or not the parties intended to empower the tribunal to adapt the contract is a question of contract interpretation [*BERGER, p. 5; FRICK, p. 193*]. The CISG forms part of Mediterranean law [*PO1, p. 53, para. III.4.*]. According to Mediterranean jurisprudence, the CISG governs the interpretation of arbitration agreements [*ibid.*]. Under CISG 8(1), "*statements made by* […] *a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*". The hypothetical understanding of a reasonable third person of the same kind, in the same circumstances, is the criterion under the objective test of CISG 8(2) [*Cowhides Case; Magnesium Case; Marble Panel Case; FARNSWORTH, p. 99, para. 2.4; HUBER-MULLIS, p. 12; LAUTENSCHLAGER, pp. 262 -264; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, p. 153*]. When determining the intent of the parties, according to CISG 8(3), several circumstances can be taken into consideration. These include the agreement as such, the negotiations between the parties and any practices which they have established between themselves [*Chateau v. Sabate USA Inc.; Filanto S.p.A. v. Chilewich; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, p. 150*]. To determine whether the parties intended to include the power to adapt depends on the interpretation of said circumstances [*OLG 5 U 21/06; Scheldebouw v. Hero Glas; GAILLARD/SAVAGE, p. 28, para. 41*].

26 The Arbitration Agreement reads that "*any dispute arising out of this contract* […]" shall be referred to arbitration [*Exh. C5, p. 14, para. 15*]. CLAIMANT argues that the term "*any*" "*extends to all disputes having any plausible factual or legal relation to the parties'*

agreement" [*Cl. Memo., p. 5, para. 11; BORN I, p. 1347*]. Although not outright false, this statement misconstrues the source from which it was taken. The cited passage uses the word "*any*" primarily in the context of an arbitration agreement lacking specifications like "*arising out of*" or "*relating to*" [*BORN I, pp. 1347-1348*]. Furthermore, it states that "*it is unclear* […] *why the addition of the word* […] *"any" should materially affect analysis*" [*ibid.*]. This illustrates that in the current case, the presence or absence of the word "*any*" is not relevant for determining whether the Tribunal is empowered to adapt the contract or not.

27 CLAIMANT further argues that the phrase "*arising out of this contract*" is a broad formulation, which includes the power to adapt the contract [*Cl. Memo., p. 5, para. 10*]. However, courts have held on several occasions that "*arising out of this contract*" is a rather narrow wording for an arbitration agreement and especially more narrow than the phrase "*relating to this contract*" [*Co.Britton v. Co-op Banking Group; Cont'l Cas. Co v. City of Richmond; Mediterranean Enters., Inc. v. Ssangyong Corp.; My Left Foot Children's Therapy Case; Texaco, Inc. v. American Trading Transp.; Tracer Research Corp. v. National Environmental Services*]. As addressed above [*supra para. 7*], adaptation can result in a new contract. The obligations of the parties are defined by an external institution, in this case, the Tribunal. A dispute about a possible adaptation therefore does not arise out of the contract itself, but rather relates to it.

28 As shown above [*supra para. 24*], the only wording left after the Model Clause had been narrowed down by the Parties is "*arising out of the contract*". The Parties eliminated the broader phrase "*related to this contract*" as well as any reference to non-contractual disputes from the Arbitration Agreement [*Exh. C5, p. 13, para. 15; Exh. R1, p. 33*]. RESPONDENT's intention was to reduce "*the fairly broad wording*" of the Model Clause [*Exh. R1, p. 33*]. CLAIMANT argues that eliminating the broader phrase of two, while stating one's intention to narrow down the broad wording of a clause, does not impact the scope of the Arbitration Agreement [*Cl. Memo., p. 5, para. 10*]. Furthermore, at the time of contract conclusion, RESPONDENT had no intent to empower the Tribunal to adapt the contract [*Exh. R3, p. 35*].

29 Regardless of whether CLAIMANT shared RESPONDENT's view at that time or not, it could not have been unaware of RESPONDENT's intention. Neither could a reasonable third person under the objective test of CISG 8(2) have understood RESPONDENT's proposal as anything different than narrowing down the Arbitration Agreement to the point where it no longer included a power to adapt.

B. The Parties had no intention to empower the Tribunal to adapt the contract

30 CLAIMANT asserts that during negotiations RESPONDENT promised to agree to empower the Tribunal to adapt the contract [*Cl. Memo., p. 4, para. 8*]. It further argues that at the time of contract conclusion this alleged provisional promise was still binding [*ibid.*]. RESPONDENT will show that this assertion of CLAIMANT shall be dismissed for the following three reasons.

31 First, CLAIMANT alleges that "*Mr. Antley* […] *explicitly stated to* […] *Ms. Napravnik that the arbitrators should adapt the contract where the parties could not be able to reach a solution*" [*Cl. Memo., p. 4, para. 8*]. However, CLAIMANT misrepresents what was actually said, which reads "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree"* [*Exh. C8, p. 17*]. This is not a binding statement since the word "*probably*" relativises it. Ms. Napravnik acknowledged this by saying: "*I suggested to clarify that issue and to include an express reference into the hardship clause or the arbitration clause to avoid any doubts*" [*ibid.*]. She did not state that she and Mr. Antley agreed to include an express reference. Despite the alleged consent, both negotiators did not document in any way that the Tribunal should be empowered to adapt the contract. To assume an irrefutable consent of the Parties is thus unwarranted.

32 Second, the only evidence put forward to prove this claim is the witness statement of Ms. Napravnik, an employee of CLAIMANT [*Cl. Memo., p. 4, para. 8*]. In Mr. Antley's notes of that negotiation, the only phrase that could have a connection to his alleged statement is a short note reading "*connection of hardship clause with arbitration clause*" [*Exh. R3, p. 35*]. Such a sentence could also be interpreted as being an unsettled point in the ongoing negotiations, especially regarding the specifics of a potential adaptation mechanism. Thus, there is no concrete evidence Mr. Antley ever agreed on providing for contract adaptation.

33 Third, under CISG 8(1), the relevant point in time for the parties' intent is the time of contract conclusion [*Building Materials Case; Fabrics Case; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, p. 153*]. The same holds true for CISG 8(2) [*Building Materials Case; Fabrics Case; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, p. 158*]. The final contract was signed by Mr. Krone for RESPONDENT and Mr. Ferguson for CLAIMANT. Both had access to the prior email chain, but not to anything discussed during the meeting mentioned above except for Mr. Antley's short note [*Exh. R3, p. 35; PO2, p. 55, paras. 5, 6*]. This note by itself did not reveal anything specific about the prior negotiations by Mr. Antley and Ms. Napravnik [*supra para. 32*]. Although the new negotiators made use of the emails they had access to, they themselves modified the clauses 6-15 and therefore negotiated a new consent for these clauses

[*PO2, p. 55, para. 4*]. In addition, CLAIMANT misrepresents the facts by stating that there was confirmed intention of the Parties to address contract adaptation in the contract [*Cl. Memo., p. 5, para. 8*]. On the contrary, Mr. Krone stated that he would have objected to "*transfer powers to the Arbitral Tribunal to increase the price upon its discretion*" [*Exh. R3, p. 35*]. As laid out above, neither Mr. Ferguson nor Mr. Krone were aware of the direction the last negotiation had taken regarding a possible adaptation.

34 Since Mr. Antley's considerations were not unambiguously documented, he cannot be held to have made a binding statement. Furthermore, the only relevant intent should be the one manifested at the time of contract conclusion. Therefore, a finding of consent to empower the Tribunal to adapt the Sales Agreement by Mr. Krone and Mr. Ferguson would be unfounded.

IV. Conclusion on Issue 1

35 The Parties did not expressly authorise the Tribunal to adapt the Sales Agreement as required by Danubian Arbitration Law. Furthermore, the Arbitration Agreement is governed by Danubian Contract Law, which implies that the Tribunal lacks the power to adapt the Sales Agreement. Even if the Tribunal were to find Mediterranean law to be applicable, it would still lack the power to adapt the Sales Agreement because there was no consent between the Parties to that effect.

