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

FREIE UNIVERSITÄT BERLIN

MEMORANDUM FOR RESPONDENT

PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

CASE NO.: HKIAC/A18128

On behalf of RESPONDENT

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

Against CLAIMANT

Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

COUNSEL FOR RESPONDENT

HELENA DIERCKX • HELEN KLABE • INÈS SCHROEDER
CLARA SEITZ • FABIAN WEIMER • TAMARA WENDRICH

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Index of Abbreviations and Definitions

%	Per cent
a fortiori	All the more
ADR	Alternative Dispute Resolution
alt.	Alternative
ANoA	Answer to the Notice of Arbitration
Art. / Artt.	Article/Articles
BCCI	Bulgarian Chamber of Commerce and Industry
BGH	Bundesgerichtshof (German Federal Court of Justice)
C […]	CLAIMANT's exhibit
CISG	United Nation Convention on Contract for the International Sale of Goods
DDP	Delivery Duty Paid
edn.	Edition
email, p. 50	Email from 2 October 2018 by Joseph Langweiler
email, p. 51	Email from 3 October 2018 by Julia Clara Fasttrack
et. seq. / et. seqq.	and the following
HKIAC	2018 HKIAC Administered Arbitration Rules
HKIAC 2013	2013 HKIAC Administered Arbitration Rules
IBA	International Bar Association

IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
Ibid.	*ibidem*
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
in casu	In the case at hand
infra	below
MoC	Memorandum of CLAIMANT
Model Law	UNCITRAL Model Law on Commercial Arbitration 1985 With amendments as adopted in 2006
No.	Number/numbers
NoA	Notice of Arbitration
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OLG	Oberlandesgericht (German Higher Regional Court)
p. / pp.	page/pages
para. /paras.	paragraph/paragraphs
Parties	The parties in the present dispute
PIA	Partial Interim Award
PICC	UNIDTROIT Principles on International Commercial Contracts

PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
R […]	RESPONDENT's exhibit
ref./ref.	*reference/references*
s.	*Sentence*
Sic.	Sis erat scriptum
supra	above
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Tribunal	The arbitral tribunal in the present dispute
UCCI	Ukrainian Chamber of Commerce and Industry
ULIS	Uniform Law for the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar
v.	versus
Vol.	Volume/Volumes

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- CISG, United Nation Convention on Contracts for the International Sale of Goods 2010
- IBA Rules, IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council 29 May 2010, International Bar Association
- HKIAC 2013, HKIAC Administered Arbitration Rules 2013
- HKIAC, HKIAC Administered Arbitration Rules 2018
- NYC, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- PICC, UNIDROIT Principles on International Commercial Contracts 2010
- ULIS, Uniform Law for the International Sale of Goods 1964
- UNCITRAL Model Law, UNCITRAL Model Law on International Commercial Arbitration (as adopted in 1985 with Amendments as adopted in 2006)
- Transparency Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Introduction

Black Beauty Equestrian (**'RESPONDENT'**) is an ambitious breeder from Equatoriana, famous for its broodmares of world champion show jumpers and international dressage champions [*NoA, p. 5, para. 4*]. For its new racehorse breeding programme it purchased 100 doses of Nijinisky III's frozen semen for artificial insemination from Phar Lap Allevamento (**'CLAIMANT'**), a company located in Mediterraneo operating a stud farm covering all areas of Equestrian sport, for an overall purchase price of 10,000.000 USD [*NoA, p. 4, para. 1; C5, p. 14, clause 6*]. Since newly effective 30% tariffs on agricultural products imposed by the government of Equatoriana arose, the purchase price increased. Now, CLAIMANT insists for RESPONDENT to bear all additional costs of at least 1,250.000 USD.

This is unwarranted since Claimant willingly took all risks associated with the purchase price when agreeing on a delivery DDP. Respondent does not accept any responsibilities in that regard.

Claimant repeatedly emphasizes the core importance of general principles of law, while neglecting the first and foremost principle: pacta sunt servanda.

To use Claimant's words, Claimant itself opened 'Pandora's box' by opting for this arbitration. Particularly its baseless allegations are nothing but a deliberate approach to hinder the arbitration proceedings.

Respondent strongly applies for the dismissal of Claimant's unfounded claims. It will show that this Tribunal must refuse its jurisdiction as well as power to adapt this contract **(Issue 1)**.

Furthermore, it is beyond doubt that Claimant should not be entitled to submit evidence from Respondent's previous arbitration. The latter is clearly covered by the same express confidentiality obligations that also apply to the proceeding at hand. Beyond that, the evidence was obtained unlawfully and can therefore not be taken into account **(Issue 2)**.

Additionally, Respondent does not agree that an adaptation of the initially agreed sales prices due to changed customs should be covered by the narrowly worded hardship clause in the disputed contract. Moreover, reliance on the CISG is impossible **(Issue 3)**.

Statement of Facts

21 March 2017	RESPONDENT asks CLAIMANT about the possibility to purchase 100 doses of frozen horse semen of Nijinsky III.
28 March 2017	RESPONDENT offers its general terms and conditions to govern the purchase and states that the applicable law must be different from the courts that have jurisdiction.
31 March 2017	CLAIMANT accepts a delivery DDP bearing all risks associated with the shipment but increases the purchase price by 1,000 USD per dose.
12 April 2017	Ms. Napravnik and Mr. Antley are injured in a car accident.
05 May 2017	President Bouckaert appoints Ms. Frankel, an ardent critic of free trade, as superminister for agriculture, trade and economics.
06 May 2017	The sales agreement is concluded.
18 May 2017	RESPONDENT pays first instalment of 5,000,000 USD as agreed.
20 May 2017	CLAIMANT ships first instalment of 25 doses.
03 October 2017	CLAIMANT ships seconds instalment of 25 doses.
15 November 2017	The import tariffs of 25% imposed by the Government of Mediterraneo take effect.
19 December 2017	The Government of Equatoriana announces retaliatory tariffs.
20 December 2017	'Peak Business News' publishes an article on earlier tariffs.
15 January 2018	The import tariffs of 30% imposed by the Government of Equatoriana take effect.
21 January 2018	RESPONDENT pays the second instalment of 5,000,000 USD as agreed after Mr. Shoemaker contacts Ms. Napravnik via phone.
23 January 2018	CLAIMANT ships third instalment of the remaining 50 doses.
31 July 2018	CLAIMANT requests arbitration.
24 August 2018	RESPONDENT submits its Answer to the Notice of Arbitration.
02 October 2018	RESPONDENT states its need for unlawfully obtained evidence for the upcoming arbitration proceeding.

Argument

ISSUE 1: THIS TRIBUNAL DOES NEITHER HAVE JURISDICTION NOR POWER TO ADAPT THE CONTRACT

1 This Tribunal lacks jurisdiction and power to decide on the present case. This is, firstly, because the law applicable to the arbitration agreement is the law of Danubia (**I.**). Secondly, the law of Danubia does not provide the powers to adapt the contract (**II.**). And thirdly, even if Mediterraneo law was applicable, it does not provide the power for adaptation (**III.**).

I. The Law Applicable to the Arbitration Agreement is Danubia Law

2 The arbitration agreement is not governed by the law of Mediterraneo, but the law of Danubia. CLAIMANT explains the applicability of Art. 8 United Nations Convention on Contracts for the International Sale of Goods ('CISG') to the interpretation of the arbitration agreement and bases its elaboration on the law of Mediterraneo [*MoC, p. 4, ref. 20*]. Further, CLAIMANT asserts that arbitration agreements are to be interpreted broadly. Though, as will be shown by RESPONDENT, the law of Mediterraneo is not applicable and CLAIMANT'S lengthy remarks unfounded. The Parties did not make an explicit choice of law and, therefore, the implied choice of the Parties shall be observed (**A.**). Though, contrary to CLAIMANT'S allegations, the law of Danubia shall apply (**B.**).

A. This Tribunal Should Observe the Implied Choice Made by the Parties

3 RESPONDENT agrees with CLAIMANT that there is no express choice of law. CLAIMANT though, misreads RESPONDENT'S statement regarding the implied choice made by the Parties [*MoC, p. 5, ref. 26*]. The Parties made an implied choice, but contrary to CLAIMANT'S assessment, the choice was made in favour of the law of Danubia, not Mediterraneo.

4 The applicable law must pass the three-stage inquiry [*Sul America v. Enesa, para. 9;*] as stated by CLAIMANT [*MoC, p. 6, refs. 29 et seq.*]. In omittance of an explicit choice of law, the implied choice of law shall apply. If no implied choice was made, the law with the closest and most real connection to the arbitration agreement must be examined [*Ibid.*]. It governs the arbitration agreement and its interpretation [*Kröll/Miselis/Perales Viscasillas, Art. 1 para. 17; Sul America v. Enesa, para. 25*]. Further, it must be noted that the implied choice often merges with factors determining the most real connection, as the law most real connected can indicate the implied choice made by the parties [*Sul America v. Enesa, para. 25*].

B. Danubia Law Is the Implied Choice of Law Governing the Arbitration Agreement

5 The law governing the agreement to arbitrate is the law of Danubia, because, firstly, the Doctrine of Separability is applicable in casu (**1.**). Secondly, the wording of the contract indicates Danubia as the choice of law (**2.**). Thirdly, the surrounding circumstances of the conclusion of the contract suggest that Danubia law was chosen (**3.**).

1. Separability Prevents an Extension of Law from the Sales to the Arbitration Agreement

6 AS CLAIMANT rightfully stated, the Doctrine of Separability separates the main contract from the arbitration agreement [*MoC, p. 4, ref. 19, p. 6, refs. 33 et seqq.*]. The law applicable to the main contract does, therefore, not extent to the law of the arbitration agreement.

7 Pursuant to Art. 16 (1) UNIDROIT Principles ('PICC') separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract [*UNCITRAL Explanatory Note, para. 25*]. Because of the separability presumption, a distinct choice of law analysis must be made in order to determine the law governing the arbitration agreement itself in distinction from the underlying contract [*Born, Law and Practice, para. 2.06*]. The importance of the Doctrine of Separability was further emphasized in the Fiona Trust Case [*Fiona Trust v. Holding*]. The arbitration agreement 'must be treated as a *distinct agreement'* and, therefore, also the proper law of the main contract has to be distanced from the law governing the arbitration agreement [*XL Insurance Ltd. v. Owens Corning; C v. D; Harbour v. Kansa; emphasis added*].

8 CLAIMANT wants to extend the choice of law made for the main contract to the arbitration agreement [*MoC, p. 6, ref. 34*]. This would not be in line with the will of the Parties. By choosing a law applicable to the main contract, the Parties clearly made their choice regarding the substantive contract, not the arbitration clause [*Besson/Poudret, para. 297; van den Berg, p. 293*]. The arbitration agreement is an agreement in itself, thus, it cannot be overruled by a separate agreement, as the parties are free to outline their own will and form their contractual arrangements [*Bantekas, p. 3*]. An extension of the choice for the main contract [*C5, p. 14, clause 14*] clearly counteracts the will of the Parties [*Epping, p. 53, para. aaa; OLG Hamburg,* 6 U 196/80*; Schlosser IPR, para. 254; Hausmann in Pfister, p. 366*] and defies the principle of party autonomy in international private law [*Lalive, p. 341*].

9 Moreover, the nature of the contracts is completely separate [*Epping, p. 53, para. aaa)*]. While the main contract is concerned with the merits of the contractual obligations and relationship of the parties, the arbitration agreement is of procedural nature and defines how the trial shall be held before the tribunal [*Tobler v. Justizkomission des Kantons Schwyz; Epping, p. 53, para. aaa)*]. The choice

of law for the substantive contract is mainly a commercial choice, while the one for the arbitration agreement is more legal in its nature, therefore, neutrality becomes a more important factor [*First Link v. Payment, para. 10*]. Combining two such unaffiliated topics would not take into account the very scope of these types of agreements. Hence, applying the express choice made for the main contract would defeat the purpose of the arbitration agreement.

10 The Doctrine of Separability does not allow the law applicable to the main contract to extent to the arbitration agreement.

