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Memorandum for
CLAIMANT

On Behalf Of

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo
– CLAIMANT –

Against

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana
– RESPONDENT –

MARC BOVERMANN • JULIEN FEURER • LUKAS GOTTSCHLING • JULIA SCHMIDT
HAUKE SCHNEIDER • LEO VERLAGE • DAVID WILLFORT • ANNA MARIA YANG-JACOBI

Freiburg, Germany

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INDEX OF ABBREVIATIONS

AG	Aktiengesellschaft (stock company)
Art./Artt.	Article/Articles
BG	Bezirksgericht (district court)
BGer	Bundesgericht (Federal Supreme Court of Switzerland)
BGH	Bundesgerichtshof (German Federal Court of Justice)
cf.	confer (compare)
Chpt.	Chapter
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Conventions on Contracts for the International Sale of Goods
Co	Company
cons.	consideration
DDP	delivered duty paid
ed.	Edition
emph. add.	emphasis added
et seq.	et sequens (and the following)
EU	European Union
HKIAC	Hong Kong International Arbitration Centre
HGer	Handelsgericht (Swiss Commercial Court)
HGB	Handelsgesetzbuch (German Commercial Code)
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes

i.e.	id est (that is)
Inc	Incorporation
lib. am.	liber amicorum (commemorative publication)
LP	Limited Partnership
Ltd	Limited
mbH	mit beschränkter Haftung (limited liablity)
Mr.	Mister
Ms.	Miss
MüKo	Münchener Kommentar
No	Number
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (appellate court)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PICC	Principle of International Commercial Contracts
PO	Procedural Order
UN	United Nations
UNCITRAL Model Law	United Nations Commision on International Trade Law Model Law on International Commercial Arbitration
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
US$	United States Dollar
v	versus
Vol.	Volume

STATEMENT OF FACTS

The parties to this arbitration (hereafter "Parties") are *Phar Lap Allevamento* (hereafter "CLAIMANT") and *Black Beauty Equestrian* (hereafter "RESPONDENT").

CLAIMANT operates Mediterraneo's oldest and most renowned stud farm which provides breeders with stallions for natural covering and frozen semen for artificial insemination.

RESPONDENT is a company from Equatoriana and famous for its broodmare line. It recently decided to add a new racehorse breeding programme to its business.

2014	CLAIMANT nearly suffers bankruptcy due to unexpected additional health and safety tests which rendered a business transaction highly unprofitable.	*Procedural Order No 2, p. 58, para. 21*
21 March 2017	RESPONDENT contacts CLAIMANT about the possibility of purchasing 100 doses of frozen semen of CLAIMANT's well-known stallion Nijinsky III.	*EXHIBIT C 1, p. 9*
24 March 2017	Trusting in a future long-lasting relationship, CLAIMANT makes an exception from its general approach to only sell small amounts of semen to one breeder. It offers RESPONDENT 100 doses under its usual conditions, such as a resale prohibition and pickup to be carried out by the customer.	*EXHIBIT C 2, p. 10* *Procedural Order No 2, p. 57, para. 16*
28 March 2017	Due to CLAIMANT's experience in the shipment of frozen semen, RESPONDENT asks for a delivery to its own premises on the basis of DDP.	*EXHIBIT C 3, p. 11*
31 March 2017	CLAIMANT confirms the changed delivery modality on the condition that it does not have to bear all of the associated risks. A hardship clause is therefore included in the contract. CLAIMANT further suggests arbitration in Mediterraneo for dispute resolution.	*EXHIBIT C 4, p. 12*
11 April 2017	CLAIMANT sends RESPONDENT a written draft for an arbitration clause changing the seat of arbitration from Equatoriana to Danubia. It also clarified that the law applicable to the Frozen Semen Sales	*Exhibit R 2, p. 34; Procedural Order No 2, p. 62, para. 50 (c)*

	Agreement was to remain Mediterranean Law.	
6 May 2017	CLAIMANT and RESPONDENT sign the Frozen Semen Sales Agreement (hereafter: "the Contract"). The agreement provides for arbitration in Danubia and a choice of law in favour of Mediterranean Law.	*EXHIBIT C 5, pp. 13 et seq.*
15 November 2017	After the first two shipments, the government of Mediterraneo unexpectedly imposes a 25 per cent tariff on agricultural products from Equatoriana.	*Procedural Order No 2, p. 58, para. 23*
19 December 2017	The government of Equatoriana retaliates by announcing a 30 per cent tariff on agricultural goods from Mediterraneo.	*Procedural Order No 2, p. 58, para. 25*
20/21 January 2018	CLAIMANT discovers that the tariffs cover racehorse semen and contacts RESPONDENT to renegotiate the purchase price. RESPONDENT urges CLAIMANT to deliver the doses and assures that a solution regarding the price would be found. CLAIMANT authorises the shipment and pays the tariffs.	*EXHIBIT C 7, p. 16* *EXHIBIT C 8, pp. 17 et seq.* *EXHIBIT R 4, p.* 36
2 February 2018	CLAIMANT learns from an Equatorianian breeder that RESPONDENT is reselling Nijinsky III's semen without CLAIMANT's consent.	*Procedural Order No 2, p. 57, para. 20*
12 February 2018	RESPONDENT's CEO terminates the negotiations regarding an adaptation of the purchase price and refuses to pay any additional amount for the tariffs.	*EXHIBIT C 8, p. 18*
29 June 2018	In a comparable arbitral proceeding RESPONDENT claims hardship due to the initial tariffs. The arbitral tribunal confirms its power to adapt the contract in a partial interim award favouring RESPONDENT.	*Procedural Order No 2, p. 60, para. 39*
31 July 2018	CLAIMANT initiates arbitral proceedings against RESPONDENT.	*Email of Mr. Langweiler, pp. 3 et seq.*

INTRODUCTION

Nijinsky III could have satisfied every breeder's need but should not have to satisfy every breeder's greed.

Based on RESPONDENT's assurances, CLAIMANT anticipated a mutually beneficial business relationship. Yet, from the beginning on, RESPONDENT planned to violate CLAIMANT's precondition by reselling a part of the delivered doses for considerable profit.

In late 2017, just as the system of free trade in Mediterraneo and Equatoriana started to unravel, RESPONDENT deceived CLAIMANT once more. After RESPONDENT successfully pressured CLAIMANT into delivering the goods, RESPONDENT's craving for profits did not come to a halt. It now tries to bail on its obligations to pay an adequate purchase price.

As a last straw, CLAIMANT initiated arbitral proceedings against RESPONDENT. Questioning the referee is bad etiquette, not only in the equestrian world. And yet, by requesting to apply a law the Parties never agreed on, RESPONDENT denies the Arbitral Tribunal's power to decide on a matter the Parties settled in their contract: an adaptation of the contract in cases of hardship [**Issue 1**].

No party could foresee the sudden and unexpected imposition of the tariffs. For such cases, the Parties included the hardship clause with a safety mechanism to prevent further damage, especially costs which endanger CLAIMANT's very existence. To compensate for the consequences of hardship, CLAIMANT is entitled to an increase of the purchase price of US$ 1,250,000 under both the contractual hardship clause and the CISG [**Issue 2**].

In a last attempt to stay in the saddle, RESPONDENT now objects to the submission of evidence that proves RESPONDENT's contradictory behaviour: In other proceedings, RESPONDENT pursued its own advantage by requesting an adaptation of the contract based on hardship caused by the tariffs imposed by Mediterraneo. The Arbitral Tribunal should take RESPONDENT's turnaround into consideration by admitting the evidence as there is no basis justifying its exclusion [**Issue 3**].

For those reasons, the Arbitral Tribunal is kindly requested to rein in RESPONDENT's greed and order RESPONDENT to pay an additional amount of US$ 1,250,000.

FIRST ISSUE: THE ARBITRAL TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

1 CLAIMANT initiated arbitral proceedings against RESPONDENT on the grounds of Clause 15 of the Contract. This Clause reads: „Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted" (hereafter "Arbitration Clause") [EXHIBIT C 5, p. 14, Clause 15]. As the Arbitration Clause is to be interpreted according to Mediterranean Law [**A**], the Arbitral Tribunal has the power to adapt the Contract [**B**].

A. Mediterranean Law Governs the Arbitration Clause and Its Interpretation

2 Mediterranean Law, including the United Nations Convention on Contracts for the International Sale of Goods (hereafter "CISG"), is applicable to the Arbitration Clause and its interpretation. In general, Parties are free to choose the law governing the arbitration agreement [*BGH, 8 May 2014, para. 11; Habas Sinai v VSC Steel, 19 Dec 2013, paras. 99 et seq.; Arsanovia v Cruz City 1 Mauritius, 20 Dec 2012, para. 8; Sulamérica v Enesa Engenharia, 16 May 2012; Harisankar, Journal of Int. Arb., 2013, p. 630; Redfern/Hunter, para. 3.217*]. This is due to the principle of party autonomy in arbitration [*Bentolila, p. 7, para. 14; Redfern/Hunter, paras. 1.38, 2.01, 3.203; Moses, p. 1*]. Additionally, Danubia, Equatoriana and Mediterraneo are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter "NYC") [*Moot Rules, para. 24*]. Art. V(1)(a) NYC rules that the parties' choice is decisive to determine the law applicable to an arbitration agreement. This applies to the pre-award stage [*Derains/Schwartz, p. 353; Wolff – Wilske/Fox, Art. II, para. 228; Kronke/Nacimiento – Schramm/Geisinger/Pinsolle, p. 56; Lew/Mistelis/Kröll, para. 6.55; Moses, p. 79; van den Berg, pp. 126-127*]. Hence, the applicable law to the Arbitration Clause and its interpretation are determined by the choice of the Parties.

3 The Parties chose Mediterranean Law to govern their Contract. Even though different laws may apply to the substantive part of a contract and the arbitration agreement, the Parties in the present case chose <u>one</u> law to govern the entire Contract. Clause 14 of the Frozen Semen Sales Agreement states that "*This Sales Agreement shall be governed by the law of Mediterraneo, including the [CISG]*" [*EXHIBIT C 5, p. 14, Clause 14*]. Equatoriana and

Mediterraneo are both party to the CISG [*PO No 1, p. 52, para. 4*], which is why the CISG forms part of the Mediterranean contract law. Consequently, Clause 14 is to be interpreted under Art. 8 CISG [**I**]. The interpretation shows that the Parties intended to apply Mediterranean Law to the Arbitration Clause [**II**]. Furthermore, this outcome is supported by international case law [**III**] and is in line with the doctrine of separability [**IV**].

I. Art. 8 CISG Governs the Interpretation of the Parties' Choice of Law

4 Art. 8 CISG governs the interpretation of the Parties' choice of law. Pursuant to the "*bootstrap rule*" the law the Parties purportedly agreed on determines the law under which the choice of law is to be interpreted [*Heidberg v Grosvenor, 21 Mar 1994; Girsberger/Cohen, ULR (2017), p. 323; Dicey/Morris/Collins, para. 16-022; cf. Midgulf v Groupe Chimique, 10 Feb 2010; Art. 6 (1) (a) The Hague Principles on choice of law in international contracts; Artt. 3 (5), 10 (1) Rome I Regulation*]. In Clause 14, the Parties chose Mediterranean Law, including the CISG, to govern the entire Contract [*EXHIBIT C 5, p. 14, Clause 14*]. Therefore, the Parties' choice of law is to be interpreted under the CISG.

II. The Parties Intended to Apply Mediterranean Law to the Arbitration Clause

5 The interpretation of Clause 14 indicates the Parties' intent to apply Mediterranean Law to the Arbitration Clause. Pursuant to Art. 8 (1) CISG, statements made by and other conduct of a party are to be interpreted according to its intent where the other party knew or could not have been unaware what that intent was. Whenever Art. 8 (1) CISG is inapplicable, Art. 8 (2) CISG determines that statements made by a party must be interpreted according to the understanding of a reasonable person subjected to the same circumstances as the opposing party. Accordingly, single terms of a contract need to be interpreted in context of the whole contract [*ICAC No 95/2004 (2005), para. 3.3.3; BGH, 3 Apr 1996; HGer Zurich, 30 Nov 1998; OLG Dresden, 27 Dec 1999, para. II (2); Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 8, paras. 30, 51; Baldus, p. 131; Calnan, p. 35, para. 3.02; cf. CIETAC, 9 Dec 2005*]. The interpretation of the Contract shows that the Parties chose Mediterranean Law to govern the entire Contract including the Arbitration Clause. This is evidenced by the Contract itself [**1**] and the drafting history [**2**].

