16th Annual

# Willem C. Vis (East) International Commercial Arbitration Moot

31 March – 7 April 2019

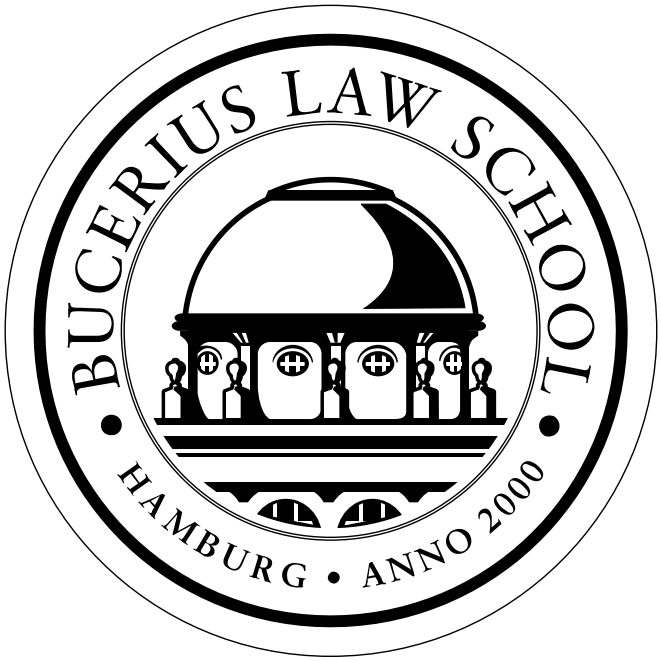
Hong Kong

## MEMORANDUM FOR CLAIMANT

BUCERIUS LAW SCHOOL

Hamburg, Germany

| *on behalf of* | *against* |
|---|---|
| Phar Lap Allevamento | Black Beauty Equestrian |
| Rue Frankel 1 | 2 Seabiscuit Drive |
| Capital City | Oceanside |
| Mediterraneo | Equatoriana |
| **-CLAIMANT-** | **-RESPONDENT-** |




HELENA PFAD | CLAUDIUS PIETZCKER | MARIA-TERESA KARL | FYNN SCHULTHEIß

# TABLE OF CONTENTS

# INDEX OF ABBREVIATIONS

| | |
|---|---|
| Alt. | alternative |
| ANoA | RESPONDENT's Answer to the Notice of Arbitration of 24 August 2018 |
| Art. /Artt. | Article / Articles |
| Award | Partial Interim Award rendered on 29 June 2018 in another Arbitration to which Respondent is party, which CLAIMANT seeks to introduce as evidence |
| CE | CLAIMANT's Exhibit |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| ed. | editor |
| *et seq.* | et sequens (and that which follows) |
| *et seqq.* | et sequential (and those which follow) |
| fn. | footnote |
| HKIAC Rules 2013 | 2013 HKIAC Administered Arbitration Rules |
| HKIAC Rules 2018 | 2018 HKIAC Administered Arbitration Rules |
| IBA Rules | IBA Rules on the Taking of Evidence in International Arbitration (2010) |
| *ibid.* | ibidem (in the same place) |
| *in casu* | in this case |
| *infra* | later in this writing |
| Letter of 2 October 2018 | Mr Langweiler's letter of 2 October 2018 (p. 50) |
| Letter of 3 October 2018 | Ms Fasttrack's letter of 3 October 2018 (p. 51) |
| Mediterranean Tariffs | 25% tariffs on agricultural products imposed on imports from Equatoriana by the President of Mediterraneo, Mr. Bouckaert, in April 2017 |
| Model Law | UNCITRAL Model Law on International Commercial Arbitration with amendments (2006) |
| NoA | CLAIMANT's Notice of Arbitration of 31 July 2018 |

| | |
|---|---|
| p. / pp. | page / pages |
| para. / paras | paragraph / paragraphs |
| Parties | Phar Lap Allevamento (CLAIMANT) and Black Beauty Equestrian (RESPONDENT) |
| PICC | UNIDROIT Principles of International Commercial Contracts (2016) |
| PO 1 | Procedural Order No. 1 of 5 October 2018 |
| PO 2 | Procedural Order No. 2 of 2 November 2018 |
| RE | RESPONDENT's Exhibit |
| *supra* | above in this writing |
| Tariffs | 30% tariffs on agricultural products (including horse semen) imposed on imports from Mediterraneo by the government of Equatoriana on 19 December 2017 |
| TLDB Principles | TransLex Principles |
| US$ | United States Dollars |
| WTO | World Trade Organization |

# INDEX OF AUTHORITIES

*Accaoui Lorfing, Pascale*, LA RENEGOCIATION CONTRACTUELLEMENT IMPREVUE - THE CONTRACTUALLY UNFORESEEN RENEGOTIATION, International Business Law Journal 2010, 35–55 [cited as: *Accaoui Lorfing (2010)*; cited at: para. 109 et seq.].

*Ashford, Peter*, THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION: A GUIDE, Cambridge, 2013 [cited as: *Ashford (2013)*; cited at: paras 49, 61].

*Bamberger, Heinz Georg/Roth, Herberth/Hau, Wolfgang/Poseck, Roman (Eds.)*, BECKOK BGB, Munich, 48. edition 2018 [cited as: *author, in: BeckOK-BGB (2018)*; cited at: para. 71].

*Beisteiner, Lisa*, CHAPTER I: THE ARBITRATION AGREEMENT AND ARBITRABILITY, THE (PERCEIVED) POWER OF THE ARBITRATOR TO REVISE A CONTRACT – THE AUSTRIAN PERSPECTIVE, Austrian Yearbook on International Arbitration 2014, 77–122 [cited as: *Beisteiner (2014)*; cited at: paras 26, 27, 29].

*Berger, Klaus Peter*, RENEGOTIATION AND ADAPTION OF INTERNATIONAL INVESTMENT CONTRACTS: THE ROLE OF CONTRACT DRAFTERS AND ARBITRATORS, Vanderbilt Journal of Transnational Law 2003, 1347–1380 [cited as: *Berger (2003)*; cited at: paras 25, 39, 92, 110].

*Bianca, C. Massimo/Bonell, Michael Joachim (Ed.)*, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, Milan, 1987 [cited as: *author, in: Bianca/Bonell (1987)*; cited at: para. 33, 129].

*Blackaby, Nigel/Partasides, Constantine/Redfern, Alan/Hunter, Martin (Ed.)*, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, Oxford, New York, 6. edition 2015 [cited as: *Redfern and Hunter (2015)*; cited at: paras 7, 9, 23, 29, 31, 50, 64].

*Blair, Cherie/Vidak Gojković, Ema*, WIKILEAKS AND BEYOND: DISCERNING AN INTERNATIONAL STANDARD FOR THE ADMISSIBILITY OF ILLEGALLY OBTAINED

EVIDENCE, 33 ICSID Review 235–259 (2018) [cited as: *Blair/Vidak Gojković (2018)*; cited at: paras 47, 54, 63].

*Born, Gary B.*, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, Alphen aan den Rijn, 2. edition 2015 [cited as: *Born Arb: Law & Practice (2015)*; cited at: paras 18, 40].

*Born, Gary B.*, INTERNATIONAL COMMERCIAL ARBITRATION, Alphen aan den Rijn, 2. edition 2014 [cited as: *Born, IntComArb (2014)*; cited at: paras 12, 50, 60].

*Brunner, Christoph/Lew, Julian D. M.*, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION, Austin, 2008 [cited as: *Brunner/Lew (2008)*; cited at: paras 89, 104, 105, 128].

*CISG Advisory Council*, EXEMPTION OF LIABILITY FOR DAMAGES UNDER ARTICLE 79 OF THE CISG, RAPPORTEUR: PROFESSOR ALEJANDRO M. GARRO, CISG-AC Opinion No. 7 2007 [cited as: *CISG-AC 7*; cited at: paras 128, 129, 133].

*Collins, Lord of Mapesbury/Harris, Jonathan*, DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS, London, 15. edition 2017 [cited as: *Dicey, Morris & Collins (2017)*; cited at: para. 20].

*Cremandes, Bernardo*, GOOD FAITH IN INTERNATIONAL ARBITRATION, 27 American University International Law Journal 761–790 (2012) [cited as: *Cremandes (2012)*; cited at: para. 52].

*DiMatteo, Larry A.*, CONTRACTUAL EXCUSE UNDER THE CISG: IMPEDIMENT, HARDSHIP, AND THE EXCUSE DOCTRINES, 27 Pace Int'l L. Rev (2015), available under: https://core.ac.uk/download/pdf/46713357.pdf [cited as: *DiMatteo (2015)*; cited at: para. 92].

*DiMatteo, Larry A./Janssen, André/Magnus, Ulrich/Schulze, Reiner (Ed.)*, INTERNATIONAL SALES LAW – CONTRACT, PRINCIPLES & PRACTICE: IMPOSSIBILITY AND HARDSHIP,

Munich, 2016 [cited as: *author, in: International Sales Law (2016)*; cited at: paras 89, 105].

*Felemegas, John*, COMPARATIVE EDITORIAL REMARKS ON THE CONCEPT OF GOOD FAITH IN THE CISG AND THE PECL, Pace International Law Review 2001, 399–406 [cited as: *Concept of Good Faith in the CISG and the PECL*; cited at: para. 109].

*Ferrari, Franco*, BURDEN OF PROOF UNDER CISG, Kluwer Law International, 1–8 [cited as: *Ferrari (2001)*; cited at: para. 75].

*Ferrari, Franco/Flechtner, Harry M./Brand, Ronald A. (Ed.)*, THE DRAFT UNCITRAL DIGEST AND BEYOND CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION PAPERS OF THE PITTSBURGH CONFERENCE ORGANIZED BY THE CENTER FOR INTERNATIONAL LEGAL EDUCATION (CILE), Munich, 2004 [cited as: *author, in: Ferrari et al. (2004)*; cited at: para. 135].

*Flechtner, Harry M.*, TRANSCRIPT OF A WORKSHOP ON THE SALES CONVENTION: LEADING CISG SCHOLARS DISCUSS CONTRACT FORMATION, VALIDITY, EXCUSE FOR HARDSHIP, AVOIDANCE, NACHFRIST, CONTRACT INTERPRETATION, PAROL EVIDENCE, ANALOGICAL APPLICATION, AND MUCH MORE, Journal of Law & Commerce 1999, 191–258 [cited as: *Workshop Pennsylvania*; cited at: paras 155, 158, 159].

*Greenberg, Simon*, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE, Cambridge, 2011 [cited as: *Greenberg (2011)*; cited at: para. 64].

*Horn, Norbert*, ADAPTION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE, Deventer, 1984 [cited as: *Horn (1984-I)*; cited at: para. 105].

*Horn, Norbert*, DIE ANPASSUNG LANGFRISTIGER VERTRÄGE, Frankfurt am Main, 1984 [cited as: *Horn (1984-II)*; cited at: para. 84].

*Hwang, Michael/Chung, Katie*, DEFINING THE INDEFINABLE: PRACTICAL PROBLEMS OF CONFIDENTIALITY IN ARBITRATION, 26 Journal of International Arbitration 609–645 (2009) [cited as: *Hwang/Chung (2009)*; cited at: para. 60].

*Janda, Constanze*, STÖRUNG DER GESCHÄFTSGRUNDLAGE UND ANPASSUNG DES VERTRAGES, Neue Justiz 2013, 1–10 [cited as: *Janda (2013)*; cited at: para. 89].

*Kröll, Stefan*, THE RENEGOTIATION AND ADAPTATION OF INVESTMENT CONTRACTS, in: *Horn, Norbert (Ed.)*, Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, The Hague, 2004 [cited as: *Kröll (2004)*; cited at: para. 89].

*Kubalczyk, Anna-Magdalena*, EVIDENTIARY RULES IN INTERNATIONAL ARBITRATION - A COMPARATIVE ANALYSIS OF APPROACHES AND THE NEED FOR REGULATION, 3 Groningen Journal of International Law 85–109 (2015) [cited as: *Kubalczyk (2015)*; cited at: para. 49].

*Kühner, Detlef*, THE REVISED IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, 27 Journal of International Arbitration 667–677 (2010) [cited as: *Kühner (2010)*; cited at: para. 49].

*Lee, Yong-Shik*, CONTINUING CONTROVERSY ON „UNFORESEEN DEVELOPMENTS" – REVIEWER'S NOTE, Journal of World Trade 1153–1157 (2003) [cited as: *Lee (2003)*; cited at: para. 92].

*Lew, Julian D. M.*, EXPERT REPORT (IN ESSO/BHP V. PLOWMAN), 11 Arbitration International 283–296 (1995) [cited as: *Lew (1995)*; cited at: para. 60].

*Lindström, Niklas*, CHANGED CIRCUMSTANCES AND HARDSHIP IN THE INTERNATIONAL SALE OF GOODS, Nordic Journal of Commercial Law 2006, 1–29 [cited as: *Lindström (2006)*; cited at: para. 88].

*Maskow, Dietrich*, HARDSHIP AND FORCE MAJEURE, 40 The American Journal of Comparative Law 657–669 (1992) [cited as: *Maskow (1992)*; cited at: paras 89, 105].

*Mehren, George M. von/Salomon, Claudia*, SUBMITTING EVIDENCE IN AN INTERNATIONAL ARBITRATION: THE COMMON LAWYER'S GUIDE, 20 Journal of International Arbitration 285–294 (2003) [cited as: *von Mehren/Salomon (2003)*; cited at: para. 49].

*Moser, Michael/Bao, Chiann*, A GUIDE TO THE HKIAC ARBITRATION RULES, Oxford, 2. edition 2017 [cited as: *Moser/Bao (2017)*; cited at: paras 49, 50, 57, 60].

*Kröll, Stefan/Mistelis, Loukas/Perales Viscasillas, Pilar (Ed.)*, UN Convention on Contracts for the International Sales of Goods (CISG), 2. edition 2018 [cited as: *author, in: Kröll et al. (2018)*; cited at: paras 71, 113, 126, 128, 129, 133, 135, 142, 152, 163].

*Pietrowski, Robert*, EVIDENCE IN INTERNATIONAL ARBITRATION, 22 Arbitration International 373–410 (2006) [cited as: *Pietrowski (2006)*; cited at: paras 50, 62].

*Pilkov, Konstantin*, EVIDENCE IN INTERNATIONAL ARBITRATION: CRITERIA FOR ADMISSION AND EVALUATION, The International Journal of Arbitration, Mediation and Dispute Management 2014, 147–155 [cited as: *Pilkov (2014)*; cited at: para. 50].

*Piltz, Burghard*, INTERNATIONALES KAUFRECHT. DAS UN-KAUFRECHT IN PRAXISORIENTIERTER DARSTELLUNG, Munich, 2. edition 2008 [cited as: *Piltz (2008)*; cited at: para. 135].

