Sixteenth Annual
Willem C. Vis East International Commercial Arbitration Moot
31st March – 7th April 2019

Memorandum for CLAIMANT

On behalf of
Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo
(CLAIMANT)

Against
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana
(RESPONDENT)

CARINA GRABNER • UTA MÜLDNER • JESSICA SCHNEEBERGER •
CHARLES ERIC SWANSON • MAXIMILIAN ZIMMER• JONAS ZINKAND

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Apr	April
Art./Arts.	Article/Articles
A.S.	*Anonim Şirket* (Turkish Joint Stock Company)
Aug	August
CAS	Court of Arbitration for Sport
CEO	Chief Executive Officer
cf.	*conferre (*confer)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Co.	Company
Corp.	Corporation
DAL	Danubian Arbitration Law (verbatim adoption of the Model Law)
DDP	Delivered Duty Paid (Incoterm 2010)
Dec	December
ed.	edition
emph. add.	emphasis added
et al.	*et alia* (and others)
Exhibit C	CLAIMANT's Exhibit (1-8)
Exhibit R	RESPONDENT's Exhibit (1-4)
Feb	February
f./ff.	*folio* (following)/ (and the following)

Hague Principles	The Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
HKIAC Rules 2013	2013 Hong Kong International Arbitration Centre Administered Arbitration Rules
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
i.e.	*id est* (that is to say)
Inc.	Incorporation
IUSCT	Iran-United States Claims Tribunal
Jan	January
Ltd.	Limited
Mar	March
MCL	Mediterranean Contract Law (verbatim adoption of the UNIDROIT Principles)
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments
MüKoBGB	*Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Munich Commentary on the German Civil Code)
MüKoHGB	*Münchener Kommentar zum Handelsgesetzbuch* (Munich Commentary on the German Commercial Code)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y., 10 June 1958)

No.	Number
Oct	October
p./pp.	page/pages
para. /paras.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PICC	Principles for International Commercial Contracts
PLC	Public Limited Company
PO	Procedural Order
Pte. Ltd.	Private Limited
S.A.	*Société Anonyme* (French Limited Company)/ *Sociedad Anónima* (Mexican Limited Company)
S.A.S.	*Société par Actions Simplifiée* (French Simplified Joint-Stock Company)
Sales Agreement	Frozen Semen Sales Agreement
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollar
USA	United States of America
v.	versus
WTO	World Trade Organization

INDEX OF AUTHORITIES

BEISTEINER, Lisa	The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective In: Austrian Yearbook on International Arbitration 2014 Wien (2014) pp. 77-122 Cited as: *Beisteiner*	In para. 36
BERGER, Klaus Peter	Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense In: International Arbitration (2001) pp. 1-17 Cited as: *Berger*	In para. 40
BERGER, Klaus Peter	Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration Volume II: Handbook, 3rd ed. Kluwer Law International (2015) Cited as: *Berger II*	In para. 13
BERNADINI, Piero	Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause In: Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention The Hague (1999) pp. 197-203 Cited as: *Bernadini*	In paras. 13, 18

BLACKABY, Nigel **PARTASIDES**, Constantine **REDFERN**, Alan **HUNTER**, Martin	Redfern and Hunter on International Arbitration, 6th ed. New York (2015) Cited as: *Redfern/Hunter*	In para. 13
BORN, Gary	International Commercial Arbitration, 2nd ed. Alphen aan den Rijn (2014) Cited as: *Born*	In paras. 8, 13, 25, 28, 33, 69, 70
BORN, Gary	The Law Governing Arbitration Agreements: An International Perspective In: Singapore Academy of Law Journal (2014) pp. 814-848 Cited as: *Born II*	In para. 13
BOYKIN, James H. **HAVALIC**, Malik	Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration In: Transnational Dispute Management 5 (2015) Cited as: *Boykin/Havalic*	In paras. 56, 60

BREKOULAKIS, Stavros L.	The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? In: Journal of International Arbitration, (2007) pp. 341-364 Cited as: *Brekoulakis*	In para. 11
BROWN, Alexis C.	Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration In: American University International Law Review (2001) pp. 969-1025 Cited as: *Brown*	In paras. 69, 73
BRUNNER, Christoph	Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration Kluwer Law International (2008) Cited as: *Brunner*	In paras. 85, 114, 117, 119, 129, 144, 148
CISG ADVISORY COUNCIL OPINION	CISG Advisory Council Opinion No. 7 Exemption of Liability for Damages under Article 79 of the CISG Available at: https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html (consulted on 05.12.2018) cited as: *CISG-AC Opinion No. 7*	In paras. 114, 129

