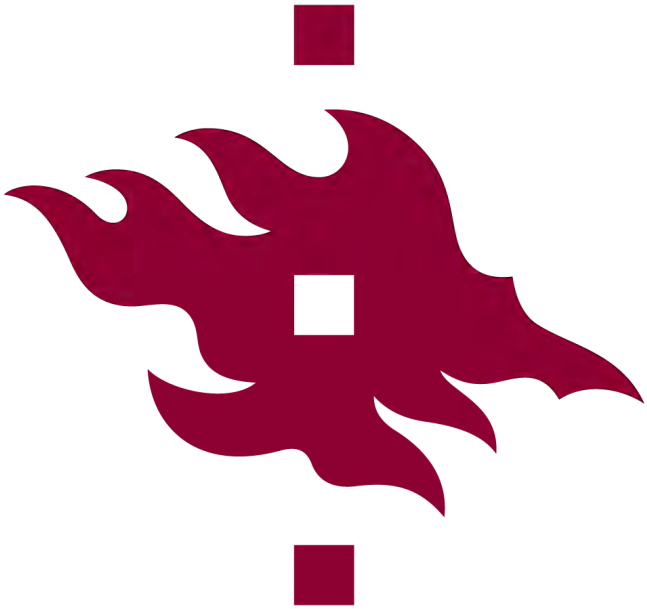
SIXTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, 31TH MARCH –7TH APRIL 2019

UNIVERSITY OF HELSINKI



MEMORANDUM FOR RESPONDENT

HKIAC/A18128

ON BEHALF OF
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

AGAINST
Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

COUNSEL FOR RESPONDENT
OLGA JEGANOVA • REBECCA KRAMSU • SAARA-MARJA LAHTINEN • MALVIINA LINNINEN

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TABLE OF ABBREVIATIONS

%	per cent
a fortiori	with stronger reason
ANoA	RESPONDENT's Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
CE	CLAIMANT's Exhibit
cf.	confer (see)
ch./chs.	Chapter/Chapters
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG Advisory Council
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DDP	INCOTERMS Delivery Duty Paid
de facto	in reality or fact
e.g.	exempli gratia (for example)
ed./eds.	editor/editors
Email Fasttrack	Ms. Fasttrack's email of 3 October 2018
Email Langweiler	Mr. Langweiler's email of 2 October 2018

et seq./et seqq.	and the following one/s (et sequens/et sequentes)
HKIAC	Hong Kong International Arbitration Centre
HKIAC Model Clause	The HKIAC Model Clause for Arbitration under the HKIAC Administered Arbitration Rules
HKIAC Rules	The 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
i.e.	id est (that is)
IBA	International Bar Association
IBA Rules	The IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration (The Hague, The Netherlands)
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
lex arbitri	the law of the seat of arbitration
MCL	Mediterranean Contract Law
MfC	Memorandum for Claimant
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
Mr.	Mister
Ms.	Miss
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)

No.	number
NoA	CLAIMANT's Notice of Arbitration
p./pp.	page/pages
para./paras.	paragraph/paragraphs
Partial Interim Award	Partial Interim Award rendered in the arbitral proceedings between RESPONDENT and its Mediterranean buyer on 29 June 2018
PECL	Principles of European Contract Law
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
RE	RESPONDENT's Exhibit
Sales Agreement	Frozen Semen Sales Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)
US	The United States of America
USD	United States Dollars
v.	versus (against)
Vol.	volume
WTO	World Trade Organization

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HKIAC MODEL CLAUSE	The HKIAC Model Clause for Arbitration under the HKIAC Administered Arbitration Rules 2013

HKIAC RULES	The 2018 HKIAC Administered Arbitration Rules
HKIAC 2013 RULES	The 2013 HKIAC Administered Arbitration Rules
IBA RULES	The IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC HARDSHIP CLAUSE	ICC Hardship Clause 2003
MODEL LAW	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Vienna, June 21, 1985)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958)
PECL	Principles of European Contract Law (2002)
SECRETARIAT NOTE 5TH SESSION	Note by the Secretariat: Model Law on International Commercial Arbitration: Possible further features and draft articles of a model law (A/CN.9/WG.II/WP.41), January 12, 1983
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UNCITRAL MODEL LAW CASE DIGEST	UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, 2012 Edition (New York, 2012)

UNCITRAL SECRETARIAT GUIDE	UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, September 2016)
UNIDROIT PRINCIPLES	The UNIDROIT Principles of International Commercial Contracts (2016)
WORKING GROUP 6TH SESSION	Report of the Working Group on international contract practices on the work of its sixth session (A/CN.9/245)
WORKING PAPERS 6TH SESSION	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)

STATEMENT OF FACTS

Black Beauty Equestrian ("**RESPONDENT**") is a company specialized in horse breeding, incorporated in Equatoriana. It is famous for its broodmare lines, and is currently building up its own racehorse breeding programme.

Phar Lap Allevamento ("**CLAIMANT**") is the oldest stud farm in Mediterraneo. It provides its champion stallions for breeding purposes both by natural coverage and artificial insemination.

1. On **21 March 2017**, RESPONDENT sends a request for an offer for 100 doses of CLAIMANT's stallion Nijinsky III's frozen semen. On **24 March 2017**, CLAIMANT replies with an offer for 100 doses of frozen semen to RESPONDENT.

2. On **28 March 2017**, RESPONDENT requests modifications to the offer including a delivery of the doses on Delivery Duty Paid ("**DDP**") terms. On **31 March 2017**, CLAIMANT agrees on a DDP delivery in three installments on the condition that a hardship clause is added in the agreement to transfer risks associated with additional health and safety requirements to RESPONDENT.

3. On **25 April 2017**, a new president with a protectionist approach towards international trade, is elected in Mediterraneo.

4. On **6 May 2017**, the parties conclude the Frozen Semen Sales Agreement ("**Sales Agreement**").

5. In **November 2017**, Mediterraneo announces a 25 % tariff on all agricultural products imported from Equatoriana.

6. In response, on **19 December 2017** Equatoriana announces a retaliatory 30 % tariff on all agricultural products from Mediterraneo. The tariffs take effect a month later on **15 January 2018**.

7. On **20 January 2018,** a day before the last shipment of 50 doses is to be authorized, CLAIMANT informs RESPONDENT about the imposed tariffs affecting the delivery. RESPONDENT's representative recognizes the situation, but states that according to his

understanding CLAIMANT is responsible for paying the tariffs. CLAIMANT authorizes the last shipment and pays the tariffs.

8. On CLAIMANT's request, the parties meet on **12 February 2018** to discuss the tariffs. CLAIMANT insists that RESPONDENT should pay the additional costs caused by the tariffs. RESPONDENT contests this as pursuant to the Sales Agreement, CLAIMANT bears the risk of tariffs.

9. On **31 July 2018**, CLAIMANT submits its Notice of Arbitration ("**NoA**") to Hong Kong International Arbitration Centre ("**HKIAC**"). RESPONDENT files its Answer to the Notice of Arbitration ("**ANoA**") on **24 August 2018**.

10. On **2 October 2018**, CLAIMANT announces that it intends to submit the Partial Interim Award rendered in RESPONDENT's other arbitration as evidence in the current proceedings. The documents have been leaked either through an illegal hack of RESPONDENT's computer system or through a breach of confidentiality obligations.

SUMMARY OF ARGUMENT

11. RESPONDENT was delighted by the new deal with CLAIMANT which would enable it to breed its own world-class champion horse – before things took a turn for the worse. Little did RESPONDENT know back then that right after it would fulfill all its contractual obligations, CLAIMANT would attempt to slide its financial problems onto RESPONDENT's shoulders and start demanding an additional payment. However, changes in customs regulations are business as usual in today's world. Yet, when Equatoriana imposed the tariff and CLAIMANT's commercial risk materialized, CLAIMANT's reasons to avoid responsibility started galloping.

12. When RESPONDENT rightfully refused to pay any additional price for the doses, CLAIMANT dragged RESPONDENT into an arbitral proceeding to have the parties' agreement rewritten. To this end, CLAIMANT is trying to stretch not only the narrow hardship clause but also the applicable law beyond its limits to replenish its financial sources at RESPONDENT's expense. However, RESPONDENT should not be obliged to take over the risks belonging to CLAIMANT.

13. With regard to the procedural issues, RESPONDENT respectfully requests the arbitral tribunal to dismiss the claim, as the arbitral tribunal lacks the jurisdiction and the powers to adapt the Sales Agreement (**I**). Aware of its weak position, CLAIMANT is attempting to submit improperly obtained documents as evidence in the current proceedings. To conduct the arbitration in a fair and efficient manner, the arbitral tribunal is respectfully requested not to allow CLAIMANT to submit the documents as evidence (**II**). With regard to the merits of the case, RESPONDENT respectfully asks the arbitral tribunal to find that RESPONDENT is not obliged to pay any additional remuneration demanded by CLAIMANT, neither under the hardship clause nor under the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") (**III**).

ARGUMENT

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION OR THE POWERS TO ADAPT THE SALES AGREEMENT

14. For the sake of clarity, RESPONDENT does not object to the arbitral tribunal's jurisdiction in general. RESPONDENT agrees that by including the arbitration clause in the Sales Agreement the parties have agreed that their disputes shall be solved by the arbitral tribunal. However, the claim raised does not merely require the arbitral tribunal to order a payment on the basis of an interpretation of the Sales Agreement but asks for its adaptation. RESPONDENT strongly objects to the arbitral tribunal's jurisdiction and powers to decide the particular claim concerning adaptation. The parties have not granted the arbitral tribunal the jurisdiction or the powers to adapt their agreement but only to interpret and enforce it. Therefore, RESPONDENT seeks the arbitral tribunal to dismiss the claim.