*Rauscher, Thomas/Krüger, Wolfgang (Ed.)*, MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG MIT GERICHTSVERFASSUNGSGESETZ UND NEBENGESETZEN, Munich, 5. edition 2017 [cited as: *author, in: MüKo-ZPO (2017)*; cited at: paras 26, 27].

*Reisman, W. Michael/Freedman, Eric E.*, THE PLAINTIFF'S DILEMMA: ILLEGALLY OBTAINED EVIDENCE AND ADMISSIBILITY IN INTERNATIONAL ADJUDICATION, 76 The American Journal of International Law 737 (1982) [cited as: *Reisman/Freedman (1982)*; cited at: para. 50].

*Säcker, Franz Jürgen/Rixecker, Roland/Oekter, Hartmut/Limperg, Bettina (Ed.)*, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, VOLUME 3, Munich, 7. edition 2016 [cited as: *author, in: MüKo-BGB (2016)*; cited at: paras 128, 142].

*Salje, Peter*, NATIONALE UND INTERNATIONALE VERTRAGSPRAXIS BEI ANPASSUNGSKLAUSELN, Neue Zeitschrift für Gesellschaftsrecht 1998, 161–167 [cited as: *Salje (1998)*; cited at: paras 84, 111].

*Sanders, Pieter (Ed.)*, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, The Hague, 2011 [cited as: *ICCA Guide (2011)*; cited at: para. 40].

*Schlechtriem, Peter/Schroeter, Ulrich G.*, INTERNATIONALES UN-KAUFRECHT: EIN STUDIEN- UND ERLÄUTERUNGSBUCH ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENEINKAUF, Tübingen, 6. edition 2016 [cited as: *Schlechtriem/Schroeter (2016)*; cited at: para. 157].

*Schmidt, Karsten (Ed.)*, MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH, VOLUME 5, Munich, 4. edition 2018 [cited as: *author, in: MüKo-HGB (2018)*; cited at: para. 152].

*Schwenzer, Ingeborg (Ed.)*, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG): SCHLECHTRIEM & SCHWENZER, Oxford, 4. edition 2016 [cited as: *author, in: Schlechtriem/Schwenzer (2016)*; cited at: paras 71, 87, 128, 142, 152].

*Schwenzer, Ingeborg*, FORCE MAJEURE AND HARDSHIP IN INTERNATIONAL SALES CONTRACTS, Victoria University of Wellington Law Review 709–726 (2008) [cited as: *Schwenzer (2008)*; cited at: paras 89, 127, 130].

*Smeureanu, Ileana M.*, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION, Alphen aan den Rijn, 2011 [cited as: *Smeureanu (2011)*; cited at: para. 60].

*Staudinger, Julius von (Ed.)*, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Berlin, 2018 [cited as: *author, in: Staudinger (2018)*; cited at: para. 142].

*UNCITRAL*, CISG SECRETARIAT COMMENTARY, UN DOC. A/CONF. 97/5, 1978, available under: http://www.cisg-online.ch/index.cfm?pageID=644 [cited as: *Secretariat Commentary*; cited at: para. 142].

*UNCITRAL*, DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 2016, available under: http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf [cited as: *Digest CISG*; cited at: paras 33, 124, 126, 134, 142].

*UNCITRAL Working Group*, REVISED DRAFT ARTICLES A TO G ON ADAPTATION AND SUPPLEMENTATION OF CONTRACTS, COMMENCEMENT OF ARBITRAL PROCEEDINGS, MINIMUM CONTENTS OF STATEMENTS OF CLAIM AND DEFENSE, LANGUAGE IN ARBITRAL PROCEEDINGS, COURT ASSISTANCE IN TAKING EVIDENCE, TERMINATION OF ARBITRAL PROCEEDINGS AND PERIOD FOR ENFORCEMENT OF ARBITRAL AWARD, A/CN.9/WG.II/WP.44, Yearbook of the United Nations Commission on International Trade Law 1984, 179–183 [cited as: *UNCITRAL Working Group (1984)*; cited at: paras 26 et seq.].

*Waincymer, Jeffrey*, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, Alphen aan den Rijn, 2012 [cited as: *Waincymer (2012)*; cited at: para. 50].

*World Trade Organization*, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 2. edition 2017 [cited as: *World Trade Organization (2017)*; cited at: para. 144].

*Yerxa, Rufus/Wilson, Bruce*, KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, Cambridge, 2005 [cited as: *Yerxa/Wilson (2005)*; cited at: para. 144].

REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE, October 1951 available under: http://www.sice.oas.org/dispute/gatt/50furhat.asp [cited as: *Withdrawal by the US of a Tariff Concession under Art. XIX of the GATT*; cited at: para. 92].

# INDEX OF COURT DECISIONS

| | | |
|---|---|---|
| **Austria** | Austrian Supreme Court | 10 November 1994 – 2 Ob 547/93 = CISG-online No. 117, available under: http://cisgw3.law.pace.edu/cases/941110a3.html [cited as: *Chinchilla Furs Case*; cited at: para. 33]. |
| | Austrian Supreme Court | 15 October 1998 – 2 Ob 191/98x = CISG-online No. 380, available under: http://cisgw3.law.pace.edu/cases/981015a3.html [cited as: *Austrian Wood Case I*; cited at: para. 162]. |
| | Austrian Supreme Court | 21 March 2000 – 10 Ob 344/99g = CISG-online No. 641 = CLOUT Case 425, available under: http://cisgw3.law.pace.edu/cases/000321a3.html [cited as: *Austrian Wood Case II*; cited at: para. 162]. |
| **Belgium** | Commercial Court Brussels | *Matermaco SA v. PPM Cranes Inc.*, 20 September 1999, XXV [2000] Yearbook Commercial Arbitration 673 [cited as: *Matermaco v. PPM Cranes*; cited at: para. 23]. |
| **England and Wales** | House of Lords | *Fiona Trust & Holding Corp v. Privalov*, 17 October 2007, [2007] UKHL 40 [cited as: *Fiona Trust & Holding Corp v. Privalov*; cited at: para. 41]. |
| | Court of Appeals | *Dolling-Baker v. Merrett*, 21 March 1990, [1990] 1 W. L. R. 1205 [cited as: *Dolling-Baker v. Merret*; cited at: para. 60]. |
| | Court of Appeals (Civ), | *Sulamérica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors*, 16 May 2012 – A3/2012/0249, EWCA Civ [2012], 638 [cited as: *Sulamérica v. Enesa*; cited at: paras 12, 20, 23]. |
| | Court of Appeals | *Emmott v. Michael Wilson & Partners Ltd*, 12 March |

| | | |
|---|---|---|
| | | 2008, 1 Lloyd's Law Reports 67 [cited as: *Emmott v. Michael Wilson & Partners*; cited at: para. 60]. |
| | High Court | *London & Leeds Estates Ltd v. Paribas Ltd. (No. 2)*, 28 July 1994, [1995] 1 EGLR 102 [cited as: *London & Leeds Estates Ltd v. Paribas Ltd. (No. 2)*; cited at: para. 60]. |
| | High Court (Commercial Court), | *Arsanovia Ltd & Ors v. Cruz City 1 Mauritius Holdings*, 20 December 2012, [2012] EWCH 3702 (Comm) [cited as: *Arsanovia v. Cruz City*; cited at: para. 12]. |
| | High Court (QB) | *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, 3 March 1981, [1981] 2 Lloyd's Law Reports 446 [cited as: *Black Clawson International v. Papierwerke Waldhof-Aschaffenburg*; cited at: para. 9]. |
| | High Court (Commercial Court), | *Leibinger & Anor v. Stryker Trauma GmbH*, 31 March 2006, [2005] EWHC 690 (Comm) [cited as: *Leibinger v. Stryker Trauma*; cited at: para. 11]. |
| | High Court of Justice (Commercial Court) | *Sumitomo v. Oil And Natural Gas Commission*, 23 July 1993, [1994] 1 Lloyd's Law Reports 45 [cited as: *Sumitomo v. Oil & Natural Gas*; cited at: para. 9]. |
| **France** | French Supreme Court | 30 June 2004 – Y 01-15.964 = CISG-online No. 870, available under: http://cisgw3.law.pace.edu/cases/040630f1.html [cited as: *Polyurethane Foam Case*; cited at: para. 134]. |
| | Court of Appeal Colmar | *Société Romay AG v. SARL Behr France*, 12 June 2001 – 1 A 199800359 = CISG-online No. 694, available under: http://cisgw3.law.pace.edu/cases/010612f1.html [cited as: |

| | | |
|---|---|---|
| | | *Société Romay AG v. SARL Behr France*; cited at: para. 134]. |
| | Court of Appeal Paris | *Société Bomar Oil N.V v. E.T.A.P*, 20 January 1987, Recue de l'Arbitrage 1987, 482 [cited as: *Société Bomar Oil N.V v. E.T.A.P*; cited at: para. 40]. |
| **Germany** | German Supreme Court | 28 November 1964 – VII ZR 112/62, Neue Juristische Wochenschrift 1964, 591 [cited as: *German Supreme Court, 28 November 1964*; cited at: paras 9, 12]. |
| | German Supreme Court | 30 September 2010 – III ZB 69/09, NJW-RR 2011, 569 [cited as: *German Supreme Court, 30 September 2010*; cited at: para. 40]. |
| | German Supreme Court | 24 March 1999 – VIII ZR 121/98 = Clout Case 271 = CISG Online No. 396, Neue Juristische Wochenschrift 1990, 2240, available under: http://cisgw3.law.pace.edu/cases/990324g1.html [cited as: *Vine Wax Case*; cited at: para. 134]. |
| | German Supreme Court | 31 October 2001 – VIII ZR 60/01 = CISG-online No. 617, available under: http://cisgw3.law.pace.edu/cases/011031g1.html [cited as: *Machinery Case*; cited at: para. 33]. |
| | Higher Regional Court Frankfurt | 24 September 1985, XV [1990] Yearbook of Commercial Arbitration 666 [cited as: *Higher Regional Court Frankfurt, 24 September 1985*; cited at: para. 35]. |
| | Higher Regional Court Frankfurt am Main | 30 August 2000 – 9 U 13/00 = CISG-online No. 594, available under: http://cisgw3.law.pace.edu/cases/000830g1.html [cited |

| | | |
|---|---|---|
| | | as: *Twisted Yarn Case*; cited at: para. 33]. |
| | Higher Regional Court Hamburg | 24 Januar 2003 – 11 Sch 06/01, XXX [2005] Yearbook Commercial Arbitration 2005, 509 [cited as: *Higher Regional Court Hamburg, 24 January 2003*; cited at: para. 12]. |
| | Higher Regional Court Hamburg | 28 February 1997 – 1 U 167/95, available under: http://cisgw3.law.pace.edu/cases/970228g1.html [cited as: *Iron Molybdenum Case*; cited at: para. 134]. |
| | Regional Court Alsfeld | *Flagstone Case*, 12 May 1995 – 31 C 534/94 = CLOUT Case 410, available under: http://cisgw3.law.pace.edu/cases/950512g1.html [cited as: *Flagstone Case*; cited at: para. 134]. |
| **Nether-lands** | Court of Appeal The Hague | *Owerri Commercial Inc. v. Dielle Srl.*, 4 August 1993, XIX [1994] Yearbook Commercial Arbitration 703 [cited as: *Owerri Commercial v. Dielle*; cited at: para. 20]. |
| | District Court Hertogenbosch | *Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV*, 2 October 1998 – CISG-online No. 1309, available under: http://cisgw3.law.pace.edu/cases/981002n1.html [cited as: *Milk Powder Case*; cited at: para. 134]. |
| **Singapore** | High Court | *BCY v. BCZ*, 9 November 2016 – [2016] SGHC 349, available under: https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/bcy-v-bcz-(for-release)-(08-11-2016)-pdf.pdf [cited as: *BCY v. BCZ*; cited at: paras 9, 12]. |
| **Sweden** | Swedish Supreme | *Bulgarian Foreign Trade Bank Ltd v. Al Trade Finance* |

| | | |
|---|---|---|
| | Court | *Inc.*, 27 October 2000 – T1881-99, XXVI [2001] Yearbook Commercial Arbitration 291 [cited as: *Bulbank Case*; cited at: para. 23]. |
| **Switzerland** | Swiss Supreme Court | *Tradax Export S.A. v. Amoco Iran Oil Company*, 7 February 1984, XI [1986] Yearbook Commercial Arbitration 532 [cited as: *Tradax Export v. Amoco Iran Oil*; cited at: para. 40]. |
| | Swiss Supreme Court | 5 April 2005 – 4C.474/2004, CISG-online 1012, available under: http://cisgw3.law.pace.edu/cases/050405s1.html [cited as: *TETA-Case*; cited at: para. 33]. |
| | Swiss Supreme Court | *FC Metalist v. UEFA & PAOK FC*, 27 March 2014 – 4A_362/2013, available under: http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202014%204A%20362%202013.pdf [cited as: *FC Metalist v. UEFA & PAOK FC*; cited at: paras 52, 61]. |
| | Commercial Court Zürich | 24 October 2003 – CISG-online No. 857, available under: http://cisgw3.law.pace.edu/cases/031024s1.html [cited as: *Commercial Court Zürich, 24 October 2003*; cited at: para. 87]. |
| | Regional Court St. Gallen | 3 July 1997 – 3PZ97/18 = CLOUT Case 215 [cited as: *Raw Materials Case*; cited at: para. 33]. |
| **United States** | US Supreme Court | *Scherk v. Alberto-Culver Co.*, 17 June 1974 – 94 S.Ct. 2449, 417 U.S. 506 [cited as: *Scherk v. Alberto-Culver*; cited at: para. 40]. |

| | |
|---|---|
| US Court of Appeals, 2nd Circuit | *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 7 June 2001, 252 F.3d 218 [cited as: *Dreyfus v. Blystad*; cited at: para. 35]. |
| US Court of Appeals, 5th Circuit | *Int'l Chem. Workers Union v. Columbian Chem. Co.*, 30 May 2003, 331 F.3d 491 [cited as: *Int'l Chem. Workers Union v. Columbia Chem. Co*; cited at: para. 47]. |
| US Court of Appeals, 7th Circuit | *Generica Ltd v. Pharm. Basics, Inc.*, 29 September 1997, 125 F.3d 1123 [cited as: *Generica v. Pharm. Basics*; cited at: para. 47]. |
| US Court of Appeals, 7th Circuit | *International Insurance Co. v. Caja Nacional De Ahorro y Seguro*, 7 June 2002 – 01–3054, 293 F.3d 392 [cited as: *Int'l Insurance Co. v. Caja Nacional De Ahorro y Seguro*; cited at: para. 40]. |
| US Court of Appeals, 11th Circuit | *MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*, 29 June 1998 – CISG-online No. 342, F.3d 144, 1384, available under: http://cisgw3.law.pace.edu/cases/980629u1.html [cited as: *Marble Case*; cited at: para. 33]. |
| US District Court for the Southern District of New York | *Hilaturas Miel, S.L. v. Republic of Iraq*, 20 August 2008 – CISG-online 1777, 573 F.Supp.2d 781 [cited as: *Acrylic Yarn Case*; cited at: para. 145]. |

# INDEX OF ARBITRAL AWARDS

Arbitration 47 [cited as: *ICC 11869*; cited at: paras 10, 12]

International Center for the Settlement of Investment Disputes

*Caratube International Oil Company LLP and Devincci Salah Hourani v. Kazakhstan*, 27 September 2017 – ICSID Case No. ARB/13/13, available under: https://www.italaw.com/sites/default/files/case-documents/italaw9324.pdf [cited as: *Caratube and Hourani v Kazakhstan, Award (2017)*; cited at: para. 53].

