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WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

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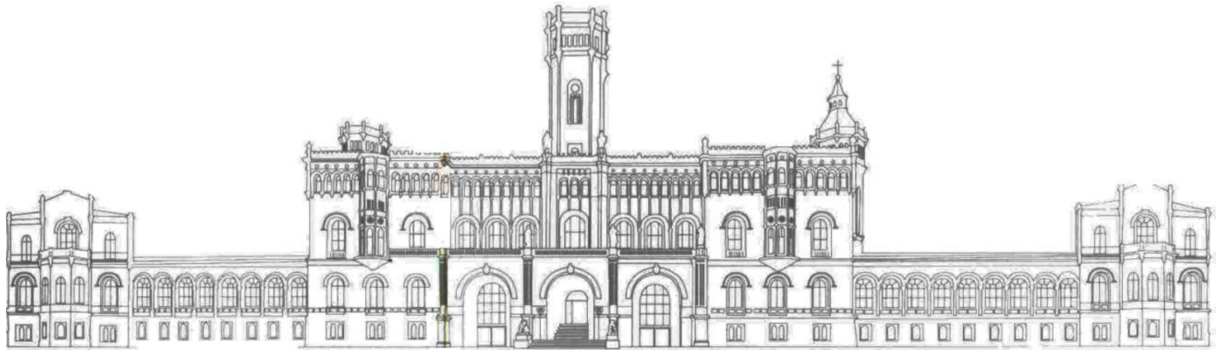
MEMORANDUM FOR CLAIMANT



LEIBNIZ UNIVERSITY OF HANNOVER

ON BEHALF OF:	**AGAINST:**
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LIST OF ABBREVIATIONS

§(§)	paragraph(s)
%	percent
Answ.	Answer
Arb.	Arbitration
Art.	Article(s)
App.	Application
cf.	*confer* (see)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CEO	Chief Executive Officer
DAL	Danubian Arbitration Law
DDP	Delivery Duty Paid
ed.	edition
et al.	et alli (and others)
et seq.	and the following
Exh.	Exhibit
e.g.	exempli gratia (for example)
Exh. C	Claimant's Exhibit
Exh. R	Respondent's Exhibit
fn.	footnote
HKIAC 2013 Rules	Hong Kong International Arbitration Centre 2013 Rules
HKIAC Rules	Hong Kong International Arbitration Centre 2018 Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
Inc.	Incorporated
INCOTERMS	International Commercial Terms

Lex arbitri	Law of the seat of arbitration
Ltd.	Limited
MAL	Mediterranean Arbitration Law
Mr	Mister
Ms	Miss
No	Number(s)
Not. Arb.	CLAIMANT's Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 7 June 1959
Ord.	Order
p./pp.	Page/pages
Para.	Paragraph/section
Proc.	Procedural
PIA	Partial Interim Award
PO1	Procedural Order No. 1 of 5th October 2018
PO2	Procedural Order No. 2 of 2nd November 2018
Req.	Request
Supra	above
UML	UNCITRAL Model Law
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut International pour L'Unification du droit
UPICC	UNIDROIT Principles of International Commercial Contracts
US$	United States Dollar
U.K.	United Kingdom
USA	United States of America
v	*versus* (against)

TABLE OF AUTHORITIES

Treaties, Conventions and Laws

Abbreviation	Title
CISG	Convention on Contract of the International Sale of Goods, Vienna 1980
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1974
UNICTRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016

Rules

Abbreviation	Title
HKIAC Rules	Hong Kong International Arbitration Centre 2018 Rules
HKIAC 2013 Rules	Hong Kong International Arbitration Centre 2013 Rules
IBA Rules	IBA Guidelines on the Taking of Evidence in International Arbitration 2010
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
INCOTERMS	International Commercial Terms

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STATEMENT OF FACTS

The parties to this arbitration are **Phar Lap Allevamento** [hereinafter: CLAIMANT] and **Black Beauty Equestrian** [hereinafter: RESPONDENT].

CLAIMANT is a company located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, covering all areas of equestrian sport. CLAIMANT is also offering courses on horse care, breeding and riding/driving, as well as providing stallions for breeding English thoroughbreds and Anglo Arabs.

RESPONDENT is the owner of a race horse stable located in Oceanside, Equatoriana. It is famous for its broodmare lines and now tries to establish an own racehorse stable.

21 March 2017	RESPONDENT approaches CLAIMANT for the purchase of 100 doses of frozen semen (p. 9).
31 March 2017	CLAIMANT and RESPONDENT [hereinafter: the Parties] agree to the delivery of the Semen *DDP* combined with the inclusion of a Hardship Clause (p. 12).
11 April 2017	CLAIMANT states that Mediterranean Law governs the contract, proposes Danubia as seat of arbitration and suggests the ICC Hardship Clause (p. 34).
12 April 2017	The Parties expressly agree to empower the Arbitral Tribunal [hereinafter: the Tribunal] to adapt the Sales Contract in case the Parties cannot reach an agreement (p. 17).
	The Parties' main negotiators are heavily injured during a car accident leading to their replacement for the finalization of the Sales Contract (p. 17).
06 May 2017	The Parties sign the Frozen Semen Sales Agreement [hereinafter: Sales Contract] (p. 13).
15 November 2017	The newly elected President of Mediterraneo imposes a surprising 25% tariff on agricultural products from Equatoriana (pp. 6, 58).
19 December 2017	The Government of Equatoriana even more unexpectedly announces 30% tariff on agricultural products as a retaliatory measure (p. 15).
21 January 2018	After CLAIMANT approached RESPONDENT in order to find an amicable solution, RESPONDENT promises to find a satisfying agreement on the price (p. 18).
23 January 2018	CLAIMANT authorizes the last shipment of 50 doses of semen (p. 6).

January 2018	RESPONDENT violates the Sales Contract and sells the semen to third parties (p. 57).
12 February 2018	CLAIMANT's attempts to settle the dispute amicable fail due to the aggressive behavior of RESPONDENT's CEO (p. 18).
29 June 2018	An HKIAC-Tribunal renders a Partial Interim Award in RESPONDENT's parallel arbitral proceedings confirming the arbitrator's power to adapt the contract (p. 60).
31 July 2018	CLAIMANT commences arbitration to pursue its right to adapt the contract (p. 4).
02 October 2018	CLAIMANT becomes aware of the Partial Interim Award and requests to submit it as evidence in the current proceedings (p. 50).

SUMMARY OF ARGUMENTS

1 CLAIMANT as seller and RESPONDENT as buyer concluded a purchase agreement providing for the delivery of 100 doses of frozen horse semen for the purposes of equestrian horse breeding. Even though the Equatorianian Government implemented a tariff of 30% on agricultural products shortly before the delivery of the last 50 doses of semen was due, CLAIMANT made every effort to enable the shipment.

2 As RESPONDENT walked away from its former promise to renegotiate the contractual price, CLAIMANT initiated arbitration in accordance with the Arbitration Agreement contained in Clause 15 of the Parties' Sales Contract. With its notice of Arbitration, CLAIMANT requests the Tribunal to adapt the Sales Contract and order RESPONDENT to pay the tariffs amounting to US$ 1,250,000. RESPONDENT's objection to the Tribunal's jurisdiction is without merits since, under the governing Law of Mediterraneo, the Arbitration Agreement assigns the Tribunal the power to adapt the contract (**Issue I**).

3 In order to accommodate RESPONDENT's wish to ensure a timely and swift delivery, CLAIMANT agreed on delivery *DDP*. At the same time, the Parties' agreed on a Hardship Clause to counterbalance all risks associated with *DDP*. This Hardship Clause covers the imposed tariffs as comparable unforeseen events and entitles CLAIMANT to an increased remuneration in the amount of the tariffs, US$ 1,250,000. In any event, CLAIMANT can rely on Art. 79(1) CISG and Art. 6.2.3(4)(b) UPICC to justify its request for contract adaptation (**Issue II**).

4 RESPONDENT has initiated arbitration in a similar case regarding a sale of a racehorse to a customer located in Mediterraneo. This contract was equally affected by the tariffs and the customer also rejected any price adaptation. Recently, the Tribunal in that case has rendered a Partial Interim

Award [hereinafter: PIA] assuming its jurisdiction and power to adapt the contract in similar circumstances. CLAIMANT bought a copy of the PIA which it wants to submit as evidence. RESPONDENT unfoundedly objects to the admissibility of the PIA either due to an alleged computer hack or a breach of a confidentiality agreement. (**Issue III**).

ISSUE I: THE TRIBUNAL HAS THE JURISDICTION TO INCREASE CLAIMANT'S REMUNERATION

5 CLAIMANT was determined to support RESPONDENT in establishing its own breeding stable in the distinguished sport of horseracing. In order to build a long-lasting business relationship, CLAIMANT exceptionally agreed to sell 100 doses of frozen semen of its world champion stallion, Nijinsky III. However, as soon as CLAIMANT had fulfilled RESPONDENT's demands, RESPONDENT decided to turn its back on CLAIMANT.

6 Just before the delivery of the last 50 doses of frozen semen in January 2018, the Parties found themselves in the middle of an economical war between their countries of origin. The Equatorianian Government surprisingly imposed a 30% tariff including frozen racehorse semen. Nonetheless, CLAIMANT delivered the semen encouraged by RESPONDENT's promise to find an appropriate solution for the extraordinary situation.

7 When CLAIMANT paid the tariffs to enable the delivery, it did not only lose its full profit margin but additionally faced a loss of 25%. As the Sales Contract provides for a Hardship Clause covering the tariffs, CLAIMANT requests the Tribunal to order RESPONDENT to pay the additional tariffs amounting to US$ 1,250,000 to restore the contractual equilibrium. Instead of facing its obligations, RESPONDENT grasps at straws and objects to the Tribunal's jurisdiction and power to modify the purchase price [*Answ. Not. Arb., p. 31 para. 12*]. The Parties validly concluded the following Arbitration Agreement:

8 "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof, shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Vindobona, Danubia. The numbers of arbitrators shall be three. The arbitration proceedings shall be conducted in English.*"

9 **First**, the Tribunal has the jurisdiction to adapt the Sales Contract under the Arbitration Agreement contained in Clause 15 of the Sales Contract (**A.**). **Second**, RESPONDENT's objection to the jurisdiction is a violation of good faith (**B.**).

A. THE TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE SALES CONTRACT

10 The Tribunal has the jurisdiction to decide on a claim for contract adaptation. In accordance with Art. 19(1) Danubian Arbitration Law [hereinafter: DAL], which is a verbatim adoption of the UNCITRAL Model Law 2006 and the *lex arbitri*, the Parties chose the Hong Kong International Arbitration Centre Rules 2018 [hereinafter: HKIAC Rules] to govern the arbitral proceedings [*PO1, p. 51 para. 4*]. Under both, Art. 19.1 HKIAC Rules and Art. 16(1) DAL, the tribunal has the so-called competence-competence to determine its own jurisdiction [*Balthasar, p. 20 para. 38; Born, p. 1077; Feehily, p. 355; Moser/Bao, para. 9.129; Redfern/Hunter, para. 5.108*]. For the purpose of determining its own competence, the tribunal shall apply the law it deems most appropriate [*Born, p. 1399; Conrad/Münch/Black-Branch, para 1.14; Lew/Mistelis/Kröll, para. 6-52*].

11 From the very beginning of their business relationship, CLAIMANT insisted on the applicability of the Mediterranean Law [*Exh. C3, p. 11*]. It only admitted to Danubia as a neutral venue for the arbitration [*Exh. R2, p. 34*]. Turning the facts, RESPONDENT artificially attempts to create the impression that Danubian Law as the law of the seat of arbitration governs the Arbitration Agreement in order to substantiate its objection to the Tribunal's jurisdiction [*Not. Arb., p. 7 para. 15*]. Driven by the incentive to avoid any further payment obligation, RESPONDENT argues that the Tribunal might lack jurisdiction to adapt the Sales Contract under Danubian Law [*Answ. Not. Arb., p. 31 para. 12*]. As the Law of Mediterraneo governs the Arbitration Agreement (**I.**), the Tribunal has the jurisdiction to decide on the claim for contract adaptation (**II.**).