15. The law applicable to the arbitration, i.e. *lex arbitri,* determines the arbitral tribunal's jurisdiction and powers. The arbitral tribunal does not have the jurisdiction to adapt the Sales Agreement under the applicable *lex arbitri,* i.e. the Danubian Arbitration Law ("**DAL**"). The parties have not expressly granted the arbitral tribunal the power to adapt the Sales Agreement as required by DAL **(A)**. In any case, DAL requires that the parties have consented to the arbitral tribunal's adaptation power. Whether such consent has been given is determined by the law governing the arbitration agreement. Here, the law governing the arbitration agreement is the Danubian Contract Law

("**DCL**"), which requires an express authorization for adaptation by the arbitral tribunal. The parties have not given such an authorization to the arbitral tribunal **(B)**. Even if the arbitration agreement were governed by the Mediterranean Contract Law ("**MCL**"), the arbitral tribunal still lacks the jurisdiction and the powers to adapt the Sales Agreement as the parties have excluded the arbitral tribunal's adaptation power **(C)**.

A. THE PARTIES HAVE NOT EXPRESSLY AUTHORIZED THE ARBITRAL TRIBUNAL TO ADAPT THE SALES AGREEMENT AS REQUIRED BY THE *LEX ARBITRI*

16. Contrary to CLAIMANT's allegations [*MfC, paras. 42–6*], the *lex arbitri* requires an express agreement by the parties to grant the arbitral tribunal the power to adapt their agreement. Here, if the parties wanted to authorize the arbitral tribunal to adapt the Sales Agreement, they should have done so expressly. An express conferral of powers is, however, missing from the Sales Agreement. Therefore, the arbitral tribunal does not have the jurisdiction or the powers to adapt the Sales Agreement.

17. The *lex arbitri* determines whether the arbitrators are authorized to decide on the contract adaptation [*Berger I, p. 10; Brunner, p. 493; Frick, pp. 193–4; Ferrario, p. 84*]. Where the parties have stipulated a seat of arbitration in their agreement, the law of that seat is the law applicable to their arbitration [*Ferrario, pp. 85–8; Henderson, p. 910*]. Here, the parties have expressly agreed that the seat of the arbitration is Vindobona, Danubia [*CE 5, p. 14*]. Thereby, the *lex arbitri* is DAL, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") [*PO1, para. 4, p. 53*].

18. The legislative history of the Model Law ought to be considered by the arbitral tribunal in the case at hand, as it is an important guide when interpreting DAL [*cf. Weigand, paras. 14.16–14.17*]. The Working Group discussed including a provision concerning contract adaptation in the Model Law. It considered that if such a provision were included, the mandate to adapt a contract should be expressly conferred upon the arbitral tribunal in writing [*Working Group 6th Session, para. 18*; *Secretariat Note 5th Session, para. 8*]. This was because by adapting a contract, the arbitral tribunal creates new contractual obligations for the parties. Such new obligations can become binding only when the parties have agreed to be bound [*Secretariat Note 5th Session, para. 8*] as the parties are

considered to be in the best position to judge their own interests [*Frick, p. 148; Fouchard/Gaillard/Goldman, p. 25; Al Faruque, p. 153*].

19. However, the Working Group concluded that the arbitral tribunal's power to adapt contracts would be unacceptable to most countries [*Working Group 6th Session, paras. 19–21; Working Papers 6th Session, para. 14; cf. Broches II, p. 83*]. Therefore, a provision concerning arbitral tribunals' power to adapt contracts was intentionally left out from the Model Law [*Working Group 6th Session, paras. 19–20; cf. Working Papers 6th Session, para. 20*]. Thus, the question was left to be governed by the laws of national legal systems [*Beisteiner, pp. 106–7; Broches I, p. 40*].

20. When adopting the Model Law, states may add a provision concerning arbitral tribunals' power to adapt contracts in their national arbitration laws. For example, Bulgaria has included such a provision [*Art. 1.2 of the Commercial Arbitration Act of Bulgaria*]. However, the national legislator of Danubia decided not to include such a provision in DAL but to follow the original formula of the Model Law. Thus, DAL does not allow arbitral tribunals to adapt contracts without the parties' express agreement.

21. This is in line with the general legal principle of narrow interpretation of the adjudicator's powers in the law of Danubia. The Danubian general contract law (i.e. DCL) requires that the parties have expressly conferred the power to adapt the contract upon the arbitral tribunal [*PO2, para. 45; cf. paras. 35-7*]. Respectively, the courts in Danubia are of the view that contract adaptation is not possible under DAL without the parties' express agreement [*PO2, para. 36*].

22. An express conferral of the arbitral tribunal's adaptation power is missing in the Sales Agreement. Indeed, no clause in the Sales Agreement mentions adaptation. Therefore, the arbitral tribunal's mandate does not extend to adapting the Sales Agreement but is limited to adjudicate legal disputes arising from breach or non-performance of the Sales Agreement.

23. To conclude, the parties have not authorized the arbitral tribunal to adapt the Sales Agreement as required by DAL. Therefore, the arbitral tribunal does not have the jurisdiction or the powers to adapt the Sales Agreement and should dismiss the claim.

B. IN ANY EVENT, THE PARTIES HAVE NOT EXPRESSLY AUTHORIZED THE ARBITRAL TRIBUNAL TO ADAPT THE SALES AGREEMENT AS REQUIRED BY THE LAW GOVERNING THE ARBITRATION AGREEMENT

24. Should the arbitral tribunal consider that DAL does not require an express authorization for contract adaptation, the question of whether the parties have granted the arbitral tribunal the adaptation power is determined by the arbitration agreement in the light of the law governing it. Here, the law governing the arbitration agreement is DCL **(1)**, which requires an express authorization for adaptation by the arbitral tribunal. The parties have not given such an authorization to the arbitral tribunal **(2)**. Therefore, the arbitral tribunal does not have the jurisdiction or the powers to adapt the Sales Agreement.

1. The parties agreed that the Danubian Contract Law governs the arbitration agreement

25. There is no express provision in the Sales Agreement as regards the law governing the arbitration agreement. However, the parties have made an implied choice in favor of the law of the seat, i.e. DCL, to govern the arbitration agreement. Contrary to CLAIMANT's contention [*MfC, paras. 11 et seqq.*], the parties did not agree either explicitly or implicitly that MCL would govern the arbitration agreement.

26. In absence of an explicit choice-of-law regarding the arbitration agreement, the prevailing presumption is that the parties impliedly chose the law of the seat to govern the arbitration agreement [*Born, pp. 509–14; Fouchard/Gaillard/Goldman, para. 430; Bulbank case; FirstLink case; C v. D; XL Insurance v. Owens Corning; ICC cases 1507, 4504, 5294, 6149, 14046*]. As an example, in *XL Insurance v. Owens Corning* the contracts contained a New York applicable law clause, along with a clause providing for arbitration in London. The court recognised that the choice of London as the seat of the arbitration implied a choice of English law as the law governing the arbitration agreement. The presumption is in line with Art. 36(1)(a)(i) DAL and Art. V(1)(a) of the New York Convention ("**NYC**"), which provide that the law governing the arbitration agreement in the absence of an express choice is the law of the place where the award will be made, i.e. the law of the seat [*Redfern/Hunter, p. 159; Born, p. 478; Pearson, p. 121*].

27. The parties have not made an explicit choice regarding the law governing the arbitration agreement. However, the parties have undisputedly agreed that the seat of the arbitration is Vindobona,

Danubia [*CE 6, p. 14*]. By seating the arbitration in Danubia, the parties impliedly agreed that the arbitration clause shall be governed by the law of the seat, i.e. DCL.

28. Furthermore, pre-contractual negotiations are relevant when determining the parties' choice-of-law, as reflected in most international codifications on contractual norms [*e.g. Art. 8(3) CISG; Art. 5:102 PECL; Art. 4.3 UNIDROIT Principles*]. The parties' implied choice in favour of DCL is apparent from the negotiations of the Sales Agreement. When drafting the arbitration agreement, the parties had included a separate mention concerning the law governing the arbitration agreement, being the law of the seat [*RE 1, p. 33*]. This mention was merely forgotten from the final agreement [*PO2, para. 6*] due to a severe car accident in the midst of the negotiations leading to both parties' main negotiators being replaced. However, the mention concerning the choice-of-law was not necessary from a legal point-of-view, as the arbitration agreement already included a choice for the seat and thus an implied choice in favour of the law of Danubia.

29. The conclusion that the parties impliedly agreed DCL to govern the arbitration agreement is further supported by the closest connection test. When finding the law applicable to the arbitration agreement, the arbitral tribunal may consider which law has the closest and most real connection to the arbitration agreement [*Sulamérica case; C v. D; Abuja v. Meridien; ICC cases 6719, 5730, 4367; cf. Jones, p. 921*]. The law with which an arbitration agreement has its closest and most real connection is the law of the seat [*Sulamérica case; C v. D; Abuja v. Meridien; FirstLink case; Shashoua v. Sharma*]. Thus, also according to this standard the arbitration agreement is governed by DCL.

30. By contrast, unlike CLAIMANT alleges [*MfC, paras. 11 et seqq.*], the parties never agreed on MCL as the law governing the arbitration agreement. The law expressly chosen to govern the substantive contract does not extend to the arbitration agreement [*Pearson, p. 121; Fouchard/Gaillard/Goldman, p. 222; Berger II, pp. 319–20; Redfern/Hunter, p. 158; Craig/Park/Paulsson, pp. 52–4; cf. Moser/Bao, p. 259*]. Pursuant to the doctrine of separability recognized under Art. 16 DAL, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the main contract. In the *Bulbank case*, when choosing the law applicable to the arbitration agreement, the court ignored the parties' express choice-of-law concerning the underlying contract, considering that the arbitration clause ought to be treated as a separate agreement subject to a separate law.

31. The final choice-of-law clause provides that "[*t*]*his Sales Agreement shall be governed by the law of Mediterraneo*" [*CE 5, p. 14*]. The choice-of-law refers only to the "sales" part of the agreement, i.e. the main agreement. Following the doctrine of separability, the arbitration agreement is an agreement separate from the main agreement. Thus, the choice-of-law regarding the law governing the main agreement does not extend to it. This is further affirmed by the fact that the parties placed the choice-of-law clause in its own separate clause preceding the arbitration agreement. As noted above [*para. 28*], during the negotiations, the parties treated the choice-of-law concerning the main agreement separate from the choice-of-law concerning the arbitration agreement [*RE 1, p. 33*]. A separate mention concerning the law governing the arbitration agreement was merely forgotten from the Sales Agreement.

32. To conclude, the parties have not agreed to apply MCL to the arbitration agreement. On the contrary, the parties impliedly chose the law of the seat, i.e. DCL, to govern the arbitration agreement.

