SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG, MARCH 31 - APRIL 7, 2019

MEMORANDUM FOR CLAIMANT

PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

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TABLE OF ABBREVIATIONS AND DEFINITIONS

%	per cent
Answer	RESPONDENT's Answer to the Notice of Arbitration of 24 August 2018
Arbitration Clause	Clause 15 of the Frozen Semen Sales Agreement, being the Arbitration Agreement
Art./Artt.	Article/Articles
BGer	Bundesgericht
CAS	Court of Arbitration for Sport
CIETAC	The 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)
CJEU	Court of Justice of the European Union
DDP	delivery duty paid
de facto	*in fact* [*Latin*]
et seq.	*et sequence* (and the following)
ed./eds.	Editor/Editors
e.g.	*exempli gratia* (for example)
et al.	*at alii* (and others)

Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
ff.	*folio* (on the (next) pages)
Hardship Clause	Clause 12 of the Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules 2013	Administered Arbitration Rules of the Hong Kong International Arbitration Centre, Issue 2013
HKIAC Rules	Administered Arbitration Rules of the Hong Kong International Arbitration Centre, Issue 2018
ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce
i.e.	*id est* (that is)
Inc.	Incorporated
INCOTERMS 2010	Pre-defined commercial terms published by the ICC in 2010
infra	below
intro.	introduction
Letter Fasttrack	Ms. Fasttrack's letter of 3 October 2018
Letter Langweiler	Mr. Langweiler's letter of 2 October 2018
Ltd.	limited
Mr.	Mister
Ms.	Miss
No.	number/numbers

Notice	CLAIMANT's Notice of Arbitration of 31 July 2018
New York Convention NYC	The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
OLG	Oberlandsgericht
p./pp.	page/pages
pacta sunt servanda	*agreements must be kept* [*Latin*]
para./paras.	paragraph/paragraphs
PECL	Principles of European Contract Law
per se	*by or of itself* [*Latin*]
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
proc.	proceedings
Sales Agreement	Frozen Semen Sales Agreement dated 6 May 2017
supra	above
UK	United Kingdom
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)
U.S.	United States
USD	United States Dollars
v.	*versus* (against)
Vol.	Volume

STATEMENT OF FACTS

The parties to this arbitration ("**the Parties**") are PharLap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**").

CLAIMANT operates a renowned horse breeding farm, and is based in Capital City, Mediterraneo. RESPONDENT is a company operating in Oceanside, Equatoriana, and is famous for its broodmare lines. Three years ago, it entered the racehorse business and started breeding its own horses. The following events gave rise to the present dispute:

2015 After facing severe problems with foot and mouth disease, Equatoriana imposed serious restrictions on the transportation of all living animals. This made natural coverage in horse breeding difficult and costly. The ban on artificial insemination was temporarily lifted until **December 2018**.

21 March 2017 RESPONDENT contacted CLAIMANT intending to buy 100 doses of frozen horse semen from its famous stallion, Nijinsky III. CLAIMANT voiced its concern regarding the size of the request, as it would normally not sell such a large amount to a single breeder. Given RESPONDENT'S good reputation and the promise of long-term cooperation, CLAIMANT was willing to make an exception, especially as it was facing financial struggles. Ms. Napravnik, for CLAIMANT, and Mr. Antley, for RESPONDENT, negotiated the terms of the sale.

12 April 2017 Before an agreement on the terms of the sale was reached, Ms. Napravnik and Mr. Antley were in a severe car accident on the way to dinner, and subsequently had to be replaced. Mr. Ferguson, for CLAIMANT, and Mr. Krone, for RESPONDENT, took over. While neither had been involved in the negotiations, they both had access to previous email exchanges.

6 May 2017 Mr. Ferguson and Mr. Krone finalised and signed the Frozen Semen Sales Agreement ("**Sales Agreement**"). The Parties agreed that CLAIMANT would provide 100 doses of frozen horse semen to be shipped in three deliveries. In return, RESPONDENT was to pay the sales price of USD 10,000,000 in total.

15 November 2017	In an unexpected move, the newly-elected President of Mediterraneo imposed a 25% tariff on all agricultural goods from Equatoriana.
19 December 2017	Unable to resolve the trade dispute with Mediterraneo amicably, Equatoriana announced a counter-tariff of 30% upon all agricultural goods from Mediterraneo. The tariff took effect on **15 January 2018**.
20 January 2018	While preparing the third shipment, CLAIMANT was surprised to learn from the Equatorianian custom clearing office that the counter-tariff also applied to horse semen. This meant that CLAIMANT faced a 30% increase of the agreed-upon costs. Concerned, it tried to contact RESPONDENT regarding the additional costs, but RESPONDENT was unavailable the whole day.
21 January 2018	Mr. Shoemaker, the person responsible for RESPONDENT's racehorse breeding program, finally answered. He assured CLAIMANT that a solution regarding the additional costs would be found. Then he urged CLAIMANT to arrange the shipment, as a quick delivery was of great importance to RESPONDENT. He furthermore assured RESPONDENT's interest in a long-term relationship.
23 January 2018	Trusting RESPONDENT's reassurances, CLAIMANT authorised the last shipment and paid the additional costs of USD 1,500,000.
2 February 2018	CLAIMANT learned from an Equatorianian breeder that RESPONDENT had resold 15 doses of Nijinsky III's frozen semen to 10 different breeders. This was against one of CLAIMANT's main requests concerning the deal.
12 February 2018	CLAIMANT confronted RESPONDENT's CEO about the resold doses. She reacted aggressively and refused further discussions. RESPONDENT has since refused to pay any additional amount for the tariffs or to renegotiate.
31 July 2018	CLAIMANT filed a request for arbitration pursuant to the Clause 15 of the Sales Agreement ("**Arbitration Clause**").
2 October 2018	CLAIMANT informed the arbitral tribunal that it would submit evidence concerning another HKIAC arbitration RESPONDENT was party to. Therein RESPONDENT, contrary to its current position, requested price adaptation where it was negatively affected by tariffs.

INTRODUCTION

1 Majestic thoroughbreds, a neck and neck race to the roaring of the spectators. The air is charged with excitement and tension. Which horse will win? Hong Kong stands as the undisputed leader in horse racing bets. Every race, huge sums of money are at stake. But every bet is bound by rules. The prime directive: the loser must pay.

2 Like in horse racing, the Parties laid a bet. RESPONDENT was offered most favourable delivery terms. In return, it had to cover CLAIMANT's cost if an unforeseen event made the delivery more expensive. If no such event occurred, RESPONDENT would have won itself great delivery terms at almost no cost. If such an event did occur, RESPONDENT would have lost the bet and pay whatever the cost increase was. When Equatoriana imposed its counter-tariffs, RESPONDENT's horse was out of the race. RESPONDENT's debt is due and has to be paid.

3 With regard to the procedural issues, the Tribunal has the power to adapt the contract, either under Mediterranean or Danubian law (**Issue 1**). Furthermore, the Tribunal shall admit the evidence CLAIMANT is requesting to submit even under the assumption it has been obtained illegally (**Issue 2**)**.** On the merits, CLAIMANT is entitled to the payment of the additional USD 1,250,000 due to an adaptation of the price. The adaptation is appropriate under both, Clause 12 of the Sales Agreement and CISG 79 as the imposed Equatorianian tariff constitutes a hardship (**Issue 3**).

ISSUE 1: THE TRIBUNAL HAS POWER TO ADAPT THE CONTRACT

4 The Parties are bound by the Arbitration Clause. The Arbitration Clause does not explicitly address which law it is governed by. Determining the correct applicable law is essential in establishing whether the Tribunal has the power to adapt the contract as requested by CLAIMANT. According to RESPONDENT's assertions, the Tribunal would have no power to adapt the contract if the Arbitration Clause is interpreted under Danubian law. However, CLAIMANT will demonstrate that the CISG is applicable to interpret the Arbitration Clause (**I**). The Parties intended to empower the Tribunal to adapt the contract or in any event, a reasonable third person would have understood so (**II**). Even if Danubian Contract Law governs the Arbitration Clause, the Tribunal still has the power to adapt the contract (**III**).

I. The CISG governs the Arbitration Clause and its interpretation

5 Contrary to RESPONDENT's assertions [*Answer, pp. 30-31, paras. 5, 7, 13*], Danubian law does not govern the interpretation of the Arbitration Clause. The absence of an express choice of

law in the Arbitration Clause does not automatically make the law of the seat of arbitration applicable. CLAIMANT will show that the CISG governs the Arbitration Clause. First, Mediterranean law governs the Arbitration Clause (**A**). Second, under Mediterranean law the CISG is applicable to arbitration agreements (**B**). In any case, the CISG would still be the law that meets the Parties interest for legal certainty and international uniformity (**C**).

A. Mediterranean law governs the Arbitration Clause

6 The Parties intended to submit the Arbitration Clause to Mediterranean law because of three considerations. First, the Sales Agreement contains a choice of law provision which is also applicable to the Arbitration Clause (**1**). Second, CLAIMANT made it clear to RESPONDENT that only Mediterranean law is acceptable (**2**). Third, the Parties would have wanted the Arbitration Clause to be an effective dispute resolution mechanism (**3**).

1. According to the Sales Agreement, Mediterranean law governs the Arbitration Clause

7 Case law of both civil and common law states demonstrates that the law of the underlying contract also governs the arbitration agreement [*Black Clawson v. Papierwerke; Channel Tunnel Case; ICC Case 11869; ICC proc. 4392; ICC proc. 1501; Telenor v. Storm; BORN II, pp. 302-304*]. This holds true as long as there is no express choice of law in the arbitration agreement. In the *Arsanovia Case*, as well as in *ICC Case 6379*, it was held that the parties' choice of law for the underlying contract also extends to the arbitration agreement. This practice is compatible with the doctrine of separability. The doctrine of separability generally states that an arbitration agreement and an underlying contract can be considered as two separable contracts [*First Options v. Kaplan; BORN I, p. 464*]. The rationale of the doctrine is that an arbitration clause remains effective even if the main contract is found to be invalid [*BCY v. BCZ*]. Consequently, only questions regarding invalidity could justify separating the two contracts. If the validity of the main contract is not disputed, the arbitration agreement and the main contract remain one single contract [*Prima Paint Corp v. Flood & Conklin; Sulamérica; VOROBEY, p. 141*]. Therefore, if an arbitration agreement is included in the main contract, it is likely that the contracting parties intended their entire relationship to be governed by the same law [*Arsanovia Case; BCY v. BCZ*; *Sonatrach v. Ferrell*]. If the intention is opposite, parties normally expressly provide for a different law to govern the arbitration agreement [*Cassa v. Rals; Channel Tunnel Case; Piallo v. Yafriro; REDFERN/HUNTER, p. 221, para. 3.207*].