I. MEDITERRANEAN LAW GOVERNS THE ARBITRATION AGREEMENT

12 Mediterranean Law governs the Arbitration Agreement. There is no general rule in international arbitration for the determination of the law applicable to the arbitration agreement [*Born, p. 473; Lew/Mistelis/Kröll, para. 6-52; Redfern/Hunter, para. 3.07*]. Taking recourse to general principles of international private law, the Tribunal shall apply a three-step approach. The starting point for any determination of the law governing the arbitration agreement is the parties' explicit choice of law [*Art. 34(2)(a)(i) UML; Art 5(1)(a) NYC; BCY v BCZ*; *Sulamerica v Enesa*; *Born, pp. 495 et seq*]. As a second step, the tribunal shall examine all circumstances and consider whether the parties have impliedly chosen the law applicable to their arbitration agreement [*BCY v BCZ; Sulamerica v Enesa*]. If parties fail to indicate the applicable law, the law which has the closest and most real connection to the arbitration agreement shall be applied as a mean of last resort [*BCY v BCZ*; *Habas Sinai v VSC Steel Company Ltd.; Sulamerica v Enesa*; *Born, pp. 495 et seq; Rauscher/Krüger, preface § 1025 para. 7; Art. VI(2) European Convention on International Commercial Arbitration; Art. 4 The Hague Principles; Art. 4 Rome I Regulation*].

13 **First**, the Parties' explicit choice of Mediterranean Law as the *lex causae* of the Sales Contract extends to the Arbitration Agreement (**1.**). **Second**, the Parties impliedly chose the application of Mediterranean Law to the Arbitration Agreement (**2.**). **Third**, the Arbitration Agreement has the closest and most real connection to Mediterranean Law (**3.**)

1. The Parties' explicit choice of Mediterranean Law as the *lex causae* of the Sales Contract extends to the Arbitration Agreement

14 The Sales Contract contains an express choice of law clause in favor of Mediterranean Law which extends to the Arbitration Agreement. According to Clause 14 of the Sales Contract "*[t]his Sales Agreement shall be governed by the law of Mediterraneo [...]*" [*Exh. C5, p. 14*].

15 Parties to international contracts frequently consider that "*the choice of law will be equally applicable to the main contract and the arbitration agreement, as part of the main contract*." [*Ferrari/Kröll, p. 28*]. Hence, their choice of law clause in the main contract constitutes an express choice of law clause with regard to the law of the arbitration agreement [*Arsanovia Ltd. v Cruz City 1; German Federal Court of Justice III ZR 42/74; ICC No. 3572; Born, p. 491; Lew/Mistelis/Kröll, para. 6-24; Poudret/Besson, para. 178; Primrose, p. 147; Redfern/Hunter, para. 2.68*].

16 CLAIMANT's and RESPONDENT's choice of Mediterranean Law extends to the Arbitration Agreement for two reasons: **First**, the Sales Contract constitutes one single legal relationship (**a.**); and **second**, the application of the same law to the Sales Contract and the Arbitration Agreement is consistent with the doctrine of separability (**b**.).

a. The Sales Contract constitutes one single legal relationship between CLAIMANT and RESPONDENT

17 The Sales Agreement and the Arbitration Agreement constitute a single legal relationship between the Parties for three reasons:

18 **First**, parties in international trade generally submit their complete legal relationship to the same law [*German Federal Court of Justice III ZR 42/74; Sulamerica v Enesa; Ferrari/Kröll, p 29; Sicard-Mirabel/Derains, p. 16 et seq.*]. Different applicable laws to different parts of the same legal relationship can lead to complexities [*Born, p. 591; Ferrari/Kröll, p 29*]. As most lawyers are qualified in only one jurisdiction, additional legal advice may become necessary [*Ferrari/Kröll., p. 29*]. Therefore, the commercially most sensible approach in order to avoid legal complexities and to save costs and time is to apply the same law to the Sales Contract as well as to the Arbitration Agreement. Thus, Mediterranean Law governs the Sales Contract and the Arbitration Agreement.

19 This finding is supported by the decision of the High Court of England and Wales from 20th December 2012 in the case *Arsanovia Limited v Cruz City 1*. In that case, *Cruz City* applied for arbitration against *Arsanovia Ltd.* Both parties entered into a shareholders agreement including a

choice of law clause in favor of Indian law and an arbitration agreement with the arbitration seated in London. The court held that the law applicable to the arbitration agreement was Indian law since "*the parties expressly chose that [their Shareholders Agreement] should be governed by and construed in accordance with the laws of India, […] Indian law should govern and determine the construction of all clauses […] including the arbitration agreement*." Likewise, the Sales Contract contains a choice of law clause in favor of Mediterranean Law. Accordingly, this choice of law should govern the whole Sales Contract including the Arbitration Agreement.

20 **Second**, the choice of law clause literally subjects the Arbitration Agreement to the Law of Mediterraneo. The acceptance of the contract is also an acceptance of the arbitration clause without any further formality requirement [*Redfern/Hunter, para. 3.13*]. Within the Sales Contract, the Parties designated three different terms to their relationship. The Parties title the Sales Contract in its whole as "*Sales Agreement*" [*Exh. C5, p. 13*]. The Arbitration Agreement refers to "*this Contract*" in general [*Exh. C5, p. 14 para. 15*]. The Parties signed the whole Sales Contract referring to all terms and conditions in "*this Agreement*" [*Exh. C5, p. 14 para. 14*]. By referring this "*Sales Agreement*" to the Law of Mediterraneo, the Parties thus referred their whole relationship including the Arbitration Agreement to Mediterranean Law.

21 **Third** and contrary to RESPONDENT's assertion [*Answ. Not. Arb,, p. 31 para. 15*], the absence of the choice of law part of the HKIAC standard clause is of no relevance for the determination of the applicable law. The HKIAC provides a choice of law clause within their standard arbitration clause [*Moser/Bao, para. 4.23*]. However, the use of this provision is non-mandatory [*Moser/Bao, para. 4.23*]. Within the last piece of communication, CLAIMANT proposed the current version of the arbitration clause [*Exh. R2, p. 34*]. Since CLAIMANT repeatedly referred to Mediterranean Law as the applicable law within that very same email [*Exh. R2, p. 34*], it considered the incorporation of the choice of law clause as irrelevant. RESPONDENT's consecutive negotiator Mr Krone knew about the issue due to a note prepared by RESPONDENT's former negotiator Mr Antley stating "*clarify […] applicable law*". Thus, CLAIMANT reasonably must have understood his silence as dropping the issue [*Exh. R3, p. 35*]. Hence, both Parties intentionally left out the choice of law clause since it was clear that Mediterranean Law governs the Arbitration Agreement.

22 For those reasons, the Sales Contract and the Arbitration Agreement constitute one single legal relationship governed by the Law of Mediterraneo.

b. The application of the law governing the Sales Contract to the Arbitration Agreement is consistent with the doctrine of separability

23 An application of the law governing the Sales Contract to the Arbitration Agreement is consistent with the doctrine of separability. According to both, Art. 19.2 HKIAC Rules and Art. 16(1) DAL,

the tribunal may rule on its own jurisdiction and *„[**f**]**or that purpose**, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract […]"* [*emphasis added; cf. Born, p. 401; Primrose, p. 147; Redfern/Hunter, para. 2.134*]. The doctrine of separability is a lifesaver of the arbitral agreement in case the existence, validity or effectiveness of the underlying contract is at stake [*Born, p. 401; Feehily, p. 379; Fouchard/Gaillard/Goldmann, para. 398; Kaplan/Moser, p. 139; Primrose, p. 150; Redfern/Hunter, para. 2.134*]. The separability presumption does not mean "*that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract.*" [*ICC No. 4131; Born, p. 474*].

24 RESPONDENT is questioning neither the validity of the Sales Contract nor the validity of the Arbitration Agreement itself [*PO2, p. 61 para. 48*]. Its assertion can only be interpreted as an attempt to justify its objection to the Tribunal's jurisdiction [*Answ. Not. Arb., p. 31 para. 13*]. However, the doctrine of separability is by no means a tool of defending unpleasant claims. Consequently, the application of the Law governing the Sales Contract to the Arbitration Agreement is consistent with the doctrine of separability

2. The Parties impliedly choose the applicability of Mediterranean Law as the law of the Arbitration Agreement

25 CLAIMANT and RESPONDENT impliedly chose Mediterranean Law to govern their Arbitration Agreement. The parties' explicit choice of a law governing the underlying contract is a strong indication for an implied choice of the law governing the arbitration agreement [*BCY v BCZ; Sulamerica v Enesa*]. Only very special circumstances may call for the applicability of a different law to the arbitration agreement [*BCY v BCZ; ICC No. 2626; Ferrari/Kröll, p. 30*]

26 Contrary to RESPONDENT's assertion [*Answ. Not. Arb., p. 31 para. 15*], the Parties did not agree on Danubian Law to govern the Arbitration Agreement. The only apparent connection between the Sales Contract and Danubian Law is the Parties' choice for Danubia as the seat of arbitration [*Exh. C4, p. 14*]. CLAIMANT will establish that **first**, the Parties did not agree to link the applicable law to the seat of arbitration (**a.**); and **second**, the choice of the seat of arbitration is only relevant for the applicable procedural law (**b.**).

a. The Law applicable to the Arbitration Agreement is detached from the arbitral seat

27 At no point during the negotiations, the Parties agreed to link the seat of arbitration and the applicable law. When interpreting arbitration agreements, tribunals give special notice to general principles, e.g. the meeting of the parties' minds [*Swiss Federal Tribunal 4A_452/2007; Born, p. 1322*]. CLAIMANT's and RESPONDENT's meeting of minds identifies the applicable law as to be independent from the seat of arbitration for two reasons.

28 **First**, there was no common ground between the Parties that the law of the seat of arbitration shall govern the Arbitration Agreement. During the first negotiations, RESPONDENT's employee Ms Napravnik explicitly rejected a synchronization of jurisdiction and applicable law [*Exh. C3, p. 11*]. In particular, RESPONDENT was concerned about the fact that "*[CLAIMANT's] law applies and [its] courts have jurisdiction*" [*Exh. C3, p. 11*]. RESPONDENT itself offered an applicable law deviating from the place of jurisdiction [*Exh. C3, p. 11*]. When RESPONDENT offered the corresponding pair of Equatoriana as the seat of arbitration and Equatorianian Law as applicable law, the Parties had already validly agreed on the application of Mediterranean Law. Thus, RESPONDENT's email can only be understood as a mere suggestion without any legal effect on the applicable law [*Exh. R2, p. 34*]. Consequently, there is no fact indicating that CLAIMANT and RESPONDENT impliedly agreed to link the applicable law to the seat of arbitration.

29 **Second**, CLAIMANT explicitly contested the applicability of any foreign law. During the discussions, Ms Napravnik on behalf of CLAIMANT told RESPONDENT's negotiator Mr Antley that CLAIMANT was unable to consent to any foreign law without the consent of its financing committee [*Exh. R2, p. 34*]. Accordingly, CLAIMANT informed RESPONDENT that the committee permitted Danubia as the seat of arbitration [*Exh. R2, p. 34*]. RESPONDENT was not informed about any approval of Danubian Law as the committee did not permit its applicability. Consequently, RESPONDENT's negotiator Mr Antley could not have assumed that CLAIMANT intended to create a link between the applicable law and the seat of arbitration as long as this might lead to the application of a foreign law. For those reasons, CLAIMANT requests the Tribunal to find that there was no implied choice in favor of the law of the seat of arbitration.

b. The Parties' choice of Danubia as the seat of arbitration solely affects the applicable *lex arbitri*

30 The impact of the choice of the seat of arbitration is limited to the applicable procedural law. The choice of the arbitral seat is of particular importance for the arbitral proceedings [*Bentolila, para. 34; Born, p. 2059*]. The *lex arbitri* might directly influence the arbitration, e.g. by imposing mandatory obligations [*Born, p. 2060; Fouchard/Gaillard/Goldman, para. 1178*]. Additionally, national courts at the seat of arbitration are prepared to assist any time during the arbitral proceeding [*Born, p. 2060; Paulsson, p. 2; Williams, p.1*].

31 CLAIMANT and RESPONDENT chose Vindobona, Danubia as the seat of arbitration since it constitutes a neutral venue [*Exh. R2, p. 34*]. Accordingly, DAL as the *lex arbitri* applies to procedural questions during the arbitral proceedings and Danubian courts are competent to assist at any point during the arbitral proceedings. This was of utmost importance since neither party was willing to accept the home jurisdiction of the other party [*Exh. C4, p. 12*].