ISSUE 2: CLAIMANT SHALL NOT BE ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION

36 As correctly stated by CLAIMANT, RESPONDENT is involved in another arbitration under the HKIAC 2013 Rules [*Cl. Memo., p. 15-16, para. 50; Letter Fasttrack, p. 51*]. The Other Arbitration arose out of a contract RESPONDENT had with one of its customers [*Letter Langweiler p. 50; PO2, p. 60, para. 39*]. RESPONDENT had to deliver a mare to a Mediterranean buyer [*ibid.*]. After contract conclusion, Mediterraneo imposed a tariff on all agricultural products [*ibid.*]. As the tariff included living animals, the delivery of the mare became far more expensive [*ibid.*]. Hence, RESPONDENT asked the tribunal to adapt the contract [*PO2, p. 60, para. 39*]. CLAIMANT now seeks to submit the Partial Interim Award and the relevant submission from the Other Arbitration (collectively "**the Evidence**") [*Cl. Memo., p. 9, para. 28; Letter Langweiler, p. 49*]. The Tribunal ordered the Parties to address whether CLAIMANT is entitled "*to submit the evidence from the other arbitration on the basis of the assumption that this evidence had been obtained either through a breach of confidentiality agreement or an illegal hack of RESPONDENT's computer system*" [*PO1, p. 53, para. III.1.b*].

37 CLAIMANT is not yet in possession of the Evidence but has the opportunity to purchase it against a payment of USD 1,000 from a company which provides intelligence on the horseracing industry [*PO2, pp. 60-61, para. 41*]. This company has a doubtful reputation as to where it gets its information from, and further refuses to disclose its sources [*ibid.*]. This refusal furthers speculation that the company obtained the Evidence through either a leak from two former employees of RESPONDENT or from a hack of RESPONDENT's computer system [*ibid.*]. These two former employees of RESPONDENT were witnesses in the Other Arbitration [*ibid.*]. CLAIMANT would therefore only submit the Evidence by first purchasing it from the questionable company. RESPONDENT acknowledges that CLAIMANT was not directly responsible for the breach of confidentiality or the illegal hack.

38 Danubian Arbitration Law and the HKIAC 2018 Rules are applicable in the case at hand [*supra para. 7; PO1, p. 51, para. II*]. The IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") can be used to supplement the legal provisions and the institutional rules that apply to the arbitration [*IBA Rules Preamble 1; ASHFORD, pp. 11, 29; MARGHITOLA, p. 34; ZUBERBÜHLER et al., p. 4*]. Evidence can be submitted if the requirements of Danubian Arbitration Law 19(2), which are the same as in HKIAC 2018 Rules 22.2, are fulfilled. These provisions require *inter alia* "[…] *admissibility, relevance, materiality* […]". Conversely, evidence must be excluded if one of the requirements, admissibility, relevance or materiality is not fulfilled.

39 CLAIMANT argues that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("**UNCITRAL Rules on Transparency**") are applicable [*Cl. Memo., p. 12, para. 36*]. The UNCITRAL Rules on Transparency are applicable only in investment treaties arbitration involving investor-state contracts [*UNCITRAL Rules on Transparency 1.; EULER et al./NADAKAVUKAREN SCHEFER, p. 42*]. As neither Party is an investor or a state, the UNCITRAL Rules on Transparency are not applicable, and therefore cannot be relied upon in the present case. Consequently, CLAIMANT's argument that the UNCITRAL Rules on Transparency prevail over the HKIAC Rules [*Cl. Memo., p. 12, para. 38*] must be rejected.

40 CLAIMANT further addresses the methods by which the Evidence could be introduced to the current arbitration, namely the joinder of the other party or in-camera proceedings [*Cl. Memo., pp. 17-18, paras. 60-65*]. As the Tribunal has ordered the Parties to address the narrow issue of whether CLAIMANT is entitled to submit the Evidence [*PO1, p. 53, para. III.1.b.*], such a discussion is misplaced at this point in the proceeding. Therefore, RESPONDENT will limit the following discussion to the issue at hand, whether the Evidence

may be submitted.

41 CLAIMANT argues that the necessity of the evidence overrides any breach of confidentiality agreements, statutory confidentiality or illegality of the hack [*Cl. Memo., pp. 10-12, paras. 31-35; pp. 16-17, paras. 52-59*]. This must be rejected. RESPONDENT will demonstrate that the Evidence shall be excluded due to its confidentiality (**I**). Alternatively, the Evidence must be excluded due to the lack of relevance and materiality (**II**). In any event, RESPONDENT's interest of confidentiality must prevail (**III**). Further, the entitlement of CLAIMANT to submit the confidential and unrelated Evidence would violate RESPONDENT's right to a fair proceeding (**IV**).

I. The Evidence shall be excluded due to its confidentiality

42 CLAIMANT alleges that the Evidence shall be submitted despite its confidentiality [*Cl. Memo., p. 10, para. 30*]. CLAIMANT therefore acknowledges the confidential nature of the Evidence [*ibid.*]. The confidential nature of the Evidence renders it inadmissible (**A**). Further, if the Evidence surfaced through an illegal hack, it would still be protected by the confidentiality, as the Evidence is not publicly available (**B**).

A. The confidential nature of the Evidence renders it inadmissible

43 Arbitrations are inherently confidential and shall remain so [*Aita v. Ojjeh; Bankers Trust; Russell v. Russell; ASHFORD, pp. 83-87; BAGNER II, p. 21; BORN I, p. 2781; KOURIS, p. 127; WAINCYMER, p. 798*]. Confidentiality is one of the key advantages in arbitration as opposed to litigation [*Bibby Bulk v. Cansulex; Eastern Saga; Esso v. Plowman; Hassneh Insurance v. Mew; BAGNER I, p. 143; BAGNER II, p. 23*; *COLLINS, p. 327; PAULSSON/RAWDING, pp. 303-307; REED, p. 367; SMEUREANU, pp. 3-4; SMIT, p. 299; TWEEDDALE, p. 59*]. The rationale for the requirement of confidentiality is to protect the interest of the parties by keeping their disputes out of the public eye, which could harm their business [*Associated Electric; Russell v. Russell; ASHFORD, p. 84; COOK/GARCIA, pp. 231-232; OGLINDA, p. 64*]. Confidentiality further prevents third parties from procuring a confidential arbitration document or award [*Ali Shipping Case; Dolling-Baker v. Merrett; ASHFORD, p. 85; COLLINS, p. 327; KOURIS, pp. 130 -131; PAULSSON/RAWDING, p. 304*]. This would jeopardise arbitration institutionally as a dispute settlement mechanism [*COLLINS, p. 327; PAULSSON/RAWDING, p. 303; SMEUREANU, pp. 150-151*].

44 Not all institutional arbitration rules impose a general confidential obligation on the parties [*BORN I, p. 2802; MOSES, pp. 3-4*]. The HKIAC Rules, however, contain an express

confidentiality provision that forbids disclosure of non-public materials from the arbitration to third parties [*BORN I, p. 2803; MOSER/BAO, pp. 281-282*]. HKIAC 2013 Rules 42.1 states that "[…] *no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration*". HKIAC 2013 Rules 42.2 extends this obligation to witnesses and the HKIAC. RESPONDENT will demonstrate that the Evidence is inadmissible in a strict sense due to its confidentiality for the following two reasons.

45 First, anyone bound by a confidentiality obligation must not disclose the protected information. If confidential information is disclosed anyway, it does not lose its confidential nature. Whether the receiving person is bound by any specific confidentiality obligation or not is irrelevant. Otherwise, such an obligation may easily be avoided by simply sharing the confidential information. This would undermine the purpose of such confidentiality obligations. In the present case, CLAIMANT is bound neither by a contractual obligation nor by the HKIAC Rules of the Other Arbitration. The Evidence, however, could have surfaced only from two of RESPONDENT's former employees, which were bound by confidentiality obligations, or through an illegal hack [*Letter Fasttrack, p. 51; PO2, pp. 60-61, para. 41*]. In any case, the Evidence was initially protected by confidentiality obligations. RESPONDENT's interest in the confidentiality of the Evidence remains the same, regardless of possesses it. Therefore, the Evidence is inherently confidential, regardless of whether or not CLAIMANT is bound by any confidentiality obligation.

46 Second, consistent application of the HKIAC Rules requires the Evidence to remain confidential. CLAIMANT acknowledges [*Cl. Memo., p. 11, para. 32*], both the Other Arbitration and the arbitration at hand are conducted under the HKIAC Rules [*Letter Langweiler, p. 50; PO2, p. 60, para. 39*]. Both arbitrations are supervised by the HKIAC. The HKIAC grants the parties confidentiality for the information related to the arbitration [*HKIAC 2018 Rules 45*]. If the Evidence were to be admitted, the Tribunal would disregard the HKIAC Rules it is bound by. Such an inconsistent application of these rules would undermine the credibility of the HKIAC itself. Therefore, information which is confidential in one arbitration, shall also be considered as confidential in another arbitration under the same rules. Allowing CLAIMANT to submit the Evidence would render the confidentiality guaranteed by the HKIAC a toothless tiger, and consequently disregard one of its key aspects.