1. The Contract Demonstrates the Applicability of Clause 14 to the Arbitration Clause

6 The Parties manifested their choice of Mediterranean Law as the applicable law to the Arbitration Clause in the written Contract. When an arbitration agreement is part of the

written contract and not a separate agreement, it can be assumed that the parties intended to conclude a single contract [*Union of India v McDonnell Douglas, 1993, 2 Lloyd's Rep 48; Redfern/Hunter, pp. 158 et seq., paras. 3.12 et seq.; Lew, ICCA Congress Series, Volume 9, pp. 143 et seq.*]. In particular, a term like "*this agreement"* in a choice of law clause suggests that the parties intended the clause to apply to the entire contract [*Arsanovia v Cruz City, 20 Dec 2012, paras. 22 et seq.*]. In the present case, this result is evidenced by several facts:

7 First, Clause 14 of the Contract determines Mediterranean Law to be the applicable law for "*This Sales Agreement*", thus, no differentiation between the substantive part of the Contract and the Arbitration Clause is made. Second, the Arbitration Clause is embedded in the Contract's enumeration and not physically separated from the Contract [*EXHIBIT C 5, p. 14, Clause 15*]. Third, the Arbitration Clause refers "*disputes arising out of this Contract*" to arbitration [*EXHIBIT C 5, p. 14, Clause 15, emph. add.*], which indicates that the Arbitration Clause is part of the Contract. Fourth, the Parties signed a single contract by referring to it as "*this Agreement*" [*EXHIBIT C 5, p. 14, Clause 16*]. Hence, the Parties did not isolate the Arbitration Clause from the rest of the Contract and therefore intended to apply Mediterranean Law to it.

2. The Drafting History Shows the Applicability of Clause 14 to the Arbitration Clause

8 The drafting history of the Contract also shows that the Parties intended the Arbitration Clause to be governed by the same law as the rest of the Contract, which is Mediterranean Law. According to Art. 8 (3) CISG, the parties' negotiations need to be considered when interpreting the contract. The proposals made by the Parties reflect that the entire Contract is governed by Mediterranean Law [**a**]. The negotiations further show that there are no indications Danubian Law should govern the Arbitration Clause [**b**].

a) The Proposals of the Parties Reflect the Choice of Mediterranean Law

9 Considering the drafting history, the Parties' intent to apply Mediterranean Law to the Arbitration Clause is revealed.

10 According to Art. 8 (1) CISG, RESPONDENT could not have been unaware of CLAIMANT's intent to apply Mediterranean Law to the Arbitration Clause. In its email of 11 April 2017, CLAIMANT modified the Arbitration Clause, changing the seat of arbitration from Equatoriana to Danubia and deleting the express choice of law clause proposed by RESPONDENT. This implies that CLAIMANT assumed that the Contract already provided for the application of

Mediterranean Law and thus an additional choice of law was not necessary. This is further demonstrated by CLAIMANT's modification of the Arbitration Clause being under the condition that Mediterranean Law applied to the entirety of the Frozen Semen Sales Agreement [*EXHIBIT R 2, p. 34; PO No 2, p. 62, para. 50(c)*]. As a result, RESPONDENT could not have been unaware that it was CLAIMANT's intent to apply Mediterranean Law to the entire Contract, including the Arbitration Clause.

11 Moreover, a reasonable person under Art. 8(2) CISG would also have concluded that the Parties chose Mediterranean Law to govern the Arbitration Clause. During the negotiations, CLAIMANT and RESPONDENT agreed that the Arbitral Tribunal should be entitled to adapt the Contract [*EXHIBIT C 8, p. 17*]. They assumed that from a legal point of view, it was not necessary to include an express authorisation for the adaptation into the Contract [*ibid.*]. Under Danubian Law, which strictly applies the *four corner rule*, it is highly unlikely that the Arbitral Tribunal is entitled to adapt a contract without an express authorisation [*PO No 1, p. 52, para. 2*]. As the Parties were assuming that it was not necessary to include an express authorisation for the Arbitral Tribunal into the Contract, they could not have considered Danubian Law to be applicable to the Arbitration Clause at the same time. Hence, a reasonable person according to Art. 8(2) CISG could only have concluded that the Parties agreed on applying Mediterranean Law to the Contract including the Arbitration Clause.

b) There Are No Indications That the Parties Intended Danubian Law to Govern the Arbitration Clause

12 There are no indications of a common intent of the Parties to apply Danubian Law to the Arbitration Clause. First, CLAIMANT could not have been aware of RESPONDENT's alleged intent to apply Danubian Law to the Arbitration Clause. RESPONDENT did not indicate once that it wanted to apply Danubian Law to the Arbitration Clause. It even suggested to apply Equatorianian Law to the Arbitration Clause [*EXHIBIT R 1, p. 33*]. Contrary to Danubian Contract Law, Equatorianian Contract Law does not contain the *four corner rule*, since it is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts 2016 (hereafter "PICC") [*PO No 1, p. 53, para. III.4*]. Consequently, RESPONDENT intended to apply a law not containing the *four corner rule* at the time. Thus, CLAIMANT could not have been aware of any intent to apply Danubian Law to the Arbitration Clause.

13 Second, in its email of 11 April 2017 [*EXHIBIT R 2, p. 34*], CLAIMANT explained that it could not agree to a foreign law being applied to its contracts without special approval of the

creditor's committee. The application of Danubian Law would have required special approval, which in fact was never granted. Thus, the Parties could not have chosen to apply Danubian Law to the Arbitration Clause.

14 Third, Mr. Krone, RESPONDENT's final negotiator, expressed in his witness statement: "Had I known at the time that Mr. Antley was referring to the law applicable to the arbitration instead of the law applicable to the contract I would have definitively included an express reference to the law of Danubia into the arbitration agreement" [EXHIBIT R 3, p. 35]. Thereby, Mr. Krone admitted that he was unaware of his predecessor's alleged intent to apply Danubian Law to the Arbitration Clause. Also, he acknowledged that his behaviour must have been perceived as him agreeing to the choice of Mediterranean Law regarding the Arbitration Clause. Therefore, CLAIMANT could not have been aware that RESPONDENT allegedly intended to apply Danubian Law to the Arbitration Clause.

15 In conclusion, there are no indications that RESPONDENT intended to apply Danubian Law to the Arbitration Clause. Instead, the Parties agreed on applying Mediterranean Law to the Arbitration Clause.

III. International Case Law Supports the Choice of Mediterranean Law

16 Additionally, international case law supports the application of Mediterranean Law to the Arbitration Clause. The cases of *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others, 16 May 2012* (hereafter: "*Sulamérica v Enesa Engenharia*") and *BCY v BCZ, 9 Nov 2016* (hereafter: "*BCY v BCZ*") constitute persuasive authority. According to those cases, the choice of law regarding the substantive contract is presumed to apply to the arbitration agreement [**1**]. At the same time, the seat of arbitration does not affect the law applicable to the arbitration agreement [**2**].

1. The Choice of Law for the Contract Applies to the Arbitration Clause

17 *Sulamérica v Enesa Engenharia* demonstrates that the law governing the substantive contract applies to the respective arbitration agreement, unless indicated otherwise. The parties in *Sulamérica v Enesa Engenharia* chose Brazilian law to govern their contract and England to be the seat of arbitration. However, they did not expressly choose a law to govern their arbitration agreement, just like in the present case. When confronted with the issue concerning the law applicable to the arbitration agreement, the English Court of Appeal established a presumption that parties which had not expressly chosen the law governing the

arbitration agreement *"intended the whole of their relationship to be governed by the same system of law"* [*Sulamérica v Enesa Engenharia, para. 11*]. This principle has been approved internationally by courts, arbitral tribunals and scholars [*BCY v BCZ, 9 Nov 2016, para. 49; Cassa di Risparmio v Rals, 16 Oct 2015, para. 76; Habas Sinai v VSC Steel, 19 Dec 2013, para. 101; Arsanovia v Cruz City 1 Mauritius, 20 Dec 2012; Sonatrach Petroleum v Ferrell International, 4 Oct 2001, para. 32; ICC No. 11869, 2011, para. 12; ICC No. 9987, 2004, para. 32; ICC No. 6752, 1991, para. 12; ICC No. 6379, 1990, para. 8, Dicey/Morris/Collins, para. 16-019; Wolff – Wilske/Fox, Art. V, para. 115; Kronke/Nacimiento – Nacimiento, p. 224; Briggs, para 14.39*]. This assumption also applies to the present case. As CLAIMANT and RESPONDENT chose Mediterranean Law to govern the Contract, they intended to apply the same law to the Arbitration Clause. Thus, it can be assumed that the law governing the substantive Contract governs the Arbitration Clause as well.

2. The Seat of Arbitration Does Not Affect the Choice of Law

18 Moreover, as recognised in the judgement of *BCY v BCZ,* the seat of arbitration does not indicate the law applicable to the arbitration agreement. In *BCY v BCZ*, the parties chose the law of New York to govern their substantive contract and opted for arbitration in Singapore. Once again, no law was chosen to govern the arbitration agreement, just like in the present case. When issues regarding the law governing the arbitration agreement arose, the Singapore High Court concluded that the law of the substantive contract should only be replaced by the law of the seat of the arbitration, if an application of the law of the underlying contract would "*negate the arbitration agreement*" [*BCY v BCZ, 9 Nov 2016, para. 74*]. As the Arbitration Clause can take effect under Mediterranean Law, the law of the seat of arbitration is to be disregarded when determining the law applicable to the Arbitration Clause. Therefore, the choice to arbitrate in Danubia has no impact on the decision to apply Mediterranean Law to the entire Contract.

IV. The Application of Mediterranean Law Is in Line With the Doctrine of Separability

19 The doctrine of separability does not contradict the application of Mediterranean Law. According to Art. 19(2) HKIAC Rules 2018, an arbitration agreement may be treated as an agreement independent of the other terms of the contract. Yet, the concept of separability simply ensures that the parties' chosen mechanism for dispute resolution takes effect in cases where the underlying contract is invalid. Its purpose is <u>not</u> to strictly insulate the arbitration agreement from the substantive contract [*Sulamérica v Enesa Engenharia, 16 May 2012,*

para. 26; BCY v BCZ, 9 Nov 2016, para. 61; Dicey/Morris/Collins, para. 16-020; Wolff – Wilske/Fox, Art. II, para. 294; Redfern/Hunter, p. 104, para. 2.102; Balthasar – Solomon, § 2, para. 96; cf. Arbitration Act 1996, part 1, section 7; Glick/Moser – Glick/Venkatesan, p. 137]. Accordingly, Art. 19 (2) HKIAC Rules 2018 restricts the separability to these purposes. Consequently, a choice of law for the substantive contract may determine the applicable law of the arbitration agreement [*BCY v BCZ, 9 Nov 2016, para. 66; Born, p. 477; Wolff – Wilske/Fox, Art. V, para. 115*]. The application of Mediterranean Law is therefore in line with the doctrine of separability.

B. Under Mediterranean Law, the Arbitration Clause Allows for an Adaptation of the Contract

20 Under Mediterranean Law, including the CISG, the Arbitral Tribunal has the power to adapt the Contract. According to the Arbitration Clause, „*Any dispute arising out of this contract* […] *shall be referred to and finally resolved by the Arbitral Tribunal*" [*EXHIBIT C 5, p. 14, Clause 15*]. Generally, the application of the CISG is not limited to the substance of commercial contracts but the CISG may also be applied to an arbitration agreement [*Hibro Compensatoren v Trelleborg, 17 Jan 2007, para. 2.5; Epis-Centre v La Palentina, 17 Feb 1998, para. 5; Filanto v Chilewich, 14 April 1992; Schwenzer/Jaeger, p. 103; Walker, JLC 2005/06, p. 163; Koch, Kritzer lib. am., pp. 270 et seq.; Schwenzer/Tebel, Magnus lib. am., p. 325*]. Further, there is consistent jurisprudence in Mediterraneo that if a sales contract is governed by the CISG, the latter also applies to the interpretation of the arbitration agreement [*PO No. 1, p. 53, para. 4*].

21 Interpreted under the CISG, the wording of the Arbitration Clause covers an adaptation of the Contract [**I**]. Already during the negotiations, the Parties relied on the Arbitral Tribunal's power to adapt the Contract [**II**].

