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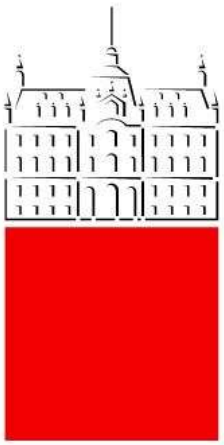
Willem C. Vis East International Commercial Arbitration Moot

University *of Ljubljana*



MEMORANDUM FOR CLAIMANT

On Behalf of:	Against:
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City, Mediterraneo	Oceanside, Equatoriana
-CLAIMANT-	-RESPONDENT-

ANJA GABROVŠEK • MONIKA JEJČIČ • ŠPELA MIHELIN
TEJA PIRNAT • MARUŠA POLAK • ŽAN ŠPORN KRAJNC • TONE TOMAŽIČ

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TABLE OF ABBREVIATIONS

¶/¶¶	paragraph/paragraphs
%	per cent
AC	Advisory Council
AnA	Answer to Notice of Arbitration
Apr	April
Art./Arts.	Article/Articles
Aug	August
BEL	Belgium
C-email	CLAIMANT's Email from 2 October 2018
CAS	Court of Arbitration of Sport
CHE	Switzerland
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of European Union
DAL	Danubian Arbitration Law
DDP	Delivery Duty Paid
Dec	December
e.g.	exempli gratia; for example (Latin)
eds.	Editors
et al.	et alii; and others (Latin)

et seq.	et sequens; and the following one (Latin)
EU	European Union
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
Feb	February
HKIAC	Hong Kong International Arbitration Center
HKIAC AR	Hong Kong International Arbitration Center Arbitration Rules recommended by HKIAC since 1. 11. 2018
HKIAC AR 2013	Hong Kong International Arbitration Center Arbitration Rules recommended by HKIAC until 1. 11. 2018
i.e.	id est; that is (Latin)
IBA Rules	IBA Rules on Taking Evidence
ibid.	ibidem (in the same place)
ICAC	The International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
infra	below (Latin)
Jan	January

Jul	July
Jun	June
lex arbitri	law of the seat of arbitration
Mar	March
NoA	Notice of Arbitration
Nov	November
NY	New York
NZL	New Zealand
Oct	October
p./pp.	page/pages
PICC	UNIDROIT Principles of International Commercial Contracts
PO1	Procedural Order from 5 October 2018
PO2	Procedural Order from 2 November 2018
R-email	RESPONDENT's Email from 3 October 2018
Sales Agreement	Frozen Semen Sales Agreement
Sec.	Section
Sep	September
supra	above (Latin)
UK	United Kingdom

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus
Vol.	Volume

STATEMENT OF FACTS

Phar Lap Allevamento ("**CLAIMANT**") is a company registered and located in Capital City, Mediterraneo. It operates as a stud farm, which covers breeding programs and also offers frozen semen of champion stallions for artificial insemination.

Black Beauty Equestrian ("**RESPONDENT**") is a company located and registered in Oceanside, Equatoriana. It is famous for its broodmare lines and it has newly started a breeding program.

24 March 2017	Due to the lifting of the ban on artificial insemination by the government of Equatoriana and on RESPONDENT's request, CLAIMANT offered 100 doses of frozen semen from Nijinsky III.
28 March 2017	RESPONDENT insisted on Delivery Duty Paid according to Incoterms 2010 edition ("**DDP**") as CLAIMANT has greater experience with the shipment of frozen semen.
31 March 2017	CLAIMANT was prepared to accept DDP in exchange for a moderate price increase, but explicitly refused to bear any risks associated with it.
11 April 2017	CLAIMANT and RESPONDENT ("**the Parties**") during their negotiations agreed on an arbitration clause largely based on Model Clause proposed by the HKIAC. The clause provided for a neutral seat of arbitration in Danubia but did not include a choice of law clause. This draft ("**the Arbitration Agreement**") was later included in the contract.
6 May 2017	The Parties included hardship clause into the force majeure clause ("**Clause 12**") and added the Arbitration Agreement in CLAIMANT's standard sales agreement template. This became the final contract ("**the Sales Agreement**"). In the Sales Agreement, the Parties agreed to three instalments, first of 25 doses, second of 25 doses and third of 50 doses.
20 January 2018	CLAIMANT found out that the final shipment of 50 doses was affected by tariffs of 30% imposed by the government of Equatoriana and informed RESPONDENT about it.

21 January 2018	RESPONDENT urged CLAIMANT on delivering the third shipment of doses and assured that the Parties will find the solution for additional costs.
12 February 2018	RESPONDENT refused to negotiate and opposed to the payment of an additional amount for the tariffs.
31 July 2018	CLAIMANT submitted the Notice of Arbitration.
24 August 2018	RESPONDENT submitted the Answer to the Notice of Arbitration.
2 October 2018	CLAIMANT informed the arbitral tribunal ("**the Tribunal**"), that it received information that RESPONDENT itself asked for adaptation of the contract in another arbitration. CLAIMANT wants to submit the partial interim award rendered in that arbitration ("**the Interim Award**") as soon as it will receive it.
3 October 2018	RESPONDENT objects to the submission of the Interim Award as it claims that it was obtained by illegal means.

APPLICABLE LAW: The Sales Agreement is subject to the UN Convention on Contracts for the International Sale of Goods ("**the CISG**") and the law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("**the PICC**"). In the Arbitration Agreement, the Parties subjected the arbitral proceedings to the 2018 HKIAC Administered Arbitration Rules ("**the HKIAC AR**"). As Danubia is the seat of arbitration, Danubian Arbitration Law ("**the DAL**"), which is a largely verbatim adoption of the UNCITRAL Model Law, applies as *lex arbitri*.

INTRODUCTION

1. When the global economy undoubtedly took a turn for the worst thanks to the resurgence of protectionism and tariffs, CLAIMANT expected that RESPONDENT would behave rationally and realize that the contract needs to be adapted. Instead, RESPONDENT is horsing around and claiming that the adaptation of the price is not necessary. RESPONDENT is doing this in spite of CLAIMANT endorsing all of its wishes and agreeing to sell 100 doses of frozen semen from CLAIMANT's star stallion Nijinsky III to RESPONDENT at its request. CLAIMANT hoped for a long and mutually profitable relationship, however, RESPONDENT clearly had different plans in mind from the very beginning.

2. RESPONDENT wants to derail this arbitration by alleging that the Tribunal does not have the jurisdiction and the power to adapt the contract. These claims are completely untrue and present nothing more than RESPONDENT's attempts of dodging its responsibilities. Nevertheless, CLAIMANT will prove that the Arbitration Agreement is governed by the law of Mediteraneo which gives the Tribunal the jurisdiction and the power to adapt the contract (**Issue I**).

3. On top of that, RESPONDENT wants to conceal its previous behaviour by demanding that the Tribunal rejects CLAIMANT's submission of the Interim Award because it was allegedly obtained either by a breach of employee's confidentiality agreement or illegal hack. CLAIMANT will, however, prove that its irrelevant how the Interim Award was obtained and will demonstrate that the Interim Award should be admitted irrespective of whether CLAIMANT had anything to do with the obtaining of the award (**Issue II**).

4. RESPONDENT asserts that the claim for the adaptation of price is baseless in spite of evident facts and CLAIMANT's generous willingness to give up its profit margin of 5%. CLAIMANT, which now unjustly bears the tariffs, will, however, prove that it is entitled to the increase in the purchase price not only under Clause 12 of the Sales Agreement (**Issue III**), but also under the CISG (**Issue IV**).

ISSUE I: THE TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT, WHICH IS GOVERNED BY THE LAW OF MEDITERRANEO

5. In the Sales Agreement, arbitration was agreed upon by the Parties as a dispute resolution mechanism [*Exh. C5, p.14, ¶15*]. RESPONDENT proposed that Equatoriana be the seat of arbitration and that its law be applicable to the Arbitration Agreement [*Exh. R1, p.33*]. CLAIMANT, however, was opposed to the proposal and expressed the wish for arbitration in a neutral country, such as Danubia [*Exh. R2, p.34*]. During the negotiations, the original negotiation team members of both Parties had a car accident and were not able to participate in the finalisation of the Sales Agreement [*Exh. C8, p.17*]. Employees of both Parties who were not previously involved in the drafting and negotiation process, replaced the original negotiation team [*AnA, p.30, ¶8*]. In the end, the Parties modified the Model Clause proposed by the HKIAC and included it in their Sales Agreement [*AnA, p.31, ¶13*]. However, they did not include a clause determining the applicable law in the Arbitration Agreement.

6. When RESPONDENT's country imposed a 30% tariff on agricultural products, the price of the last shipment increased [*Exh. C7, p.16*]. A dispute between the Parties arose over the necessity of an adaptation of the contract [*AnA, p.31, ¶12*]. RESPONDENT does not acknowledge the claim for an increased payment to fall under the scope of the Arbitration Agreement and denies the jurisdiction and the power of the Tribunal to adapt the Sales Agreement [*AnA, p.31, ¶13*]. This is due to RESPONDENT's position that the Arbitration Agreement is governed by the law of Danubia which provides for a narrow interpretation of the Arbitration Agreement [*AnA, p.31, ¶13*].

7. Contrary to RESPONDENT's allegations, the Arbitration Agreement and its interpretation are governed by the law of Mediterraneo (**1.**). Therefore, the jurisdiction and the power of the Tribunal for adaptation of the contract arise out of the Arbitration Agreement (**2.**).

1. The Arbitration Agreement and its interpretation are governed by the law of Mediterraneo

8. CLAIMANT will demonstrate that by virtue of the battle of forms, the law of Mediterraneo applies to the Arbitration Agreement (**1.1**). Additionally, the Parties made an implied agreement that the Arbitration Agreement is governed by the law of Mediterraneo (**1.2**). Furthermore, as the

Arbitration Agreement and Sales Agreement are not separate, they are governed by the same law (**1.3**).

1.1 By virtue of the battle of forms, the law of Mediterraneo applies to the Arbitration Agreement

9. A battle of forms situation is an exchange of opposing written proposals which form a contract between two parties [*Sambugaro, pp.69-79; Szurski, in Sanders, p.62, ¶3; Cunciberti, in Affaki et al., p.206*]. In case one party makes an offer on its conditions and the other party accepts that offer but on its own conditions, it is reasonable to assume that the contract is concluded on the terms of the latter party if the first party does not object [*High court of Justice of England and Wales (UK), 15 Oct 2010; High Court of Justice (UK), 19 Nov 2009*]. Moreover, if the draft of an arbitration agreement is transmitted from one party to another and no objections are made in a reasonable time, the substance of the proposals is considered to be part of the contract [*Born III, p.805*].