8 The Arbitration Clause of the Sales Agreement does not contain an express choice of law. It reads in the relevant parts: "*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*]. The Parties based the Arbitration Clause on the HKIAC Model Clause ("**Model Clause**") [*Exh. R1, p. 33*]. The Model Clause, however, proposes an express choice of law clause, which the Parties did not include into their Arbitration Clause. What remains in the contract is the choice of law clause for the Sales Agreement as a whole: "*This Sales Agreement shall be governed by the law of Mediterraneo* […]" [*Exh. C5, p. 14, para. 14*]. This choice of law clause is placed directly before the Arbitration Clause and is, thus, in direct connection with it. In addition, the Arbitration Clause is integrated in the Sales Agreement as a paragraph like all other provisions which govern the purchase of the frozen horse semen. The Sales Agreement does not optically distinguish between the Arbitration Clause and the rest of the Sales Agreement, e.g. the same font.

9 It follows that the Parties did not intend to submit the Arbitration Clause to the law of the seat of arbitration. RESPONDENT did not object to the choice of Mediterranean law while removing the choice of law in the Arbitration Clause. This must be interpreted as RESPONDENT's acceptance of Mediterranean law to govern the Arbitration Clause.

2. During the negotiations, CLAIMANT made it clear to RESPONDENT that only Mediterranean law would be acceptable

10 In the absence of an express choice of law, the implied choice of the parties becomes decisive. An implied choice of law is identified by the parties' intentions [*BCY v BCZ; Sulamérica; CRCICA Award no. 64/1995*]. Generally, in order to determine the actual intention of the parties, not only the exact wording of the contract is relevant. Other circumstances such as the behaviour and the interests of the parties can also be taken into account [*Arnold v. Britton & Ors; ICC Award No. 13129; ICC Award No. 4145; Walter v. Cross Pacific*]. The Parties implicitly chose Mediterranean law for the following two reasons.

11 First, RESPONDENT suggested at the beginning of the contract negotiations an explicit choice of law and a choice of the seat of arbitration. It proposed the following wording: "*The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana.*" [*Exh. R1, p. 33*]. CLAIMANT rejected these two sentences of the proposal [*Exh. R2, p. 34*]. CLAIMANT stated that an internal policy makes it very difficult to submit a contract to foreign law or to arbitrate in the country of the counterparty [*ibid.*]. The internal policy would require a special approval by the Creditors' Committee [*ibid.*]. Since Danubia is not

"*the country of the counterparty*", it was acceptable as the seat of arbitration [*ibid.*]. However, CLAIMANT's internal policy requires the special approval for any "*foreign law*", not just the law of the counterparty [*ibid.*]. Therefore, only Mediterranean Law would have been possible without an additional approval. As CLAIMANT clearly communicated, having the Arbitration Clause governed by Danubian law would require special approval [*ibid.*]. It was therefore evident to RESPONDENT that only Mediterranean law was an option for CLAIMANT.

12 Second, RESPONDENT never objected to CLAIMANT's express refusal to accept foreign law governing the Arbitration Clause. Most likely, because the new draft did not change the legal situation for RESPONDENT at all. Mediterraneo and Equatoriana are both contracting states of the CISG [*PO1, p. 53, para. III.4*]. The general contract laws of both states are a verbatim adoption of the UPICC [*ibid.*]. Therefore, the change of the applicable law from Equatorianian law to Mediterranean law was just a formality for RESPONDENT. Therefore, there was no need for RESPONDENT to further negotiate the matter.

13 CLAIMANT made it clear to RESPONDENT that no foreign law is acceptable as CLAIMANT removed the choice of law clause and referred to the internal policy. Therefore, it was evident to RESPONDENT that only Mediterranean law was an option for CLAIMANT. RESPONDENT never objected to CLAIMANT's express refusal to accept foreign law.

3. In any event, the Parties would have chosen a law that would provide for an effective dispute resolution mechanism

14 RESPONDENT argues that Danubian Contract Law is applicable to the Arbitration Clause [*Answer, p. 31, para. 13*]. The Parties recognied that under Danubian Contract Law there is a "*high likelihood*" that contract adaptation is not covered by the Arbitration Clause due to the "*four corners rule*" [*PO1, p. 52, para. II*]. CLAIMANT will demonstrate that the Parties intended to enter into an arbitration agreement that provides for an effective dispute resolution mechanism. For that reason, the Parties would not implicitly have chosen a law that causes the Arbitration Clause to have a limited effect.

15 Parties agreeing to arbitration intend to have a valid arbitration agreement which provides the basis for an effective dispute resolution mechanism [*BORN I, p. 545*]. The choice of law is essential to ensure that the arbitration agreement is valid [*Dalico Case; Hecht v. Buisman's; ICC Award No. 2321*]. Substantive validity and interpretation of an arbitration agreement are closely connected [*SCHWENZER/JAEGER, p. 323*]. The question of whether the parties reached an agreement at all cannot be separated from the question what the parties agreed upon [*Sumitomo Case; SCHWENZER/JAEGER, p. 323*]. The arbitration agreement must be interpreted

in a manner that serves its actual purpose which is to provide for effective dispute resolution in front of an arbitral tribunal [*Dalico Case; Hecht v. Buisman's; ICC Award No. 2321; ICC Award No. 7920; KAHN, pp. 5 7*]. The law that favours the validity of an arbitration agreement and its applicability to a certain dispute is to be preferred [*Austrian Case I; Austrian Case II; Dalico Case; BORN I, p. 547*]. If an arbitration agreement does not cover a certain dispute, parties would have to resort to litigation with all its uncertainties. This is what parties want to avoid by opting for arbitration [*EDWARDS, p. 23; MATTLI, p. 925*].

16 The Arbitration Clause was meant to avoid the problems of international litigation [*Exh. C4, p. 12*]. In both CLAIMANT's and RESPONDENT's jurisdictions, the "*four corners rule*" is not used for contract interpretation. Both Parties are familiar with CISG and UPICC and therefore their broad rules of interpretation [*supra para. 12*]. By applying Mediterranean law, the Arbitration Clause will be interpreted in a manner that serves its actual purpose to resolve the dispute through arbitration. It would not be reasonable to conclude that the Parties selected Danubian law, because it excludes certain disputes from arbitration, e.g. contract adaptation. Consequently, this dispute would be decided in front of a national court. This would result in litigation instead of arbitration.

17 Therefore, the Parties did most likely not choose a foreign law which would prevent the power of the Tribunal to decide about contract adaptation. The Parties did not choose Danubian law as it would lead to litigation.

B. Within Mediterranean law, the CISG governs the interpretation of the Arbitration Clause

18 RESPONDENT argues that the CISG does not apply to the Arbitration [*PO2, p. 60, para. 36*]. Since the CISG only governs sales contracts, according to RESPONDENT the Arbitration Clause cannot be governed by the CISG. [*Answer, p. 31, para. 14*]. As CLAIMANT will demonstrate, RESPONDENT's view must be rejected because the CISG generally governs arbitration agreements.

19 The tribunal's power to adapt a contract is a question of material validity [*LEW, pp. 120-121; DAOUDA, p. 20*]. Material validity is governed by the substantive law applicable to the main contract [*BORN I, p. 836*]. In the present case, the substantive law is the CISG. The CISG addresses questions of the material validity of dispute resolutions clauses [*First Options v. Kaplan; Interim Award NAI; Transmar Commodity v. Cooperativa Agraria; SCHLECHTRIEM/SCHWENZER/SCHROETER, Intro to Artt. 14–24, para. 20*].

20 According to CISG 1(1), the CISG applies to international sales contracts. The CISG does not explicitly address arbitration agreements. However, CISG 19(3) demonstrates the intention to include arbitration clauses in its scope. CISG 19(3) states that "*different terms relating* […] *to the settlement of disputes are considered to alter the terms of the offer materially*". It follows that if the acceptance to an offer contains a different term relating to arbitration, no contract is concluded under the CISG. Therefore, such a deviation is qualified as a material change of an offer. Hence, an arbitration agreement is considered to be a material part of a sales contract [*Chateau v. Sabaté USA Inc.; SCHLECHTRIEM/SCHWENZER/SCHROETER, Intro to Artt. 14–24, para. 18; SCHWENZER/JAEGER, p. 320; SCHWENZER/TEBEL, p. 745;*]. Furthermore, the courts of Mediterraneo apply the CISG to arbitration agreements if it governs the underlying sales contract [*PO1, p. 53, para. III.4*].

21 Therefore, the reference to dispute settlement clauses in CISG 19(3) demonstrates that arbitration clauses are within the scope of the CISG. In conclusion, within Mediterranean law the CISG governs the interpretation of an arbitration agreement.

C. Even if the Parties did not choose Mediterranean law, the CISG meets the need for legal certainty and international uniformity

22 Even if the Tribunal were to conclude that the Parties did not choose the law of the Sales Agreement to govern the Arbitration Clause, the CISG would still be the most suitable law.

The very nature of international arbitration calls for the law of the international arbitration to be detached from any national law [*Dalico Case; ICC proc. No. 5066; Menicucci v. Mahieux; MOSES, pp. 64-65; REDFERN/HUNTER, pp. 179-181, paras. 3.73-3.80*]. This is important in order to provide for a uniform regulatory basis [*KAUFMANN-KOHLER/RIGOZZI, p. 63, para. 2.15*]. CISG 7(1) stipulates that the CISG has to be interpreted conform with its international character and the need to promote uniformity in its application. The CISG is therefore sufficiently detached from any national law.

23 Danubia, Mediterraneo and Equatoriana are all contracting states of the CISG [*PO1, p. 53, para. III.4*]. The CISG is the only law that is identical in all three states. Even if the Parties intended to govern the Arbitration Clause by a neutral law, the CISG meets this requirement. Therefore, the Parties would never be confronted with unpleasant inconsistencies. The interpretation of an arbitration agreement becomes foreseeable under the CISG. Therefore, the application of the CISG meets the required neutrality and the need for legal certainty.

II. The Tribunal has the power to adapt the contract

24 Contrary to RESPONDENTs allegations, CLAIMANT will demonstrate that the Tribunal has the power to adapt the Sales Agreement for the following four reasons. First, there was explicit consent between the Parties (**A**). Second, the wording of the Arbitration Clause empowers the Tribunal to contract adaptation (**B**). Third, narrowing down the Arbitration Clause had no effect on the power to adapt the contract (**C**). Fourth, a reasonable third person would have understood the inclusion of clause 12 of the Sales Agreement ("**Hardship Clause**") as empowering the Tribunal to adapt the contract (**D**).