*ConocoPhillips v. Venezuela*, Dissenting Opinion of Georges Abi-Saab on the Decision on Respondent's Request for Reconsideration, 10 March 2014, available under: https://www.italaw.com/sites/default/files/case-documents/italaw3121.pdf [cited as: *Dissenting Opinion of Georges Abi-Saab (2014)*; cited at: para. 53].

*EDF (Services) Limited v. Romania*, Procedural Order No. 3, 29 August 2008 – ICSID Case No. ARB/05/13, available under: https://www.italaw.com/sites/default/files/case-documents/ita0264.pdf [cited as: *EDF v. Romania*; cited at: paras 49, 52, 62].

*Ioannis Kardassopoulos & Ron Fuchs v. Georgia*, Award, 3 March 2010 – ICSID Case No. ARB/07/15, available under: https://www.italaw.com/sites/default/files/case-documents/ita0347.pdf [cited as: *Kardassopoulos & Fuchs v. Georgia*; cited at: para. 50].

*Libanco Holdings Co. Ltd. v. Turkey*, Decision on Preliminary Issues, 23 June 2008 – ICSID Case No. ARB/06/8, available under: https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf [cited as: *Libanco Holdings v. Turkey*;

| | |
|---|---|
| | cited at: para. 52]. |
| | *Railroad Development Corp (United States of America) v. Republic of Guatemala*, Decision on provisional measures, 15 October 2018, available under: https://www.italaw.com/sites/default/files/case-documents/ita0700.pdf [cited as: *Railroad Development Corp. v. Guatemala*; cited at: para. 49]. |
| Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry | 11 May 1997, available under: http://cisgw3.law.pace.edu/cases/970511r1.html [cited as: *ICAC at the RF CCI (1997-I) Case*; cited at: para. 135] |
| | 5 June 1997 – CISG-online No. 1247, available under: http://cisgw3.law.pace.edu/cases/970605r1.html [cited as: *ICAC at the RF CCI (1997-II) Case*; cited at: para. 163]. |
| | 22 January 1997 – CISG-online No. 1296, available under: http://cisgw3.law.pace.edu/cases/970122r1.html [cited as: *Butter Case*; cited at: para. 142]. |
| WTO | *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, 14 December 1999 – WT/DS98/AB/R [cited as: *Korea – Dairy Products*; cited at: para. 92]. |
| | *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Panel, 21 December 2000 – WT/DS177/R; WT/DS178/R [cited as: *US – Lamb*; cited at: para. 92]. |
| Ad hoc (UNCITRAL Rules) | *Hulley Enterprises Limited (Cyprus) v. Russia*, Final Award, 18 July 2014 – PCA Case No. AA 226, available under: |

https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf [cited as: *Hulley v. Russia*; cited at: para. 53].

*Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, available under: https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf [cited as: *Methanex v. USA*; cited at: paras 49, 52].

*Veteran Petroleum Limited (Cyprus) v. Russia*, Final Award, 18 July 2014 – PCA Case No. AA 228, available under: https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf [cited as: *Veteran Petroleum v. Russia*; cited at: para. 53].

*Yukos Universal Limited (Isle of Man) v. Russia, Final Award*, Final Award, 18 July 2014 – PCA Case No. AA 227, available under: https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf [cited as: *Yukos v. Russia*; cited at: para. 53].

# STATEMENT OF FACTS

2 **Phar Lap Allevamento ["CLAIMANT"]** is the operator of Mediterraneo's oldest stud farm which covers all areas of the equestrian sport. **Black Beauty Equestrian ["RESPONDENT"]** owns several broodmare lines in Oceanside, Equatoriana, and established a racehorse stable three years ago.

| | | |
|---|---|---|
| **21 Mar 2017** | RESPONDENT contacts CLAIMANT via email with an inquiry about the availability of 100 doses of Nijinsky III's, CLAIMANT's best racehorse, frozen semen for purchase. | CE 1, p. 9 |
| **24 Mar 2017** | CLAIMANT sends an offer to RESPONDENT. | CE 2, p. 10 |
| **28 Mar – 11 Apr 2017** | The Parties negotiate the details of the Sales Agreement. They find a common understanding for DDP delivery in exchange for a hardship clause. CLAIMANT agrees to HKIAC arbitration in Mediterraneo, but deletes the choice of law for the arbitration agreement that was introduced by RESPONDENT. | CE 3, p. 11; CE 4, p. 12; RE 1, p. 33; RE 2, p. 34 |
| **12 Apr 2017** | CLAIMANT's Julie Napravnik and RESPONDENT's Chris Antley, the two main negotiators, are both injured in a car accident and unable to proceed with the negotiations. | CE 8, p. 17 |
| **6 May 2017** | The Sales Agreement is signed by both Parties. | CE 5, p. 14 |
| **19 Dec 2017** | Equatoriana imposes 30% Tariffs on agricultural products (including horse semen) imported from Mediterraneo. | CE 6, p. 15 |
| **20 – 23 Jan 2018** | CLAIMANT immediately contacts RESPONDENT about the Tariffs and requests a solution to authorise the third shipment. RESPONDENT urges CLAIMANT to deliver on time and assures CLAIMANT that a solution will be found. | CE 7, p. 16; CE 8, p. 18; RE 4, p. 36 |
| **23 Jan 2018** | CLAIMANT pays the Tariffs and delivers the third shipment. | CE 8, p. 18 |
| **31 Jul 2018** | CLAIMANT initiates arbitration to effect a price adaptation. | NoA, p. 3 |
| **2 and 3 Oct 2018** | CLAIMANT requests the Tribunal to admit an arbitral award ["Award"] as evidence. RESPONDENT claims that the Award is inadmissible due to an alleged illegal obtainment. | Letter of 2 and 3 October, pp. 50-51 |

# SUMMARY OF ARGUMENTS

3 **Issue 1**: The Tribunal has both jurisdiction and power to adapt the Sales Agreement. In Clause 14 of the Sales Agreement, the Parties expressly chose Mediterranean law. As it is generally the parties' common interest to subject their entire contractual relationship to only one law, this express choice of law must also govern to the separable arbitration agreement in Clause 15. Under Mediterranean General Contract Law both courts and arbitral tribunals are explicitly empowered to perform contract adaptations. *In casu*, the arbitration agreement defines the scope of the jurisdiction of the Tribunal: construction of the agreement under the applicable Mediterranean law shows that the its wording allows for contract adaptation. Further, this complies with the express intention of the Parties and is thus the only way to properly respect their party autonomy expressed in the arbitration clause.

4 **Issue 2**: CLAIMANT is entitled to submit as evidence the Award which was rendered in the course of another arbitral proceeding to which RESPONDENT is a party. Under the IBA Rules and standards set out in arbitral case law, the Award is admissible. RESPONDENT is unable to prove a violation of the duty of good faith as CLAIMANT itself was not involved in any form of illegal obtainment. Finally, RESPONDENT cannot cite any applicable privileges protecting the Award or substantiate that admitting the Award would be disproportionate.

5 **Issue 3**: CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under Clause 12 of the Sales Agreement and Art. 79 CISG. The basis for this adaptation is economic hardship suffered by CLAIMANT caused by the Tariffs on agricultural goods imposed by Equatoriana. Until now, CLAIMANT alone had to bare an additional financial burden bringing it to the edge of bankruptcy. RESPONDENT itself shares the view that the Tariffs constitute hardship and has made this very argument in another arbitration demanding a price adaptation due to tariffs imposed by Mediterraneo ["Mediterraneo Tariffs"]. This contradictory behaviour is evidenced in the Award CLAIMANT seeks to introduce. As a result of this hardship experienced by CLAIMANT, the contract needs to be adapted. Although the remedy of contract adaptation is not expressly provided for in Clause 12 of the Sales Agreement, the Clause needs to be reasonably interpreted to include such a remedy. Likewise, the wording of Art. 79 CISG does not include contract adaptation as a remedy. Nevertheless, such a remedy is available through external gap filling under Art. 7 (2) CISG and as a trade usage under Art. 9 (2) CISG.

## ISSUE 1: THE TRIBUNAL HAS JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

6 CLAIMANT seeks adaptation of the Sales Agreement under Clause 12 thereof and pursuant to Art. 79 CISG. With their arbitration agreement in Clause 15 of the Sales Agreement, the Parties referred the issue of contract adaptation to arbitration. While Respondent alleges that Danubian law governs the arbitration clause [*ANoA, p. 31 paras 13,14*], this argument fails to appreciate—among other things—the express choice of Mediterranean law in Clause 14 of the Sales Agreement. Thus, the arbitration clause is governed by the general contract law of Mediterraneo (**I.**). Thereunder, the Tribunal has the power to perform a contract adaptation (**II.**). Further, interpretation of the arbitration agreement confirms that the Tribunal has jurisdiction over the dispute (**III.**).

### I. Mediterranean law is applicable to the arbitration agreement

7 The law of an arbitration agreement is determined through an express (**A.**) or implied (**B.**) choice of the parties or, in the absence thereof, by its closest and most real connection (**C.**) [*cf. Redfern and Hunter (2015), p. 158 Note 7*]. All three tests concur in showing that Mediterranean law is applicable to the arbitration agreement; RESPONDENT's submission that Danubian law be applicable is not cogent.

#### A. The parties expressly agreed on Mediterranean law

8 In Clause 14 of the Sales Agreement, the Parties expressly elected the applicability of Mediterranean law in accordance with Art. 28 (I) of the Model Law which serves as both Mediterraneo's and Equatoriana's arbitration law [*cf. PO 2, p. 56 para. 14*]. This express choice of Mediterranean law also applies to the arbitration agreement.

##### 1. The arbitration clause is a part of the Sales Agreement

9 The arbitration agreement in Clause 15 is the last of 15 clauses of the Sales Agreement. As such, the same law should be applicable to this particular clause as is applicable to all other clauses [*cf. Redfern and Hunter (2015), p. 158 Note 7*]. Just like the other clauses, the arbitration agreement contains rights and obligations—namely, to refer the dispute to arbitration—assumed by the Parties under the contract. It does not seem plausible why the law applicable to this clause should be different from the law applicable to the rest of the contract. Consequently, many authorities have held that the law governing the substantive contract usually also governs the arbitration agreement [*Black Clawson International v. Papierwerke Waldhof-Aschaffenburg, p. 455 ("one will find in most instances that the law governing the [arbitration] agreement is the same as the substantive law of the contract in*

*which it is embodied…"); Sumitomo v. Oil & Natural Gas, p. 57 (The law governing the arbitration agreement and the law governing the substantive contract will "rarely differ"); cf. also German Supreme Court, 28 November 1964, p. 592; BCY v. BCZ, paras 49 et seqq.*]

10 *In casu,* the seat of the arbitration—Danubia—is outside the normal jurisdiction of the law chosen in the contract—Mediterranean law. However, this does not change the above assumption that the law of the underlying contract also applies to the arbitration agreement [*cf. ICC 11869, pp. 52 et seq., where the arbitrator in an arbitration under ICC Rules in Vienna found that English law was applicable to the arbitration clause as it was the law of the underlying contract*].

11 There even is precedent for the choice of law clause in a contract to apply to an arbitration agreement that is not contained in the original contract but forms a separate document: The English High Court held that German law was applicable to an arbitration agreement providing for arbitration in England because the contract contained a choice of German law [*Leibinger v. Stryker Trauma, p. 38*]. In that case, the arbitration agreement was regarded as an *"adjunct"* to the underlying contract even though it was contained in a separate document [*ibid.*]. *In casu,* the arbitration agreement was not a separate document but directly and physically incorporated into the contract, making for an even stronger connection. Therefore, it should be governed by the same law that governs the underlying contract.

**2. This does not violate the doctrine of separability**

12 It does not violate the doctrine of separability to extend the choice of law of the substantive contract to the arbitration agreement. This doctrine aims to ensure the arbitration agreement remains intact when the underlying contract is deemed void; it may also require a separate choice of law analysis for the arbitration agreement [*Born, IntComArb (2014), pp. 515 et seq.*]. It does not, however, mandate that the choice of law clause in the underlying contract cannot encompass the arbitration agreement. Rather—in the absence of indications to the contrary—, there is a strong presumption that the choice of law for the underlying contract also applies to the arbitration agreement [*cf. ICC 11869, p. 51 et seq. ("Irrespective of its separability there are no indications that the parties […] wanted to submit the arbitration agreement to a different law than the main contract."); Arsanovia v. Cruz City, para. 22 ("notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made"); German Supreme Court, 28 November 1964, p. 592; Higher Regional Court Hamburg, 24 January 2003, pp. 16 et seq.; ICC 9987, p. 349; Sulamérica v. Enesa, p. 26; BCY v. BCZ,*

*paras 60 et seq.*].

### 3. Summary

13 The Parties exercised their party autonomy when making the choice of law. Their express choice of Mediterranean law also applies to the arbitration agreement and must be respected.

## B. Alternatively, the Parties impliedly chose Mediterranean Law

14 If the Tribunal finds the express choice does not apply to the arbitration agreement, the Parties made an implied choice in favour of Mediterranean law. The Tribunal may draw indications of an implied choice from the circumstances surrounding the conclusion of the contract such as the drafting history (**1.**) and economic interests (**2.**) [*cf. Art. 8 (1) and (3) CISG; regarding the applicability of the CISG cf. infra para. 33*].

### 1. The drafting history shows an implied choice

15 The drafting history shows that Mediterranean law should be applicable. Claimant has an internal policy that demands that any contract submitted to foreign law is to be approved by the creditors' committee [*RE 2, p. 34*]. This committee consists of all of CLAIMANT's financing banks. An agreement to subject Clause 15 of the Sales Agreement to Danubian law—or any other law that is not Mediterranean—would thus have to be approved by the committee. This, in turn, would likely cause considerable delays in the conclusion of the contract. All this could be avoided by choosing Mediterranean law for the entire Sales Agreement including the arbitration clause. Accordingly, CLAIMANT removed the reference regarding the law of the arbitration clause in their draft proposal [*ibid.*] so that this law would be Mediterranean law—the same as the law of the rest of the contract.