2. The Wording of the Contract Indicates that Danubia Law Is Applicable to the Arbitration Agreement

11 The wording of the sales agreement does not indicate Mediterraneo law as applicable to the arbitration agreement. Rather, the wording of the contract leads to the conclusion that the law of Danubia was chosen by the Parties. This is due to the fact that the law governing the main contract does not determine the law of the arbitration agreement (**a.**) and, thus, the law of the seat shall govern the arbitration agreement (**b.**).

a. The Law Governing the Main Contract Does Not Extent to the Arbitration Agreement

12 CLAIMANT alleges that 'the law of the contract' [*MoC, p. 7, ref. 39*] shall govern the arbitration agreement. This is wrong as the Doctrine of Separability applies and the main contract cannot serve as an indicator for the arbitration agreement.

13 Firstly, as elaborated above [*supra, ref. 10*], the Doctrine of Separability prohibits any extension of the law of the main contract to the arbitration agreement, especially given that a choice of seat of arbitration was made [*C5, p. 14, clause 15*].

14 Secondly, CLAIMANT goes to great lengths to explain the indicating effect of a choice of law for the main contract [*MoC, p. 7, ref. 40*]. Though, if a contract contains a choice of law clause for the substantive contract as well as a choice of seat for the arbitration and both clauses point to a different legal system, the indicating effect of the choice of law for the main contract is neutralised [*Fouchard, Gaillard, Goldman, p. 222, para. 425; Epping, p. 53, para. aaa)*]. The choice of law clause for the substantive contract names Mediterraneo law [*C5, p. 14, clause 14*]. The choice of seat for the arbitral proceedings names Danubia [*C5, p. 14, clause 15*]. Further, the choice of law for the material contract can only be applied exceptionally to the arbitration agreement [*Schwenzer/Jaeger, para. 102*]. To the contrary, it is indeed common practice for parties to want their arbitration agreement to be governed by a different law than the associated main contract [*Born, vol. I, p. 473*]. Only when at time of contracting the seat of arbitration is not yet determined – which in casu it was – the law

governing the substantive contract can serve in case of doubt as an indication for the arbitration agreement [*C5, p. 14, clause 15; Hausmann in Pfister, p. 366*]. However, this approach is widely disputed, as the parties' choice is not merely testified adequately with sufficient security [*Epping, p. 56, para. bbb)*]. Thus, the choice of law for the main contract cannot serve as an indicator for the arbitration agreement.

b. The Law of the Seat of Arbitration Governs the Arbitration Agreement

15 RESPONDENT will demonstrate that the law of the arbitral seat governs the arbitration agreement.

16 CLAIMANT also cited the Sul-America-Case which states that the proper law of the arbitration agreement is the law of the seat [*Sul America v. Enesa, para. 8; MoC, p. 6, refs. 29 et seq.* While CLAIMANT correctly stated that the closest and most real connection to the arbitration agreement must be found [*MoC, p. 5, ref. 28*], the case showed that this connection is to be found in the law of the seat of arbitration [*Sul America v. Enesa*]. Importance is to be given to the choice of seat, as it determines the 'curial law' and the jurisdiction of the courts in the country where the proceedings take place [*Sul America v. Enesa; Redfern/Hunter, p. 162, para. 3.25; Bulgarian Trade Bank v. Giro Credit AG*].

17 The purpose of provisions regulate choices and conflicts of law in arbitration is to ensure a uniform approach for legal certainty and predictability in international law [*Epping, p. 54, para. bbb)*]. The best way to ensure this is to require high standards to the choice of law and to resort to the secure subsidiary criteria of the arbitrational seat [*Ibid.*].

18 Under Japanese law, the place of arbitration defines the law governing the arbitration agreement [*Ueno in Gottwald, p. 558, para. 8*] as it is assumed that the arbitration agreement is a procedural contract. Further, this approach is acting in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NYC'). When observing the contractual choices made by the Parties and determining the closest and most real connection, it is generally advised to resort to principles of international conventions. The choice of law rule contained in the NYC states that when no choice of law was made for the arbitration agreement, the law of the seat of arbitration governs the agreement [*Tibor/Barceló/Kröll/Mehren, p. 148, para. II.1.d.*]. Art. 34 II(a)(i) UNCITRAL Model Law ('Model Law') also provides that in order not to invalidate the decisions, the law of the seat of arbitration shall apply [*Gottwald, p. 20*].

19 Where the Parties expressly choose to submit 'any dispute arising out of this contract' [*C5, p. 14, clause 15*] to a particular arbitral forum, they intend to settle their dispute in reference to the law of the country where the arbitration is held. There, the sitting arbitrators are most familiar

with the domestic law [*Tunisienne Navigation v. Armement Maritime; Channel Group v. Balfour Beatty, para. 83*]. Naming a forum of arbitration in the arbitration agreement indicates that the law of the respective country shall govern the agreement to arbitrate [*Black Clawson v. Papierwerke; McConnaughay/Ginsburg, p. 350*]. Especially when a choice of seat for the arbitration was made in the agreement, rather than in a separate agreement or in a later point in time, that very law applies to its interpretation [*Besson/Poudret, paras. 260 et seqq.*]. Also, the London Court of International Arbitration Rules adopted the method to set the law applicable to the arbitration agreement as the law of the seat of arbitration in its Art. 16(4) [*Redfern/Hunter, p. 159, para. 3.15*]. Furthermore, every party to an international arbitration has an interest to see its dispute being settled in a neutral venue [*First Link v. Payment, para. 10]*. In this case, only Danubia law can serve this interest [*ANoA, p. 30, para. 7; R2, p. 34; R3, p. 35*].

20 Usually, the lex arbitri and the law applicable to the arbitration agreement are the same, namely the law of the seat of arbitration [*Besson/Poudret, para. 291*], as counteracting this method leads to significant problems in recognition of arbitral awards [*Hausmann in Pfister, p. 366*]. An exception is to be made when parties submit the arbitration agreement explicitly to a different legal system [*Besson/Poudret, para. 291*]. As mentioned above, the parties did not explicitly choose a law governing the arbitration agreement [*supra, ref. 3; C5, p. 14, clause 15; MoC, ref. 26*]. As the law of the seat is Danubia law [*C5, p. 14, clause 15*], the arbitration must consequently also be governed by the latter. The wording of the contract does not indicate that the arbitration agreement is governed by the law of Mediterraneo. To the contrary, the law governing the arbitration agreement is Danubia law.

3. The Circumstances Surrounding the Conclusion of the Contract Confirm that Mediterraneo Law Cannot Apply to the Arbitration Agreement

21 An evaluation of the circumstances leads to the conclusion that the arbitration agreement must be governed by Danubia law.

22 It is true that the original proposal by CLAIMANT for the sales agreement included the application of the law and jurisdiction of Mediterraneo [*MoC, p. 8, ref. 42; C2, p. 10*]. However, RESPONDENT immediately objected and proposed the courts of Equatoriana as a counterweight to the substantive contract being governed by the law of Mediterraneo [*C3, p. 11*]. This strongly indicates RESPONDENT'S intent to not be subject to any procedures governed by the law of Mediterraneo, neither by trial by court nor by arbitration. CLAIMANT later, in its email on 31 March 2017, stated that it would not accept to submit to the jurisdiction of the courts of Equatoriana [*C4, p. 12*]. At this point both Parties clearly stated that neither wanted to submit to dispute resolution under lex

arbitri of the respective other country. CLAIMANT must have known that the only possibility was to choose arbitration in a neutral country and proposed arbitration in Danubia [*R2, p. 34*] as a response to the proposed arbitration clause by RESPONDENT [*R1, p. 33*].

23 CLAIMANT argues that it needed approval by the Creditor's Committee in order to submit 'to any foreign law' and could only change the seat of arbitration, not the law governing the arbitration agreement [*MoC, p. 8, ref. 45*]. That statement is inaccurate. CLAIMANT wrote in its email of 11 April 2017 that 'dispute resolution in the country of the *counterpart*' [*R2, p. 34, emphasis added*] was subject to approval by the Committee and that it would be possible to arbitrate *in a neutral country* [*Ibid, emphasis added*]. Furthermore, CLAIMANT did not need the approval of the Creditors Committee to submit to arbitration in Danubia, as it had already approved arbitration in Danubia in a similar case [*PO2, pp. 56 et seq., para. 14*].

24 In the same email, CLAIMANT states that the law applicable to the agreement shall remain the law of Mediterraneo [*R2, p. 34*]. CLAIMANT claims that by referring to the sales agreement it was also including the arbitration agreement [*MoC, p. 9, ref. 46*]. That can be easily disproven as the Doctrine of Separability applies [*supra, refs. 6 et seqq.*] and the wording of the email suggests otherwise. There would be no need for clarification that the choice of law in favour of Mediterraneo shall apply to the sales agreement if there was not a deviating choice of law for the arbitration agreement. CLAIMANT emphasises that the applicable law shall *remain* Mediterraneo which only makes sense when another part of the contract *changed* the applicable law [*R2, p. 34, emphasis added*]. Therefore, the law governing the arbitration agreement was altered. As mentioned above [*supra, ref. 23*], the law of Mediterraneo and the law of Equatoriana were not an option. Stringently, the law of Danubia remains the only feasible option.

25 Furthermore, the arbitration clause originally proposed by RESPONDENT contained corresponding choice of seat and choice of law [*R1, p. 33*]. RESPONDENT prompted CLAIMANT to raise objections to the arbitration clause, which CLAIMANT did, however, it did not raise any objection to the correspondence of seat and governing law [*R2, p. 34*]. It was clear that the law governing the arbitration agreement was the law of Danubia [*Ibid.*].

26 All further arguments presented by CLAIMANT, as an Mediterraneo bank account, Nijinsky III's location and the finalisation of the sales agreement in Mediterraneo, do not lead to the arbitration agreement being governed by Mediterraneo law [*MoC, p. 9 ref. 47*]. All these matters concern the substantive part of the contract, not the arbitration agreement. As explained [*supra, ref. 9*], the arbitration agreement and the main contract are completely different in nature. A close connection cannot be drawn from these circumstances of the main contract to the arbitration agreement.

27 Regarding the circumstances, a choice of law for the arbitration agreement must consequently be in favour of Danubia, thus, it governs the arbitration agreement and its interpretation.

II. Under Mediterraneo Law, this Tribunal Does Not Have the Jurisdiction and Power to Adapt the Contract

28 Even if the law of Mediterraneo applied the Tribunal lacks jurisdiction to decide on a contract. This is the case, as the parties did not intent to include an adaptation mechanism (**A.**) and this Tribunal further does not have the power to perform a contract adaptation (**B.**).

A. The Parties Did Not Intent to Include an Adaptation Mechanism

29 While the Parties explicitly agreed to settle any dispute arising out of the contract by arbitration administered by the Hong Kong International Arbitration Centre ('HKIAC') [*C5, p. 14, clause 15*], this agreement did not include any reference to a contract adaptation [*Ibid.*].

30 As stated by CLAIMANT [*MoC, p. 6, ref. 33*], the Tribunal has the Kompetenz-Kompetenz to decide on its own jurisdiction [*Berger, Int'l. Economic Arb., p. 351; De Boisséson, p. 715, para. 732; Lew/Mistelis/Kröll, p. 332, paras. 13 et seqq.; Besson/Poudret, p. 387*]. Contrary to CLAIMANTS baseless allegations, the Tribunal should find that it does not have jurisdiction to decide on a contract adaptation [*MoC, p. 6, ref. 33*].

31 The Tribunal is also required to ensure a fair and efficient conduct of the proceedings pursuant to 13 (5) HKIAC. In order to ensure a fair trial, the intent of the parties must be respected, and this Tribunal shall act only in accordance with the arbitration agreement. Even if Art. 8 CISG [*MoC, p. 10, ref. 53 et seq.*] were applied and RESPONDENT'S statements were interpreted, Mr. Krone would have objected to transfer powers to the Tribunal to increase the price upon its discretion [*R3, p. 35*]. The agreement, however, does not include any statement regarding contract adaptation [*C5, p. 14, clause 15*]. This omittance clearly shows the intent of the Parties not to grant the jurisdiction to perform contractual adaptations to this Tribunal. The Tribunal is invited to take note of the parties' explicit will and deny its jurisdiction regarding a contractual adaptation.