A. The Parties expressly agreed to empower the Tribunal to adapt the contract

25 According to 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*". When determining the intent of the parties according to CISG 8(3), a number of circumstances can be taken into consideration. This includes the agreement as such, the negotiations between the parties, any practices which they have established between themselves, usages and all other relevant circumstances [*Chateau v. Sabate USA Inc.; Filanto S.p.A. v. Chilewich; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, Art. 8 para. 13*]. Whether the parties intended a power to adapt depends on the interpretation of the circumstances of the contract conclusion [*Filanto S.p.A. v. Chilewich; OLG 5 U 21/06; Scheldebouw v. Hero Glas; GAILLARD/SAVAGE, p. 28, N 41*].

26 In the case at hand, CLAIMANT made it clear to RESPONDENT that it was unwilling to take over responsibility for certain risks arising out of the changed delivery modalities [*Exh. C4, p. 12*]. RESPONDENT could therefore not have been unaware of CLAIMANTs intent. Referring to CLAIMANT's statement, RESPONDENT proposed the final Hardship Clause which provides that "*the seller* [CLAIMANT] *shall not be responsible* […] *for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exh. C5, p 14, para. 12; PO2, p. 56, para. 12*]. From this, it can be concluded that the Parties agreed to a distribution of risks as well as to create a mechanism to manage these risks should they materialise. During the contract negotiations, Ms. Napravnik and Mr. Antley discussed what this mechanism should be. They agreed that adaptation by the Tribunal would be adequate, if renegotiations failed [*Exh. C8, p. 17*]. This demonstrates that the Parties had explicit consent that the Tribunal would be empowered to adapt the contract.

B. The wording of the Arbitration Clause can only be understood as providing for contract adaptation

27 CLAIMANT will show two things. First, if RESPONDENT had wanted to exclude to power to adapt the contract, it did not make its intentions clear enough. Second, a reasonable third person would understand the final wording of the Arbitration Clause as including adaptation.

First, pursuant to CISG 8(1), a contract shall be interpreted according to the parties' subjective intent, where the other party could not have been unaware of what this intent was [*supra para. 25*]. RESPONDENT alleges that it was its intent to exclude "*any reference which could be interpreted as an empowerment for contract adaptation*" from the Model Clause [*Answer, p. 31, para. 13*]. However, when Mr. Antley proposed a reduced version of the Arbitration Clause, he only stated that the Model Clause was "*fairly broad*" and that he wanted to streamline it "*a little*" [*Exh. R1, p. 33*]. He did not specify which matters exactly he would like to exclude [*ibid.*]. As will be shown below, the remaining wording of the clause shall be understood as including contract adaptation [*infra para. 28*]. Hence, CLAIMANT could not have known that this was RESPONDENT's intention. There has therefore been no consent to exclude the power to adapt the contract.

28 Second, the wording "*dispute arising out of this contract*" empowers the Tribunal to adapt the contract. 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 Case; FARNSWORTH, p. 99, para. 2.4; HUBER-MULLIS, p. 12; LAUTENSCHLAGER, para. 3.1; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL II, Art. 8, para. 20*]. Emphasis is placed on the usual meaning of words when establishing the understanding of a reasonable third person [*ICC Award No. 9187*; *SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, Art. 8, para. 41*]. The word "*dispute*" is defined as "*a conflict or controversy"* [*BLACK'S LAW, p. 540*]. The term "*dispute*", as well as the wording "*arising out of this contract*" include the matter of contract adaptation. [*Austrian Case I; Ethiopian Oilseeds; Francis Travel; Maritime Belge v. Distrigas; Vosper Thornycroft; Samick Lines; Woolf v. Collis; BGH III ZR 281/00; KRÖLL, p. 457*]. Even more so, when the dispute is sufficiently close connected with the purpose of the contract and no contrary intention of the parties is visible [*SCHMITTHOFF, p. 613*].

29 CLAIMANT requests an adaptation of the purchase price based on the Hardship Clause. The price as well as the distribution of risks, disputed in the present case, are essential parts of every sales contract. The dispute is therefore sufficiently close connected to the purpose of the

contract.

30 In conclusion, a reasonable third person would understand the wording of the Arbitration Clause as empowering the Tribunal to adapt the contract.

C. A reasonable third person would have understood the inclusion of the Hardship Clause as empowering the Tribunal to adapt the contract

31 CLAIMANT will demonstrate that a reasonable third person would have understood the wording of the Hardship Clause as empowering the Tribunal for two reasons. First, RESPONDENT's allegation must be rejected since avoidance is an ill-suited remedy (**1**). Second, adaptation is a part of the concept of hardship and therefore integrated in any hardship mechanism (**2**).

1. Having avoidance as the only available remedy can only lead to unsatisfactory results

32 RESPONDENT wrongfully alleges that contract adaptation is not within the scope of the Hardship Clause [*Answer, p. 32, para. 18*]. If this was true, CLAIMANT could only rely on termination of the contract and demand restitution [*infra para. 88*]. CLAIMANT will show why RESPONDENT's view only leads to unsatisfactory results. First, the delivered semen cannot be returned completely by RESPONDENT and this was apparent at the time of contract conclusion (**a**). Second, the returned doses would cause new tariffs, causing only disadvantages for both Parties and would be harmful to a long-term business relationship (**b**). Third, Mr. Shoemaker's statement showed that RESPONDENT wanted to prevent at all cost that CLAIMANT avoided the contract (**c**).

a. Not all of the delivered semen doses could be returned

33 If a contract is avoided, a party that has already performed in part or in full is entitled to claim restitution under CISG 81(2). This restitution targets only the original goods [*SCHLECHTRIEM/SCHWENZER/FOUNTOULAKIS, Art. 81, para. 20*].

34 The delivery of the frozen horse semen was scheduled in three instalments over a time period of eight months [*Exh. C5, p. 14, para. 8*]. The risks targeted by the Hardship Clause could manifest at any point in these eight months. RESPONDENT wanted to use the first shipment in the breeding season of 2017. It was clear that the doses of the first shipment, due in May 2017, would have been used by the end of the breeding season in July [*Exh. C5, p. 14, para. 8; PO2, p. 56, para. 11*]. If a case of hardship occurred after this date, avoidance of the contract would lead to the problem that full restitution would not be possible anymore. Since

CISG 82(1) demands restitution of the original goods, any dose of semen used on a mare would no longer be returnable.

b. Restitution would only disadvantage both Parties

35 The place of restitution is determined based on the place of performance of the original contract. To ensure a fair distribution of risk, the delivery modalities are mirrored [*SCHLECHTRIEM/SCHWENZER/FOUNTOULAKIS, Art. 81, para. 29*]. The costs of restitution must be borne by the party that makes the restitution. If a party is exempted from paying damages, the other party cannot claim damages for the cost of the restitution [*SCHLECHTRIEM/SCHWENZER/FOUNTOULAKIS, Art. 81, para. 33*].

36 CLAIMANT had to deliver the semen to RESPONDENT. In the case of restitution, RESPONDENT would have to deliver the semen to CLAIMANT because the delivery modalities would be mirrored. RESPONDENT would have to import the semen into Mediterraneo, which would cause new tariffs. RESPONDENT would have to bear the tariff of 25% [*Notice, p. 6, para. 9*] because CLAIMANT would be exempt from paying damages under the Hardship Clause. RESPONDENT would not be able to make further use of the semen it wanted to acquire [*Exh. R4, p. 36*].

37 The doses that RESPONDENT would return to CLAIMANT would be of little value since the market for frozen race horse semen seems to be rather small [*PO2, p. 57, paras. 15, 19*]. CLAIMANT had not sold frozen semen of one of its race horses before since there never had been a request [*PO2, p. 57, para. 15*]. Furthermore, CLAIMANT did not consider trying to sell it on its own accord or in such large quantities [*Exh. C2, p. 10*]. To not decrease the value of their own stallion, race horse breeders must carefully select the mares which should receive the stallion's semen [*PO2, p. 57, para. 19*]. Since Nijinsky III is a world class stallion [*Exh. C2, p. 10; Notice, p. 4, para. 3*], finding a mare that matches its pedigree will make it even harder to resell its semen.

38 Furthermore, the large amount of frozen semen doses would be hard to sell, since buyers tend to buy only one or two doses even when there is only a temporary chance to buy [*PO2, p. 57, para. 20*]. Finally, the original tariff of USD 1,500,000 was paid to the government of Equatoriana. By terminating the contract and demanding restitution CLAIMANT would still be at a loss of USD 1,500,000. Both Parties initially wished for a long-term business relationship [*Exh. C3, p. 11; C4, p. 12*]. The core assumption for any long-term business relationship is that the parties achieve a mutually beneficial situation [*PRYKE/SMITH, p. 138; SCOTT, p. 2027*]. This is the opposite of the outlined scenario.

39 The overall losses suffered by both Parties, if the contract was terminated, would only increase. Hence, restitution would only disadvantage both Parties.

c. Shoemaker showed that Respondent had no interest in avoidance

40 Excluding adaptation as a possible mechanism would only leave the option to avoid the entire contract which was outlined above [*supra paras. 31 et seq.*]. Mr. Shoemaker's statement demonstrated clearly that this was not in RESPONDENTs interest [*Exh. R4, p. 36*]. His primary concern was that CLAIMANT would deliver [*ibid.*]. In other words, RESPONDENT wanted to ensure that CLAIMANT would not try to avoid the contract but adhere to it. Mr. Shoemaker further stated on the phone that RESPONDENT did not agree to an adaptation outright, but that it was in the realm of possibility, should "*the contract provide[s] for*" [*ibid.*]. Therefore, Mr. Shoemaker made clear that RESPONDENT had no interest in CLAIMANT avoiding the contract.

41 In conclusion, RESPONDENT interpretation of the contract would only lead to unsatisfactory results for both sides. Therefore, a reasonable third person would not have assumed that the Hardship Clause only allowed for avoidance.

2. Contract adaptation is part of the hardship mechanism

42 By integrating the Hardship Clause into the Sales Agreement, the Parties included the concept of hardship as well. CLAIMANT will show that a reasonable third person would understand that this concept includes the possibility of contract adaptation. This holds especially true in light of the circumstances laid out above [*supra paras. 25 et seq.*].

43 The concept of hardship includes the duty to renegotiated as well as the possibility of a contract adaptation [*Aluminium v. Essex; Societe Case; BERGER, p. 2; BRUNNER, p. 479; FLAMBOURAS, p. 290; HARRIES, p. 165; MCINNIS, pp. 218-219*]. UPICC 6.2.3 explicitly states that after unsuccessful renegotiations the court may adapt the contract if it finds it reasonable.

44 Under the objective test of CISG 8(2), the intent of the parties is determined by the understanding of a reasonable third person of the same kind. Mr. Krone, a lawyer with a UPICC background, proposed the Hardship Clause to Mr. Ferguson, also a lawyer with a UPICC background [*Exh. C8, p. 17*]. A reasonable third person of the same kind as Mr. Ferguson would have understood this as including the concept of hardship from the UPICC.