10. Contrary to RESPONDENT's allegations [*AnA, p.30, ¶6*], CLAIMANT did object to RESPONDENT's proposal that the Arbitration Agreement be governed by the law of the place of the arbitration [*Exh. R2, p.34*]. In the exchange of emails, CLAIMANT clearly stated that in order to avoid any further futile discussion, CLAIMANT needs a special approval if the Parties want to submit the contract to a foreign law [*Exh. R2, p.34*]. As an arbitration agreement is considered to be a procedural contract [*PO2, p.60, ¶36; Born II, p.359*], CLAIMANT's statement also applies to the Arbitration Agreement in the case at hand.

11. Furthermore, CLAIMANT excluded the clause determining the governing law in its final offer [*Exh. R2, p.34*]. Although it was RESPONDENT's "*sincere wish for an arbitration agreement to be governed by the law of the place of arbitration*" [*AnA., p.30, ¶5*], RESPONDENT made no objections. Moreover, RESPONDENT cannot remember with sufficient certainty why it did not include the sentence concerning the applicable law in the Arbitration Agreement [*PO2, p.55, ¶6*]. Three weeks later, RESPONDENT signed the Sales Agreement containing the Arbitration Agreement under CLAIMANT's conditions [*Exh. C5, p.13*, *¶15*].

12. Finally, due to the battle of forms, Danubian law does not apply to the Arbitration Agreement in the present case, as RESPONDENT alleges [*AnA, p.31, ¶31*]. As the last offer was made by CLAIMANT in which it excluded the clause determining the governing law and RESPONDENT did

not object to it, the Sales Agreement was concluded on CLAIMANT's conditions. Thus, the law of Mediterraneo applies to the Arbitration Agreement.

1.2 The Parties made an implied agreement that the Arbitration Agreement is governed by the law of Mediterraneo

13. The law governing the arbitration agreement is to be established firstly by determining whether the parties expressly chose the law of the arbitration agreement [*Court of Appeal (UK), 16 May 2012, ¶¶25,26; Miles/Goh, in Kaplan/Moser, p.387, ¶1*]. Implied choice of law is to be considered when there is no express choice of law made by the parties [*ibid.*]. Therefore, an implied choice of law leads to the conclusion that the parties intended the arbitration agreement to be governed by the same law as the main contract [*Collins/Harris, ¶¶16-017,16-018; High Court of Justice (UK), 28 Jul 2000; Court of Appeal (UK), 16 May 2012, ¶26*]. Especially, in cases where the main contract contains an express choice of law, but the arbitration agreement does not, the latter agreement will be governed by the law that was expressly chosen to govern the main contract [*Born II, p.581, ¶1*; *High Court of Justice (UK), 4 Oct 2001*; *Court of Appeal (UK), 16 May 2012, ¶26*; *German Court of Appeal, 24 Jan 2003; High Court of Justice I (UK), 22 Dec 1992*; *High Court of Justice (UK), 28 Jul 2000*].

14. In addition, the general choice of law clause is to be interpreted as extending to arbitration agreement contained within the underlying contract [*ICC Award No.11869, 2011; German Court of Appeal, 24 Jan 2003; Born II, p.581, ¶1*]. For instance, in cases when there is no indication that parties wanted to submit the arbitration agreement to a law different from the one in the main contract [*ibid.*].

15. In the present case, the Parties made an agreement that the law of Mediterraneo is the law governing the Sales Agreement [*Exh. C5, p.14, ¶14*]. However, the Parties did not expressly agree on the law governing the Arbitration Agreement. As there is no indication that the Parties wanted to submit the Arbitration Agreement to a different law than the one governing the Sales Agreement, the Parties impliedly extended the choice of law clause in the Sales Agreement to the Arbitration Agreement contained therein. Therefore, the Tribunal should find that the law of Mediterraneo as the law governing the Sales Agreement also applies to the Arbitration Agreement.

1.3 As the Arbitration Agreement and the Sales Agreement are not separate, they are governed by the same law

16. The doctrine of separability as a general principle of international arbitration law in particularly determines the contractual formation and validity of the arbitration agreement [*Born II, p.400, ¶1*]. The main purpose of the doctrine of separability is to limit the invalidity of the contract from extending to the arbitration agreement [*Miles/Goh, in Kaplan/Moser, p.388, ¶1; Glick/Venkatesan, in Kaplan/Moser, p.132, ¶2*]. Although in other cases, the doctrine does not follow the approach that the main contract and the arbitration agreement are considered as separate [*Miles/Goh, in Kaplan/Moser, p.388, ¶1; Briggs,* ¶14.37; *Singapore High Court, 9 Nov 2016; Court of Appeal (UK), 16 May 2012*].

17. Moreover, the arbitration agreement and the contract are not totally independent of one another, as evidenced by the fact that acceptance of the contract means acceptance of the arbitration agreement [*Miles/Goh, in Kaplan/Moser, p.388, ¶1*]. Thus, where the arbitration agreement forms a clause that is a part of the main contract, it is reasonable to assume that the parties intend their entire relationship to be governed by the same law [*Singapore High Court, 9 Nov 2016; Court of Appeal (UK), 16 May 2012*].

18. Contrary to RESPONDENT's statements [*AnA, p.31, ¶14*], the doctrine of separability does not support the interpretation that the Arbitration Agreement and the Sales Agreement are separate. The separability should be considered only in the event of invalidity of the Sales Agreement, which is not disputed in the present case. As the Arbitration Agreement is a clause forming a part of the Sales Agreement [*Exh. C5, p.14, ¶15*], the law governing the Arbitration Agreement is the law governing the contract. Therefore, the Tribunal should find that the law of Mediterraneo is the law governing the Arbitration Agreement.

2. The jurisdiction and the power of the Tribunal for adaptation of the contract arise out of the Arbitration Agreement

19. CLAIMANT will show that the Parties' dispute falls under the scope of the Arbitration Agreement, therefore the Tribunal has the jurisdiction to decide on the issue (**2.1**). Moreover, the Tribunal's power to adapt the contract arises out of the Arbitration Agreement (**2.2**).

2.1 The Parties' dispute falls under the scope of the Arbitration Agreement

20. Contrary to RESPONDENT's allegations [*AnA. p.30, ¶¶9,10,12*], the Tribunal has the jurisdiction

to adapt the contract. In case of changed circumstances, the jurisdiction of an arbitral tribunal to adapt the contract, has to be established under *lex arbitri* [*Brunner, p.494*]. Pursuant to Art. 7(1) DAL, the parties may submit to arbitration all or specific disputes that have arisen between them.

21. What is more, additional legal ground for the jurisdiction of the Tribunal is provided by the HKIAC AR. Pursuant to Art. 19(1) HKIAC AR, an arbitral tribunal may rule on its own jurisdiction, including objections with respect to the scope of the arbitration agreement. When the parties cannot agree if a particular issue extends to their arbitration agreement, it should be understood that the arbitral tribunal has the power to determine the scope of its own jurisdiction [*Born I, p.1088*].

22. Furthermore, the scope of the arbitration agreement has to be assessed through a textual analysis and application of the meaning assigned to the words of the clause [*Federal Court of Australia, 15 Aug 2005*]. When the parties agree, at the time of finalizing a contract, to refer to arbitration "*any dispute arising out of the contract,*" their agreement should not be interpreted narrowly [*Federal Court of Australia, 15 Aug 2005, p.566, ¶15; House of Lords (UK), 21 Feb 1985*; *High Court of Justice (UK), 29 Jun 1956*]. The term "*dispute*" covers the request for adaptation of the contract [*Brunner, p.497*]. Furthermore, the phrase "*arise out of*" is broad enough to include claims not contractual in nature, but which have a close association with the contract [*High Court of Justice (UK), 29 Jun 1956*]. Additionally, the word "*any*" in an arbitration agreement spreads to all disputes having any possible factual or legal relation to the parties' agreement [*Born II, p.1091*].

23. Therefore, an arbitration agreement is qualified as broadly scoped if it contains the phrases mentioned above. If the arbitration agreement is broad, the presumption of arbitrability arises the so called "*pro-arbitration*" presumption [*District Court (NY), 26 Feb 2009*]. This requires that the agreement should be interpreted to include, rather than to exclude disputes and to ensure that all of the parties' disagreements are resolved in a single forum [*Born I, p.1067*].

24. The Parties did not specify, who would have jurisdiction for an adaptation of the contract in case of changed circumstances in the case at hand. However, the Arbitration Agreement contains the phrase "*any dispute arising out of*" [*Exh. C5, p.13, ¶15*], which qualifies it as broadly scoped. Because of the latter and the pro-arbitration presumption, the Arbitration Agreement extends to all claims relating to the Sales Agreement. This also includes an adaptation of the contract.

25. Contrary to RESPONDENT's statements [*AnA, p.31, ¶13*], the broad wording of the Arbitration Agreement was not reduced, although the Parties slightly modified the Model Clause of the HKIAC. What is more, this did not exclude the Tribunal's right to adapt the contract. Thus, it should be determined, that under *lex arbitri* and under the HKIAC AR the Tribunal has jurisdiction to adapt the contract.

2.2 The Tribunal's power to adapt the contract arises out of the Arbitration Agreement

26. CLAIMANT will demonstrate, that the Arbitration Agreement is sufficient to confer to the Tribunal the power to adapt the contract (**a.**). Additionally, when concluding the Arbitration Agreement, the Parties' intent was to empower the Tribunal to adapt the contract (**b.**) What is more, an estoppel should apply in order to preclude RESPONDENT from denying the power of the Tribunal to adapt the contract (**c.**).

a. The Arbitration Agreement is sufficient to confer on the Tribunal the power to adapt the contract

27. When the power of an arbitral tribunal is taken into consideration, the best approach is to look at the arbitration agreement itself [*Redfern, et al., pp.1-21, ¶9*]. Firstly, the arbitrator's power to decide on legal questions includes the power to adapt the contract [*Frick, p.196*]. When the parties want to limit this power, it is essential to include the limitation to the Arbitration Agreement [*ibid.*]. Secondly, the adaptation of the contract falls under the term "*dispute,*" which supports the power of arbitral tribunals to adapt the contract [*Brunner, p.497*]. Lastly, a standard arbitration agreement is considered to be sufficient enough to grant an arbitral tribunal the same power as a court has under Mediterraneo law [*PO2, p.60, ¶39*].