47 In conclusion, the Evidence did not lose its confidential nature. Further, if the Evidence were admitted, the purpose of confidentiality granted by the HKIAC would be disregarded.

Therefore, CLAIMANT shall not be entitled to submit the Evidence.

B. Additionally, the Evidence is not publicly available

48 CLAIMANT alleges that the Evidence should still be admissible, despite its confidential nature and the procurement through the illegal hack [*Cl. Memo., p. 16, para. 53*]. CLAIMANT bases this allegation on the case *Caratube v. Kazhakstan*, which it further alleges to be a "*factually similar case*" [*ibid.*]. However, this argument must be rejected. RESPONDENT will demonstrate that the *Caratube v. Kazhakstan* case is not factually similar as the Evidence in the present case is not publicly available.

49 In *Caratube v. Kazhakstan,* a group hacked the computer system of the government of Kazakhstan and procured many confidential documents. Further, the hackers published the documents on a website that was publicly available [*Caratube v. Kazhakstan*]. A party to the arbitration, which was not involved in the hack, sought to submit the illegally procured documents [*ibid.*]. The tribunal admitted a part of the evidence but applied the requirement that it had to be publicly available.

50 In the present case, as CLAIMANT states, Mr. Velazquez who is a former employee of the Mediterranean buyer in the Other Arbitration informed CLAIMANT about the existence of the Other Arbitration [*Cl. Memo., pp. 10-11, para. 32; PO2, p. 60, para. 40*]. CLAIMANT is not in possession of the Evidence [*ibid.*]. Mr. Velazquez therefore promised to provide CLAIMANT with a copy of the Evidence [*Letter Langweiler, p. 50*]. As Mr. Velazquez could not access the Evidence himself, he provided CLAIMANT with the address of a company that would provide the Evidence for a price [*PO2, pp. 60-61, para. 41*]. The fact that even Mr. Velazquez, who as a former employee knew the main issues underlying the Other Arbitration [*PO2, p. 60, para. 40*], could not access the Evidence demonstrates that the Evidence can in no way be publicly available. Additionally, CLAIMANT already has an offer to purchase the Evidence [*PO2, pp. 60-61, para. 41*]. If the Evidence was publicly available, the financially struggling CLAIMANT would not spend any money on something it could also get for free. This indicates that the purchase from the other company would be the only option to acquire the Evidence. The evidence in the *Caratube v. Kazhakstan* case was publicly available, whereas the Evidence in the case at hand is not. Therefore, the cases are different. In conclusion, the Evidence is not publicly available.

II. Alternatively, the Evidence shall be excluded due to lack of sufficient relevance to the case or materiality to its outcome

51 The rules applicable to the case at hand state that evidence shall be excluded, if it is neither relevant nor material to the case [*Danubian Arbitration Law 19(2); HKIAC 2018 Rules 22.3; IBA Rules 9.2(a)*]. RESPONDENT will show that the Evidence is neither relevant (**A**) nor material (**B**) and shall therefore be excluded.

A. The Evidence is not relevant to the current case

52 CLAIMANT alleges that the Evidence is relevant to the case at hand as the disputes of the Other Arbitration and the case at hand are similar disputes [*Cl. Memo., p. 11, para. 32*]. Relevance requires that evidence is important to the case [*EBERL/SCHLOSSER, pp. 67-68; HABEGGER p. 33; MARGHITOLA, pp. 47-48*]. Evidence must be logically related to what needs to be proven [*PILKOV, p. 148*]. If evidence is not relevant to the case, the parties are not entitled to submit it [*Kılıç v. Turkmenistan*; *Opic Karimum Corporation v. Venezuela*; *Yukos*]. Consequently, evidence that is not relevant shall not be considered [*HO; KURKELA/TURUNEN, p. 143*]. Arbitral tribunals determine the relevance of evidence [*Danubian Arbitration Law 19(2); HKIAC 2018 Rules 22.2; IBA Rules 9.2(a)*]. However, in the present case, the disputes are not similar and therefore not logically related for the following three reasons.

53 First, the Other Arbitration and current arbitration are two different proceedings, concerning different parties and different disputes [*PO2, p. 60, para. 39*]. In the present case, CLAIMANT performed and paid the additional costs for the tariffs without relying on the fact that RESPONDENT had previously been involved in the Other Arbitration. CLAIMANT did not even know of the Other Arbitration until after it had initiated the current proceedings [*Letter Langweiler, p. 50; PO2, p. 60, para. 40*]. This means the dispute in the Other Arbitration arose independently from the dispute in the current case, and *vice versa*.

54 Second, the arbitration agreements in the two arbitrations are different [*Exh. C5, p. 14, para. 12; PO2, p. 60, para. 39*]. In the Other Arbitration, the parties included the Model Clause in its entirety [*PO2, p. 60, para. 39*]. In the case at hand, only a narrowed down version of the Model Clause was included [*supra paras. 24-29*]. In the Other Arbitration, the arbitral seat is Mediterraneo, whereas in the present arbitration the Tribunal is seated in Danubia [*Exh. C5, p. 14, para. 15*]. Therefore, the arbitrations are governed by different laws [*supra para. 21*; *PO2, p. 60, para. 39*]. As the arbitration agreements are different in scope and include the application of different laws, they are not logically related to one another.

55 Third, hardship is regulated differently [*infra para. 86*]. The contract in the Other Arbitration and the Sales Agreement include different hardship clauses [*Exh. C5, p. 14, para. 12; Answer, p. 30, para. 4; PO2, p. 60, para.* 39]. The hardship clauses are fundamental to the cases as they define hardship. The contract in the Other Arbitration includes the ICC Hardship Clause 2003 ("**ICC-Hardship Clause**") [*PO2, p. 60, para. 39*], whereas the Sales Agreement contains a hardship wording which is considerably less broad than the ICC-Hardship Clause [*infra para. 87*]. The question of whether the requirements for a case of hardship are met builds the core of both arbitrations. These requirements are different in the two disputes.

56 As shown above, the two proceedings arose independently from one another. Furthermore, the two arbitrations have different arbitration agreements and hardship clauses. In conclusion, the Other Arbitration and the present case are not logically related. Therefore, the Evidence is not relevant to the case at hand.

B. The Evidence is not material to the outcome of the case

57 CLAIMANT argues that the Evidence is material to the current case as it would prove an inconsistency in RESPONDENT's position in the two disputes [*Cl. Memo., p. 11, para. 34; p. 14, para. 43*]. Evidence is material if it could influence the outcome of the case [*BGer 4A_362/2013; BGer 4A_448/2013; Corfu Case; Fc Metalist v. UEFA; Methanex v. United States; EBERL/SCHLOSSER, pp. 67-68; HABEGGER, p. 33; MARGHITOLA, pp. 47-48; PIETROWSKI, p. 405; PILKOV, p. 148; VON GOELER, p. 173*]. Arbitral tribunals determine the materiality of evidence [*Danubian Arbitration Law 19(2); HKIAC 2018 Rules 22.2; IBA Rules 9.1*]. However, the Evidence at present is not material.

58 Any position taken in the Other Arbitration cannot be held against RESPONDENT. As shown above, the disputes differ fundamentally [*supra para. 53*]. CLAIMANT argues that despite these differences RESPONDENT takes on inconsistent positions [*Cl. Memo., p. 11, para. 32*]. This argument must be rejected. In the Other Arbitration, the parties authorised the tribunal to adapt the contract [*PO2, p. 60, para. 39*]. In the present case, the Parties did not authorise the Tribunal to adapt the contract [*supra para. 35*]. In RESPONDENT's opinion, a case of hardship occurred under the terms of the contract in the Other Arbitration. Therefore, RESPONDENT asked for an adaptation of the contract [*PO2, p. 60, para. 39*]. On the contrary, in the present case, it is RESPONDENT's position that hardship did not occur [*infra paras. 85-86*]. Consequently, RESPONDENT's seemingly different positions are consistent with the terms of the separate contracts and the differing facts of the cases. Even if the behaviour was contradictory, this would not change the outcome of the case. The Tribunal's power to adapt a

contract does not depend on RESPONDENT's behaviour in another, unrelated arbitration. In conclusion, the Evidence would in no way influence the outcome of the current case and is therefore not material.