45 In conclusion, adaptation is a possible remedy under the UPICCs concept of hardship. Not having the option of contract adaptation only leads to unsatisfactory results. Therefore, Mr. Krone's proposal to include the Hardship Clause would have been understood by a reasonable third person as empowering the Tribunal to adapt the contract.

III. Even if Danubian law governs the Arbitration Clause, Tribunal has the power to adapt the contract

46 CLAIMANT will demonstrate that the Tribunal is empowered to adapt the contract even if it applies Danubian law to govern the Arbitration Clause for the following two reasons. First, RESPONDENT's view of the "*four corners rule*" is not applicable as it would violate the New York Convention ("**NYC**") in the present case (**A**). Second, the Arbitration Clause allows for contract adaptation since the requirements of Danubian Contract Law are met (**B**).

A. RESPONDENT's interpretation of the "*four corners rule*" contradicts the New York Convention and is therefore not applicable

47 The objective of Art. II of the New York Convention is to promote consistent recognition of arbitration agreements [*WILSKE/FOX, Art. II, p. 152, para. 152*]. NYC II(3) requires Contracting States to recognise arbitration agreements and refer the parties to arbitration. Only where an arbitration agreement "*is null and void, inoperative or incapable of being performed*", national courts can declare themselves competent [*NYC II(3)*]. These requirements concerning the invalidity of an arbitration agreement cannot be left to th discretion of Contracting States. Instead, they need to be interpreted in a uniform way across national borders [*BORN I, pp. 493-494, 562-563; WILSKE/FOX, Art. II, p. 185, para. 307*].

48 In *Ledee v. Ceramiche Ragno,* a U.S. court rejected the challenge of an arbitration agreement, based on its alleged invalidity under Puerto Rican law. The court held that NYC II(3) must be interpreted to cover only situations, like fraud, waiver or duress, that can be applied neutrally on an international scale [*Ledee v. Ceramiche Ragno*]. Another U.S. court stated that the "*null and void*" requirement in NYC II(3) should be read narrowly [*Rhone Mediterranee*]. Further courts have refused to apply foreign laws if they prescribed special burdens for arbitration agreements [*Doe v. Royal; Becker Case; BORN II, p. 309*].

49 According to RESPONDENT's interpretation of the "*four corners rule*", the interpretation of the Arbitration Clause is limited to its wording [*Answer, p. 32, para. 16*]. No external evidence, not even the rest of the contract, written on the same paper, could be relied upon in order to support the validity of an arbitration agreement. This is not comparable to the situations accepted like fraud or duress [*supra para. 48*]. It is also not a requirement that can be applied neutrally on an international scale, since different countries apply different rules of interpretation.

50 Therefore, the Tribunal should consider interpreting the Arbitration Clause broadly even

under Danubian law. RESPONDENT's interpretation of the "*four corners rule*" would lead to the Arbitration Clause being interpreted solely by its textual content. It contradicts the fundamental goal to promote the use of international arbitration agreements.

B. The Arbitration Clause empowers the Tribunal to adapt the contract under Danubian Contract Law

51 CLAIMANT will demonstrate that first, the broader interpretation of the "*four corners rule*" is grounded in Danubian Contract Law. Second, the Tribunal would be empowered to adapt the contract according to such an interpretation.

52 First, the "*four corners rule*" has essentially the same effect as the merger clause in UPICC 2.1.17, which states "*the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the contract.*" [*PO2, p. 61, para. 45*]. As was shown above [*supra paras. 7 et seq.*], if the validity of the main contract is not questioned, the arbitration agreement is to be seen as part of the main contract. Even under the "*four corners rule*" the Sales Agreement as well as statements made by the Parties can be used to interpret the Agreement Clause [*Syllabus v. Sanders; Schumacher v. Spencer*].

53 Second, above [*supra para. 26*] it was shown that the wording of the Hardship Clause can only be understood to include adaptation as a possible remedy. The Hardship Clause was intended by the Parties to authorise the Tribunal. The requirement that in cases of hardship a tribunal may only adapt the contract "*if authorized*", as stated in Danubian Contract Law 6.2.3(4)(b), has been fulfilled.

54 In conclusion, the Tribunal has the power to adapt the contract under Danubian Contract Law. It has been authorised to do so by the Arbitration Clause in connection with the Hardship Clause.

IV. Conclusion on Issue 1

55 The Tribunal has the power to adapt the contract. The Arbitration Clause has to be interpreted broadly because it is governed by the CISG. Under the interpretation of the CISG, the Arbitration Clause in context of the Hardship Clause empowers the Tribunal to adapt the contract. In any event, a reasonable third person would have understood the Arbitration Clause in context of the Hardship Clause to empower the Tribunal to adapt the contract. Should the Danubian Contract Law govern the Arbitration Clause, the Tribunal would still be empowered to adapt the contract. The alleged „*four corners rule*" does not stand in the way of

interpreting the Arbitration Clause broadly.

ISSUE 2: CLAIMANT is entitled to submit evidence from the other arbitration

56 RESPONDENT is involved in another HKIAC arbitration proceeding ("**Other Arbitration**") [*Letter Fasttrack, p. 50*]. In the Other Arbitration, RESPONDENT is disputing with a Mediterranean company that bought one of RESPONDENT's mares [*Letter Langweiler, p. 50; PO2, p. 60, para. 39*]. RESPONDENT had to deliver the mare to Mediterraneo [*ibid.*]. After the sales contract was concluded, Mediterraneo imposed a tariff of 25% on agricultural products, including living animals [*ibid.*]. The costs for RESPONDENT increased due to the tariff [*ibid.*]. Subsequently, RESPONDENT refused to deliver the mare until the buyer paid the costs [*ibid.*]. In the Other Arbitration, RESPONDENT claimed an additional payment when it was negatively affected by the Mediterranean tariff [*Letter Langweiler, p. 49*]. RESPONDENT asked the tribunal of the Other Arbitration for price adaptation, which RESPONDENT does not recognise in the present case [*PO2, p. 60, para. 40*]. In a Partial Interim Award, the tribunal confirmed its power to adapt the contract, should the Mediterranean tariff result in hardship [*PO2, p. 60, para. 39*]. Consequently, the information about the Other Arbitration supports CLAIMANT's request for adaptation, as it demonstrates RESPONDENT's contradictory behaviour.

57 At the annual breeder conference, Mr. Velazquez, who had previously worked for the Mediterranean buyer, provided CLAIMANT with information about the Other Arbitration, [*PO2, p. 60, para. 40.*]. Mr. Velazquez gave CLAIMANT the address of a company which would sell CLAIMANT a copy of the Partial Interim Award and the relevant submission of the Other Arbitration (together "**the Evidence**").

58 RESPONDENT claims that the source of the Evidence could either be two former employees of RESPONDENT or a hack of its computer system. The Tribunal instructed the Parties to address the issue whether CLAIMANT should be entitled to submit the Evidence on the basis of the assumption that it had been obtained illegally. Barring the Evidence would violate CLAIMANT's right to be heard (**I**). In addition, the Tribunal should use its discretion to admit the Evidence (**II**).

I. Barring the evidence would violate CLAIMANT's right to be heard

59 According to HKIAC Rules 13.1 "*the arbitral tribunal shall adopt suitable procedures* [...] [that] *afford the parties a reasonable opportunity to present their case*". The opportunity to fully present a case is an essential element of the right to be heard [*BORN I, p. 2175*]. The right to be heard is a fundamental principle in international arbitration [*BGer 4A_450/2007;*

MOSER/BAO, p. 162]. New York Convention V(1)(b) states that the "*recognition and the enforcement of the award may be refused* [if] […] *the party* […] *was* […] *unable to present his case*". An award violating the right to be heard will possibly not be recognised or enforced.

60 The Tribunal must grant CLAIMANT the opportunity to fully present its case. As shown above [*supra paras. 67 et seq.*], the Evidence is relevant and material. In order to demonstrate to the Tribunal the relation between tariffs, hardship and contract adaptation, the admissibility of the Evidence is crucial for CLAIMANT. If the Tribunal were to bar CLAIMANT from submitting the Evidence, its right to be heard could be violated. In consequence, the award might not be recognised or enforced under New York Convention V(1)(b).

II. The Tribunal should use its discretion to admit the evidence

61 Under HKIAC Rules 22.2, "[*t*]*he arbitral tribunal shall determine the admissibility* [...] *including whether to apply strict rules of evidence*". According to HKIAC Rules 22.3, "*the arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence*". The HKIAC Rules grant tribunals broad discretion in determining the admissibility of evidence [*MOSER/BAO, p. 191*]. In international arbitration, illegally obtained evidence is admissible when the interest of truth finding outweighs the illegality [*Fc Metalist v. UEFA; BGer 4A_362/2013; BGer 4A_448/2013*]. The Tribunal should therefore admit the Evidence for the following three reasons. First, even assuming that the Evidence was originally obtained illegally, the illegal obtainment does not automatically prevent the admissibility in the present case (**A**). Second, the Evidence could influence the outcome of the case as it is material (**B**). Third, the materiality of the Evidence outweighs any harm caused by the illegal procurement (**C**).

A. The illegally obtained Evidence may be submitted

62 Obtaining evidence illegally does not automatically prevent its admissibility. In the present case, CLAIMANT did not act illegally or unethically in obtaining the Evidence.

63 A party that uses illegal means to obtain evidence shall not gain advantage through its illegal action [*Caratube v. Kazakhstan; Persia International Bank v. Council; WAINCYMER, p. 797*]. The illegality of evidence has always been considered less grave if the party relying on it did not act illegally itself [*Bible v. United Student Aid Funds Inc.; Persia International Bank v. Council; BOYKIN/HAVALIC pp. 19-23*]. This principle is called the doctrine of *clean hands* [*Iranian Hostages; Methanex v. US; Meuse Water Case; Persia International Bank v.*

Council; SCHWEBEL, p. 233]. The doctrine has developed into a general principle of law [*ILC REPORT, p. 114*]. In *Caratube v. Kazakhstan*, a group hacked the computer system of the Kazakhstan Government and acquired many government documents [*Caratube v. Kazakhstan*]. A party to the arbitration, having nothing to do with the hack, sought to submit the illegally obtained documents [*ibid.*]. Based on the doctrine of *clean hands*, the evidence in this case was admitted [*ibid.*]. In *Persia International Bank v. Council*, a party wanted to submit confidential diplomatic information which was originally obtained illegally. Because this party was not involved in the illegal procurement of the information, the tribunal applied the doctrine of *clean hands*. The evidence was admitted despite its illegal nature [*Persia International Bank v. Council*].