32 The decision in the case *BCY v BCZ* from the High Court of Singapore in 2016 supports this finding [*BCY v BCZ*]. In that case, the court had to consider the validity of the parties' ICC arbitration clause. The agreement did not specify the law applicable to the arbitration agreement. Whilst the plaintiff relied on Singapore law as the law of the seat of arbitration, the defendant invoked the law of the state New York as the law governing the underlying sales agreement. The court found that the law governing the main contract, i.e. the law of the state of New York, also applied to the arbitration agreement since "*the presumed desire for neutrality is not necessarily a strong enough reason for favoring the law of the seat over the law of the main contract.*"

33 Likewise, CLAIMANT's and RESPONDENT's desire for neutrality is fulfilled by the applicability of the DAL and the possible assistance of Danubian state courts. Thus, the choice of the seat of arbitration is limited to the applicable *lex arbitri* and of no relevance for the applicable law.

3. The Arbitration Agreement has the closest and most real connection to Mediterranean Law

34 Mediterranean Law is most closely and really connected to the Parties' Arbitration Agreement. The principle of closest and most real connection is one of the fundamental principles of private international law [*Born, pp. 542 et seq.; Hay/Rösler, p. 107; Leible, p. 212*]. In case the validity of a contract depends on the applicable law, the validation principle calls for the application of the law upholding the agreement rather than the law rendering it invalid [*Hamlyn v Talisker; ICC No. 7920; ICC No. 11869; Mastrobuono v Shearson; Born, p. 544*]. In respect of the fact that parties to an arbitration agreement promise to arbitrate disputes, "*it makes no commercial or logical sense to conclude that parties would intentionally select a law to govern that agreement which would then invalidate it*" [*Born, p. 548; see also First Options v Kaplan; Berger, p. 431*].

35 The law applicable to the Arbitration Agreement is either Danubian Law as the law of the seat of arbitration or Mediterranean Law as the law governing the Sales Contract. According to RESPONDENT's allegations, the Tribunal might lack jurisdiction if Danubian Law governs the Arbitration Agreement [*Answ. Not. Arb., p. 31 para. 12*]. As the Arbitration Agreement only unfolds its full powers interpreted under Mediterranean Law, it constitutes the closest and most real connection. Thus, Mediterranean Law governs the Arbitration Agreement.

II. THE TRIBUNAL HAS THE POWER TO DECIDE ON AN ADAPTATION OF THE SALES CONTRACT

36 The Tribunal has the power to decide on an adaptation of the Sales Contract. CLAIMANT and RESPONDENT concluded the Sales Contract including the Arbitration Agreement referring "*[a]ny dispute […] arising out of this contract […]*" to arbitration [*Exh. C. 5, p. 13, emphasis added*]. Nonetheless,

RESPONDENT asserts that the Tribunal lacks the power to decide whether the imposed 30% tariffs justify an increase of CLAIMANT's remuneration [*Answ. Not. Arb., p. 31 para. 12*].

37 International arbitration agreements deal with "*often unforeseen and widely varying circumstances"* [*Born, p. 1325*]. Parties do not consciously consider whether their agreement covers certain types of claims or not [*Born, p. 1325*]. Mainly, Parties want to agree on an efficient method of dispute resolution without the need to specify all possible legal consequences [*cf. Fiona Trust v Privalov; Kuklachev v Gelfman; Born, p. 544*]. For this reason, the agreement to arbitrate shall encompass all disputed claims, which usually would have fallen within the jurisdiction of a state court [*Born, p. 1326; Kröll, p. 168; Redfern/Hunter, para. 2.65*].

38 The scope of powers of state courts depends on the substantive law [*cf. Brunner, Force Majeure, p. 494; Kröll, p. 168*]. Whenever the substantive law empowers state courts to rule on a claim for contract adaptation, the agreement to arbitrate shifts that empowerment on the arbitral tribunal without requiring an express statement by the parties [*N.V Distrigas Case; Brunner, Force Majeure, p. 495*]. Thus, whenever contract adaptation is generally accepted under the applicable substantive law, the "*resulting procedural power of arbitral tribunals should also be generally accepted*" in order to avoid a split of fora [*Brunner, Force Majeure, p. 497; see also Kröll, p. 183; Welser/Molitors, p.18*].

39 RESPONDENT asserts that the Parties' narrowed version of the HKIAC Arbitration Clause does not empower the Tribunal to adapt the Sales Contract as any reference that could be interpreted as an empowerment for contract adaptation had been deleted [*Answ. Not. Arb., p. 31 para. 13*]. However, the power to adapt the Sales Contract is a question of the applicable substantive law and, therefore, of no relevance for the Tribunal's jurisdiction [*cf. Kröll, p. 168*].

40 Contrary to RESPONDENT's assertion, the Tribunal has the jurisdiction to decide on CLAIMANT's demand for price adjustment as the claim falls within the scope of the Arbitration Agreement. **First**, contract adaptation is a "*dispute*" in the sense of the Parties' Arbitration Agreement (**1.**); **Second**, CLAIMANT's request for contract adaptation has a contractual nature and arises out of the Sales Contract (**2.**). **Third**, in any event, the Parties explicitly empowered the Tribunal according to Art. 28(3) DAL (**3.**).

1. CLAIMANT's request for contract adaptation is a "*dispute*" in the sense of the Parties' Arbitration Agreement

41 CLAIMANT's request for contract adaption is a "*dispute*" in the sense of the Arbitration Agreement. It is widely recognized that arbitration agreements have to be interpreted in a way favoring arbitration [*Fiona Trust v Privalov; Higher Regional Court Frankfurt, 5 U 167/84; Born, p. 1326; Fouchard/Gaillard/Goldman, para. 513*]. Likewise, the Law of Mediterraneo provides for pro-arbitration interpretation irrespective of an alleged narrow wording [*Not. Arb., p. 7 para. 16*]. Since parties

generally seek the commercially most efficient solution in form of a goal-oriented process, tribunals shall opt for the commercial logical solution [*Insigma Tech v Alstom; Born, p. 1346*].

42 Following the commercially sensible interpretation of agreements to arbitrate, the term "*dispute*" also needs to be interpreted economically viable [*Born, p. 1348; Brunner, Force Majeure, p. 496; Redfern/Hunter, para. 2.68*]. In conformity with the terms "*difference*", "*controversy*" or "*claim*", "*disputes*" cover "*a disagreement on a point of law or fact, a conflict of legal views or interests between two persons*" [*Greece v U.K.*; *see also Born, p. 1348; Brunner, Force Majeure, p. 476*]. Hence, it is generally accepted that arbitrators take a rather proactive role since their adjudication is not limited to yes or no decisions but goes far beyond that function [*Brunner, Force Majeure, p. 496; IBA Guidelines, para. 14; Strohbach, p. 482*].

43 Irrespective of the fact whether the Arbitration Agreement contains the terms "*controversies, differences or claims*", its scope remains unchanged. All of those terms are freely interchangeable with the term "*dispute*". Consequently, RESPONDENT's literal streamlining of the wording in the Parties' Arbitration Agreement [*Exh. R1, p. 33*] serves esthetic reasons rather than legal ones. From a legal point of view, the reduction of the wording has no legal impact since "*[a]ny dispute*" covers CLAIMANT's request for contract adaptation.

2. CLAIMANT's demand for an increased remuneration arises out of the Sales Contract

44 CLAIMANT's demand for contract adaptation has its legal basis within the Sales Contract. According to the Parties' Arbitration Agreement, the Tribunal shall finally settle all disputes "*arising out of*" the Sales Contract [*Exh. C5, p. 14*]. **First**, an economically viable interpretation leads to the conclusion that CLAIMANT's demand for increased remuneration arises out of the Sales Contract (**a.**). **Second**, the scope of the Parties' Arbitration Agreement covers CLAIMANT's demand for contract adaptation even if the Tribunal applies a narrow approach of interpretation (**b.**).

a. A commercially sensible interpretation demonstrates that CLAIMANT's demand for price adjustment falls within the ambit of the Arbitration Agreement

45 A commercially viable interpretation of the Arbitration Agreement demonstrates that the CLAIMANT's request for an increased remuneration falls within its ambit. Parties to international arbitration agreements commonly use the phrase "*arising out of this contract*" [*IBA Guidelines, para. 13; Molitoris/Welser, p.18*]. Initially, this or equal phrasings such as "*arising under this contract*" were interpreted as merely covering contractual claims and particularly excluding non-contractual disputes, i.e. torts [*Chimimport v D'Alesio; Ashville V Elmer Contractors*; *Born, p. 1352*]. This leads to a fragmentation of jurisdiction and a two or more stop process instead of a goal-orientated one-stop arbitration [*Fiona Trust v Privalov*; *Molitoris/Welser, p.18, Redfern/Hunter, para. 2.66*]. Accordingly, the pro-arbitration approach which is accepted "*in a substantial majority of jurisdictions*" [*Born, p. 1326: see also Mitsubishi v*

Chrysler; X. SA und A v Y. AG] interprets arbitration agreements as covering all disputes arising between the parties including non-contractual claims and even torts [*Dialysis Access v RMS Lifeline; Higher Regional Court Frankfurt, 5 U 167/84; Schoenduve Corp. v Lucent Techs.*].

46 This finding is supported by the United Kingdom House of Lords in *Fiona Trust v Privalov* in 2007. In that case, a Russian group of eight companies entered into charterparties with three companies, each containing the right for either party to elect to have "*any dispute arising under this charter*" to be referred to arbitration in England. The owners commenced court proceedings for the torts of conspiracy, bribery and breach of fiduciary duty whilst the charterers applied for a stay of court proceedings in favor of arbitration. The House of Lords liberally interpreted the arbitration agreement and found that claims for tort were covered by the scope of the arbitration agreement. In this context, the court stated that "*if businessmen go to the trouble of agreeing that their disputes be heard […] by a tribunal of their choice they do not expect […] that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause […]. [I]t seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed.*" In cases were parties want to assign different parts of their relationship to different judicial bodies "*they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.*" [*Fiona Trust v Privalov*].

47 Likewise, CLAIMANT and RESPONDENT as reasonable businessmen are presumed not to have expected to spend time and expenses in a costly and time-consuming dispute concerning the Tribunals' jurisdiction. To the contrary, both Parties made all efforts to save time and costs throughout the whole contractual relationship. Thus, CLAIMANT requests the Tribunal to interpret the Arbitration Agreement in a commercially sensible way and to find that it has jurisdiction to decide on a claim for contract adaption.

b. In any event, CLAIMANT's demand for an increased remuneration arises out of the Sales Contract

48 Even if the Tribunal applied a narrow approach of interpretation, CLAIMANT's request for contract adaptation is covered by the scope of the Arbitration Agreement as it has its legal basis within the Sales Contract. The term "*arising out of this contract*" is meant to cover all disputes containing a contractual obligation as a necessary element to pursue or defend a claim [*Aspero v Shearson American Express; Brogsitter; Higher Regional Court Frankfurt 5 U 167/84; Kaverit v Kone Corp.; Kroll v Doctor's Associates; Morgan v Smith Barney; Swiss Federal Tribunal, 1962; IBA Guidelines, para. 14; Lew/Mistelis/Kröll, para. 7-63*]. In particular, this includes a claim "*concerning a modification of the original contractual stipulations*" [*SpA Romea v Gottfried Ortner*].

49 CLAIMANT is entitled to an increased remuneration under both, Clause 12 of the Sales Contract and the CISG [*see para. 55*]. The Tribunal has to consider the scope and the meaning of the Hardship Clause contained in the Sales Contract to find that contract adaptation is the only fair decision in line with the Parties' common intention. Even if the Tribunal uses the CISG as the basis for a price adjustment, it has to take the contractual obligations into account when determining whether hardship has occurred. In either case, contractual obligations are the legal basis of CLAIMANT's demand. Thus, it is irrelevant whether the Arbitration Agreement refers to disputes "*in relation to*" the Sales Contract or even non-contractual claims. In any event, the claim for an increased remuneration arises out of the Sales Contract.

3. The Parties explicitly empowered the Tribunal to adapt the Sales Contract pursuant to Art. 28(3) Danubian Arbitration Law

50 Even if the Tribunal took recourse to the DAL to determine its power to decide on an adaptation of the Sales Contract, it would have jurisdiction to decide on an adaptation of the Sales Contract as CLAIMANT and RESPONDENT explicitly empowered the Tribunal to undertake price adjustments. Art. 28(3) DAL contains a general principle stating that arbitral tribunals need an empowerment to exercise all types of coercive powers [*PO2, p. 60 para. 36*]. Though Danubian Courts demand an explicit authorization, the empowerment must not fulfill any writing requirement [*Holtzmann/Neuhaus, Art. 28 para. 3; Musielak/Voit, § 1051 para. 4; Rauscher/Krüger, § 1051 para. 48*].