28. The Parties chose a standard arbitration agreement since they largely based their Arbitration Agreement on the Model Clause proposed by the HKIAC [*Exh. R1, p.33*]. The phrase "*dispute*" included in the Arbitration Agreement [*Exh. C5, p. 14, ¶15*], gives the Tribunal the power to adapt the contract. Furthermore, the Parties did not include any provisions limiting the Tribunal's power. Thus, the standard Arbitration Agreement, concluded between the Parties, confers on the Tribunal the power to adapt the contract.

b. Additionally, when concluding the Arbitration Agreement, the Parties' intent was to empower the Tribunal to adapt the contract

29. As established above [*supra ¶8 et seq.*], the law governing the Arbitration Agreement and its

interpretation is the law of Mediterraneo. Moreover, the jurisprudence in Mediterraneo provides that the CISG also applies for the interpretation of the arbitration clause contained in sales contracts governed by the CISG [*PO1, p.53, ¶4*]. As stated in Art. 8(1) CISG, parties' statements and conduct are to be interpreted according to their intent. Additionally, the subjective intent of a party needs to be known or ought to have been known to the other party [*Art. 8(1) CISG; Schlechtriem/Butler, p.55, ¶54*]. Furthermore, all relevant circumstances of the case, including the negotiations, need to be considered when determining the intent of the parties [*Art. 8(3) CISG*].

30. As interpretation of the arbitration agreements under the Law of Mediterraneo is broad [*PO1, p.53, ¶4*], it includes all the negotiations and other statements made by the Parties. During negotiations, RESPONDENT itself proposed that an arbitral tribunal should adapt the contract in case of any disagreement by the Parties [*Exh. C8, p.17*]. Moreover, the Parties intent was to include an express reference in the Arbitration Agreement providing the power to arbitral tribunal to adapt the contract if the Parties were unable to agree on amendments [*Exh. C8, p.17, Exh. R3, p.35*]. It was only due to the replacement of negotiators as a consequence of the car accident that an explicit authorisation for the Tribunal to adapt the contract was not included into the Arbitration Agreement [*Exh. R3, p.35*]. Furthermore, when concluding the contract, RESPONDENT never objected that the Tribunal has the power to adapt the contract under the Arbitration Agreement [*Exh. R3, p.35*].

31. As seen from the Parties' negotiations, their intent when concluding the Arbitration Agreement was to empower the Tribunal to adapt the contract. Therefore, the Tribunal has the power to adapt the contract.

c. **Estoppel should apply in order to preclude RESPONDENT from denying the power of the Tribunal to adapt the contract**

32. Estoppel, as a general principle of international procedural law is applicable in international arbitration [*United States Court of Appeals, 18 Jun 2004, p.6; Baptista, in Cremades Sanz Pastor/Lew, p.135*]. It is especially well-recognised in common law jurisdictions [*United States Court of Appeals, 18 Jun 2004, p.5; Born II, p.1472*]. Judicial estoppel, as one of the types of estoppel, precludes a party from adopting a position opposing to one taken earlier in the same or related litigation [*United States Court of Appeals, 14 Jul 2013; Supreme Court of South Carolina, 11 Aug 1997*]. Two limitations have to be considered when applying judicial estoppel. First, the position of a party that is to be estopped must be contradictory with its prior position [*United States Court of Appeals,*

23 Mar 2004; United States Court of Appeals, 14 Jul 2013]. Second, the prior contradictory position must have been adopted by the first forum in some manner [*United States Court of Appeals, 24 May 1994; ibid.*].

33. Prior to the current arbitration, RESPONDENT was involved in another dispute concerning the sale of a mare by RESPONDENT to a buyer in Mediterraneo [*C-email, p.50*]. This dispute also revolved around an increase in the cost of shipment due to the imposition of tariffs [*ibid.*]. Arbitration in Mediterraneo, governed by the HKIAC AR 2013 was agreed upon by the parties in that dispute [*PO2, p.60, ¶39*]. Similarly, as in the present case, they adopted the Model Clause proposed by the HKIAC [*ibid.*]. As in the current arbitration, the contract contained a choice of law clause in favour of Mediterraneo law that also applied to their arbitration agreement [*ibid.*]. Since RESPONDENT was the one negatively affected by the tariffs in that dispute, RESPONDENT itself asked for an adaptation of the contract by the tribunal [*C-email, p.50*].

34. This is inconsistent with and contrary to RESPONDENT's position in the current arbitration, where RESPONDENT denies the power of the Tribunal to adapt the contract for an increased remuneration under very similar arbitration agreement [*NoA, p.30, ¶10*]. The tribunal in the other arbitration decided in accordance with RESPONDENT's position as it confirmed its power to adapt the contract under arbitration agreement in the Interim Award [*PO2, p.60, ¶39*]. Therefore, estoppel should apply, even more so since Danubia is a common-law country [*PO2, p.61, ¶44*].

35. Accordingly, both requirements for applying judicial estoppel are fulfilled. Firstly, RESPONDENT's position changed in two arbitrations RESPONDENT was a party to. Secondly, the tribunal in the other arbitration adopted RESPONDENT's opposing position. Consequently, judicial estoppel should apply in order to preclude RESPONDENT from adopting a position different than that taken in the previous arbitration. Therefore, the Tribunal has the power to adapt the contract.

CONCLUSION ON ISSUE I

36. The Mediterraneo law is the law governing the Arbitration Agreement and its interpretation. Moreover, due to the broadly scoped Arbitration Agreement the Tribunal has the jurisdiction to adapt the contract. Additionally, under the applicable law of Mediterraneo the Tribunal's power to adapt the contract arises out of the Arbitration Agreement.

ISSUE II: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION REGARDLESS OF THE MANNER IT WAS OBTAINED

37. As CLAIMANT stated above [*supra* ¶*33*], RESPONDENT took a contradictory position in a similar HKIAC arbitration [*PO2, p.60,* ¶*39*]. CLAIMANT became informed of RESPONDENT's conduct at the annual breeder conference where one of the participants, Mr. Velazquez, notified CLAIMANT about the other arbitration being conducted under the HKIAC AR 2013 and RESPONDENT's position in that arbitration [*C-email, p.50; PO2, p.60,* ¶*40*]. To prove RESPONDENT's contradictory behaviour and to confirm the power of the Tribunal to adapt the contract under the Arbitration Agreement, CLAIMANT is willing to acquire and later submit the Interim Award from the other arbitration to the current arbitration [*PO2, p.60,* ¶*41*].

38. Parties in arbitration are free to submit any evidence they wish in order to prove the facts that are essential to establish their respective cases [*Pietrowski, pp.373-374; Pilkov, p.147,* ¶*4; Berger, p.608,* ¶*1*]. It is then in the arbitral tribunal's discretion to decide which evidence should be admitted [*Hwang/Lim, p.31,* ¶*4; Waincymer, p.856*]. The arbitral tribunal's power to determine the admissibility of evidence arises firstly from the arbitration agreement, secondly from the chosen arbitration rules, and thirdly from *lex arbitri* [*Blackaby/Partasides/Redfern, et al, p.306,* ¶*5.06; Moses, p.2; Schäfer/Verbist/Imhoos, p.10*].

39. When the evidence is taken into consideration, the arbitral tribunal shall determine the *relevance*, *materiality,* and *admissibility* (*in a narrow sense*) of the evidence [*Art. 22(2) HKIAC AR; Art 19(2) DAL*]. However, the evidence is considered admissible in a broad sense when all three requirements from Art. 22(2) HKIAC AR and Art. 19(2) DAL are met [*Alozn/Galadari, p.3; Pilkov, p.148* ¶*3*].

40. Such an approach is also reflected in the IBA Rules, which are the most commonly used rules on the taking of evidence [*Veeder, in Giovannini/Mourre, p.321; Marghitola, p.33; Born II, p.2348; Müller, p.78; Von Segesser, p.1*]. The IBA Rules can be used even if not agreed upon by the parties directly [*O'Malley, p.6,* ¶*1.15, p.9* ¶*1.24; Kohler, p.296; Gunter, p.129*] as it reflects international practice [*Marghitola, p.34; Kreindler, p.157; Blackaby/Partasides/Redfern, et al, p.381,* ¶*6.95; Born II, p.2348*].

41. RESPONDENT asserts that the Interim Award should not be admitted as an evidence due to its alleged confidential nature and the supposed fact that it was obtained unlawfully [*R-email, p.51,*

¶3]. However, CLAIMANT will demonstrate that the requirements for the admissibility in a broad sense are met. The Interim Award is relevant to the case at hand, material to its outcome (**1.**), and admissible in the narrow sense (**2.**). Furthermore, the refusal of the evidence proposed by CLAIMANT would violate CLAIMANT's right to be heard, and consequently, the enforceability of the award may be at risk (**3.**). Therefore the Tribunal should admit the Interim Award.

1. The Interim Award is relevant to the case at hand and material to its outcome

42. The two main criteria for the admissibility of the evidence in a broad sense are the relevance of the evidence to the case and the materiality to its outcome [*Pilkov, p.148; Art.9(2)(a) IBA Rules*]. The relevance criterion is a logical connection with what the evidence alleges to prove in the case [*Von Goeler, p.173, ¶1; Pilkov, p.148, ¶5*], while the materiality of the evidence is mostly considered in relation to its connection to the outcome of the case [*Von Goeler, p.173, ¶1; IBA Commentary p.53, ¶2; Pilkov, p.149, ¶3*]. In other words, evidence is material and relevant if it is necessary for complete consideration of the facts of the case [*Waincymer, pp.858,859*; *Raeschke-Kessler, p.427*].

43. One of the key issues in the current case is whether the Tribunal has the power to adapt the contract under the Arbitration Agreement [*PO1, p.52, III, 1a*]. The Interim Award is relevant in order to show that in a similar dispute under the HKIAC AR 2013 RESPONDENT acknowledged and the tribunal later affirmed its power to adapt the contract arising out of the arbitration agreement governed by the law of Mediterraneo as in the case at hand [*PO2, p.60, ¶39*]. Regarding materiality, the Interim Award is necessary to preclude RESPONDENT from adopting a different position from that taken in the other arbitration [*supra ¶33*].

44. Consequently, without the information provided by the Interim Award the Tribunal will not adequately establish all of the necessary facts and thus, the decision will be uninformed and unfair. As the proposed evidence is relevant to the case and material to its outcome, the Tribunal should find that the first two conditions for admissibility in a broad sense are met.

2. The Interim Award is admissible in a narrow sense

45. CLAIMANT will prove that the requirements for the admissibility in a narrow sense are met, as the Interim Award is admissible regardless of the manner it was obtained (**2.1.**) and regardless of the fact that the Interim Award is confidential (**2.2.**).