64 In the present case, CLAIMANT took no steps to obtain any information about RESPONDENT's Other Arbitration. It was rather a company providing intelligence on the horseracing industry which offered CLAIMANT the Evidence [*PO2, pp. 60-61, para. 41*]. Thus, it was not CLAIMANT that possibly hacked RESPONDENT's computer system [*ibid.*]. Likewise, CLAIMANT had nothing to do with a potential breach of the confidentiality agreement that existed between RESPONDENT and its two former employees [*Letter Fasttrack, p. 51*]. The agreement was merely between RESPONDENT and the two former employees.

65 Therefore, as CLAIMANT was neither involved in the breach of a confidentiality agreement, nor in the hack of RESPONDENT's computer system, CLAIMANT did not act illegally.

B. The Evidence could influence the outcome of the case

66 In order to be admitted by the Tribunal, the Evidence must have the potential to influence the outcome of the case. This means that the Evidence must be relevant (**1**) and material (**2**).

1. The Evidence is relevant to the case

67 In order to decide whether CLAIMANT should be entitled to submit the Evidence, the Tribunal needs to consider its relevance. Relevance is defined as the importance of the evidence to the case [*EBERL/SCHLOSSER, pp. 67-68; HABEGGER, p. 33; MARGHITOLA, pp. 47-48*]. The evidence must be logically related to what needs to be proven [*PILKOV, p. 148*]. In the case at hand, the Evidence is relevant for the following four reasons.

68 First, the Sales Agreement and the sales contract of the Other Arbitration are designed similarly. Both sales agreements are related to the horse breeding business. Both agreements included a DDP clause, a hardship clause, an arbitration clause, and a choice of Mediterranean law [*Exh. C5, p. 14, paras. 8, 12, 14, 15; PO2, p. 60, para. 39*]. Hence, the contracts are

similarly designed.

69 Second, the hardship clauses of both contracts are similar. In the Other Arbitration, the contract included the ICC-Hardship Clause 2003 [*PO2, p. 60, para. 39*]. It states that hardship is assumed if "*continued performance of* [a party] *has become excessively onerous*". In the Sales Agreement, the Hardship Clause requires an event that makes the contract "*more onerous*" [*Exh. C5, p. 14, para. 12*]. Thus, the hardship clauses resemble one another, with the only difference being a lower threshold for hardship in the present case.

70 Third, additional cost in both cases were triggered by tariffs. The dispute in the Other Arbitration concerns the price increase due to the imposition of the Mediterranean tariff [*Letter Langweiler, p. 49, para. 2; PO2, p. 58, para. 24; PO2, p. 60, para. 39*]. The dispute in the current arbitration concerns the price increase due to the counter-tariff imposed by Equatoriana [*Notice, p. 6, paras. 9, 10; Exh. C7, p. 15; Letter Langweiler, p. 49*]. Hence, the triggers of additional costs are similar.

71 The two arbitrations deal with similar sales agreements and contain a similar hardship clause. The additional costs were triggered by similar events. Thus, the evidence of the Other Arbitration is relevant to the current case.

2. The evidence is material to the case

72 In order to decide on the admissibility of the Evidence, the Tribunal needs to consider its materiality. Evidence is material if it could influence the outcome of the case [*Fc Metalist v. UEFA; BGer 4A_362/2013; BGer 4A_448/2013; Corfu Case; Methanex v. USA; EBERL/SCHLOSSER, pp. 67-68; HABEGGER, p. 33; MARGHITOLA, p. 47-48*]. This means that the case could not be sufficiently presented without material evidence [*WAINCYMER, p. 859*].

73 In the present case, the Evidence is material for the following two reasons. First, CLAIMANT, as seller, requests an adaptation of the price due to hardship caused by the unforeseen imposition of the Equatorianian tariff [*Notice, p. 7, para. 18, 19*]. RESPONDENT, as seller, in the Other Arbitration asked for an adaptation of the price due to hardship caused by the imposition of the Mediterranean tariff [*PO2, p. 60, para. 39*]. If the Tribunal were to admit the Evidence, CLAIMANT could demonstrate that RESPONDENT itself considers hardship caused by unforeseen tariffs as a justification for price adaptation.

74 Second, a 25% increase of costs due to the Mediterranean tariff led to the dispute in the Other Arbitration [*PO2, p. 58, para. 24*]. RESPONDENT argues that the increase of 25% of the costs reaches the threshold of the ICC Hardship Clause 2003 ("**ICC Clause**") which is defined as

"*excessively more onerous*" [*Letter Langweiler, p. 49*]. In the case at hand, the Equatorianian tariff led to a 30% increase of costs [*Exh. C7, p. 16*]. In the Hardship Clause the threshold for hardship is defined by the term "*more onerous*". Should CLAIMANT be allowed to submit the Evidence, it could demonstrate that RESPONDENT assumes that a 25% increase of costs constitutes a case of hardship.

75 In conclusion, the Evidence shows that RESPONDENT considers hardship due to unforeseen tariffs as a possibility to justify a price adaptation. Furthermore, it reveals that RESPONDENT considers a 25% increase of costs to meet the threshold for hardship. This could possibly influence the outcome of the present dispute. Thus, the Evidence qualifies as material.

C. The materiality of the Evidence outweighs any harm caused by obtaining it illegally

76 In determining the admissibility of illegally obtained evidence, there is no standard rule that requires automatic dismissal of the evidence [*BLAIR/GOJKOVIC, p. 236*]. Rather, tribunals must balance the materiality against the harm caused by the illegal gain of the evidence [*BGer 4A_362/2013; BGer 4A_448/2013; Fc Metalist v. UEFA*]. Materiality reflects the interest of truth finding. The illegality reflects the level of harm done to the legal order. Illegally obtained evidence is admissible when the interest of truth finding outweighs the level of harm done to the legal order [*BGer 4A_362/2013; BGer 4A_448/2013; Fc Metalist v. UEFA; Yukos Case*]. In the *Corfu Case*, the United Kingdom sought to rely on evidence obtained in violation of international law. However, the court did not exclude the evidence. Hence, the method in which the evidence is obtained is not as important as its materiality.

77 Based on the assumption of the Tribunal, there are two possible ways the evidence could have been obtained. First, the source of the Evidence could be two former employees of RESPONDENT which were bound by confidentiality obligations [*PO1, p. 53, para. III.1.b.*]. Second, the source could be a hack of RESPONDENT's computer system [*ibid.*]. However, CLAIMANT will show, that the materiality prevails over either the illegality of the breach of the confidentiality obligations (**1**) and the hack (**2**).

1. The Evidence should not be dismissed, even if unauthorisedly disclosed by former employees of RESPONDENT

78 In the balancing of interests, the materiality of the Evidence outweighs the breach of the confidentiality agreement, as well as of confidentiality obligations under the HKIAC Rules 2013.

79 According to RESPONDENT, two of its former employees could have leaked the Evidence [*Letter Fasttrack, p. 50; PO2, p. 60, para. 41*]. The employees were bound by a confidentiality agreement to not disclose information about the Other Arbitration [*PO2, p. 61, para. 41*]. The two former employees were witnesses in the Other Arbitration [*ibid.*]. The Other Arbitration was held under the HKIAC Rules 2013 [*Letter Fasttrack, p. 51*]. According to HKIAC Rules 2013 42.2 "[witnesses] *may not publish, disclose or communicate any information relating to (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration*". The purpose of a confidentiality obligation, be it contractual or statutory, is to ensure that the information is not made public [*BORN I, p. 2781*].

80 In the present case, there is no danger that the evidence will ever reach the public. The evidence will only be used within the current arbitration. CLAIMANT is bound by the confidentiality obligations of the HKIAC Rules in this arbitration. HKIAC Rules 45.1 lays down that, "*no party* […] *may publish, disclose or communicate any information relating to* […] *the arbitration under the arbitration agreement*". The purpose of the confidentiality agreement between RESPONDENT and its two former employees is therefore still fulfilled.

2. The Evidence should not be dismissed, even if it was procured through an illegal hack

81 RESPONDENT's computer system was hacked [*Letter Fasttrack, p. 50*]. According to RESPONDENT, the hackers retrieved the Evidence from its computer system [*ibid.*].

82 Since the WikiLeaks scandal, the legal criteria for the admissibility of evidence has changed. Evidence that would have been considered inadmissible due to its confidential character is now admissible because it is considered to be public information [*ORTIZ*]. In several cases, confidential data was admitted [*Caratube v. Kazakhstan; Conoco Phillips Case; Kilic; Opic; Yukos Case*].

83 In the present case, it was not CLAIMANT that hacked RESPONDENT's computer system. A company that provides intelligence on the horseracing industry on commercial basis, offered the Evidence to CLAIMANT [*PO2, p. 60, para. 40*]. CLAIMANT would have to pay USD 1,000 for the Evidence [*PO2, p. 61, para. 41*]. As CLAIMANT has no further relation to the company, it must be assumed that the company would sell the Evidence to anyone who is willing to pay. Therefore, the Evidence is *de facto* publicly available.

84 In conclusion, the consequences of submitting the illegally obtained Evidence are insignificant. As the Evidence is publicly available, there is no need to legally protect it. However, as shown above [*supra paras. 72 et seq.*], the Evidence is material. In the balance

of interests, materiality outweighs the illegal obtainment.

III. Conclusion on Issue 2

85 Refusing the submission of evidence would violate CLAIMANT's right to be heard. Furthermore, the Tribunal should use its discretion to admit the evidence. First, obtaining evidence illegally does not automatically prevent its admissibility, as CLAIMANT did not act illegally itself. Second, the Evidence could influence the outcome of the case because it is relevant and material. Third, materiality prevails over the interest of the legal order. Thus, CLAIMANT is entitled to submit the evidence from the Other Arbitration, even under the assumption that the evidence has been obtained illegally.

ISSUE 3: CLAIMANT is entitled to the payment of USD 1,250,000, resulting from an adaptation of the Sales Agreement

86 While preparing the last shipment, CLAIMANT discovered that the Equatorianian tariff applied to frozen horse semen [*Exh. C7, p. 16*]. Assuring a solution regarding the payment of the tariff, RESPONDENT urged CLAIMANT to release the last shipment [*Exh. C7, p. 16; C8, p. 18; R4, p. 36*]. This made CLAIMANT's delivery 30% more expensive, resulting in additional costs of USD 1,500,000. CLAIMANT is now faced with the burden of all additional costs which endangers the very existence of its business. Although the Parties agreed on a hardship clause and RESPONDENT offered to find a solution regarding the costs, RESPONDENT has refused to accept any responsibility and is utterly unwilling to cooperate [*Exh. C8, p. 18*]. RESPONDENT now erroneously alleges that the additional costs constitute no base for price adaptation. CLAIMANT will show that it is entitled to the payment of USD 1,250,000 resulting from an adaptation of the price under the Hardship Clause (**I**) or under the CISG (**II**).