B. This Tribunal Does Not Have the Power to Adapt this Contract

32 CLAIMANT'S claim cannot rely on an adaptation power granted by clause 12 of the sales agreement or by Art. 79 CISG.

33 Firstly, the arbitration clause does not grant the power of adaptation to this Tribunal (**1.**). Secondly, clause 12 of the sales agreement constitutes a derogation of Art. 79 CISG excluding its applicability (**2.**). In any case, Art. 79 CISG does not govern cases of hardship and furthermore

does not provide the requested remedy (**3.**). CLAIMANT can moreover not rely on the application of Art. 6.2.3 PICC (**4.**)

1. The Arbitration Clause Does Not Grant the Power of Adaptation the Arbitral Tribunal

34 CLAIMANT explains in great length that the arbitration agreement does not restrict the power of the Arbitral Tribunal to adapt the contract and argues that this clause 'represents a standard arbitration agreement' [*MoC, p. 4, ref. 21, p. 12, ref. 65*]. Nonetheless, it fails to include the fact that standard arbitration agreements do not grant the power to perform contract adaptations [*Berger 2001, p. 8*]. Rather, it would have to be incorporated into the clause as was discussed, but never performed by the Parties [*C8, p. 17; C5, p. 14, clause 15*]. Therefore, the power for adaptation cannot be found in the arbitration agreement.

2. Clause 12 of the Sales Agreement Constitutes a Derogation from Art. 79 CISG

35 By including clause 12 as a force majeure and hardship clause the Parties provided for a special regulation excluding the application of Art. 79 CISG [*ANoA, p. 32, para 20*]. Art. 6 CISG allows Parties to establish an exclusion of the CISG or to derogate from its provisions.

36 CLAIMANT argues that a clear intent to derogate from a CISG provision is required pursuant to Art. 6 CISG [*MoC, p. 13, ref. 67; CISG AC No. 16, para. 3.1*]. However, this only applies to an exclusion not a derogation.

37 In the case at hand the Parties derogated from Art. 79 CISG by including the force majeure/ hardship clause into their contract [*ANoA, p. 32, para. 20*]. Due to the concept of party autonomy this is their right as stipulated by Art. 6 CISG [*CISG AC No. 16, para. 1.1*].

38 Since clause 12 constitutes a derogation from the CISG, it is exhaustive and no reliance on Art. 79 CISG is possible [*Russia 17 October 1995 Arbitration proceeding 123/1992*]. A derogation does not affect the application of the CISG in general as it can be total or partial [*Kröll/Miselis/Perales Viscasillas, p. 109, para. 23; Machine Case para. 14*]. When a contractual clause is in contradiction with the CISG it can be presumed that the parties intended to derogate from the CISG in that particular matter [*Machine Case para. 14*]. When the parties provide a list of force majeure situations, this list must be deemed exhaustive [*Russia 17 October 1995 Arbitration proceeding 123/1992*]. No further reliance on the CISG is possible. Even if such a rigid rule were not applicable, the issue should be resolved by means of contract interpretation [*Saidov, p. 55*]. Looking at the negotiations between CLAIMANT and RESPONDENT it becomes obvious that a narrowly worded hardship clause was their intention all along. Originally, CLAIMANT suggested the ICC hardship clause which was rejected by RESPONDENT due to its broad nature [*ANoA, p. 30, para. 4*]. In the end, a number of possible

hardship scenarios were exhaustively enumerated in clause 12 [*C5, p. 14, clause 12*].

3. Art. 79 CISG Does Not Govern Hardship

39 CLAIMANT erroneously believes that Art. 79 CISG governs hardship. As established previously [*supra para. 38*] Art. 79 CISG is excluded due to the derogation in clause 12. However, even if the CISG were applicable next to clause 12 it would not govern hardship in any of its provisions.

40 CLAIMANT correctly asserts that a situation constitutes hardship when certain events change the contractual equilibrium of the contract [*MoC, p. 13, ref. 71; Schwenzer, p. 714; Brunner, p. 221*]. The difference to force majeure is that instead of becoming impossible the performance becomes more burdensome and onerous for the obligor [*Kröll/Miselis/Perales Viscasillas, p. 1070, para. 78*]. risks were added directly into the clause before incorporating the hardship wording [*Ibid.*] Hence, this emphasizes the Parties' consent on a narrowly worded clause exhaustively [*Brunner, p. 221*].

41 In the CISG there is no provision that specifically concerns situations in which changed circumstances render a performance more onerous or difficult [*Rimke, p. 217*]. Art. 79 CISG speaks of 'an impediment beyond his control'. This means that in order for hardship to be governed by the CISG, hardship would have to constitute an impediment under Art. 79 CISG. There is no indication in the article however, that hardship qualifies as such an impediment. Hardship as ground for avoidance is not a remedy that is governed by the CISG [*Nuova Fucinati v. Fondmetall International; Vital Berry Marketing v. Dira-Frost; Iron molybdenum case; Steel ropes case; Corn case*]. Hardship is excluded from the scope of Art. 79 CISG and is not an impediment in the sense of this article [*Petsche, p. 166; Slater, p. 253; Jenkins, p. 2025; Zeller, p. 153; Kessedjian p. 417; Flambouras, p. 278; Bund, p. 393*].

42 Even if this Tribunal should find that Art. 79 CISG included cases of hardship as being an impediment, Art. 79 CISG would still not be applicable in the case at hand. Economic difficulties, hardship, can only under very narrow circumstances constitute an impediment [*Schlechtriem/Schwenzer, p. 1142, para. 31*]. The CISG Advisory Opinion No. 7 speaks of impediments that render the performance of the contract 'excessively onerous' [*CISG Op. 7, para. 3.1*]. Since the threshold for hardship determined by judges and arbitrators is so high in order to align it with impossibility, the functional outcome is that hardship is not governed by Art. 79 CISG [*Kuster/Andersen, p. 3*]. As will be shown below, none of the necessary requirements are met [*infra, refs. 112 et seqq.*].

4. Art. 79 CISG Does Not Provide the Requested Remedy of Price Adaptation

43 Furthermore, Art. 79 CISG does not provide the requested remedy for an adaptation of the price

[*ANoA, p. 32, para. 21*]. The fact that the requested remedy is not governed by any of the provisions in the CISG is another indicator that hardship is not governed by Art. 79 CISG. CLAIMANT requests an adaptation of the price by this Tribunal. If a party's failure to perform is due to an impediment beyond his control the party is exempted from liability, Art. 79(1) CISG. Consequently, the remedy offered by Art. 79 CISG is being *not liable* [*emphasis added, Art. 79(1) CISG*].

44 The remedy requested by CLAIMANT, adaptation, is a typical request in cases of hardship. However, the remedies that are available in situations of hardship differ significantly from the remedy provided in Art. 79 CISG [*Petsche, p. 160*]. The primary remedy under the UNIDROIT Principles' provisions on hardship is the request for renegotiation [*Art. 6.2.3 PICC*]. Only in case the renegotiation fails may the disadvantaged party resort to the court that can either terminate the contract or adapt the contract to the changed circumstances [*Art. 6.2.3(4) PICC*]. Also, the ICC hardship model clause provides as a remedy renegotiation [*ICC Hardship Clause 2003*].

45 The difference in the provided remedies of Art. 79 CISG and specific hardship provisions show that the CISG and other hardship rules have an entirely different nature [*Petsche, p. 161*]. This is due to the fact that hardship is not governed by Art. 79 CISG. Since Art. 79 CISG only governs situations in which the performance becomes impossible, the remedy is a liability exemption for not performing [*Ibid.*] and not an adaptation remedy [*Flechtner, 2011, p. 9*]. Hardship provisions deal with the situation in which the performance became more burdensome and therefore provide a remedy to restore the contractual balance [*Petsche, p. 161*].

46 The significant differences in the provided remedies also show that hardship does not have room within the CISG and Art. 79 CISG cannot deal with hardship situations adequately [*Ibid.*].

5. Art. 6.2.3 PICC Is Not Applicable and Cannot Provide for a Contract Adaptation

47 CLAIMANT wants to rely on the UNIDROIT Principles in order to find the necessary remedy for contract adaptation [*MoC, p. 15, ref. 80*]. However, CLAIMANT erroneously believes that there is a gap within the CISG that can be filled by applying the UNIDROIT Principles.

48 Art. 79 CISG does not contain a gap in regard to hardship. This means that the UNIDROIT Principles and therefore Art. 6.2.3 PICC cannot be used to fill a gap [*Rimke, 239; Slater, p. 621*]. The only consequence of rejecting hardship as being part of the CISG can be that there is no scope for hardship provisions to be brought in by applying Art. 7(2) CISG [*Bridge, p. 636*]. Consequently, this means that there is no room within the CISG to determine that the Artt. 6.2.1, 6.2.2, 6.2.3 PICC are general principles to be consulted to supplement the CISG via Art. 7(2) CISG [*Ibid*]. These articles are not incorporated implicitly in the wording of Art. 79 CISG.

49 Even if this Tribunal should determine that there is a gap within the CISG concerning hardship that would have to be filled, it would not be filled with the UNIDROIT Principles.

50 Firstly, according to the CISG Advisory Opinion No. 7 arbitral tribunals may provide further relief consistent with the CISG and the *general principles on which it is based* [*CISG AC No. 7, para. 3.2, emphasis added*]. Art. 7(2) CISG does not authorize a gap-filling on the basis of other legal texts or compilations of legal principles [*Flechtner, p. 204*]. Especially from the wording of Art. 7(2) CISG it becomes clear that no recourse can be made to external general principles such as the UNIDROIT Principles [*Ferrari, p. 169*]. Consequently, the first reason why the UNIDROIT Principles in no way be consulted to supplement the CISG is because they are not general principles on which the CISG is based, since the PICC was adopted 14 years after the Convention [*Slater, p. 260*]. The hardship provisions of the UNIDROIT Principles do not correspond to current practices in international trade [*ICC 8873, 1997*] and do not represent worldwide trade customs or usages [*ICC 12446, 2004; Uribe, p. 238*].

51 Secondly, the UNIDROIT Principles' provisions, especially the ones concerning hardship, are incongruous with the legislative history of the CISG [*Slater, p. 259*]. This is due to the fact that the word "impediment" in Art. 79 CISG was interpreted very narrow by the Working Group in the former Art. 74 Convention Relating to a Uniform Law on the International Sale of Goods ('ULIS') [*Slater, p. 258*].

52 In any case, Art. 6.2.3 PICC is not applicable in casu since its requirements are not fulfilled, as will be demonstrated below [*infra, refs. 131 et seq.*].

III. Under Danubia Law the Arbitral Tribunal Does Not Have the Jurisdiction and Power to Adapt the Contract

53 As elaborated above, Danubia law is applicable to the arbitration agreement and its interpretation [*supra, ref.* 27]. Thus, this Tribunal does not have jurisdiction and power to adapt the contract. This is because the arguments elaborated above [*supra, refs. 28 et seqq.*] also apply under Danubia law. Further, CLAIMANT assesses the likelihood of a contractual adaptation but fails to provide persuasive arguments to underline this assessment [*MoC, p. 16, ref. 84*]. CLAIMANT, moreover, fails to point out why the contract provides for an adaptation mechanism [*infra, refs. 109 et seqq.*].

54 Additionally, the law of Danubia applies, which provides pursuant to Art. 6.2.3(4)(b) Danubia Contract Law that a tribunal may only perform contract adaptation, if authorized. Even if Art. 6.2.3(4)(b) Danubia Contract Law was applicable [*infra, ref 131*], the Parties never agreed to authorize a contract adaptation [*supra, refs. 29 et seqq.*]. Mr. Krone would have objected to transfer

power to the Tribunal to increase the price upon its discretion [*R3, p. 35*].