2.1 The Interim Award should be admitted regardless of the manner it was obtained

46. Irrespective of whether or not CLAIMANT had any involvement in the obtaining of questionable evidence, RESPONDENT incorrectly alleges that the evidence should not be admitted in the present arbitration [*R-email, p.51*]. On the contrary, CLAIMANT will show that the Interim Award was obtained without the unlawful involvement of CLAIMANT and should therefore be admitted (**a.**). Furthermore, the Interim Award should be admitted even if CLAIMANT had been involved in the unlawful acquisition of the Interim Award (**b.**).

a. The Interim Award was obtained without unlawful involvement of CLAIMANT and should therefore be admitted

47. There is no general prohibition against admitting unlawfully obtained evidence [*Blair/Gojković, p.235; Sicard-Mirabal/Derains, p.208, ¶1*]. Therefore, arbitral tribunals admit unlawfully obtained evidence, especially if the evidence was obtained without the unlawful involvement of the submitting party [*ICSID, 5 Jun 2012; CJEU, 6 Sep 2013; CJEU, 8 Jul 2004; CAS, 8 Mar 2012; CAS, 24 Feb 2012; United States Supreme Court, 6 Jul 1976*]. RESPONDENT alleges that the only manner the Interim Award could have been obtained was either by a breach of confidentiality by RESPONDENT's former employees or by illegal hack [*PO2, p.60, ¶41*]. CLAIMANT was not involved in either, but it will acquire the Interim Award in another manner [*PO2, p. 60, ¶41*].

48. At the annual breeder conference CLAIMANT was approached and informed by Mr. Velazquez of the other arbitration under the HKIAC AR 2013 in which RESPONDENT was involved. Since Mr. Velazquez was familiar with the main issue in the other arbitration, he offered to provide the Interim Award of those proceedings [*C-email, p. 50; PO2, p.60, ¶40*]. CLAIMANT wants to acquire the Interim Award in order to prove RESPONDENT's contradictory behaviour.

49. Thus, CLAIMANT has shown that it was informed of the other arbitration by coincidence and that it can acquire the Interim Award without any unlawful behaviour. Therefore, the Tribunal should admit the Interim Award as evidence.

b. The Interim Award should be admitted even if CLAIMANT was involved in the unlawful acquisition of the Interim Award

50. Even assuming that CLAIMANT was involved in the unlawful acquisition of the Interim Award [*R-email, p.51*], the Interim Award should be admitted anyway, since there is no exclusionary rule in arbitration that would dismiss unlawfully obtained evidence [*CJEU, 8 Jul 2004;*

Worster, pp.462,464; Taylor, p.626]. Additionally, arbitral tribunals have held that even illegally obtained evidence are admissible as long as the evidence are relevant to the matters at issue [*ICJ, 15 Dec 1949; Court of Appeal (UK), 4 Feb 2003; ICSID, 5 Jun 2012; Pietrowski p.378*]. In other words, relevant evidence cannot be excluded on the ground that it was obtained by illegal means. Admission of all relevant evidence is also in line with Art. 18 DAL, which states that "*each party shall be given a full opportunity to present the case.*"

51. Since there are no exclusionary rules regarding evidence in arbitration, it is irrelevant whether the Interim Award was obtained either by illegal hacking or a breach of confidentiality by a former employee of RESPONDENT. In light of the above and because CLAIMANT has already established that the Interim Award is relevant in the current case [*supra* ¶*43*], the Interim Award should be admitted by the Tribunal.

2.2 The fact that the Interim award is confidential cannot prevent its admission in the present case

52. According to RESPONDENT, the Interim Award is confidential, as it was rendered in arbitration under the HKIAC AR 2013, which contain an express obligation to keep proceedings confidential [*R-email, p.51*]. Therefore, it is RESPONDENT's position that the Interim Award should not be admitted in the current arbitration due to its confidentiality [*ibid.*].

53. On the contrary, CLAIMANT will prove that the confidentiality of the Interim Award cannot be regarded as an impediment that could prevent the admission of the Interim Award (**a.**). In any case, the confidentiality of previous arbitration is limited because the interest of fair disposal prevails (**b.**).

a. The confidentiality of the Interim Award cannot be regarded as an impediment that could prevent the admission of the Interim Award

54. In the present case, RESPONDENT asserts that the submission of the Interim Award as evidence would violate confidentiality obligations under the HKIAC AR 2013 [*R-email, p.51*], which stipulate for an express obligation to keep proceedings confidential. The confidentiality of the arbitral award is only binding on the participants in the arbitral proceedings and not on third parties [*Born II, p.2821,* ¶*2*]. In case of considering the IBA Rules, Art. 9(2)(b) thereof provides that the arbitral tribunal can exclude evidence if it is covered by legal impediment under the legal rules determined by the tribunal to be applicable.

55. According to Art. 42 HKIAC AR 2013, "*no party may publish, disclose or communicate*" information relating to the proceedings or the award. These terms are explained in Art. 3(5) HKIAC AR 2013, which defines "*party*" as claimant, respondent and an additional party. As CLAIMANT in the present case did not participate in any of the aforementioned roles in the other proceedings, it cannot be counted as a party. Thus, the confidentiality of the Interim Award as stated in Art. 42 HKIAC AR 2013 is binding only on the participants of the previous arbitral proceedings, but not on CLAIMANT, as it was not involved in the previous arbitration.

56. If a party was not involved in the confidential proceedings and was not obliged to keep the proceedings confidential, Art. 42 HKIAC AR 2013 cannot constitute an impediment that would preclude a party from submitting evidence. Therefore, confidentiality arising out of Art. 42 HKIAC AR 2013 cannot be viewed as an impediment in the present arbitration; thus, the Tribunal should admit the Interim Award as evidence.

b. The confidentiality of previous arbitration is limited because the interest of fair disposal prevails

57. Arbitral awards and other arbitral materials are in general considered to be confidential documents [*Born I, p.2790*]. However, as arbitral awards are not protected by absolute confidentiality [*ICSID, 5 Jun 2012; Neill, p.290; Poorooye/Feehily, p.281, ¶1*], interim awards can be admitted under certain circumstances.

58. Furthermore, a party is allowed to submit confidential documents if there is a justified interest [*High Court of Justice, 8 Apr 2011*]. This means that when necessary for the fair disposal of another case, an arbitral award can be disclosed and used in different proceedings [*High Court of Justice II (UK), 22 Dec 1992; Court of Appeal (UK), 21 Mar 1990; Smeureanu, p.11, ¶3*]. The arbitral tribunal has to balance opposing interests and decide whether some other reasons outweigh the confidentiality interest [*High Court of Wellington (NZL), 22 Dec 2003*; *Metzler, in Klausegger/Klein/Kremslehner et al., p.252*].

59. As stated above [*supra ¶37*], CLAIMANT was informed of RESPONDENT's participation in another arbitral proceeding, where RESPONDENT itself asked the tribunal for the adaptation of the contract [*C-email, p. 50, ¶2*]. As this significantly contradicts RESPONDENT's position in the present arbitral proceedings, CLAIMANT needs to acquire and submit the Interim Award. This would prove RESPONDENT's contradictory position and therefore justifies CLAIMANT's interest in

acquiring and submitting the Interim Award. Thus, the submission of the Interim Award is necessary for the fair disposal of the case.

60. Moreover, it is not reasonable for the Tribunal to protect the confidentiality of the Interim Award as in the current proceedings the admissibility of the Interim Award is necessary for the correct establishment of the facts and therefore for the fair dispensation of justice. Consequently, the interest of CLAIMANT for the fair disposal of the case should prevail over arbitration confidentiality.

61. To conclude, the Interim Award is admissible in a narrow sense, regardless of the manner the Interim Award was obtained [*supra* ¶*51*] and its confidentiality [*supra* ¶¶*56, 60*]. Consequently, the last condition for admissibility in a broad sense is fulfilled and the Interim Award is admissible.

3. Refusal of evidence proposed by CLAIMANT would violate CLAIMANT's right to be heard

62. The right to be heard is a fundamental principle of fair proceedings and therefore constitutes the core of due process [*Schwarz/Konrad, p.427; Baldwin, p.233*]. In accordance with the right to be heard, a party must be given a full opportunity to present its case by offering evidence [*High Court of Justice (UK), 20 Mar 1998; Art. 18 DAL*]. Furthermore, it requires that both parties be granted the opportunity to submit to the arbitral tribunal everything that they consider relevant [*Supreme Court of Austria, 6 Sep 1990; Schwarz/Konrad, p.429*]. It is deemed that a party was unable to present its case, if the submission of the party's relevant evidence is rejected. Due to this, an arbitral award may not be enforceable [*Court of Appeals of the United States, 24 Nov 1992; Art. 34 (2)(a)(ii) DAL*].

63. In order to present all relevant facts, it is necessary for CLAIMANT to submit all the relevant evidence, including the Interim Award, to the Tribunal. The Interim Award is essential in order to show that RESPONDENT already acknowledged the power of the tribunal to adapt the contract arising out of an arbitration agreement under the HKIAC AR 2013, which is governed by the law of Mediterraneo [*C-email, p.50*]. Consequently, CLAIMANT would not be able to prove the contradictory position of RESPONDENT without the submission of the Interim Award and therefore the Tribunal would not render its award by taking into account all relevant facts of the case.

64. The refusal of the proposed evidence would violate CLAIMANT's right to be heard, as the proposed evidence is relevant for the presentation of the case at hand, and thus, for the Tribunal's decision. In order to avoid the risk of the award being unenforceable, it is essential for the Tribunal to uphold CLAIMANT's right to be heard, and therefore to admit the Interim Award as evidence in the present case.

CONCLUSION ON ISSUE II

65. CLAIMANT is entitled to submit the Interim Award, and as the requirements for the admission in a broad sense are met, the Tribunal should admit the Interim Award as evidence. This is due to the fact that the Interim Award is relevant to the case, material to its outcome and it should be admitted regardless of its confidentiality and the manner it was obtained. To conclude, the Tribunal should acknowledge that CLAIMANT's right to be heard would be violated if the admission of the Interim Award were denied.

ISSUE III: CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000.00 RESULTING FROM PRICE ADAPTATION UNDER CLAUSE 12

66. The Parties concluded the Sales Agreement, by virtue of which they agreed on the sale of 100 doses of the frozen semen [*Exh. C5, pp.13,14*]. During negotiations RESPONDENT insisted on DDP [*Exh. C3, p.11*], which CLAIMANT accepted on a condition that it does not assume the additional risks associated with DDP [*Exh. C4, p.12*]. Consequently, the Parties included a hardship clause in Clause 12 of the Sales Agreement [*Exh. C5, p.14, ¶12*]. Before the shipment of CLAIMANT's last 50 doses, the government of Equatoriana imposed a 30% tariff, i.e. the present impediment and as a result CLAIMANT had additional DDP costs of USD 1,500,000.00 [*Exh. C6, p.15*]. At first, RESPONDENT appeared to generally accept the need for price adaptation due to CLAIMANT's additional tariff costs and was prepared to negotiate [*Exh. C8, pp.17,18*]. Contrary to this, RESPONDENT now refuses to pay the additional costs and argues that Clause 12 does not cover the present impediment and does not provide for an adaptation of the price [*AnA, p.32, ¶¶18,19*]. However, this position is incorrect.