I. CLAIMANT is entitled to an adaptation of the price pursuant to the Parties' Hardship Clause

87 Hardship occurs when an event fundamentally alters the equilibrium of a contract. 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, Art. 79, para. 78; VOGENAUER/MCKENDRICK, paras. 1, 2*]. In such cases the parties may consider to include a clause which aims to restore the equilibrium of the contract. In the present case, the Parties agreed on a hardship clause in the Sales Agreement [*Exh. C5, p. 14, para. 12*]. In case of hardship, several remedies are possible which aim to

restore the equilibrium of the contract. In the case at hand, adaptation of the price is appropriate (**A**). Furthermore, the increase of the costs due to the imposition of the Equatorianian tariff constitutes a case of hardship (**B**).

A. Adaptation is the appropriate remedy for hardship

88 In the present case, the Parties agreed on a hardship clause which can be invoked in the case of increased costs. The Hardship Clause provides that "*Seller* [CLAIMANT] *shall not be responsible* […] *for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". The clause, however, remains silent on what recourse is available to the Parties in the event of such hardship. Generally, in hardship cases, parties have a duty to renegotiate the contract [*UPICC 6.2.3; PECL 6:111*]. If renegotiations fail, two alternatives remain: avoidance or adaptation of the contract [*CISG-AC No. 7, para. 26; PETER, p. 237; SCHMITTHOFF, p. 86; SCHWENZER et al., paras. 45.110-45.119; STROHBACH, p. 39*].

89 As will be demonstrated below [*infra paras. 91 et seq.*] the imposition of the tariffs constitutes hardship as defined by the Parties' Hardship Clause. After CLAIMANT learned that the Equatorianian tariff led to additional costs, it tried to find a solution with RESPONDENT [*Exh. C7, p. 16; C8, p. 18*]. These attempts were thwarted by RESPONDENT's unwillingness to meaningfully engage in finding an amicable solution [*Notice, p. 6, para. 10*]. Confident that RESPONDENT would stick to its word, CLAIMANT rendered performance and advanced the costs [*Notice, p. 6, para. 13; Exh. C8, p. 18; Answer, p. 30, para. 10*]. Ultimately, the renegotiations failed.

90 Furthermore, in this case, avoidance of the contract is highly impractical and contrary to either Parties' interests. As shown above, the doses cannot be given back [*supra paras. 33 et seq.*]. Also, returning the doses would generate additional costs due to tariffs [*supra para. 36*] Lastly, Mr. Shoemaker showed no interest in avoidance of contract [*supra paras. 40 et seq.*]. In the light of the above, adaptation of the contract is the only appropriate remedy in the present case.

B. The Equatorianian tariff constitutes hardship under the Hardship Clause

91 RESPONDENT argues that the Hardship Clause was narrowly written, and that the imposition of the Equatorianian tariff does not constitute hardship [*Answer, p. 32, para. 19*]. This must be rejected because, contrary to RESPONDENT's argument, the Parties agreed on the broadly worded Hardship Clause, intended to cover precisely such cases. Consequently, CLAIMANT

shall not be held responsible for the additional costs as the imposition of the Equatorianian tariff is covered by the Hardship Clause. As the Sales Agreement is subject to the CISG, the CISG rules on contract interpretation apply. In the absence of a clear and common intent, two aspects have to be considered. First, the understanding of a reasonable third person of the same kind placed in the same circumstances [*CISG 8(2); Cowhides Case; Magnesium Case; Marble Case; FARNSWORTH, p. 99, para. 2.4; HUBER/MULLIS, p. 12; LAUTENSCHLAGER, para. 3.1; SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, Art. 8, para. 20*]. Second, all relevant circumstances including negotiations, established practices between the parties, usages and any subsequent conduct [*CISG 8(3); SCHLECHTRIEM/SCHWENZER/SCHMIDT-KESSEL, Art. 8, para. 21; STAUDINGER/MAGNUS, Art. 8, para. 17*].

92 A reasonable third person would have understood the Hardship Clause to cover the imposition of the Equatorianian tariff. Based on its wording, the Hardship Clause covers the Equatorianian tariff (**1**). Alternatively, the Parties' negotiations lead to the conclusion that the additional costs constitute a case of hardship (**2**). Furthermore, the additional 30% costs meet the threshold required under the Hardship Clause (**3**). Lastly, the risk of tariffs has not been shifted to CLAIMANT (**4**).

1. According to its wording, the Hardship Clause covers the Equatorianian tariff

93 The Hardship Clause precludes CLAIMANT from responsibility for "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". As only health and safety requirements are explicitly listed, it must be determined whether the tariff reflects a "*comparable unforeseen event*". It will be shown that the Equatorianian tariff constitutes a "*comparable*" (**a**) and "*unforeseen*" (**b**) event.

a. The Equatorianian tariff constitutes a "*comparable*" event making the contract more onerous

94 In the present case, the imposition of the tariff is a "*comparable*" event as understood under the Hardship Clause for the following three reasons.

95 First, health and safety requirements, like tariffs, are sovereign governmental actions regulating trade between different states. Generally, private parties are neither involved in the process of imposing tariffs nor of health and safety requirements. In the present case, the Parties did not participate in the drafting process, defining the scope of, or implementing the Equatorianian tariff [*Exh. C6, p. 15*].

96 Second, health and safety requirements, like tariffs, can lead to suddenly increased costs.

CLAIMANT indicated to RESPONDENT that they "*both know from past experiences unforeseeable additional health and safety requirements* […] *which can increase the cost by up to 40%* […]" [*Exh. C4, p. 12*]. Similar to this situation, the Equatorianian tariff was suddenly imposed and CLAIMANT's costs increased by 30% [*Exh. C7, p. 16*].

97 Third, The Hardship Clause needs to be interpreted in its entirety. According to the Clause, "*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* […]" This shows that CLAIMANT wanted to be excused from performance in a large variety of events. Even insignificant ones such as "*missing flights*" or "*weather delays*" are mentioned in the clause [*ibid.*]. However, it would be senseless for a party "*not willing to take over any further risks*" [*Exh. C4, p. 12*] to be protected only against minor risks and not against major risks. Since the financial impact of a tariff is more significant than the impact of missed flights or weather delays, tariffs are more likely to constitute a case of hardship under the Hardship Clause.

98 Hence, health and safety requirements as well as tariffs are measures imposed by governments that cause a sudden increase of costs. While considering that the Hardship Clause has a wide scope of application, a reasonable third person would have understood that the Equatorianian tariff constitutes a "*comparable*" event.

b. The imposition of the Equatorianian tariff was "*unforeseen*"

99 Although Mediterraneo had imposed restrictions before, it was unforeseen that Equatoriana would retaliate with a counter-tariff. The amount of 30%, as well as the inclusion of all agricultural goods is unprecedent [*Exh. C6, p. 15*]. Tariffs for agricultural goods normally do not apply to frozen race horse semen because horses are usually treated differently from livestock [*Notice, p. 6, para. 11*]. Both CLAIMANT and RESPONDENT were unaware that horse semen could be categorised as "*animal products*" [*Notice, p. 6, para. 11; Exh. C7, p. 16*]. Even the ministry employees and informed circles did not know that frozen semen fall under the Equatorianian tariff [*Exh. C6, p. 15; R4, p. 36; PO2, p. 58, para. 26*]. The retaliation was even more exceptional because Equatoriana has been one of the biggest supporters of free trade [*Exh. C6, p. 15*].

100 In conclusion, the imposition of the tariff itself and the fact that the frozen semen falls under "*animal products*" were events the Parties did not anticipate during their negotiations. Therefore, the tariff was "*unforeseen*" in the understanding of the Hardship Clause.

2. Considering all relevant circumstances, the Parties intended to include the Equatorianian tariff in the Hardship Clause

101 To determine the understanding of a reasonable third person, according to CISG 8(3), "*due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties"*. Particular weight has to be given to the wording of the parties' statements [*Ethyl Acetate Case*].

102 In the email of 31 March 2017, CLAIMANT stated that "*we* [CLAIMANT] *are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulations or import restrictions*" [*Exh. C4, p. 12*]. Without addressing CLAIMANT's request, RESPONDENT suggested a draft of the Hardship Clause [*PO2, p. 56, para. 12*]. Therein RESPONDENT does not specify the mentioned risks associated with customs regulations. Instead, the Hardship Clause explicitly lists health and safety requirements to provide for hardship. This draft was then included in the Sales Agreement without any changes [*PO2, p. 56, para. 12*].

103 Given respect to the above, a reasonable third person would consider all relevant circumstances, including the Parties' negotiations. It would assume that the imposition of the Equatorianian tariff provides for a case of hardship under the Hardship Clause as it constitutes a risk that is associated with customs regulations.

3. The increase of costs by 30% meets the required threshold defined by the Hardship Clause

104 Hardship can only occur if the price increase reaches a certain threshold. Pursuant to the Hardship Clause, the event has to make the contract "*more onerous*". The price increase of 30% meets the threshold defined by the term "*more onerous*" for the following two reasons.

105 First, CLAIMANT proposed to include the ICC Clause in the Sales Agreement [*Exh. R2, p. 32*]. Under Art. 2 of the ICC Clause, performance must become „*excessively more onerous*". RESPONDENT expressly mentioned during negotiations that it considered the ICC Clause too broad [*Exh. R3, p. 35*]. Despite RESPONDENT's request, the Parties agreed on a wording which treats CLAIMANT more favourably regarding the threshold. The Parties replaced the expression "*excessively more onerous*" with "*more onerous*". This significantly lowers the threshold needed for hardship compared to the ICC Clause. Accordingly, any increase of costs already makes the contract "*more onerous*". RESPONDENT contests the Hardship Clause regarding the events to be covered [*Answer, p. 30, para. 4*]. However, RESPONDENT speaks

neither about a threshold nor that the increase of the costs would not make the contract "*more onerous*". Therefore, the Parties lowered the threshold set in the ICC Clause so that every increase of costs would meet the threshold.

106 Second, in any event, the additional costs of 30% meet the threshold because they destroy the commercial basis of the contract. During negotiations, CLAIMANT referred to incidents "*which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal*" [*Exh. C4, p. 12*]. In this regard, CLAIMANT voiced its interest in including a hardship clause in the contract which addresses such events [*ibid.*]. Hence, for CLAIMANT the threshold allowing for hardship is reached when the commercial basis of the contract would be void. RESPONDENT never opposed to CLAIMANT's proposal. In the present case, however, CLAIMANT had a profit margin of 5% calculated [*Exh. C8, p. 17*]. From that follows that an increase of costs surpassing the 5% profit margin destroys the commercial basis for CLAIMANT. Therefore, the imposition of the Equatorianian tariff destroys CLAIMANT's profit margin. It also causes additional costs of 25% which drastically worsened CLAIMANT's financial situation [*ibid.*].