I. The Wording of the Arbitration Clause Covers an Adaptation of the Contract

22 The wording of the Arbitration Clause allows for an adaptation of the Contract by the Arbitral Tribunal. There is a general presumption that parties intend to have all disputes arising out of their contractual relationship to be resolved by the chosen arbitration mechanism [*Fiona Trust v Privalov, 24 Jan 2007, paras. 6 et seq.; Pennzoil Exploration Co v Ramco Energy Ltd, 13 May 1998; Aggeliki Charis v Pagnan, 17 May 1994, p. 9; Ethiopian Oilseeds Corp v Rio Del Mar Foods, 31 Jul 1989, para. 97; BGH, 27 Feb 1970, p. 13; Balthasar – Balthasar, § 1, para. 32; Redfern/Hunter, para. 2.69; Moses, p. 30*]. Usually a broad conferral of

competences to the Arbitral Tribunal includes the power to adapt contracts [*Frick, pp. 196 et seq.; Berger, VJTL, 2003, p. 1376; Brunner, Hardship, p. 496*]. The application of this general assumption is supported by the following two reasons:

23 First, the Arbitration Clause does not contain a restriction of the power to adapt the Contract. The term "*any dispute*" covers all differences in opinion [*Brunner, Hardship, p. 496; Berger, VJTL., 2003, p. 1376*]. Consequently, the term "*arising out of this contract*" broadly covers all contractual claims and only excludes tortious and statutory claims [*Moses, p. 30; Redfern/Hunter, para. 2.18*]. Although RESPONDENT narrowed down the HKIAC model clause to the wording "*arising out of this Contract*" [*EXHIBIT R 1, p. 33*], an adaptation of the Contract is a contractual claim and therefore covered by the Arbitration Clause.

24 Second, the question of adaptation is a question of substantive law, which means that there is no need for an additional procedural regulation. Art. 6.2.3 (4) (b) of Mediterranean general contract law, which a verbatim adoption of the PICC, shows that an adaptation of the contract is a possible substantive consequence of hardship. Only Danubian Law requires that parties expressly authorise the arbitral tribunal to adapt a contract [*PO No. 2, p. 61, para. 45*]. Such an additional procedural requirement is quite exceptional and unknown to Mediterranean Law. Therefore, the wording of the Arbitration Clause covers an adaptation of the Contract.

II. The Parties Relied on the Arbitral Tribunal's Power to Adapt the Contract

25 During the negotiations, the Parties already relied on the Arbitral Tribunal's power to adapt the Contract. The Contract and its drafting history show that the Parties agreed on an adaptation by the Arbitral Tribunal to be possible.

26 First, if the Arbitral Tribunal were not empowered to adapt the Contract, the Parties would have to turn to state courts in order to resolve the present issue. However, both Parties expressly declined litigation by state courts in cases concerning contractual claims [*EXHIBIT C 3, p. 11; EXHIBIT C 4, p. 12*]. It was not their intent to give up on the benefits of arbitration for any contractual matter. Thus, both Parties intended to empower the Arbitral Tribunal as otherwise the Parties' agreement would not take effect.

27 Second, by including the Hardship Clause into the Contract, the Parties indicated that they did not mean to restrict the Arbitral Tribunal's power. Provided that an adaptation is possible under the substantive law, an arbitral tribunal can adapt a contract without further procedural requirements [*Brunner, Hardship, p. 493; Kröll, Ergänzung und Anpassung, pp. 19 et seq.*].

As an adaptation of the Contract is the consequence of invoking hardship [*infra, para. 36*], the Hardship Clause allows for an adaptation without a procedural empowerment.

28 Lastly, CLAIMANT explicitly stated that it wanted to have a mechanism in place which allowed for the adaptation of the Contract [*EXHIBIT C 8, p. 17*]. RESPONDENT agreed and even added that it should be "*the task of the arbitrators to adapt the contract*" [*EXHIBIT C 8, p. 17*]. Therefore, the Parties agreed that the Arbitral Tribunal may adapt the Contract.

29 **Conclusion of the First Issue:** Mediterranean Law governs the Arbitration Clause. The Parties intended Clause 14 to determine Mediterranean Law as the law applicable to the Arbitration Clause. International case law supports the application of Mediterranean Law. Interpreted under Mediterranean Law, the Arbitration Clause provides for the Arbitral Tribunal's power to adapt the Contract. The Arbitral Tribunal therefore has the power to adapt the Contract.

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

30 CLAIMANT went out of its way to comply with RESPONDENT's order of 100 doses of frozen semen, as it was looking forward to a mutually beneficial long-term business relationship. Because of the unusually large size of the order, the delivery had to be split into three shipments. The unexpected commercial conflict between Mediterraneo and Equatoriana surprised both CLAIMANT and RESPONDENT and unfortunately caused the cost of the last shipment of 50 doses to rise by 30 per cent. Aware of RESPONDENT's need for a fast delivery, CLAIMANT initiated the delivery of the third shipment and provisionally paid the additional tariffs, relying on RESPONDENT to keep its assurance to reach an agreement on the price. Taking advantage of CLAIMANT's trust, RESPONDENT terminated the renegotiations along with the entire business relationship and refused to pay any additional amount for the tariffs.

31 As these scenarios are covered by the Hardship Clause, Clause 12 of the Contract (hereafter: "Clause 12"), CLAIMANT is entitled to an adaptation of the purchase price [**A**]. In any case, CLAIMANT is entitled to an adaptation under the CISG [**B**]. To restore the equilibrium of the Contract, the price should be increased by US$ 1,250,000 [**C**].

A. CLAIMANT Is Entitled to an Adaptation of the Price Under Clause 12 of the Contract

32 CLAIMANT is entitled to an adaptation of the price under Clause 12 of the Contract. In General, Clause 12 provides for an adaptation of the Contract [**I**]. Its specific requirements are met [**II**] and the application of Clause 12 is not limited by the Parties' reference to DDP [**III**].

I. Clause 12 Provides for an Adaptation of the Contract

33 Considering the Parties' intent at the time of drafting as well as the general rationale of hardship clauses, Clause 12 provides for an adaptation of the Contract.

1. The Parties Intended the Hardship Clause to Provide for an Adaptation

34 An interpretation according to Art. 8 (1), (3) CISG demonstrates the Parties intent to provide for an adaptation of the Contract. Mr. Antley, RESPONDENT's lawyer, stated during a discussion with CLAIMANT's lawyer, Ms. Napravnik, that "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" [*EXHIBIT C 8, p. 17, line 16 et seq.*]. Mr. Antley then promised to come up with a proposal for an express reference, even though Ms. Napravnik did not deem it necessary [*EXHIBIT C 8, p. 17*]. This conduct shows that both parties generally intended Clause 12 to provide for an adaptation.

The same impression is conveyed by the content of Mr. Antley's note. It stated that one of the remaining points that required clarification was the "*Connection of [the] hardship clause with [the] arbitration clause*" [*EXHIBIT R 3, p. 35*]. This note indicates that both Parties wished the Arbitral Tribunal to restore the equilibrium of the Contract in cases of hardship.

35 Further, in the respective domestic legal systems of the Parties, an adaptation of the Contract is a legal remedy in cases of hardship. Both Mediterraneo and Equatoriana have adopted the PICC as their general contract law. Art. 6.2.3 PICC explicitly recognises the remedy of adaptation in cases of hardship. Both Parties referred to Clause 12 as a Hardship Clause [*EXHIBIT C 4, p. 12; EXHIBIT R 3, p. 35*]. The circumstances of the drafting process therefore suggest that the Parties intended Clause 12 to provide for an adaptation of the Contract in cases of hardship.

2. It is the General Rationale of a Hardship Clause to Provide for an Adaptation

36 Moreover, it is the general rationale of a hardship clause to provide for an adaptation of the contract. The purpose of a hardship clause is to deal with unforeseen circumstances that fundamentally change the contractual equilibrium, rendering the performance of one of the parties more onerous or difficult [*Momberg, p. 14; Böckstiegel, p. 159-160; Oppetit, p. 794*]. As a legal remedy, hardship clauses are meant to provide for a revision of the contract in order to restore the contractual equilibrium and alleviate the hardship [*Weick, ZEuP, p. 299; Bernardini, p. 213; Rimke, pp. 228-229; Schlechtriem/Schwenzer – Schwenzer Art. 79, para 58; Staudinger-Martinek, pp. 344 et seq.; Schmitthoff, p. 417; Fontaine, p. 457*]. This remedy may consist in either an adaptation of the contract by the tribunal or in the complete dissolution of the contract [*Brunner, Hardship, p. 448*]. Often, parties do not want to dissolve their contract which makes an adaptation of the contract by the arbitral tribunal the preferable option. Hence, the general rationale of a hardship clause is to provide for contract adaptation.

37 In the present case, a dissolution of the Contract was not in the Parties' interests. This is indicated by RESPONDENT urging CLAIMANT to deliver in spite of the tariffs and CLAIMANT's willingness to comply on the basis that an agreement on the price would later be reached [*EXHIBIT C 8, p. 17*]. Furthermore, rescinding the Contract is not possible in the present case, as RESPONDENT had already resold and used part of the delivery. Therefore, adapting the Contract is the proper remedy in the present case.

II. The Requirements of Clause 12 Are Met

38 Clause 12 states that "Seller shall not be responsible […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [EXHIBIT C 5, p. 14]. The requirements of Clause 12 are met, as the tariffs are an event comparable to additional health and safety requirements [**1**]. Furthermore, they were unforeseen [**2**] and made performance of the Contract more onerous [**3**].

1. The Tariffs Are an Event Comparable to Additional Health and Safety Requirements

39 The tariffs are an event comparable to additional health and safety requirements as set forth in Clause 12 of the Contract. In the past, CLAIMANT had made negative experiences with additional health and safety regulations, which nearly ruined it financially [*PO No 2, p. 59, para. 29*]. Therefore, those risks were specifically mentioned in the Contract. CLAIMANT, however, was aware that such hardship could be caused by any similar event. The "*health and safety requirements*" were thus merely meant to be a specific subcategory of the "*changes in customs regulations or import restrictions*" which CLAIMANT refused to be responsible for when answering RESPONDENT's request for DDP [*EXHIBIT C 4, p. 12*]. Clause 12 was aimed to cover those risks as "*comparable unforeseen events*".

40 RESPONDENT could not have been unaware of CLAIMANT's aforementioned understanding of "*comparable unforeseen events*". In the email of 31 March 2017, CLAIMANT explicitly stated that it was "*not willing to take over <u>any</u> further risks […], in particular not those associated with <u>changes in customs regulations or import restrictions</u>*" [*EXHIBIT C 4, p. 12*]. CLAIMANT then goes on to name specific examples that caused problems in the past, namely unexpected health and safety requirements [*ibid.*]. The broad wording *"additional health and safety requirements or comparable unforeseen events*" was actually chosen by RESPONDENT's negotiator to address the risks mentioned by Ms. Napravnik in her email of 31 March 2017 [*PO No 2, p. 56, para 12*]. Thus, both Parties agreed that the wording of Clause 12 was to be understood in the context of this email. As tariffs are customs by definition [*Radin Law Dictionary,"customs"*], the Parties intended Clause 12 to cover unexpected tariffs.

41 In any case, any ambiguity of the wording "*comparable unforeseen events*" has to be interpreted to RESPONDENTS disadvantage. The final wording of the Hardship Clause was proposed by the head of RESPONDENT's legal department, Mr. Krone [*PO No 2, p. 56, para 12*]. If the meaning of a term is ambiguous and the ambiguity cannot be resolved under Art. 8 CISG, the term is to be interpreted *contra preferentem*, against the interests of

the party that drafted it [*Schlechtriem/Schwenzer-Schmidt-Kessel, Art. 8, para 49*]. CLAIMANT proposed to adopt the ICC Hardship Clause [*EXHIBIT R 3, p.35*]. RESPONDENT's negotiator Mr. Krone instead suggested the wording "*health and safety regulations and comparable unforeseen events*" to limit application of the Hardship Clause to such events [*PO No 2, p. 56, para 12*]. As RESPONDENT provided the final version of the Clause, it must carry the risk of its ambiguity. When in doubt, the wording "*comparable unforeseen events*" is thus to be interpreted as a reference to customs regulations and import restrictions, including tariffs.

2. The Tariffs Were Unforeseen

42 The tariffs were unforeseen by both Parties and in fact unforeseeable. The tariffs were imposed by the Equatorianian government in response to the tariffs imposed by Mediterraneo. The initial tariffs already surprised most analysts [*EXHIBIT C 6, p. 15*]. The retaliatory tariffs imposed by the Equatorianian government were even more unexpected, since the Equatorianian government had up to that point been an ardent supporter of free trade [*NOTICE OF ARBITRATION*, *p. 6, para. 10*]. The drastic and sudden retaliation "*came as a surprise even to informed circles*" [*EXHIBIT C 6, p. 15*]. Hence, the imposition of tariffs by the Equatorianian government could not have been foreseen.

43 Furthermore, neither Party foresaw that frozen horse semen would be affected by the tariffs. Usually, racehorse breeding is categorised differently from standard agricultural products [*NOTICE OF ARBITRATION, p. 6, para 11*]. RESPONDENT itself had to contact the ministry to clarify the situation [*EXHIBIT R 4, p. 36*]. Even the ministry employees were not certain whether frozen racehorse semen were covered by tariffs on animal products [*ibid*]. The Parties therefore did not foresee and could not have foreseen the imposition of the tariffs on racehorse semen.