16 RESPONDENT was aware of this policy and its consequences; in fact, RESPONDENT itself submitted this into evidence [*RE 2, p. 34*]. Since RESPONDENT itself was keen to speed up negotiations [*CE 3, p. 11 passim; RE 1 p. 33*], it seems only logical that RESPONDENT would agree with Mediterranean law to avoid unnecessary delays.

### 2. The implied choice is line with the Parties' economic interest

17 The Parties further had an economic interest in applying Mediterranean law to the arbitration clause. As evidenced by their communications, the Parties were interested in a long-term relationship [*CE 2, p. 10 paras 2 et seq.; CE 3, p. 11 para 2; CE 8, p. 17 para. 7*]. They further intended to minimise their costs and operate as efficiently as possible: they discussed quantity discounts and agreed on a DDP contract to benefit from CLAIMANT's experience and expertise relating to shipping [*cf. CE 3, p. 11 para. 2 and CE 4, p. 12 para. 2-4*].

18 To subject the arbitration clause to Mediterranean law helps the Parties' efforts to act as economically as possible. Arbitration is considered more cost-efficient than proceedings in national courts with multiple instances [*Born Arb: Law & Practice (2015) chapter 1 para. 23*]. While Danubian law would likely consider the requested contract adaptation *not* covered by the arbitration agreement [*cf. PO 1, p. 52 para. II bullet 3*], Mediterranean law would allow the dispute to be settled by arbitration [*infra paras 25 et seqq.*], thus reducing costs.

19 Further, if Danubian law were applicable to the arbitration agreement, the dispute would be split into two different proceedings: first, in the arbitral proceedings, the Tribunal would find that it does not have jurisdiction for a contract adaptation. Next, further proceedings in the national courts would ensue. This fragmentation of judicial review into two different forums with different systems of law cannot have been in the Parties' interests as it would cause delays and additional costs. Under Mediterranean law, however, the risk of such a split jurisdiction and its economic implications would be eliminated.

### C. Mediterranean has the closest and most real connection to the arbitration clause

20 Even if the Tribunal should not follow CLAIMANT's previous arguments, the arbitration clause has the closest and most real connection with the law of Mediterraneo and is thus governed by it [*cf. Sulamérica v. Enesa, para. 9; Owerri Commercial v. Dielle, p. 706; Dicey, Morris & Collins (2017), para. 16R–001*]. This is because *"several connecting factors"* [*ICC Case 8113, p. 325*] link the agreement to the law of Mediterraneo.

21 First, the arbitration agreement is closely linked to Mediterranean law by the nature of its underlying contract: it is one clause in the contract over the sale of horse semen by Mediterraneo-based CLAIMANT; this contract is governed by Mediterranean law.

22 Second, the arbitration agreement has a direct physical connection with the law of Mediterraneo due to the place of its conclusion: the Parties signed the Sales Agreement on 6 May 2017 in Mediterraneo [*PO 2, p. 56, para 13*].

23 Third, the closest and most real connection is not established simply because Danubia is the seat of the arbitration. Even in cases where courts applied the law of the seat [*cf. Sulamérica v. Enesa; Bulbank Case; Matermaco v. PPM Cranes*], the result was always to uphold an arbitration agreement as one party sought to invalidate it [*Redfern and Hunter (2015), p. 162 para. 3.27*]. One might regard this as the courts following the general pro-arbitration assumption [*infra para. 40*]. In the case at hand, however, the application of Danubian law would lead to the dispute *not* being settled by arbitration [*cf. PO 1, p. 52 para. II bullet 3*]. The seat thus does not argue in favour of applying its own law to the arbitration agreement. In

addition, Danubia was only chosen by the Parties because they needed a neutral forum with a functioning judicial system [*cf. PO 2, pp. 56 et seq. para. 14*].

### D. Summary

24 The express choice of Mediterranean law for the Sales Agreement also applies to the arbitration clause. In any case, party intent—evidenced by drafting history and economic interest—further demonstrates an implied choice of Mediterranean law. Alternatively, Mediterranean law is applicable to the arbitration clause as the law with the closest and most real connection. In short: all tests lead to the applicability of Mediterranean law to the arbitration clause. Consequently, Mediterranean law is the measure to determine that the Tribunal has the power and jurisdiction to adapt the contract.

## II. The Tribunal has the power to adapt the contract

25 In order to effectively act as a viable alternative to the national courts, tribunals generally have vast powers that cover direct legal claims as well as contract adaptations [*cf. Berger (2003), pp. 1375 et seq.*]. *In casu,* the Tribunal has the power to adapt the contract because state courts under Mediterranean law have such power (**A.**). Further, the Parties conferred the power to adapt to the Tribunal by agreement (**B.**). Neither of this infringes public policy (**C.**).

### A. Due to the Principle of synchronised powers, the Tribunal has at least the same powers as a state court

26 The powers of tribunals encompass all powers of state courts provided the issue is arbitrable ("principle of synchronised powers") [*Beisteiner (2014), p. 87; cf. also UNCITRAL Working Group (1984), para. 13; Münch in: MüKo-ZPO (2017), section 1029 para. 77*]. The Tribunal thus has the power to adapt the contract because Mediterranean state courts do. Mediterraneo General Contract Law—a verbatim adoption of the PICC [*PO 1, p. 53 para III (4)*]—provides in Art. 6.2.3 (4) (b) that the *"court"* may *"adapt the contract"* in cases of hardship. Art. 1.11 PICC further clarifies that *"court"* encompasses arbitral tribunals, statutorily reasserting the principle of synchronised powers. State courts as well as arbitral tribunals thus have the power under Mediterranean law to adapt contracts.

### B. Additionally, the Parties empowered the Tribunal to adapt the contract

27 In addition, the Tribunal may derive its power from an express empowerment by the Parties. As its powers stem from an arbitration clause, a tribunal may even be given additional powers broader than those of state courts [*Beisteiner (2014) pp. 96 et seqq.; UNCITRAL Working Group (1984), para. 17; cf. also Münch in: MüKo-ZPO (2017), section 1029 para. 76*].

28 Such a transfer of power has occurred here: according to Clause 15 of the Sales Agreement, *"any dispute arising out of this contract, including the […] interpretation […] thereof shall be referred to and finally resolved by arbitration […]"*. The Sales Agreement (*"this contract"*) further contains as Clause 12 an agreement to adapt the contract in certain cases of hardship [*infra paras 69 et seqq.]*. The power to adapt the contract has thus been explicitly transferred to the Tribunal.

### C. Public policy does not contradict this reasoning

29 Public policy does not prevent tribunals from adapting contracts. Particularly instructive is the widely accepted notion that tribunals may decide as *amiable compositeur* or *ex aequo et bono* [*cf. Art. 36.2 HKIAC Rules 2018; Art. 35(2) UNCITRAL Arbitration Rules (2013); Article 28(3) Model Law; Beisteiner (2014), p. 98; Redfern and Hunter (2015), pp. 217 et seq.*]. If parties may empower a tribunal to decide without the application of any specific law, they must also be able to transfer the power to adapt their contract.

### D. Summary

30 Under Mediterranean law, both state courts and tribunals have the power to adapt contracts pursuant to Art. 6.2.3 (4) (b) PICC. Furthermore, the Parties conferred the power to adapt their contract to the Tribunal through the drafting of their contract. Lastly, public policy allows the Tribunal to have such power. The Tribunal thus generally has the power to perform a contract adaptation. Next, CLAIMANT will show that the scope of the arbitration agreement *in casu* covers the contract adaptation.

## III. The Tribunal has the jurisdiction to adapt the contract

31 The jurisdiction of a tribunal is derived from the arbitration agreement [*cf. Redfern and Hunter (2015), p. 92 para. 2.63*]. In the present case, it provides that *"[a]ny dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration […]"* [*Clause 15 of the Sales Agreement*]. This agreement covers the Tribunal's jurisdiction over contract adaptations. This becomes clear when interpreting the agreement in accordance with the applicable Mediterranean law [*supra paras 7 et seqq.*]. Mediterranean law mandates that the CISG is applicable to the arbitration clause at hand (**A.**). Interpretation of the arbitration agreement under the CISG shows that the Tribunal has jurisdiction over the adaptation (**B.**)

### A. The CISG is applicable to the arbitration clause

32 Mediterranean jurisprudence stipulates that the CISG applies to an arbitration clause if its

underlying sales contract itself is subject to the CISG [*PO 1, p. 51 para. III (4)*]. Mediterraneo and Equatoriana are both contracting states of the CISG [*ibid.*]. Pursuant to Art. 1 (1) (a) CISG, the Sales Agreement between the Parties is thus governed by the CISG. Consequently, so is the arbitration clause contained in the Sales Agreement.

33 Art. 8 (1) CISG reads, *"statements made by […] a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was"*. The primary goal of contractual interpretation therefore is to ascertain the actual intent of the parties [*Digest CISG, p. 54 Notes 14, 21; Supermarket Products Case; Raw Materials Case*]. If an actual *"meeting of the minds"* cannot be proven, it has to be determined whether the actual will of one party was so easily recognisable by the other party that it *"could not have been unaware"* of it [*";TETA-Case*]. Under Art. 8 (3) CISG, due regard is to be given to the contract negotiations [*Digest CISG, p. 54 Note 5; Marble Case; Machinery Case; Chinchilla Furs Case; Twisted Yarn Case; Fashion Products Case; Farnsworth, in: Bianca/Bonnell, para. 1.4; Albrecht, Art. 8 para. 2; Peterkova, pp. 153 et seq.*]. The CISG thus does not mandate a strict four corner rule.

### B. The arbitration agreement is to be interpreted broadly

34 The scope of the arbitration clause covers the adaptation of the contract: interpretation of the agreement in accordance with the CISG shows that this was the Parties' intent.

#### 1. The wording of Clause 15 demands a broad construction

35 The starting point in determining the Parties' intent pertaining to the scope of the arbitration agreement is its wording. It refers all disputes "*arising out of*" the Sales Agreement to arbitration. This is a broad phrasing. Other arbitration agreements referencing disputes *"arising under"* the contract have been held to be narrower. In contrast, *"arising out of"* is deemed more likely to *"evidence […] the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause"* [*Dreyfus v. Blystad, pp. 225 et seq.; Higher Regional Court Frankfurt, 24 September 1985, p. 669*]. While subtle, such nuances in the language may be the deciding factor; they must be considered if the precise wording should have any significance at all.

36 The dispute between the Parties concerns a contract adaptation pursuant to Clause 12 of the contract or, alternatively, pursuant to Art. 79 CISG. One must note that Clause 12 is a hardship/force majeure clause. Such clauses inherently presuppose the adaptation of the contract. The dispute thus arises directly *out of this contract*.

37 The Parties quarrel over the contractual payment for the horse semen: CLAIMANT seeks

compensation for the unforeseen imposition of the Tariffs. Materially, the Parties are still in dispute over their original contract. It seems implausible that this dispute should be a separate issue and not one "*arising out of* " the contract. All indications point to the contrary.

38 The Parties' desire for a broad arbitration agreement is further evidenced by the paradigmatic listing of some of the types of dispute that fall under the agreement. It comprises any dispute arising out of the contract, *"**including** the existence, validity, interpretation, performance, breach or termination thereof"* (emphasis added). With this list, especially by prefacing it with *"including"*, the Parties made clear that they wanted all conceivable disputes to be resolved in arbitration. Only when extending its jurisdiction to the adaptation will the Tribunal properly honour the Parties' intent for a comprehensive dispute resolution mechanism.

**2. This is in line with the contractual structure and the NYC**

39 With their system of a hardship clause and an arbitration clause, the Parties created a mechanism for the Tribunal to decide over the contract adaptation in this case. Clause 12 regulates that CLAIMANT is not liable for undue hardship. In Clause 15, the Parties expressed their agreement to resolve all disputes through arbitration. This system demonstrates how the Parties foresaw both the possible need for a contract adaptation (Clause 12) as well as the need for an effective means of dispute resolution (Clause 15). Consequently, when adapting the contract, the Tribunal will merely apply and enforce the hardship clause of Clause 12, ensuring CLAIMANT does not unduly bear the burden of Equatoriana's Tariffs [*cf. Berger (2003), p. 1372 ("The arbitral tribunal therefore is not called upon to make a creative legal decision but rather to decide the rights and obligations of the parties.")*]. Regarding the adaptation pursuant to Art. 79 CISG, a similar principle applies. Any other conclusion would be counterproductive: no reasonable person would split this one issue into two independent proceedings in different jurisdictions [*cf. also supra para. 19*].

40 Furthermore, granting the Tribunal jurisdiction over the adaptation is in line with the New York Convention ["NYC"]: the pro-arbitration approach, articulated in Art. II NYC, stipulates that arbitration agreements and awards must be widely recognised [*German Supreme Court, 30 September 2010, p. 570; IMC Aviation Solutions v. Altain Khuder, para. 45; Int'l Insurance Co. v. Caja Nacional De Ahorro y Seguro, p. 399; cf. Scherk v. Alberto-Culver; Société Bomar Oil N.V v. E.T.A.P, pp. 485-486; Tradax Export v. Amoco Iran Oil, p. 535; Born Arb: Law & Practice (2015), § 2.02 para 7; ICCA Guide (2011), p. xi*]. It codifies the

understanding that arbitration is an appropriate and equal alternative to national courts. Likewise, the Arbitration Law of Mediterraneo demands a broad interpretation of arbitration agreements [*NoA, p. 7 para. 16*]. RESPONDENT's notion that the Tribunal lacks jurisdiction [*cf. ANoA, p. 31 para. 7*] would undermine both the NYC and the Mediterranean Arbitration Law.

### 3. The Parties intended a broad construction of the arbitration clause

41 As noted above, the Parties desired an equitable and economical method of dispute resolution [*supra paras 17 et seq.*]. Extending the Tribunal's jurisdiction to the contract adaptation is the best way to serve the Parties' interest in efficient proceedings: were the adaptation not covered, as RESPONDENT submits, a potentially long and costly battle over multiple instances in courts in various jurisdictions could ensue. It is thus in the Parties' interest to interpret the arbitration clause widely. Consequently, arbitration clauses are assumed to encompass *any* dispute arising out of the parties' relationship unless the wording explicitly refutes this assumption [*Fiona Trust & Holding Corp v. Privalov, para. 1*].

42 Another indication for the Parties' intent can be drawn from the drafting history. RESPONDENT's Mr Antley himself understood it to be the Tribunal's responsibility to perform the contract adaptation under the hardship clause [*CE 8, p. 17 para. 4*]. Ms Napravnik (CLAIMANT) agreed. Both Parties had come to a meeting of the minds regarding the Tribunal's jurisdiction over the contract adaptation.