67. CLAIMANT requests an increase of the price by USD 1,250,000.00, which is 25% of the original price. CLAIMANT will prove that it is entitled to this amount as Clause 12 covers the present impediment (**1.**) and provides for price adaptation (**2.**).

1. Clause 12 is applicable to the present impediment

68. Hardship clauses arrange the revision of the contract whenever a change in circumstances significantly modifies the economy of the contract [*Rimke, p.228; Den Haerynck, in Campbell, pp.231,232; Commercial Court Tongeren (BEL), 25 Jan 2005*]. Hardship clauses have to define the triggering events, i.e. the circumstances that are to be considered and the consequences these events must have on the obligations thereunder to justify adaptation [*Frick, p.177; Rimke, p.135*]. For a hardship clause to be applicable, the impediment has to be one of the triggering events and must have contractually defined consequences as to the obligation [*Frick, p.177; Rimke, p.135*].

69. As Clause 12 is a hardship clause, CLAIMANT will demonstrate that the imposition of tariffs is one of the triggering events for Clause 12 (**1.1**) and that the present impediment fulfilled the contractually agreed hardship standard (**1.2**).

1.1 The imposition of tariffs triggers Clause 12

70. Under the CISG, contracts must be interpreted as a whole [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.159, ¶3; Bund, p.411; ICAC, 27 May 2005*]. Individual terms must be understood as an integral part of the contract and are to be viewed within the context [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.159, ¶30*].

71. If DDP is agreed upon, the seller has the obligation to obtain customs clearance of the goods [*Incoterms 2010*]. However, this obligation does not automatically include the risk of changes in law and regulations connected with customs clearance [*Brunner, pp.131,132; Ramberg, p.61*]. Furthermore, any type of obligation covered by the Incoterms 2010 is subject to the other terms of the contract [*Ramberg, pp.18,19*]. The parties can choose delivery DDP and explicitly exclude or limit certain risks connected with customs clearance with other contract terms [*Ramberg, p.18; Brunner, pp.131,132; Bensafi/Mack/Nassef/Simonnet, ¶3.1*].

72. CLAIMANT will demonstrate that the risk of hardship associated with DDP was allocated to RESPONDENT. The Parties did this by modifying Clause 12, which is triggered by additional health and safety requirements and comparable unforeseen events. The imposition of tariffs is such a triggering event for Clause 12, as this was the intent of the Parties (**a.**). In any event, a reasonable third person would have understood that the imposition of tariffs triggers Clause 12 (**b.**).

a. The intent of the Parties was for the imposition of tariffs to trigger Clause 12

73. A contract is to be interpreted according to the intent of the parties [*Art. 8(1) CISG, Schmidt/Kessel, in Schlechtriem/Schwenzer, p.151, ¶10*]. When determining parties' intent, regard must also be given to negotiations [*Art. 8(3) CISG; Schmidt/Kessel, in Schlechtriem/Schwenzer, p.152, ¶¶13,32; Farnsworth, in Bianca/Bonell, p. 96, ¶1.4*; *Digest of Art.8, ¶21*].

74. RESPONDENT insisted on DDP due to CLAIMANT's greater experience with the shipment of frozen semen and urgency of the delivery [*Exh. C3, p.11*]. CLAIMANT was prepared to accept DDP on a condition that additional risks associated with DDP are excluded [*Exh. C4, p.12*]. RESPONDENT considered the firstly proposed ICC Hardship Clause to be too broad for the purpose of the contract and the objectives pursued [*Exh. R4, p.12*]. However, this was only because the ICC Hardship Clause covers all unforeseeable events [*ICC Hardship Clause*] and the intent of the Parties was only to regulate events associated with DDP [*Exh. C4, p.12*].

75. The final wording of Clause 12 was agreed on with reference to the risks mentioned in CLAIMANT's email of 31 March 2017 [*Exh. C4, p.12; PO2, p.56, ¶12*]. In the email, CLAIMANT made it clear that it was not willing to assume any additional risks associated with DDP, in particular not those associated with *"changes in customs regulation or import restrictions*" [*ibid.*]. The intent of the Parties was for the hardship clause to limit CLAIMANT's risk in connection with the remaining DDP obligation of obtaining customs clearance, as they had already transferred the obligation to pay tank rental and handling fees to RESPONDENT and agreed on a payment before the shipment [*Exh. C5, p.14*]. Therefore, the intent of the Parties was for changes in customs clearance to trigger Clause 12. The payment of tariffs is one of the duties under customs clearance [*Ramberg, p.61; Dictionary of International Trade*], thus, it is clear that it was covered by the Parties' intent to regulate hardship in Clause 12. Consequently, the imposition of tariffs triggers Clause 12.

b. In any event, a reasonable third person would have understood that the imposition of tariffs triggers Clause 12

76. If the Tribunal finds that the subjective intent of the Parties is not determinable, the question should be decided under objective interpretation. In accordance with Art. 8(2) CISG, in the absence of the parties' subjective intent, the hypothetical understanding of a reasonable third person of the same kind, placed in the same circumstances, is decisive [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.155, ¶20; Huber/Mullis, p.12; ICC Award No. 8324, 1995*].

77. The Parties allocated the risk of hardship, "*caused by additional health and safety requirements or comparable unforeseen events*" to RESPONDENT by Clause 12 [*Exh. C5, p.14, ¶12*]. If the wording of the hardship clause refers to *events* as the circumstances that are to be considered it is to be understood very broadly [*Rimke, p.229; Haerynck/Campbell, pp.231,232*]. Since the imposition of tariffs has several common features with additional health and safety requirements, it is to be understood as an event comparable to additional health and safety requirements. Firstly, the government imposes both of them [*Incoterms 2010; Ramberg, p.150*]. Secondly, both can lead to increased DDP costs [*ibid.*]. Lastly, they both fall within the scope of the obligation to obtain import clearance [*Incoterms 2010; Ramberg, p.150; Dictionary of International Trade*]. Thus, a reasonable person could only understand the imposition of tariffs as an event comparable to the additional health and safety requirements explicitly listed in Clause 12.

78. Furthermore, the use of the term *unforeseen,* instead of the term *unforeseeable,* considerably broadens the scope of the hardship clause [*Frick, p.179*]. While an event is unforeseen if it is not expected, it is unforeseeable if it is not able to be reasonably expected [*Merriam-Webster Dictionary, Cambridge Dictionary*]. Equatoriana has always been a big supporter of free trade [*Exh. C6, p.15*], thus the imposed measures were a big surprise even to informed circles [*ibid.*]. Consequently, the Parties could not expect the imposition of tariffs by the government of Equatoriana and the present imposition of tariffs would be understood as an unforeseen event in the eyes of a reasonable third person.

79. In light of the above, a reasonable third person would have understood the imposition of tariffs as an event that triggers Clause 12, as the imposition of tariffs is an event comparable to additional health and safety requirements and was unforeseen.

1.2 The present impediment fulfilled the hardship standard of Clause 12

80. When drafting a hardship clause, the parties must determine the required degree of severity of the circumstances that will suffice to trigger the right to invoke hardship i.e. the hardship standard [*Brunner, p.514; Bund, p.409; Frick, p.177*]. The used terms may be more liberal than the general hardship test, which requires the occurrence of an excessively onerous burden [*Brunner, p.514*]. The term "*more onerous*" is a more liberal standard than excessively onerous standard or a fundamental alteration of the contractual equilibrium [*Brunner, p.516; Fucci, p.54*].

81. In the case at hand, the Parties agreed on the hardship clause to cover events "*making the contract more onerous,"* [*Exh. C5*, *p.14*] which is a more liberal standard. That the Parties wanted to provide for a more relaxed standard can also be seen in the fact that they agreed on the final wording of Clause 12 with reference to CLAIMANT's email of 31 March 2017 [*PO2, p.56, ¶12*]. The email addressed the risks that can "*increase the cost by up to 40%,"* [*Exh. C7, p.16*; *PO2, p.56, ¶21*] thus the hardship clause also covers an increase in costs under 40%. The imposed tariffs increased the DDP costs by USD 1,500,000.00, which is 30% of the original price [*Exh. C8, p.17*]. The 30% cost increase evidently affected CLAIMANT's obligation in a qualified manner.

82. Since the Parties lowered the hardship threshold and explicitly referred to an increase in the cost of less than 40%, the Tribunal should find that the imposition of tariffs made the contract more onerous and thus fulfilled the hardship standard of Clause 12.

2. Clause 12 is an adaptation clause

83. Clause 12 provides that the seller shall not be responsible for hardship [*Exh. C5, p.14, ¶12*]. This provision is to be interpreted according to the actual intent of the Parties, which was for Clause 12 to be an adaptation clause (**2.1**). Moreover, the interpretation *favor negotii* leads to the same conclusion (**2.2**).

2.1 It was the intent of the Parties for Clause 12 to provide for an adaptation of the price

84. When determining intent of the Parties, due regard must be given to the surrounding circumstances [*Art. 8(3) CISG; Zuppi, in Kröl/Mistelis/Viscasillas, p.150, ¶25; Digest of Art.8, ¶21*]. The Parties manifested their intent for Clause 12 to provide for adaptation during the negotiations (**a.**). Moreover, the Parties' intent for Clause 12 to be an adaptation clause was confirmed by their subsequent conduct (**b.**).

a. The Parties' intent for Clause 12 to be an adaptation clause can be seen in their negotiations

85. When determining parties' intent, regard must also be given to the negotiations [*supra ¶73*]. When discussing the hardship clause, which was later added to Clause 12, CLAIMANT expressed its concerns with regard to the provided remedies [*Exh. C8, p.17*]. RESPONDENT's proposal was that the price should be adapted by an arbitral tribunal if the Parties could not agree on an amendment [*Exh. C8, p.17*]. To clarify the Parties' understanding of the hardship clause, CLAIMANT proposed an express reference in the hardship clause or the Arbitration Agreement

[*ibid.*]. The fact that the Parties did discuss the issue of price adaptation can be seen in RESPONDENT's negotiation file, where RESPONDENT's negotiator wrote "*connection of hardship clause with arbitration clause,*" right after the discussion [*Exh. R3, p.35*].