DELAUME, Georges R.	Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria In: Tulane Law Review (1989) pp. 573-611 Cited as: *Delaume*	In para. 23
DERAINS, Yves **SCHWARTZ**, Eric A.	A Guide to the ICC Rules of Arbitration, 2nd ed. Kluwer Law International (2005) Cited as: *Derains/Schwartz*	In para. 8
DIMATTEO, Larry A. **JANSSEN**, André **MAGNUS**, Ulrich **SCHULZE**, Reiner	International Sales Law Baden-Baden (2016) Cited as: *DiMatteo/Author*	In para. 100
FERRARI, Franco **KIENINGER**, Eva-Maria **MANKOWSKI**, Peter **OTTE**, Karsten **SAENGER**, Ingo **SCHULZE**, Götz **STAUDINGER**, Ansgar	Internationales Vertragsrecht: ROM-I VO – CISG – CMR – FactÜ, 3rd ed. München (2018) Cited as: *Ferrari/Kieninger/Mankowski/Author*	In para. 30

FERRARIO, Pietro	The Adaptation of Long-Term Gas Sale Agreements by Arbitrators Kluwer Law International (2014) Cited as: *Ferrario*	In para. 85, 129
FROHLOFF, Jan	Verletzung von Schiedsvereinbarungen: Eine Untersuchung des deutschen Schiedsverfahrensrechts zu den Pflichten der Schiedsparteien und den Rechtsfolgen ihrer Verletzung Tübingen (2017) Cited as: *Frohloff*	In para. 69
FUCCI, Frederik R.	Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts New York (2006) Available at: https://files.arnoldporter.com/hardship_excuse_article.pdf (consulted on 04.12.2018) Cited as: *Fucci*	In para. 119
GAILLARD, Emmanuel **SAVAGE**, John	Fouchard, Gaillard, Goldman in International Commercial Arbitration The Hague (1999) Cited as: *Fouchard*	In para. 11, 28, 73

GERMAN FEDERAL AGENCY FOR CIVIC EDUCATION	Handelsgewichtetes Zollniveau based on data by the World Bank Available at: bpb.de/nachschlagen/zahlen-und-fakten/globalisierung/52506/zoelle (consulted on 06.12.2018) Cited as: *German Federal Agency for Civic Education*	In paras. 97, 104
GERTZ, Craig M.	The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage In: Northwestern Journal of International Law & Business (1991) pp. 163-186 Cited as: *Gertz*	In para. 23
GIRSBERGER, Daniel **VOSER**, Nathalie	International Arbitration: Comparative and Swiss Perspectives, 3rd ed. Kluwer Law International (2016) Cited as: *Girsberger/Voser*	In paras. 8, 79
GLICK, Ian **VENKATESAN**, Niranjan	Choosing the Law Governing the Arbitration Agreement In: Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles Kluwer Law International (2018) pp. 131-150 Cited as: *Glick/Venkatesan*	In para. 26

HARISANKAR, K. Sathyapalan	International Commercial Arbitration in Asia and the Choice of Law Determination Journal of International Arbitration (2013) pp. 621-636 Cited as: *Harisankar*	In para. 15
HONNOLD, John O. **FLECHTNER**, Harry M.	Uniform Law for International Sales under 1980 United Nations Convention, 4th ed. Alphen aan den Rijn (2009) Cited as: *Honnold/Flechtner*	In paras. 30, 114
HONSELL, Heinrich	Kommentar zum UN-Kaufrecht Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG), 2nd ed. Berlin, Heidelberg (2010) Cited as: *Honsell/Author*	In para. 129
HORVATH, Günther J. **WILSKE**, Stephan **LEW**, Julian D. W.	Guerrilla Tactics in International Arbitration Kluwer Law International (2013) Cited as: *Horvath/Author*	In para. 60

HUBER, Peter **MULLIS**, Alastair	The CISG: A New Textbook for Students and Practitioners Sellier (2007) Cited as: *Huber/Mullis*	In para. 31
ISHIDA, Yasutoshi	CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something In: Pace International Law Review (2018) pp. 331-382 Cited as: *Ishida*	In paras. 117, 119, 129, 144
KEMP, Malcom	The Confidentiality of Commercial Arbitration: A Key Exception Available at: http://conventuslaw.com/report/the-confidentiality-of-commercial-arbitration-a/ (consulted on 04.12.2018) Cited as: *Kemp*	In para. 73
KOLLER, Christian	Die Schiedsvereinbarung In: Schiedsverfahrensrecht I Wien, New York (2012) pp. 91-337 Cited as: *Koller*	In para. 13