43 This is further supported by the fact that Mr Antley was going to draft a clarification for either the hardship clause or the arbitration agreement with reference to the Tribunal's jurisdiction to perform the adaptation [*CE 8, p. 17 para. 4*]. Even though Ms Napravnik did not deem this legally necessary, the Parties wanted to avoid any doubt as to the Tribunal's duty to perform the adaptation [*ibid.*]. Due to the tragic accident, Mr Antley never provided such a draft proposal. Nevertheless, he did make a note in his negation file that the *"[c]onnection of [the] hardship clause with [the] arbitration clause"* still needed to be finalised, demonstrating that it was still his intention to include this clarification into the contract [*RE 3, p. 35*].

## C. Summary

44 Interpretation of the arbitration agreement shows that it covers contract adaptation. There is ample evidence of the Parties' intent to this effect. The arbitration agreement's wording is sufficiently broad. Both the NYC as well as the Mediterranean Arbitration Law presume a wide interpretation, and the Parties expressed their view that the Tribunal should adapt the contract. Considering the above, the Tribunal has jurisdiction to adapt the contract.

### IV. Conclusion

45 Under applicable Mediterranean law, the Tribunal has the power to adapt the contract. The Tribunal also has jurisdiction under the arbitration agreement to perform the adaptation.

## ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBIRAL PROCEEDINGS TO WHICH RESPONDENT IS A PARTY

46 CLAIMANT requests to submit an arbitral award from another arbitration to which RESPONDENT was a party ["the Award"] as evidence in order to prove inconsistent conduct of RESPONDENT with regard to the hardship clause. RESPODENT, however, purports that the Award is inadmissible. It claims that it was obtained illegally [*cf. Letter of 3 October*]. In this regard, RESPONDENT alleges that the Award has either been leaked by former employees or obtained in the course of a hack of RESPONDENT's computer systems. Contrary to RESPONDENT's argument, however, the Award is admissible under all applicable rules and standards.

47 The Award is admissible under all applicable rules. The Tribunal has a wide discretion to determine the admissibility of evidence [*cf. Generica v. Pharm. Basics, p. 1130; Int'l Chem. Workers Union v. Columbia Chem. Co, p. 497; Blair/Vidak Gojković (2018), p. 236*]. The applicable procedural law, Art. 22 HKIAC Rules 2018, provides that „*the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence."* A similar provision is incorporated in Art. 18 (2) sentence 2 Mediteranneo Arbitration Law. However, the Tribunal needs to take recourse to rules and standards that reflect international arbitral customary law, since neither the applicable rules nor an express agreement of the parties provide detailed standards for the admissibility of evidence (**I.**). Under these rules and standards, the Award is admissible (**II.**).

### I. The Tribunal should apply the IBA Guidelines and arbitral case law as internationally recognised standards

48 The Tribunal should exercise its discretion under Art. 22.2 HKIAC Rules 2018 by taking recourse to the IBA Rules and arbitral case law to assess the admissibility of the Award.

49 The IBA Rules are a vital source for HKIAC tribunals to structure the evidentiary procedure [*cf. Moser/Bao (2017), p. 191*]. As the IBA Rules *"reflect the experience of recognized professionals in the field and draw their strength from the intrinsic merit and persuasive value"* [*Art. 1 para. 1 IBA Rules*], the Tribunal can choose to apply them without an express agreement of the parties [*Railroad Development Corp. v. Guatemala, para. 15*]. Further, the IBA Rules are *"well received as a useful harmonisation of the procedures commonly used in*

*international arbitration"* [*Ashford (2013), p. 6; cf. von Mehren/Salomon (2003), p. 292*]. The IBA Rules are the ideal source to identify international standards for the evidentiary procedure as they balance the complexities arising from the diverse legal backgrounds of parties, counsels and arbitrators [*Kubalczyk (2015), p. 96; Kühner (2010), p. 667; Preamble 1 of the IBA Rules*]. Additionally, the Tribunal should have recourse to arbitral precedent addressing procedural issues not explicitly settled in the applicable laws [*see, e.g., EDF v. Romania, para. 10 et seq. applying Methanex v. USA*].

### II. Applying these principles renders the evidence admissible

50 As a general rule in international arbitration, each party carries the burden to prove the facts necessary to establish its claim or defence [*Pietrowski (2006), p. 379; Waincymer (2012), p. 762*]. This rule is included in Art. 22.1 HKIAC Rules 2018. In international arbitration, there is a general presumption that evidence which is relevant to the case is admissible [*Moser/Bao (2017), p. 193; cf. also Pietrowski (2006), p. 378; Pilkov (2014), p. 148*]. Under the IBA Rules, this presumption can only be rebutted if evidence is *"irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Art. 9.2 of the IBA Rules"* [*Born, IntComArb (2014), p. 2311*]. In its famous *Corfu Channel Case*, the International Court of Justice established the fundamental rule of international law that illegal obtainment does not render evidence *per se* inadmissible [*Corfu Channel Case paras 34-36; cf. Reisman/Freedman (1982), p. 748*]. The applicable standard of proof is a *"'balance of probability' standard"* [*Born, IntComArb (2014), p. 2314; Redfern and Hunter (2015), p. 378; cf. Kardassopoulos & Fuchs v. Georgia, para. 229*].

51 Applying these standards, the Award admissible. RESPONDENT carries the burden of proof regarding the inadmissibility of any evidence submitted by CLAIMANT and is unable to supply sufficient proof that the Award was obtained illegally. Even if the Tribunal finds that there has been an illegal obtainment of the evidence, admitting the evidence would not violate a duty of good faith as CLAIMANT itself was not involved in any illegality (**1.**). Further, the evidence is not privileged (**2.**).

#### A. Admitting the evidence would not violate a general doctrine of good faith

52 The principle of good faith applies to all parties in arbitral proceedings [*Cremandes (2012), p. 784*] and is also reflected in the third preamble of the IBA Rules. The tribunal in *Methanex v. USA* applied good faith as a standard for assessing the admissibility of illegally obtained evidence. It was held that documents obtained by Methanex from trash cans on another company's premises were not admissible because Methanex violated its duty of good faith in

obtaining them [*Methanex v. USA, paras 54, 58*]. This ruling was confirmed in several other cases: in *EDF v. Romania* the tribunal directly applied the *Methanex* standard [*EDF v. Romania, para. 38*] and did not admit a secretly taped audio recording as evidence. The tribunal in *Libanco Holdings Co. Ltd. v. Turkey* excluded evidence that was obtained through wiretapping by Turkish intelligence, as *"parties have an obligation to arbitrate fairly and in good faith*" [*Libanco Holdings v. Turkey, para. 78*]. Finally, the Swiss Supreme Court set aside an award that relied on illegally obtained evidence finding that it violated public policy [*FC Metalist v. UEFA & PAOK FC, para. 3.2.1*]. The facts common to all of these cases was that the party which later submitted the evidence had performed the illegal obtainment itself.

53 In contrast to the decisions cited above, evidence that was undisputedly obtained through hacking or other illegal means by third parties has been admitted by tribunals. In the identical final awards in *Yukos*, *Hulley* and *Veteran Petroleum*, the tribunal did not even discuss the admissibility of documents that had been illegally made public on the WikiLeaks Website. Instead, it explicitly relied on them in its award [*Yukos v. Russia; Hulley v. Russia; Veteran Petroleum v. Russia, cf. paras 1186, 1189, 1202, 1213, 1223 respectively*]. Likewise, the Tribunal in *Caratube v. Kazakhstan* admitted documents that had been obtained by hackers and made public as *"Kazakh Leaks"* [*Caratube and Hourani v. Kazakhstan, Award (2017), para. 1261*]. In his dissent in *ConocoPhillips v. Venezuela*, Georges Abi-Saab said that tribunals must not ignore the existence and relevance of leaked documents as evidence due to their *"high degree of credibility"* [*Dissenting Opinion of Georges Abi-Saab (2014), para. 64*].

54 The most important conclusion that can be drawn from this case law analysis is that there is no *fruit of the poisonous tree* doctrine in international arbitration [*Blair/Vidak Gojković (2018), p. 238*]. Thus, merely using documents that were obtained illegally by a third party does not violate a duty of good faith. It therefore does not constitute a ground of exclusion. A good faith violation could only in the obtainment itself.

55 Here, CLAIMANT was not and will not be involved in any form of illegal obtainment. Rather, it will obtain the Award through acquisition from a company that *"provides intelligence on the horseracing industry"* [*PO 2, p. 61, para. 41*]. Hence, the Award is admissible as CLAIMANT did neither hack into RESPONDENT's systems (**a.**) nor did it violate a confidentiality agreement (**b.**).

### 1. CLAIMANT itself was not involved in any hacking

56 CLAIMANT was not involved in any hacking. CLAIMANT neither hacked into RESPONDENT's systems itself, nor did it commission the hack. Also, CLAIMANT is not

responsible for any hacking by hiring the intelligence company. Even this company itself acquired documents only after the hack had already occurred. Under the good faith standard described above, RESPONDENT would have to prove that CLAIMANT itself hacked into its systems. The mere reliance on illegally obtained documents does not amount to a good faith violation. RESPONDENT, however, has never even alleged that CLAIMANT performed the hack itself, still less offered any evidence in this regard. As no good faith violation is given, the fact that there might have been an illegal obtainment through hacking at some point is not enough to render the Award inadmissible.

### 2. CLAIMANT itself did not illegally obtain the Award by violating a confidentiality agreement

57 Art. 9 (2) (e) of the IBA Rules states one of the exceptions to the general presumption of admissibility, namely that the tribunal shall exclude any evidence that it deems to be inadmissible on compelling grounds of commercial or technical confidentiality. The arbitral proceedings that resulted in the Award were conducted under the HKIAC Rules 2013. Thus, a confidentiality obligation could arise under Art. 42 HKIAC Rules 2013. Due to the principle of relativity of contractual obligations [*cf. Moser/Bao (2017), p. 282*], Art. 42 is, in general, only binding for the parties to the respective arbitration. Art. 42.2 HKIAC Rules 2013 contains a list of non-parties that are exceptionally bound by the confidentiality obligation. The list contains, *inter alia*, the arbitral tribunal and its secretary, experts, and witnesses, but not unrelated third parties such as CLAIMANT. Thus, RESPONDENT's argument that CLAIMANT is bound by the confidentiality agreement that was concluded by the parties to the other arbitration [*Letter of 3 October 2018*] lacks a legal basis. Consequently, CLAIMANT did not obtain the Award in violation of a confidentiality agreement.

### 3. Conclusion

58 RESPONDENT fails to meet the required standard of proof for a good faith violation. There has not been any such violation. Thus, the admissibility of the evidence cannot be denied because of an alleged illegal obtainment.

## B. The evidence is not privileged

59 The Award that CLAIMANT seeks to introduce cannot be excluded on grounds of privilege as there is no general duty of confidentiality in international arbitration (**a.**) and admitting the Award would not be disproportionate (**b.**).

### 1. There is no general duty of confidentiality in arbitration

60 The Award should not be privileged due to a *general* duty of confidentiality [*cf. Born, IntComArb (2014), p. 2785; Lew (1995), esp. paras. 11 and 28; Smeureanu (2011), p. 22*]. To the contrary, courts in several cases have ruled that third parties may even be entitled to documents from other arbitrations if the information is relevant to their own case: the High Court of Australia held that it did not consider confidentiality to be *"an essential attribute of a private arbitration"* [*Esso Australia v. Plowman, para. 35*]. This approach was also adopted in *United States v. Panhandle Eastern Corp.* [*United States v. Panhandle Eastern Corp., pp. 349 et. seq.*]. Traditionally, English courts take a more restrictive approach to confidentiality in arbitration [*cf. Dolling-Baker v. Merret*]. But even these courts find that there is no absolute confidentiality of arbitration [*Emmott v. Michael Wilson & Partners, paras 85 et. seqq.; Hwang/Chung (2009), p. 612*]. In addition, only the parties are bound to confidentiality agreements due to the principle of relativity of contractual obligations [*cf. Moser/Bao (2017), p. 282*]. Therefore, RESPONDENT's allegation that Art. 42 HKIAC Rules 2013 constitutes an absolute obligation of confidentiality [*Letter of 3 October 2018*] is incorrect. In *London and Leeds Estates Ltd v. Paribas Ltd (No 2)*, the court rejected objections on grounds of confidentiality and upheld a subpoena against an expert witness who had given contradictory statements in different arbitrations [*London & Leeds Estates Ltd v. Paribas Ltd. (No. 2), esp. pp. 109 et seq.*]. Applying this rationale to the present case, RESPONDENT must not rely on confidentiality to conceal its inconsistent behaviour.

### 2. Admitting the evidence would not be disproportionate

61 The Tribunal may exclude evidence based on considerations of procedural economy and proportionality pursuant to Art. 9 (2) (g) IBA Rules. The IBA Rules leave arbitral tribunals with the discretion to assess the probative value of the evidence presented [*Ashford (2013), p. 146*], which is exercised through balancing the interests of both parties [*FC Metalist v. UEFA & PAOK FC, para. B.c.*]. Evidence may only be excluded on the basis of such a balancing test. In the case at hand, however, it would not be disproportionate to admit the Award. It is an authentic and persuasive piece of evidence. Moreover, admitting the Award would encourage fair and efficient proceedings.

62 In *EDF v. Romania* the tribunal held that *"proven authenticity is in fact an essential condition for the admissibility of […] evidence"* [*EDF v. Romania, para. 29*]. The authenticity of the Award has not been challenged by RESPONDENT in the case at hand. Further, there is no *best evidence rule* in international arbitration [*Barcelona Traction, Separate Opinion of Judge*

*Fitzmaurice (1970), p. 98; cf. Pietrowski (2006), p. 393*]. Consequently, it is irrelevant that CLAIMANT can only obtain a copy of the Award.

63 The principle of efficiency in arbitration is laid down in Art. 13.5 HKIAC Rules 2018, as well as Preamble 1, Artt. 2.1 and 9 (2) (g) IBA Rules. Fair and efficient conduct requires that all relevant evidence is available to arbitral tribunals [*cf. Blair/Vidak Gojković (2018), p. 236*]. The Award is of high probative value as it gives proof of RESPONDENT's inconsistent conduct. It is therefore a crucial source of information for the Tribunal [*infra paras 75 et seqq.*]. Therefore, admitting the Award would enhance the efficiency of the proceedings.

64 Additionally, the duty to conduct fair proceedings in Art. 13.5 HKIAC Rules 2018 is mainly related to the requirement of equal treatment of the parties. This is established in Art. 13.1 HKIAC Rules 2018 and generally perceived to be an essential principle of international arbitration [*Redfern and Hunter (2015), p. 356*]. This requirement is also incorporated in Art. V (2) (b) NYC. Under this provision, the enforcement of an award can be refused if one of the parties was not able to fully present its case. The Award is highly important for CLAIMANT in order to fulfil its burden of proof. The Tribunal should admit the evidence in order to accomplish its duty to render an enforceable award [*Greenberg (2011), p. 268*].