86. Unfortunately, the two main negotiators were involved in a car accident and subsequently replaced [*NoA, p.5, ¶8*]. Consequently, the express reference was not included as the new negotiators were not familiar with the previous discussions of the Parties [*ibid.*]. As RESPONDENT's proposal was an adaptation of the price by an arbitral tribunal and CLAIMANT had the same preference, it was the Parties' common intent for Clause 12 to be an adaptation clause.

b. The Parties' subsequent conduct shows that the Parties' intent was for Clause 12 to be an adaptation clause

87. The intent of parties can also be drawn from their subsequent conduct [*Art. 8(3) CISG; Zuppi, in Kröl/Mistelis/Viscasillas, pp.150,151, ¶¶26,27; Digest of Art.8, ¶¶21,27; Commercial Court Aargau (CHE), 26 Nov 2008; House of Lords (UK), 1 Jul 2009*].

88. In the present case, CLAIMANT contacted RESPONDENT immediately after it was informed that the newly imposed tariffs of 30% on agricultural products were applicable to the shipment [*Exh. C7, p.16*]. CLAIMANT made it clear that before the authorisation of the last shipment, the solution with regard to the imposition of tariffs had to be found [*ibid.*]. Moreover, CLAIMANT expressed its position that RESPONDENT has to bear the additional costs due to the tariffs [*Exh. C8, pp.17,18*]. RESPONDENT did not object and appeared to generally accept CLAIMANT's position [*Exh. R4, p.35; Exh. C8, pp.17,18*]. Furthermore, RESPONDENT even emphasised its interest in a long-term relationship with CLAIMANT and told CLAIMANT about its plans to buy 50 doses of frozen semen from a different stallion from CLAIMANT [*Exh. C8, pp.17,18*]. Consequently, the subsequent conduct of the Parties reflects their understanding of Clause 12, which is to provide for adaptation.

89. In light of the above, the Tribunal should find that the intent of the Parties was for Clause 12 to provide for adaptation clause, as demonstrated in their negotiations and subsequent conduct.

2.2 Under the interpretation *favor negotii*, Clause 12 provides for price adaptation

90. There is a clear position of *favor negotii*, under the CISG, that favours the continuation of the

contract whenever possible [*Zuppi, in Kröll/Mistelis/Perales Viscasillas, p.152, ¶29; Schmidt/Kessel, in Schlechtriem/Schwenzer, p.171, ¶51*]. The parties must be treated as they intended that their contract should be fully effective [*Guide to Art.8, p.296*]. *Favor negotii* establishes the presumption that the parties did not agree to the individual provisions without reason [*Schmidt/Kessel, in Schlechtriem/Schwenzer, p.171, ¶51*]. By adding the hardship clause in the contract, the parties agreed to modify their original agreement when this is necessitated by the circumstances [*Commercial Court Tongeren (BEL), 25 Jan 2005*]. Hardship clauses apply to situations of changed circumstances in which the parties intend to continue the contract [*Rimke, p.228, Schmitthoff, p.648*]. Unless otherwise specified, it is assumed that the parties intended to authorise the tribunal to adapt the contract when they include a hardship clause in the contract, as otherwise the parties' intent would remain without effect [*Brunner, p.515; Frick, p.178; ICC Award No. 2478, 1974*].

91. In the present case, the Parties agreed to a hardship clause which excluded CLAIMANT's responsibility in the event of hardship [*Exh. C5, p.14, ¶12*]. The inclusion of a hardship clause in itself would be meaningless if this did not carry a remedy of adaptation therewith. Indeed, without the possibility of price adaptation, the will of the Parties would be frustrated since they could not achieve the purpose pursued by Clause 12, which was to transfer the risk of hardship caused by the events associated with DDP to RESPONDENT [*supra* ¶¶*73-75*]. Consequently, Clause 12 should be interpreted as an adaptation clause as otherwise its inclusion would be meaningless.

CONCLUSION ON ISSUE III

92. As the imposition of tariffs was one of the triggering events of Clause 12 and it fulfilled the hardship standard, Clause 12 applies. Under Clause 12, RESPONDENT bears the risk of hardship, thus the contact has to be adapted such that RESPONDENT pays the additional costs. Consequently, CLAIMANT is entitled to an outstanding payment of USD 1,250,000.00 resulting from price adaptation under Clause 12.

ISSUE IV: IN ANY EVENT, CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000.00 RESULTING FROM PRICE ADAPTATION UNDER THE CISG

93. If the Tribunal finds that price adaptation under Clause 12 is not possible, the price can in any case be increased under the CISG. CLAIMANT will prove that it is entitled to an increase in the price for at least USD 1,250,000.00 since hardship is recognised under the CISG (**1.**) and an

adaptation of the price is a remedy provided by the CISG in cases of hardship (**2.**) Furthermore, the requirements for an adaptation of the price due to hardship are fulfilled in the present case (**3.**).

1. The CISG can be the legal basis for CLAIMANT's claim because it recognises hardship

94. CLAIMANT will prove that hardship can be an impediment under Art. 79(1) CISG and thus Art. 79 CISG is directly applicable to CLAIMANT's claim (**1.1**). If Art. 79 CISG cannot be directly used, hardship is an internal gap in the CISG and therefore has to be resolved by gap-filling (**1.2**).

1.1 Art. 79 CISG is directly applicable to CLAIMANT's claim since hardship can be an impediment

95. Firstly, RESPONDENT claims that the Parties excluded the application of Art. 79 CISG by providing for special regulation with Clause 12 [*AnA, p.32, ¶20*]. Nonetheless, the provisions of the CISG do not apply only if they are expressly and unambiguously excluded [*Mistelis, in Kröll/Mistelis/Perales Viscasillas, p.106, ¶20; Supreme Court of Austria, 22 Oct 2001*]. If parties include a clause that specifically regulates certain events that might occur, this does not mean that they excluded the application of Art. 79 CISG in general [*Bund, p.404*]. Consequently, Art. 79 CISG applies in the present case as it was not expressly and unambiguously excluded by the Parties and the inclusion of Clause 12 cannot be viewed as an exclusion of Art. 79 CISG in general.

96. Secondly, when applying Art. 79 CISG the provisions thereof must be interpreted with regard to the international character of the CISG and the need to promote uniformity in its application and the observance of good faith in international trade [*Art. 7(1) CISG; DiMatteo, p280*].

97. If a change in circumstances results in a fundamental alteration of the equilibrium of the contract, the insistence of a party on the performance by the disadvantaged party, strictly in accordance with the terms of the contract is incompatible with the principle of good faith [*ICC Award No. 7365; Brunner, p.101; Berger, p.537; Da Silveira, p.324*]. Therefore, a change in circumstances that results in a fundamental alteration the equilibrium of the contract i.e. hardship, can be an impediment under Art. 79(1) CISG in accordance with the principle of good faith.

98. Furthermore, legislative history can be taken into account to determine what was intended with a particular provision [*Schwenzer/Hachem, in Schlechtriem/Schwenzer, p.130, ¶22*]. When drafting Art. 79 CISG terms like "*force majeure*" and "*hardship*" were avoided. The drafters used the neutral term

"*impediment*" to prevent any reference to concepts pertaining to local legal systems to make sure that the provision will be interpreted autonomously [*Kessedjian, p.417; DiMatteo, p.275; Flambouras, p.266*]. The proposal of the hardship provision in the CISG was thus rejected only to avoid terminology that resembles domestic principles and therefore as such cannot be conclusive evidence of a hardship rejection by the drafters [*Dai, p.134; Brunner, p.250*]. Furthermore, at the deliberations the general view was that "*impediment*" includes the "*unaffordability*" of performance [*Schlechtriem, p.101*] therefore, the intention of the drafters was for Art. 79 CISG to govern situations of impossibility and situations that make performance burdensome [*ibid.; Lindström, ¶2.1; Brunner, p.101; Berger, p.537; Da Silveira, p.324*].

99. Lastly, it is a generally held view that hardship can be an impediment according to Art. 79(1) CISG [*Schlechtriem/Butler, p.204, ¶291; Atamer, in Kröll/Mistelis/Perales Viscasillas, p.1089, ¶79; AC Opinion No.7, ¶3.1; Belgian Supreme Court, 19 Jun 2009; Da Silveira, p.328, ¶493*]. CLAIMANT's claim is based on an event that fundamentally changed the equilibrium of the contract and made performance burdensome [*infra ¶¶119 et seq.*], therefore this event amounts to hardship and consequently an impediment under Art. 79(1) CISG. Accordingly, Art. 79 CISG directly applies to CLAIMANT's claim.

1.2 Alternatively, hardship has to be resolved by gap-filling

100. If the Tribunal finds that hardship cannot be interpreted as impediment under Art. 79(1) CISG, the question of hardship should be considered as an internal gap in the CISG. The rights and obligations of the seller and the buyer are governed by the CISG [*Art. 4 CISG*]. A hardship situation is related to the rights and obligations of the buyer and the seller as hardship is connected with the mitigation of liability or the adjustment of obligations due to events subsequent to the conclusion of the contract [*Garro, in Felemegas, p.244; AC Opinion No.7, ¶36*]. Therefore, hardship is a matter governed but not explicitly settled by the CISG and thus represents an internal gap in the CISG.

101. CLAIMANT will prove that Art. 79 can be used by analogy to fill the hardship gap (**a.**). In any case, Art. 6.2.2 PICC can be used to fill the hardship gap (**b.**). Finally, the hardship gap is to be filled by the law of Mediterraneo (**c.**).

a. Art. 79 CISG can be used by analogy to fill the hardship gap

102. In the first instance, an internal gap in the CISG has to be filled by analogy [*Perales Viscasillas, in*

Kröll/Mistelis/Perales Viscasillas, p.134, ¶¶53,54; Felemegas, in Felemegas, p.25; Bonell, in Bianca/Bonell, p.78]. The gap can be filled by analogy, if this is not contrary to the purpose of the rule itself or to the intention of the drafters [*ibid.*].