KRÖLL, Stefan	Ergänzung und Anpassung von Verträgen durch Schiedsgerichte Köln, Berlin et al. (1998) Cited as: *Kröll*	In paras. 85, 148
KRÖLL, Stefan	Die Entwicklung des Schiedsrechts 2015 In: Neue Juristische Wochenschrift (2016) pp. 849-852 Cited as: *Kröll II*	In para. 44
KRÖLL, Stefan **MISTELIS**, Loukas A. **VISCASILLAS**, Pilar Perales	UN Convention on Contracts for the International Sales of Goods (CISG), 2nd ed. München (2018) Cited as: *Kröll/Mistelis/Viscasillas/Author*	In paras. 106, 111, 114, 117, 119, 126, 143
LOOKOFSKY, Joseph M.	The 1980 United Nations Convention on Contracts for the International Sale of Goods In: International Encyclopaedia of Laws – Contracts, Suppl. 29 The Hague (2000) pp. 1-192 Cited as: *Lookofsky*	In para. 30

LEW, Julian D. M. **MISTELIS**, Loukas A. **KRÖLL**, Stefan	Comparative International Commercial Arbitration Kluwer Law International (2003) Cited as: *Lew/Mistelis/Kröll*	In para. 33
MANKIW, Nicholas Gregory **TAYLOR,** Mark P.	Economics, 4th ed. Hampshire (2017) Cited as: *Mankiw/Taylor*	In paras. 92, 121, 143
MAROSSI, Ali Z.	Shifting the Burden of Proof in the Practice of the Iran – United States Claims Tribunal In: Journal of International Arbitration (2011) pp. 427-443 Cited as: *Marossi*	In para. 77
MAYER, Pierre	The Limits of Severability of the Arbitration Clause In: Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention The Hague (1999) pp. 261-267 Cited as: *Mayer*	In paras. 11, 17

MELIS, Werner	Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration In: Journal of International Arbitration (1984) pp. 213-221 Cited as: *Melis*	In para. 119
MEYER HAUSER, Bernhard F.	Anwaltsgeheimnis und Schiedsgericht Zürich (2004) Cited as: *Meyer-Hauser*	In para. 55
MOSER, Michael **BAO**, Chiann	A Guide to the HKIAC Arbitration Rules Oxford (2017) Cited as: *Moser/Bao*	In para. 65
MOSES, Margaret L.	The Principles and Practice of International Commercial Arbitration, 3rd ed. Cambridge (2017) Cited as: *Moses*	In para. 11

NASSAR, Nagla	Sanctity of Contracts Revisited Dordrecht, Boston, London (1995) Cited as: *Nassar*	In para. 129
O'MALLEY, Nathan D.	Rules of Evidence in International Arbitration an Annotated Guide London (2012) Cited as: *O'Malley*	In para. 79
PILTZ, Burghard **BREDOW**, Jens	Incoterms München (2016) Cited as: *Piltz/Bredow/Author*	In para. 100
REISMAN, Michael W. **FREEDMAN**, Eric E.	The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Arbitration In: American Journal of International Law (1982) pp. 737-753 Cited as: *Reisman/Freedman*	In para. 77

SÄCKER, Franz Jürgen **RIXECKER**, Roland **OETKER**, Hartmut **LIMPERG**, Bettina	Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 3, 7th ed. München (2016) Cited as: *MüKoBGB/Author*	In paras. 29, 117, 119, 124
SCHMIDT, Karsten	Münchener Kommentar zum Handelsgesetzbuch, Volume 5, 4th ed. München (2018) Cited as: *MüKoHGB/Author*	In para. 125
SCHMIDT-AHRENDTS, Nils **HÖTTLER**, Philipp	Anwendbares Recht bei Schiedsverfahren in Deutschland In: Zeitschrift für Schiedsverfahren (2011) pp. 267-276 Cited as: *Schmidt-Ahrendts/Höttler*	In para. 44
SCHLECHTRIEM, Peter **SCHROETER**, Ulrich G.	Internationales UN Kaufrecht, 6th ed. Tübingen (2016) Cited as: *Schlechtriem/Schroeter*	In paras. 29, 114. 126