III. In any case, RESPONDENT's interest of confidentiality must prevail

59 If confidential evidence is relevant and material to a case, tribunals can balance the contrasting interests of the parties [*QUIRK/PERNT, p. 260*]. Tribunals balance the interest of submitting evidence against the interest of confidentiality, and rule in favour of the stronger interest [*BGer 4A_362/2013; BGer 4A_448/2013; Fc Metalist v. UEFA*].

60 CLAIMANT states that its interest of submitting the Evidence should override the confidentiality obligation [*Cl. Memo., p. 10, para. 30*]. RESPONDENT's interest is to maintain the inherent confidential nature of the Evidence, just as the parties in the Other Arbitration agreed upon [*supra para. 45*]. Further, RESPONDENT's interest is to keep the information about any arbitration out of the public eye in order to protect its business. Any information about the Other Arbitration could hurt its business by tainting its reputation, and therefore harm it in the long run [*supra para. 45*]. CLAIMANT's interest seems to be to show that RESPONDENT takes a different position in the Other Arbitration opposed to the current case [*Cl. Memo., pp. 10-11, para. 32*]. Whereas CLAIMANT has only a short-term interest solely directed to this arbitration, RESPONDENT's long-term interest could be crucial to its whole commercial future.

61 Balancing RESPONDENT's fundamental interest in protecting its business against CLAIMANT's interest of gaining a minor advantage in the current case, can only lead to one reasonable outcome. RESPONDENT's interest prevails over CLAIMANT's.

IV. Entitling CLAIMANT to submit the Evidence would violate RESPONDENT's right to a fair procedure

62 CLAIMANT argues that it shall be entitled to submit the Evidence, as the Tribunal otherwise "w*ill not be able to make a fair and informed judgement, and* [*that*] *CLAIMANT will miss the chance to present its case completely*" [*Cl. Memo., pp. 11-12, para. 35*]. However, evidence which is considered to be neither relevant nor material to the case will not be admitted by a tribunal [*Danubian Arbitration Law 19(2); HKIAC 2018 Rules 22.2, IBA Rules 9.2(a)*]. As shown above, the Evidence is neither relevant [*supra para. 56*], nor material to the current case [*supra para. 58*]. Even if it were to be considered as relevant and material, RESPONDENT's interest of confidentiality prevails over CLAIMANT's interest of submitting the

Evidence [*supra para. 61*]. Hence, CLAIMANT is not deprived of its right to present its case. Thus, the Tribunal will be able to make a fair and informed decision without the submission of the Evidence. Furthermore, the submission of the Evidence would lead to a violation of RESPONDENT's procedural right to equal treatment (**A**). Additionally, CLAIMANT would violate its procedural obligation to act in good faith by submitting the Evidence (**B**).

A. The submission of the Evidence would constitute unequal treatment of the Parties

63 Due process is a key component in international arbitration [*BORN I, p. 3500; KURKELA/TURUNEN, pp. 1-2*]. It provides for fair treatment of the parties [*FORTESE/HEMMI, p. 112*]. One of the key objectives of the HKIAC 2018 Rules is to provide for procedural fairness [*MOSER/BAO, p. 170*]. Procedural fairness requires an equal treatment of the parties [*BORN I, p. 3506*]. Danubian Arbitration Law 18 provides that "*the Parties shall be treated with equality*". Equal treatment is a fundamental principle of justice [*Foremost Tehran Inc. v. Islamic Republic of Iran; BORN I, p. 2170*]. If parties are not treated equally, this could hinder the enforceability of the award under the New York Convention, even though the New York Convention does not provide for it expressly [*BORN I, p. 3520*]. Therefore, tribunals must ensure that the proceedings do not favour one party.

64 As seen above, RESPONDENT is protected by confidentiality against the submission of the Evidence [*supra para. 47*]. Further, the Evidence is neither relevant [*supra para. 56*] nor material [*supra para. 58*]. Therefore, CLAIMANT has no legal interest in bringing the Evidence into the proceedings. Even if CLAIMANT would have an interest of disclosure, RESPONDENT's fundamental interest in keeping its business confidential prevails [*supra para. 61*]. Hence, the Evidence is inadmissible [*supra para. 47*]. If the inadmissible Evidence were to be submitted, CLAIMANT would gain an unfair procedural advantage. Therefore, the Parties' would not be treated equally.

B. Through the submission of the Evidence, CLAIMANT would violate its procedural obligation to act in good faith

65 HKIAC 2018 Rules 13.5 requires that the parties shall do "*everything necessary*" to achieve procedural fairness. This includes the parties' obligation to act in good faith [*MOSER/BAO, p. 170*]. The requirement for acting in good faith sets high ethical standards for parties under the HKIAC 2018 Rules [*ibid.*]. Further, the Preamble of the IBA Rules demands that "*each Party shall act in good faith* [...]". The obligation of acting in good faith is violated when a party seeks to submit confidential documents with the intent of pressuring or harming the opposing party [*Libananco v. Turkey*; *ZUBERBÜHLER et al., pp. 5-6, para. 16*]. In the *Methanex*

case, the tribunal excluded evidence that had been procured illegally, as it violated the general duty of acting in good faith in proceedings [*Methanex v. United States; JOHN; BLAIR/GOJKOVIC, p. 250; BOYKIN/HAVALIC, pp. 5-6*].

66 CLAIMANT fully acknowledges that the Evidence is of confidential nature [*Cl. Memo., p. 10, para. 30*]. Nevertheless, CLAIMANT still seeks to submit the Evidence. Even worse, CLAIMANT personally arranged to purchase the Evidence from a company with a questionable reputation [*PO2, pp. 60-61, para. 41*]. This company offered CLAIMANT the Evidence for a purchase price of USD 1,000 [*PO2, pp. 60-61, para. 41*]. This potential purchase would be the only possibility to obtain the Evidence in order to bring it into the current proceedings. CLAIMANT's purchase of such confidential information would therefore make it an active participant in, at best, unethical dealings, and, at worst, an illegal enterprise. CLAIMANT must be completely aware of the possible violation of RESPONDENT's right to a fair procedure. Despite this, CLAIMANT still wants to gain advantage through submitting the Evidence. This behaviour is not compatible with acting in good faith. Considering the high ethical standard required under the HKIAC 2018 Rules, the submission of the Evidence would violate CLAIMANT's procedural obligation of acting in good faith.

V. Conclusion on Issue 2

67 Due to its confidential nature, the Evidence is inadmissible, and shall therefore be excluded. Alternatively, the Evidence lacks relevance and materiality. In any case, RESPONDENT's interest of confidentiality prevails over CLAIMANT's interest of submitting the Evidence. Moreover, the submission of the Evidence would violate RESPONDENT's right to a fair procedure. Therefore, CLAIMANT shall not be entitled to submit the Evidence from the Other Arbitration.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO ANY PAYMENT RESULTING FROM AN ADAPTATION OF THE PRICE, UNDER EITHER THE HARDSHIP CLAUSE OR CISG

68 While preparing the last shipment, the Parties discovered that the Equatorianian tariff applied to frozen horse semen and increased the costs [*Notice, p. 6, para. 11; Exh. R4, p. 36*]. At this point, however, RESPONDENT had already paid the full purchase price [*Exh C5, p. 14, para. 6*]. This means that at the time when the alleged hardship arose, CLAIMANT delivered in full knowledge of the situation. In fact, there was no pressure for CLAIMANT to release the delivery. It could have held back the third shipment, and consequently not paid any tariffs. CLAIMANT opted for another way of acting. After a call with RESPONDENT, CLAIMANT

released the last shipment and paid the additional costs of the last delivery [*Exh. C8, p. 18*]. Since CLAIMANT alleges its financial survival is now endangered, it therefore contests to bear the additional cost of USD 1,500,000 [*Cl. Memo., pp. 19-29, paras. 66-103*]. Instead, it requests the Tribunal to adapt contract [*Notice, pp. 7-8, paras. 18-20*]. The Tribunal shall deny these requests as neither the Hardship Clause (**I**) nor the CISG (**II**) entitles CLAIMANT to any additional payment resulting from an adaptation of the price.

I. The Hardship Clause does not entitle CLAIMANT to any additional payment resulting from an adaptation of the price

69 The Parties' Hardship Clause does not excuse CLAIMANT from its responsibility to pay the additional costs of the tariff. RESPONDENT will show that the Parties allocated the risk of tariffs to CLAIMANT (**A**). Furthermore, the Sales Agreement does not provide for contract adaptation (**B**) In any event, the imposition of the Equatorianian tariff is not covered by the Hardship Clause (**C**).