65 In light of the above, CLAIMANT's interests in proving its factual allegations and in fair proceedings outweigh RESPONDENT's interest in maintaining the confidentiality of the other arbitral proceedings. Thus, admitting the Award would not be disproportionate.

### 3. Conclusion

66 CLAIMANT itself did not illegally obtain the evidence by being involved in hacking or a comparable act. There is no *fruit of the poisonous tree* rule in international arbitration. Further, there is no confidentiality rule preventing the introduction of the Award in the instant case. To the contrary, admitting the Award will advance fairness, equality and efficiency.

## ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE

67 The unexpected imposition of Tariffs on agricultural goods by the government of Equatoriana made the delivery of the third shipment of horse semen 30% more expensive. As soon as CLAIMANT learned about this impediment, it contacted RESPONDENT to find a mutually acceptable solution [*CE 7, p. 16 passim*]. RESPONDENT, however, required timely delivery and, to achieve this, deliberately gave the impression that it was willing to bear the bulk of the additional costs [*cf. RE 4, p. 36 passim*]. In good faith, CLAIMANT relied on this impression and delivered the third shipment, paying the Tariffs. Following this, RESPONDENT broke

off the negotiations in an aggressive manner and is unwilling to bear any part of the additional costs [*cf. CE 8, p. 18*].

68 This behaviour of RESPONDENT has caused the current situation: the shipment is already delivered and RESPONDENT refuses to negotiate while CLAIMANT is now facing bankruptcy [*cf. PO 2, p. 59 para 29*]. In light of this, CLAIMANT has no chance but to resort to arbitration and ask the Tribunal to adapt the contract. This adaptation can be performed under Clause 12 of the Sales Agreement (**I.**), which was specifically inserted into the contract to protect CLAIMANT from risks such as the Tariffs at hand. In any case, CLAIMANT also has a claim pursuant to Art. 79 CISG (**II.**).

## I. CLAIMANT is entitled to contract adaptation under Clause 12

69 Clause 12 of the Sales Agreement 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 financial strain put on CLAIMANT as a result of the Tariffs introduced by the government of Equatoriana constitutes such a case of hardship (**A.**). As a result, the contract needs to be adapted by the Arbitral Tribunal (**B.**).

### A. Tariffs constitute hardship in the sense of Clause 12

70 The 30% Tariffs on agricultural products, including horse semen, caused hardship for CLAIMANT in the sense of Clause 12. This becomes evident when interpreting the Clause under Art. 8 CISG, which is applicable pursuant to Art. 1 (1) (a) CISG [*supra para. 33*]. It was the Parties' joint intention and understanding that the term "*hardship*" should be interpreted broadly to cover a wide range of risks thus also covering tariffs (**1.**). Even if one assumed the Parties' intent was unclear on this issue and interpreted the clause objectively pursuant to Art. 8 (2) CISG, one would reach the same conclusion (**2.**). Lastly, the Tariffs were also "*unforeseen"* in the sense of Clause 12 (**3.**).

#### 1. The Parties agreed that the Clause should cover a wide range of risks

71 Pursuant to Art. 8 (1) CISG, *"statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what his intent was"*. Pursuant to Art. 8 (3) CISG, regard is to be given to the negotiations [*supra para. 33*]. While the wording of Art. 8 CISG refers to *"statements"* it is undisputed that it also applies to the interpretation of contractual terms [*cf. Schmidt-Kessel, in: Schlechtriem/Schwenzer (2016), para. 3; cf. also Zuppi, in: Kröll et al. (2018), para. 13; and Saenger in: BeckOK-BGB (2018), Art. 8 CISG para. 1*].

72 In the following, CLAIMANT will illustrate that the drafting history of Clause 12 shows that the Clause was meant broadly and thus also covers tariffs (**a.**). This is further supported by the subsequent behaviour of RESPONDENT in another arbitration where it understood tariffs to constitute "hardship" (**b.**).

**a. This is evidenced in the drafting history**

73 Clause 12 was included into the Sales Agreement after CLAIMANT agreed to a DDP delivery, which RESPONDENT requested due to CLAIMANT's *"greater experience in the shipment of frozen semen"* [*CE 3, p. 11*]. A *"Delivery Duty Paid"* clause usually includes the deliverer's obligation to carry all risks, including financial risks, of the delivery until it arrives at the buyer's premises [*cf. Gaston Schul BV v. Staatssecretaris van Financiën, para. 40*]. However, CLAIMANT told RESPONDENT that it was *"not willing to take over **any** further risks associated with such a change in the delivery terms, in particular changes in customs regulations or import restrictions"* (emphasis added) and requested that *"[a]t minimum, a hardship clause should be included into the contract to address such subsequent changes"* [*CE 4, p. 12]*. This shows that CLAIMANT should be protected against all risks stemming from changed circumstances. The enumeration of risks in Clause 12 of the Sales Agreement is only exemplary. This is also reflected in the wording which refers to *"other comparable unforeseen events"*.

74 CLAIMANT also explained that it needed a hardship clause due to its past experiences with *"unforeseeable additional health and safety requirements"* [*CE 4, p. 12*]. This case had been *"widely reported in the press as it nearly resulted in the insolvency of Claimant"* [*PO 2, p. 58 para. 21*]. Furthermore, RESPONDENT was aware of rumours that CLAIMANT was still in economic difficulties [*PO 2, p. 58 para. 22*]. CLAIMANT also stated that an increase of the cost by up to 40 % would *"destroy the commercial basis of the deal"* [*CE 4, p. 12*]. Thus, it should have been clear to RESPONDENT that due to CLAIMANT's fragile economic condition, it was essential for CLAIMANT to be protected against any changes that would make performance more expensive. Therefore, the clause has to be interpreted broadly. Hence, pursuant to Art. 8 (1) CISG, the hardship clause is applicable to the Tariffs.

**b. RESPONDENT's behaviour in other proceedings demands a broad construction**

*75* Furthermore, in analysing the Parties' intent, pursuant to Art. 8 (3) CISG, *"due consideration is to be given to all relevant circumstances […] and any subsequent conduct of the parties."* Under this provision, the subsequent conduct of RESPONDENT regarding its involvement in

another arbitration is a relevant criterion. Any party which seeks to derive beneficial legal consequences from a provision has to prove the factual prerequisites of that provision [*cf. Ferrari (2001), p. 2*]. CLAIMANT complies with this burden of proof by submitting the Award into this trial. The Award is admissible evidence [*see supra paras 46 et seqq.*]. It shows RESPONDENT's subsequent behaviour and proves its understanding of the term *"hardship"* as the facts of that proceeding (**i.**) are comparable to those of the instant case (**ii.**).

**i. The other proceedings also concerned tariffs**

76 RESPONDENT's second arbitration was the result of the introduction of 25% tariffs on *"living animals"* imposed by Mediterraneo [*PO 2, p. 58 para. 24*]. RESPONDENT was the seller in this dispute and claimed that the price of a mare it was selling to a buyer in Mediterraneo had to be adapted under the ICC Hardship Clause 2003 and Mediterranean Contract Law [*PO 2, p. 60 para 39*].

77 The underlying contract included a DDP Mediterraneo clause, which meant RESPONDENT would have had to carry the risk of the delivery [*PO 2, p. 60 para. 39*]. RESPONDENT had asked the buyer from Mediterraneo for a renegotiation of the price but the buyer refused and *"challenged the powers of the arbitrator to adapt the contract"* [*ibid.*].

**ii. The other proceedings are comparable to the case at hand**

78 RESPONDENT's argument in that arbitration shows that its understanding of *"hardship"* covers newly introduced tariffs. In fact, the Tariffs imposed on CLAIMANT's delivery of frozen semen are even 5% higher than the Mediterranean Tariffs imposed on RESPONDENT's delivery of the mare to its customer [*CE 6, p. 15*]. Furthermore, the contract between CLAIMANT and RESPONDENT even states that CLAIMANT shall not be responsible for risks associated with the DDP delivery [*cf. CE 5, p. 15 para. 12]*.

79 This understanding of hardship is not only applicable to the ICC Hardship Clause 2003, but also to Clause 12 of the Sales Agreement. Both clauses provide for hardship. RESPONDENT alleges that the ICC Hardship Clause is broader than Clause 12 [*cf. ANoA, p. 30 para. 4*]. However, this fails to take into the account that the ICC Hardship Clause requires performance to have become *"excessively onerous"*. In contrast, Clause 12 only requires performance to have become *"more onerous"*, providing for a broader scope of application.

80 Concludingly, if RESPONDENT claims that the 25% rise in tariffs imposed on itself qualifies as hardship, applying RESPONDENT's own understanding of *"hardship",* the 30% Tariffs imposed on CLAIMANT's delivery have to constitute hardship as well.

### c. Summary

81 The drafting of Clause 12, during which CLAIMANT expressed its intention to not take over any further risks, and the subsequent behaviour of RESPONDENT in its second arbitration, show that there was a common interest and understanding of the parties that the events like the Tariffs should fall within the scope of Clause 12 of the Sales Agreement.

## 2. Tariffs fall within the scope of Clause 12 Art. 8 (2) CISG

82 Even if one assumed that an interpretation pursuant to Art. 8 (1) CISG was not possible as the Parties' intent was unclear, the Tariffs would also fall within the scope of Clause 12 when interpreting it objectively pursuant to Art. 8 (2) CISG. The Clause covers hardship caused *"by additional health and safety requirements or comparable [...] events"*. While the Tariffs do not constitute health and safety requirements, they are an event comparable to the introduction of new regulations in this field (**a.**). Furthermore, the Tariffs also fall within the generally accepted meaning of the term hardship in international trade (**b.**).

### a. Tariffs are comparable to additional health and safety requirements

83 The Tariffs imposed on CLAIMANT's delivery are comparable to additional health and safety requirements which were given as an example for hardship in Clause 12.

84 Both tariffs and health and safety requirements fall within the scope of hardship because they are imposed by external powers, namely governments. Events can only be considered as hardship if the imposition of the measures cannot be controlled by either party [*cf. Horn (1984-II), p. 132; cf. also Salje (1998), p. 166*], which was the case for both Parties.

85 Furthermore, tariffs and health and safety requirements have the same economic impact on sellers who export their goods. To comply with additional health and safety requirements, the products have to be checked and adapted in different ways, which raises costs. Having to pay tariffs also imposes additional costs on the deliverer.

86 Therefore, even from an objective point of view, the Tariffs are comparable to health and safety requirements.

### b. Tariffs are covered by the generally accepted meaning of the term hardship

87 Furthermore, when interpreting a term pursuant to Art. 8 (2) CISG, reference can be made to the ordinary or normal meaning of a word [*cf. Schmidt-Kessel, in: Schlechtriem/Schwenzer (2016) Art. 8 CISG para. 40; cf. also Commercial Court Zürich, 24 October 2003, p. 10*]. Following the internationally recognised definition, tariffs constitute a case of hardship.

88 The term hardship indicates in international trade *"an external event [which] fundamentally*

*alters the balance of the performances under the contract and an unreasonable burden is placed on one of the parties. […] The burden is often economic"* [*cf. Lindström (2006), p. 3*].

89 Furthermore, the doctrine of *rebus sic stantibus* (change of circumstances) is generally recognised in public international law and includes the change of circumstances resulting in hardship [*cf. DiMatteo, in: International Sales Law (2016), p. 701; cf. also Janda (2013), p. 1; Kröll (2004), p. 15; and Schwenzer (2008), p. 2*]. This doctrine also applies when no change of circumstances clause is included in the agreement itself [*cf. Brunner/Lew (2008), p. 8; cf. also Maskow (1992), p. 4; and Schwenzer (2008), p. 1,2*].

90 Under this doctrine, the Tariffs as external events which rendered performance significantly more onerous constitute hardship and fall within the scope of the generally accepted term. The imposition of 30% of tariffs brings CLAIMANT close to its financial ruin and it is to be considered as hardship within in the scope of the term in international trade law.

**c. Summary**

91 The Tariffs imposed on CLAIMANT's delivery are comparable to additional health and safety requirements, which were given as an example for hardship in Clause 12. Furthermore, the Tariffs are covered by the generally accepted meaning of hardship.

**3. The Tariffs were unforeseen in the sense of Clause 12**

92 Clause 12 of the Sales Agreement states that the comparable events which have caused the hardship need to have been *"unforeseen"*. Generally, *"unforeseen"* is distinguished from the term *"unforeseeable"* [*cf. Lee (2003), p. 3; cf. also DiMatteo (2015), pp. 298 et. seqq.*] and understood to imply a lesser threshold [*cf. US – Lamb, para. 7.22*]. *"Unforeseen"* is to be interpreted in the sense of *"unexpected"*, whereas *"unforeseeable"* has a similar meaning to *"unpredictable"* [*cf. Korea – Dairy Products, para. 84*]. This is generally understood to refer to the parties' perception at the time of contracting [*cf. Withdrawal by the US of a Tariff Concession under Art. XIX of the GATT, para. 9; cf. also Berger (2003), p. 7*], meaning that the decisive question is whether the Parties saw a possibility of new tariffs being introduced by the government of Equatoriana on horse semen. Following this understanding, the Parties did not foresee the introduction of new tariffs (**a.**).

93 Even if the Tribunal should not follow CLAIMANT's submission and interpret the term *"unforeseen"* to mean whether a reasonable person could have anticipated the event, the Tariffs would also fall within the scope of such an interpretation (**b.**)

### a. The Tariffs were not anticipated by the Parties

94 Neither CLAIMANT nor RESPONDENT contemplated the possibility of the imposition of new tariffs in their communication prior to the conclusion of the Sales Agreement. This shows that they did not deem this possible; otherwise they would have addressed the issue.

95 Even when they read of the newly introduced Tariffs on agricultural goods, it did not cross either party's mind that the frozen semen could be considered an *"agricultural good"* [*PO 2, p. 58 para. 26*]. Both CLAIMANT and RESPONDENT were *astonished"* [*NoA, p. 6 para. 11*] to hear that racehorse semen were also subject of the new agricultural Tariffs.

### b. A reasonable person could not have anticipated the Tariffs

96 To begin with, at the time of contracting, there had been no tariffs imposed on agricultural goods at all in either Equatoriana or Mediterraneo [*PO 2, p. 58 para. 25*]. The introduction of new tariffs by Mr Bouckaert, the newly elected president of Mediterraneo, was not to be expected. Mediterraneo had never imposed comparable tariffs before [*PO 2, p. 58 para. 23*].

97 Even if one regarded the appointment of Ms Cecil Frankel as the minister for agriculture as a sign of potential policy changes, the retaliation by Equatoriana was in any case not foreseeable. In the past, *"various governments have always tried to solve disputes amicably or via invoking the relevant WTO mechanism"* [*CE 6, p. 15*]. The introduction of tariffs as a retaliatory measure *"came as a big surprise even to informed circles"* as *"Equatoriana has always been one of the biggest supporters of the existing system of free trade"* [*ibid.*].