SCHROETER, Ulrich G.	Rückkaufverpflichtungen und „contra proferentem" - Regel unter dem UN-Kaufrecht In: Internationales Handelsrecht (2014) pp. 173–216 Cited as: *Schroeter*	In para. 111
SCHWENZER, Ingeborg	Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed. Oxford (2015) Cited as: *Schlechtriem/Schwenzer/Author*	In paras. 29, 30, 31, 40, 100, 101, 106, 111, 114, 117, 123, 126
SCHWENZER, Ingeborg	Force Majeure and Hardship in International Sales Contracts In: Victoria University of Wellington Law Review (2008) pp. 709-725 Cited as: *Schwenzer*	In para. 85, 119, 129
SCHWENZER, Ingeborg **JAEGER**, Florence	The CISG in Arbitration In: The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer Alphen aan den Rijn (2017) pp. 311-325 Cited as: *Schwenzer/Jaeger*	In para. 28

SHACKLETON, Stewart R.	Global Warming: Milder Still in England (Part II) In: International Law Review (1999) pp. 117 ff. Cited as: *Shackleton*	In para. 73
UNCITRAL WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICE	Report of the Working Group on International Contract Practices on the Work of its eighteenth session In: Yearbook of the United Nations Commission on International Trade Law New York (1988) pp. 53-103 Cited as: *UN Doc. A/CN.9/263*	In para. 40
VOGENAUER, Stefan	Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd ed. Oxford (2015) Cited as: *Vogenauer/Author*	In paras. 136, 137, 139, 140, 142, 143
VON STAUDINGER, Julius **MARTINEK**, Michael	Wiener UN-Kaufrecht / Kommentar zum Bürgerlichen Gesetzbuch (BGB) mit Einführungsgesetz und Nebengesetzen Volume 2, 16th ed. Berlin (2018) Cited as: *Staudinger/Author*	In paras. 29, 114, 123, 126, 129

WAINCYMER, Jeffrey	Procedure and Evidence in International Arbitration Kluwer Law International (2012) Cited as: *Waincymer*	In paras. 56, 79
WEICK, Günther	Rechtsvergleichende Untersuchung und Vorschlag für eine einheitliche europäische Lösung In: Zeitschrift für Europäisches Privatrecht (2014) pp. 281-312 Cited as: *Weick*	In para. 106
WELSER, Irene	The Arbitrator and the Arbitration Procedure, Efficiency-Today's Challenge in Arbitration Proceedings In: Austrian Yearbook on International Arbitration 2014 Wien (2014) pp. 151-167 Cited as: *Welser*	In para. 23
WORLD INTELLECTUAL PROPERTY ORGANISATION	Protection of undisclosed information Available at: https://www.wipo.int/patents/en/topics/trade_secrets.html (consulted on 06.12.2018) Cited as: *WIPO*	In para. 58

ZACCARIA, Elena C.	The Effects of Changed Circumstances in International Commercial Trade In: International Trade and Business Law Review (2004) pp. 135-182 Cited as: *Zaccaria*	In para. 106

INDEX OF CASES

	Higher Regional Court Brandenburg 18 November 2008 Case No. 6 U 53/07 CISG Online No. 1734 Citied as: *Beer Case*	In para. 129
	Higher Regional Court Cologne 14 October 2002 Case No. 16 U 77/01 CISG Online No. 709 Citied as: *Designer Clothes Case*	In para. 106
	Higher Regional Court Munich 31 August 2015 Case No. 34 Sch 11/13 Cited as: *Electricity Case*	In para. 44
International Court of Justice	United Kingdom v. Albania International Court of Justice 9 April 1949 Cited as: *Corfu Channel Case*	In para. 60
Kenya	Kundan Singh Construction Ltd. v. Tanzania National Roads Agency High Court of Kenya 8 December 2012 Case No. 171/2012 Cited as: *Kundan Singh v. Tanzania*	In para. 11

Singapore	FirstLink Investments Corp Ltd. v. GT Payment Pte. Ltd. and others High Court of the Republic of Singapore 14 May 2014 Case No. HC 915/2013 Cited as: *FirstLink v. GT Payment*	In para. 11
	BCY v. BCZ High Court of the Republic of Singapore 16 August 2016 Case No. HC 502/2016 Cited as: *BCY v. BCZ*	In para. 11, 13, 17, 25, 26
	Soh Beng Tee & Co Pte. Ltd. v. Fairmount Development Pte. Ltd. Court of Appeal 9 May 2007 Case No. CA 100/2006 Cited as: *Soh Beng Tee v. Fairmount Development*	In para. 79
Spain	Sociedad Cooperativa Epis-Centre vs. La Palentina S.A. Supreme Court of Spain 17 February 1998 Case No. 3587/1996 CISG Online No. 1333 Cited as: *Epis-Centre v. La Palentina*	In para. 29
Sweden	Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc. Supreme Court of Sweden 27 October 2000 Case No. T 1881-99 Cited as: *Bulgarian Foreign Trade Bank v. Trade Finance*	In para. 73