3. The Tariffs Made the Contract More Onerous

44 The tariffs made the Contract more onerous for CLAIMANT. The Parties agreed on a low threshold with regard to the onerous event. The ICC Hardship Clause, on which the Parties originally based their Clause 12 [*EXHIBIT R 2, p. 34*], requires an event to make the performance "*excessively onerous*" [*ICC Hardship Clause 2003*]. The Parties deviated from this wording and merely required the event to make the Contract "*more onerous*" [*EXHIBIT C 5, p. 14, Clause 12*]. Thus, the Parties agreed on a low threshold of onerousness.

45 The price increase of 30 per cent is covered by the wording "*more onerous*" when considering the Parties' correspondence. CLAIMANT insisted not to take over "*any further risks*" associated with DDP [*EXHIBIT C 4, p. 12*]. Specifically, the risks of changes in customs regulations were not acceptable to CLAIMANT, as in CLAIMANT's experience, they could increase the costs by "*up to 40 per cent*" [*ibid., emph. add.*]. This was the worst-case-scenario imagined by CLAIMANT. Hence, the wording was meant to cover changes resulting in a cost increase of considerably less than 40 per cent. Otherwise, Clause 12 would be rendered almost inapplicable. A price increase of 30 per cent is therefore covered by the wording.

46 Additionally, the threshold for onerousness has to be lowered even further where the obligor is threatened by financial ruin [*Brunner, Hardship, pp. 435 et seq.; Schwenzer, Bucher lib. am., p. 730; Girsberger/Zapolskis, Jurisprudence 2012*]. CLAIMANT depends on the profits of the transaction for the future of its credit line. CLAIMANT's very existence is seriously endangered by the additional costs [*PO No 2, p. 59, para. 29*]. Thus, the threshold for hardship is to be set even lower.

47 This is supported by RESPONDENT's opinion that a cost increase as low as 25 per cent qualifies as hardship even under the ICC Hardship Clause: When RESPONDENT itself was affected by the tariffs imposed by the Mediterranean government, RESPONDENT called for an adaptation under the ICC Hardship Clause 2003 [*PO No 2, p. 60, para. 39*]. If 25 per cent tariffs qualify as "*excessively onerous*" as required by the ICC 2003 hardship clause, certainly the 30 per cent counter tariffs must be covered by the wording "*more onerous*". In conclusion, the tariffs made the Contract more onerous.

III. The Reference to DDP Does Not Limit the Application of Clause 12

48 The reference to DDP does not disqualify the unexpected tariffs from being a cause of hardship. RESPONDENT asked for a delivery "*on the basis of DDP*" [*EXHIBIT C 3, p. 11*]. DDP stands for "delivery duty paid" and refers to the ICC incoterm, usually meaning that the seller carries all costs and risks of delivery [*Incoterms 2010 Guide, p. 204*]. However, the ICC clarifies that incoterms do not override hardship clauses, neither contractual nor statutory ones [*Incoterms 2010 Guide, p. 18*]. Therefore, an agreement on delivery on the basis of DDP does not affect the applicability of Clause 12.

49 The Parties did not assign the risk of unexpected tariffs to CLAIMANT. Party agreements supersede incoterms such as DDP [*Incoterms 2010 Guide, p. 41; Geofizika DD v MMB Int., 28 Apr 2010; EBJS – Joost, para. 130; Bensafi/Mack/Nassef/Simonet, para. 3; Ndlovu,*

p. 218, para. 50; Coetzee, p. 211; van Weele, p. 40]. Thus, the Parties were able to deviate from the usual meaning of DDP. By their referral to DPP in the Contract, the Parties did not intend CLAIMANT to bear the risks of unexpected tariffs. This is evidenced by the drafting history and the Contract itself:

50 First, the Parties introduced the Hardship Clause with the sole objective of adjusting the risk distribution under DDP. It is undisputed that the Parties deviated from the distribution of risks usually associated with DDP [*PO No 2, p. 56, para. 8*]. The inclusion of Clause 12 was meant to release CLAIMANT from the responsibility for unexpected difficulties during the delivery [*EXHIBIT C 4, p. 12*]. Thus, the Parties intended the Hardship Clause to limit the original risk distribution of DDP.

51 Second, the reasons for choosing delivery on the basis of DPP were primarily of practical nature, and not related to the reallocation of risk. An interpretation under Art. 8 (1), (3) CISG shows that the Parties' mainly referred to DDP because they wanted to profit from CLAIMANT's greater experience in the shipment of frozen semen, in particular CLAIMANT's know-how concerning the necessary export and import documentation [*EXHIBIT C 3, p. 11*]. The incoterm DDP is the only incoterm making the seller responsible for all import formalities [*Piltz/Bredow, para. D-501*]. RESPONDENT asked for a delivery "*on the basis of DDP*" [*EXHIBIT C 3, p. 11*] because CLAIMANT already had the necessary permits and import licenses. DDP was thus chosen for convenience and did not mean to assign all delivery risks to CLAIMANT.

52 Lastly, seen from the perspective of a reasonable person in terms of Art. 8 (2) CISG, RESPONDENT seemed to agree that CLAIMANT did not accept the additional risks associated with DDP. When RESPONDENT asked CLAIMANT for DDP delivery, CLAIMANT refused to accept "*any further risks*" and requested an increase of the purchase price by US$ 1000 per dose to cover the "*additional costs associated with a delivery DDP*" [*EXHIBIT C 4, p. 12*]. After all, CLAIMANT had to carry out an international transport of frozen semen that requires permanently cooled nitrogen containers. RESPONDENT refused to pay an additional US$ 1,000 per dose for receiving "*basically nothing*" [*ANSWER TO NOTICE OF ARBITRATION, p. 30, para. 4*]. It cannot be assumed that RESPONDENT would have called a full risk allocation towards CLAIMANT "*basically nothing*". RESPONDENT was thus aware that the additional costs did not cover additional risks, but only transportation costs.

53 In fact, RESPONDENT argued that the overall price should be lowered to account for the risk removal [*PO No 2, p. 56, para. 8*]. In the end, CLAIMANT did lower the price for a delivery on

the basis of DDP to US$ 500 per dose and RESPONDENT accepted [*cf. EXHIBIT C 4, p. 12; EXHIBIT C 5, p. 14, Clauses 6, 8*]. The minor price increase does not suggest a full transfer of risks to CLAIMANT. Thus, a reasonable person would have concluded that CLAIMANT does not bear additional risks such as unexpected tariffs. The Parties consequently varied from the usual risk allocation of DDP. Hence, the application of Clause 12 is not limited by the agreement on DDP.

54 In conclusion, Clause 12 allows for an adaptation of the Contract. The requirements of Clause 12 are met, and its application is not excluded by the reference to DDP. CLAIMANT is entitled to an adaptation of the Contract under Clause 12.

B. In Any Case, CLAIMANT Is Entitled to an Adaptation Under the CISG

55 CLAIMANT is also entitled to a price adaptation under the CISG. The provisions of Art. 79 CISG are applicable in addition to Clause 12 [**I**]. Art. 79 (1) CISG provides for an adaptation of the Contract [**II**]. Since the requirements of Art. 79 CISG are met [**III**], CLAIMANT is entitled to an adaptation of the Contract.

I. Art. 79 CISG Is Applicable in Addition to Clause 12

56 The provisions of Art. 79 CISG are applicable in the present case. While it is theoretically possible to draft a clause that restricts the application of Art. 79 CISG, that clause would "*have to make clear that it replaces any resort to Art. 79 CISG under the CISG*" [*Ferrari/Flechtner/Brand – Brand, p. 405; cf. Cordero-Moss, p. 117; Tarquino, p. 40; Miettinen, p. 38; Czerwenka, p. 169*]. Clause 12 neither explicitly nor implicitly states that it replaces Art. 79 CISG. Hence, Clause 12 does not prevent the application of Art. 79 CISG.

57 Further, hardship clauses are generally applied alongside the codified law. In American law, where hardship clauses are commonly used, it is standard practice that contractual clauses operate alongside the provisions of the applicable law [*Harriscom Svenska v Harris, 23 Aug 1993*]. The same approach has been adopted in the context of the CISG. It was found that contractual hardship and force majeure clauses are to be considered alongside the CISG [*cf. Clout Case, OLG Hamburg, 28 Feb 1997, para. 2 (d)*].

58 Last, and most importantly, the Parties did not intend the Hardship Clause to constitute a derogation from the CISG. The Hardship Clause was included to protect CLAIMANT from the additional risks associated with DDP [*EXHIBIT C 4, p. 12*]. Considering this, Clause 12 could not have been intended to eliminate the protection offered by the CISG. As CLAIMANT

requested, it was included to offer additional protection against the events of hardship that CLAIMANT was particularly concerned about [*PO No 2, p. 56, para 12*]. There is no reason to privilege parties without a hardship clause by granting them the protection of Art. 79 CISG, while at the same time denying parties the same benefit which have recognised the concept of hardship in their contract. Clause 12 was thus not meant to derogate from Art. 79 CISG in the sense of Art. 6 CISG. Hence, Art. 79 CISG is applicable in addition to Clause 12.

II. Artt. 79, 7 (2) CISG Allow For the Remedy of Contract Adaptation

59 In cases of hardship, Artt. 79, 7 (2) CISG allow for an adaptation of the Contract. According to Art. 7 (2) CISG, questions concerning matters governed by the CISG, which are not expressly settled in it are to be settled in conformity with the general principles on which the CISG is based. Whilst Art. 79 CISG governs hardship, it contains an internal gap as to the legal consequences for situations of hardship [**1**]. When the gap is filled as set forth in Art. 7 (2) CISG, Art. 79 CISG provides for an adaptation in cases of hardship [**2**].

1. Art. 79 CISG Contains an Internal Gap As to the Legal Consequences of Hardship

60 Art. 79 CISG governs hardship but contains an internal gap regarding the legal consequences of hardship. It is generally accepted that hardship can be an impediment in the sense of Art. 79 CISG [*Scafom International v Lorraine Tubes, CISG-AC Opinion No 7, para. 37, Rapporteur: Garro; Bund, pp. 392 et seq.; Schlechtriem/Schroeter, CISG, para. 678; Schwenzer, lib. am. Bucher, p. 726; Schlechtriem/Schwenzer - Schwenzer, Art. 79, para. 31; Staudinger – Magnus, Art. 79, para. 24; Düchs, p. 118; Honnold/Flechtner, Art. 79, para. 432.2; MüKo-HGB – Mankowski Art. 79, para. 64*]. Art. 79 CISG primarily regulates situations of force majeure. Hardship may be considered as a particular group of cases under the force majeure excuse [*Brunner, Hardship, p. 392*]. It must be understood "*to be part of the rules on impairments of performance governed by the CISG*" [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79 para. 31*]. Art. 79 CISG thus governs situations of hardship.

61 Yet, Art. 79 CISG does not settle the consequences of an impediment in form of hardship. Taken literally, Art. 79 CISG is an exemption from liability for damages and covers a party's inability to perform. In situations of hardship, however, performance is still physically possible and Art. 79 CISG does not affect the obligation to perform [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, para. 55; cf. Lindström, p. 3*]. An exemption from liability is not an adequate solution for situations of hardship, as the buyer could still demand performance [*Schlechtriem/Schwenzer – Schwenzer, Art. 79, para. 55*]. Only the remedies of a complete

exemption of the duty to perform or an adaptation of the contract by a court or tribunal fit the situation of hardship. An adaptation of the contract ensures the continuance of the contract as well as a relief for the disadvantaged party [*Brunner, Hardship, p. 218*]. Therefore, as Art. 79 CISG governs hardship, it would need to provide for the remedy of contract adaptation. As said remedy is not expressly settled in Art. 79 CISG, the provision contains a gap with regard to the consequences of hardship.

62 This is particularly important in the present case: CLAIMANT delivered in good faith, trusting RESPONDENT's assurances that a solution would be found. Once CLAIMANT had authorised the delivery, RESPONDENT refused to renegotiate [*Exhibit C 8, p. 18*.]. Neither the exemption from liability nor an exemption from the duty to perform could suitably protect CLAIMANT from the hardship. As RESPONDENT resold and presumably used some of the doses, the delivery and the payment of the tariffs cannot be reversed [*cf. PO No 2, p. 57, para 20*]. Thus, the only way to restore the equilibrium is to adapt the Contract.

63 In conclusion, the exemption from liability granted by Art. 79 CISG is no suitable remedy for cases of hardship in general, in particular in the present case. As the CISG governs situations of hardship, there is an internal gap in Art. 79 (1) CISG regarding the legal remedies for cases of hardship.