107 In conclusion, the increase of costs by 30% destroys the commercial basis of the contract for CLAIMANT and thereby meets the required threshold to be eligible for hardship.

4. The Parties allocated the risk of increased tariffs to RESPONDENT

108 The parties are free to allocate the risk in the contract [*SCHWENZER et al., para. 38.08*]. In the present case, the Parties allocated the risk of tariffs to RESPONDENT. In Clause 8 of the Sales Agreement, the Parties agreed on a delivery DDP to RESPONDENT's premises [*PO2, p. 56, para. 10*]. According to the INCOTERMS 2010, DDP means that the seller bears all the risks concerning costs for delivery and duties [*PILTZ/BREDOW, p. 570, para. D-500*]. The seller fulfils its obligation when the goods have been made available in the import country, after all customs have been cleared and tariffs have been paid [*ibid.*]. The interpretation of the DDP Clause is subject to the CISG. Under the objective test of CISG 8(2), it has to be established to which extent the standard risk allocation of a DDP agreement has changed from the point of a reasonable third person. Pursuant to CISG 8(3), negotiations of the Parties should be considered. In cases of incoherence between an Incoterm clause and the Parties' will, the will shall prevail [*Albacruz v. Albazero; Euro-Asian Oil SA v. Abilo (UK) Ltd; LÖGERING, p. 39*].

109 CLAIMANT accepted delivery DDP but also stated that it is "*not willing to take over any further risks associated with such change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions*" [*Exh. C4, p. 12*]. In the

Sales Agreement, the Hardship Clause was added which addresses certain risks. This shows that CLAIMANT wanted to have the Hardship Clause by means of a compensation for additional obligations imposed on CLAIMANT by the DDP Clause. Therefore, the Parties negotiations show that the DDP Clause was not intended to shift the risk for additional tariffs to CLAIMANT.

110 Additionally, DDP delivery increased the purchase price for the frozen horse semen only by USD 200 per dose [*PO2, p. 56, para. 8*]. In relation to the purchase price of USD 100,000 per dose, the USD 200 price increase for DDP constitutes merely 0.2% of the purchasing price. A certain amount of these 0.2% of the price must be used to cover the transportation costs. CLAIMANT would not have received a substantial compensation for taking over a lot of the risks associated with DDP, such as paying for the imposed tariff. The price increase of USD 200 per dose at most reflected the transport costs and the duties existing at the time the contract was concluded. Furthermore, RESPONDENT considered waiving the DDP delivery for future contracts [*Exh. C4, p. 11*]. This shows that RESPONDENT was not interested in a risk allocation, but rather in fast delivery and CLAIMANT's experience. A reasonable third party would have understood that CLAIMANT was not willing to take over the risk to pay for additional tariffs.

111 Therefore, the risk of the tariffs in question has not been shifted to CLAIMANT.

II. Alternatively, CLAIMANT is entitled to the payment based on adaptation of the contract under the CISG

112 Even if the Arbitral Tribunal were to determine that the Hardship Clause does not allow the recovery of increased costs, CLAIMANT is entitled to the payment based on contract adaptation under the CISG.

113 CLAIMANT bases its request for adaptation on CISG 79. The article does not explicitly state the term "*hardship*". However, it is recognised that CISG 79 covers cases of hardship to avoid a disproportionate burden in case of an unforeseen circumstance [*Scafom v. Lorraine; BRUNNER, pp. 204, 398-399; CISG-AC No. 7, para. 26; FLECHTNER II, pp. 234-236; KRÖLL et al., Art. 79, para. 79; SCHLECHTRIEM/SCHWENZER/SCHWENZER, Art. 79, para. 31; SCHWENZER II, pp. 723-724*]. CISG 79 does not provide for appropriate remedies. Therefore, this gap in the CISG needs to be filled with UPICC 6.2.3(4)(b). Under UPICC 6.2.3(4)(b), adaptation is possible [*Scafom v. Lorraine; FLECHTNER II, pp. 234-236*].

114 CLAIMANT will show that the Hardship Clause does not derogate from CISG 79 (**A**) and that

the Equatorianian tariff constitutes as hardship under CISG 79 **(B)**. Furthermore, the UPICC supplements the CISG for price adaptation (**C**)

A. The Hardship Clause does not derogate from CISG 79

115 According to the Hardship Clause, CLAIMANT shall not be responsible for cases of "[…] *hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exh. C5, p. 14, para. 12*]. RESPONDENT argues that CLAIMANT cannot rely on CISG 79 because the Hardship Clause constitutes a derogation from the hardship situations in the CISG [*Answer, p. 32, para. 20*]. This must be rejected.

116 According to CISG 6, the parties may exclude the application of the Convention and therewith CISG 79 [*Steel Bars Case; KRÖLL et al./MISTELIS, Art. 6, para. 25*]. Derogation under CISG 6 requires that the parties establish a clear intent [*Steel Bars Case; CISG-AC No. 16, paras. 3.6-3.8*]. The parties' reasonable intent must be determined pursuant to CISG 8(2) and 8(3) [*ibid.*] Even if not express, derogation must clearly result from the parties' intentions [*ibid.*].

117 In the case at hand, the Parties neither explicitly nor implicitly derogated from the CISG by implementing the Hardship Clause in the Sales Agreement. The explicitly listed events and the open formulation of "*comparable unforeseen events*" show that the Parties intended the Hardship Clause to be illustrative rather than exhaustive. Everything not mentioned explicitly in the Hardship Clause is therefore not excluded but open to interpretation. Under the Hardship Clause, it seems that the Parties intended to only regulate specific risks for CLAIMANT. This is demonstrated by the express wording of the Hardship Clause stating that "*Seller shall not be responsible for* […] *hardship*". Contrary to the Hardship Clause, CISG 79 remains neutral with regard to the responsible Party. If the Hardship Clause derogated from CISG 79, this would mean that RESPONDENT could not invoke CISG 79 in a case of hardship. This has never been addressed during the Parties' negotiations and contract conclusion and has never been their intent. The Hardship Clause only wants to specify one-sided risks.

118 In light of the above, by including the Hardship Clause into the Sales Agreement, the Parties did not derogate from CISG 79. Thus, CISG 79 remains applicable to the case at hand.

B. The Equatorianian tariff constitutes hardship under CISG 79

119 Invoking CISG 79 requires an impediment that is beyond the control of the disadvantaged party and that could not reasonably have been expected or avoided at the time of contract conclusion. Furthermore, the invoking party must not have assumed the risk of the

impediment [*CIETAC (1996); CIETAC (1997); Chemical Fertilizer Case; BOOG, p. 325; KRÖLL et al./ATAMER, Art. 79 paras. 43-45, 79; SCHLECHTRIEM/SCHWENZER/SCHWENZER, Art. 79, paras. 11-16; BRUNNER, pp. 398-399, 204; SCHWENZER I, p. 713; SCHWENZER II, p. 714; PETER, p. 237; LEE, p. 296*].

120 In the case at hand, it is undisputed that the Equatorianian tariff caused the increase of the price [*Answer, p. 6, paras. 9-11*]. As already shown above the risk of any additional tariff has not been shifted to CLAIMANT [*supra paras. 108 et seq.*]. This situation does not change in the light of hardship under CISG. Additionally, the imposition of the Equatorianian tariff is neither foreseen under the Hardship Clause [*supra paras. 99 et seq.*], nor is it foreseeable under the CISG. Furthermore, CLAIMANT had no influence on the imposition of the Equatorianian tariff [*supra para. 95*]. Moreover, the cost increase was unavoidable as the tariff was imposed after contract conclusion and before the last shipment was rendered [*Exh. C5, p. 14, para. 8; PO2, p. 58, para. 25*]. Lastly, the imposition of the tariff constitutes a circumstance that was beyond CLAIMANT's control. Therefore, the remaining issue is whether the imposition of the Equatorianian tariff constituted an impediment under CISG 79. It will be shown that the tariff was an impediment (**1**). Additionally, the already rendered performance will not exclude its right to invoke hardship under CISG 79 (**2**).

1. The Equatorianian tariff constitutes an impediment under CISG 79

121 Under to CISG 79, an impediment is required. An impediment is an event that makes it more difficult or impossible for one party to perform its obligations [*Vine Wax Case; CISG-AC No. 7, para. 26; LEE, p. 299; SCHLECHTRIEM/SCHROETER, p. 302, para. 678*]. Not only do natural occurrences but also man-made disasters, like acts of authority, qualify as an impediment [*BRUNNER, p. 206; KRÖLL et al./ATAMER, Art. 79, para. 46*]. The impossibility, as well as the unaffordability of performance can constitute an impediment [*Scafom v. Lorraine; CISG-AG No. 7, para. 26; PIROZZI, p.211; SCHLECHTRIEM/SCHROETER, p. 302, para. 678; SCHWENZER I, p. 713*]. For the unaffordability, a court assumed a price increase of 70% in a rather volatile market to be sufficient [*Scafom v. Lorraine*]. However, the threshold for unaffordability can be lowered, when the financial ruin is imminent [*BRUNNER, pp. 438-439; SCHWENZER I, p. 716*].

122 In the case at hand, the tariff affected CLAIMANT's third shipment, making it 30% more expensive, which makes it unaffordable for CLAIMANT. CLAIMANT's performance did not become impossible, since the import of horse semen was still permitted by Equatoriana. However, performance became excessively more difficult. Therefore, the relevant threshold

required for an impediment is reached for the following two reasons.

123 Jurisprudence regards a price increase of 70% in a volatile market as reaching the relevant threshold to be qualified as an impediment, even in the absence of a hardship clause [*Scafom v. Lorraine*]. In the present case, however, the Parties negotiations lead to the conclusion, that for CLAIMANT the threshold would be set at a low level [*supra para. 104*]. CLAIMANT made clear that it wanted to maintain the commercial basis of the deal [*Exh. C4, p. 12*]. Furthermore, CLAIMANT conducts business in a market that is not speculative at all, since there is no actual market price for frozen semen [*PO2, p. 57, para. 19*]. Therefore, a 30% price increase reaches the relevant threshold for an impediment, as it makes the deal unaffordable for CLAIMANT.

124 The threshold is to be set lower due to CLAIMANT's financial difficulties. According to Ms. Napravnik, CLAIMANT has been facing financial struggles during the last two years [*Exh. C8, p. 17; PO2, p. 59, para. 29*]. CLAIMANT has been making losses since 2014, and would be financially endangered if it had to bear the additional costs [*ibid.*]. Not only would CLAIMANT's profit margin be diminished, CLAIMANT's very existence would be jeopardised [*Exh. C8, p. 17*]. Considering, CLAIMANT's financial situation, the relevant threshold covers a price increase of 30%.