### c. Summary

98 The Tariffs imposed on the third delivery were not anticipated by CLAIMANT and RESPONDENT. Further, a reasonable person could not have anticipated them.

## 4. Conclusion

99 As shown, the 30% Tariffs on agricultural products caused economic hardship for CLAIMANT, which is covered by Clause 12 of the Sales Agreement. Thus, as a next step, CLAIMANT will show that under these prerequisites Clause 12 provides for contract adaptation.

## B. As a result, the contract should be adapted by the Tribunal

100 Clause 12 provides that in cases of hardship, the *"[s]eller shall not be responsible"*. While it does not explicitly outline a further procedure, this becomes evident through interpretation of the Clause. Primarily, RESPONDENT was obligated to enter renegotiations with CLAIMANT when the Tariffs were announced. However, since RESPONDENT broke off

these negotiations, the Arbitral Tribunal can adapt the contract (**1.**). When interpreted in light of the drafting history, Clause 12 only leaves room for an adaptation that lets RESPONDENT bear the additional costs (**2.**). CLAIMANT is therefore entitled to payment of US$ 1,250,000 (**3.**).

### 1. Since RESPONDENT quit negotiations, the Tribunal can adapt the contract

101 Due to the fact that the renegotiations failed, the contract now has to be adapted by the Tribunal. This was the common intent of the Parties during the drafting of the Sales Agreement (**a.**). It is furthermore a general principle of international trade that, following failed renegotiations, the contract can be adapted by a court (**b.**). In any case, RESPONDENT is bound to contract adaptation under the principle of good faith, Art. 7 (1) CISG (**c.**).

#### a. The Parties agreed that the Tribunal should adapt the contract in such cases

102 Pursuant to Art. 8 (1) CISG, regard is to be had to the intent of the parties, which, pursuant to Art. 8 (3) CISG, can be shown through the negotiations [*supra para. 33*]. The intent of the Parties was that in cases of hardship pursuant to Clause 12, the Parties should try to reach a solution through negotiations. Should these negotiations fail, they should then resort to arbitral proceedings in which an arbitral tribunal could adapt the contract.

103 This is shown by the fact that Mr Antley, RESPONDENT's representative, understood the Clause this way, as he said that *"in his view […] it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree"*, which was also the understanding Ms Napravnik of CLAIMANT had of this Clause [*CE 8, p. 17*]. They intended to clarify this by inserting an express reference. However, due to the accident they never managed to do so [*ibid.*]. Nonetheless, this joint understanding shows how the clause was supposed to be interpreted.

#### b. General principles of international law favour this approach

104 Generally, for the interpretation of contractual hardship clauses, reference may be had to internationally accepted contract principles unless the party agreement suggests otherwise [*cf. Brunner/Lew (2008), p. 76*].

105 The duty to renegotiate is recognised in international law [*Horn (1984-I), p. 49*]. Only if the renegotiations fail should they be followed by another form of dispute settlement [*cf. Brunner/Lew (2008), p. 55*]. This is also evidenced by the PICC, PECL and TLDB Principles. These codifications are not laws of specific countries, but instead were drafted from the essence and general principles of multiple laws. All of them contain similar provisions for

renegotiation and adaption of contracts in case of hardship [*cf. Brunner/Lew (2008), p. 55; DiMatteo, in: International Sales Law (2016), p. 682; regarding PICC see Maskow (1992), p. 3*].

106 CLAIMANT contacted RESPONDENT and asked for renegotiations. RESPONDENT then gave CLAIMANT the impression that it was interested in finding a solution for the additional costs that CLAIMANT carried at that time. Shortly after, RESPONDENT refused all of CLAIMANT's renegotiation attempts [*CE 8, p. 18*].

107 Since renegotiations have failed, the Tribunal can now adapt the price of the third delivery.

### c. In any case, RESPONDENT is bound to contract adaptation under the principle of good faith, Art. 7 (1) CISG

108 The principle of good faith provides for the adaptation of the price in consideration of the contractual relationship between CLAIMANT and RESPONDENT through the duty to cooperate (**i.**) and the doctrine of *venire contra factum proprium* (**ii.**).

#### i. RESPONDENT is bound to contract adaption under the duty to cooperate

109 The principle of good faith obligates a party not to take advantage of its contracting partner in cases of unforeseen events that alter the contract into something different to what was agreed upon [*cf. Accaoui Lorfing (2010), p. 4*]. The principle of good faith also provides for the duty to cooperate [*cf. CISG Art. 7, para. 28; Accaoui Lorfing (2010), p. 5; Concept of Good Faith in the CISG and the PECL, p. 5*].

110 The duty requires the parties of a contract to "*seek, and if possible, try to find a solution for the fundamental alteration of the contract equilibrium"* [*cf. Accaoui Lorfing (2010), p. 9*]. Consequently, RESPONDENT had to try to find a solution with CLAIMANT and that would have been through negotiations [*cf. Berger (2003), p. 11*].

111 Since the renegotiations failed between both Parties [*supra para. 106]*, there must be another way to restore the equilibrium. If reasonable parties had considered the possibility of not finding a common solution during the drafting process, they would have left the decision with the arbitral tribunal [*cf. Salje (1998), p. 7*]. When the contract was drafted, both Parties still acted in good faith. CLAIMANT and RESPONDENT had agreed that they would entrust the adaptation of a contract to an arbitral tribunal, which RESPONDENT has also done in its other arbitration *[PO 2, p. 60 para. 39*]. The contract adaptation can only be considered as *ultima ratio* for the Parties. However, RESPONDENT was not willing to renegotiate with CLAIMANT.

112 As a result, due to RESPONDENT's unwillingness to comply with the duty to cooperate, the Tribunal has the power to adapt the contract to restore the equilibrium between the Parties.

#### ii. RESPONDENT is bound to contract adaptation pursuant to the doctrine of *venire contra factum proprium*

113 Furthermore, the principle of good faith *"imposes a code of behaviour on both parties, calling each other to consider the interests of the other contracting party"* [*cf. Perales Viscasillas, in: Kröll et al. (2018), Art. 7 para. 25*]. In particular, one specific manifestation of this principle is the estoppel principle also known as v*enire contra factum proprium*, which is also a general principle of the *lex mercatoria [ibid. at para. 27*].

114 RESPONDENT gave CLAIMANT the impressions that an adaptation of the contract was possible. It thereby created the present situation in which the goods have been shipped and non-delivery is no longer possible. Therefore, due to RESPONDENT's own behaviour and refusal to renegotiate the contract, the only remedy now left is adaptation of the contract by the Tribunal. Thus, RESPONDENT cannot refuse contract adaptation as this would violate the principle of good faith, Art. 7 (1) CISG.

### d. Summary

115 CLAIMANT is entitled to contract adaptation by the Tribunal as this is the understanding that both Parties had at the time of contracting. This is also in line with general principles in international trade. In any case, RESPONDENT is bound to contract adaptation under the principle of good faith.

## 2. Clause 12 provides for the financial responsibility of RESPONDENT in cases of hardship

116 In light of the contractual risk allocation, RESPONDENT needs to bear the greater part of the additional costs when the contract is adapted. This can be inferred from Clause 12, jointly considered with the provisions set out in the Sales Agreement and its drafting history.

117 Clause 12 of the Sales Agreement states that the *"[s]eller shall not be responsible"*. Further, Clause 9 provides that the *"[b]uyer is responsible for compliance with registry requirements"*, while Clause 10 states that the *"[b]uyer is responsible for all tank rental and handling fees"*. Particularly in the latter clause, which is written in italics—indicating that it was specifically drafted by the Parties for the contract at hand [*PO 2, p. 55 para 3*]—, the term *"responsible"* is used for a financial risk allocation. Considering that the Parties drafted both clauses themselves, it can be assumed that they used the term *"responsible"* in a

consistent manner to allocate costs. When interpreting Clause 12 in this light, it becomes clear that CLAIMANT was not supposed to cover any expenses incurred as a result of changes in circumstances that would lead to hardship. Furthermore, CLAIMANT was in a fragile financial situation which RESPONDENT was aware of [*PO 2, p. 58 para. 22]*.

118 Thus, the Clause has to be interpreted in a way which ensures CLAIMANT does not carry any additional costs. Since, naturally, costs have to be attributed to either party, this only leaves room for the interpretation that the costs were to be borne by RESPONDENT. Therefore, Clause 12 of the Sales Agreement provides for RESPONDENT's financial responsibility in cases of hardship.

#### 3. This entitles CLAIMANT to the payment of US$ 1,250,000

119 As a result, CLAIMANT is entitled to payment of US$ 1,250,000 through contract adaptation. The Tariffs imposed on CLAIMANT for the third delivery were 30%. CLAIMANT would have made a profit of 5% from the delivery. As a gesture of good faith, CLAIMANT is not asking the Tribunal to adapt the price in the full amount of the imposed tariffs. Instead, CLAIMANT only asks for its losses, which were 25% of the price of the third delivery, amounting to US$ 1,250,000.

120 Therefore, CLAIMANT is entitled to a payment of US$ 1,250,000.

### II. In any case, CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under the CISG

121 If the Tribunal should find that CLAIMANT is not entitled to additional payment under Clause 12 of the Sales Agreement, CLAIMANT is entitled to the same amount resulting from an adaptation of the price under the CISG.

122 For the adaptation, CLAIMANT will prove that Clause 12 of the Sales Agreement does not constitute a derogation pursuant to Art. 6 CISG (**A.**). Furthermore, the Tariffs imposed by Equatoriana are an impediment within the scope of Art. 79 (1) CISG (**B.**). While Art. 79 CISG does not explicitly provide for the remedy of contract adaptation, this impediment entitles CLAIMANT to the relief of contract adaptation under Art. 7 (2) Alt. 1 and Alt. 2 and Art. 9 (2) CISG (**C.**). The adaptation gives CLAIMANT the right to receive an additional payment of US$ 1,250,000 (**D.**).

### A. Clause 12 of the Sales Agreement does not constitute a general derogation pursuant to Art. 6 CISG

123 Contrary to RESPONDENT's submission [*ANoA, p. 32 para. 20*], Clause 12 of the Sales Agreement cannot be seen as a derogation from Art. 79 CISG.

124 Art. 6 CISG empowers the parties to *"derogate from or vary the effect of"* provisions of the CISG. This includes derogations from Art. 79 (1) CISG [*cf. Digest CISG, p. 379 para. 23*]. However, Clause 12 does not constitute a derogation from the provisions made in Art. 79 (1) CISG. This is supported by the drafting history of the Clause, which is relevant pursuant to Art. 8 (1) CISG [*supra para. 33*]. The Clause was introduced to address CLAIMANT's concerns following the introduction of the DDP delivery. CLAIMANT was not willing to take over *"any risks"* associated with such a change and referenced *"in particular"* those associated with changes in customs regulations or import restrictions [*CE 4, p. 12*]. This shows that the Clause was only supposed to name exemplary risks to improve CLAIMANT's legal position but cannot be seen as a derogation of other claims that it would have had. This is also supported by the fact that, in CLAIMANT's view, the hardship clause was a requirement which should be met *"at minimum"* [*CE 4, p. 12*]. Thus, it was clearly not supposed to exclude any further claims. RESPONDENT was aware of this intention as it was directly communicated to its main negotiator, Mr Antley.

125 Clause 12 does therefore not constitute a derogation and thus, Art. 79 (1) CISG can be applied.

### B. The Tariffs are an impediment within the scope of Art. 79 (1) CISG

126 The Tariffs imposed on CLAIMANT fall within the scope of Art. 79 (1) CISG. Pursuant to the Article, a party is not liable for *"a failure to perform any of its obligations"* if it is hindered to perform by an impediment (**1.**) that was beyond its control (**2.**) and it *"could not reasonably be expected to have taken […] into account"* (**3.**). Furthermore, it is required that the party could not have *"avoided or overcome"* the impediment (**4.**) [*cf. Digest CISG, p. 374 para. 1; Nicholas, pp. 5 et seq.; Atamer, in: Kröll et al. (2018), Art. 79 para. 43*]. The Tariffs fulfil these requirements.

#### 1. The Tariffs constitute an impediment pursuant Art. 79 (1) CISG

127 The Tariffs constitute an impediment pursuant to Art. 79 (1) CISG. Impediment in the sense of Article 79 (1) CISG does not only include cases where performance becomes impossible, but also cases of hardship where performance is rendered extraordinarily burdensome yet not impossible [*cf. Schwenzer (2008), p. 713*] (**a.**). The Tariffs imposed on CLAIMANT's

delivery constitute hardship in this sense (**b.**) and even if the Tribunal should find that they do not fall within the usual scope of the Article, the parties agreed upon this interpretation in the present case (**c.**).

**a. Economic hardship constitutes an impediment pursuant to Art. 79 (1) CISG**

128 Economic hardship is an impediment pursuant to Art. 79 (1) CISG [*cf. CISG-AC 7, para. 26 et. seqq.; Huber, in: MüKo-BGB (2016), para. 79; Atamer, in: Kröll et al. (2018), para. 79; Schwenzer in: Schlechtriem/Schwenzer (2016), para. 30; Brunner/Lew (2008), p. 3*].

129 Regarding the wording of Art. 79 (1) CISG, the term *"impediment"* is vague and unprecise and does not exclude situations of burdensome economic hardship [*cf. CISG-AC 7, para. 27; Nicholas, p. 5–4; Atamer, in: Kröll et al. (2018), Art. 79 para. 80; Tallon, in: Bianca/Bonell (1987), p. 594*]. This also reflects the natural understanding of the term, which is evidenced by the fact that even RESPONDENT itself refers to the Tariffs as a *"present impediment"* [*ANoA, p. 32 para. 19*].

130 Furthermore, a distinction between the impossibility of performance and extraordinarily burdensome economic hardship would not be practical. In today's well-connected world, performance only rarely becomes impossible due to availability of international procurement possibilities. In other words: more often than not performance may not be impossible but unreasonably expensive and thus irrational from an economic point of view. If economic hardship did not fall under Art. 79 (1) CISG, its scope would be smaller than intended. In addition, if the Article did not cover economic hardship, tribunals and courts would have to resort to domestic concepts of hardship for the interpretation and this would undermine the aim of a unified sales law [*cf. Schwenzer (2008), p. 713*].

131 In conclusion, the term *"impediment"* in Art. 79 (1) CISG covers economic hardship.

**b. The Tariffs imposed on CLAIMANT constitute an impediment pursuant to Art. 79 CISG**

132 The Tariffs that were imposed on CLAIMANT's delivery constitute extraordinarily burdensome economic hardship and therefore are an impediment under Art. 79 (1) CISG.