55 Eventually, CLAIMANT tries to interpret Art. 28(3) Danubia Arbitration Law in its favour whilst clearly violating both the letter and the spirit of the law [*MoC, p. 16, ref. 85*]. RESPONDENT does not question the fact that, with explicit authorisation, the Arbitral Tribunal could indeed decide *ex aequo et bono* or as *amiable compositeur*. An explicit authorisation or empowerment, however, was never agreed upon by the Parties.

56 Under the law of Danubia, the arbitration agreement does not grant the jurisdiction and necessary power for a contract adaptation to this Tribunal.

IV. Conclusion on Issue 1

57 This Tribunal is respectfully requested to take note that it does neither have the jurisdiction nor the power under the arbitration agreement to adapt the contract.

ISSUE 2: THIS TRIBUNAL SHOULD NOT ALLOW EVIDENCE FROM THE OTHER HKIAC ARBITRATION

58 RESPONDENT respectfully asks this Tribunal to find the Partial Interim Award ('PIA') and further submissions from the other arbitration proceedings inadmissible to the arbitration at hand. By ignoring actual and legal facts, further, lacking source information [*MoC, p. 19, refs. 101, 103 et seq.; p. 21, refs. 112 et seq.; p. 22, ref. 117*] CLAIMANT draws an incomplete argumentation. Affirming it would lead to an unjustifiable conclusion on the submission of evidence. CLAIMANT correctly refers to Art. 22(2) HKIAC when sorting evidentiary questions, however, misinterprets the article's mandatory requirements of relevance, materiality and weight. Moreover, it is not aware that these criteria and the arbitrators' discretion to interpret them are limited when legal privileges or public policy are violated as happend in casu (**I.**). Contrary as stated by CLAIMANT the origin of evidence must be taken into account. Since it was obtained unlawfully, it is inadmissible (**II.**). Eventually, CLAIMANT thwarts the process by raising assumptions, which it cannot explain or does not address in its Memorandum. Such behavior contradicts the duty to act in good faith (**III.**).

I. The Criteria of Relevance, Materiality and Weight Are Not Fulfilled

59 Evidence can only be submitted if is 'relevant to the case and material to its outcome' under Art. 22(3) HKIAC. CLAIMANT however, is not in the possession of the evidence and cannot submit it [*email, p. 50; PO2, p. 60, para. 41*]. Yet, it is the parties' duty to submit evidence to tribunals for evaluating it [*Sattar, pp. 7 et seq.*]. After falsely concluding the criteria for submission are met CLAIMANT mentions the Tribunal's power to request the production of documents [*MoC, p. 20,*

ref. 105]. It is unaware that arbitrators interpret these criteria differently regarding the production not the submission of evidence [*Piklov, p. 151*]. CLAIMANT gives suitable definitions for 'relevance', 'materiality' and 'weight' [*MoC, p. 18, ref. 97*], yet, fails while interpreting them [*MoC, pp. 18 et seqq., refs. 99 et seqq.*]. Firstly, the evidence is not relevant (**A.**). When examining materiality and weight evidence necessarily needs to be assessed as relevant first [*Pilkov, pp. 149, 152*]. Since it is not, these further questions cannot be addressed. But even if it was relevant, it is not material and CLAIMANT misinterprets the criterion of 'weight' under Art. 22 (2) HKIAC as a precondition (**B.**). Additionally, CLAIMANT ignores the limitations of these criteria when the evidence's obtainment violates public policy or privilege standards, as happened in casu (**C.**). Eventually, according to Art. 22(2) HKIAC arbitrators can apply strict rules of evidence. In any way, they serve as guidelines and lead to the evidence's inadmissibility (**D.**).

A. The Evidence Is Not Relevant

60 CLAIMANT correctly states that RESPONDENT is part of another arbitration but fails to explain why the PIA and submissions of this other arbitration are important for the one at hand. It falsely concludes the proceedings to be similar. An explanation, why an award is relevant when proceedings are similar is missing as well (**1.**). Furthermore, CLAIMANT wrongly argues that evidence becomes relevant simply because otherwise doubts of its relevance cannot be set aside (**2.**). Eventually, RESPONDENT will demonstrate that due to CLAIMANT'S behavior the evidence in question cannot be important to it (**3.**).

1. The Arbitration Proceedings Are Not Similar

61 RESPONDENT is engaged in another ongoing arbitration [*PO2, p. 60, para. 39*]. CLAIMANT falsely states both proceedings are comparable since they are similar [*MoC, pp. 18 et seq., refs 99 et seq; p. 19, ref. 99*]. Yet, it contradicts itself when three sentences later stressing the situation in the other arbitration as *even less favorable*, implying it must have been different [*MoC, p. 19, ref. 100, emphasis added*]. It underlines the inconsistency of its argumentation itself when referring to the PIA rendered in the other arbitration [*MoC, pp. 18 et seq., ref. 100*]. This award clarifies that if 25% tariffs are found to result in hardship in this one case, the tribunal deciding in this one case may adapt the purchase price of a mare. In casu, the question whether this Tribunal can adapt a contract on horse semen if 30% tariffs lead to hardship is raised. Different parties bound by different contracts with different purchase prices and purchase objects that might be affected by different tariffs cannot be comparable not to mention similar.

62 Additionally, CLAIMANT believes Mediterraneo law applicable for both arbitration agreements

[*MoC, pp. 18 et seq., ref. 100*]. As stressed above the agreement in question is governed by Danubia law [*supra, ref. 27*]. The conclusion of both sales agreements under Mediterraneo law [*MoC, p. 18, ref. 99; C5, p. 14, clause 14; PO2, p. 60, ref. 39*] can hardly be an argument for comparable arbitration proceedings since there must be lots of sales contracts conducted under Mediterraneo law resulting in arbitration which are not mentioned. Even if the hardship clause in the other arbitration leads to an adaptation [*MoC, p. 19, ref. 100*], the one at hand does not [*infra, refs. 91 et seqq.*].

63 CLAIMANT wrongly sees a similarity in the fact that both contracts were negotiated by Mr. Antley [*MoC, p. 18, ref. 99*]. An argumentation why this leads to similar arbitrations which are still led by different arbitrators [*PO2, p. 60, para. 37*] is missing. Also, it is unknown who Mr. Antley's counterpart on behalf of 'Opponent' is and how him or her understood their contract.

64 Moreover, CLAIMANT creates its own facts when interpreting the circumstances which led to the other arbitration as 'even less favorable for RESPONDENT than they are for CLAIMANT' [*MoC, pp. 18 et seq., ref. 100*]. In the other arbitration additional costs of 25% of the purchase price are in question while at hand additional costs of 30% – 1,250.000 USD– are in question [*email, p. 50*]. The additional tariffs in the other arbitration are of an overall lower percentage. Furthermore, the 30% affect CLAIMANT [*PO2, p. 59, paras. 29, 30*]. There is no information about the economic situation of RESPONDENT if it bore the additional 25%, however, RESPONDENT is financially rather stable [*PO2, p. 59, para. 30*]. It remains unclear to RESPONDENT how CLAIMANT could interpret the situation which led to the other arbitration as a worse one for RESPONDENT than the one leading to the other arbitration at hand. Consequently, the arbitration proceedings are not similar.

2. Evidence Does Not Become Relevant Simply to Set Aside Doubts

65 CLAIMANT states the evidence gains relevance because its veracity was denied by RESPONDENT stating 'the allegations […] do not reflect reality and are taken out of context' [*MoC, p. 10, ref. 101*]. However, RESPONDENT stated this on behalf of 'Opponent' [*email, p. 51*]. Moreover, the veracity of the award was not denied, but merely its sufficiency to serve as relevant evidence here. That the denial of evidential relevance by one party leads to a sudden increase of relevance is an unpersuasive notion, since source information is missing. However, such assumptions can only be wrong. Otherwise a party could claim anything, however unfounded, since after the denial of its relevance it would automatically become relevant and admissible. This would grant a hall pass to introduce evidence which is untenable.

3. The Evidence Is Not Important to CLAIMANT

66 RESPONDENT will demonstrate that the evidence is not important to CLAIMANT since it did not

exploit all legal methods of obtaining it first (**a.**) and is still able to present its case (**b.**).

a. CLAIMANT Does Not Try to Obtain the Evidence legally

67 Not even trying to obtain an award legally before tending towards illegal methods [*infra, ref. 86*] underlines CLAIMANT'S ignorance towards the evidentiary material. Art. 3(9) IBA Rules of Taking Evidence in International Arbitration ('IBA Rules') gives detailed explanations of how a party should proceed if it wishes the production of a document which it is not able to obtain. CLAIMANT should have been aware of the possibility to ask the Tribunal for legal advice on how to obtain the document from either 'Opponent' or the other arbitrators under Art. 3(9), s.1, alt. 1 IBA Rules. It did not ask the Tribunal 'to take such steps itself' according Art. 3(9), s.1, alt. 2 IBA Rules either. Third parties have the limited possibility to request disclosure of prior arbitration documents [*Fireman's case; Jaffe case; Gotham case*]. CLAIMANT did not since CLAIMANT uses the IBA Rules for its argumentation [*MoC, p. 20, refs. 108 et seq; p. 22, refs. 118 et seqq.*] it is highly concerning that it did not recognize such an important provision.

b. CLAIMANT Is Not Deprived of Its Possibility to Present Its Case

68 Furthermore, evidence can only be relevant if one party is otherwise deprived of its possibility to present its case and meet its burden of proof under Art. 22(1) HKIAC [*Teamsters case; Piklov, p. 149*]. Tribunals must provide a fair chance to present a case, however, a party must not be allowed to submit all evidence it deems appropriate [*Shterjova, p. 436; Shaughnessy, p. 459*]. Since the burden of proof is not bound by 'mathematical equivalence' it is even justifiable if one party bears a greater burden of proof [*Shaughnessy, p. 461*]. CLAIMANT'S initial argumentation could not have been based on the evidence, since it requested arbitration on 31 July 2018, not mentioning its need for further evidence [*NoA, pp. 3, et seqq.*]. In its email from 2 October 2018 it claims it just gained knowledge of the evidence [*email, p. 50*]. The initial argumentation was developed without the evidentiary material. Thus, CLAIMANT is still able to present its case. Other than in *Teamsters v. Troha*, the third party has *evidence other than their own testimony* [sic.]. In that case it was stated that a witness statement can present such *other evidence*. CLAIMANT can still call Mr. Velasquez, a professional, as a witness [*MoC, p. 21, ref. 112*]. This is in line with the Art. 34(2)(a)(ii) Model Law since it rules out a challenge of the award on the grounds that a party was deprived of its possibility to present its case [*Shaughnessy, p. 460*]. Consequently, the evidence is not relevant.

B. The Evidence Does Not Meet the Threshold of Materiality and Weight

69 Even if the evidence was found relevant, it would not be material. Evidence is material, if there is a connection between it and the cases' outcome [*MoC, p. 18, ref. 97*]. CLAIMANT wrongly explains

this connection with the 'uniformity principle' in Art. 2A Model Law and the HKIAC [*MoC, p. 19, refs. 102 et seq.*]. However, Art. 2A Model Law promotes uniformity on the application of the Model Law which does not lead to same result in similar issues [*MoC, p. 19, ref. 103*]. The explanatory note of the Model Law clarifies that the said principle aims to uniform the understanding of Model Law and internationally accepted principles, not a uniform decision on cases [*UNCITRAL Explanatory Note, para. 4*]. CLAIMANT addresses 'forcibility and predictability' as such principles [*MoC, pp. 19 et seq, ref. 104*]. Source information about them being internationally accepted in arbitration is missing. Moreover, CLAIMANT falsely states *arbitration, like any disputable proceedings* would be based on these rationales [*Ibid; emphasis added*], not recognising arbitration as an alternative dispute resolution ('ADR') which is not based on standards resulting from ordinary jurisdiction [*Labes/Lörcher in Hasselblatt, Teil B, § 7, no. I., no. 1., subsec. b)*]. Even if predictability or foreseeability might be desired by some [*Pickrahn, p. 177*], the essence of arbitration is that it is 'inherently unpredictable' and 'lacks certainty' as a result of the parties' autonomy, procedural flexibility and neutrality [I*bid.; Geisinger, p. 233; Born, Vol. I, p. 84 et seqq.*]. If CLAIMANT desired principles of ordinary jurisdiction it should not have opted for arbitration. As stressed, the circumstances of both cases differ enormously [*supra, refs. 61 et seqq.*]. Thus, the PIA cannot influence the outcome in casu. Evidence is material if the legal conclusion is drawn from it [*Marghitola, p. 53*]. CLAIMANT only later refers to the evidence, yet, does not draw its initial conclusion from it [*supra, ref. 68*]. Hence, it is not material. Additionally, evidence proofing the same fact becomes less material [*Piklov, p. 149*]. Therefore, requesting the PIA *and* relevant submissions from the other arbitration demonstrates CLAIMANT'S contradicts basic procedural issues of international commercial arbitration.