A. The Parties allocated the risk of imposed tariffs to CLAIMANT

70 Parties to a contract are free to allocate any risks [*SCHWENZER et al., p. 481*]. Risk allocation clauses such as the INCOTERMS may be included to simplify delivery terms [*LÖGERING, p. 35*]. In the present case, the Parties agreed on delivery DDP to RESPONDENT's premises [*PO2, p. 56, para. 10*]. As DDP stands for Delivered Duty Paid, the seller is obliged to pay all costs incurred in connection with delivery and customs clearance [*PILTZ/BREDOW, p. 570*]. DDP provides for the maximum obligation for the seller in terms of delivery modalities [*ibid.*]. Yet CLAIMANT tries to portray the understanding of DDP differently [*Cl. Memo., pp. 19-20, paras. 67-70*]. By means of contract interpretation and in absence of a common intent of the Parties, the understanding of a reasonable third person according to CISG 8(2) is decisive [*supra para. 25*].

71 By agreeing on delivery DDP, CLAIMANT knew that it had to bear all duties. As CLAIMANT is experienced in international transportation [*PO2, p. 56, para. 9*], it must have been aware that it was taking the maximum risk. In exchange for delivery DDP, RESPONDENT paid additional costs of USD 50,000 [*PO2, p. 56, para. 8*]. As CLAIMANT only had additional costs of USD 20,000 due to delivery DDP [*ibid.*], the remaining USD 30,000 are to be understood as a risk premium. If the Equatorianian tariff had not been imposed, CLAIMANT would have made a profit of USD 30,000 from the delivery alone. A price increase for DDP without CLAIMANT bearing the risks of DDP would be commercially unsound. As RESPONDENT stated, it was not

willing to pay more for receiving basically nothing [*Answer, p. 50, para. 4*].

72 CLAIMANT alleges that the costs for custom clearance were excluded from the DDP Clause, due to the fact that the Hardship Clause was added, especially since it was written in italics [*Cl. Memo., pp. 19-20, paras. 67-70*]. This view must be rejected. During contract negotiations, CLAIMANT stated that it was "[…] *not willing to take any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions*" [*Exh. C4, p. 12*]. However, RESPONDENT never agreed with this proposal, and additionally this reservation never made it into the contract. Also, the added Hardship Clause only covers risks for "*additional health and safety requirements or comparable unforeseen events*" [*Exh. C5, p. 14, para. 12*]. Since tariffs are not health and safety requirements or comparable to these [*infra para. 88*], the risk of tariffs was not excluded from the DDP Clause by adding the Hardship Clause to the contract. Furthermore, adding a DDP Clause to the contract and excluding tariffs from the DDP Clause at the same time, was not the Parties' intent. Should this have been the intention, the Parties should have chosen the INCOTERM clause DAP, which stands for Delivered At Place. Under the DAP term, the seller would have been exempted from import duties [*PILTZ/BREDOW, p. 570*], which is exactly what CLAIMANT now requests. CLAIMANT argues that the use of italics for the hardship clause demonstrates the Parties' intention [*Cl. Memo., p. 20, para. 70*]. CLAIMANT supports this argument with the UCC [*Cl. Memo., p. 20, para. 69*], which, as the domestic sales law of the U.S., has no bearing on the case at hand. Furthermore, the DDP clause is also written in italics [*Exh. C5, p. 14, para. 8*] In any case, the italic font reveals no hints about the Parties' intent, but is solely due to the fact that a template was used as a contract document [*PO2, p. 55, para. 3*].

73 Additionally, the purpose of international standard terms, such as INCOTERMS, is to ensure the possibility to agree on delivery and cost regulations in a simple way [*LÖGERING, p. 35*]. Therefore, a reasonable third person would have understood the DDP clause to cover the risk of tariffs. If the Tribunal were to conclude that the duties were excluded from the DDP Clause, this would be contrary to the spirit and purpose of the party agreement. Further it would also promote misunderstandings, as it would deviate from the clear wording of the contract.

74 In conclusion the Parties agreed on an increased price for the DDP risk allocation and did not deviate from the DDP risk allocation by adding the Hardship Clause to the Sales Agreement. Therefore, the Parties allocated the risk of imposed tariffs to CLAIMANT.

B. The Sales Agreement does not provide for price adaptation

75 Contrary to CLAIMANT's argument [*Cl. Memo., pp. 21-22., paras. 74-76; p. 24, paras. 85-86*], the Hardship Clause does not provide for an adaptation of the price (**1**). RESPONDENT will also show that it never agreed to price adaptation after contract conclusion (**2**).

1. The Hardship Clause does not allow for an adaptation of the price

76 The Parties' Hardship Clause provides that the "*Seller* [CLAIMANT] *shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exh. C5, p. 14, para. 12*].

77 Generally, in cases of hardship, parties have a duty to renegotiate the contract, and if such renegotiations fail, avoidance or adaptation of the contract are possible options [*PECL 6:111; UPICC 6.2.3; CISG-AC No. 7, para. 26; BRUNNER, p. 259; PETER, p. 237; SCHMITTHOFF, p. 86; SCHWENZER et al., p. 674; STROHBACH, p. 39*]. In the present case, the Parties agreed on a Hardship Clause in the Sales Agreement [*Exh. C5, p. 14, para. 12*]. A contractual hardship clause always contains two parts [*SCHWENZER et al., p. 667*]. The first part defines the situations which will trigger the clause and the second part addresses its mechanism and consequence [*ibid.*]. Both, the legal effects and the triggering events, can be defined by the parties [*SCHWENZER et al., p. 666*]. By means of contract interpretation and in absence of a common intent of the Parties, the understanding of a reasonable third person according to CISG 8(2) is decisive.

78 The Sales Agreement is primarily based on an industry template provided by CLAIMANT. All additions made by the Parties are written in italics [*PO2, p. 55, para. 3*]. Most of the Hardship Clause already existed in the industry template [*PO2, p. 56, para. 12*]. The Parties only included the phrase "[…] *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*ibid.*]. The only effect the Hardship Clause provides for is that CLAIMANT "[…] *shall not be responsible* […]" [*ibid.*]. This shows that the Parties intended the legal effects of the term "*shall not be responsible*" to extend also to the newly included phrase. Otherwise, the Parties would have included other legal consequences in the existing template.

79 Before the Parties amended the template of the Hardship Clause, it originally stated that "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or*

acts of God" [*Exh. C5, p. 14, para. 12*]. In this context, "*shall not be responsible*" indicates that the seller shall be exempt from performance. It shall further be exempt from liability for damage that results from non-performance. Thus, from the perspective of a reasonable third person according to CISG 8(2), the Hardship Clause can only be understood to exempt CLAIMANT from paying damages due to non-performance and does not extend to an adaptation of the price. In conclusion, as the same legal consequence applies to the newly included phrase, the Hardship Clause does not provide for an adaptation of the price.

80 CLAIMANT appears to argue that RESPONDENT violated a duty to renegotiate the contract which resulted in a disadvantage for CLAIMANT [*Cl. Memo., p. 24, paras. 85-86*]. However, it does not clarify the basis for such a duty [*ibid.*]. As shown before, the Hardship Clause only excuses CLAIMANT from performance and liability for damages when hardship occurs, if it withheld its performance [*supra para. 79*]. To support its argument, CLAIMANT cites decisions of a French court and a U.S. court [*Cl. Memo., p. 24, paras. 85-86*]. However, both cases applied domestic law, not the CISG, and furthermore, the parties were all seated in the same country. Thus, these cases should not be considered by the Tribunal, as they are not comparable.

81 Even if a duty to renegotiate was assumed, RESPONDENT would have complied with it. The purpose of the duty to renegotiate is that the parties should find an amicable solution [*BRUNNER, p. 483*]. Ms. Napravnik stated that CLAIMANT "*confronted*" RESPONDENT with the additional costs [*Exh. C8, p. 18*]. CLAIMANT did not try to find a solution that would work for both Parties. Instead, it only insisted on its demands. The duty to renegotiate in good faith does not mean for RESPONDENT to comply with the demands of CLAIMANT. Since RESPONDENT is of the opinion that no case of hardship occurred, it did not act in bad faith by refusing to continue negotiations.