2. The parties have not authorized the arbitral tribunal to adapt the Sales Agreement

33. According to RESPONDENT's understanding, it is undisputed that should the arbitration agreement be governed by DCL, it would not be interpreted as authorizing a contract adaptation by the arbitral tribunal. CLAIMANT expressly acknowledges that "*according to Danubian law, the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Tribunal*" [*MfC, para. 14*].

34. For the sake of clarity, arbitral tribunals may adapt contracts under DCL only if the parties have expressly conferred such a power upon the arbitral tribunal. Here, the parties have not authorized the arbitral tribunal to adapt the Sales Agreement. Therefore, the arbitral tribunal lacks the jurisdiction and the powers to adapt the Sales Agreement.

35. Under Art. 6.2.3(4)(b) DCL, the arbitral tribunal may adapt the contract in case of hardship only "*if authorized*" [*PO2, para. 45*]. According to Art. 4.3 DCL, agreements are to be interpreted in accordance with the four corners rule [*PO2, para. 45*]. This means that the interpretation of an agreement is limited to its wording and no external evidence such as prior negotiations may be used to contradict or supplement the agreement [*Vogenauer, p. 374*]. Correspondingly, contrary to

CLAIMANT's assertions [*MfC, para. 44*], an authorization for contract adaptation required by DCL must be express and cannot be implied.

36. An authorization for contract adaptation is to be expressly included either in an arbitration agreement itself or in a specific contractual adaptation clause [*Berger I, p. 8; Kröll, p. 457; Beisteiner, p. 109; Craig/Park/Paulsson, p. 144; Bernini, p. 421*]. For example, in *ICC case 7544,* the arbitral tribunal confirmed its power to adapt the contract where the parties had expressly authorized in the arbitration agreement the tribunal to decide on "*all disputes arising out of the contract <u>including a change of the contract itself</u>*" (emphasis added). By contrast, where the parties have not authorized the arbitral tribunal to adapt the contract, contract adaptation should not be imposed upon them [*Berger I, p. 5; Kröll, p. 457*].

37. The arbitral tribunal may go beyond the four corners of the contract only when interpreting the writing of the contract [*PO2, para. 45; Vogenauer, p. 374*] or when the contract is ambiguous, e.g. when it has conflicting terms [*Posner, p. 535; Robert Bosch v. Honeywell*]. However, a contract is not ambiguous merely because the parties disagree as to its proper interpretation [*Martorana, p. 16; Pileggi; Robert Bosch v. Honeywell*].

38. The parties have not included any authorization for contract adaptation, neither in the arbitration agreement nor in any other clause in the Sales Agreement. The wording of the arbitration agreement merely states that the arbitral tribunal has the jurisdiction to decide *"any dispute arising out of this contract"* [*CE 5, p. 14*]. The arbitration agreement was drafted on the basis of the HKIAC Model Clause [*RE 1, p. 33*]. However, RESPONDENT expressly stated to CLAIMANT that the wording of the HKIAC Model Clause was too broad [*RE 1, p. 33*]. Thus, the wording of the clause was reduced and any reference which could be interpreted as an empowerment for contract adaptation was deleted [*RE 1, p. 33*]. The parties certainly did not even further broaden the scope of the arbitration agreement by including an authorization to adapt the Sales Agreement. For these reasons, the arbitration agreement cannot be interpreted as authorizing the arbitral tribunal to adapt the Sales Agreement.

39. The parties have not included an express authorization for contract adaptation in any other clause under the Sales Agreement either. As will be explained in detail below [*para. 82 et seqq.*], the parties have exhaustively defined in the hardship clause the recourse available to the seller in the

case of hardship. The narrow hardship clause provides only for a limitation to CLAIMANT's liability. The wording of the clause is not ambiguous, and thus the arbitral tribunal's jurisdiction is to be determined within the four corners of the Sales Agreement. Thus, the hardship clause cannot be interpreted as authorizing the arbitral tribunal to adapt the Sales Agreement.

40. In the light of the above, the parties have not authorized the arbitral tribunal to adapt the Sales Agreement as required by DCL. Therefore, the arbitral tribunal lacks the jurisdiction and the powers to adapt the Sales Agreement and it should dismiss the claim.

C. EVEN IF THE ARBITRATION AGREEMENT WERE GOVERNED BY THE MEDITERRANEAN CONTRACT LAW, THE PARTIES EXCLUDED THE ARBITRAL TRIBUNAL'S ADAPTATION POWER

41. CLAIMANT acknowledges that as the arbitration agreement is governed by DCL, the arbitral tribunal does not have the power to adapt the Sales Agreement. Therefore, CLAIMANT artificially argues that the arbitration agreement is governed by MCL, and thus an express authorization for contract adaptation is not required. However, even if the arbitral tribunal were to consider that the arbitration agreement is governed by MCL, the arbitral tribunal still lacks the jurisdiction and the powers to adapt the Sales Agreement. The parties did not intend the arbitral tribunal to have the power to adapt the Sales Agreement irrespective of what law governs the arbitration agreement.

42. When determining what the parties have intended the arbitral tribunal to be authorized to do, a contract shall be interpreted according to the common intent of the parties pursuant to Art. 4.1 MCL. In this respect, the most important factor is the wording of the contract [*Vogenauer, p. 588*]. Furthermore, regard is to be had to all relevant circumstances, including preliminary negotiations between the parties under Art. 4.3 MCL.

43. The arbitration agreement states that "[*a*]*ny dispute arising out of this contract* [...] *shall be referred to and finally resolved by arbitration*" [*CE 5, p. 14*]. The arbitration agreement was drafted on the basis of the HKIAC Model Clause [*RE 1, p. 33*]. However, RESPONDENT expressly stated to CLAIMANT that the wording of the HKIAC Model Clause was too broad [*RE 1, p. 33*]. Therefore, the wording of the clause was narrowed down and any reference which could be interpreted as an empowerment for contract adaptation was deleted [*RE 1, p. 33*]. For example, the considerably expansive wording of the HKIAC Model Clause including "*all disputes, controversies, differences*

or claims", was cut down to "*any disputes*", and disputes merely "*relating to*" the agreement were excluded. Such a substantial reducing of the wording expresses the parties' will to exclude adaptation from the arbitral tribunal's mandate. Thus, the parties meant for the principle of *pacta sunt servanda* to prevail.

44. Contrary to CLAIMANT's arguments [*MfC, para. 14*], it cannot be concluded from the parties' preliminary negotiations that they intended to mandate the arbitral tribunal to adapt the Sales Agreement. CLAIMANT rests its argument solely on the witness statement of its own representative Ms. Napravnik. Ms. Napravnik claims that she discussed the need for an adaptation mechanism with RESPONDENT's negotiator Mr. Antley on 12 April 2017 before the two were injured in a car accident [*CE 8, p. 17*]. There are no other records to support Ms. Napravnik's allegations concerning such discussion. Neither does such discussion indicate that the parties agreed on the matter, nor was any statement to that extent included in the Sales Agreement either.

45. Should the arbitral tribunal find that the parties' common intent cannot be established, the contract is to be interpreted with reference to a standard of a reasonable person under Art. 4.1(2) MCL. This means that the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances. In this respect, regard is to be had to all the circumstances of the case including the nature and purpose of the contract under Art. 4.3 MCL. The nature and purpose of the contract refers to what kind of content is characteristic for a certain the type of contract [*Vogenauer, pp. 591–2*]. The parties to a particular type of contract normally intend to bring about certain legal consequences [*Vogenauer, p. 591*].

46. The purpose of the Sales Agreement was to acquire a fixed amount of 100 doses of Nijinsky III's frozen semen for the two following breeding seasons [*PO2, para. 11*]. The Sales Agreement is a short-term agreement lasting only for eight months. It does not concern continuous deliveries, nor does it form a part of any complex contractual arrangement lasting for several years or decades. In this light, it would not be reasonable to interpret the Sales Agreement as providing for adaptation to uphold it over a long period of time. Instead, a reasonable person would understand that parties to this type of agreement wanted the principle of *pacta sunt servanda* to prevail.

47. In the view of the above, the arbitral tribunal lacks the jurisdiction and the powers to adapt the Sales Agreement irrespective of which law governs the arbitration agreement. Therefore, the arbitral tribunal should dismiss the claim at hand.

II. THE ARBITRAL TRIBUNAL SHOULD NOT ALLOW CLAIMANT TO SUBMIT THE DOCUMENTS FROM RESPONDENT'S OTHER ARBITRAL PROCEEDINGS AS EVIDENCE

48. RESPONDENT is currently a party to another arbitration with one of its customers in which the dispute concerns a sale of a mare. The Partial Interim Award rendered in those proceedings has been leaked either through a breach of confidentiality obligations or through an illegal hack of RESPONDENT's computer system. Now, CLAIMANT seeks to submit the documents from that separate arbitration as evidence in the current proceedings. However, the documents are irrelevant and immaterial to the present case **(A)**. In any case, admitting the documents as evidence would be against the principle of fairness **(B)**. Therefore, the arbitral tribunal should not admit the documents as evidence.

A. THE DOCUMENTS ARE IRRELEVANT AND IMMATERIAL TO THE PRESENT CASE

49. The arbitral tribunal should not allow CLAIMANT to submit the documents from RESPONDENT's other arbitration as evidence. Contrary to CLAIMANT's assertions [*MfC, paras. 66 et seqq*], the documents are irrelevant and immaterial to the present case. Consequently, unlike CLAIMANT contends [*MfC, paras. 71–2*], rejecting the documents from evidence would not violate CLAIMANT's right to be heard.