70 Furthermore, CLAIMANT wrongly asserts the rationale of 'weight' as a precondition for the submission of evidence [*MoC, p. 18, ref. 98, p. 19, ref. 102*]. This criterion is not directly linked to admissibility since it concerns the tribunals impression of submitted evidence [*Piklov, p. 152 et seq.*]. It only needs to be credible [*Ibid*]. CLAIMANT contradicts itself stating the evidence is no precedent but should have a high persuasive effect on this Tribunal [*MoC, pp. 19 et seq, ref. 104*]. It dictates this Tribunal to decide in its favour unconditionally which makes the award having a precedential effect. This undermines the arbitrators' ability to decide on the question of weight and their broad discretion. Consequently, the evidence would not meet the threshold of materiality or weight if it were not already irrelevant.

C. These Criteria Do Not Apply When Legal Privileges and Public Policy Are Violated

71 CLAMANT narrowly applies these criteria without recognizing their limitations. They cannot be applied when legal privileges or public policy are violated [*Shaughnessy, p. 459; Shterjova, p. 435 et seq.*].

Even if evidentiary material was found to be relevant and reliable it would not be admissible due to a privilege [*Piklov, p. 150*]. As lined out below the obtainment of evidence is a violation of such [*infra, refs. 77 et seq.*]. Therefore, the addressed criteria do not even apply in casu.

D. Recognized Principles Serve as Guidelines

72 According to Art. 22(2) HKIAC tribunals are not bound by but can take strict rules of evidence into account. It's even suggested to always consider them since they are developed in experienced judicial systems which serves their persuasiveness resulting in a decrease of challenges of awards [*M/B, p. 191, para 9.154*]. Art. 4.3 of Danubia law under which the arbitration process is conducted, recognizes the 'four corners rule' prohibiting reliance on external evidence like drafting history or preceding communication [*ANoA, p. 32, para 16; PO2, p. 61, para. 45; Ross/Trannen, p. 224*]. Danubia having a functioning judicial system, strongly points towards the consideration of the four corners rationale [*PO2, pp. 56 et seq., para. 14*]. If drafting history and preceding communication of the arbitration in question cannot be consulted, the award from a foreign arbitration can a fortiori not be consulted as external evidence.

73 Arbitration practice tends to a cumulative approach in evidentiary questions which implies the consideration of internationally accepted rationales like the 'fruit of the poisonous tree doctrine' [*Shterjova, pp. 442, 444; Meyer, pp. 370 et seqq.*]. Under this theory illegally obtained evidence is inadmissible. CLAIMANT could argue the doctrine is as an exclusionary rule of American civil law procedure [*Nardone case; Townes case*] not applicable to international commercial arbitration. Yet, its rationale must be considered for a more justifiable solution.

II. The Evidence Is Inadmissible Regarding the Way it Was Obtained

74 CLAIMANT argues the evidence can be submitted irrespective of its obtainment and even if it was obtained illegally its importance weighs out its origin [*MoC, pp. 20 et seq., refs. 107, 111*]. RESPONDENT will demonstrate that these assumptions cannot be followed and the evidence is inadmissible, since they lack persuasive source information (**A.**). Moreover, CLAIMANT does not apply the IBA Rules adequately. It wrongly interprets Art. 9(2)(b) IBA Rules and neglects all provisions not in its favour (**B.**). In Addition, the clean hands doctrine was applied improperly since CLAIMANT as well as the intelligence company committed illegal acts (**C.**).

A. Investor State Arbitration Is No Adequate Source for Commercial Arbitration Disputes

75 To stress its assumptions CLAIMANT refers to investor state case law and articles on investor State arbitration only [*MoC, p. 20, refs. 106, 108; p. 21, ref. 111*]. However, investor state and commercial

arbitration are incommensurable juridical processes which involve different parties and mechanisms. Investor state arbitration contrary to commercial arbitration is subject to a public interest [*Gehring/Euler in Euler, p. 9; Carmody, p. 100*]. CLAIMANT concludes from standards developed in investor state arbitration without explaining their suitability to commercial arbitration. Therefore, its argumentation is not persuasive.

B. The IBA Rules and International Practice Lead to the Inadmissibility of Evidence

76 The possibility of referring to the IBA Rules even if they are not expressly incorporated is extensively documented [*MoC, pp. 20 et seqq., refs. 107 et seqq.*]. This was, never denied by RESPONDENT since it is already clear from the preamble [*IBA Rules, Preamble, No. 3*]. Nevertheless, CLAIMANT fails in applying these rules. As outlined the evidence lacks relevance and materiality and is already inadmissible under Art. 9(2)(a) IBA Rules [*supra, refs. 60 et seqq.*]. Additionally, CLAIMANT wrongly concludes on legal impediment and privilege, Art. 9(2)(b) IBA Rules (**1.**). The evidence is further confidential under Art. 9(2)(e) and Art. 9(4) IBA Rules (**2.**). Also, its admissibility would be unproportionate and unfair under Art. 9(2)(g) IBA Rules (**3.**). Even the investor state arbitration case law cited by CLAIMANT and international practice lead to the evidence's inadmissibility (**4.**).

1. Exclusion Due to Violation of Legal Impediment or Privilege, Art. 9(2)(b) IBA Rules

77 It is irrelevant that RESPONDENT did not expressly claim a privilege or detriment since the tribunal can apply those rules on its own motion according to Art. 9(2) IBA Rules. Arbitrators have broad discretion, yet, when exercising it, they must pay attention if a party is familiar with privilege rules [*B/K/N, p. 289*]. CLAIMANT affirms the existence of privileges mentioning the 'professional privilege' [*MoC, p. 22, ref. 117*]. Thus, it is familiar with legal privileges and the Arbitrators may apply them. CLAIMANT, however, denies the suitability of a professional privilege in casu [*Ibid.*]. Thereby it circumvents the large playing field of legal privileges which are clearly applicable. It focuses on the relationship between the former employees and RESPONDENT only, yet, not on the arbitration between RESPONDENT and 'Opponent'. However, the evidence it desires to disclose, is an award, not a statement by an employee [*email, p. 50*]. Additionally, its line of reasoning is not persuasive since it is not confirmed by source reference [*MoC, p. 22, ref. 117*].

78 Legal privileges allow to keep information confidential, without facing negative consequences [*Shterjova, pp. 432, 437*]. The submissions of a legal process as requested amount to a 'professional privilege' since both parties had legal counsel in the other arbitration. Excluding evidence due to privileges outweighs the evidence's influence in setting out the truth since non-disclosure is more

significant than the 'value of the evidence' [*Ibid; Ginsburg/Mosk, pp. 345 et seq.*]. In any case, disclosing the PIA and submissions would be a legal impediment, since RESPONDENT would be deprived of its confidentiality protection. RESPONDENT did, furthermore, not waive any of its rights by choosing an international forum for dispute settlement [*Shaughnessy, p. 467*]. Also, not only domestic, but rather international developed public policy standards for arbitration need to be considered [*Piklov, p. 150; Zhilsov, p. 98*]. *Basic moral values* like acting in good faith and not obtaining evidence illegally need to be ensured [*Zhilsov, p. 104; emphasis added*]. Yet CLAIMANT acted in bad faith and obtained evidence illegally [*infra, ref. 87*]. In conclusion submitting the evidence is impossible under Art. 9(2)(b) IBA Rules and additionally contradicts public policy.

2. Exclusion Due to Violation of Confidentiality, Art. 9(2)(e), (4) IBA Rules

79 CLAIMANT only examines witness confidentiality under Artt. 45(1), (2) HKIAC and 9(2)(b), (3) IBA Rules [*MoC, p. 22, ref. 118*]. These assumptions are negligible since the other arbitration is covered by an expressed confidentiality (**a.**). Additionally, confidentiality outweighs a need for transparency (**b.**) and mandatory exceptional circumstances for disclosure of an award are not given (**c.**).

a. The Other Arbitration Is Conducted Under Expressed Confidentiality

80 CLAIMANT is unaware of the other arbitration being conducted under expressed confidentiality due to Art. 42 HKIAC 2013 [*email, p. 51*]. It examines the 2018 provision of Art. 45(1), (2) HKIAC regarding the criteria of witness confidentiality concerning a possible privilege [*MoC, p. 22, ref. 118.*] without recognising that Art. 42(1)(b) HKIAC 2013 as well as Art. 45(1)(b) HKIAC already amount to non-disclosure regarding the PIA. The parties opted for HKIAC arbitration, thus HKIAC confidentiality rules apply irrespectively [*M/B, p. 282, para. 12.30*]. HKIAC is one of the strongest protectors of confidentiality [*M/B, p. 283, para. 12.37*]. According to Art. 42(1) HKIAC 2013 an award can only be disclosed if the parties expressly agree to do so. Neither RESPONDENT nor 'Opponent' agreed on disclosing the award [*email p. 51*]. If they break this obligation, they would have to fear sanctions [*M/B, p. 282, para. 12.30*]. Additionally, none of the exceptions of confidentiality under Art. 42(3)(a)(i), (ii) HKIAC 2013 apply at hand. Further, such exceptions can only be invoked by one of the contracting parties, which CLAIMANT is not [*M/B, p. 283, para. 12.33*]. Also, a formal request for publication under Art. 42(5)(a) HKIAC 2013 is missing. This might not be a requirement in the 2018 version. However, RESPONDENT and 'Opponent' would object to disclosure under Art. 42(5)(c) HKIAC 2013 or Art. 45(3)(b) HKIAC and would, thus, hinder its publication. An express confidentiality agreement is subject to Artt. 9(2)(e) and 9(4) IBA Rules. According to the latter article tribunals can disclose material that was already confidential when it was created only if disclosure is appropriate [*Ashford, p. 165*]. Since CLAIMANT

obtains the award illegally and acts in bad faith [*infra, ref. 87*], its disclosure is not appropriate.

b. Confidentiality Predominates Transparency

81 CLAIMANT argued with the Principle of Transparency and the Transparency Rules in its email, however, circumventing both in its memorandum [*email, p. 50*]. CLAIMANT will emphasise that the Transparency Rules are not applicable, and confidentiality predominates transparency anyway. CLAIMANT wrongly concluded the Transparency Rules applicability to international commercial arbitration [*email, p. 50*]. The Rules' title and scope in Art. 1(1) lead to applicability in 'Investor-State Arbitration' only. Also, the rule's inapplicability is especially emphasised on the official webpage of UNCITRAL [*UNCITRAL FAQ*]. Arbitration is inherently confidential since this is one of its main differences and advantages to court proceedings [*Lew/Mistelis/Kröll, p. 2; Ashford, p. 165; Gehring/Euler in Euler, p. 8; Carmody, p. 129*]. It especially offers *complete confidentiality* compared to other ADRs [*Baxter case, emphasis added*]. Parties that decide on international commercial arbitration usually suffer enormous damages through disclosure since commercially-sensitive information would be available for competitors, customers and others. Since confidentiality prohibits collateral damage it restricts disclosure to third parties [*Born, Vol. I, p. 89; Born, Vol. II, p. 2782*]. RESPONDENT just started building up its own racehorse breeding programme and cannot afford to disclose its business strategy [*C1, p. 9*]. Since none of the requirements for disclosure are met [*supra, refs. 61 et seqq.*], it is even more concerning that 'Opponent' would also suffer such damages being involved involuntarily.

c. No Exceptional Circumstances Lead to the Admissibility

82 As stated under exceptional circumstances prior awards can be disclosed according to Art. 3 (9) IBA Rules if requested by a third party [*supra, ref. 67*]. The first precondition for such a disclosure, is the relevance of the award [*Fireman's case*], which is not met in casu [*supra, refs. 60 et seqq.*.. Additionally, the party seeking the disclosure must demonstrate that the award *is compelling enough to outweigh the privacy interests involved* [*Ibid. emphasis added*]. Since CLAIMANT only addresses witness confidentiality, but not the confidentiality of the other arbitration this criterion is not fulfilled either. Further, if a party is still able to present its case the disclosure needs to be declined [*ITT case*]. As stated, CLAIMANT can still present a case [*supra, ref. 68*]. There are also courts already rejecting the possibility to disclosure under exceptional circumstances [*Malibu case*].