82 CLAIMANT argues that it was the Parties' common intent according to CISG 8(1) to make adaptation available for cases of hardship [*Cl. Memo., pp. 4-5, para. 8*]. Contrary to this assumption, the Parties did not intend to allow for contract adaptation. The relevant time to determine the intent of the Parties under CISG 8 is the time of contract conclusion [*supra para. 33*]. The content of the negotiations between Mr. Antley and Ms. Napravnik were all unknown to Mr. Krone and Mr. Ferguson, the negotiators who finalised the Sales Agreement [*Exh. C8, p. 17*]. The statements Mr. Antley made were not documented. Because Ms. Napravnik was hospitalised after the car accident with Mr. Antley, she was unable to communicate the information of the negotiations to Mr. Krone and Mr. Ferguson [*Exh. C8,*

p. 17]. Mr. Krone and Mr. Ferguson did not consider adaptation to be in the final contract. In conclusion, the Parties did not have common intent to include price adaptation as the statements made by Mr. Antley were unknown to the negotiators who concluded the contract in the time of contract conclusion.

2. RESPONDENT never agreed to price adaptation after contract conclusion

83 CLAIMANT asserts that RESPONDENT agreed to contract adaptation [*Cl. Memo., pp. 21-22, paras. 75-76*]. It alleges that Mr. Shoemaker, the person responsible for RESPONDENT's racehorse breeding program, made assurances that contract adaptation would be possible as he made promising statements on the phone with Ms. Napravnik and that he was authorised to do so [*Cl. Memo., pp. 21-22, paras. 73-76.*]. Contrary to these allegations, Mr. Shoemaker stated that "*if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price*" [*Exh. R4, p. 36*]. He also pointed out in the phone call that he is not a lawyer and was not involved in the prior negotiations [*ibid.*]. Considering these circumstances, this cannot be understood as agreeing to contract adaptation. On the contrary, he told Ms. Napravnik that according to his understanding of the DDP Clause, all risks have to be borne by CLAIMANT [*ibid.*]. Mr. Shoemaker even prepared this sentence, as suggested by a lawyer, to prevent him from exceeding his authority [*ibid.*]. He tried to protect RESPONDENT's interests, while carefully paying attention not to make false promises to CLAIMANT. Instead, Ms. Napravnik, as an experienced lawyer [*Exh. C8, p. 17*], should have known that Mr. Shoemaker's statement was not sufficient from a legal perspective.

84 Mr. Shoemaker's consideration of renegotiations does not change the fact that he was not the person authorised to make such commitments. Ms. Napravnik should have considered that Mr. Shoemaker is not a lawyer and was not involved in the prior negotiations. The fact that he believed a mutual understanding would be reached cannot be seen as an agreement to contract adaptation through a third party. In conclusion, RESPONDENT never agreed to price adaptation after the Sales Agreement had been concluded.

C. In any event, the imposition of the Equatorianian tariff is not covered by the Hardship Clause

85 Even under the assumption that the Hardship Clause allowed for adaptation, the Equatorianian tariff would provide no ground for adaptation under the Hardship Clause. A hardship clause always defines under which events it shall be triggered [*supra para. 77*]. It is up to the Parties to define which events should trigger hardship [*ibid.*].

86 The Hardship Clause defines the triggering events as "*additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exh. C5, p. 14, para. 12*]. CLAIMANT seems to argue that the imposition of the Equatorianian tariff constitutes a "*comparable unforeseen event making the contract more onerous*" [*Cl. Memo., pp. 23-24, paras. 79-84*]. Contrary to these assumptions, RESPONDENT will show that the Equatorianian tariff is not covered by the Hardship Clause as its imposition is not a "*comparable* […] *event*" (**1**). Additionally, it was not "*unforeseen*" (**2**). In any event, the price increase does not meet the relevant threshold of "*making the contract more onerous*" (**3**).

1. The imposition of the Equatorianian tariff does not constitute a "*comparable*" event

87 Although not raised by CLAIMANT, a CLAIMANT may have argued that the imposition of the Equatorianian tariff is a "*comparable*" event. However, according to Mr. Antley's "*negotiation files*", the Parties did not choose to include the ICC-Hardship Clause as it was considered to be too broad [*Exh. R3, p. 35*]. Consequently, the Hardship Clause has to be interpreted narrowly. Events trigger the Hardship Clause only if they are comparable to "*additional health and safety requirements*". The purpose of this phrase was to prevent cases that are similar to events CLAIMANT already experienced. During negotiations, CLAIMANT referred to prior impositions of health and safety requirements by the government of Danubia in response to an outbreak of foot and mouth disease [*PO2, p. 58, para. 21*]. In the present case, however, the imposition of additional health and safety requirements and the imposed tariff serve different purposes. The health and safety requirements are usually a governmental response to natural phenomena. The Equatorianian tariff, on the other side, is a measure taken by the government of Equatoriana in reaction to the Mediterranean tariffs on agriculture products [*Notice, p. 6, para. 9*]. Thus, the Equatorianian tariff is not comparable to health and safety requirements.

88 CLAIMANT states that RESPONDENT cannot rely on a narrow formulation of the hardship clause, since RESPONDENT is said to have fundamentally breached the contract by reselling 15 doses [*Cl. Memo., pp. 26-27, paras. 94-98*]. In early negotiations, CLAIMANT stated that the doses may not be resold [*Exh. C2, p. 10*]. However, the Sales Agreement does not contain any resale prohibition [*Exh. C5, pp. 13-14*]. If the resale prohibition had been a condition of the contract, the parties would have included such an important provision in the Sales Agreement. Therefore, a reasonable third person would have understood that there was no resale prohibition in the Sales Agreement according to CISG 8(2). In conclusion, the Equatorianian tariff does not constitute a "*comparable*" event.

2. Additionally, the imposition of the Equatorianian tariff was not "*unforeseen*"

89 According to the Hardship Clause, the imposition of the Equatorianian tariff must be "*unforeseen*". CLAIMANT asserts that the Equatorianian tariff was not anticipated by the Parties [*Cl. Memo., p. 23, para. 82*].

90 CLAIMANT argues that Equatoriana never had imposed similar tariffs before [*Cl. Memo., p. 21, para. 78*]. However, while it is true that Equatoriana had a reputation as a supporter of free trade, it had once imposed a direct retaliation measure before [*Exh. C6, p. 15*]. Also, it has to be considered that Mr. Bouckaert campaigned for a more protectionist approach to international trade since January 2017 [*Exh. C6, p. 15*]. He was elected President of Mediterraneo a few weeks before the contract was concluded on 6 May 2017 [*Exh. C5, p. 14; Exh. C6, p. 15*]. Furthermore, Mr. Bouckaert appointed Ms. Frankel, one of the most ardent critics of free trade, as his "*superminister*" for agriculture, trade and economics on 5 May 2017 [*PO2, p. 58, para. 23*]. Ms. Frankel was an outspoken protectionist for years [*ibid.*]. These were strong indications, which parties operating in international trade had to be aware of. It has to be considered that such crucial changes in trade politics may entail at least some changes. In conclusion, the imposition of Equatorianian tariff may have been an unusual, but not an "*unforeseen*" event and, thus, not covered by the Hardship Clause.

3. In any case, the additional costs do not meet the required threshold

91 Even if the Tribunal were to determine that the Hardship Clause includes the Equatorianian tariff, the relevant threshold would not be met. The Hardship Clause does not mention the exact threshold that would give rise to the excuse of hardship. It only refers to events "*making the contract more onerous*". The Sales Agreement does not provide any further information regarding the required threshold [*Exh. C5, pp. 13-14*]. CLAIMANT baselessly alleges that a 30% increase of costs would suffice to meet the required threshold [*Cl. Memo., p. 24, paras. 83-84*]. Instead, in absence of a specification by the Parties, it has to be determined what threshold is decisive in general cases of hardship.

92 RESPONDENT agrees with CLAIMANT that hardship occurs when an event fundamentally alters the equilibrium of a contract [*Cl. Memo., p. 23, para. 79; BRUNNER, pp. 391-395; KRÖLL et al./ATAMER, pp. 1070-1071; VOGENAUER/MCKENDRICK, p. 814*]. When performance becomes so onerous that a party cannot reasonably be expected to perform, it may be exempted from its performance or otherwise compensated [*BRUNNER, pp. 391-395; KRÖLL et al./ATAMER, pp. 1070-1071; VOGENAUER/MCKENDRICK, p. 814*].

93 CLAIMANT argues that if the financial ruin of one party is imminent, the threshold should be lowered [*Cl. Memo., p. 24, para. 83*]. However, a lowered threshold may, if at all, only be considered in long-term contracts [*BRUNNER, pp. 438-439*]. Long-term contracts take years to perform [*ibid.*]. The Sales Agreement was concluded on 6 May 2017 and the last shipment was due 23 January 2018 [*Exh. C5, p. 14*]. Accordingly, it took approximately eight months for the Sales Agreement to be executed, thus the Sales Agreement does not constitute a long-term contract.