50. The parties agreed that the arbitral proceedings are conducted under the HKIAC Administered Arbitration Rules ("**HKIAC Rules")** [*CE 5, p. 14*]. According to Art. 19(2) DAL and Art. 22.2 HKIAC Rules, the arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence. This means that, as such, the arbitral tribunal has a broad discretion when taking evidence [*Born, p. 2307; Waincymer, p. 750; Alvarez, p. 677*]. However, the arbitral tribunal should exercise this discretion in accordance with the applicable legal rules and principles [*Born, p. 2154; Waincymer, p. 752*]. On the one hand, the arbitral tribunal needs to guarantee the parties a reasonable opportunity to present their cases in accordance with Art. 18 DAL and Art. 13.1 HKIAC

Rules. On the other hand, the arbitral tribunal should ensure that the proceedings are conducted efficiently [*Born p. 2141; Moser/Bao, p. 161*]. It has been emphasized in Art. 13.1 HKIAC Rules that the proceedings should be conducted avoiding unnecessary delay or expense. Furthermore, Art. 13.5 HKIAC Rules imposes a direct obligation upon the parties and the arbitral tribunal to do everything necessary to ensure the fair and efficient conduct of the arbitration. This means that evidence should only be used for the purpose of proving legally relevant facts of the case, not for any other purpose [*cf. Pilkov, p. 147*]. Considering the requirement of fairness, the evidence should not be used only for the purpose of putting the other party in a bad light.

51. The IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") provide guidance on exercising discretion concerning the aforementioned balancing in connection with the taking of evidence. They are a generally accepted standard representing the best practices in international arbitration [*O'Malley, pp. 9–10; Marghitola, p. 33; Kaufmann-Kohler/Bärtsch, p. 18; Redfern/Hunter, p. 381; Waincymer, p. 760; cf. Born, pp. 2347–8*]. It has been explicitly emphasized that when taking evidence in arbitration conducted under the HKIAC Rules, the arbitral tribunal should have regard to the IBA Rules [*Moser/Bao, p. 191; cf. Ma/Brock, para. 15.074*]. In fact, also CLAIMANT agrees that the IBA Rules are applicable in the current proceedings [*MfC, paras. 52–3*].

52. According to Art. 9.2(a) IBA Rules, the arbitral tribunal shall exclude from evidence any document that lacks sufficient relevance to the case or materiality to its outcome. A document is relevant only where it is necessary for a party to establish the truth of its factual allegations on which its legal conclusions are based [*Raeschke-Kessler, p. 427; Moser/Bao, p. 193; Ylikantola, p. 133; Kaufmann-Kohler/Bärtsch, p. 18; O'Malley, pp. 269–70*]. A party presenting the evidence must be able to justify its relevance. The arbitral tribunal should take a proportionate approach to limiting the scope of the evidence which a party wishes to present [*Waincymer, p. 751; Redfern/Hunter, p. 357; Moser/Bao, pp. 162–3; Karaha Bodas Co. case*]. The refusal to admit evidence is not a violation of the party's right to be heard where the evidence is insufficient to substantiate a claim or it lacks relevance or materiality to the case at hand [*Bridge case; Jermini, pp. 605–9*].

53. The documents from the other arbitration are irrelevant and serve no purpose in the present case. CLAIMANT has not even alleged that these documents would have any connection to the legally relevant facts of this particular case. CLAIMANT seeks to submit the Partial Interim Award and

the related submissions from a completely separate arbitration between RESPONDENT and its customer under a different arbitration clause concerning a different agreement, a different product, different tariffs, and thus different legally relevant facts. For these reasons, the documents have no connection whatsoever to the present case.

54. The relevant factual circumstances in the present case can be boiled down to: (i) the content of the Sales Agreement between CLAIMANT and RESPONDENT, and (ii) the circumstances affecting CLAIMANT's performance. The documents are not related to the Sales Agreement between the parties. Respectively, the documents do not concern the circumstances affecting CLAIMANT's performance in the present case.

55. It appears that the real reason why CLAIMANT is seeking to force these documents into this arbitration is to put RESPONDENT in a bad light. With these documents, CLAIMANT attempts to speculate that RESPONDENT has acted "*contradictorily*" [*MfC, para. 68*]. CLAIMANT is trying to mislead the arbitral tribunal from the legally relevant facts of the case. Including such evidence would be alien to the duty and the right to arbitrate in a fair and efficient manner.

56. To conclude, the documents are irrelevant and immaterial, and in fact, have no connection whatsoever to the present case. Considering the duty to conduct the arbitration in a fair and efficient manner, the arbitral tribunal should not admit the documents as evidence in these proceedings.

B. ADMITTING THE DOCUMENTS AS EVIDENCE WOULD BE AGAINST THE PRINCIPLE OF FAIRNESS

57. Should the arbitral tribunal not reject the documents due to the lack of relevance and materiality, in any case, they should not be admitted as evidence. Admitting the documents would violate the duty to ensure the fairness of the arbitral proceedings **(1)**. This is because the documents are obtained either through an illegal hack of RESPONDENT's computer system which violates the right to data security **(2)**, or through a breach of confidentiality obligations violating the right to confidential communication **(3)**.

1. Both the parties and the arbitral tribunal have the duty to ensure fairness in arbitration

58. In this section, RESPONDENT will set out the legal framework for exercising the arbitral tribunal's discretion regarding the admissibility of evidence obtained from questionable sources.

59. The arbitral tribunal has the power to rule on the admissibility of evidence under both Art. 19(2) DAL and Art. 22.2 HKIAC Rules. The arbitral tribunal should exercise its discretion taking into account that the proceedings must be conducted in accordance with the fundamental principles of justice and fairness as reflected in Art. 18 DAL and Art. 13.5 HKIAC Rules. Protection of values such as property, privacy and data security as well as confidentiality and the right to confidential communication requires that violating these values is not accepted in arbitration.

60. According to Art. 13.5 HKIAC Rules, the arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration. This duty is further reflected by the public policy requirements set out in the Art. V(2)(b) NYC and Arts. 34 and 36 DAL. Public policy protects the most basic and explicit principles of justice and fairness [*UNCITRAL Model Law Case Digest, p. 183*]. It does not allow conducting the arbitral proceedings contrary to the essential morality or the basic principles of public and economic life [*UNCITRAL Model Law Case Digest, p. 183*].

61. Public policy standards have to be taken into account during the conduct of the proceedings. These standards do not only pertain to individual rules related to enforcement of the award, but they are also principles guiding the arbitral tribunal's discretion at all stages of the proceedings [*Kurkela/Turunen, pp. 5–7*]. It has been explicitly recognized that public policy considerations require excluding confidential information or illegally obtained evidence [*Waincymer, p. 793; Pilkov, p. 154; Blair/Gojkovic, p. 257; cf. Sussman, p. 16; Avantage/Sony/Philips case*].

2. The documents obtained through an illegal hack must not be admitted

62. If the documents were obtained through an illegal hack of RESPONDENT's computer system, they may not be admitted as evidence. Unlike CLAIMANT alleges [*MfC, paras. 56–8*], it has been involved in the procurement of the documents, which further highlights the need to reject them from evidence.

63. Neither DAL, the HKIAC Rules nor the IBA Rules provide specific provisions regarding the admissibility of illegally obtained evidence. Therefore, the question of admissibility has to be decided within the context of the legal framework discussed above [*paras. 58-61*]. As noted, the concept of public policy includes fundamental principles of justice and fairness. Illegal hack is by its nature to be considered a textbook example of a conduct in violation of the principles of justice

and fairness. Consequently, obtaining evidence through such an illegal hack is also contrary to these principles. Therefore, admitting such evidence would mean tolerating and even encouraging such illegal conduct. This would be contrary to the objectives of international public policy. Thus, evidence obtained through an illegal hack cannot be admitted. For example, in *Wee Shuo Woon v. HT* the court specifically held that illegally hacked documents were inadmissible because to hold otherwise would be "*to encourage unauthorized access and pilferage of confidential information*".

64. The need to reject illegally obtained evidence is even more apparent when the party attempting to rely on such evidence has played any role in obtaining the evidence [*Waincymer, p. 797; Blair/Gojkovic, p. 256*]. This has also been recognized in extensive case law [*Caratube v. Kazakhstan; Methanex v. USA; Iranian Hostages case; Persia International Bank v. Council; EDF v. Romania*]. A party has "*dirty hands*" in procuring the evidence not only if it has itself committed a crime, but also when it has been aware of an illegal act of a third person attributable to it and has derived an advantage from such unlawful act [*Chitty, pp. 1185–8; Wee Shuo Woon v. HT*].

65. As RESPONDENT informed CLAIMANT and the arbitral tribunal on 3 October 2018, its computer system was hacked in September 2018 [*Fasttrack email, p. 50*]. The documents CLAIMANT is seeking to introduce into evidence are likely to be obtained through this illegal hack. The documents are now being offered for sale by a company with "*a doubtful reputation as to where it gets its information from*" [*PO2, para. 41*]. The company has refused to disclose its sources in this case, trying to protect its business of cashing in on hacked or leaked confidential documents. CLAIMANT has made an arrangement to acquire a copy of the documents against a payment of USD 1000 from the said company [*PO2, para. 41*]. Aware of the illegal source of the documents, CLAIMANT still seeks to purchase and submit them as evidence. For these reasons, contrary to what CLAIMANT contends [*MfC, para. 57*], CLAIMANT had a role to play in the procurement of the documents. Admitting the documents as evidence would be in direct contradiction to the principle of fair proceedings.

66. To conclude, admitting the illegally obtained documents would be against the basic principles of justice and fairness, especially as CLAIMANT has been involved in the illegal procurement of the documents. Therefore, the arbitral tribunal should not allow CLAIMANT to submit the documents as evidence.

3. The documents obtained through a breach confidentiality must not be admitted

67. If the documents were obtained through a breach of confidentiality, the arbitral tribunal should not admit them as evidence. The arbitral tribunal should respect and secure confidentiality and the right to confidential communication. CLAIMANT claims that the documents need to be admitted "*in order to respect procedural fairness*" [*MfC, para. 72*]. This is incorrect as the principle of fairness on the contrary requires that the documents obtained in violation of confidentiality obligations are excluded.

68. Neither DAL nor the HKIAC Rules provide specific provisions regarding the admissibility of evidence obtained through a breach of confidentiality obligations. Therefore, the question of admissibility has to be decided within the context of the framework discussed above [*paras. 58-61*] and with the guidance of the IBA Rules.