2. Gap-Filling Under Art. 7 (2) CISG Provides for the Remedy of an Adaptation

64 According to Art. 7 (2) CISG, this gap is to be filled in conformity with the general principles on which the CISG is based. The remedy of contract adaptation can be derived from the general principles underlying the CISG [**a**]. As the PICC reflect the same general principles that underlie the CISG, the remedy of Art. 6.2.3 PICC may be used to supplement the CISG [**b**].

a) The General Principles of the CISG Suggest the Remedy of Contract Adaption

65 The general principles underlying the CISG suggest that an adaptation of the contract is the appropriate remedy to fill the gap in Art. 79 CISG.

66 First, the remedy of contract adaptation can be deduced from Art. 50 CISG [*Da Silveira, p. 344*], which entitles the buyer to reduce the price when goods are flawed. "*The remedy of price reduction is a kind of adjustment of the contract to reflect a disturbed balance between performance on one side and obligation on the other side*" [*Schwenzer, Art. 79, para. 55*].

The CISG is thus familiar with the concept of contract adaptation, especially in case of a shift in the balance of the contract.

67 Second, the general principle of *favor contractus* calls for an adaptation in cases of hardship. The CISG is based on the principle of *favor contractus* [*Bonell, p. 1137, Carvalhal Sica, p. 14, FCF v Adriafil Commerciale, 15 Sep 2000*]. According to this principle, a contract should be preserved as long as possible. In a situation of hardship, an adaptation is the only remedy that preserves the contract [*Brunner, Hardship, p. 218*]. The alternatives to adaptation, i.e. exemption of performance and/or termination of the Contract, both negate the concept of *favor contractus*. With regard to *favor contractus*, an adaptation is the more appropriate remedy to fill the internal gap in Art. 79 CISG. Hence, the general principles underlying the CISG suggest an adaptation of the Contract in the present case.

b) Art. 6.2.3 PICC May Be Used to Supplement Art. 79 CISG

68 The remedy of contract adaptation can also be derived from the PICC. Regarding the question of hardship, there is wide support for using Art. 6.2.3 PICC to fill the internal gap in Art. 79 CISG [*Garro, pp. 1152 et seq.; Bonell, p. 323; Reiley, p. 145; Perillo, pp. 11 et seq.; Momberg, p. 214; Basedow, pp. 136 et seq.; Bund, p. 392; Brunner, Hardship, p. 218; Aguiar Júnior, p. 72; Da Silveira, p. 343; Veneziano, pp. 147 et seq.; Gama Junior, p. 207*].

69 Art. 6.2.3 (4) PICC provides that if the court finds hardship, it may either terminate the contract or adapt the contract with a view of restoring the equilibrium. The PICC have been recognised as instruments for the interpretation and gap filling of international uniform law [*Dupiré Invicta industrie v Gabo, 17 Feb 2015, para. 140; ICC No 229/1996 RUS, ICC No 8817; ICC No 9117; Report of UNCITRAL 45th session*]. Its provisions on hardship have been called "*an accurate representation, although incomplete, of the usages of international trade*" and have been frequently used by arbitral tribunals to supplement the applicable law [*ICC No 9479; ICC No 7365; ICC No 10021*]. In 2009, the Belgian Supreme Court used the PICC to fill the gap in Art. 79 CISG in the landmark decision of *Scafom International v Lorraine Tubes*, where the court determined that the claimant was in a situation of hardship due to a sudden price increase and adapted the contract on the basis of Art. 6.2.3 PICC.

70 In fact, RESPONDENT itself has, on another occasion, declared its support for the use of Art. 6.2.3 PICC as supplement to the CISG. RESPONDENT is party in an arbitration proceeding concerning an international sales contract with a different Mediterranean company [*PO No 2,*

p. 60, para. 39]. In that arbitration, RESPONDENT is affected by the tariffs as seller and referred to Art. 6.2.3 PICC to demand an adaptation of the contract due to hardship [*ibid.*].

71 In conclusion, an adaptation of the Contract can be derived from the general principles of the CISG, also expressed in Art. 6.2.3 PICC. Artt. 79, 7 (2) CISG therefore provide for the remedy of contract adaptation.

III. The Requirements of Art. 79 (1) CISG Are Met

72 The requirements of Art. 79 (1) CISG are met. The tariffs are an impediment beyond CLAIMANT's control that CLAIMANT could not have reasonably been expected to take into account [**1**]. Also, CLAIMANT could not have avoided or overcome their consequences [**2**].

1. The Tariffs Were an Impediment Beyond CLAIMANT's Control and Could Not Reasonably Have Been Taken Into Account

73 The tariffs were an impediment beyond CLAIMANT's control, as they were imposed by the Equatorianian government [*NOTICE OF ARBITRATION, p.6, para 10*]. CLAIMANT could not have been expected to take the tariffs into account, since they were an unforeseeable event [*supra, paras. 42*].

2. CLAIMANT Could Not Have Avoided or Overcome the Consequences of the Tariffs

74 First, CLAIMANT could not have avoided the impediment. The tariffs were imposed by the Equatorianian government. As a Mediterranean company, CLAIMANT had no way to influence the trade policies of a foreign country. CLAIMANT also immediately acted by calling RESPONDENT once it was informed that the tariffs affected horse semen [*EXHIBIT C 7, p. 16*]. The tariffs were therefore unavoidable for CLAIMANT.

75 Second, CLAIMANT could also not have overcome the consequences of the tariffs. The party referring to Art. 79 CISG is obliged "*to show a reasonable effort to overcome the effects*" of an unavoidable impediment [*Kröll/Mistelis/Perales Viscasillas – Atamer, Art. 79, paras. 55 et seq.; Bianca/Bonell – Tallon, pp. 580 et seq.*]. Alternative ways of delivery to circumvent the impediment, such as adjusting the packaging of the product or the routes of transport, should be considered [*Kröll/Mistelis/Perales Viscasillas – Atamer, Art. 79, paras. 55 et seq.*]. Such alternatives were not accessible to CLAIMANT as it could not have obtained a reduction in the tariffs [*PO No 2, p. 58, para. 27*]. In fact, avoiding the tariffs

would have been against the law. CLAIMANT could thus not have been expected to overcome the impediment. In conclusion, all the requirements of Art. 79 (1) CISG are met.

C. The Price Should Be Increased by US$ 1,250,000

76 It now lies within the Arbitral Tribunal's discretion to adapt the price in order to restore the equilibrium of the Contract. A price increase of US$ 1,250,000 is suggested as a fair solution for the following reasons:

77 To restore the equilibrium of the contract, it is reasonable to take all relevant circumstances of the case into account. It is thus to be noted RESPONDENT has been reselling a considerable amount of the doses at a 20 per cent profit [*PO No 2, p. 57, para. 20*] and is planning to resell even more, at least half of the entire shipment [*PO No 2, p. 56, para. 11*]. This resale already distorted the originally intended equilibrium of the Contract, as CLAIMANT had made it a precondition for the entire transaction that the semen would not be resold without CLAIMANT's "*express written consent*" [*EXHIBIT C 2, p. 10*].

78 Clause 12 states that CLAIMANT shall not be responsible for hardship. It is therefore reasonable to relocate the additional costs to RESPONDENT. Further, RESPONDENT is in the better position to avoid any detriment resulting from the additional tariffs. Whilst CLAIMANT is on the verge of bankruptcy and the additional tariffs seriously endanger the integrity of its company [*PO No 2, p. 59, para. 30*], RESPONDENT is not financially endangered by the additional costs. CLAIMANT is willing to renounce its calculated profits of US$ 250,000. The purchase price should therefore be increased by US$ 1,250,000.

79 The same increase should be considered appropriate if the Contract is adapted under Art. 79 CISG: If CLAIMANT had not trusted in RESPONDENT's promise to find an amicable agreement for the increased custom costs, CLAIMANT could have exempted itself from delivery due to Art. 79 CISG and therefore would have avoided the additional costs of US$ 1,500,000. CLAIMANT should not suffer losses for acting in good faith and should therefore should be treated as if it had not delivered. In this case, CLAIMANT would not have lost US$ 1,500,000. CLAIMANT is willing once more to forgo its profits; the price should therefore be increased by US$ 1,250,000.

80 **Conclusion of the Second Issue:** For these reasons, the Arbitral Tribunal is kindly requested to grant an adaptation of the Contract and increase the purchase price by US$ 1,250,000.

THIRD ISSUE: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

81 CLAIMANT has the right to submit evidence from the other arbitration proceedings. RESPONDENT is party to arbitration proceedings comparable to the present ones. In those proceedings, RESPONDENT takes CLAIMANT's position and asks for an adaptation of the contract due to the sudden imposition of tariffs between Mediterraneo and Equatoriana [*PO NO 2, p. 60, para. 39; CLAIMANT's Email, p. 50*]. In the partial interim award of the other arbitration (hereafter "Interim Award"), the arbitral tribunal's power to adapt the contract was confirmed [*PO No 2, p. 60, para. 39*]. CLAIMANT wishes to submit this award as evidence, since the other proceedings run parallel to the present ones [*CLAIMANT's Email, p. 50*].

82 In international arbitration, no exclusionary rules of evidence apply directly [*Sandifer, pp. 3 et seq.; Redfern/Hunter, para. 6.81; Kazazi, p. 1; Waincymer, para. 10.16; Sicard-Mirabal/Derains, p. 208; Reisman/Freedman, AJIL, 1982, p. 743; Pietrowski, Arb. Int., 2006, p. 408; Zuberbühler/Hofmann/Oetiker/Rohner, p. 168; Blair/Gojković, ICSID Review, 2018, p. 238*]. Instead, pursuant to Art. 22 (2) HKIAC Rules 2018, the admissibility, relevance, materiality and weight of evidence lie within the broad discretion of the arbitral tribunal. Due to the relevance and materiality of the Interim Award [**A**] and the lack of reasons for its inadmissibility [**B**], CLAIMANT should be allowed to submit the evidence.

A. The Relevance and Materiality of the Evidence Justify Its Submission

83 CLAIMANT should be entitled to submit the Interim Award, as it is relevant to the case and material to its outcome. The general standards for the evaluation of evidence are its relevance and materiality to the case [*Interhandel, 21 Mar 1959, p. 30; ICTR-99-54-T, 2011, paras. 14 et seq.; SCSL-03-1-T, 2011, p. 5; Moser/Bao, HKIAC Commentary, para. 9.162; Pilkov, Arbitration, 2014, p. 154*]. This is reflected in Art. 22 (3) HKIAC Rules 2018 as well. Evidence is relevant when it is useful to prove a fact from which a legal conclusion can be drawn [*Raeschke-Kessler, Arb. Int., 2002, p. 427; Born, p. 2362; Pilkov, Arbitration, 2014, pp. 148 et seq.*]. It is material if the information is needed for a complete consideration of the legal issues [*ibid.*]. The Interim Award is relevant and material, since the other proceedings run parallel to the current Arbitration with regard to the following two circumstances:

84 The contract between the parties of the other arbitration contains an ICC Hardship Clause (2003) [*PO No 2, p. 60, para. 39*]. In the Interim Award, the arbitral tribunal of the other proceedings affirmed its power to adapt the contract [*ibid.*]. Since in both proceedings

neither the respective hardship clause nor the arbitration clause contain an express reference to the possibility of price adaptation [*cf. EXHIBIT C 5, p. 14, Clauses 12, 15; PO No 2, p. 60, para. 39*], the Interim Award can help to determine the power of the Arbitral Tribunal.

85 In addition, both proceedings concern the question of hardship caused by the tariffs imposed between Mediterraneo and Equatoriana. In the other arbitration, RESPONDENT claims that the requirements of hardship under the ICC Hardship Clause 2003 are met [*PO No 2, p. 60, para. 39*]. In fact, RESPONDENT argues that tariffs of 25 per cent make a contact "*excessively more onerous*" as required under the ICC Hardship Clause. In the present case, the tariffs amount to 30 per cent and the threshold for hardship is lower, only requiring the Contract to be "*more onerous*" [*cf. EXHIBIT C 5, p. 14, Clause 12; supra, paras. 44 et seq.*]. The two proceedings are thus sufficiently similar, making the decisions of the other arbitration relevant and material guidance for the solution of the current dispute.

B. The Evidence Is Admissible in the Present Case

86 The Interim Award is admissible as evidence. Relevant and material evidence may only be excluded if there are legitimate reasons to do so [*Schlosser, para. 835; Moser/Bao, HKIAC Commentary, paras. 9.162 et seq.; Pietrowski, Arb. Int., 2006, p. 378*]. In the present dispute, this is not the case. Publicised information is generally admissible [**I**]. Even if RESPONDENT's allegations concerning the inadmissibility were to be considered, the admissibility of the evidence would neither be impeded by alleged illegality [**II**] nor by confidentiality concerns [**III**]. Instead, the evidence should be admissible to ensure a fair and just award [**IV**].