103. The requirements for hardship can be abstracted by the way of analogy from Art. 79 CISG, since concept of hardship is closely related to Art. 79 CISG [*Atamer, in Kröll/Mistelis/Perales Viscasillas, p.1089, ¶81; Fischer, p.213; Garro, p.1183*]. It would not be against the purpose of the rule or intentions of the drafters to use Art. 79 CISG by analogy to resolve the hardship gap within the CISG [*ibid.; supra ¶98*]. Consequently, if the Tribunal finds that term impediment referred to in Art. 79(1) CISG does not cover hardship, it should use Art. 79 CISG in the present case nevertheless by analogy to decide if increased costs of performance due to the imposition of tariffs constitute a legally relevant hardship.

b. In any case, Art. 6.2.2 PICC should be used to fill the hardship gap

104. In accordance with the established hierarchy of gap-filling under Art. 7(2) CISG [*Perales Viscasillas, in Kröll/Mistelis/Perales Viscasillas, p.134, ¶53; Felemegas, in Felemegas, p.25*], when no specific provisions for gap filling by analogy are available and no general principles are found within the specific provisions of the CISG, the prevailing understanding and practice is to use *lex mercatoria*, in particular PICC, to supplement the CISG [*ICC Award No. 12460, 2004; ICC Award No.12097, 2003; ICC Award No.11638, 2002; Felemegas, in Felemegas, p.33*].

105. Art. 6.2.2 PICC, which is based on principle of good faith [*Da Silveira, pp.340 et seq.*], can be used to supplement CISG in cases of hardship [*Garro, p.1184; Brunner, p.419*]. Consequently, if the Tribunal finds that hardship cannot be resolved with the CISG, it should use Art. 6.2.2 PICC as a legal basis for CLAIMANT's claim. CLAIMANT will demonstrate that it has found itself in a situation which fulfills all the requirements for hardship as defined by Art. 6.2.2 PICC [*infra ¶¶119 et seq.*].

c. As a last option, hardship gap is to be filled with Art. 6.2.2 Mediterraneo law

106. Recourse is to be had to the applicable domestic law if there is a gap in the CISG that cannot be settled by analogical use of its articles or its general principles not even with the assistance of other uniform law projects such as the PICC [*Art. 7(2) CISG; Perales Viscasillas, in Kröll/Mistelis/Perales Viscasillas, p.134, ¶53*].

107. The Parties determined that the law of Mediterraneo, including the CISG is governing the Sales Agreement [*Exh. C5, p.14*]. Accordingly, the applicable domestic law is the law of Mediterraneo which is a verbatim adoption of the PICC [*PO1, p.53*]. Therefore, provisions of the law of Mediterraneo are the same as the PICC. Thus, Art. 6.2.2 Mediterraneo law determines requirements that have to be met in order for hardship to exist [*ibid.*]. Consequently, if the Tribunal finds that the hardship gap in the CISG cannot be resolved by analogical application of Art. 79 CISG or the application of Art. 6.2.2 PICC, it should use Art. 6.2.2 Mediterraneo law to determine if increased costs due to the imposition of tariffs constitute a legally relevant hardship in the present case.

2. The remedy of price adaptation is provided in cases of hardship

108. The remedy of price adaptation is provided in cases of hardship since firstly, remedial gap in Art. 79 CISG has to be filled to ensure a necessary price adaptation (**2.1**). Secondly, if the PICC is used to determine hardship, it allows an adaptation of the price due to hardship in Art. 6.2.3 PICC (**2.2**). Lastly, if the law of Mediterraneo is used, it also provides for an adaptation of the price due to hardship in Art. 6.2.3 Mediterraneo law (**2.3**).

2.1 The remedial gap in Art. 79 CISG has to be filled to ensure a necessary price adaptation

109. Art. 79 CISG does not explicitly provide for any other remedy than exemption from liability for damages. Nevertheless, it cannot be argued that because Art. 79 CISG provides a party's exemption from liability on grounds of hardship, this provision deals exhaustively with all remedies for such a situation [*Da Silveira, p.334*], as nothing in Art. 79 CISG *"prevents either party from exercising any right other than to claim damages"* [*Art. 79(5) CISG*]. Therefore, Art. 79 CISG does not deal with situations where either party wants for the contract to be performed despite hardship on different terms and only expressly settles the problems resulting from non-performance due to an impediment [*Garro, p.1184; AC Opinion No.7, ¶36*]. Consequently, Art. 79 CISG does not provide a sufficient remedial scheme to the party who finds itself in a hardship situation [*Belgian Supreme Court, 19 Jun 2009; AC Opinion No.7, ¶3.2; Da Silveira, p.334, ¶505; Ishida, p.364*], thus there is a remedial gap in Art. 79 CISG.

110. CLAIMANT will show that the remedial gap in Art. 79 CISG has to be filled in accordance with the general principles of the CISG (**a.**). In any case, Art. 6.2.3 PICC should be used to supplement Art. 79 CISG (**b.**).

a. Price can be adapted under Art. 79 CISG according to the general principles of the CISG

111. According to Art. 7(2) CISG, matters governed by the CISG that are not expressly settled in it are to be settled with the general principles on which it is based [*Schwenzer/Hachem, in Schlechtriem/Schwenzer, p.133, ¶27; Perales Viscasillas, p.16*].

112. The principle of good faith requires that the parties try to adapt the price in case of changed circumstances. Therefore, the right of a party to request renegotiations in case of hardship can be derived from the principle of good faith [*Da Silveira, p.342, ¶517*; *Schlechtriem, in Transcript, p.237; AC Opinion No.7, ¶40*]. It can also be derived from the principle of good faith that if requested renegotiations fail, the disadvantaged party should be entitled to the remedy of price adaptation [*ibid.*].

113. Furthermore, the principle of price adaptation can be identified within the CISG [*Schlechtriem, in Transcript, p.237*]. The CISG provides for remedy of price adaptation to adjust the disturbed balance when the equilibrium of the contract is altered. This can be seen in Art. 50 CISG, where non-conformity alters the equilibrium of the contract and the disadvantaged party has the remedy of price adaptation [*ibid.*]. Consequently, the party suffering hardship has the remedy of price adaptation under Art. 79 CISG, if its requirements are fulfilled, according to the principle of good faith and the principle of price adaptation. Therefore, the Tribunal should find that the price should be adapted in the present case, as the requirements of Art. 79 CISG are fulfilled [*infra ¶119 et seq.*] and thus CLAIMANT is entitled to USD 1,250,000.00.

b. In any case, Art. 6.2.3 PICC can be used to supplement Art. 79 CISG

114. Art. 6.2.3 PICC should be used to provide for remedial scheme that includes an adaptation of the price in a hardship situation, if general principles of the CISG cannot be used to provide for remedies [*Da Silveira, p.343*]. The Belgian Supreme Court came to similar conclusion in the *Scafom International BV* case, as it found the there was a remedial gap in Art. 79 CISG that had to be filled by the general principles of international trade and applied Art. 6.2.3 PICC on this basis to provide for a remedial scheme in a hardship situation that fulfilled the requirements from Art. 79 CISG. Consequently, Art. 6.2.3 PICC can be used to provide CLAIMANT with the remedy of price adaptation, since the requirements under Art. 79 CISG are fulfilled [*infra ¶¶119 et seq.*].

2.2 If the PICC is used to determine hardship, it allows adaptation of the price in Art. 6.2.3 PICC

115. If the hardship gap in the CISG is filled with the PICC, remedies for hardship should also to be determined with the PICC [*Da Silveira, p.327*]. If the Tribunal uses Art. 6.2.2 PICC to determine hardship [*supra* ¶¶*104,105*], it should automatically also use Art. 6.2.3 PICC to provide remedies for CLAIMANT including price adaptation if hardship under Art. 6.2.2 PICC occurred.

2.3 The law of Mediterraneo also provides for price adaptation due to hardship in Art. 6.2.3 Mediterraneo law

116. Lastly, if the hardship gap in the CISG is filled with the applicable domestic law, remedies for the disadvantaged party should also be determined by the applicable domestic law [*Da Silveira, p.28*]. If the Tribunal uses Art. 6.2.2 Mediterraneo law to determine hardship [*supra* ¶¶*106,107*], it should therefore also use Art. 6.2.3. Mediterraneo law to provide for remedies that include price adaptation if hardship under Art. 6.2.2 Mediterraneo law is found to exist.

3. Every requirement for price adaptation due to hardship is fulfilled in the present case

117. As it was presented, the Tribunal can firstly use Art. 79 CISG directly or by analogy to resolve the question of whether a situation of hardship which requires remedies exists [*supra* ¶¶*95 et seq.*]. Secondly, if this is not possible, the Tribunal can use Art. 6.2.2 PICC to determine hardship [*supra* ¶¶*104,105*]. Lastly, if even Art. 6.2.2 PICC cannot be used, recourse is to be had to Art. 6.2.2 Mediterraneo law [*supra* ¶¶*106,107*], which provides the same as Art. 6.2.2 PICC [*PO1, p.53*].

118. Art. 79 CISG and Art. 6.2.2 PICC/Mediterraneo law encompass similar requirements for establishing a legally relevant hardship [*Brunner, p.397*]. Thus, for the purpose of greater orderliness, CLAIMANT will present fulfilment of the requirements together. CLAIMANT will prove that all of the requirements for price adaptation due to hardship are fulfilled as firstly, the imposition of tariffs fundamentally altered the equilibrium of the contract (**3.1**). Secondly, CLAIMANT made a reservation regarding the risks arising from changes in customs regulations (**3.2**). Thirdly, the imposition of tariffs is an unavoidable event beyond CLAIMANT's control that occurred after the conclusion of the Sales Agreement (**3.3**). Furthermore, CLAIMANT has notified RESPONDENT of the imposition of tariffs and requested renegotiation (**3.4**). Additionally, performance was not yet rendered when CLAIMANT invoked hardship (**3.5**). Finally, CLAIMANT will demonstrate that it is reasonable for the Tribunal to order an adaptation of the price by USD 1,250,000.00 (**3.6**).

3.1 The imposition of tariffs fundamentally altered the equilibrium of the contract

119. In order for hardship to exist, there needs to be an event which fundamentally alters the equilibrium of the contract [*Art. 6.6.2 PICC/Mediterraneo law; Off Cmt to Art. 6.2.2 PICC, p.219; Brunner, p.397; Schwenzer p.714; Da Silveira, p.323,* ¶*488*]. If the cost of a party's performance increase, the contract equilibrium is altered [*ibid.*]. The relevant percentage of cost increase should be determined by comparing estimated cost at the time of the conclusion of the contract with the cost after the occurrence of the event [*Brunner, p.433*]. What percentage of the cost increase can be considered as fundamental alteration is to be determined with an assessment of the specific circumstances of the case [*Brunner, p.426; Girsberger/Zapolskis, pp.128 et seq*]. For example, in the *Icori Estero S.p.A* case the arbitral tribunal determined that a rise in the cost of performance by 35% amounts to a fundamental alteration [*ibid.; Fucci, p.21*]. Especially in cases where debtor has a risk of financial ruin or a low profit margin the necessary percentage of costs increase which amounts to fundamental alteration is lowered [*Brunner, p.435; Girsberger/Zapolskis, pp.128 et seq*].