69. According to Art. 9.2(e) IBA Rules, the arbitral tribunal shall exclude from evidence any document on grounds of commercial confidentiality that the arbitral tribunal determines to be compelling. Commercial confidentiality means e.g. documents covered by confidentiality agreements with third parties [*Marghitola, p. 93; O'Malley, p. 302*]. The arbitral tribunal should respect and secure confidentiality by excluding evidence protected by confidentiality obligations [*O'Malley, p. 301*]. Indeed, the value of confidentiality and the right to confidential communication should be considered to protect a document from being used in the proceedings, in particular if it had been revealed by the wrongful conduct of a third party [*cf. Blair/Gojkovic, p. 257*]. For example, in *Libananco v. Turkey*, the arbitral tribunal excluded confidential documents from evidence. It emphasized the importance of confidentiality and the obligation of all parties to arbitrate fairly and in good faith, and that arbitral tribunals have the inherent jurisdiction to ensure that these obligations are complied with.

70. As noted above [*paras. 60-1*], the concept of public policy includes fundamental principles of justice and fairness. Deliberate breaching of confidentiality obligations is to be considered as contradictory to these principles. Consequently, admitting evidence obtained through such improper means would entail tolerating and even encouraging disregard for confidentiality obligations when acquiring evidence. This would be contrary to the objectives of international public policy. Thus, evidence obtained through a breach of confidentiality obligations should not

be admitted. This is reflected also under Art. 9.2(g) IBA Rules which provides that considerations of procedural proportionality, fairness or equality of the parties serve as a ground for exclusion of evidence.

71. CLAIMANT attempts to justify the submission of the documents by pointing out that it owes no obligation of confidentiality towards RESPONDENT [*MfC, paras. 59–60*]. However, the documents were tainted once they had been acquired. RESPONDENT's two former employees, who had been under an obligation to keep all information about the other arbitral proceedings confidential [*PO2, para. 41*], leaked the documents to a company making its profit by selling confidential documents of other businesses. The motive behind such questionable action by the former employees might have been to damage RESPONDENT as a retaliation for their dismissal in July 2018 [*PO2, para. 41*] or simply to cash in by selling the documents. In any event, the circumstances leading to the disclosure of the documents are virtually comparable to bribery or corporate crime.

72. CLAIMANT is fully aware of the confidential nature of the documents and that RESPONDENT would under no circumstances be willing to disclose them voluntarily. Despite this, CLAIMANT is taking the law into its own hands and paying a fee of USD 1000 for the documents otherwise inaccessible for it. Admitting such evidence would mean allowing and encouraging parties to acquire evidence by paying third parties to disclose confidential documents from other arbitral proceedings. This would violate the essence of arbitration which is to ensure parties a confidential procedure for solving their disputes. Therefore, the arbitral tribunal should not allow CLAIMANT to submit the documents as evidence.

73. Furthermore, CLAIMANT attempts to justify the submission of the documents by claiming that the documents are in the public domain and that their confidentiality has ceased [*MfC, paras. 61 et seqq.*]. This is incorrect.

74. Information that is in the public domain is openly accessible information, such as materials publicly available from stock exchanges or newspaper articles, which the parties acknowledge from external sources [*Smeureanu, pp. 111–2*]. Information is not public if it is only in the knowledge of a private circle of people [*Smeureanu, p. 112; cf. Dessemontet, p. 309*]. For example, in *Wee Shuo Woon v. HT*, the court concluded that even though the documents sought to be introduced into evidence

were available through WikiLeaks, as it was highly probable that only few knew of its existence, the contents were not public knowledge and retain their confidential status.

75. Here, the documents are not in the public domain. The *Caratube v. Kazakhstan case* CLAIMANT develops to support its allegations relates to admitting evidence which is easily accessible in the world wide web, and thus does not apply here [*MfC, paras. 61 et seqq.*]. RESPONDENT has certainly not itself published the documents and has never intended the documents for public distribution. Even though the documents are now in the possession of the above-mentioned company, they are not in the public domain. This is because the general public does not have a direct access to the documents, but one would have to pay a fee of USD 1000 for them [*PO2, para. 41*]. In comparison, information included in a publicly available newspaper can be acquired for a few dollars. Such a considerable fee payable for the documents confirms that the documents are not publicly available. Furthermore, it is unlikely that more than a few people know about the existence of the documents. Indeed, CLAIMANT also itself found out about the possibility to acquire the documents purely coincidentally as a hearsay at the annual breeder conference [*PO2, paras. 40–1*]. For these reasons, the documents are not public knowledge and retain their confidential status.

76. In conclusion, admitting the documents obtained through a breach of confidentiality would be against the basic principles of justice and fairness in international arbitration. Therefore, the arbitral tribunal should not allow CLAIMANT to submit the documents as evidence.

III. CLAIMANT IS NOT ENTITLED TO ANY ADDITIONAL REMUNERATION FROM RESPONDENT

77. CLAIMANT's claim for an additional remuneration of USD 1.25 million or any other amount is unfounded. All performances under the Sales Agreement have been performed. In the words of clause 5 of the Sales Agreement, RESPONDENT *"specifically agrees and understands that no semen will be shipped until all fees have been paid*" (emphasis added) [*CE 5, p. 14*]. Indeed, RESPONDENT agrees and understands that as CLAIMANT shipped all the doses, all fees had been paid.

78. CLAIMANT concluded the Sales Agreement with RESPONDENT without preparing appropriately for the risks that may arise during its term. When the Government of Equatoriana

imposed the 30 % tariff, CLAIMANT's costs increased. CLAIMANT is now trying to make up the deal that turned out to be unfavourable for it and to invoke every pretext to have the Sales Agreement revised to its benefit. In reality, CLAIMANT's commercial risk simply materialized. RESPONDENT should not be obliged to take over the risks belonging to CLAIMANT. CLAIMANT is not entitled to adaptation of the Sales Agreement on the basis of the tariffs, neither under the hardship clause **(A)** nor under the CISG **(B)**.

A. THE SALES AGREEMENT CANNOT BE ADAPTED ON THE BASIS OF THE TARIFFS UNDER THE HARDSHIP CLAUSE

79. CLAIMANT invokes the hardship clause under the Sales Agreement to seek adaptation of the purchase price [*MfC, paras. 74 et seqq.*]. However, the hardship clause does not provide adaptation as an available remedy **(1)**. In any case, the conditions under the hardship clause are not met **(2)**. Therefore, the arbitral tribunal should reject CLAIMANT's claim for any additional remuneration.

1. The hardship clause does not provide adaptation as an available remedy

80. CLAIMANT claims that it is entitled to adaptation of the Sales Agreement on the basis of the hardship clause. This is incorrect as the hardship clause does not provide for contract adaptation but only for a limitation of the seller's liability.

81. When determining whether adaptation is available under the contract, the interpretation starts from the intent of the parties pursuant to Art. 8(1) CISG. In establishing the parties' intent, the starting point is the wording of the contract [*Schlechtriem/Schwenzer, p. 153; Neumann, p. 51; Coke case; Matresses case*]. The contract cannot be adapted if the hardship clause does not expressly provide for adaptation as a remedy but only obliges the parties e.g. to renegotiate the contract [*ICC case 2478; Simon, ch. 1; Frick, pp. 225–6*]. Thus, an adaptation remedy cannot be implied [*Simon, ch. 1*; *cf. Brunner, p. 421*].

82. The hardship clause, to which CLAIMANT seeks to appeal, provides that "[*s*]*eller shall not be responsible*". The clause continues to define the force majeure and hardship situations where the seller's liability is limited. However, the hardship clause does not provide for adaptation of the Sales Agreement. It is apparent from the wording of the clause that the parties wanted to provide the same effect, i.e. exemption from liability, for both force majeure and hardship situations. Thus,

the hardship clause entitles the seller to refrain from performance and to avoid the duty to pay damages to the buyer in case of force majeure or hardship. Had the parties wanted CLAIMANT to be entitled to request adaptation in the case of hardship, they would have added such mention in the hardship clause. However, no adaptation by a third party is possible on the basis of hardship clause.

83. Furthermore, when establishing the parties' intent, due consideration is to be given to pre-contractual negotiations under Art. 8(3) CISG. Here, the drafting history of the hardship clause supports that the parties did not intend to allow adaptation in the case of hardship. While negotiating the hardship clause, CLAIMANT suggested reliance on the ICC Hardship Clause [*RE 2, p. 34*]. Notably, even the ICC Hardship Clause does not provide for contract adaptation as a remedy but covers only renegotiation and termination of the contract. Still, RESPONDENT considered even the suggested ICC Hardship Clause to be far too broad for the purpose of the Sales Agreement [*RE 3, p. 35*]. Therefore, the parties agreed on an inclusion of an even narrower hardship clause. In fact, they only added a simple hardship reference into the force majeure clause. They certainly did not even further broaden the scope of the ICC Hardship Clause by including the possibility for adaptation.

84. If the parties' intent cannot be established, the question shall be decided under Art. 8(2) CISG in the light of the hypothetical understanding of a reasonable person of the same kind, placed in the same circumstances. In determining whether a reasonable person would understand contract adaptation to be available, the nature of the contract is to be taken into account [*cf. Frick, p. 212*]. Contract adaptation is designed to uphold contracts in cases of long-term contracts lasting for around 20–25 years and subject to temporal changes in circumstances [*Ferrario, p. 72; Frick, p. 224; Fox, p. 250; cf. Kröll, p. 425*]. By contrast, in case of short-term contracts, risk-taking is assumed on the part of the parties and adaptation is avoided [*Frick, p. 224*].

85. A reasonable person would understand that the parties did not mean CLAIMANT to be entitled to request adaptation in the case of hardship but only to refrain from performance and to avoid the duty to pay damages. The Sales Agreement is a short-term contact lasting for only eight months. It is not a complex long-term contract likely to be exposed to temporal changes in circumstances and requiring adaptation to meet these changes. Thus, it would not be reasonable to interpret that the parties intended for such a short-term agreement to be adapted.