51 During the pre-contractual negotiations RESPONDENT's negotiator Mr Antley explicitly proposed to assign the Tribunal the task of contract adaptation in case the Parties cannot agree [*Exh. C8, p. 17*]. Although from a legal point of view it was not necessary, the Parties agreed to include an express reference into the Sales Contract. For the mere reason of the severe car accident that lead to the replacement of Ms Napravnik and Mr Antley, the clarification was not incorporated into the Sales Contract. However, the tentative agreement remains unchanged. This holds especially true since RESPONDENT'S consecutive negotiator did not note the issue at all [*Exh. R3, p. 35*]. In consequence, CLAIMANT and RESPONDENT explicitly empowered the Tribunal to adapt the Sales Contract.

B. RESPONDENT ACTS AGAINST GOOD FAITH BY CONTESTING THE TRIBUNAL'S JURISDICTION TO ADAPT THE SALES CONTRACT

52 CLAIMANT requests the Tribunal to find that RESPONDENT acts against the doctrine of Good Faith by objecting to the Tribunal's jurisdiction. The doctrine of Good Faith is not only an integral part of international law [*e.g. Art. 2(2) United Nations Charter; Art. 7(1) CISG; Art. 34(1) ICSID Convention*] but is also known to several legislations [*Art. 1134 French Civil Code; Art. 2(1) Swiss Civil*

Code; § 242 German Civil Code; Armstrong v Agricultural Ins; Director General of Fair Trading v First National Bank plc]. A corollary of this doctrine is the principle of *venire contra factum proprium* determining that a party cannot set itself in contradiction to its former behavior as long as the other party involved has acted in reasonable reliance on that parties' conduct [*Henriques, p. 519*].

53 RESPONDENT's employee Mr Shoemaker testified that he "*knew that CLAIMANT would not deliver if [he was] to reject their request [for contract adaptation] outright*" [*Exh. R4, p. 36*]. While leading CLAIMANT to believe in an amicable solution in order to encourage the last shipment of frozen semen, RESPONDENT never planned to keep its promise. Relying upon RESPONDENT's statement that they "*will certainly find an agreement on the price*" [*Exh. R4, p. 36*], CLAIMANT was caught off guard when RESPONDENT stopped all negotiations. RESPONDENT's reluctance towards any adjustment of the purchase price contradicts its previous behavior. For this reason, RESPONDENT acts against the principle of *venire contra factum proprium* and violates the principle of good faith.

CONCLUSION ISSUE I

54 The Tribunal has the jurisdiction and the power to adapt the Sales Contract since Mediterranean Law governs the Parties' Arbitration Agreement. RESPONDENT's reduction of the wording of the Arbitration Agreement has no legal impact on the Tribunal's power to increase CLAIMANT's remuneration. In any event, RESPONDENT's objection to the Tribunal's power constitutes a violation of good faith.

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

55 By signing the Sales Contract both Parties equally promised to abide all of its terms [*Exh. C5, p. 14*]. Shortly before CLAIMANT wanted to deliver the last 50 doses of frozen semen, the Equatorianian Government - RESPONDENT's country of origin - imposed a 30% tariff on agricultural products extending to frozen horse semen. Although the tariffs amounted to US$ 1,500,000, CLAIMANT naturally proceeded to perform the contract losing its profit margin and suffering a loss of US$ 1,250,000. Encouraged by RESPONDENT's guarantee to find a satisfying solution, CLAIMANT was confident that RESPONDENT would bear all additional costs. Instead of adhering to this promise, RESPONDENT preferred to resell the semen to third parties in breach of the Sales Contract [*PO2, p. 57 para. 20*].

56 Moreover, RESPONDENT's outrageous and unprofessional behavior jeopardized CLAIMANT's attempts to solve the dispute amicably [*Exh. C8, p. 18*]. Thus, CLAIMANT was left with no other choice than requesting the Tribunal to restore the contractual equilibrium by adding the tariffs to the purchase price. CLAIMANT explicitly insisted on the incorporation of a Hardship Clause to

avoid liability in unforeseen circumstances. Hence, CLAIMANT was thunderstruck when RESPONDENT tried to invoke the agreement on *DDP* delivery in order to circumvent its payment obligations.

57 As CLAIMANT suffers an immense loss whereas RESPONDENT unjustifiably profits from the imposition of the tariffs by its own Government, CLAIMANT requests the Tribunal to order RESPONDENT to pay the tariffs in the amount of US$ 1,250,000 as, **first**. CLAIMANT is entitled to an increased remuneration according to Clause 12 of the Sales Contract (**A.**); and, **second**, in the alternative, the Tribunal should increase the purchase price pursuant to Art. 79(1) CISG and Art. 6.2.3(4)(b) UPICC (**B.**).

A. CLAIMANT IS ENTITLED TO AN ADDITIONAL PAYMENT UNDER CLAUSE 12 OF THE SALES CONTRACT

58 Clause 12 of the Sales Agreement entitles CLAIMANT to an additional payment of US$ 1,250,000. Pursuant to Clause 12 of the Parties' Sales Contract, the "*Seller shall not be responsible for […] hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exh. C5, p. 14*].

59 RESPONDENT asserts that Clause 12 of the Sales Contract neither covers the tariffs nor provides for contract adaptation. However, this assertion is unfounded, not supported by evidence and against the facts of the case. **First**, an interpretation of Clause 12 guided by Art. 8 CISG shows that the imposed tariffs constitute a comparable unforeseen event (**I**.). **Second**, the Parties intended to restore the contractual equilibrium in the case of hardship (**II.**).

I. THE IMPOSED TARIFFS ARE A COMPARABLE UNFORSEEN EVENT IN THE SENSE OF CLAUSE 12 OF THE SALES CONTRACT MAKING THE CONTRACT MORE ONEROUS

60 Clause 12 of the Sales Agreement encompasses the imposition of tariffs as a comparable unforeseen event [*Exh. C5, p. 14*]. Art. 8(1) CISG contains the initial step in the process of interpreting the scope of the Hardship Clause by providing for a subjective approach of interpretation [*Huber/Mullis, p. 12*]. In a second step, the objective approach of interpretation contained in Art. 8(2) CISG serves as guidance [*Kröll et al., Art. 8 para. 3*]. Applying to both approaches, Art. 8(3) CISG specifies those elements which deserve due consideration in the process of interpretation.

61 **First**, the subjective approach contained in Art. 8(1) CISG reveals the Parties' intention to encompass the imposition of potential tariffs (**1.**). **Second**, the objective understanding of a reasonable third person regarding the wording of Clause 12 covers the tariffs imposed (**2.**). **In any case**, Clause 12 has to be interpreted *contra proferentem* against RESPONDENT (**3.**).

1. According to Art. 8(1), (3) CISG, the negotiation history reflects the Parties' intent to encompass potential trade restrictions

62 The subjective approach of Art. 8(1) CISG reveals the Parties' common intention to encompass tariffs in Clause 12. According to Art. 8(1) CISG, "*statements made by and other conduct of a party have to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*". While Art. 8 CISG serves as the main instrument to interpret an agreement's content [*Huber/Mullis, p.12; Kröll et al., Art. 8 para. 2*], the interpreter is entitled to look beyond the four corners of a contract as stated by Art. 8(3) CISG [*Franklins v Metcash; Kröll et al., Art. 8 para. 30; Schlechtriem/Schwenzer, Art. 8 para. 31;*]. In particular, special importance needs to be given to the draft, former correspondence as well as pre-contractual behavior [*Brunner, CISG, Art. 8 para. 16*].

63 The integration of the imposition of tariffs into the Hardship Clause constitutes a meeting of minds between the Parties as demonstrated by the following two reasons: **First**, the explicit incorporation of the Hardship Clause reveals the Parties' intention to counterbalance any risks exceeding *DDP* delivery risks (**a.**). **Second**, the Parties incorporated the Hardship Clause to exempt CLAIMANT from all risks going beyond matters of transportation of the semen (**b.**)

a. The Hardship Clause was intended to absorb the risks associated with *DDP* delivery

64 The Parties intended to include the Hardship Clause as a tool to counterbalance *DDP* delivery risks. As stated in CLAIMANT's general conditions, usually delivery *EXW* applies [*PO2, p. 56 para. 9*]. *EXW* stands for *Ex Works* meaning that the seller's delivery obligation is fulfilled by placing the goods either at the disposal of the buyer at the seller's premises or at any other specified location [*Incoterms 2010*]. In order to support RESPONDENT in establishing a racehorse stable, CLAIMANT agreed on delivery *DDP* Equatoriana. In contrast to *EXW*, *DDP* constitutes the most extensive obligation for the seller [*Piltz/Bredow, para. D-500*]. It stands for *Delivery Duty Paid* and obliges the seller to undertake all steps and bear all costs necessary to unload the goods at the agreed premises [*Brunner, Force Majeure, p. 131*]. Hence, parties usually incorporate hardship clauses in contracts containing *DDP* delivery terms to counterbalance the risks associated [*Brunner, Force Majeure, p. 132; Ramberg, p. 152*].

65 In an email dated 31st March 2017, CLAIMANT's negotiator Ms Napravnik pointed out that CLAIMANT was neither willing nor able to assume any further risks associated with "*changes in customs regulations or import restrictions*" [*Exh. C4, p. 12*]. For this reason, Ms Napravnik proposed to incorporate a hardship clause to "*address such subsequent changes*" [*Exh. C4, p. 12*]. At this time, the costs associated with *DDP* delivery amounted to only US$ 200. CLAIMANT did not only find itself

in a financially strained situation but also informed RESPONDENT about several negative experiences with former governmental impositions which seriously endangered the commercial basis of previous deals [*Exh. C4, p. 12*].

66 That is why CLAIMANT intended to set its delivery costs in stone by incorporating the Hardship Clause in order to avoid any further costs under all circumstances. Thus, excluding the tariffs from the Hardship Clause would circumvent its sole purpose as additional costs might easily arise given the broad obligation of *DDP* delivery. RESPONDENT did not only prepare the Hardship Clause, its negotiators even agreed on incorporating it in full knowledge of the former email correspondence [*PO2, p. 55 para. 5*]. Hence, RESPONDENT must have been aware of CLAIMANT's intention to incorporate the Hardship Clause as a risk-limiting tool. In consequence, the negotiation of the Sales Contract evidences the Parties' intention to incorporate the tariffs into the Hardship Clause.

b. The Parties incorporated the Hardship Clause to exempt CLAIMANT from all risks going beyond matters of transportation

67 The Hardship Clause was meant to cover all risks going beyond the purpose of providing RESPONDENT with the necessary transportation expertise. In an email dated 28th March 2017, RESPONDENT requested delivery *DDP* since it did not have the necessary expertise "*in the shipment of frozen semen including the necessary export and import documentation*" [*Exh. C3, p. 11*]. This lack of expertise resulted from a ban on artificial insemination which was only lifted shortly before the Parties started to negotiate the Sales Contract [*Exh. C1, p. 9*].

68 In addition, RESPONDENT urgently needed the semen before 2nd February 2018 to be able to use it within the breeding season prior to the anticipated reimposition of the ban in the end of 2018 [*Exh. C3, p. 11; PO2, p. 59 para. 33*]. In order to accommodate this wish and to ensure *"better transportation terms and swifter delivery*" [*Exh. C8, p. 17*], CLAIMANT agreed on delivery *DDP* [*Exh. C4, p. 12*]. However, it was "*clear to both Parties that <u>Claimant should not bear all risks</u> associated with such a delivery"* [*Exh. C8, p. 17 (emphasis added)*].

69 To decrease the major risks, CLAIMANT made the incorporation of the Hardship Clause a condition for entering into the Sales Contract [*Exh. C4, p. 12*]. Thus, the Hardship Clause was incorporated to ensure that any risks borne by CLAIMANT are limited to transportation matters.