133 Art. 79 (1) CISG applies to cases of economic hardship, when the performance has become *"extremely onerous"* [*Atamer, in: Kröll et al. (2018), Art. 79 para. 81; cf. also CISG-AC 7, para. 28*]. The threshold of *"extremely onerous"* can be determined by interpretation of the circumstances [*cf. Atamer, in: Kröll et al. (2018), Art. 79 para. 82*], including the question of risk allocation by the parties.

134 To assess which party bears this risk of liability, it needs to be taken into account what the party seeking relief expected when the contract was concluded [*"risk analysis approach", Digest CISG, p. 375 para. 6; cf. Chinese Goods Case; Vine Wax Case; Milk Powder Case; Iron Molybdenum Case; Société Romay AG v. SARL Behr France; Polyurethane Foam Case; Flagstone Case*]. If the party did not assume that it would have to bear the risk of an impediment, this risk has to be shared to restore the contractual equilibrium. This applies in cases of hardship and in cases of impossibility of performance.

135 Tariffs result from an intervention of states and cannot be compared to cases of market fluctuation. The latter is a natural and well-known risk of commercial transactions that reasonable parties always take into account. Thus, they will—to a certain extent—consider and allocate this risk of the contract negotiations. Generally, the risk of market fluctuations is allocated to the seller [*Steel Ropes Case; ICAC at the RF CCI (1997-I) Case; Piltz (2008), para. 4-244; Kröll et al. Art. 79 para. 82 Note 215; Flechtner, in: Ferrari et al. (2004) p. 827*]. On the contrary, newly imposed Tariffs are no natural risk of commercial transactions. Thus, tariffs do not amount to an impediment in the sense of Art. 79 CISG due to their size, but because their occurrence generally is an unallocated risk. Certainly, the Parties did not assume the risk of the sudden introduction of a 30% import tariff on horse semen.

136 Further, the 30% Tariffs were extremely onerous due to CLAIMANT's difficult financial situation. RESPONDENT was aware of rumours that CLAIMANT was still experiencing financial troubles [*PO 2, p. 58 para. 22*]. CLAIMANT informed RESPONDENT that increased costs by up to 40% would *"destroy the commercial basis of the deal"* [*CE 4, p. 12*] A rise in costs by 30% made the performance of the contract thus not impossible for CLAIMANT but extremely onerous.

137 Therefore, the Tariffs of 30% constitute economic hardship and accordingly an impediment pursuant to Art. 79 (1) CISG.

**c. In any case, pursuant to Art. 6 CISG, the Parties agreed that the Tariffs would constitute an impediment within the scope of Art. 79 (1) CISG**

138 Even if one argued that the Tariffs imposed on CLAIMANT do not constitute economic hardship within the scope of Art. 79 (1) CISG, pursuant to Art. 6 CISG, the Parties decided that the scope of Art. 79 (1) CISG should include a broader field of change of circumstances. Therefore, following the Parties' intent, the Tariffs constitute an *"impediment"*.

139 CLAIMANT had made clear that it did not want to bear *"**any** further risks"* (emphasis added) [*CE 4, p. 12*] associated with the introduction of the DDP delivery clause. Thus, it wanted to

exclude the risk of having to bear negative consequences resulting from events such as *"unforeseeable additional health and safety requirements"* [*ibid.*] from the contractual relationship. This intention had been communicated to RESPONDENT, making it aware of this under Art. 8 (1) CISG. Thus, the Parties intended to align the scope of Art. 79 CISG with their aim to exempt CLAIMANT from all risks. Therefore, they broadened the scope of Art. 79 CISG under Art. 6 CISG.

140 Considering this, the 30% Tariffs fall within the scope of Art. 79 (1) CISG as an impediment.

#### d. Summary

141 The Tariffs imposed on CLAIMANT constitute economic hardship and therefore an impediment under Art. 79 (1) CISG. At least this is what the Parties intended.

### 2. The Tariffs are an impediment beyond CLAIMANT's control

142 The Tariffs were imposed on the third delivery by the government of Equatoriana and therefore beyond CLAIMANT's control. Tariffs are a governmental regulation. Such regulations or the actions of governmental officials that prevent a party's performance are generally considered as being beyond this party's control [*Secretariat Commentary, § 65 No. 5; Butter Case; Coal Case; Caviar Case; Digest CISG, p. 377 para. 16; Atamer, in: Kröll et al. (2018), Art. 79 para. 73; Magnus, in: Staudinger (2018), Art. 79 para. 28; Huber, in: MüKo-BGB (2016), Art. 79 para. 11; Schwenzer, in: Schlechtriem/Schwenzer (2016), Art. 79 para. 17*].

### 3. CLAIMANT could not reasonably be expected to have taken the Tariffs into account at the time of the conclusion of the contract

143 CLAIMANT could not reasonably be expected to have taken the Tariffs into account at the time of the conclusion of the contract because a reasonable third person engaged in the type of business in question could, on the basis of the concrete circumstances, not have anticipated and thus foreseen them [*supra paras 96 et seq.*].

### 4. CLAIMANT could not have avoided or overcome the Tariffs

144 Lastly, CLAIMANT could not have been reasonably expected to avoid or overcome the Tariffs or its consequences. CLAIMANT was not able to try to reach a dispute settlement in front of the World Trade Organisation, which Equatoriana is a member of [*PO 2 No. 47*], because it is an individual non-state party. Only state parties can initiate WTO proceedings or adopt any other measures against Tariffs imposed by states [*World Trade Organization (2017), pp. 21 et seq.; Yerxa/Wilson (2005), p. 31*].

145 The delivery of a *"commercially reasonable substitute"* [*cf. Acrylic Yarn Case*] was also not possible due to RESPONDENT's express interest in the frozen horse semen of Nijinski III [*PO 2, p. 57 para. 19; CE 1, p. 9; CE 2, p. 10; CE 5, p. 13*]. In addition, the delivery of frozen semen of a different stallion would have been subject to the Tariffs as well and thus resulted in the same additional costs.

146 Therefore, CLAIMANT could not have avoided or overcome the Tariffs or its consequences.

#### 5. Summary

147 The Tariffs constitute hardship within the scope of Art. 79 (1) CISG, they were beyond CLAIMANT's control, could not reasonably be taken into account, and the Tariffs and their consequences could not have been avoided or overcome.

### C. CLAIMANT is entitled to the relief of contract adaptation by the Tribunal

148 CLAIMANT is entitled to contract adaptation due to the impediment imposed by the Tariffs. Art. 79 (1) CISG does not provide for contract adaptation, because it only releases the party from its liability to perform. Therefore, there is an internal gap within the Convention regarding the legal consequences of an impediment where one party has already delivered (**1.**). This gap can be filled by either invoking general principles of the Convention pursuant to Art. 7 (2) Alt. 1 CISG (**2.**) or by taking recourse to the applicable contract law pursuant to Art. 7 (2) Alt. 2 (**3.**). In any case, the hardship rules of the PICC are applicable as international trade usages pursuant to Art. 9 (2) CISG (**4.**).

#### 1. There is an internal gap in the Convention with regard to the remedial consequences of hardship

149 The matter of contract adaptation is not expressly provided for in Art. 79 (1) CISG or any other article of the Convention. This does not, however, mean that the question of contract adaptation is excluded from the Convention. The missing provision can either constitute an internal or an external gap within the Convention [*cf. Perales Viscasillas, in: Kröll et. al. (2018), Art. 7 para. 51*].

150 Regarding the question of contract adaptation there is an internal gap in the Convention because it is not expressly settled in the Convention (**a.**), but the matter concerned is governed by the Convention (**b.**).

##### a. The remedial consequences of hardship are not expressly settled in the Convention

151 The remedial consequences of economic hardship as an impediment in cases where delivery has already taken place are not settled in the Convention.

152 Art. 79 (1) CISG provides an exception from the principle of *pacta sunt servanda* in case of an impediment and frees the party burdened by it from its liability. However, it does not provide for the question of whether the aggrieved party can still be held to specific performance in connection with other provisions of the Convention [*cf. Schwenzer, in: Schlechtriem/Schwenzer (2016), Art. 79 para. 52; Mankowski, in: MüKo-HGB (2018), Art. 79 para. 7*]. Furthermore, the question of the aggrieved party's legal remedies, including contract adaptation, is not addressed [*cf. Atamer, in: Kröll et al. (2018), Art. 79 para. 80*].

153 Even combined with the principle of good faith pursuant to Art. 7 (1) CISG, the legal remedies following an impediment are not settled in the Convention.

**b. The question of legal remedies following hardship concerns a matter governed by the Convention**

154 Hardship itself and also its legal remedies are a part of post-contract developments that make a party's performance more difficult. As can be seen in Artt. 46 and 62 CISG for the cases of breach of contract by the seller or buyer, the Convention contains certain provisions that include distinct legal remedies. In conclusion, the CISG is not generally silent on remedies. As a consequence, legal remedies for hardship, which falls within the scope of Art. 79 (1) CISG, are a matter governed by the CISG which is not expressly settled therein.

155 The question of the legal remedies of hardship is thus an internal gap of the Convention [*Workshop Pennsylvania, p. 237; Atamer, in: Kröll et al. (2018), Art. 79 para. 80*]. This gap is to be settled in conformity with Art. 7 (2) CISG.

**c. Summary**

156 The CISG includes an internal gap regarding the remedial consequences of hardship as the question of remedies is in general covered by the Convention.

**2. The contract can be adapted under the general principles of the CISG, Art. 7 (2) Alt. 1 CISG**

157 Regarding the remedial consequences of an impediment under Art. 79 CISG, general principles can be inferred from the Convention pursuant to Art. 7 (2) Alt. 1 CISG and the question of how the Convention treats disturbances in the contractual parity [*Schlechtriem/Schroeter (2016), para. 495*].

158 There are various events which can affect the contractual equilibrium, such as the delivery of non-conforming goods. As can be demonstrated with this example, the Convention favours a compromise between the two extreme solutions shown: on the one hand, both parties are

bound to the contract even when one party fails to perform one of its contractual obligations properly. For this reason, a buyer in general has no right to return the non-conforming goods. The court can restore the disturbed contractual parity by reducing the price in a proportional manner [*cf. Art. 50 CISG*]. On the other hand, both parties only have the right to avoid the contract if the failure to perform amounts to a fundamental breach [*Artt. 64 (1) (a), 49 (1) (a), 25 CISG*]. Thus, a contract subject to the CISG may be adapted in order to restore the contractual parity [*Schlechtriem, in: Workshop Pennsylvania, p. 236*].

159 This solution can be applied—by means of Art. 7 (2) Alt. 1 CISG—to the cases of economic hardship under Art. 79 CISG where one party has delivered despite the impediment. In such cases, contractual parity may be restored by the Tribunal adapting the price. The remedy of price reduction in Art. 50 CISG can be seen as a specific form of this general instrument. Under this general instrument, an adjustment of the contract by the Tribunal is possible in order to rectify a disturbed balance between performance and obligation [*Schlechtriem, in: Workshop Pennsylvania, p. 236*].

### 3. The contract can be adapted pursuant to Art. 7 (2) Alt. 2 CISG in connection with Mediterranean Contract Law

160 In addition, if the Tribunal finds no *"general principles"* to settle the question of remedies, the internal gap has to be filled in conformity with the law applicable pursuant to the rules of private international law. Applying these, CLAIMANT is entitled to the adaptation of the contract under Art. 7 (2) Alt. 2 CISG in connection with Mediterranean Contract Law.

161 The Sales Agreement between CLAIMANT and RESPONDENT is governed by Mediterranean Contract Law [*CE 5, p. 14 para. 14*] which is a verbatim adoption of the PICC [*PO 1, p. 53 para. 4*]. Art. 6.2.3. (4) PICC entitles a party to contract adaptation by the court if renegotiations failed beforehand. Therefore, CLAIMANT is also entitled to contract adaptation under Mediterranean Contract Law as previous negotiations between CLAIMANT and RESPONDENT have failed [*supra para. 106*]

### 4. In any case, the contract can be adapted pursuant to Art. 6.2.3. (4) PICC in connection with Art. 9 (2) CISG

162 Furthermore, CLAIMANT is entitled to contract adaptation under Art. 6.2.3. (4) PICC in connection with Art. 9 (2) CISG. A usage pursuant to Art. 9 (2) CISG prevails even if provisions of the Convention conflict [*cf. Austrian Wood Case I; Austrian Wood Case II*].

163 In cases of hardship, a court can reasonably adapt a contract under Art. 6.2.3. (4) PICC. Pursuant to Art. 9 (2) CISG, parties can impliedly include *"a usage of which the parties knew*

*or ought to have known and which […] is widely known to, and regularly observed by, parties […] in the particular trade"*. The PICC generally constitute trade usages under Art. 9 (2) CISG [*cf. ICAC at the RF CCI (1997-II) Case*]. Thus, the adaptation of contracts by a court provided for in Art. 6.2.3. (4) PICC is to be considered an international trade usage due to its inclusion in the PICC [*cf. Atamer, in: Kröll et al. (2018), Art. 79 para. 86*]. Both CLAIMANT and RESPONDENT are internationally operating companies in the horse breeding business and thus at least should have known about the trade usage reflected in Art. 6.2.3. (4) PICC.

164 The contract can be adapted by the Arbitral Tribunal pursuant to Art. 6.2.3. (4) PICC in connection with Art. 9 (2) CISG.

#### 5. Summary

165 The contract can be adapted by the Arbitral Tribunal to fill the internal gap within the Convention pursuant to Art. 7 (2) Alt. 1 or 2 CISG or it can be adapted pursuant to Art. 6.2.3. (4) PICC in connection with Art. 9 (2) CISG as an international trade usage.

### D. Under the remedy of contract adaptation, CLAIMANT is entitled to a payment of US$ 1,250,000.

166 CLAIMANT is entitled to contract adaptation by the Tribunal and a payment of US$ 1,250,000 to restore the economic equilibrium between the Parties. CLAIMANT is showing that it is acting in good faith by giving up its profit margin of 5 % and is only interested in receiving the additional payment from RESPONDENT to be released from the burdensome hardship caused by the Tariffs.

167 The Tribunal is thus respectfully invited to adapt the contract pursuant to the general principles of the CISG and to Mediterranean Contract Law or, in any case, pursuant to Art. 6.2.3. (4) PICC in connection with Art. 9 (2) CISG.

## PRAYER FOR RELIEF

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

1. The Tribunal has the jurisdiction and the power under the arbitration agreement to adapt the contract,
2. CLAIMANT is entitled to submit the Award as evidence.
3. CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price pursuant to
    a. Clause 12 of the Sales Agreement.
    b. Art. 79 CISG.

## Certificate and Choice of Forum

To be attached to each Memorandum

I, Moritz Nickel, on behalf of the Team for (name of School)

Bucerius Law School hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

■ Our School is competing in both Vis East Moot and Vienna Vis Moot.

■ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Bucerius Law School

Name Moritz Nickel

Signature Hamburg, 29 Nov 2018, M. Nickel