86. For the sake of clarity, unlike CLAIMANT claims [*MfC, paras. 105–6*], RESPONDENT's representative Mr. Shoemaker did not promise adaptation of the Sales Agreement nor would he had the authority to do so. During the phone call on 20 January 2018 between the parties' representatives concerning the imposed tariffs, Mr. Shoemaker stated that "*if the contract provides for an increased price*", the parties would find a solution [*RE 4, p. 36*]. He was not certain about the content of the Sales Agreement as he had not been involved in negotiating the Sales Agreement and had no legal education. Yet, he emphasized that according to his understanding all risks had to be borne by CLAIMANT [*RE 4, p. 36*]. He certainly did not promise anything more than what was provided by the Sales Agreement, and as explained above [*paras. 80 et seqq.*], this does not include contract adaptation. Moreover, Mr. Shoemaker made known to Ms. Napravnik that he would not have had the authority to commit to any adaptation of the price [*RE 4, p. 36*]. Therefore, CLAIMANT delivered the last shipment at its own risk.

87. In the light of the above, the hardship clause does not provide adaptation by the arbitral tribunal as an available remedy. The hardship clause only allocates risks between the parties and limits seller's liability in force majeure and hardship situations. Therefore, the arbitral tribunal should reject CLAIMANT's claim for any additional remuneration on the basis of the hardship clause.

2. In any case, the conditions under the hardship clause are not met

88. Even if the arbitral tribunal were to consider that the hardship clause provides for adaptation, the cumulative criteria under the hardship clause are not met. First, the tariffs are not an event comparable to health and safety requirements **(a)**. Second, the tariffs were not unforeseeable **(b)**. Third, the tariffs did not make the Sales Agreement more onerous for CLAIMANT **(c)**.

a. The tariffs are not an event comparable to additional health and safety requirements

89. CLAIMANT alleges that the tariffs are an event comparable to additional health and safety requirements as required by the hardship clause [*MfC, para. 83*]. This is incorrect. The parties agreed to exclude only additional health and safety requirements and comparable events from CLAIMANT's liability. In respect of all other risks, the parties agreed on a Delivery Duty Paid (DDP) delivery, meaning that CLAIMANT assumes all responsibility, risk and costs associated with transporting the doses. Thus, the hardship clause does not cover the tariffs.

90. A hardship clause applies only to situations defined under the clause. It cannot be analogously applied to other risks [*Berger III, p. 1363; cf. Rimke 229, cf. Schmitthoff p. 420*]. Indeed, that would be in contradiction of the parties' intentions [*Berger III, p. 1363*]. Thus, even open-ended hardship clauses cannot be interpreted to cover every conceivable event [*Berger III, p. 1362*]. Contracting parties in international commerce must be presumed to have the professional competence to include a clause that expressly covers all the triggering events they wanted [*Berger III, pp. 1355, 1363; cf. ICC cases 1990, 1512, 2291, 2438, 3130, 3380*].

91. The parties included a narrow hardship clause to address CLAIMANT's concerns stemming from its past negative experiences with unforeseeable additional health and safety requirements [*PO2, p. 21*]. During the negotiations, CLAIMANT insisted that "*a hardship clause should be included into the contract to address <u>such</u> subsequent changes*" (emphasis added) [*CE 4, p. 12*]. Understanding CLAIMANT's concern, RESPONDENT was willing to take over such risks concerning additional health and safety requirements. Consequently, the parties agreed that "[*s*]*eller shall not be responsible* [...] *for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [*CE 5, p. 14*].

92. CLAIMANT has failed to establish that tariffs are a comparable event to additional health and safety requirements [*MfC, paras. 81–3*]. Health and safety requirements, such as additional health tests and long quarantine times, concern the quality and content of the product. The purpose of such requirements is to ensure the safety of people, animals and ecosystem and to prevent the spread of dangerous diseases [*cf. AVMA; Council Regulation (EC) No 1/2005*]. Instead, tariffs are customary fees in international trade imposed on all products of certain kind at their importation or exportation. They are used to raise state revenue or to protect domestic industries from foreign competition [*Investopedia article*]. Merely the fact that both health and safety requirements and tariffs potentially have financial consequences does not mean that the two are comparable. Indeed, if tariffs were considered a comparable event to additional health and safety requirements, it would be hard to find an event that would not be. Such approach would be completely irrational. As CLAIMANT itself states, "*it is intended by the parties that the clause must have a limited scope*" [*MfC, para. 80*]. Indeed, the inclusion of the hardship clause was to limit only specific risks outside CLAIMANT's responsibility and not to cover every conceivable event.

93. To conclude, the tariffs are not a comparable event to additional health and safety requirements. Thus, CLAIMANT cannot rely on the hardship clause as it does not cover tariffs.

b. The tariffs were not unforeseeable

94. Even if the tariffs were comparable to health and safety requirements, contrary to CLAIMANT's contention [*MfC, para. 82*], the tariffs were foreseeable. Therefore, the conditions under the hardship clause are not met.

95. An event is reasonably foreseeable when there is a realistic possibility that it will occur [*Azerdo Da Silveira, p. 225; Flambouras, pp. 270–1*]. It is decisive whether a merchant familiar with the particular trade, and placed in the same circumstances that prevailed at the time of the conclusion of the contract, would have taken the event into account when assessing the risks involved in the transaction [*Azerdo Da Silveira, pp. 224–5*]. Particularly, if the party has some expertise in the field that may allow it to foresee the occurrence of the event, the party may reasonably be expected to rely on its expertise to assess upcoming risks [*Brunner, p. 160*]. If the event was foreseeable at the time of the conclusion of the contract, the aggrieved party is presumed to have assumed the risk that the event will eventually occur [*Azerdo Da Silveira, p. 223; Brunner, pp. 157, 290*]. This is in particular, where early signs of the impediment were already apparent at the time of the conclusion of the contract [*Flambouras, p. 271; ICC cases 3099/3100, 7197*].

96. The 30 % tariff imposed by Equatoriana was a retaliatory measure to the 25 % tariff announced by President of Mediterraneo on agricultural products from Equatoriana [*CE 6, p. 15*]. Early signs of the trade war were already apparent at the time of the conclusion of the Sales Agreement on 6 May 2017. The President of Mediterraneo had already in his election program in January 2017 announced his protectionist approach to international trade, in particular in relation to agricultural products [*CE 6, p. 15*]. Prior to the conclusion of the Sales Agreement, the President also appointed Ms. Cecil Frankel, an ardent critic of free trade, as his "superminister" for agriculture, trade and economics [*PO2, para. 23*]. The subsequent changes in Mediterraneo's custom regulations naturally caused tension in its commercial relation to Equatoriana. It is common in international trade that if one country imposes tariffs, the other country will response by imposing retaliatory measures. Indeed, this is constantly happening in international politics, the most recent example

being the trade war between the US and China in 2018 [*cf. BBC News*]. Thus, it was foreseeable that Equatoriana imposes the retaliatory tariff.

97. Being involved in international trade and transportation business for years [*PO2, para. 9; CE 3, p. 11*], CLAIMANT should have been aware of the possibility of changes in tariffs and realize the risk of prevailing political changes affecting them. Neither is it the first time Equatoriana has imposed direct retaliatory measures in response to restrictions imposed by other countries [*CE 6, p. 15*].

98. Furthermore, contrary to what CLAIMANT argues [*MfC, para. 82*], CLAIMANT should have known that the frozen horse semen is classified as an agricultural product and therefore subject to the imposed tariff. CLAIMANT has special expertise in cross-border shipment of frozen semen including the necessary export and import documentation [*CE 8, p. 17–8*]. CLAIMANT previously even had its own transportation division [*PO2, para. 9*]. Therefore, it is fair to assume that CLAIMANT was familiar with the World Trade Organization's ("**WTO**") tariff classifications, *a fortiori* as both Mediterraneo and Equatoriana are members in the WTO [*PO2, para. 47*]. Within the WTO tariff classification, the definition of agricultural products is very broad and covers not only basic agricultural products such as live animals, but also the products derived from them such as meat and animal skins [*WTO webpage; cf. WTO Staff Working Paper*]. For these reasons, it was foreseeable that the tariffs covered also the frozen horse semen.

99. In the light of the above, the tariffs were foreseeable at the time of concluding the Sales Agreement. Thus, this criterion under the hardship clause is not met either.

c. The tariffs did not make the Sales Agreement more onerous for CLAIMANT

100. Even if the tariffs were comparable to health and safety requirements and unforeseeable, the requirement of onerousness under the hardship clause is not met. Thus, unlike CLAIMANT contends [*MfC, paras. 83–5*], CLAIMANT cannot rely on the hardship clause to seek adaptation of the Sales Agreement.

101. The standard confirmed in international trade for the application of the hardship exemption is that the performance of the contract becomes excessively onerous [*Art. 6:111(2)(c) PECL; ICC Hardship Clause 2003, Art. 6.2.2(1) UNIDROIT Principles*]. In order to become excessively

onerous, the balance of the contract must have been fundamentally altered [*Brunner, pp. 397–9; Frick, p. 178; cf. Kröll, p. 445*]. For reference, the 1994 edition of the UNIDROIT Principles on International Commercial Contracts ("**UNIDROIT Principles**") expressly suggested a threshold of 50 % alteration. Under general contract principles, a 100–125 % increase in the cost of performance is required to amount to hardship [*Brunner, pp. 431–2*]. In fact, no arbitral awards are known where arbitrators would have granted relief merely because the costs of performance have increased by 50 % or less [*Girsberger/Zapolskis, p. 126; Zaccaria, p. 169; Brunner, pp. 428–31; van Houtte, p. 190*]. An alteration of this degree falls within the typical sphere of commercial risk of the party [*Brunner, pp. 116–7; Steel bars case*]. In this respect, it is irrelevant whether the increased cost deprives the party of an expected profit [*Brunner, p. 434*].

102. Here, the hardship clause sets down the requirement that the event sought to be relied on to rely on the hardship clause has made the contract "*more onerous*" [*CE 5, p. 14*]. The parties have not defined the threshold of how much the balance of the Sales Agreement must have been altered to entitle a party to rely on the hardship clause. However, the parties cannot have intended that any small increase in costs would grant the affected party the possibility to invoke the hardship clause and avoid the liability to perform. Such an interpretation would be irrational. Instead, it is reasonable to assume that the parties intended the generally accepted hardship standard to apply, requiring that the Sales Agreement has become excessively onerous for CLAIMANT.