3. Exclusion Due to Violation of Fairness and Equality, Art. 9(2)(g) IBA Rules

83 According to Art. 9(2)(g) IBA Rules fairness and equality need to be established. This is also laid down in Art. 13(1), (5) HKIAC. Such principles are the most important pillars in a legal regulatory

framework and cannot be circumvented [*H/N, p. 564*]. Parties must have equal opportunities to support their claims. If the rejection of evidence becomes *'an exclusion of justice'* unacceptable results are the outcome [*Shaughnessy, p. 469*]. Since CLAIMANT acts in bad faith [*infra, ref. 87*] it violates these provisions and is not worthy of protection. It can be unfair if a tribunal applies an only national legal privilege which is unknow to the other party [*Ashford, p. 145*]. Yet, this did not happen. Also, CLAIMANT is still able to present its case [*supra, ref. 68*]. However, if this Tribunal would allow the submission of illegally obtained evidence, RESPONDENT and 'Opponent' were deprived of their relied-on confidentiality. This is highly unfair and leads to an unequal treatment of the parties.

4. International Practice Leads to Inadmissibility

84 Even under the referred to investor state cases the evidence would be inadmissible [*MoC, p. 20, ref. 106*]. In *Methanex* the tribunal concluded the evidence was already only marginally relevant but since it was obtained unlawfully it could not be submitted [*Methanex case*]. In *Opic Karimum* the documents were found to be irrelevant [*Opic Karimum case*]. CLAIMANT refers to investor state arbitration, yet, it does not recognize its latest development – the two-step admissibility test from 2017 [*Blair, p. 256 et seqq.*]. Even under this test the evidence is inadmissible since at the second step the admissibility contradicts possible public interests as the public cannot favour violation of public policy [*supra, refs. 77 et seq.*]. Thirdly in a weighing of interests, confidentiality predominates any other interests like transparency [*supra, ref. 81*]. Since commercial arbitration is bound by even stricter rules of confidentiality, the test would even lead to inadmissibility if it was designed primarily for it.

85 Under the IBA Rules and international practice the submission is inadmissible.

C. Illegal Acts Were Committed by CLAIMANT and the Intelligence Company

86 CLAIMANT wrongly claims it acts with clean hands since no illegal acts were committed by itself or the intelligence company. It wrongly states it is common practice in any business field to hide sources [*MoC, p. 21, ref. 112*]. This is not persuasive since a source reference is missing. Moreover, only journalists can claim a 'journalists' privilege' and refuse to reveal their sources [*Ginsburg/Mosk, p. 355*]. Especially since illegal obtainment is a burning topic in international commercial arbitration CLAIMANT should be able to present legal sources. It claims such services to be necessary so the public has access to information through blogs or law reviews [*MoC, p. 21, ref. 112*]. CLAIMANT thereby misses the core idea of commercial arbitration – keeping processes confidential to avoid detriment [*supra, ref. 81*]. CLAIMANT calls the company to allegedly have a doubtful reputation, yet, the fact-finding mission has revealed that the doubtful reputation as an actual fact [*PO2, p. 60,*

para. 41]. One cannot speak of clean hands when sensitive documents shall be purchased with 1,000 USD from a company not revealing its sources [*PO2, p. 60, para. 41*]. CLAIMANT wrongly states the company is not directly involved since it did not hack the computer system or question former employees [*MoC, p. 21, ref. 114*]. However, it is unknow who committed said acts [*email, p. 51*]. However, both scenarios are illegal, and the evidence was obtained through it. CLAIMANT falsely states since there might be an internal remedy for RESPONDENT against its former employees a disclosure by them would be no illegal action [*MoC, p. 21, ref. 116*]. Yet, even if there are internal remedies, such do not transform prior wrongdoing into legality [*Becker, p. 981*]. It is of no doubt that the hacking, questioning and purchasing are illegal actions.

III. CLAIMANT Deliberately Obstructs the Process and Acts in Bad Faith

87 Above all, CLAIMANT'S claim cannot be considered since it is not raised in good faith which is a precondition for every claim in in international commercial arbitration [*Art. 2A (1) Model Law, Ginsburg/Mosk, p. 382; Berger, p. 502; Cheng, p. 105*]. CLAIMANT wants to clarify its vague assumption '[…] the other Party […] may also be joined' [*MoC, pp. 17 et seq., ref. 94*]. However, it only states this was no formal request for a joinder, since none of the mandatory requirements under Art. 27 HKIAC are met [*MoC, p. 18, ref. 94*]. An explanation what the assumption means instead is still missing. Such a contentless statement, the legal or procedural purpose of which cannot be explained, is a statement into the blue which leads to 'unfounded claims' or prohibited 'fishing expedition' [*BGH, VI ZR 178/94; OLG FfM, 24 U 183/08; Dölling, p. 3124; M/B, p. 170, para. 9.49; Park, pp. 262, 272*]. National courts cannot enforce awards based on such statements [*OLG Muc, 34 Sch 21/05*]. Thus, CLAIMANT'S statement is an attempt to obstruct or delay the fact-finding process [*BGH, XI ZR 262, 10*; *Dölling, p. 3124*]. This even seems to be a tactic since in its prior email CLAIMANT argues with the Transparency Rules, its Memorandum, however, is lacking any argumentation based on the transparency rationale. Mentioning without referring to it is another attempt to delay the process. Such actions contradict the main principles of efficient and fast proceedings under Art. 13(1), (5) HKIAC [*Born, vol. I, p. 86; Gierse, p. 463; Stipanowich, pp. 401, 403; S/L, pp. 19 et seq; M/B, p. 161, para. 9.08 et seq; H/N, p. 551*]. The deliberate violation of the HKIAC by delaying the process leads to a claim raised in bad faith, which must necessarily be discarded.

IV. Conclusion on Issue 2

88 This Tribunal should find that CLAIMANT is not entitled to submit the evidence from the other arbitration since it is not relevant nor material to the case, violates privilege and confidentiality

rights and is, above all, obtained illegally. Moreover, allowing claims raised in bad faith, like the one at hand, a fair hearing would open the alleged 'Pandora Box'.

ISSUE 3: THIS TRIBUNAL SHOULD NOT ADAPT THE CONTRACT AND NOT ODER RESPONDENT TO PAY ANY ADDITIONAL AMOUNT

89 CLAIMANT erroneously believes that it is entitled to the payment of 1,250.000 USD under clause 12 of the contract or Art. 79 CISG. The 30% tariffs do not constitute hardship neither under clause 12 nor under the CISG (**I.**). Furthermore, this Tribunal should not order RESPONDENT to pay any additional amount (**II.**).

I. The 30% Tariffs do not Constitute Hardship

90 RESPONDENT will prove in the following that the 30% tariffs do not constitute hardship under clause 12 of the sales agreement (**A.**) or under Art. 79 CISG (**B.**).

A. The 30% Tariffs Do Not Constitute Hardship Under the Contract

91 Clause 12 of the sales agreement does not apply to the present impediment due to its narrow wording and the agreement of a delivery based on DDP (**1.**). Even if this Tribunal should disagree, the requirements of clause 12 are not met and therefore the 30% tariffs do not fall under the scope of clause 12 (**2.**). Even if the requirements of hardship were applicable, CLAIMANT fails to address the issue that clause 12 does not contain the appropriate remedy (**3.**).

1. Clause 12 Is Narrow and Is Inapplicable Due to the DDP Agreement

92 Clause 12 is a narrow clause. Furthermore, the Parties agreed on a Delivery Duty Paid ('DDP'). Contrary to CLAIMANT's allegations [*MoC, p. 23, ref. 124 et seq.*] clause 12 is and was intended to be restrictive and apply only under specific circumstances. It is true that the final wording was drafted by RESPONDENT [*PO2, p. 56, para.12*]. That is why CLAIMANT argues clause 12 should be interpreted against the drafter (contra proferentem) according to Art. 8(2) CISG and Art. 4.3 PICC [*MoC, p. 24, ref. 131; Honnold, p. 118, para. 107.1; German athlete case*]. While this is not undisputed [*Farnsworth, p. 98 et seq., para. 24 et seq.*] even by applying Art. 8(2) CISG and Art. 4.3 PICC the result is a narrow clause. With reference to the risks mentioned by CLAIMANT RESPONDENT suggested the wording [*PO2, p. 56, para.12*] *comparable unforeseen events* clearly restricting the clause's application to specific situations.

93 After restarting negotiations Mr. Krone informed Mr. Ferguson that the suggested ICC hardship clause was considered by RESPONDENT to be too broad for the purpose and objectives pursued [*PO2, p. 56, para. 12*]. CLAIMANT correctly states that the ICC hardship clause is broad in terms of

the situations considered to be hardship and the remedies which it provides [*Fucci, para. 131; Kessedijan, p. 424*]. These two aspects are precisely what Mr. Krone rejects by stating that RESPONDENT objects to the ICC hardship clause finding it to be too broad for the purpose of this contract and the objectives pursued [*PO2, p. 56, para. 12*]. Mr. Krone and Mr. Ferguson agreed on the inclusion of a narrow hardship clause into the force majeure clause [*R3, p. 35*].

94 Furthermore, the Parties agreed on three shipments on the basis of DDP transferring the risks to CLAIMANT. Clause 8 of the Contract stipulates that CLAIMANT will deliver the shipments in three instalments DDP [*C5, p. 14*]. By incorporating the INCOTERM DDP and regulating in their contract all three shipments DDP the parties transferred the risks of delivery onto CLAIMANT. The seller, here CLAIMANT bears maximal burdens, while the buyer, RESPONDENT, bears minimal burdens [*DiMatteo, p. 272, para. 17*]. CLAIMANT correctly acknowledges [*MoC, p. 24, ref. 133*] that delivery under the DDP INCOTERM means the 'seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination' [*Ramberg, p. 149*]. Consequently, DDP means that seller assumes the risk for import and export clearance of the goods and therefore represents the maximum obligation for the seller [*Brunner, p. 131; Ramberg, p. 149*]. The fact that INCOTERMS do not cover hardship, CLAIMANT refers to [*MoC, p. 25, ref. 135*] does not change anything in regard to CLAIMANT'S responsibility. To the contrary, CLAIMANT'S obligation to deliver DDP is only excluded in case CLAIMANT can benefit from an exemption, like force majeure or hardship [*Ramberg, p. 18*]. As described below, CLAIMANT is not exempted from delivery due to hardship [*infra, refs. 98 et seqq.*]. Additionally, exactly because the INCOTERMS do not specifically govern hardship the parties are advised to regulate matters such as renegotiation due to hardship and exemption of liability in their contract [*Bateson/Flambouras, No. 2*]. Lastly, the incorporation of a hardship clause into the contract was CLAIMANT'S request due to accepting the delivery DDP [*C4, p. 12*].

95 Contrary to CLAIMANT'S assertion [*MoC, p. 25, ref. 137*] RESPONDENT did make it clear what extent the DDP was supposed to take. In the email on 28 March 2017 RESPONDENT requested a delivery on the basis of DDP [*C3, p. 11*]. This request was accepted by CLAIMANT in Ms. Napravnik's email on 31 March 2017 [*C4, p. 12*]. Additionally, CLAIMANT knew what a delivery on the basis of DDP would entail. Firstly, CLAIMANT had past experiences with the sale of goods on the terms of DDP, since CLAIMANT sold three mares to farms in Danubia in 2014 [*PO2, p. 58, para. 21*]. Secondly, CLAIMANT knew that a delivery on the basis of DDP means to take over risks, since CLAIMANT insisted on a price increase [*C4, p. 12*]. Based on the contractual provisions the direct additional costs associated with transportation and DDP delivery per dose are 200 USD [*PO2, p. 56, para. 8*].