2. A third person must have understood the tariffs as a "*comparable unforeseen event*" in the sense of the Parties' Hardship Clause

70 Applying the reasonable third person test, the wording of Clause 12 of the Sales Contract covers the tariffs imposed. The aforementioned Clause requires the cause of "*hardship*" to be either an additional health and safety requirement or a "*comparable unforeseen event*" [*Exh. C5, p. 14 para. 12*]. Pursuant to Art. 8(2) CISG, the reasonable third person test applies [*Lautenschlager, p. 259;*

Staudinger, Art. 8 para. 17]. Accordingly, "*statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances*".

71 A reasonable third person in the shoes of both, CLAIMANT and RESPONDENT would have understood the Hardship Clause to encompass the imposed tariffs. **First**, the Parties intended to cover all governmental regulations including the imposed tariffs (**a.**). **Second**, the imposition of the tariffs was unforeseeable for both Parties (**b.**).

a. The Hardship Clause covers all governmental regulations including the imposed tariffs

72 In general, the term "*hardship*" refers to "*severe and unpredictable changes in circumstances, which alter the contractual equilibrium fundamentally*" [*Kröll et al., Art. 79 para. 78; cf. Arroyo, p. 124*]. RESPONDENT's draft of the Hardship Clause further specified those circumstances to "*health or safety requirements or comparable unforeseen events*" [*Exh. C5, p. 14 para. 12*]. Health and safety requirements are "*the laws, rules, and principles that are intended to keep people safe from injury or disease*" [*health and safety in Cambridge Dictionary; cf. Batabyal*]. As those requirements are governmental regulations, a reasonable third person must have understood the comparable event as equally referring to a governmental regulation. The imposition of tariffs was performed by the Equatorianian Government [*Exh. C6, p. 15*], and, hence, the tariffs constitute a comparable event in the sense of Clause 12.

b. The imposition of the tariffs was comparable unforeseen in the sense of the Hardship Clause

73 The imposition of the tariffs was comparable unforeseen to both Parties and, thus, falls within the ambit of Clause 12 of the Sales Contract. An event is unforeseeable whenever the parties could neither have predicted nor anticipated its realization [*unforeseeable in Black's Law Dictionary, Cambridge Dictionary, Oxford Dictionary*].

74 An economic war between the Parties' countries of origin started an economical chain reaction which resulted in the imposition of the 30% tariff on agricultural products affecting the delivery of the semen. Already the triggering imposition of the tariffs by the newly elected Mediterranean President was not foreseeable – not even for economic analysists [*Exh. C6, p. 15*]. It was even more surprising that the Equatorianian Government took direct retaliatory measures by equally imposing a tariff on agricultural products as the country always upheld the principles of economic freedom [*Exh. C6, p. 15*]. In the end, economic analysts were perplex in consideration of both, the extent of the tariffs amounting to 30% as well as the scope covering frozen semen [*Exh. C6, p. 15*]. As not even the competent personnel within the custom authority knew about the broad ambit of the tariffs [*Exh. R4, p. 36*], it had crossed neither CLAIMANT's nor RESPONDENT's mind

that the semen was subject to a 30% tariff. Thus, the tariffs constitute a "*comparable unforeseeable event*" in the sense of Clause 12.

3. In any event, the Clause has to be interpreted *contra proferentem* against RESPONDENT

75 In any case, RESPONDENT bears the risk of an ambiguous wording as it drafted the Hardship Clause. As an internationally recognized rule of interpretation, the *contra proferentem rule* is generally applicable under the CISG [*Kröll et al., Art. 8, para. 24; Vogenauer, Art. 4.6, para. 2; Schlechtriem/Schwenzer (Eng), Art. 8, para. 49*]. According to the aforementioned rule any uncertainties arising out of an unclear contract term are to the detriment of the drafter itself [*Horne Coupar v Velletta; Himpurna California Energy Ltd v Republic of Indonesia; Michelle Seidel v TELUS Communications Inc; Whissell Ventures v Royal Insurance*].

76 In fact, RESPONDENT itself drafted the wording of the Hardship Clause which was finally added to Clause 12 of the Sales Contract [*PO2, p. 56 para. 12*]. However, RESPONDENT now seems to see ambiguities in the wording of Clause 12 by arguing that the tariffs are not encompassed as a "*comparable unforeseen event*". Given this ambiguities, RESPONDENT as the drafter is the one to bear any risk arising out of this ambiguity. Favoring the interpretation against RESPONDENT, the tariffs fall within the ambit of the Hardship Clause.

II. THE PARTIES INTENDED TO MAINTAIN THE CONTRACTUAL EQUILIBRIUM EVEN IN CASES OF HARDSHIP

77 The Parties' Hardship Clause provides for an increased remuneration as the Parties intended to maintain the contractual equilibrium. Art. 8 CISG also applies in order to fill contractual gaps [*Säcker/Rixecker, Art. 8 para. 7*]. In that case, tribunals shall seek the solution that the parties reasonably would have agreed on in order to fill the gap [*Säcker/Rixecker, Art. 8 para. 7; Schlechtriem/Schwenzer, Art. 8 para. 27;*]. When doing so, the tribunal shall consider both, Art. 8 CISG and the notion of Good Faith contained in Art. 7(1) CISG [*Mushroom Case; Koneru, p. 138; Kröll et al., Art. 7 para. 31; Molinuevo, p. 151*].

Clause 12 solely exempts one party from liability in case the contractual performance has become more onerous. It is, however, silent on the legal consequence in case the contractual performance has become more onerous but the party performs the contract anyway. As the contractual performance has become "*more onerous*" for CLAIMANT (**1.**), the Tribunal shall adhere to the Parties' intentions and restore the contractual equilibrium (**2.**).

1. The contractual performance has become more onerous for CLAIMANT

78 CLAIMANT faces a situation rendering the Contract more onerous and, thus, exceeds the threshold set by Clause 12. The Hardship Clause provides for a hardship situation if the performance of the

contract has become "*more onerous*". The determination of the exact threshold is subject to Art. 8 CISG. However, Art. 8 CISG cannot be invoked without recourse to the principle of good faith [*Higher Regional Court Cologne, 16 U 5/07; Mushroom Case; Kröll et al., Art. 7 para. 31; Powers, p. 343*]. Following the principle of good faith, the financial background of the parties has to be taken into account [*Brunner, Force Majeure, p. 425; Draetta, p. 357*].

79 Clause 12 of the Sales Contract has its origin in the ICC Hardship Clause 2003 providing for hardship if the performance became "*excessively onerous*" [*PO2, p. 56 para 12*]. Even though RESPONDENT lowered the standard when it changed the wording to "*more onerous*" (**a.**), the contractual performance has become "*excessively onerous*" since CLAIMANT loses any profit and faces a huge loss (**b.**).

a. RESPONDENT lowered the standard of the Hardship Clause by changing the wording from "*excessively onerous*" to "*more onerous*"

80 By changing the wording, RESPONDENT explicitly lowered the standard of the Hardship Clause. Whereas the term "*onerous*" only requires that some service, interest or condition is unequal in its value to what is promised [*Black, p. 262*], the term "*excessively onerous"* describes a situation, in which the contract falls into a major imbalance [*Fu, p. 119 para. 3.4.1.3.(2)*].

81 Looking at the word "*excessive*" in a literal way, the contractual burden must have become "*too much*" onerous [*excessive in Cambridge Dictionary*], i.e. an unreasonable burden for one party to perform the contract [*Brunner, Force Majeure, p. 214*]. To the contrary, the term "*more*" merely serves a comparative purpose [*more in Cambridge Dictionary*]. Hence, the contractual performance gets "*more onerous*" in case the performing party faces additional obstacles compared to the original contractual obligation.

82 RESPONDENT itself changed the wording of the ICC Hardship Clause 2003 from "*excessively onerous*" to "*more onerous*". Thereby, it lowered the threshold from an unreasonable burden to additional obstacles. Although RESPONDENT's employee Mr Antley initially considered the wording of the ICC Clause as being too broad, he was the one who suggested the wording which was finally added to Clause 12 [*PO2, p. 56 para. 12*]. If RESPONDENT relies upon its alleged intention to narrow the Hardship Clause, the Clause proves to be ambiguous and, consequently, has to be interpreted against its drafter. Therefore, Clause 12 sets a low standard for cases of hardship.

b. CLAIMANT not only loses any profit but also suffers a loss amounting to US$ 1,250,000 rendering the contractual performance more onerous

83 The contractual performance has become more onerous for CLAIMANT since it is not only left without any profit but also suffers a loss amounting to US$ 1,250,000. Pursuant to CLAIMANT's initial contractual obligation, CLAIMANT sold and delivered 100 doses of frozen semen for US$

100,000 per dose. Whereas the original price calculation included a profit margin of 5% amounting to US$ 5,000, the payment of the 30% tariffs leaves CLAIMANT with no profit at all causing an additional loss of US$ 25,000 per dose. Given the fact that the part of the price per dose which relates to the cost for delivery increased from US$ 200 to US$ 25,200, the costs for delivery increased by 12,500%. Hence, CLAIMANT faces additional obstacles in comparison to its initial contractual obligation.

84 This finding holds even more true when considering CLAIMANT's overall economic situation. CLAIMANT has been suffering losses from 2014 onwards [*PO2, p. 59 para. 29*]. Only due to several extensive restructuring measures and a substantial cut of its work force, CLAIMANT managed to stay in business [*Exh. C8, p. 17*]. RESPONDENT knew that CLAIMANT was going through an intense restructuring process [*PO2, p. 59 para. 29*] and that every additional financial burden might cause CLAIMANT's bankruptcy [*PO2, p. 59 para. 29*]. Thus, the performance of the contract has become more onerous.

2. The Tribunal shall exercise its power and restore the contractual equilibrium

85 CLAIMANT requests the Tribunal to adhere to the Parties' intention and to restore the contractual equilibrium. When parties fail to stipulate an express legal consequence, the contract still allows access to the application of an adaptation remedy as contracts are vulnerable to political and economic changes [*Bordacahar, p. 3; Brunner, Force Majeure, p. 517*]. This approach is the only way to create commercially sensible results and to ensure that contracts are kept alive [*Berger, Gap Filling, p. 16; Zaccaria, p. 137*]. For that reason, arbitrators "*adapt contracts to meet the needs and intentions of disputing parties, and by doing so, they contribute to the rule of law*" [*Bordacahar, p. 3*].

86 CLAIMANT and RESPONDENT explicitly agreed to assign the Tribunal the power to adapt the Sales Contract in case of hardship [*see para. 51*]. When CLAIMANT paid the tariffs, the contractual equilibrium has been upset. Hence, the Tribunal shall exercise its power and restore the contractual equilibrium for the following two reasons:

87 **First**, RESPONDENT subsequently acknowledged its duty to bear the additional tariffs. When determining the parties' hypothetical intentions, tribunals have to consider subsequent conduct pursuant to Art. 8(3) CISG. When RESPONDENT's employee Mr Shoemaker called CLAIMANT's employee Ms Napravnik, his "*primary concern was to ensure that the remaining 50 doses were actually shipped*" [*Exh. R4, p. 36*]. Since he knew that CLAIMANT would only deliver under the condition of an increased remuneration, Mr Shoemaker assured that they "*will certainly find an agreement on the price*" [*Exh. R4, p. 36*]. As he further stated that this information came either from RESPONDENT's legal department or the contract drafters [*Exh. R4, p. 36*], CLAIMANT had no doubt regarding the validity of RESPONDENT's promise.

88 **Second**, CLAIMANT must not be liable for the 30% tariffs under Clause 12 of the Sales Contract. Had CLAIMANT not delivered the last shipment of 50 doses of frozen semen, RESPONDENT would most likely have pursued a claim for damages. In this scenario, Clause 12 would have exempted CLAIMANT from liability. Nonetheless, CLAIMANT delivered the 50 doses of semen relying upon RESPONDENT's promise to renegotiate the purchase price. The Parties' intention to release CLAIMANT from liability remains unchanged. In order to enforce this intention, the Tribunal has to increase CLAIMANT's remuneration in the amount of the 30% tariffs, US$ 1,500,000. CLAIMANT already made the first step towards a balanced solution by waiving its profit margin of 5%, US$ 250,000 [*Not. Arb., p. 7 para. 18*].

89 For this reason, the Hardship Clause allows the Tribunal to adapt the Sales Contract and to increase the remuneration by US$ 1,250,000.