I. Publicised Information Is Generally Admissible

87 Since the Interim Award is publicly available, it should not be excluded by the Arbitral Tribunal. If information is available to the public, the question of admissibility does not depend on illegality or confidentiality concerns [*Bancoult III, 22 Oct 2008, paras. 20 et seq.; SCSL-03-1-T, 2011, p. 5; El-Masri v Macedonia, 13 Dec 2012, para. 77; Persia Int. Bank v Council of the EU, 6 Sep 2013, para. 95; Symbion Power v Venco Imtiaz Construction, 10 Mar 2017, pp. 12 et seq.*]. This is due to the fact that there is no need to protect the information from being disclosed anymore. Furthermore, a party should not be denied its right to submit information if everyone else has access to it. In the present case, the Interim Award can be bought by anyone interested [*PO No 2, p. 61, para. 41*]. Therefore, the evidence is public and the submission is admissible.

II. Alleged Illegality Does Not Affect the Admissibility of the Evidence

88 Even if RESPONDENT's allegations of illegality were held to be founded, this would not affect the admissibility of the Interim Award. The alleged illegal obtainment cannot be attributed to CLAIMANT [**1**]. Even when assuming that a third party had obtained the information illegally, there is no legal rule precluding the admission of the Interim Award as evidence [**2**].

1. The Alleged Illegal Obtainment Cannot Be Attributed to CLAIMANT

89 CLAIMANT was not involved in any alleged illegal obtainment of the Interim Award. Occasionally, it had been held that evidence may only be excluded if there is proof that the party submitting the information was directly involved in its illegal obtainment [*Methanex v US, 2005, Part II, Chpt. I, paras. 55 et seq.; Persia Int. Bank v Council of the EU, 6 Sep 2013, para. 95; Ortiz, Transnational Notes, 2018, para. 7; Boykin/Havalic, TDM, 2014, pp. 33 et seq.*]. Pursuant to Art. 22 (1) HKIAC Rules 2018, RESPONDENT bears the burden of proof regarding its allegations against CLAIMANT.

90 However, RESPONDENT does not even know for sure how the information was obtained. It alleges two possibilities, namely a breach of confidentiality committed by its own employees or a computer hack [*RESPONDENT's Email, p. 51*]. None of these scenarios have a connection to CLAIMANT.

91 In addition, RESPONDENT is not able to prove its allegations of illegality against CLAIMANT. CLAIMANT was not involved in the hack of RESPONDENT's computer system [*cf. PO No 2, p. 61, para. 41*]. This is underlined by the fact that the Interim Award is not yet in the possession of CLAIMANT [*ibid.*]. If CLAIMANT had obtained the information itself, it would not have to buy it from another company. Therefore, RESPONDENT fails to fulfil its burden of proof under Art. 22 (1) HKIAC Rules 2018 and the alleged illegal obtainment cannot be attributed to CLAIMANT.

2. No Legal Rule Precludes the Admission of Illegal Evidence in the Present Case

92 Assuming that the Interim Award had been obtained through a computer hack, no legal rule precludes its admission. The applicable law does not prohibit the admission of illegal evidence [**a**]. The IBA Rules on the Taking of Evidence in International Arbitration (hereafter "IBA Rules") would also deem the information admissible [**b**].

a) The Applicable Law Does Not Prohibit the Admission of Illegal Evidence

93 Admitting illegal evidence is not prohibited by the law applicable to the present dispute. The HKIAC Rules 2018 as the law of the arbitration and the Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law [*PO No 1, p. 53, para. 4*], are silent on the question of illegal evidence. Considering the regulatory detail of the HKIAC Rules [*cf. Liu, Kluwer Arbitration Blog, 2018, paras. 6 et seq.*], this can be understood as a deliberate decision not to exclude such information.

94 In addition, the national law of the Parties does not render the evidence inadmissible. There is no rule on the admissibility of illicit evidence in the national arbitration laws of Equatoriana, Mediterraneo or Danubia [*PO No 2, p. 61, para. 46*]. If neither the *lex loci arbitri* nor the national law of the Parties prohibit the submission of illegal information, there are no legal grounds to declare the evidence inadmissible.

95 In fact, excluding the evidence would contradict the character of international arbitration. Compared to national law, international arbitration is supposed to give the parties more freedom in how they conduct their proceedings [*Born, Law and Practice, p. 22; Binder, paras. 5-015 et seq.; Sandifer, pp. 3 et seq.; Pietrowski, Arb. Int., 2006, p. 408; Ortiz, Transnational Notes, 2018, para. 5; UNCITRAL Analytical Commentary, Art. 19, para. 1*]. There is an international common understanding in favour of the admission of illegally obtained evidence. Authorities in Europe, Asia, America, Africa and Australia have found that illegal evidence is not automatically inadmissible [*Elias v Pasmore, 23 Jan 1934, p. 2; Persia Int. Bank v Council of the EU, 6 Sep 2013, para. 95; BGer, 4A_448/2013, 27 Mar 2014, cons. 53; BGer, 4A_362/2013, 27 Mar 2014, cons. 54; Peiris, OTTL, 1981, pp. 310 et seq.; Jain, JILI, 1980, pp. 322 et seq.; MüKo ZPO – Prütting, § 284, para. 66*]. One of the few stricter exclusionary rules on evidence is the so-called "*Fruit of the Poisonous Tree Doctrine*". Pursuant to this doctrine, evidence cannot be admitted if it has any illegal roots [*Silverthorne v US, 26 Jan 1920, p. 390; Nardone v US, 11 Dec 1939, p. 341; US v Leon, 5 Jul 1984, p. 898*]. Yet, this doctrine is only used in US American Law and only in the field of criminal law [*Townes v New York, 6 May 1999, paras. 17 et seq.; Reich v Minnicus, 22 Jul 1999, pp. 681 et seq.*]. In international arbitration, there is no need for such strict exclusionary rules, as arbitrators are qualified to decide the case in a fair manner and do not have to be "protected" from illicit information like members of a jury would be [*Fouchard/Gaillard/Goldman, pp. 560 et seq.; Sandifer, p. 182; Waincymer, para. 10.16; Pilkov, Arbitration, 2014, p. 151*]. As a result, limiting the parties' rights to submit evidence

would contravene the character of international arbitration. There is thus no reason for the Interim Award to be inadmissible.

b) Even Under the IBA Rules, the Evidence Is Admissible

96 Even if the Arbitral Tribunal were to apply a stricter standard with regard to the admissibility of evidence, the Interim Award would still be admissible in the present case. According to Art. 22(2) HKIAC Rules 2018, the Arbitral Tribunal can decide "*whether to apply strict rules of evidence*". Exercising this discretion, the IBA Rules are often used for purposes of gap filling and to specify rules on evidence submission [*Moser/Bao, HKIAC Commentary, para. 9.155; Pilkov, p. 150; Poudret/Besson, para. 646; Born, pp. 2348 et seq.; Moses, p. 45; IBA Arbitration Committee, SchiedsVZ, 2010, p. 41; Ireton, ICSID Review, 2015, p. 238*]. However, even the IBA Rules do not exclude the admission of the Interim Award.

97 Pursuant to Art. 9(2)(b) IBA Rules, information obtained in violation of a legal impediment may be inadmissible. This does not bar the admissibility of the Interim Award for two reasons: First, the obtainment of the evidence by CLAIMANT does not violate any applicable law in the present case [*cf. supra, para. 89 et seq.*]. Second, the provisions in Art. 9(2) IBA Rules have to be applied in accordance with Art. 9(3) IBA Rules [*Waincymer, para. 10.17.9; Zuberbühler/Hofmann/Oetiker/Rohner, p. 178*]. Hence, any legal impediment or privilege can be waived under Art. 9(3)(d) IBA Rules. RESPONDENT communicated to CLAIMANT details about the existence of the other arbitration [*RESPONDENT's Email, p. 51*]. In fact, RESPONDENT explicitly referred to the content of the dispute and the third party consented to this statement [*ibid.*]. In this way, RESPONDENT affirmatively used allegedly privileged information. Thus, the Interim Award is not protected under Art. 9(2)(b) IBA Rules and therefore admissible.

III. Confidentiality Concerns Do Not Impede the Admissibility of the Evidence

98 The evidence is also not rendered inadmissible by confidentiality concerns. RESPONDENT opposes the submission of the Interim Award by referring to the confidentiality provisions in Art. 42 HKIAC Rules 2013 [*RESPONDENT's Email, p. 51*]. However, confidentiality concerns do not affect the admissibility of evidence [**1**]. Even if such concerns were to be considered, RESPONDENT's concerns would not justify the inadmissibility of the Interim Award [**2**].

1. Confidentiality Concerns Generally Do Not Affect the Admissibility of Evidence

99 In general, confidentiality concerns do not affect the admissibility of evidence. Confidentiality provisions under the HKIAC Rules are not exclusionary rules on evidence.

Instead, they are contractual obligations, only binding the contracting parties not to relay information to the outside [*Redfern/Hunter, para. 2.176*]. If a party does not comply with its duty of confidentiality, the other party may be entitled to a remedy [*Moser/Bao, HKIAC Commentary, para. 12.30*]. However, it does not follow from a confidentiality provision that such a violation results in the procedural prohibition to submit information. Thus, there are no exclusionary rules on evidence within the confidentiality provisions of the HKIAC Rules.

100 Moreover, the confidentiality provision from the other arbitration does not bind CLAIMANT or the Arbitral Tribunal and cannot make the Interim Award inadmissible. Pursuant to Art. 42 (1) HKIAC Rules 2013, parties are not allowed to share information from the arbitral proceedings. This provision is extended to other participants of the proceedings as listed in Art. 42 (2) HKIAC Rules 2013. However, these confidentiality provisions do not bind non-involved third parties, even if they operate under the same institution [*Gotham Holdings v Health Grades, 3 Sep 2009, para. 665; Poudret/Besson, paras. 526 et seq.; Redfern/Hunter, para. 2.22; Hay, 40 under 40 Int. Arb., p. 212; Cook/Garcia, p. 231; Smeureanu, paras. 42 et seq.*]. CLAIMANT and the Arbitral Tribunal are not part of the other proceedings and are therefore not bound by its rules. Thus, confidentiality concerns do not affect the admissibility of the evidence.

2. Even if Confidentiality Concerns Were to Be Considered, RESPONDENT's Concerns Would Not Justify the Inadmissibility of the Evidence

101 Even if RESPONDENT's confidentiality concerns were to be considered, they would not justify the inadmissibility of the evidence for the following reasons:

102 RESPONDENT's information is still protected by the confidentiality provisions of the current proceedings. The Parties have agreed to apply the HKIAC Rules 2018 [*PO No 1, p. 52, para. II; EXHIBIT C 5, p. 14, Clause 15*]. These rules contain the same confidentiality obligations as the previous edition of 2013. In addition, Art. 22 (7) HKIAC Rules 2018 provides for hearings to be held in private. Thus, neither the Arbitral Tribunal nor any other party is allowed to publish or communicate any information about the Arbitration or the Parties. Therefore, the information is still sufficiently protected.

103 Moreover, admitting the Interim Award into evidence would not aggravate the alleged violation of RESPONDENT's privacy. The rationale of confidentiality provisions is to prevent sensitive information from becoming public [*Redfern/Hunter, para. 2.176*]. However, both Parties and the Arbitral Tribunal have already learned about the contents of the Interim Award

[*CLAIMANT's Email, p. 50; RESPONDENT's Email, p. 51*]. Hence, any alleged violation of RESPONDENT's privacy is not aggravated.

104 In addition, the evidence does not have to be protected, as it only reveals procedural information. Pursuant to Art. 9(2)(e) IBA Rules, the admission of evidence may be prohibited for reasons of commercial or technical confidentiality, if the Arbitral Tribunal determines those to be compelling. However, CLAIMANT wishes to submit only procedural details. Therefore, RESPONDENT'S confidentiality concerns do not justify the exclusion of the Interim Award as evidence.

IV. In Any Case, the Evidence Should Be Admissible to Ensure a Fair and Just Award

105 To ensure a fair and just award, the evidence should be admissible. Excluding the Interim Award would jeopardise the consistency of decisions within the HKIAC. Even though there is no doctrine of precedents in international arbitration, principles of predictability and efficiency support the premise to use preceding awards as guidance [*Sandifer, p. 109; Comrie-Thomson, JIA., 2017, pp. 279 et seq.*]. Both proceedings are governed by the rules of the HKIAC and concern similar questions of law and fact. Yet, RESPONDENT relies on directly contradicting legal evaluations within the two arbitrations [*cf. PO No 2, p. 60, para. 39; CLAIMANT's Email, p. 50*]. This contradictory behaviour could lead to differing awards in similar cases. The Interim Award should thus be considered to enable consistent decisions.