125 Taking into account the Parties negotiations and CLAIMANT's financial struggles, the increase of the price by 30% qualifies as an impediment according to CISG 79

2. The already rendered performance cannot be held against CLAIMANT

126 Pursuant to CISG 79, hardship can only occur when a party failed to perform. Once a party has performed, it is not entitled to invoke a substantial increase of the costs. However, in the present case, hardship occurred before the last shipment was due. Therefore, hardship became relevant before performance was rendered. Even though CLAIMANT performed at the urging of RESPONDENT [*Exh. R4, p. 36*], this does not affect its claim for hardship.

127 CLAIMANT will show that the already rendered performance cannot be held against it due to the following three reasons: First, CLAIMANT rendered performance to comply with its obligation to fulfil the contract according to the principle of *pacta sunt servanda* (**a**). Second, CLAIMANT performed to fulfil its duty to mitigate damages according to CISG 77 (**b**). Third, RESPONDENT misleadingly insisted on the delivery as fast as possible (**c**).

a. CLAIMANT performed to comply with the principle of *pacta sunt servanda*

128 According to CISG 28 and CISG 62, a contract is binding. The parties are obliged to perform

their obligations according to the fundamental principle *pacta sunt servanda* [*SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN, Art. 28, para. 1; SCHLECHTRIEM/SCHWENZER/MOHS, Art. 62, para. 1*]. In case of hardship, the CISG remains silent on whether the performance may be withheld. A case of hardship does therefore not release a party from its obligation to perform. On the other hand, hardship according to CISG 79 requires non-performance.

129 In the present case, hardship occurred before the last shipment was due. When CLAIMANT contacted RESPONDENT, the latter insisted on immediate delivery [*Exh. C7, p. 16; C8, pp. 17-18; R4, p. 36*]. Acting according to its wish, CLAIMANT delivered the last 50 doses and advanced the additional costs of USD 1,500,000 [*Exh. C8, p. 18*]. Thereby, CLAIMANT complied with the principle of *pacta sunt servanda*. The already rendered performance shall therefore not be held against CLAIMANT.

b. CLAIMANT's performance mitigated damage according to CISG 77

130 According to CISG 77, a party which relies on breach of contract must take reasonable measures to mitigate its loss. Mitigation of damage is regarded as a general principle in international arbitration [*ICC Award 4761; SCHLECHTRIEM/SCHWENZER/SCHWENZER, Art. 77, para. 1; SCHWENZER/MANNER, pp. 479-482*].

131 As soon as CLAIMANT knew that the imposed tariff increased the cost of the last shipment, it contacted RESPONDENT [*Exh. C7, p. 17*]. Mr. Shoemaker then urged Ms. Napravnik to authorise the shipment as planned, since RESPONDENT needed the doses and had already initiated the payment of the second installment [*Exh. C8, p. 18*]. As Mr. Shoemaker states, "[his] *primary concern was to ensure that the remaining 50 doses were actually shipped, some of which were urgently needed given that start of the breeding season".* Accordingly, withholding performance would have resulted in damages for RESPONDENT. Additionally, this would have caused damages to RESPONDENT since it planned to resell at least 25 doses per year to other breeders [*PO2, p. 56, para. 11*]. Thus, CLAIMANT fulfilled its duty to mitigate losses by maintaining the contract.

c. CLAIMANT performed based on misleading assertions made by RESPONDENT

132 According to CISG 7(1), the interpretation of the CISG shall be in regard to the principle of good faith in international trade. In *BRI Production "Bonaventure" v. Pan African Export* and in *Renard Constructions v. Minister for Public Works,* the arbitral tribunals regarded the principle of good faith as a fundamental duty of the parties. The concept of hardship is widely considered to lie in the principle of good faith [*BRUNNER, p. 394; VENEZIANO, p. 145*]. If a

change in circumstances leads to an imbalance between performance and consideration, insisting on performance may constitute a violation of the principle of good faith and abuse of rights [*ibid.*].

133 RESPONDENT urged CLAIMANT to deliver as soon as possible because, as from the outset of the contract, RESPONDENT planned to resell part of the goods [*PO2, p. 56, para. 11*]. RESPONDENT never mentioned its plans to resell the semen. After CLAIMANT made clear that a resale may only take place with express consent [*Exh. C2, p. 10*], RESPONDENT affirmed that it would use the semen for its own purposes [*Exh. C3, p. 11*].

134 Furthermore, when CLAIMANT requested renegotiation regarding the costs [*Exh. C7, p. 16; C8, p. 17*], Mr. Shoemaker reassured CLAIMANT that a solution would be found [*Exh. R4, p. 36*]. He did so without actual intent to act in accordance with his statement, as he admitted that he knew "*CLAIMANT would not deliver if* [he] *was to reject* [its] *request outright*" [*ibid.*]. RESPONDENT rejected CLAIMANT's request to renegotiate, right after CLAIMANT authorised the shipment and advanced the costs [*Exh. C8, p. 18*].

135 As shown above, RESPONDENT resold the doses although it knew that was against CLAIMANT's will and RESPONDENT never intended to amicably solve the problem of the increased costs. Instead, it deliberately misled CLAIMANT to authorise the shipment. This behaviour violated the principle of good faith and could even be viewed as an abuse of right according to CISG 7(1). As CLAIMANT always regarded its duties and RESPONDENT's wishes, the delivery of the last shipment should not be its disadvantage. Thus, the already rendered performance cannot be held against CLAIMANT.

C. The UPICC supplements CISG 79 for price adaptation

136 As shown above [*supra para. 113*], the CISG does govern the concept of hardship but does not settle it entirely. CISG 79 addresses the requirements for cases of hardship. However, this provision does not provide the appropriate remedies as it only exempts the breaching party from damages. As CLAIMANT will show, the absence of the appropriate remedies must be understood as a gap within the CISG, which shall be filled with the UPICC (**1**). Further it will be shown that under the UPICC adaptation of the price is allowed (**2**).

1. CISG 79 contains a gap regarding the remedies for hardship

137 The prevailing view is that CISG 79 governs cases of hardship [*Nuova Fucinati v. Fondmetall International; Scafom v. Lorraine; FLECHTNER I, p. 90; SCHWENZER I, p. 713; CISG-AC No. 7, para. 3.1; SCHLECHTRIEM/SCHWENZER/SCHWENZER, Art. 79, para. 31*]. Yet, CISG 79 only

mentions that a party shall not be liable for damages in a case of hardship. Therefore, the appropriate remedies for hardship are not governed by this provision. It follows that there is an internal gap which must be filled because a concept of hardship without any possible remedies would be a toothless tiger. CISG 7(2) prescribes that a gap in the CISG shall be filled by the general principles underlying the Convention [*Scafom v. Lorraine; BONELL, p. 317-318; FOUNTOULAKIS, p. 322; GARRO, pp. 1152, 1155-1160; BURKART, p. 222; VENEZIANO, p. 142*]. The UPICC is regarded as such general principles underlying the CISG [*Scafom v. Lorraine; Chemical Fertilizer Case; Electrical Appliances Case; Food Products Case; ICC Case 9117; ICC Case 14108; FOUNTOULAKIS, p. 322; KOTRUSZ, p. 151; GARRO, p. 1156; MICHAELS, p. 655; VENEZIANO, pp. 139-142*]. As the UPICC governs remedies for hardship, they provide the appropriate instrument to fill the gap according to CISG 7(2).

2. UPICC 6.2.3 regulates price adaptation

138 According to UPICC 6.2.3(1), "*in a case of hardship the disadvantaged party is entitled to request renegotiations*". Further, UPICC 6.2.3(3) states that "*upon failure to reach agreement within a reasonable time either party may resort to the court*". In the present case, CLAIMANT tried to renegotiate but RESPONDENT refued to cooperate [*Exh. C7, p. 16; C8, p. 18*]. Any attempts to find an amicable solution were unsuccessful [*Exh. C8, p. 18*]. Therefore, CLAIMANT resorted to the Tribunal.

139 UPICC 6.2.3(4) states that "*if a court finds hardship, it may if reasonable, terminate the contract at a date and on terms to be fixed* [(4)(a)]*, or adapt the contract with a view to restoring its equilibrium* [(4)(b)]*".* As shown above [*supra paras. 32 et seq.*], the termination of the contract is not a suitable option, as the tariff has already been paid and the goods have already been used. Therefore, termination is not reasonable.

140 Thus, UPICC 6.2.3(4)(b) explicitly provides the possibility of the adaptation of the contract in order to restore its equilibrium, if the tribunal finds it reasonable. In *Scafom v. Lorraine*, the Belgian Supreme Court ordered the seller to renegotiate the contract according to UPICC 6.2.3. The parties did not include a hardship clause in the contract. The Court assumed that renegotiation is appropriate, as the price for steel unforeseeably increased by 70% after the contract was concluded and therefore caused an impediment according to CISG 79(1) [*Scafom v. Lorraine*].

141 As in the present case, the contract was concluded under the CISG [*Scafom v. Lorraine; Exh. C5, p. 14, para. 14*]. Further, in both cases, an impediment according to CISG 79(1) had arisen [*supra para. 140*]. However, in the present case CLAIMANT tried to renegotiate, but

RESPONDENT refused to [*Exh. C8, p. 18*]. First, CLAIMANT tried to find a solution with Mr. Shoemaker regarding the price [*Exh. C7, p. 16*]. Later, CLAIMANT tried to renegotiate with RESPONDENT's CEO [*Exh. C8, p. 18*]. However, she angrily dismissed further renegotiations [*ibid*.] Therefore, the adaptation of the price is reasonable to restore the equilibrium of the contract. The equilibrium changed because the Equatorianian tariff was imposed and CLAIMANT paid the additional USD 1,500,000 for the last shipment. The original relationship of performance and counter-performance shifted to CLAIMANT's disadvantage. With a price adaptation, the Tribunal would restore the equilibrium of the contract. Thus, the UPICC should be considered to allow for price adaptation in the current case.

III. Conclusion on Issue 3

142 CLAIMANT acted in the best of its knowledge and experience. As the imposition of the Equatorianian tariff constitutes hardship, CLAIMANT is entitled to the payment of USD 1,250,000, resulting from an adaptation of the price excluding profit margin either under the Hardship Clause or under the CISG.

PRAYER FOR RELIEF

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

1. The Tribunal has power to adapt the contract because the Sales authorises it to do so;
2. CLAIMANT is entitled to submit evidence from the other arbitration;
3. CLAIMANT is entitled to the payment of USD 1,250,000 resulting from an adaptation of the price, either under the Hardship Clause or CISG 79.

CLAIMANT reserves the right to amend its prayer for relief as may be required.

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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, December 6, 2018

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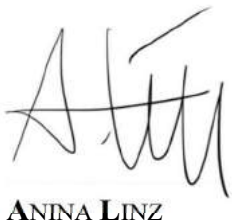

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