B. ALTERNATIVELY, THE TRIBUNAL SHALL AWARD CLAIMANT US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE SALES CONTRACT ACCORDING TO ART. 79(1) CISG AND ART. 6.2.3(4)(B) UPICC

90 In the alternative, CLAIMANT is entitled to an increased remuneration amounting to US$ 1,250,000 pursuant to Art. 79(1) CISG and Art. 6.2.3(4)(b) UPICC. Shortly before CLAIMANT planned to deliver, both Parties found themselves in the middle of an economic war between their countries of origin. Despite the imposition of a 30% tariff, CLAIMANT performed the contract relying upon RESPONDENT's promise to renegotiate the price [*Exh. C8, p.18*]. As RESPONDENT stopped all negotiations [*Exh. C8, p. 18*], the Tribunal should restore the contractual equilibrium by adding the tariffs to the purchase price by means of price adjustment.

91 **First**, the Parties did not derogate from Art. 79 CISG by including the Hardship Clause into the Sales Contract (**I.**). **Second**, CLAIMANT is entitled to an adaptation of the Sales Contract according to Art. 79(1) CISG and Art. 6.2.3(4)(b) UPICC (**II.**).

I. ART. 79(1) CISG APPLIES TO THE PRESENT HARDSHIP SITUATION SINCE THE PARTIES DID NOT DEROGATE FROM IT

92 Art. 79(1) CISG applies to the given hardship situation since the Parties did not derogate from it by including the Hardship Clause. Pursuant to Art. 6 CISG, the parties are empowered to exclude the CISG under the condition of an either intentional [*Brunner, CISG, Art. 6 para. 1; Kröll et al., Art. 6 para. 15*] or an implied exclusion as far as the parties' intention becomes crystal clear [*Kröll et al., Art. 6 para. 16*].

93 CLAIMANT and RESPONDENT explicitly agreed on the incorporation of the Hardship Clause indicating that both Parties equally placed value on the regulation of potential hardship situations. In

fact, the Parties never indicated their intention to derogate from the CISG at all. Rather, they wanted the Convention to coexist with the Hardship Clause serving as an additional safeguard. RESPONDENT's assertion that the Parties derogated from Art. 79 CISG is not more than another attempt to create obstacles for CLAIMANT to receive a reasonably remuneration. Thus, the Parties did in no way intend to derogate from Art. 79(1) CISG.

II. THE TRIBUNAL SHALL ADAPT THE CONTRACT ACCORDING TO ART. 79(1) CISG IN CONNECTION WITH ART. 6.2.3(4)(B) UPICC

94 CLAIMANT requests the Tribunal to restore the contractual equilibrium by means of price adjustment in the amount of US$ 1,250,000. Pursuant to Art. 79(1) CISG, "*[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract […]*".

95 In particular, the obligor is exempted from liability as long as an act of God inhibits the performance of its duties. Given the fact that the CISG does not explicitly address the occurrence of hardship, the concept of Art. 79(1) CISG serves as guidance in hardship situations [*Kröll et al., Art. 79 para. 79; Schlechtriem/Schwenzer (Eng), Art. 79 para. 4; Staudinger, Art. 79 para. 2*]. In the event hardship occurs requiring a price adjustment by means of contract adaptation, Art. 79(1) CISG in connection with the UPICC helps along [*Bonell, p. 113; Da Silveira, p. 337; Kröll et al., Art. 79 CISG, para. 85; Schwenzer, Force Majeure and Hardship, p. 724*].

96 Pursuant to Art. 6.2.3(4)(b) UPICC, if the tribunal finds hardship it "*may, if reasonable, adapt the contract with a view to restoring its equilibrium*". CLAIMANT requests the Tribunal to adapt the Sales Contract as, **first**, the UPICC are an adequate set of rules to supplement the CISG (**1.**); **second**, the imposition of tariffs constitutes hardship according to Art. 6.2.2 UPICC (**2.**) and, **third**, it is reasonable to restore the equilibrium by increasing CLAIMANT's remuneration in the amount of US$ 1,250,000 (**3.**).

1. The UNIDROIT Principles are an adequate set of rules to supplement the CISG

97 CLAIMANT requests the Tribunal to apply the UPICC to handle hardship under the CISG. The UPICC "*may be used to interpret or supplement uniform law instruments*", such as the CISG [*Preamble UPICC; Bonell, p. 110; Köhler, p. 60*]. The starting point when drafting the UPICC was the CISG [*Brunner, CISG, Art. 7 para. 9*]. Therefore, they perfectly serve as guidance to achieve a uniform application of the CISG [*Brunner, Force Majeure, pp. 418 et seq.*]. Since they are considered general principles under Art. 7(2) CISG and trade usage according to Art. 9(2) CISG, the Convention acknowledges the application of the UPICC [*ICC No. 8128; Arroyo, p. 28; Brunner, CISG, Art. 7*

para. 9; Garro, pp. 183 et seq.; Kröll et al., Art. 79, para. 85; Perillo, p. 9]. Consequently, the Tribunal shall apply the UPICC to handle the hardship situation under the CISG.

2. Due to the imposition of tariffs, the Tribunal shall find hardship according to Art. 6.2.2. UPICC

98 CLAIMANT requests the Tribunal to find hardship due to the imposition of the 30% tariffs according Art. 6.2.2 UPICC. Pursuant to the aforementioned Article, hardship is "*where the occurrence of events fundamentally alters the equilibrium of the contract […] because the cost of a party's performance has increased […]*". This may happen under the condition that the event was not known to the parties at the time of contract conclusion (**6.2.2.(a) UPICC**), the events could not reasonably have been taken into account by the disadvantaged party (**6.2.2.(b) UPICC**), that the event arose beyond the parties' control (**6.2.2.(c) UPICC**) and that the disadvantaged party did not assume the risk of the events (**6.2.2.(d) UPICC**).

99 The imposition of tariffs constitutes hardship since **first**, the tariffs lead to an alteration of the Sales Contract's equilibrium (**a.**), **second**, neither CLAIMANT nor RESPONDENT knew about the imposition of tariffs or could have taken the risk into account at the time when the Sales Contract was concluded (**b.**) and, **third**, the tariffs arose beyond both CLAIMANT's and RESPONDENT's control (**c.**) while, **fourth**, CLAIMANT did not assume the risk by agreeing on *DDP* delivery (**d.**).

a. The imposition of the tariffs alters the equilibrium of the Sales Contract

100 The imposition of the tariffs leads to an alteration of the contractual equilibrium according to Art. 6.2.2 UPICC. Whether a change of circumstances is fundamental is subject to a case-by-case-review taking various factors into consideration, *inter alia* a party's financial situation [*Da Silveira, p. 326*]. An alteration is fundamental when it amounts to a minimum of 50% of the costs or the value of the performance [*Brunner, Force Majeure, p. 427*]. If a party's financial ruin is impending, the threshold for hardship has to be lowered [*Brunner, Force Majeure, pp. 438 et seq.*; *Schwenzer, Force Majeure and Hardship, p. 716*].

101 Encouraged by RESPONDENT's promise to adjust the purchase price, CLAIMANT delivered the last shipment of frozen semen shouldering all additional costs. As a consequence of the tariffs CLAIMANT not only lost its profit of US$ 250,000 but additionally faces a loss amounting to US$ 1,250,000. Thus, CLAIMANT's loss is 500% higher than the profit it was initially entitled to.

102 In addition, RESPONDENT knew exactly about CLAIMANT's financial difficulties from 2014 onwards [*Exh. C8, p. 17*] alongside with strict restructuring measures which were decisive for the prolongation of its two main credit lines [*PO2, p. 59 para. 29*]. Since RESPONDENT pushes CLAIMANT to the edge of bankruptcy, the Tribunal should increase its remuneration in order to avoid

punishing CLAIMANT for its corporative behavior. Thus, the tariffs constitute hardship since they lead to an alteration of the contractual equilibrium.

b. CLAIMANT and RESPONDENT did not know about the imposition of the tariffs and could not reasonably have taken them into account at the time of contract conclusion

103 Both Parties did not know about the imposition of the tariffs and could not have reasonable taken the risks into account at the time when the Sales Contract was concluded. Under Art. 6.2.2(a) and (b) UPICC, the knowledge of the disadvantaged party is decisive when determining whether the risks could have been reasonably taken into account [*Vogenauer, Art, 6.2.2 para. 11*]. If catastrophic events are likely to occur, it is more difficult for a party to invoke hardship [*Vogenauer, Art, 6.2.2 para. 12*].

104 The imposition of tariffs by the Equatorianian Government came as a complete surprise since it has always been known as "*one of the biggest supporters of the existing system of free trade*" [*Exh. C6, p. 15*]. Even economic analysts were completely caught off guard [*Exh. C6, p.15*]. In addition, Equatoriana is not CLAIMANT's country of origin which makes it even harder to reasonably consider possible political actions. Thus, CLAIMANT cannot be accused of not having reasonably taken the political circumstances in Equatoriana, RESPONDENT's country of origin, into account.

c. CLAIMANT did not assume the risk by agreeing to *DDP* delivery considering the minor price adjustments

105 The minor price adjustment made in return for delivery *DDP* is incompatible with the assumption that CLAIMANT overtook the risk of unforeseeable tariffs. According to Art. 6.2.2(d) UPICC, the disadvantaged party cannot rely on hardship in case it has assumed the risk of the damaging event [*Vogenauer, Art, 6.2.2 para. 15*]. The assumption of risk does not have to be express, it can be derived from the circumstances or the nature of the contract [*Vogenauer, Art, 6.2.2 para. 15*].

106 Originally, CLAIMANT offered to sell the semen for US$ 99,500 [*Exh. C2, p. 10*]. RESPONDENT's demand for *DDP* delivery caused additional costs. Given these additional costs, CLAIMANT could only agree on changing its delivery terms from *EXW* to *DDP* against a price increase of US$ 1,000 per dose [*Exh. C4, p. 12*]. However, RESPONDENT was not willing to accept CLAIMANT's request for an additional US$ 1,000 per dose [*PO2, p. 56 para. 8*]. To temper this price increase, RESPONDENT agreed on the incorporation of the Hardship Clause [*PO2, p. 56 para. 12*]. Accepting this as a compromise, CLAIMANT in turn reduced the price increase by 50%, from US$ 1,000 to US$ 500 per dose [*PO2, p. 56 para. 8*]. Thus, the final purchase price added up to only US$ 100,000 per dose instead of the originally requested US$ 105,000 [*Exh. C5, p. 13*]. The small price increase would be disproportionate to the boundless extent of the tariffs risks. Given this moderate price adjust-

ment, RESPONDENT, as a reasonable businessperson, could not have expected CLAIMANT to assume major risks, such as the tariffs. Therefore, the tariffs constitute hardship since CLAIMANT did not assume the risk by agreeing to *DDP* delivery.

3. The Tribunal needs to restore the contractual equilibrium by increasing CLAIMANT's remuneration in the amount of US$ 1,250,000

107 CLAIMANT requests the Tribunal to find that it is reasonable to increase CLAIMANT's remuneration in the amount of US$ 1,250,000. Pursuant to Art. 6.2.3(3) and (4)(b) UPICC, the tribunal may reasonably adapt the contract "*with a view to restoring its equilibrium*" if the parties could not reach an agreement within a reasonable time. When doing so, the tribunal should fairly distribute the loss between the parties [*Vogenauer, Art. 6.2.3 para. 7*]. Whilst this distribution does not need to be equal to be fair, the Tribunal should consider the parties' risk allocation and make the performance bearable [*Vogenauer, Art. 6.2.3 para. 7*].

108 Immediately after the imposition of the tariffs CLAIMANT and RESPONDENT started to renegotiate the contractual price [*Exh. C8, p. 18*]. At a first glance, the uncooperative behavior of RESPONDENT's CEO jeopardized the attempt to find an agreement on the price [*Exh. C8, p. 18*]. At a second glace, RESPONDENT was never willing to admit to any further payments [*Exh. R4, p. 36*] and, hence, CLAIMANT's attempts to amicable solve the problem failed.

109 The Parties' original contractual agreement was to perform the Sales Contract in a cost covering way including a 5% profit margin for CLAIMANT [*see para. 106*]. Since CLAIMANT even agreed to waive its profit margin, only the re-implementation of a cost-covering price restores the contractual equilibrium.

110 Hence, the Tribunal should add the remaining loss caused by the tariffs of US$ 25,000 per dose to the purchase price. Covering the losses of all 50 doses of frozen semen, this leads to an increased remuneration of US$ 1,250,000. Thus, the Tribunal shall order RESPONDENT to pay further US$ 1,250,000 resulting from an adaptation of the purchase price.