106 Moreover, not admitting the Interim Award as evidence endangers the enforceability of the award. According to Art. 13(1) HKIAC Rules 2018, a party shall have a full opportunity to present its case. This mandatory provision binds the arbitral tribunal as well as the parties [*ICSID No ARB/98/4, 2002, para. 57; Redfern/Hunter, para. 3.128; Girsberger/Voser, p. 218; Waincymer, AIAJ, 2009, p. 1*]. Pursuant to Art. 36(1)(a)(ii) Danubian Arbitration Law and Art. V(1)(b) NYC, the enforcement of an award can be refused if the right to be heard was infringed. This cannot be intended by the Arbitral Tribunal, as it "*shall make every reasonable effort to ensure that the award is valid*" [*Art. 13(10) HKIAC Rules 2018*]. To avoid violating CLAIMANT's right to fully present its case and to ensure the enforceability of the Award, the evidence should be admissible.

107 **Conclusion of the Third Issue:** The Interim Award is relevant and material to the present case. Alleged illegality cannot render the evidence inadmissible, and neither can confidentiality concerns. To ensure a fair, just and enforceable award, the Arbitral Tribunal is therefore kindly asked to grant CLAIMANT the submission of the evidence.

REQUEST FOR RELIEF

In response to the Arbitral Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

- The Arbitration Clause is governed by Mediterranean Law. Interpreted thereunder, the Arbitration Clause provides for the Arbitral Tribunal's power to adapt the Contract **[First Issue].**
- CLAIMANT is entitled to an adaptation of the Contract either under Clause 12 of the Contract or under the CISG **[Second Issue]**.
- CLAIMANT should be entitled to submit the Interim Award from the other arbitration proceedings as evidence **[Third Issue]**.

On these grounds, the Arbitral Tribunal is respectfully requested to order RESPONDENT to pay an additional amount of US$ 1,250,000 to restore the equilibrium of the Contract.

Freiburg im Breisgau, 6 December 2018

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INDEX OF AUTHORITIES

Aguiar Júnior, Ruy Rosado de
Aspects of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG),
in: CISG and Latin America: Regional and Global Perspectives,
Portland (2016)
pp. 59-77
cited as: *Aguiar Júnior*
in para. 68

Baldus, Christian
Beweislastverteilung im UN-Kaufrecht,
Frankfurt am Main (1995)
cited as: *Baldus*
in para. 5

Balthasar, Stephan (ed.)
International Commercial Arbitration, International Conventions, Country Reports and Comparative Analysis,
Munich (2016)
cited as: *Balthasar – Author*
in paras. 19, 22

Basedow, Jürgen
Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts,
in: Uniform Law Review, Vol. 5 (2000), Issue 1,
pp. 129-139
cited as: *Basedow, ULR, 2000*
in para. 68

Bensafi, Manal
Mack, Rontavian
Nassef, Nadine
Simonnet, Paisley
Association of Corporate Counsel
Incoterms: Too simple?,
https://www.acc.com/legalresources/quickcounsel/incoterms-too-simple.cfm?makepdf=1
last accessed: 06 Dec 2018
cited as: *Bensafi/Mack/Nassef/Simonnet*
in para. 49

Bentolila, Dolores
Arbitrators as Lawmakers,
Alphen aan den Rijn (2017)
cited as: *Bentolila*
in para. 2

Berg, Albert Jan van den
The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation,
Alphen aan den Rijn (1981)
cited as: *van den Berg*
in para. 2

Berger, Klaus Peter
Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators Transnational,
in: Vanderbilt Journal of Transnational Law, Vol. 36 (2003), pp. 1347-1380
cited as: *Berger, Vand. J. Transnat'l L., 2003*
in paras. 22, 23

Bernardini, Pietro
Communications: Adaptation of contracts,
in: New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions (1983),
pp. 211-216
cited as: *Bernardini, Development of Int. Comm. Arb,, 1983*
in para. 36

Bianca, Cesare Massimo
Bonell, Michael Joachim
Commentary on the International Sales Law: The 1980 Vienna Sales Convention,
Milan (1987)
cited as: *Bianca/Bonell – Author*
in para. 75

Binder, Peter
International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,
3rd ed., London (2010)
cited as: *Binder*
in para. 95

Blackaby, Nigel
Redfern, Alan
Hunter, Martin
Redfern and Hunter on International Arbitration,
6th ed., Oxford (2015)
cited as: *Redfern/Hunter*
in paras. 2, 6, 19, 22, 23, 82, 99, 100, 103, 106

Blair, Cherie
Gojković, Ema Vidak
WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence,
in: ICSID Review, Vol. 33 (2018), No 1,
pp. 235-259
cited as: *Blair/Gojković, ICSID Review, 2018*
in para. 82

Böckstiegel, Karl Heinz
Hardship, force majeure and special risk clauses in international contracts,
in: Adaptation and Renegotiation of Contract in International Trade and Finance,
Deventer (1985)
pp. 159-169
cited as: *Böckstiegel*
in para. 36

Bonell, Michael Joachim — The UNIDROIT Principles of International Commcercial Contracts and CISG – Alternatives or Complementary Instruments?,
in: Uniform Law Review Vol. 1 (1996), Issue 1,
pp. 26-39
cited as: *Bonell, ULR, 1996*
in paras. 67, 68, 75

Born, Gary B. — International Commercial Arbitration,
2nd ed., Alphen aan den Rijn (2014)
cited as: *Born*
in paras. 19, 83, 96

Born, Gary B. — International Arbitration, Law and Practice,
2nd ed., Alphen aan den Rijn (2015)
cited as: *Born, Law and Practice*
in para. 95

Boykin, James
Havalic, Malik — Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration,
in: Transnational Dispute Management (2014),
pp. 1-38
cited as: *Boykin/Havalic, TDM, 2014*
in para. 89

Briggs, Adrian — Private International Law in English Courts,
Oxford University Press (2014)
cited as: *Briggs*
in para. 17

Brunner, Christoph — Force Majeure and Hardship under General Contract Principles – Exemption for Non-Performance in International Arbitration,
Alphen aan den Rijn (2009)
cited as: *Brunner, Hardship*
in paras. 22, 23, 27, 36, 46, 60, 61, 67, 68

Bund, Jennifer — Force Majeure Clauses; Drafting Advice for the CISG Practitioner,
in: Journal of Law and Commerce, Vol. 17 (1998),
pp. 381-413
cited as: *Bund, JLC, 1998*
in paras. 60, 68

Calnan, Richard — Principles of Contractual Interpretation,
2nd ed., Oxford (2017)
cited as: *Calnan*
in para. 5

Carvalhal Sica, Lucia — Gap-Filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention,
in: Nordic Journal of Commercial Law, Issue 1 (2006),
pp. 1-28
cited as: *Carvalhal Sica, Nordic Journal of Comm. L., 2006*
in para. 67

Coetzee, Juana — Incoterms as a Form of Standardization in International Sales Law,
Stellenbosch (2010)
cited as: *Coetzee*
in para. 49

Comrie-Thomson, Paul — A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards,
in: Journal of International Arbitration, Vol. 34 (2017), Issue 2,
pp. 275–302
cited as: *Comrie-Thomson, JIA, 2017*
in para. 105

Cook, Trevor
Garcia, Alejandro I. — International Intellectual Property Arbitration,
Alphen aan den Rijn (2010)
cited as: *Cook/Garcia*
in para. 100

Cordero-Moss, Guiditta — International Commercial Contracts: Applicable Sources and Enforceability,
Cambridge (2014)
cited as: *Cordero-Moss*
in para. 56

Czerwenka, Beate G. — Rechtsanwendungsprobleme im internationalen Kaufrecht – Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen,
Berlin (1988)
cited as: *Czerwenka*
in para. 56

Da Silveira, Mercédeh Azeredo — Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation,
Alphen aan den Rijn (2014)
cited as: *Da Silveira*
in paras. 66, 68

Derains, Yves **Schwartz,** Eric A.	A Guide to the New ICC Rules of Arbitration, The Hague (1998) cited as: *Derains/Schwartz* in para. 2
Dicey, Albert Venn **Morris,** John H. C. **Lord Collins of Mapesburry**	The Conflict of Laws, 15th ed., London (2012) cited as: *Dicey/Morris/Collins* in paras. 4, 17, 19
Düchs, Constantin	Die Behandlung von Leistungsstörungen im Europäischen Vertragsrecht, Berlin (2006) cited as: *Düchs* in para. 60
Ebenroth, Carsten **Boujong,** Karlheinz **Joost,** Detlev **Strohn,** Lutz	Handelsgesetzbuch, Vol. 2, §§ 343-475h, 3rd ed., Munich (2015) cited as: *EBJS – Author* in para. 49
Ferrari, Franco **Flechtner,** Harry **Brand,** Ronald A.	The Draft UNCITRAL Digest and Beyond: Cases Analysis and Unresolved Issues in the U.N. Sales Convention, Munich (2009) cited as: *Ferrari/Flechtner/Brand – Author* in para. 56
Fontaine, Marcel **De Lys,** Filip	Drafting of International Contracts An Analysis of Contract Clauses Boston (2009) in para. 36 cited as: *Fontaine*

Fouchard, Philippe
Gaillard, Emmanuel (ed.)
Goldman, Berthold
Savage, John (ed.)
International Commercial Arbitration,
Alphen aan den Rijn (1999)
cited as: *Fouchard/Gaillard/Goldman*
in para. 95

Frick, Joachim G.
Arbitration and Complex International Contracts,
Zurich (2001)
cited as: *Frick*
in para. 22

Gama Junior, Lauro
Hardship nos contratos internacionais: o papel revigorante dos Principios do UNIDROIT na evolução da Convenção de Viena,
in: Revista Trimestral de Direito Civil, Vol. 11 (2010),
pp. 205-229
cited as: *Gama Junior*
in para. 68

Garro, Alejandro
CISG Advisory Council Opinion No 7,
Exemption of Liability for Damages under Article 79 of the CISG,
(2007)
cited as: *CISG-AC Op. 7, Rapporteur: Garro*
in para. 68

Garro, Alejandro
The Gap-Filling Role of the UNIDROIT Principles in International Sales Law,
in: Tulane Law Review, Vol. 69 (1995)
pp. 1149-1190
cited as: *Garro, TLR, 1995*
in para. 68

Girsberger, Daniel
Cohen, Neil B.
Key Features of the Hague Principles on Choice of Law in International Commercial Contracts,
in: Uniform Law Review, Vol. 22 (2017),
pp. 316-335
cited as: *Girsberger/Cohen, ULR, 2017*
in paras. 4

Girsberger, Daniel
Voser, Nathalie
International Arbitration: Comparative and Swiss Perspectives,
3rd ed., Basel (2016)
cited as: *Girsberger/Voser*
in para. 106

Girsberger, Daniel
Zapolskis, Paulius
Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption,
in: Jurisprudence Vol. 19 (2012), No 1,
pp. 121-141
cited as: *Girsberger/Zapolskis, Jurisprudence 2012*
in para. 46

Hay, Emily
Winds of Change? Confidentiality and in International Commercial Arbitration,
in: 40 under 40 International Arbitration (2018)
pp. 211 – 230
cited as: *Hay, 40 under 40 Int. Arb., 2018*
in para: 100

Honnold, John
Flechtner, Harry
Uniform Law for International Sales Under the 1980 United Nations Convention,
Alphen aan den Rijn, 2009
cited as: *Honnold/Flechtner*
in para. 60

IBA Arbitration Committee
Draft revision of IBA Rules on the Taking of Evidence in International Arbitration,
in: Zeitschrift für Schiedsverfahren, Vol. 8 (2010),
pp. 41-47
cited as: *IBA Arbitration Committee, SchiedsVZ, 2010*
in para. 96

Ireton, Jessica O.
The Admissibility of Evidence in ICSID Arbitration: considering the validity of WikiLeaks Cables as Evidence,
in: ICSID Review, Vol. 30 (2015), No 1,
pp. 231-242
cited as: *Ireton, ICSID Review, 2015*
in para. 96

Jain, S. N.
Admissibility of illegally obtained evidence,
in: Journal of the Indian Law Institute, Vol. 22 Issue 3 (1980),
pp. 322-327
cited as: *Jain, JILI, 1980*
in para. 95

Kazazi, Mojtaba
Burden of Proof and Related Issues, A Study on Evidence Before International Tribunals,
The Hague (1996)
cited as: *Kazazi*
in para. 82

Koch, Robert

The CISG as the Law Applicable to Arbitration Agreements?, in: Camilla Andersen, Ulrich Schroeter (eds.), Sharing international commercial law across national boundaries: Festschrift for Albert H. Kritzer on the occasion of his eighteith birthday,
London (2008)
pp. 267-286
cited as: *Koch, Kritzer lib. am.*
in para. 20

Kröll, Stefan
Mistelis, Loukas A.
Perales Viscasillas, María del Pilar

Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG),
2nd ed., Munich (2018)
cited as: *Kröll/Mistelis/Perales Viscasillas*
in para. 75

Kröll, Stefan

Ergänzung und Anpassung von Verträgen durch Schiedsgerichte,
Bonn (1998)
cited as: *Kröll, Ergänzung und Anpassung*
in para. 27

Kronke, Herbert (ed.)
Nacimiento, Patricia (ed.)
Otto, Dirk (ed.)
Port, Nicola Christina

Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention,
Alphen aan den Rijn (2010)
cited as: *Kronke/Nacimiento – Author*
in paras. 2, 17

Lew, Julian D. M.