120. The estimated cost of third delivery, i.e. of 50 doses, at the time of the conclusion of the Sales Agreement were USD 4,750,000.00 since CLAIMANT had a 5% of profit margin and the contract price is USD 5,000,000.00 [*PO2, p.59*]. After the imposition of tariffs, the cost of performance increased for USD 1,500,000.00. Thus, the total cost of the performance after the imposition of tariffs amounted to USD 6,250,000.00 [*ibid.*]. Consequently, due to the imposition of tariffs the cost of the performance rose by 31.57%.

	Third delivery
Contract price	USD 5,000,000.00
Expected cost of performance at the time of the conclusion of the Sales Agreement	**USD 4,750,000.00**
Profit margin	5%
Increased total cost of performance after the imposition of tariffs	**USD 6,250,000.00**
Change in costs	**31.57%**
Loss in absolute figures	USD 1,500,000.00

121. Additional cost of DDP was USD 200 per dose, which amounts to USD 10,000.00 for the third delivery [*PO2, p.56*]. Due to the imposition of tariffs before the third delivery, CLAIMANT had to bear USD 1,500,000.00 of additional costs to realize DDP [*Exh. C7, p.16; Exh. C5, p.13*]. Therefore, the additional obligation of DDP is not proportional, as the additional costs associated with transportation and DDP amounted to 0.2% of the price at the time of the conclusion of Sales Agreement but after the imposition of tariffs the additional costs of DDP rose the cost of the performance by 31.57%.

122. Furthermore, the automatic prolongation of the two main credit lines depends on CLAIMANT's profitability in 2017 and 2018 [*PO2, p.59*]. CLAIMANT will most likely not be profitable in 2018, after it had been profitable in 2017, if it had to bear all of the additional costs [*ibid.*]. If its lines of credit are not automatically prolonged, CLAIMANT would most likely not be able to negotiate a new credit line, which would compromise its financial stability [*ibid.*]. On the other hand, RESPONDENT would not be financially endangered if it bore USD 1,250,000.00 in extra costs [*ibid.*]. Especially as it is selling the doses for 20% above the price charged by CLAIMANT [*NoA, p.8, ¶20*]. Additionally, CLAIMANT had a profit margin of only 5% [*Exh. C8, p.17*], which is lower than the profit margin of 15%, which is regularly charged for coverings by Nijinsky III [*PO2, p.57*].

123. Therefore, based on the consideration of the specific circumstances regarding DDP delivery, the risk of financial ruin of CLAIMANT and its low profit margin, the 31.57% increase in costs should be deemed a fundamental alteration of contractual equilibrium.

3.2 CLAIMANT made a reservation regarding the risks arising from changes in customs regulations

124. Under the CISG and the PICC/Mediterraneo law the obligor can successfully invoke hardship even if the occurrence of the impediment was foreseeable, if it made a reservation regarding it [*Schwenzer, in Schlechtriem/Schwenzer, p.1068, ¶13; Da Silveira, p.223, ¶355; Bruner, p.157*]. Art. 6.2.2(d) PICC/Mediterraneo law additionally explicitly requires that the disadvantaged party did not assume the risk of the event. However, if the obligor makes a reservation regarding the event, it does not assume the risk of its occurrence [*ibid.*]. A reservation can result from various proposals and statements made during negotiations, including a higher or lower price [*Bruner, p.160; McKendrick, in Vogenauer, p.818, ¶15*].

125. CLAIMANT foresaw that DDP involves risk, especially in connection with the changes in customs regulations which can increase the costs of DDP [*Exh. C4, p.12*]. CLAIMANT was not prepared to accept those risks, therefore it stated in an email to RESPONDENT during negotiations that it is not willing to assume risks associated with DDP, especially not those related with the changes in customs regulations [*ibid.*]. This statement is a reservation regarding risks arising from the changes in customs regulations. RESPONDENT did not object to this statement or proposed another risk allocation and the exclusion of risks associated with DDP was even used as an argument to lower the price [*PO2, p.56*]. Although the tariffs were not explicitly foreseen, the risk of changes in customs regulations clearly includes the risk of imposition of tariffs as tariffs are part of customs regulations [*Skud, p.969*]. Therefore, CLAIMANT can successfully invoke hardship even if the impediment was foreseeable within risks arising from changes in customs regulations, because it made reservation a regarding it. Therefore, it also did not assume the risk of changes in customs regulations.

3.3 The imposition of tariffs was an unavoidable event beyond CLAIMANT's control that occurred after the conclusion of the Sales Agreement

126. According to Art. 79(1) CISG a party relying on it must prove that it could not reasonably have been expected to avoid or overcome the impediment or its consequences [*Lindström, ¶4.4; Rimke, p.216; Tallon, in Bianca/Bonell, p.581; Schwenzer, in Schlechtriem/Schwenzer, p.1069, ¶24*]. The standard of reasonableness is used to determine what efforts are expected from the party [*ibid.*]. Party is not expected to resort to illegal means to overcome an impediment or its consequences [*ibid; Brunner, p.321*]. CLAIMANT could only avoid the payment of tariffs through illegal means, therefore the imposition of tariffs was an unavoidable event.

127. Furthermore, hardship can only be invoked if the event causing hardship is beyond the control of the disadvantaged party [*Art. 79(1) CISG; Art. 6.2.2 (c) PICC/Mediterraneo law; Off Cmt to Art. 6.2.2 PICC, p.221*]. Acts of governments are generally beyond the control of parties [*McKendrick, in Vogenauer, p.818, ¶14*]. The imposition of tariffs is an act of a government and thus beyond the control of CLAIMANT.

128. Additionally, the event causing hardship must according to Art. 6.2.2(a) PICC/Mediterraneo law, take place or become known to the disadvantaged party after the conclusion of the contract [*Off Cmt to Art. 6.2.2 PICC, p.220; McKendrick, in Vogenauer, p.817, ¶11*]. The Sales Agreement was concluded on 6 May 2017 [*Exh. C5, p.14*], while the tariffs imposed by the government of

Equatoriana were announced on 19 December 2017 and took effect from 15 January 2018 [*PO2, p.58*]. Consequently, the event causing hardship took place after the conclusion of the Sales Agreement.

3.4 CLAIMANT notified RESPONDENT of the imposition of tariffs and requested renegotiations

129. Disadvantaged party must give notice to the other party about the impediment and its effects on performance according to Art. 79(4) CISG [*Schwenzer, in Schlechtriem/Schwenzer, p.1081, ¶44; Da Silveira, p.247, ¶388; Magnus, p.22; Brunner, p.342*]. Notice must describe the nature and gravity of the impediment [*ibid.*]. Such notice can establish a basis for an adaptation of the contract [*ibid*]. Furthermore, the disadvantaged party is entitled to request renegotiations in the event of hardship under Art. 6.2.3(1) PICC/Mediterraneo law [*McKendrick, in Vogenauer, pp.819 et seq.*].

130. CLAIMANT notified RESPONDENT of the newly imposed tariffs and the resulting increase in the costs of the shipment before the delivery as soon as it learned thereof. At the same time, it requested renegotiations [*Exh. C7, p.16*].

3.5 Performance had not yet been rendered when CLAIMANT invoked hardship

131. The change in the equilibrium of a contract must relate to the obligations that remains to be performed [*Off Cmt to Art. 6.2.2 PICC, p.221; McKendrick, in Vogenauer, p.815, ¶4*]. If the party has performed, it is no longer entitled to invoke hardship [*ibid.*]. CLAIMANT invoked hardship and requested renegotiation before it performed its obligation [*Exh. C7, p.16*]. CLAIMANT performed its obligation because RESPONDENT assured it that the Parties would definitely find an agreement on the price [*Exh. C8, p.18; Exh. R4, p.36*].

3.6 It is reasonable for the Tribunal to order an adaptation of the price

132. If parties do not reach an agreement, either party may resort to the court [*Art. 6.2.3(3) PICC; McKendrick, in Vogenauer, p.820, ¶5*], which means to resort to the dispute resolution mechanism that has been agreed upon in the contract [*Kessedjian, p.422; supra ¶5 et seq.*]. If arbitral tribunal finds hardship, it may, if this is reasonable, adapt the price with a view to restoring contractual equilibrium or terminate the contract [*ibid.; Art. 6.2.3(4) PICC*]. When adapting the price, arbitral tribunal has to seek to make a fair distribution of the losses between the parties [*Off Cmt to Art. 6.2.3 PICC, p. 226*]. For instance, it has to consider the extent to which the party entitled to receive a performance may still benefit from that performance [*ibid.*].

133. CLAIMANT turned to the arbitral proceedings since RESPONDENT ended negotiations and declined to pay any additional amount for the tariffs in a meeting held on 12 February 2018 [*Exh. C8, p.18*]. RESPONDENT broke off negotiations contrary to good faith after CLAIMANT accused it of breaching the resale prohibition [*ibid.*]. It is not reasonable for the Tribunal to direct the Parties to resume negotiations since negotiations do not have a reasonable prospect of success. Termination of the contract is a less appropriate remedy since both Parties have an interest in keeping the contract in force [*ibid.*]. Therefore, the most reasonable remedy is to adapt the price. Increase of the price by USD 1,250,000.00, which is 25% of the price, would mean a fair distribution of the losses between the Parties, since CLAIMANT gave up its profit margin of 5% [*NoA, p. 7, ¶18; PO2, p.59*] and RESPONDENT will have benefits from the doses as it will establish a new racehorse stable and it is already selling the doses for the price which is 20% above the price charged by CLAIMANT [*NoA, p. 8, ¶20; PO2, p.57*].

CONCLUSION ON ISSUE IV

134. CLAIMANT's claim for an increase of the price due to hardship should be recognised by the Tribunal, since hardship is recognized under the CISG and adaptation of price is a remedy available in cases of hardship. Hardship exists in the present case as all the requirements are fulfilled, therefore the price should be adapted by the Tribunal and CLAIMANT should be awarded USD 1,250,000.00.

REQUEST FOR RELIEF

Counsel, on behalf of CLAIMANT, respectfully requests that the Tribunal:

1. Find that it has the jurisdiction and the power under the Arbitration Agreement to adapt the contract;
2. Admit the Interim Award as evidence; and
3. Increase the price in the Sales Agreement for 25% and order RESPONDENT to pay CLAIMANT an amount of USD 1,250,000.00 resulting from price adaptation.

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CERTIFICATE

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

Signed and submitted by counsel for CLAIMANT:

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TONE TOMAŽIČ

Ljubljana, 6 December 2018