CONCLUSION ISSUE II

111 CLAIMANT requests the Tribunal to order RESPONDENT to an additional payment of US$ 1,250,000. Clause 12 entitles CLAIMANT to an increased remuneration, as the Parties' intention was to encompass hardship in order to counterbalance *DDP* delivery. In the alternative, the Tribunal should restore the contractual equilibrium by means of an adaptation of the price under Art. 79(1) CISG and Art. 6.2.3(4)(b) UPICC.

ISSUE III: CLAIMANT IS ENTITLED TO SUBMIT THE PARTIAL INTERIM AWARD AS EVIDENCE

112 CLAIMANT is entitled to present the Partial Interim Award recently rendered in RESPONDENT's parallel arbitral proceeding as evidence to unmask RESPONDENT's true legal position. The underlying circumstances in the parallel arbitration evoke a *déja vu*: The contract contains not only a hardship clause as well as a choice of law clause in favor of Mediterranean Law, but also provides for delivery *DDP* and HKIAC Arbitration [*PO2, p. 60 para. 39*]. When the 25% tariffs imposed by the Mediterranean Government impeded RESPONDENT's contractual performance, it refused delivery and initiated HKIAC Arbitration in order to request a price adaptation instead [*PO2, p. 60 para. 39*].

113 Just like CLAIMANT, RESPONDENT based its request for adaptation on the contractual hardship clause or Art. 6.2.3(4)(b) Mediterranean Contract Law [*PO2, p. 60 para. 39*], which is a verbatim adoption of the UPICC [*PO1, p. 53 para. 4*]. Following RESPONDENT's legal arguments, the tribunal found that it has jurisdiction to decide upon the claim of contract adaptation under the parties' standard HKIAC arbitration clause [*PO2, p. 60 para. 39*].

114 Instead of facing the consequences of its own legal position, RESPONDENT artificially tries to depict the evidence as illegally obtained either due to an alleged hack of its computer system or a potential breach of a confidentiality agreement. However, CLAIMANT merely bought a copy of the PIA from a company providing intelligence on the horseracing industry [*PO2, p. 60 para. 39*].

115 **First**, CLAIMANT is entitled to produce the PIA as evidence under Art. 22.3 HKIAC Rules (**A.**). **Second,** the Tribunal shall draw adverse inference from RESPONDENT's reluctance to allow the PIA (**B.**). In any event, denying the admissibility of the PIA would result in a violation of CLAIMANT's right to be heard (**C.**).

A. CLAIMANT IS ENTITLED TO PRODUCE THE PARTIAL INTERIM AWARD ACCORDING TO ART. 22.3 HKIAC RULES

116 CLAIMANT is entitled to produce the PIA under the Parties' choice of arbitration rules. Under Art. 22.3 HKIAC Rules "*[…] the arbitral tribunal may allow […] a party to produce […] evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome*". The Tribunal has a broad discretion when determining the admissibility of evidence [*Balthasar, p. 426 para. 68; Moser/Bao, para. 9.153*]. In general, evidence is admissible whenever it is relevant to the case and material to its outcome [*German Federal Court of Justice VI ZR 233/17; Moser/Bao, para. 9.162; Pilkov, p. 148*].

117 Despite RESPONDENT's various attempts to create procedural obstacles by inventing stories about CLAIMANT's alleged illegal behavior, CLAIMANT fulfills all requirements for the submission of evidence. **First**, the PIA is *prima facie* admissible evidence under Art. 22.2 HKIAC Rules (**I.**). **Second**, there are no exceptional reasons rendering the PIA inadmissible (**II.**).

I. THE PARTIAL INTERIM AWARD IS *PRIMA FACIE* ADMISSABLE ACCORDING TO ART. 22.2 HKIAC RULES

118 The PIA is *prima facie* admissible under Art. 22.2 HKIAC Rules. The Article attributes the Tribunal the competence to determine "*the admissibility, relevance, materiality and weight of evidence, including whether to apply strict rules of evidence*". Accordingly, the PIA is admissible as, **first**, it is relevant to this case and important to its outcome (**1.**); and, **second**, RESPONDENT does not comply with its burden of proof (**2.**).

1. The Partial Interim Award is relevant to this case and material to its outcome since it exposes RESPONDENT's contradictory behavior

119 The PIA is relevant to this case and material to its outcome since it exposes RESPONDENT's contradictory behavior. Evidence is relevant and material to the outcome of the case whenever the requesting party would not be able to fully present its case or complete its considerations of all legal issues [*Born, pp. 2363 et seq.; Kaufmann-Kohler/Bärtsch, p. 18; Lotfi, p. 102; Marghitola, p. 49; McAllister/Bloom, pp. 36 et seq.; Moser/Bao, para. 9.161*; *Pilkov, p. 149*].

120 The PIA's content is going to demonstrate that RESPONDENT itself considers price adaptation as the only legitimate reaction to the sudden imposition of tariffs [*PO2, p. 60 para. 39*]. In addition, it reveals RESPONDENT's legal position in favor of the Arbitral Tribunal's jurisdiction and power to adapt contracts under a standard arbitration agreement [*PO2, p. 60 para. 39*].

121 Mirroring RESPONDENT's behavior to the present case would leave it arguing against its own words and, therefore, reveals its contradictory behavior. There is no other way but presenting the PIA to prove RESPONDENT's real attitude towards the qualification of tariffs as hardship [*PO2, p. 60 para. 39*] and the Tribunal's jurisdiction to undertake contract adaptations [*PO2, p. 60 para. 39*]. Thus, the PIA is material and relevant to the outcome of the case.

2. RESPONDENT does not comply with its burden to proof the alleged illegal acquisition of the information

122 RESPONDENT does not comply with its burden to proof the alleged illegal acquisition of the information. Pursuant to Art. 22.1 HKIAC Rules, each party has to prove "*the facts relied on to support its claim or defence*". The party objecting to the admissibility of evidence bears the burden of proof and has to present "*convincing*" arguments against the evidence production [*ICC No. 6497; ICC No. 7047; Kubalczyk, p. 104; O'Malley, p. 322; O'Sullivan; Pilkov, p. 150*]. A higher standard of proof

applies in case the challenging party raises strong allegations, i.e. the accusation of criminal behavior [*Oil Field of Texas v Iran; Velasquez Rodriguez Case; Pietrowski, pp. 379, 380*].

123 CLAIMANT became aware of the parallel proceedings at the annual breeder conference in Mediterraneo [*PO2, p. 60 para. 40*]. However, RESPONDENT alleges that either an illegal hack of its computer system or a breach of a confidentiality agreement led to the release of the information [*Letter by Fasttrack, p. 51*] without providing any evidence at all. Especially since RESPONDENT accuses CLAIMANT of committing a hack and, thus, of criminal behavior it is absolutely key for the Tribunal to strictly adhere to a high standard of burden of proof in order to prevent false accusations. As RESPONDENT has not brought forward any supporting evidence to justify its accusations, RESPONDENT does not meet its burden of proof at all.

II. EVEN IF THE TRIBUNAL FOLLOWED RESPONDENT'S ALLEGATIONS, THE PARTIAL INTERIM AWARD REMAINS ADMISSABLE

124 Assuming but not conceding that either a hack or a word-of-mouth communication through former employees led to the disclosure of information, the admissibility of the PIA remains unchanged. Art. 22.2 HKIAC Rules empowers the tribunal to decide on the admissibility of evidence [*Moser/Bao, para. 9.153*]. The tribunal has to weigh "*the different issues involved and issue a tailor-made decision*" when excluding evidence [*cf. Horvath/Wilske, p. 145; Esso v Plowman*]. In particular, it has to give due consideration to the legal burden of proof and each party's right to present its case [*Zuberbühler et al., p. 168 para. 6*]. Hence, evidence can only be excluded in very rare and special circumstances [*German Federal Court of Justice VI ZR 233/17; Pilkov, p. 148*].

125 Contrary to RESPONDENT's allegations [*Letter by Fasttrack, p. 51*], the underlying circumstances of the present case do not justify an exclusion of the PIA. CLAIMANT bought a copy of the award from a company providing intelligence on the horseracing industry [*PO2, p. 61 para. 41*]. RESPONDENT alleges that this company could have received the award only due to a hack of its computer systems or from one of its former employees involved in the parallel arbitration and that this would justify the PIA's inadmissibility [*Letter Fasttrack, p. 51; PO2, p. 61 para. 41*].

126 **First**, a hack of RESPONDENT's computer system does not affect the PIA's admissibility (**1.**). **Second**, the violation of either contractual or statutory confidentiality obligations results in no legitimate reason to deny the production of the PIA (**2.**). **Third**, in any event, CLAIMANT presents the PIA with clean hands (**3.**).

1. The alleged hack of RESPONDENT's computer system does not impair the admissibility of the Partial Interim Award

127 CLAIMANT requests the Tribunal to find that the alleged hack of RESPONDENT's computer system does not affect the PIA's admissibility. When weighing the Parties' interests, the Tribunal shall

consider that, **first**, CLAIMANT's submission of the PIA is consistent with the IBA Rules on the Taking of Evidence [hereinafter: IBA Rules] (**a.**); and, **second**, RESPONDENT cannot rely on any exclusionary rules of evidence (**b.**).

a. CLAIMANT's submission of the Partial Interim Award is in line with the IBA Rules on Taking of Evidence

128 The production of the PIA is consistent with the IBA Rules. Though Art. 9(2) IBA Rules provide a variety of reasons on which evidence might be excluded, it does not address the issue of improperly obtained evidence [*Kubalczyk, p. 101; Valcke, ICCA Sydney: Hot Topics; Zuberbühler et al., p. 171 para. 18*]. Hence, the absence of provisions excluding evidence that has been obtained without authorization leads to the conclusion that such evidence must be admissible [*Poudret/Besson, para. 647*; *Sandifer, pp. 189 et seq.*; *Sicard-Mirabel/Derains, p. 208; Simpson/Fox, pp. 192 et seq.*]. Since the IBA Rules are an internationally and universally recognized standard for arbitrators [*Kläsener/Dolgorukow, p. 302; Redfern/Hunter, para. 6.95; Webster, Art. 27-44*], CLAIMANT suggests the Tribunal to use this finding as a guidance. Consequently, the production of the PIA potentially obtained during a computer hack is consistent with the IBA Rules.

b. RESPONDENT cannot rely on any exclusionary rules on evidence

129 RESPONDENT cannot invoke exclusionary rules on evidence. Although RESPONDENT aims to put a spoke in CLAIMANT's wheel by raising false accusations, it cannot deny that the PIA is admissible evidence. **First**, there is no such thing as exclusionary rules on evidence in international arbitration (**i.**). **Second**, the Parties' choice for international arbitration forbids any recourse to national rules on evidence (**ii.**).

i. A general principle rendering any illegally obtained evidence as inadmissible does not exist in international arbitration

130 In international arbitration, there is no general principle existent rendering any illegally obtained evidence as inadmissible. The only doctrine rendering improperly obtained evidence inadmissible *per se*, is the Fruit of the Poisonous Tree Doctrine under US criminal law [*Nardone v United States; Boykin/Havalic, p. 1 fn 1*]. However, this doctrine is alien to most civil law systems [*Horvath/Wilske, pp. 144 et seq.*]. Outside US Criminal Law, the admissibility of illegally obtained evidence is evaluated by a case-by-case analysis [*Horvath/Wilske, p. 145*]. First and foremost, arbitral tribunals shall seek the truth and adhere to the right to be heard as well as the quest for a fair trial [*Caratube v Kazakhstan; ConocoPhillips v Venezuela; German Federal Court of Justice VI ZR 233/17; Yukos v Russian Federation; Kodek, p. 539*]. Hence, the admissibility of evidence has its limits only when it turns into an abuse of rights [*cf. Horvath/Wilske, p. 145*].

131 CLAIMANT finds itself in the position of having all information it needs to prove its case without being able to present it. As the PIA itself does not contain any commercially sensitive information, denying the PIA's admissibility would result in penalizing the potential hack as criminal behavior. However, the Tribunal is not in charge of sanctioning any possible criminal actions [*Redfern/Hunter, para. 5.83*]. If RESPONDENT seeks criminal punishment, it should file a criminal charge. The Tribunal should consider that CLAIMANT is unable to present its case without the production of the PIA. In consequence, CLAIMANT's legal rights outweigh RESPONDENT's interest in sanctioning the alleged computer hack.