The Law Applicable to the Form and Substance of the Arbitration Clause,
in: Albert Jan van den Berg (ed.), Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series,
Vol. 9 (1999),
Alphen aan den Rijn (1999)
pp. 114-145
cited as: *Lew, ICCA Congress Series 9, 1999*
in para. 6

Lew, Julian D.M.
Mistelis, Loukas A.
Kröll, Stefan M.

Comparative International Commercial Arbitration,
Alphen aan den Rijn (2003)
cited as: *Lew/Mistelis/Kröll*
in para. 2

Lindström, Niklas

Changed Circumstances and Hardship in the International Sale of Goods,
in: Nordic Journal of Commercial Law, Issue 1 (2006),
pp. 1-29
cited as: *Lindström, Nordic Journal of Comm. L., 2006*
in para. 61

Liu, Joe

HKIAC Introduces New Rules,
in: Kluwer Arbitration Blog, 22 Oct 2018
http://arbitrationblog.kluwerarbitration.com/2018/10/22/hkiac-new-rules/
cited as: *Liu, Kluwer Arbitration Blog, 2018*
in para. 93

Miettinen, Jenni
Interpreting CISG Article 79 (1): Economic Impediment and the Reasonability Requirement,
Rovaniemi (2005)
cited as: *Miettinen*
in para. 56

Momberg, Rodridgo
The effect of a change of circumstances on the binding force of contracts – Comparative perspectives,
Utrecht (2011)
cited as: *Momberg*
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Moser, Michael J.
Bao, Chiann
A Guide to the HKIAC Arbitration Rules,
Oxford (2017)
cited as: *Moser/Bao, HKIAC Commentary*
in paras. 83, 86, 96, 99

Moses, Margaret L.
The Principles and Practice of International Commercial Arbitration,
1st ed., Cambridge (2008)
cited as: *Moses, International Commercial Arbitration*
in paras. 2, 22, 23, 96

Ndlovu, Portia
Incoterms 2010: a consideration of certain implications of the Amendments to the Traditional Incoterms 2000,
in: The Comparative and International Law Journal of Southern Africa, Vol. 44 (2011),
pp. 204-224
cited as: *Ndlovu, Intern. Law Journal of South Africa, 2011*
in para. 49

Oppetit, Bruno — L'Adaptation des contracts internationaux aux changements de circonstance: la clause de hardship, in: Journal de Droit International (1974), pp. 794-814 cited as: *Oppetit, Journal de Droit Intern., 1974* in para. 36

Ortiz, Ricardo Calvillo — Admissibility of Hacked Emails as Evidence in Arbitration, in: Transnational Notes (14 May 2018), https://blogs.law.nyu.edu/transnational/2018/05/admissibility-of-hacked-emails-as-evidence-in-arbitration/ cited as: *Ortiz, Transnational Notes, 2018* in paras. 89, 95

Peiris, G. L. — The Admissibility of Evidence Obtained Illegally: A Comparative Analysis, in: Ottawa Law Review, Vol. 13 (1981), Issue 2, pp. 309-344 cited as: *Peiris, OTTL, 1981* in para. 95

Perillo, Joseph M. — Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, in: Tulane Journal International and Comparative Law, Vol. 5 (1997), pp. 5-28 cited as: *Perillo, Tulane Intern. and Comp. L., 1997* in para. 68

Pietrowski, Robert — Evidence in International Arbitration, in: Arbitration International, Vol. 22 (2006), No 3, pp. 373-410 cited as: *Pietrowski, Arb. Int., 2006* in paras. 82, 86, 95

Pilkov, Konstantin — Evidence in International arbitration: Criteria for Admission and Evaluation, in: Arbitration, the international journal of arbitration, mediation and dispute management, Vol. 80, No 2, Totton, Hampshire (2014) pp. 147-155 cited as: *Pilkov, Arbitration, 2014* in paras. 83, 95, 96

Piltz, Burghard
Bredow, Jens — Incoterms: Kommentar, Munich (2018) cited as: *Piltz/Bredow* in para. 51

Poudret, Jean-Francois
Besson, Sébastien — Comparative Law of International Arbitration, 2nd ed., London (2007) cited as: *Poudret/Besson* in paras. 96, 100

Radin Law Dictionary
Greene, Lawrence [**ed.**] — Radin Law Dictionary, 2nd ed., Ferry (1970) cited as: *Radin Law Dictionary* in para. 40

Raeschke-Kessler, Hilmar — The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence, in: Arbitration International, Vol. 18 (2002), No 4, pp. 411-430
cited as: *Raeschke-Kessler, Arb. Int., 2002*
in para. 83

Ramberg, Jan — ICC Guide to Incoterms 2010 – Understanding and practical use,
Paris (2011)
cited as: *Incoterms Guide 2010*
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Rauscher, Thomas
Krüger, Wolfgang (ed.) — Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen,
Buch 2, Verfahren im ersten Rechtszug,
5th ed., Munich (2016)
cited as: *MüKo ZPO – author*
in para. 95

Reiley, Eldon H. — International Sales Contracts,
Durham (2008)
cited as: *Reiley*
in para. 68

Reisman, W. Michael
Freedman, Eric E. — The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication,
in: The American Journal of International Law, Vol. 76 (1982),
pp. 737-753
cited as: *Reisman/Freedman, AJIL, 1982*
in para. 82

Rimke, Joern — Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, in: Pace Review of the Convention on Contracts for the International Sale of Goods 1999-2000, pp. 197-243
cited as: *Rimke, Pace Review CISG, 1999/2000*
in para. 36

Sandifer, Durward V. — Evidence Before International Tribunals, Revised Edition, New York (1975)
cited as: *Sandifer*
in para: 105

Sathyapalan, Harisankar K. — International Commercial Arbitration in Asia and the Choice of Law Determination, in: Journal of International Arbitration Vol. 30 (2013), No 6, pp. 621–636
cited as: *Harisankar, JIA, 2013*
in para. 2

Schlechtriem, Peter
Schwenzer, Ingeborg (ed.) — Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford (2016)
cited as: *Schlechtriem/Schwenzer – Author*
in paras. 5, 36, 41, 60, 61

Schlechtriem, Peter
Schroeter, Ulrich G. — Internationales UN-Kaufrecht, 5th ed., Tübingen (2013)
cited as: *Schlechtriem/Schroeter*
in para. 60

Schlosser, Peter — Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed., Tübingen (1989)
cited as: *Schlosser*
in para. 86

Schmidt, Karsten (ed.) — Münchener Kommentar zum Handelsgesetzbuch, Vol. 5, §§ 343-406 HGB, CISG,
3rd ed., Munich (2013)
cited as: *MüKo HGB – Author*
in para. 60

Schmitthoff, Clive M. — Hardship and Inetervener Clauses
in: Select Essays on International Trade Law, pp. 415-423
cited as: *Schmitthoff*
in para. 36

Schwenzer, Ingeborg
Jaeger, Florence — Das CISG im Schiedsverfahren, Die Tücken des anwendbaren materiellen Rechts im Schiedsverfahren,
in: Zeitschrift für Internationales Wirtschaftsrecht, Vol. 6 (2016),
pp. 99-106
cited as: *Schwenzer/Jaeger, IWRZ, 2016*
in paras. 20

Schwenzer, Ingeborg — Die clausula und das CISG,
in: Wolfgang Wiegand, Thomas Koller, Hans Peter Walter (eds.), Tradition mit Weitsicht. Festschrift für Eugen Bucher zum 80. Geburtstag,
Zurich (2009)
pp. 724-741
cited as: *Schwenzer, Bucher lib. am.*
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Schwenzer, Ingeborg
Tebel, David
Das Wort ist nicht genug – Schieds-, Gerichtsstands und Rechtswahlklauseln unter dem CISG,
in: Peter v. Mankowski, Wolfang Wurmnest (eds.), Festschrift für Ulrich Magnus zum 70. Geburtstag,
Berlin (2004)
pp. 319-333
cited as: *Schwenzer/Tebel, Magnus lib. am.*
in para: 20

Sicard-Mirabal, Josefa
Derains, Yves
Introduction to Investor-State Arbitration,
Alphen aan den Rijn (2018)
cited as: *Sicard-Mirabal/Derains*
in para: 82

Smeureanu, Ileana M.
Confidentiality in International Commercial Arbitration,
Alphen aan den Rijn (2011)
cited as: *Smeureanu*
in para: 100

Staudinger von, Julius
Martinek, Michael (ed.)
Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht, CISG,
2nd ed., Berlin (2013)
cited as: *Staudinger – Author*
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Tarquino, Renatha
The Hardship Gap in the Contract of International Sales of Goods,
Davis (2015)
cited as: *Tarquino*
in para. 56

United Nations Commission on International Trade Law
A/67/17 – Report of the UNCITRAL 45th session (25 June – 6 July 2012)
cited as: *Report of UNCITRAL 45th session, A/67/17*
in para. 69

United Nations Commission on International Trade Law
International Commercial Arbitration, Analytical Commentary On Draft Text Of A Model Law On International Commercial Arbitration, Report of the Secretary General,
Vienna (1985)
cited as: *UNCITRAL Analytical Commentary*
in para. 95

Veneziano, Anna
UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court,
in: Uniform Law Review, Vol. 15 (2010), Issue 1
pp. 137-149
cited as: *Veneziano, ULR, 2010*
in para. 86

Waincymer, Jeffrey
International Commercial Arbitration and the Application of Mandatory Rules of Law,
in: Asian International Arbitration Journal, Vol. 5 (2009), Issue 1,
pp. 1–45
cited as: *Waincymer, AIAJ, 2009*
in para. 106

Waincymer, Jeffrey
Procedure and Evidence in International Arbitration,
Alphen aan den Rijn (2012)
cited as: *Waincymer*
in paras. 82, 95, 97

Walker, Janet
Agreeing to Disagree: Can We Just Have Words? – CISG Article 11 and the Model Law Writing Requirement,
in: Journal of Law and Commerce, Vol. 25 (2005/2006), pp. 153-165
cited as: *Walker, JLC, 2005/06*
in para. 20

Weele, Arjan J. van
Purchasing & Supply Chain Management,
Andover (2010)
cited as: *van Weele*
in para. 49

Weick, Günter
Force Majeure: Rechtsvergleichende Untersuchung und Vorschlag für eine einheitliche europäische Lösung,
in: Zeitschrift für Europäisches Privatrecht, Vol. 22 (2014), pp. 281-312
cited as: *Weick, ZEuP, 2014*
in para. 36

Wolff, Reinmar
Commentary on the New York Convention – Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958,
Munich (2012)
cited as: *Wolff – Author*
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Zuberbühler, Tobias
Hofmann, Dieter
Oetiker, Christian
Rohner, Thomas
IBA Rules of Evidence: Commentary on the Taking of Evidence in International Arbitration,
Zurich (2012)
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CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

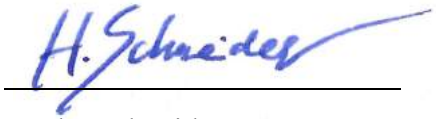
Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Marc Bovermann

Julien Feurer

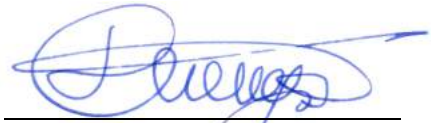
Lukas Gottschling

Julia Schmidt

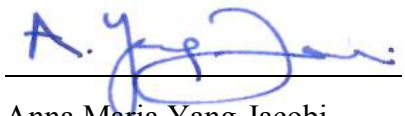


Hauke Schneider

Leo Verlage



David Willfort



Anna Maria Yang-Jacobi

Certificate and Choice of Forum

To be attached to each Memorandum

I Nicole Grohmann, on behalf of the Team for the Albert-Ludwigs-Universität Freiburg hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for the Albert-Ludwigs-Universität Freiburg

Name Nicole Grohmann

Signature