103. In determining whether the contract has become excessively onerous for a party, all of the party's performances under the contract must be taken into account [*Brunner, p. 462; ICC Publ. No. 421, p. 21; Florida Power & Light v. Westinghouse Electric; United States v. Wegematic*]. For example, in an installment contract even if only one installment is affected by hardship, the whole contract is still to be taken into account [*Brunner, p. 462–3*]. Therefore, the alteration is to be calculated by dividing the cost increase incurred from the changed circumstances by a party's original overall costs [*Brunner, pp. 432–4; cf. Japan Shipping Exchange case*].

104. Due to the imposed tariffs, CLAIMANT paid an additional USD 1.5 million. Taking into account that CLAIMANT's original costs in the whole deal of 100 doses were USD 9.5 million [*PO2, para. 31*], the tariffs have resulted in a mere 16 % alteration (USD 1.5 million / USD 9.5 million = 0.1578). This does not qualify as a fundamental alteration justifying for an exemption under the

hardship clause. Instead, such an alteration is part of CLAIMANT's general commercial risk which simply materialized.

105. In the view of the above, the tariffs did not fundamentally alter the balance of the Sales Agreement. The tariffs do not meet the threshold required to invoke the hardship clause. Thus, CLAIMANT is not entitled to contract adaptation under the hardship clause.

B. THE SALES AGREEMENT CANNOT BE ADAPTED ON THE BASIS OF THE TARIFFS UNDER THE CISG EITHER

106. CLAIMANT is claiming adaptation of the Sales Agreement on the basis of Art. 79 CISG [*MfC, paras. 93 et seqq.*]. Art. 79 CISG concerns an exemption to a party's liability. Contrary to CLAIMANT's claim, CLAIMANT cannot rely on Art. 79 CISG. First of all, by including the force majeure/hardship clause into the Sales Agreement the parties have derogated from Art. 79 CISG **(1)**. In any case, Art. 79 CISG does not regulate hardship or provide for contract adaptation as an available remedy **(2)**. In any event, should the arbitral tribunal find that the CISG applies to the current dispute, the tariffs do not meet the cumulative criteria set forth in Art. 79 **(3)**.

1. The parties have derogated from Art. 79 CISG by including the force majeure/hardship clause in the Sales Agreement

107. The parties have derogated from Art. 79 CISG by including the force majeure/hardship clause into the Sales Agreement. CLAIMANT contends that the parties did not intend to derogate from Art. 79 [*MfC, paras. 94–8*]. This is incorrect as the parties regulated the question of limitation of liability directly in the Sales Agreement. Therefore, CLAIMANT may not rely on Art. 79 CISG to seek adaptation of the Sales Agreement.

108. Art. 6 CISG empowers the parties to derogate from provisions of the CISG. Art. 79 is not excepted from this rule [*UNCITRAL CISG Case Digest, p. 379*]. The leading CISG scholars emphasize that the derogation from Art. 79 is often done by including a force majeure/hardship clause in a contract [*Schlechtriem/Schwenzer, pp. 1085–6; Huber/Mullis, p. 259; cf. Kröll/Mistelis/Perales Viscasillas, p. 1093*]. In fact, this has been recognized also by the CISG Advisory Council [*CISG-AC 10, comment 2*].

109. Whether the parties have derogated from the CISG should be determined by interpreting the parties' intent, subject to Art. 8 CISG. A derogation under Art. 6 CISG can be tacit [*Céramique Culinaire v. Musgrave; cf. Kröll/Mistelis/Perales Viscasillas, pp. 1093–4*]. Where the circumstances which a party argues to constitute a force majeure are not found in a listing of force majeure situations included in the parties' contract, the party cannot claim exemption under the Art. 79 CISG either [*ICAC case 123/1992*].

110. The parties have included a force majeure/hardship clause into the Sales Agreement to limit CLAIMANT's liability [*CE 4, p. 12*]. As Art. 79 CISG also concerns exemptions to parties' liability, the fact that the parties have decided to regulate these matters in the Sales Agreement establishes the parties' intent to derogate from Art. 79. As explained above [*paras. 80 et seqq.*], they included the force majeure/hardship clause to limit only specific risks outside CLAIMANT's responsibility and not to cover every conceivable event. Thus, the parties did not intend that some other exemptions to CLAIMANT's liability would apply under the CISG.

111. In conclusion, the parties have derogated from Art. 79 CISG by including the force majeure/hardship clause into the Sales Agreement. Therefore, the arbitral tribunal should reject CLAIMANT's claim insofar as Art. 79 CISG is relied on.

2. Art. 79 CISG does not regulate hardship and does not provide for contract adaptation

112. Should the arbitral tribunal consider that the parties have not derogated from Art. 79 CISG, in any case, CLAIMANT cannot rely on it to request adaptation of the Sales Agreement under the CISG. Art. 79 CISG grants a party an exemption from performance in force majeure situations. Instead, Art. 79 neither regulates hardship **(a)** nor provides for contract adaptation as an available remedy **(b)**.

a. Art. 79 CISG does not apply to hardship situations

113. Contrary to what CLAIMANT alleges [*MfC, paras. 99 et seqq.*], Art. 79 CISG applies only to force majeure situations and does not regulate hardship. Therefore, the imposed tariffs do not entitle CLAIMANT to an exemption under Art. 79.

114. Art. 79 CISG grants a party an exemption from performance in case of an impediment beyond its control. When interpreting the provisions of the CISG, the legislative history of the CISG should

be taken into consideration [*Schlechtriem/Schwenzer, pp. 130–1; DiMatteo/Janssen, p. 59; Gruber, p. 96*]. During the drafting of Art. 79, a proposal concerning extending the provision to cover also hardship situations was expressly rejected [*CISG Official Records 27th mtg., p. 382*]. The Committee wanted to refrain from granting excessive relief to a non-performing party [*CISG Official Records 27th mtg., p. 381*]. Thus, the application of Art. 79 was limited to force majeure cases where a party's performance has become impossible due to a totally exceptional event, such as a natural disaster or war, and was not extended to a mere difficulty to perform [*CISG Official Records 27th mtg., p. 381*]. Therefore, the term "*impediment*" does not extend to encompass hardship [*Andersen/Kuster, p. 5; Jenkins, pp. 2024–7*]. This has been confirmed also in extensive case law [*Steel bars case; Nuova Fucinati v. Fondmetall; L. v. SA C.; Loan agreement case; Winter Rapeseed case*].

115. The fact that hardship was intentionally left out from the CISG also indicates that there is no gap in the CISG in this respect. It cannot be concluded that hardship would have been left out from the CISG only to be derived from the general principles through gap-filling under Art. 7(2).

116. The case at hand does not concern a force majeure situation. The tariffs imposed by the Government of Equatoriana did not make CLAIMANT's performance impossible. Such a situation would have been for example a sudden death of CLAIMANT's stallion Nijinsky III where producing and delivering the doses would have become *de facto* impossible. Neither has there been any natural disaster, war or general strike preventing the delivery. Instead, the case concerns tariffs making the last installment of doses merely more costly for CLAIMANT. Notwithstanding the additional costs, CLAIMANT was able to pay the tariffs and deliver also the last installment. It is insufficient that the tariffs made the contract less favourable for CLAIMANT as they did not make the performance impossible.

117. To conclude, CLAIMANT cannot rely on Art. 79 CISG to request any additional remuneration. Art. 79 only provides exemption in case of an impediment making the performance impossible. The tariffs did not make CLAIMANT's performance impossible. Therefore, the arbitral tribunal should reject CLAIMANT's claim insofar as Art. 79 is relied on.

b. Contract adaptation is not an available remedy under Art. 79 CISG

118. Even if hardship were recognized as an impediment under Art. 79 CISG, in any case, contract adaptation is not possible under the provision. Unlike CLAIMANT argues [*MfC, paras. 113 et seqq.*], Art. 79 does not provide for adaptation as a remedy neither directly nor through gap-filling under Art. 7(2). Therefore, the arbitral tribunal should reject CLAIMANT's claim for any additional remuneration.

119. First, the only available remedy under Art. 79 CISG is an exemption to a party's liability [*Lookofsky I, p. 162; Flechtner, pp. 93–4; Kofod, ch. 3.2.6*]. Art. 79(1) expressly stipulates that a party "*is not liable for a failure to perform any of his obligations*" in case of impossibility to perform. During the drafting of Art. 79, there was a proposal for a wording that would allow a party faced with "*excessive difficulties*" to "*claim an adequate amendment of the contract*". However, this proposal was expressly rejected [*UNCITRAL 10th session, paras. 458, 460; Slater, p. 260*]. Therefore, even if hardship were recognized as an impediment under Art. 79, remedies under both hardship and force majeure situations are the same [*Schwenzer, p. 725; Flechtner, p. 93; Schlechtriem/Schwenzer, para. 31*]. Thus, in case of hardship the seller would be released from its obligation to deliver the goods and duty to pay damages [*Schwenzer, p. 724*]. By contrast, Art. 79 provides no legal basis for contract adaptation by the arbitral tribunal [*Lookofsky I, pp. 161–2; Kröll/Mistelis/Perales Viscasillas, p. 1091*].

120. Second, the fact that Art. 79 does not provide for contract adaptation as an available remedy does not create a gap within the CISG [*Schwenzer, pp. 713, 724; Flechtner, pp. 93, 97; Andersen/Kuster, pp. 14–5; Lookofsky I, p. 162; Kofod, ch. 3.2.6; Lindström, p. 2*]. Instead, it merely reflects the CISG's rejection of the adaptation remedy as reflected in its legislative history [*Flechtner, p. 93*]. As noted in the previous paragraph, a proposal for a provision entitling a party to claim adaptation of the contract due to hardship was expressly rejected. It cannot be concluded that adaptation would have been left out from the CISG only to be derived from the general principles through gap-filling under Art. 7(2).

121. Third, CLAIMANT seeks to invoke the Belgian High Court's decision in *Steel Tubes case* to allege that adaptation is possible under the CISG [*MfC, paras. 110–1*]. The decision was a rare one-time instance and has rightly been criticized by a multitude of CISG commentators [*Flechtner, pp. 88–*

101, Andersen/Kuster, pp. 14–5; Lookofsky I, p. 167; Kofod, ch. 3.2.6]. In its decision, the court held that since Art. 79 provides only for the remedy of exemption from damages and not for contract adaptation, there is a "gap" in the CISG. It found that it could fill the "gap" concerning adaptation by reference to the UNIDROIT Principles, which provide for adaptation. In other words, the court invented a "gap" just because the CISG does not provide for the particular remedy of adaptation [*Flechtner, p. 97*]. However, searching for a more suitable solution by groping around in the UNIDROIT Principles and forcing it onto the CISG is not acceptable [*Kofod, ch. 5; Flechtner, p. 97*]. As Professor Flechtner aptly states, the decision "*distorts the meaning of the CISG, violates the mandate to interpret the Convention with regard for its international character and threatens the political legitimacy of the treaty*" [*Flechtner, p. 83*].