96 Consequently, CLAIMANT is correct in stating that the subjective intent of a party is not to be considered unless expressed in some way [*MoC, p. 25, ref. 137; Textiles Cas*e]. However, RESPONDENT did express its intent and CLAIMANT accepted it. Moreover, clearing the goods for import and export is part of a delivery based on DDP [*Ramberg, p. 149*]. This includes paying any duty for both export and import and to carry out all customs formalities [*Ibid.*]. That the Parties acknowledged during negotiations that CLAIMANT had special expertise in this field does not exclude the validity of the DDP agreement. Rather, it proves that both parties knew what a delivery DDP involves. If the seller incurs costs by delivering the goods at the place of destination, the seller is not entitled to recover these costs from the buyer unless the parties agreed otherwise [*Ramberg, p. 149*]. This is not the case. The Parties clearly established a delivery DDP.

97 In conclusion, clause 12 is a restrictive clause and the agreement of a delivery based on DDP transfers the import and export risks to CLAIMANT.

2. In Any Case, the 30% Tariffs Do Not Fall Under the Scope of Clause 12

98 Clause 12 contains certain requirements that need to be fulfilled. The following will show that these criteria are not fulfilled, contrary to CLAIMANT'S assertion [*MoC, p. 25, ref. 139*]. The 30% tariffs are not covered by the wording of clause 12 (**a.**). Even if they were covered the tariffs have been foreseeable (**b.**). Moreover, the imposition of the tariffs did not make the contract more onerous in the meaning of clause 12 of the sales agreement (**c.**).

a. The 30% Tariffs Are Not 'Comparable' to the Health and Safety Requirements and therefore Not Covered by the Wording of Clause 12

99 The tariffs are not incorporated by the wording of the clause 12. The contractual hardship clause states the following: 'neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.' CLAIMANT elaborated correctly that in an email Ms. Napravnik reminded RESPONDENT of a past situation in which additional health and safety requirements changed the grounds of the contract making it 40% more expensive [*MoC, p. 25, ref. 140; C4, p. 12*]. Consequently, this means that by adding the words 'comparable events' to the hardship clause the Parties intended to only incorporate events that can be compared to the situation that arose through the health and safety requirements in 2014.

100 However, CLAIMANT incorrectly argues that the past experience mentioned in the email and the current tariff imposition had the same impact on CLAIMANT and that they are comparable in magnitude [*MoC, p. 26, refs. 141, 143*]. The 40% increase in price due to highly expensive tests is not comparable to an increase of only 30%. The situation mentioned by Ms. Napravnik involves a

sale made by CLAIMANT of three mares DDP for an overall price of 8 million USD [*PO2, p. 58, para. 21*]. Additional tests required a long quarantine and resulted in a 40% sales price increase [*Ibid*]. This means that the situation in 2014 resulted in an increase of 40% on the overall price of 8 million USD. In the case at hand however, the increase of merely 30% will only apply to the last shipment only consisting of 50% of the overall price. Hence, the magnitudes are not comparable.

101 Furthermore, CLAIMANT argues that the experience in 2014 almost led to its bankruptcy [*MoC, p. 26, ref. 142*]. However, the reason the 40% impacted CLAIMANT drastically is due to the fact that the previous year CLAIMANT had heavily invested in new stables and was dependent on the revenues from that sale [*PO2, p. 58, ref. 21*].

102 The 30% tariffs are not comparable in effect to the health and safety requirements and are therefore not covered by the wording of clause 12 of the sales agreement.

b. The 30% Tariffs Were Foreseeable

103 In order for CLAIMANT to profit from an exemption under Art. 79 CISG the imposition of the 30% must have been unforeseeable [*Lindström, para. 4.3*]. CLAIMANT is mistaken in asserting that the tariffs fulfill the requirement of being unforeseen [*MoC, p. 28, ref. 154*].

104 Parties who sell goods on a long-term basis have to anticipate the risk of dramatic price increases [*Lookofsky, p. 103*]. This is precisely the situation in the case at hand. Both parties have expressed their intent to mutually benefit from a long-term relationship, going beyond a single purchase [*C2, p. 10; C3, p. 11; C8, p. 18*]. This means that CLAIMANT would have to assume that during their partnership prices may fluctuate and circumstances may change.

105 In addition, it is argued that foreseeability has to be determined in ways of what a party reasonably could foresee [*Lindström, para. 4.3*]. The test is 'whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices, ought to have foreseen the impediment's initial or subsequent existence' [*Schlechtriem/Schwenzer, p. 1134, para. 14*]. Foreseeability is considered on an objective basis [*Zeller, p. 157*]. Import prohibitions do not qualify as grounds for exemption if a reasonable person in the same situation could have foreseen the prohibition during conclusion of the contract [*Lindström, para. 4.3*]. The President of Mediterraneo already announced during his election programme in January 2017 a preference for a more protectionist approach to international trade, particularly in connection to agricultural products [*C7, p. 15*]. Furthermore, he appointed Ms. Cecil Frankel as his superminister for agriculture, trade and economics on 5 May 2017, her being one of the most ardent critics of free trade [*PO2, p. 58, para. 23*]. Consequently, a reasonable person could

have foreseen that Mediterraneo will impose changes in international trade concerning agricultural products, which Equatoriana could retaliate to. Especially since in the past a previous restriction resulted in direct retaliatory measures [*C7, p. 15*]. This leads to the only conclusion that CLAIMANT could have expected also in this case a retaliation by the Government of Equatoriana. Both parties have read the newspaper article informing about the tariffs in both countries [*PO2, p. 58, para. 26*].

106 This leads to the conclusion that CLAIMANT could have foreseen a change in international trade affecting the import and export of agricultural goods.

c. The 30% Tariffs Do Not Make the Contract More Onerous

107 CLAIMANT wrongly assumes that the requirement of 'onerousness' is fulfilled in casu [*MoC, p. 28, ref. 155*]. Clause 12 speaks of events making the contract more onerous [*C5, p. 14*]. The type of hardship must be excessively onerous to trigger a remedy [*DiMatteo, p. 694, para. 88*]. Increases up to 80% have been considered insufficient to trigger the hardship relief [*Brunner, 427*]. In a *Suez Canal Case* the court had to decide whether precisely 30% would constitute hardship, denying a 30% increase in the cost as constituting hardship [*DiMatteo, p. 694, para. 88*].

108 Furthermore, Art. 6.2.2 PICC defines hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract. CLAIMANT erroneously interprets the requirement 'onerous' in clause 12 to be lower that the fundamental alteration in Art. 6.2.2 PICC [*MoC, p. 28, ref. 155*]. There is no indication during the course of the Parties' negotiations that the hardship clause and, therefore, the term 'onerous' was supposed to have lower standards than defined by the PICC. The identification of the relevant threshold can only be made in view of an evaluation of the risk assumed by the relevant party under the exact circumstances [*Brunner, p. 515*]. CLAIMANT assumed all the risks associated with a delivery based on DDP [*supra, refs. 92 et seqq.*]. This means that CLAIMANT knew that in case of unforeseen circumstances it would still have to bear the risk to deliver the goods to RESPONDENT on time. The 30% tariffs do not fall under the scope of clause 12 of the sales agreement.

3. Clause 12 Does Not Contain Any Remedy for Price Adaptation

109 Reliance on the hardship clause is moreover not possible since the clause does not provide for the requested remedy [*ANoA, p. 32, para. 19*]. RESPONDENT would have never entered into a contract the financial dimension of which would be dependent on the discretion of the Arbitrators [*ANoA, p. 32, para. 19*].

110 A hardship clause consists of one part specifying the circumstances containing hardship and a second part indicating what consequence hardship would have [*Fontaine, p. 469; Zaccaria, p. 150*]. In

the case at hand the Parties introduced the hardship clause to protect CLAIMANT from unforeseen risks severely affecting the contractual balance. However, clause 12 fails to mention any consequences resulting from hardship and the agreement, furthermore, does not contain any adaptation mechanism. Professor Schmitthoff even states that 'a hardship clause without sanctions is hardly worth the paper on which it is written' [*Schmitthoff, p. 420*]. In case the intent of the Parties was to protect a Party from an altered economic balance, the hardship clause is useless, unless the clauses describe consequences [*Zaccaria, p. 150*]. The successors replacing Ms. Napravnik and Mr. Antley did not include any reference to an adaptation mechanism in the hardship clause or the arbitration agreement while finalizing the contract [*C8, p. 17*]. Mr. Krone, Mr. Antley's successor, would have objected to transfer powers to the Tribunal to increase the price upon its discretion [*R3, p. 35*]. Furthermore, Mr. Shoemaker never committed to any price adaptation and would also not have had the authority to do so [*R3, p. 36*].

111 Consequently, clause 12 does not constitute hardship under the contract and does not provide any grounds for a price adaptation by this Tribunal.

B. The 30% Tariffs Do Not Constitute Hardship Under the CISG

112 As elaborated above [*supra, refs. 35 et seqq.*] Art. 79 CISG is not applicable next to the contractual hardship clause and furthermore does not govern hardship. Should this Tribunal however, be of the opinion that Art. 79 CISG does govern hardship, the following will show that possible hardship requirements of Art. 79 CISG are not fulfilled. The tariffs were in CLAIMANT'S control (**1.**), they were not unavoidable (**2.**) and eventually the 30% tariffs did not make the contract excessively more onerous (**3.**).

1. The 30% Tariffs Were Not Uncontrollable

113 Contrary to CLAIMANT'S statement, the 30% tariffs were not an uncontrollable impediment under Art. 79 CISG [*MoC, p. 29, ref. 163*].

114 A requirement for an exemption under Art. 79 CISG is that the impediment lies outside of the promisor's sphere of control [*Schlechtriem/Schwenzer, p. 1133, para. 12; Vine wax case; Iron molybdenum case*]. The distinction between CLAIMANT'S sphere of risk and external impediments must be drawn mostly by means of contractual risk allocation [*Schlechtriem/Schwenzer, p. 1134, para. 12*]. CLAIMANT correctly describes that natural catastrophes fall outside the sphere of the promisor's control qualifying as force majeure cases [*Schlechtriem/Schwenzer, p. 1136, para. 17; MoC, p. 29, ref. 162*]. The Parties are supposed to regulate the allocation of risk for State interventions [*Schlechtriem/Schwenzer, p. 1137, para. 18*]. Not only is such an arrangement present in the case at hand it also determines

that CLAIMANT undertook the risk for the increased 30% import tariffs, contrary to CLAIMANT'S opinion [*MoC, p. 29, ref. 161*]. By agreeing on a delivery on the basis of DDP the Parties allocated the risks for such events to CLAIMANT. DDP means that CLAIMANT assumed the risk for import and export clearance [*supra, refs. 92 et seqq.*]. Furthermore, according to legal scholars, state interventions lie outside of a parties sphere of control only *generally* [*emphasis added; Schlechtriem/Schwenzer, p. 1137, para. 18]*. A fact that was also acknowledged by CLAIMANT [*MoC, p. 29, ref. 162*].

2. The 30% Tariffs Were Not Unavoidable

115 An impediment can still be avoidable if the obligor acts diligently and takes necessary precautions during the right moment [*Kröll/Miselis/Perales Viscasillas, p. 1060, para. 54*]. In the case at hand the last shipment was due on 23 January 2018 [*C5, p. 14, clause 8*]. This means that the third shipment was due only a few days after the imposed tariffs by the Government of Equatoriana took effect on 15 January 2018 [*PO2, p. 58, para. 25*].