94 CLAIMANT incorrectly argues that the tariff causes an additional cost of 30% [*Cl. Memo., pp. 23 -24, paras. 81-82, 84*]. RESPONDENT agrees with CLAIMANT that the tariff affected the last shipment of 50 doses of frozen horse semen, resulting in USD 1,250,000 additional costs. However, these costs must be reflected in the entire contract, not only in the last shipment. As the overall delivery consists of 100 doses of frozen horse semen, the additional costs of USD 1,250,000 must be considered in relation to the overall price of USD 10,000,000. Thus, the additional costs amount to 12.5% in total. In conclusion, the required threshold is not met.

II. Furthermore, the CISG does not entitle CLAIMANT to any payment resulting from an adaptation of the price

95 CLAIMANT is furthermore not entitled to the additional payment based on adaptation of the contract under the CISG. CLAIMANT bases its request for adaptation on CISG 79 [*Cl. Memo., pp. 25-26, paras. 87-93*]. RESPONDENT will show that CISG 79 provides no ground for an adaptation of the price in the case at hand. First, the CISG deliberately omits hardship (**A**). Second, even if the CISG governed hardship, the requirements for hardship under CISG 79 are not fulfilled (**B**). Third, even if the Equatorianian tariff constituted hardship, CISG 79 would not provide for contract adaptation (**C**). Fourth, even if the Tribunal were to assume that CISG 79 contained a remedial gap, contract adaptation cannot be introduced by gap filling (**D**). In any case, RESPONDENT will show that the Parties derogated from CISG 79 by including the Hardship Clause in the Sales Agreement according to CISG 6 (**E**).

A. The CISG deliberately omits hardship

96 CLAIMANT bases its claim for an adaptation of the price on CISG 79 [*Cl. Memo., pp. 25-26, paras. 87-93*]. However, as RESPONDENT will show, the CISG deliberately omits hardship, and therefore the CISG is no legal basis for hardship.

97 The CISG does not contain a special provision dealing with questions of hardship. It does not even explicitly mention hardship [*KRÖLL et al./ATAMER, p. 1071*]. Experts and jurisprudence

concur that the CISG does not govern hardship [*A/CN.9/87; CISG-AC No. 7, paras 26-32; BIANCA/BONELL/TALLON, p. 593; ZELLER, pp. 164-165*]. Furthermore, the drafting history of CISG 79 excludes the possibility that there is an unstated hardship regulation [*A/CN.9/87; HONNOLD, p. 252*]. At the time of drafting, it was highly controversial whether the CISG would regulate hardship [*ibid*.]. The drafters finally, and deliberately refrained from it. The legislative history is an important element in ascertaining whether a certain issue is governed by the CISG [*KRÖLL et al./PERALES VISCASILLAS, p. 136; SCHLECHTRIEM/SCHWENZER/ SCHWENZER/HACHEM, p. 129*]. It leads to the conclusion that the absence of a hardship provision in the CISG constitutes a deliberate omission [*RIMKE, p. 219*]. Because the CISG deliberately omits hardship, CLAIMANT may not rely on the CISG as a basis to recover the costs.

B. Even if the CISG governed hardship, the requirements for hardship under CISG 79 are not fulfilled

98 Even if the Tribunal found that CISG 79 does govern hardship, its requirements are not fulfilled in the case at hand. CISG 79 excuses a party from failure to perform if it was due to "*an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences*". Further, the invoking party must not have assumed the risk of the impediment [*Chemical Fertilizer Case; CIETAC (1996); CIETAC (1997); BOOG, p. 325; BRUNNER, pp. 204, 398-399; KRÖLL et al./ATAMER, pp. 1055 -1056; LEE, p. 296; PETER, p. 237; SCHLECHTRIEM/SCHWENZER/SCHWENZER, pp. 1133-1134; SCHWENZER I, p. 713; SCHWENZER II, p. 714*].

99 As shown above [*supra para. 74*] the risk of any additional tariff has been shifted to CLAIMANT through the DDP Clause. Furthermore, the imposition of the Equatorianian tariff was foreseeable [*supra para. 90*]. RESPONDENT will show that the imposition of the Equatorianian tariff does not constitute an impediment under CISG 79 (**1**). Additionally, RESPONDENT will show that CLAIMANT's already rendered performance prevents a hardship exemption under CISG 79 (**2**). Further, the threshold to justify an adaptation of the contract is not reached (**3**).

1. The Equatorianian tariff does not constitute an impediment under CISG 79

100 CISG 79 requires an impediment to excuse performance. Assuming that CISG 79 governs hardship, the term impediment means that performance has become impossible or unaffordable [*Cl. Memo.*, *p. 25, para. 98; Scafom v. Lorraine; CISG-AC No. 7, para. 26;*

SCHLECHTRIEM/SCHROETER, p. 302; SCHWENZER I, p. 713]. Unaffordability is assumed when the impediment is insurmountable [*BRUNNER, p. 320*] or when the ultimate limit of sacrifice has been exceeded [*SCHLECHTRIEM/SCHWENZER/SCHWENZER, p. 1142; CISG-AC No. 7, para. 38*].

101 In the case at hand, the Equatorianian tariff affected CLAIMANT's third shipment, and made it more expensive [*Notice, p. 6, para. 10*]. CLAIMANT bases its request for adaptation on the assumption that the imposition of the Equatorianian tariff fundamentally changed the equilibrium of the contract [*Cl. Memo., p. 23-24, paras. 79-84*]. According to CLAIMANT, such a situation leads to an impediment under CISG 79, and consequently to hardship [*Cl. Memo., p. 25, paras. 87-89*]. RESPONDENT does not support this untenable argumentation that the price increase in the case at hand constitutes an impediment under CISG 79 for the following reason.

102 As stated above, an impediment requires that a performance is unaffordable, i.e. economically not possible [*supra para. 100*]. However, CLAIMANT authorised the last shipment and paid the additional costs [*Exh. C8, p. 18*]. It was therefore very well able to bear the financial consequences, because in the event of a financial impossibility it would simply not have been able to pay the additional costs. Additionally, since RESPONDENT had already paid the full purchase price, it was CLAIMANT who held the leverage by refusing to perform. That it now claims that bearing the costs would financially ruin it, is paradoxical. The fact that CLAIMANT, after a short telephone conversation in which no agreement was reached, authorised the delivery and paid the costs, shows that there was by no means an insurmountable impediment or that the ultimate limit of sacrifice was exceeded. Even by taking Ms. Napravnik's recollection of the phone call with Mr. Shoemaker into account, that he stated a solution would be found [*Exh. C8, p. 17*], this would be far from the certainty that would be required if a company was undertaking a truly impossible financial burden. Therefore, the Equatorianian tariff does not constitute an impediment under CISG 79.

2. CLAIMANT's already rendered performance prevents CLAIMANT's hardship exemption under CISG 79

103 According to CISG 79, hardship can only occur by non-performance or non-conforming performance [*SCHLECHTRIEM/SCHWENZER/SCHWENZER, p. 1131; KRÖLL et al./ATAMER, p. 1044*]. The direct consequence thereof is that once a party has performed, it is not entitled to invoke a substantial increase of the costs. Since CLAIMANT released the third shipment and did therewith perform [*Exh. C8, p. 18; R4, p. 36*], it is not entitled to invoke an increase of

costs.

104 In the case at hand, CLAIMANT does not mention whether its already rendered performance prevents a hardship exemption under CISG 79. CLAIMANT could have argued that it has only rendered its performance because RESPONDENT has urged it to do so. However, this argument should be rejected. RESPONDENT's request for performance was based on its understanding that no case of hardship occurred, which it made clear to CLAIMANT [*Exh. R4, p. 36*]. By asking for delivery, RESPONDENT only demanded CLAIMANT to comply with its contractual obligations. Since CLAIMANT was under no pressure when RESPONDENT asked for performance [*supra para. 102*], it should be assumed that CLAIMANT was of the opinion that it was not exempted under hardship. In order to avoid being liable for damage, authorising the last shipment was the only reasonable course of action. In conclusion, CLAIMANT's already rendered performance prevents the hardship exemption under CISG 79.