122. To conclude, CLAIMANT cannot rely on Art. 79 CISG to request adaptation of the Sales Agreement. Art. 79 does not provide adaptation as a remedy, neither directly nor through gap-filling under Art. 7(2). Therefore, the arbitral tribunal should reject CLAIMANT's claim insofar as Art. 79 CISG is relied on.

123. For the sake of clarity, unlike CLAIMANT purports [*MfC, para. 110*], the possibility for adaptation cannot either be derived from Art. 9(2) through any trade usages. As adaptation has been expressly rejected under the CISG, it cannot be reasonably derived from any trade usages. Moreover, the hardship rules in the UNIDROIT Principles do not constitute an international trade usage in the sense of Art. 9(2) CISG [*Veniziano, p. 144; Lookofsky I, p. 168; ICC cases 8873, 9029, 12446*]. The UNIDROIT Principles aim to set forth suggested solutions for contractual norms "*even if still not yet generally adopted*" [*Introduction to UNIDROIT Principles*]. Even in the controversial *Steel Tubes case* to which CLAIMANT refers, the court considered that contract adaptation had not become part of the contract by virtue of commercial usage in the meaning of Art. 9(2). For these reasons, the UNIDROIT Principles cannot be used to bring adaptation into the CISG as trade usage. Holding otherwise would allow an artificial extension of the CISG to cover matters that are not meant to be covered by it.

3. In any case, the cumulative criteria for exemption under Art. 79 CISG are not met

124. Even if hardship situations were to qualify as an impediment and adaptation were possible under Art. 79 CISG, the criteria set forth in Art. 79 are not met. RESPONDENT does not contest that the

tariffs imposed by the Government of Equatoriana were beyond CLAIMANT's control. However, all the cumulative criteria under Art. 79(1) must be met for an exemption. In this respect, the burden of proof is on CLAIMANT to prove the circumstances entitling it to an exemption.

125. First, the tariffs do not qualify as an impediment referred to in Art. 79 CISG **(a)**. Second, CLAIMANT could reasonably be expected to have taken the tariffs into account at the time of concluding the Sales Agreement **(b)**. Third, CLAIMANT could also reasonably be expected to have avoided or overcome the consequences of the tariffs **(c)**. Thus, the arbitral tribunal should reject CLAIMANT's claim for any additional remuneration.

a. The tariffs do not qualify as an impediment referred to in Art. 79 CISG

126. Contrary to CLAIMANT's assertions [*MfC, paras. 117-8*], the imposed tariffs do not qualify as an impediment under Art. 79 CISG. Even though the tariffs caused additional costs on the last installment of frozen semen, they did not make the Sales Agreement excessively onerous for CLAIMANT. Therefore, CLAIMANT cannot invoke the exemption under Art. 79 CISG to request any additional remuneration.

127. The wording of Art. 79 requires that a party has failed to perform its obligations due to an impediment. Impediment typically refers to *force majeure* situations where the performance has become impossible. Insofar as hardship situations are considered to fall under the notion of impediment, invoking an exemption requires a fundamental alteration of the balance of the contract [*Schwenzer, pp. 714–5; Brunner, pp. 397–9*]. As CLAIMANT itself states [*MfC, paras. 113–4*], this means that a contract must have become excessively onerous for a party [*Schwenzer, pp. 714–5; Brunner, pp. 116–7*].

128. The required alteration should be significant, at least 100 % [*Schlechtriem/Schwenzer, p. 1076; Schwenzer, p. 716; Lookofsky I, p. 165; Brunner, p. 432*]. In fact, even those decisions dealing with hardship under Art. 79 have concluded that even a price increase of 100 % does not suffice [*Schwenzer, p. 716; e.g. "FeMo" alloy case; Vital Berry v. Dira-Frost; Steel ropes case; Polyurethane foam case*]. As noted above [*paras. 101-4*], in determining whether the contract has become excessively onerous for a party, all of the party's performances under the particular contract must be taken into account.

129. CLAIMANT alleges that the tariffs have distorted the balance of the Sales Agreement and exceeded CLAIMANT's limit of sacrifice [*MfC, paras. 117–8*]. However, insofar as hardship situations are considered to fall under the notion of impediment, the Sales Agreement has not become excessively onerous for CLAIMANT. Instead, the tariffs have resulted in only 16 % alteration in the balance of the Sales Agreement [*para. 104*]. This does not qualify as a fundamental alteration justifying for an exemption under Art. 79 CISG.

130. A party's inability to make a profit on a particular contract or even loss resulting from the transaction does not in itself lead to an exemption under Art. 79 CISG [*Lookofsky II, pp. 140–1; Brunner, p. 434*; *Bernstein/Lookofsky, p. 152; Freidco v. Farmers*]. A deterioration of a party's financial situation is that party's own issue and that party cannot shift that risk to other parties [*Brunner, p. 436*]. Thus, contrary to CLAIMANT's contention [*MfC, para. 117*], CLAIMANT's inability to make a profit from this deal or speculations about CLAIMANT's sorry financial condition do not affect the conclusion that the threshold of fundamental alteration is not met.

131. In the light of the foregoing, the tariffs did not make the Sales Agreement excessively onerous for CLAIMANT. Therefore, the criterion of an impediment under Art. 79 is not met.

b. CLAIMANT could reasonably be expected to have taken the tariffs into account at the time of concluding the Sales Agreement

132. Even if the tariffs made the Sales Agreement excessively onerous for CLAIMANT, they have still been foreseeable for CLAIMANT. Art. 79(1) CISG requires the defaulting party to prove that "*it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract*". As explained above [*paras. 94 et seqq.*], the tariffs were foreseeable. Thus, CLAIMANT could reasonably be expected to have taken the tariffs into account at the time of concluding the contract. Therefore, the criteria for exemption under the Art. 79 CISG are not met.

c. CLAIMANT could reasonably be expected to have avoided or overcome the consequences of the tariffs

133. Even if the tariffs made the Sales Agreement excessively onerous for CLAIMANT and were unforeseeable, in any case, CLAIMANT could have avoided or overcome the consequences of the

tariffs. CLAIMANT has completely ignored the question of whether CLAIMANT could have avoided or overcome the tariffs' effect on its performance, irrespective of whether the imposition of the tariffs was beyond CLAIMANT's control.

134. A party is exempted under Art. 79(1) only if it could not be reasonably expected to have avoided or overcome the impediment or its consequences. In this respect, avoiding means that a party shall do everything that is possible and reasonable to prevent its performance from being affected [*Kröll/Mistelis/Perales Viscasillas, p. 1076; Gomard/Rechnagel, p. 223; Bianca/Bonell, p. 581; Sarsevic, p. 18*]. For example, the effects of a war which was likely to start, or of a flood which was announced a few days in advance, can be avoided if the required measures are taken in a timely manner [*Kröll/Mistelis/Perales Viscasillas, p. 1076*]. Overcoming, in turn, means taking all the necessary steps to preclude the consequences of the impediment [*Bianca/Bonell, p. 581; Sarsevic, p. 18*]. A party can reasonably be expected to perform the contract in the agreed manner even when this would cause greatly increased costs and even a loss to it [*Schlechtriem/Schwenzer, p. 1069*].

135. CLAIMANT could have avoided the tariffs affecting the last installment of doses by delivering it before the tariffs came into force. The Government of Equatoriana announced the tariffs on 19 December 2017 [*PO2, para. 25*]. CLAIMANT learned about the tariffs on 20 December 2017 after reading the newspaper article in the Peak Business News [*CE 6, p. 15; PO2, para. 26*]. However, it was only a month later on 20 January 2018, a day before the last shipment was due and nearly a week after the tariffs had already taken effect on 15 January 2018 [*PO2, para. 25*], when Ms. Napravnik contacted Mr. Shoemaker insisting urgently on a solution regarding the tariffs [*CE 7, p. 16*].

136. As noted above [*para. 98*], CLAIMANT should have known that the frozen semen is considered an agricultural good so that the tariffs apply to it. At least, such a possibility should have crossed CLAIMANT's mind as the tariffs were imposed by the country where CLAIMANT was primarily doing business in 2018 [*PO2, para. 29*]. CLAIMANT could reasonably be expected to have checked the scope of the tariffs from the authorities immediately when the tariffs were announced. Had CLAIMANT delivered the doses only a week earlier, it would have avoided the tariffs affecting the shipment and the current dispute would not have occured.

137. Moreover, CLAIMANT could reasonably be expected to overcome the consequences of the tariffs and perform the Sales Agreement in the agreed manner even when the tariffs resulted in increased costs. In fact, as CLAIMANT paid the tariffs and delivered the last installment, it successfully overcame the consequences of the imposed tariffs. Thus, CLAIMANT may not retrospectively claim that it could not be reasonably expected to have overcome the consequences of the tariffs.

138. In the light of the above, CLAIMANT could reasonably be expected to have avoided or overcome the tariffs affecting the last installment of doses. Thus, this criterion for the application of Art. 79 CISG is not met. Consequently, the arbitral tribunal should reject CLAIMANT's claim for any additional remuneration.

PRAYER FOR RELIEF

Counsel, on behalf of RESPONDENT, respectfully requests the arbitral tribunal:

1) To dismiss CLAIMANT's claim for a lack of jurisdiction and powers;
2) To not admit the documents from RESPONDENT's other arbitration as evidence;
3) To reject CLAIMANT's claim for additional remuneration of USD 1.25 million or any other amount;
4) To order CLAIMANT to bear all the costs arising from this arbitration.

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

CERTIFICATE

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

Helsinki, January 24, 2019

Olga Jeganova

Rebecca Kramsu

Saara-Marja Lahtinen

Malviina Linninen