116 In this case, CLAIMANT could have foreseen the occurrence of the event leading to the retaliation by the Equatorianian Government and could have taken precautionary measures. The Government of Mediterraneo imposed their tariffs by executive order on 15 November 2017 [*PO2, p. 58, para. 23*]. This was after President Bouckaert appointed Ms. Cecil Frankel as superminister for agriculture, trade and economics on 5 May 2017 [*Ibid.*]. Her being one of the most ardent critics of free trade [*Ibid.*]. She was an outspoken protectionist since years, claiming the farmers of Mediterraneo were treated badly in other markets and advocating limiting the access of foreign agricultural products to the market of Mediterraneo [*Ibid.*]. Once there are concrete hints for the occurrence of the unforeseen event the obligor must do everything in his power to not be affected by the impediment [*Kröll/Miselis/Perales Viscasillas, p. 1060, para. 54; Staudinger, p. 965*]. This usually means acting before the impediment would affect the performance [*Kröll/Miselis/Perales Viscasillas, p. 1060, para. 54*]. Both Parties knew from an article in the 'peak business news" on 20 December 2017 that the Government of Equatoriana once before reacted to a restriction imposed by another government, with a direct retaliatory measure [*C6, p. 15*].

117 Therefore, CLAIMANT should have investigated the possibility of changed trade regulations after reading the newspaper article [*C6, p. 15; PO2, p. 58, para. 26*]. This article appeared in the news one day after the Government of Equatoriana announced their retaliation but almost one month before the tariffs would take effect in 2018. If CLAIMANT had done everything in its power to comply with changed regulations the third shipment could have been delivered before the 30% tariffs would have affected it. Even more so, since CLAIMANT accepted a delivery on the basis of DDP and it

was in CLAIMANT'S interest to stay informed about current events happening in free trade.

118 Furthermore, the obligor generally has to overcome the effects of an impediment even if this would mean a substantial additional cost or a substantial loss [*Brunner, p. 322; Staudinger, p. 965; Schlechtriem/Schwenzer, p. 1135, para. 15; Sunflower seed case*]. This requirement closely correlates with the delivery on the basis of DDP, since the extent and the nature of the efforts that can be expected of the promisor to overcome the impediment is determined by the contractual risk allocation [*Schlechtriem/Schwenzer, p. 1135, para. 15*]. CLAIMANT contractually assumed the risk of delivering to RESPONDENT.

119 Lastly, the 30% tariffs do not constitute a *substantial* additional cost as will be laid out in the next section [*infra, refs. 122 et seqq.*]

120 CLAIMANT could have additionally argued that an impediment occurring close to the agreed delivery date can be harder to overcome than an impediment occurring earlier [*Lindström, p. 4.4*]. However, in the case at hand the Government of Equatoriana announced the imposition of the tariffs on 19 December [*PO2, p. 58, para. 25*], giving CLAIMANT enough time to act and avoid the impediment.

121 The only logical conclusion can be that CLAIMANT could have avoided the 30% tariffs.

3. The 30% Tariffs Did Not Make the Contract Excessively More Onerous

122 As elaborated above Art. 79 CISG does not govern hardship [*supra, refs. 39 et seqq.*] contrary to CLAIMANT'S assertion [*MoC, p. 30, para. 168*]. Even if, this Tribunal should disagree, the requirement of 'excessive onerousness' is not fulfilled.

123 If the word "impediment" were to be interpreted widely incorporating also changes in circumstances it would still not mean that hardship is covered by the CISG in its full figure. The principles 'pacta sunt servanda' remains empathized by all important provisions including the CISG [*Ingeborg Schwenzer, p. 714; Kröll/Miselis/Perales Viscasillas, p. 1070, para. 78*]. Performance that only becomes more onerous and could have been foreseen does not justify an exemption under the CISG [*Ibid*]. Rather, hardship can only be found if CLAIMANT'S performance became excessively more onerous, meaning that the equilibrium of the contract was significantly altered [*Ingeborg Schwenzer, p. 714; CISG Op. 7, para. 3.1; Perillo, p. 129*]. Economic difficulties must be sufficiently extreme to be considered an impediment under Art. 79 CISG [*Uribe, p. 241*].

124 In the case at hand CLAIMANT'S performance of the last shipment did not become excessively more onerous. The cost increase of 30% for CLAIMANT'S last shipment resulting due to the imposed tariffs does not amount a sufficiently extreme economic difficulty. Cost increases of 13%, 30%,

44%, 25-50%, 75% or 80% have been considered in international commercial arbitration cases and have been found not to qualify as hardship [*Brunner, p. 427; Girsberger/Zapolskis, p. 126*]. In the present case the third shipment only became 30% more expensive for CLAIMANT. As stated above an increase of 30% is not sufficient to fulfill the requirement of excessive onerousness and therefore hardship. Rather, a price increase of 150-200% is advisable to accept a significant alteration of the contractual equilibrium [*Schwenzer, p. 717*].

125 CLAIMANT argues that this threshold for assessing hardship may be lowered if the impediment, here the 30% tariffs, resulted in the financial ruin of the endangered party [*Brunner, p. 438, para. 3; Schwenzer, p. 716*]. CLAIMANT'S plan of profitability would be endangered if it were to bear the additional costs [*PO2, p. 59, para. 29*]. However, this would not necessarily lead to CLAIMANT'S bankruptcy. Furthermore, it is not clear weather CLAIMANT would not succeed in negotiating a new credit line, as negotiations will only most likely be very difficult [*Ibid.*], yet not impossible. CLAIMANT additionally is signatory to other credit lines besides its two main credit lines [*PO2, p. 59, para. 29*].

126 Moreover, the overall financial situation must be analyzed [*Girsberger/Zapolskis, p. 132*]. It is relevant whether the company is large enough to absorb such losses [*Ibid.*].

127 Phar Lap operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport [*NoA, p. 4, para. 1*]. CLAIMANT has 300 horses, its own mare herd, offspring and stallion depot [*Ibid.*]. Furthermore, CLAIMANT'S teaching, research, and demonstration facility is a center of excellence offering training and professional development courses on horse care, breeding and riding [*Ibid.*]. In addition, Phar Lap offers frozen semen of its champion stallions for artificial insemination [*NoA, p. 4, para. 2*]. Due to its unique storage technique the semen is long-living and of superior quality [*Ibid.*]. CLAIMANT'S success and reputation in various fields of equestrian sport and sale of frozen semen with superior techniques do not lead to the conclusion of bankruptcy by paying the additional cost. There is no indication of CLAIMANT'S bankruptcy, meaning the hardship threshold cannot be lowered.

128 Furthermore, the argument of lowering the threshold does not apply in the case at hand due to the extent the threshold would have to be lowered. An exemption due to hardship is possible if the performance unexpectedly becomes more burdensome [*Kröll/Miselis/Perales Viscasillas, p. 1071, para. 78*]. This is generally assumed at an increase of at least 150-200% [*supra, ref. 124*]. In CLAIMANT'S situation the price increase was only 30%. Even though the threshold may be lowered in certain situations, the reduction of the threshold from 200% to 30% would be extreme.

129 Consequently, the 30% tariffs do not constitute hardship under the CISG.

II. This Tribunal Should Not Order RESPONDENT to Pay any Additional Amount

130 Because of the abovementioned reasons this Tribunal should not order RESPONDENT to pay any additional amount. CLAIMANT argues that according to Art. 6.2.3(4)(b) PICC the court may adapt the contract in case it finds hardship [*MoC, p. 31, ref. 178*]. However, Art. 6.2.3(4)(b) PICC is not applicable since the requirements of Art. 6.2.2 PICC are not met (**A.**). Secondly, the requested price is not proportionate to the risk allocation in the contract (**B.**) and there are no equitable considerations supporting the price increase (**C.**).

A. Art. 6.2.3(4)(b) PICC Is Not Applicable

131 As explained above the hardship provisions of the UNIDROIT Principles are not applicable here [*supra, refs. 47 et seqq.*]. However, even if the provisions were applicable the requirements of Art. 6.2.2 PICC are not fulfilled. CLAIMANT argues that under Art. 6.2.3(4)(b) PICC the court may adapt the contract in order to restore its equilibrium in case it finds hardship [*MoC, p. 31, ref. 178*]. The Art. requests that hardship be given. It was established up to this point, however, that hardship is not given and, therefore, no fundamental alteration of the contractual equilibrium can be found. While a fundamental alteration can be considered after an increase of 50% its threshold is higher [*Vogenauer, p. 816*].

132 Furthermore, Art. 6.2.2(d) PICC requires that the events were not assumed by the party. Yet, here the Parties agreed on a delivery on the basis of DDP, transferring the risks onto CLAIMANT.

B. The Price Request Is Not Proportionate to the Risk Allocation in the Contract

133 Furthermore, CLAIMANT asserts that adaptation must lead to an 'adequate adjustment of the parties' respective obligations' [*MoC, p. 31, ref. 178; Fontaine, p. 478*].

134 Additionally, it argues that the contractual equilibrium has to be established by analyzing the contractual allocation of the risks between the parties [*MoC, p. 33, ref. 183; Schlechtriem/Schenzer, p. 1135, para. 15*]. Furthermore, CLAIMANT enumerates correctly the contractual risks assumed by RESPONDENT in Clauses 9, 10 and 13 [*MoC, p. 33, ref. 185*]. However, these risks assumed by RESPONDENT do not absolve CLAIMANT from its contractual risk obligation. Clause 8 of the sales agreement clearly states a delivery DDP. As elaborated above a delivery on the basis of DDP even incorporates the risk of import and export bans [*supra, refs. 92 et seqq.*]. This means that while CLAIMANT'S argumentation is correct it overlooked the fact that a delivery on the basis of DDP was contractually established in the Parties' sales agreement.

135 Contrary to CLAIMANT'S statement the fact that a force majeure clause and a hardship clause were incorporated into the contract does not change the effects of a DDP delivery [*MoC, p. 33, ref. 185*]. Rather, the two clauses were introduced exactly because a DDP delivery was negotiated [*C4, p. 12*].

C. There Are No Equitable Considerations Supporting the Requested Price Increase

136 CLAIMANT argues that the Parties' conduct justifies the requested price increase [*MoC, p. 34, ref. 191*]. CLAIMANT states that Mr. Shoemaker admitted to actively deceiving CLAIMANT [*Ibid.*]. During the phone call on 21 January 2018 between Mr. Shoemaker and Ms. Napravnik, Mr. Shoemaker indicated that according to his understanding DDP meant that all risks had to be borne by CLAIMANT and that he will clarify the situation with the legal department [*Ibid.*]. When he tried to reach the members of the legal department none were available [*PO2, p. 59, para. 34*]. CLAIMANT states that a parties unjustified reluctance to renegotiate may influence the Tribunal's decision [*MoC, p. 34,* ref. *192*]. However, this was not the situation in the case at hand. Mr. Shoemaker never committed to any adaptation of the price [*Ibid.*]. He also told Ms. Napravnik several times that he was not a lawyer and was not involved in the negotiations of the contract [*R4, p. 36*]. He was not reluctant to renegotiate he simply did not have the authority to consent to additional payments outside the contract without speaking to the management which was not available at the time [*R4, p. 36*]. The parties may fail to reach an agreement after renegotiating [*Zaccaria, p. 154*]. If this is not the fault of any party the agreement will continue to stand in its original form unless the parties provided for the effects of such a situation [*Ibid.*]. In casu the parties did not.

137 This Tribunal should not order RESPONDENT to pay any additional amount.

III. Conclusion Issue 3

138 This Tribunal should not adapt the contract and should not order RESPONDENT to pay any additional amount. This is due to the fact that CLAIMANT is not entitled to the increased remuneration either under clause 12 nor under Art. 79 CISG.

Prayer for Relief

In light of the above RESPONDENT requests the Arbitral Tribunal

a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
b. To reject the claim for additional renumeration in the amount of 1,250.000 USD raised by CLAIMANT;
c. To find the evidence in question inadmissible;
d. To order CLAIMANT to pay RESPONDENT'S costs incurred in this arbitration.

Certificate

Berlin, 23 January 2019

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and signed this certificate.

Helena Dierckx

Helen Klabe

Clara Seitz

Inès Schroeder

Fabian Weimer

Tamara Wendrich