3. Even if the Equatorianian tariff constituted hardship and the requirements were fulfilled, the threshold for hardship under CISG 79 is not reached

105 A possible impediment must reach a certain threshold for the remedies of CISG 79 to be applicable. The parties can generally define their spheres of risk in the contract, either expressly or impliedly [*Steel Bars Case; BRUNNER, p. 136; CISG-AC No. 7, para. 39; KATZ, p. 381*]. Scholars had initially suggested a threshold of 100% [*BRUNNER, pp. 427-428; SCHWENZER I, p. 716*]. Yet, some courts have decided that a threshold of 100% would not be enough to trigger hardship [*CISG-online 371; CISG-online 436; CISG-online 694; CISG-online 870; CISG-online 1067*]. Accordingly, a threshold of 150-200% is suggested [*SCHWENZER I, p. 717*]. The determination of the applicable threshold has to be made by contract interpretation [*SCHWENZER III, p. 372*]. Contrary to CLAIMANT's statement [*Cl. Memo., p. 24, paras. 83-84*], it cannot rely on a lowered threshold due to its financial situation [*supra para. 93*]. Concerning the threshold in the case at hand, CLAIMANT's costs increased by 30% on the third shipment. As scholars and jurisprudence show, 30% does not suffice to meet the required threshold. As the cost increase in the case at hand is only 12.5% of the entire purchase price, the required threshold is not nearly reached.

C. Even if the Equatorianian tariff constituted hardship, CISG 79 would not provide for contract adaptation

106 Contrary to CLAIMANT's position [*Cl. Memo., pp. 25-26, paras. 90-93*], CISG 79 would not provide for contract adaptation for two reasons. First, CISG 79 only provides for exemption from liability for damages. Second, CISG 79 does not contain a gap concerning remedies for

hardship.

107 According to CISG 79 "[a] *party is not liable for a failure to perform* […]". As no further remedies are mentioned, the CISG only allows a party to be exempt for paying damages in case of non-performance [*KRÖLL et al./ATAMER, p. 1055*]. The exemptive effect of hardship is limited to termination of the obligation to pay damages to the extent that the impediment exists [*SCHLECHTRIEM/SCHWENZER/SCHWENZER, pp. 1148-1149*]. By looking at the wording of CISG 79, adaptation of the contract is not allowed by the CISG, and must therefore be impossible in that context [*BIANCA/BONELL/TALLON, p. 592*]. The only remedy remaining is avoidance [*ibid.*]. This must not be understood as a remedial gap to be filled by CISG 7(2), but rather as a narrow scope of application [*Nuova Fucinati v. Fondmetall International; BIANCA/BONELL/TALLON, p. 592; SCHWENZER I, p. 724; ZELLER, p. 165*].

108 In the light of the above, CISG 79 does not allow for an adaptation of the price because the CISG does not have a remedial gap. Therefore, CLAIMANT's request is far from any legal basis. Since CLAIMANT has already rendered its performance, CISG 79 is without effect.

D. Even if CISG 79 contained a remedial gap, contract adaptation cannot be introduced by gap filling

109 Even if the Tribunal comes to the conclusion that the Equatorianian tariff constitutes a case of hardship and the CISG contained a remedial gap, contract adaptation cannot be introduced by gap filling. First, the UPICC is not a general principle according to CISG 7(2) (**1**) and second, the UPICC may not be applied as domestic law according to CISG 7(2) (**2**).

1. The UPICC is no general principle according to CISG 7(2)

110 Even under the assumption that there is a remedial gap in CISG 79 [*Cl. Memo., p. 25, para. 90*], UPICC 6.2.3(4)(b) could not fill this gap as a general principle according to CISG 7(2). Pursuant to this provision, if a matter is not settled by the CISG, it shall be settled in conformity with general principles the CISG is based.

111 As the CISG was created before the UPICC, the CISG cannot be based on principles which were drafted later [*SABOURIN, p. 247; SCHWENZER III, p. 117; SCHWENZER et al., p. 45*]. Further, the UPICC constitutes soft law which is in no way related to the CISG [*SCHWENZER III, p. 117; SCHWENZER et al., p. 45*]. The UPICC was drafted under the auspices of UNIDROIT, an international organisation [*BONELL, p. 6*]. This organisation has no legislative power and the UPICC is not bound to any consensus between states [*BONELL, p. 305*]. Therefore, such external principles are not suited to fill gaps in the CISG. However, a

general principle underlying the CISG is the principle of *pacta sunt servanda*. As this is one of the most important principles of the CISG [*MAGNUS, p. 480*], it should also be taken into account when filling gaps. To introduce the possibility of contract adaptation by gap filling, despite the fundamental principle of *pacta sunt servanda*, would undermine one of the most important pillars of the CISG.

2. Mediterranean Contract Law 6.2.3(4)(b) may not be applied as domestic law according to CISG 7(2)

112 CLAIMANT might have argued that if the CISG contained a gap concerning hardship, it must be filled with the applicable domestic law, namely Mediterranean Contract Law [*Exh. C5, p. 14, para. 14*].

113 Nonetheless, this proposal would be inadequate. As hardship is a concept which is governed very differently in various legal systems, recourse to domestic law is not appropriate [*BAASCH ANDERSEN, p. 94; KRÖLL et al./ATAMER, p. 1047; PILTZ, p. 211*]. The drafting history of the CISG clearly shows that domestic terms such as *force majeure*, *hardship* or *Wegfall der Geschäftsgrundlage* were avoided to ensure a uniform application [*BAASCH ANDERSEN, p. 94*]. The application of domestic law to cases of hardship would heavily violate this intention and the uniform application of the CISG according to its Article 7(1) [*LOOKOFSKY/FLECHTNER, p. 201*]. The use of domestic law to interpret CISG 79 was ardently criticised by scholars and experts [*LOOKOFSKY/FLECHTNER, pp. 199-208*].

114 Mediterranean Contract Law, which is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 53, para. III.4.*], contains a possibility to adapt a contract to changed circumstances in Article. 6.2.3(4)(b). However, contract adaptation by a tribunal is a concept which is mostly alien to common law [*PERILLO, pp. 9-11*]. To introduce the possibility of adapting the contract by recourse to domestic law would simply contradict the character of the CISG, since it is to be interpreted uniformly and does not prefer any legal system [*BAASCH ANDERSEN, p. 94; MENDES, p. 118*]. In conclusion, Mediterranean Contract Law 6.2.3(4)(b) may not be applied to fill a gap in the CISG.

E. In any event, the Hardship Clause derogated CISG 79 according to CISG 6

115 Individually negotiated terms take precedence over the CISG [*SCHLECHTRIEM/SCHWENZER/SCHWENZER/HACHEM, p. 115*]. According to CISG 6, the parties may exclude the application of the Convention, or its individual provisions [*Steel Bars Case; KRÖLL et al./ATAMER, pp. 109-110*]. A clear established intent of the parties is required

[*Steel Bars Case; CISG-AC No. 16, paras. 3.6-3.8*]. However, an express derogation is not needed, as an implicit derogation is sufficient [*Ceramique Culinaire v. Musgrave; Computer Hardware Case; Milking Machinery Case; Olivaylle Pty Ltd v. Flottweg GmbH & Co KGAA*].

116 Assuming that CISG 79 includes hardship would result in the CISG and the Hardship Clause governing the exact same concept. In the present case, the Parties included a hardship clause in the contract [*Exh. C5, p. 14, para. 12*]. In doing so, the Parties specified the cases in which hardship occurs. As the Hardship Clause is more narrowly formulated than the CISG [*supra para. 87*], the parties have deliberately deviated from the wording and scope of the CISG. This can only be understood as a derogation from the CISG since individually negotiated terms take precedence over the CISG. As the Parties drafted a very specific Hardship Clause, the application of CISG 79 would be against the intent of the Parties under CISG 8(2). The same holds true for the UPICC due to UPICC 1.5. In conclusion, the Parties derogated from CISG 79 by including the Hardship Clause into the Sales Agreement.

III. Conclusion on Issue 3

117 CLAIMANT is not entitled to any payment resulting from an adaptation of the price, either under the Hardship Clause or the CISG.

PRAYER FOR RELIEF

In light of the above, Counsel respectfully requests the Tribunal to find that:

1. The Tribunal lacks the power to adapt the Sales Agreement regardless of the law applicable to the Arbitration Agreement;
2. CLAIMANT is not entitled to submit the Evidence from the Other Arbitration;
3. CLAIMANT is not entitled to any payment resulting from an adaptation of the price, either under the Hardship Clause or CISG.

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CERTIFICATE

We hereby certify that this Memorandum for CLAIMANT was written only by the persons whose names are listed below and who signed this certificate:

Basel, January 24, 2019

DARIO **G**LAUSER **T**IM **I**SLER **E**VELYNE **J**OEHRI **M**ARIUS **K**OCH

ANNA **L**AISHEVTSEVA **A**NINA **L**INZ **P**ATRICK **P**LATTNER **A**LESSIO **Z**OLPI