132 This conclusion is fortified by international awards considering "*WikiLeaks*"-publications [*Caratube v Kazakhstan; Yukos v Russian Federation*]. In those cases, the tribunals were confronted with documents that were undisputedly subject to prior computer hacks. However, both tribunals admitted the non-privileged documents without spending any thought on the admissibility. In doing so, the tribunals expressed their opinion that the overriding importance of seeking the truth outweighs any potential concern on the evidence's origin. Likewise, the PIA is an important piece of the big puzzle proving RESPONDENT's obligation to pay the tariffs. Consequently, there exist no international rules on evidence rendering the PIA inadmissible.

ii. CLAIMANT's and RESPONDENT's choice for international arbitration excludes the applicability of any exclusionary rules on evidence

133 CLAIMANT's and RESPONDENT's choice for international arbitration excludes the applicability of any exclusionary rules on evidence. Precluding evidence from submission is foreign to international arbitration [*Kubalczyk, p. 100; Pietrowski, p. 378; Waincymer, p. 817*]. As a consequence, tribunals tend to be significantly reluctant to exclude evidence [*Yukos v Russian Federation; Caratube v Kazakhstan; Corfu Channel Case; Blair/Vidak Gojkovic, p. 238; Pietrowski, p. 378*].

134 CLAIMANT and RESPONDENT were unable to reach an agreement concerning the jurisdiction of state courts as each party was reluctant to accept the other party's home jurisdiction [*Exh. C3, p. 11; Exh. C4, p. 12*]. In consequence, they agreed on a dispute resolution mechanism detached from any national jurisdiction in a neutral venue [*Exh. R2, p. 34*]. The recourse to exclusionary rules of evidence from national legislations would jeopardize this agreement. Thus, CLAIMANT's and RESPONDENT's choice for arbitration forbids any applicability of exclusionary rules of evidence.

***2.* The effect of any confidentiality obligation between RESPONDENT and its former employees have no legal impact on the admissibility of the Partial Interim Award**

135 Any confidentiality obligation between RESPONDENT and its former employees have no legal impact on CLAIMANT's right to produce the PIA. RESPONDENT alleges that the company CLAIMANT bought a copy of the PIA from must have received the PIA due a breach of either statutory or

contractual confidentiality obligations [*Letter Fasttrack, p. 50; PO2, p. 61 para. 41*]. In consequence, RESPONDENT asserts that the violation of confidentiality renders the PIA inadmissible. Contrary to this assertion, **first**, any confidentiality obligation between RESPONDENT and its former employees constitutes an *inter partes* relation (**a.**); and, **second**, the general principle of transparency underlying Art. 3(1) UNCITRAL Transparency Rules [hereinafter: Transparency Rules] demands the production of the PIA (**b.**).

a. Both, statutory and contractual confidentiality constitutes an *inter partes* obligation that cannot affect the admissibility of the Partial Interim Award

136 RESPONDENT cannot invoke a breach of confidentiality to render the PIA inadmissible. According to Art. 42.1(b) HKIAC 2013 Rules, any award made in the arbitration may not be published. By incorporating the HKIAC Rules, the parties agreed to an express duty of confidentiality [*Moser/Bao, para. 12.30*]. However, the obligation of confidentiality does not bind any third party [*Enron v Argentine Republic; Noussia, p. 37; cf. Smeureanu, p. 152*].

137 **First**, any contractual confidentiality obligation between RESPONDENT and its former employees is limited to an *inter partes* obligation. RESPONDENT alleges that the employees who distributed the PIA to the company committed to a contractual confidentiality agreement [*PO2, p. 61 para. 41*]. However, this contractual obligation is an abstract and independent legal relationship without any legal impact on CLAIMANT. If RESPONDENT wishes to sanction any potential confidentiality breaches, it is well advised to address the obligors of the confidentiality agreement, i.e. its former employees.

138 **Second**, the possible breach of statutory confidentiality obligations does not affect the admissibility of the PIA. Pursuant to Art. 42.2 HKIAC 2013 Rules, the duty of confidentially encompasses witnesses [*Moser/Bao, para. 12.31*]. However, the enforceability of such duties is questionable [*Cook/Garcia, p. 248 fn. 67*] and lies upon the party calling the witness [*Art. 74(b) WIPO Rules; Born, p. 2803; Smeureanu, p. 92*]. Irrespective of the fact whether RESPONDENT or its opponent called the two former employees as witnesses, the duty to maintain the confidentiality lies with one of those parties. Any breach of said duty falls outside CLAIMANT's sphere of responsibility and, thus, any leak of information cannot be detrimental to CLAIMANT.

139 This finding is supported by *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, decided by an ICSID tribunal in 2010 [*Enron v Argentine Republic*]. In that case, the plaintiff requested to hear an employee of the defendant as witness. The defendant objected to the request since the witness would have breached a confidentiality agreement concluded between the defendant and the wit-

ness. The tribunal admitted the witness stating that "*the question concerning [the witnesses'] eventual obligations [of confidentiality] with the Republic of Argentina is a matter that can only be dealt with in the context of the contract between [the witness] and the Argentine Republic or its agencies and not before this Tribunal*".

140 Thus, the effect of any confidentiality obligation between RESPONDENT and its employees is limited to an *inter partes* relation and, therefore, is irrelevant for the production of the PIA.

b. The general principle of transparency underlying Art. 3(1) Transparency Rules demands the production of the Partial Interim Award

141 The concept of transparency as evidenced by Art. 3(1) Transparency Rules demands the submission of the PIA. According Art. 3(1) Transparency Rules, "*the following documents shall be made available to the public: […] awards of the arbitral tribunal.*" Initially, the Transparency Rules were drafted to apply in treaty-based Investor-State-Arbitrations [*Art. 1 Transparency Rules; Paulsson/Petrochilos, p. 420 para. 2*]. Nevertheless, the principle "*[j]ustice needs to be seen to be done*" requires to equally apply the underlying principles to commercial arbitration [*cf. Eslami, p. 411; Ribeiro/Douglas, p. 55*]. Tribunals must be given an insight in parallel decisions in order to render comparable decisions in comparable circumstances [*Eslami, p. 409; Karton, p. 463*]. Otherwise, two tribunals of the same arbitral institution considering the exact same circumstances might render completely different decisions [*Brekoulakis, p. 1176; Eslami, p. 410*]. Hence, arbitral awards in general need to be available in order to maintain a consistent jurisprudence [*Eslami, p. 409; Fouchard/Gaillard/Goldman, para. 384*].

142 If the Tribunal does not take notice of the PIA's content, it risks to render a divergent decision though the underlying circumstances in the parallel arbitration are identical [*PO2, p. 60 para. 39*]. As the HKIAC Rules chosen by the Parties do not offer a possibility to appeal, producing the PIA is the only way for the Tribunal to ensure a uniform jurisprudence [*cf. Eslami, p. 409*]. For this reason, the general principle of transparency underlying Art. 3(1) Transparency Rules overrides the principle of confidentiality and demands the admissibility of the PIA.

3. In any event, CLAIMANT presents the Partial Interim Award with clean hands

143 In any event, CLAIMANT presents the PIA with clean hands. According to the doctrine of clean hands, a party's request to submit evidence may be dismissed if the requesting party acts in bad faith [*Mirzayev, p. 99; Zuberbühler et al., p. 167*]. This principle is also reflected by Art 9(7) IBA Rules, stating that in case a party "*[…] has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may […] take such failure into account […]*" [*Zuberbühler et al., p. 166*]. In cases dealing with the illegal obtainment of evidence, the admission of this evidence was dependent on the criteria whether the submitting party committed the illegal act itself [*ConocoPhillips v Venezuela; Methanex v United States; Yukos v Russian Federation*].

144 CLAIMANT was never involved in any illegal action. Instead, CLAIMANT's CEO learned about RESPONDENT's parallel arbitral proceedings at the annual breeder conference and was promised a copy of the PIA by the former CEO of RESPONDENT's opponent [*PO2, p. 60 para. 40*]. However, the latter could not keep its promise so that CLAIMANT had to buy the PIA from a company providing intelligence on the horse racing industry [*PO2, p. 61 para. 41*]. Whether or not this company committed any illegal actions is beyond both, CLAIMANT's knowledge and its sphere of control. CLAIMANT cannot be held responsible for a possible hack. In consequence, CLAIMANT is by no means involved in any illegal actions and, thus, presents the PIA with clean hands.

B. THE TRIBUNAL SHALL DRAW ADVERSE INFERENCE FROM RESPONDENT'S HESITANCE TO ALLOW THE PARTIAL INTERIM AWARD

145 In any event, CLAIMANT requests the Tribunal to draw adverse inference from RESPONDENT's reluctance to allow the PIA. It is widely recognized in international arbitration that adverse inference can be drawn [*Amaral, p. 6; Giovanni/Mourre, p. 198; Waincymer, p. 775*]. Tribunals should conclude from a party's failure to produce evidence that the information contained is adverse to that party's interests [*Art. 9(5) IBA Rules*; *Giovanni/Mourre, p. 195; Zuberbühler et al., p. 183*]. However, the principle is not limited to this scenario and should generally apply in case one party is eager to prevent the submission of unfavorable evidence [*Giovanni/Mourre, p. 200, 206*].

146 RESPONDENT "*strongly objects*" to the submission of the PIA due to an alleged violation of contractual or statutory confidentiality [*Letter by Fasttrack, p. 51*]. However, the background of the parallel proceedings is already known to the Tribunal [*PO2, p. 60 para. 39*]. Thus, RESPONDENT artificially tries to prevent CLAIMANT from verifying the obvious. Consequently, CLAIMANT requests the Tribunal to infer from RESPONDENT's reluctance that the PIA contains important facts.

C. DENYING THE SUBMISSION OF THE PARTIAL INTERIM AWARD WOULD RESULT IN A VIOLATION OF CLAIMANT'S RIGHT TO BE HEARD UNDER ART. 34(2)(A)(II) DAL

147 Denying CLAIMANT's submission of evidence results in a violation of CLAIMANT's right to be heard. Pursuant to Art. 13.1 HKIAC Rules, the Tribunal shall "*afford the parties a reasonable opportunity to present their case*". In particular, each party shall have a sufficient possibility to put forward its legal and factual submissions [*Gbangbola v Smith; Tianlun Steel Wire v Dongying Construction; Born, pp. 3494 et seq.; Marriott, p. 281; Wolff, p. 302*]. Frustrating the Parties' right to fully present its legal position by excluding important evidence might result in setting aside procedure according to Art. 34(2)(a)(i) DAL [*Baldwin, p. 245; Berger/Jensen, p. 420; Schwarz/Konrad, para. 20-035*].

148 Without being able to produce the PIA, CLAIMANT finds itself in the position of being obliged to proof its statements pursuant to Art. 19.1 HKIAC Rules while concurrently being denied the possibility to do so. Only with the submission of the PIA, CLAIMANT can underpin its claim paving the way for the Tribunal to render an award containing all relevant facts. RESPONDENT must not be successful with pushing through its unfaithful intentions as the submission of the PIA would shed a completely different light on the case. For this reason, dismissing the evidence would violate CLAIMANT's right to be heard.

CONCLUSION ISSUE III

149 CLAIMANT is entitled to produce the PIA according to Art. 22.3 HKIAC Rules since it is relevant to the case and material to its outcome. RESPONDENT can neither rely on an alleged hack of its computer system nor on a breach of confidentiality to render the PIA inadmissible. In any event, the Tribunal shall draw adverse inference from RESPONDENT's reluctance to allow the PIA. Denying the submission of the PIA would violate CLAIMANT's right to be heard.

REQUEST FOR RELIEF

In consideration of the above submissions, CLAIMANT respectfully requests the Tribunal to:

(1) find that it has jurisdiction to decide on the requested price adaptation,

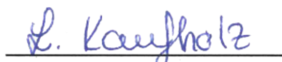
(2) order RESPONDENT to pay additional US$ 1,250,000 based on an adaptation of the purchase price under

- Clause 12 of the Sales Contract or
- Art. 79(1) CISG and Art. 6.2.3(4)(b) UPICC and

(3) to grant CLAIMANT's request to produce the Partial Interim Award as evidence.

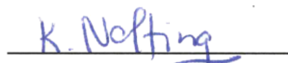
Respectfully submitted on 6th December 2018, Hannover

Friederike Bock



Lisbeth Kaufholz

Dennis Löher



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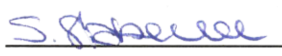

Sophie Strohbecke

Alexander Wilhelmy