Switzerland	Federal Court of Switzerland 27 March 2014 Case No. 4A_362/2013 Cited as: *Football Federation of Ukraine Case*	In para. 60
United Kingdom	Dolling-Baker v. Merrett & Another Court of Appeal 21 March 1990 Case No. 1990 WL 753385 Cited as: *Dolling-Baker v. Merrett*	In para. 73
	Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd. Court of Appeal 28 January 1993 Case No. 2399 Cited as: *Harbour Assurance v. Kansa Insurance*	In para. 25
	Ali Shipping Corporation v. Shipyard Trogir Court of Appeal 19 December 1997 Case No. APP.L.R. 12/19 Cited as: *Ali Shipping v. Shipyard Trogir*	In para. 73
	Fiona Trust & Holding Corporation & others v. Yuri Privalov & others Court of Appeal 24 January 2007 Case No. EHC 2583 Cited as: *Fiona Trust v. Privalov*	In para. 25

Sulamérica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A. Court of Appeal 16 May 2012 Case No. A3/2012/0249 Cited as: *Sulamérica v. Enesa*	In paras. 13, 26
London & Leeds Estates Ltd. v. Paribas Ltd. (No. 2) English High Court 28 July 1994 Case No. 1995 WL 1084753 Cited as: *London & Leeds Estates v. Paribas*	In para. 73
Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha Queen's Bench Division Commercial Court 26 June 1984 Case No. 1984 WL 281979 Cited as: *Oxford Shipping v. Nippon Yusen Kaisha*	In para. 73
Union of India v. McDonnell Douglas Corp. Queen's Bench Division Commercial Court 22 December 1992 Case No. 1993 WL 963197 Cited as: *India v. McDonnell*	In para. 13
Hassneh Insurance Co of Israel v. Stuart J Mew Queen's Bench Division Commercial Court 22 December 1992 Case No. 1993 WL 963287 Cited as: *Hassneh Insurance v. Stuart J Mew*	In para.73

Westwood Shipping Lines Inc and Another v. Universal Schiffahrtsgesellschaft mit beschränkter Haftung and Another Queen's Bench Division Commercial Court 11 December 2012 Case No. 1340 of 2012 Cited as: *Shipping Lines v. Universal Schiffahrtsgesellschaft*	In para. 73
Teekay Tankers Ltd. v. STX Offshore & Shipbuilding Co. Ltd. Queen's Bench Division Commercial Court 15 February 2017 Case No. CL-2014-000271 Cited as: *Teekay Tankers v. STX*	In para. 73
Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. VSC Steel Coy Ltd. Commercial Court 19 December 2013 Case No. 2013 WL 6536704 Cited as: *Habas Sinai v. VSC Steel Coy*	In para. 15
KYE Gbangbola & Lisa Lewis v. Smith & Sherriff Ltd. Technology and Construction Court 20 March 1998 Case No. 3 All ER 730 Cited as: *Gbangbola & Lewis v. Smith Sherriff*	In para. 79

United States of America	Pennsylvania Board of Probation and Parole v. Scott U.S. Supreme Court 25 June 1998 Case No. 524 U.S. 357 Cited as: *Pennsylvania Board of Probation Parole v. Scott*	In para. 55
	Iran Aircraft Industries and Iran Helicopter Support and Renewal Company v. Avco Corp. Court of Appeals of the United States, 2nd Circuit 24 November 1992 Case No. 980 F.2d 141 Cited as: *Iran Aircraft v. Avco*	In para. 79
	Townes v. City of New York Court of Appeals of the United States, 2nd Circuit 6 May 1999 Case No. 176 F.3d 138 Cited as: *Townes v. City of New York*	In para. 55
	J.J. Ryan Sons, Inc. v. Rhone Poulenc Textile S.A. Court of Appeals of the United States, 4th Circuit 13 December 1988 Case No. 863 F.2d 315 Cited as: *J.J. Ryan Sons v. Rhone Poulenc Textile*	In para. 33
	Qingdao Free Trade Zone Genius International Trading Co., Ltd. v. P and S International, Inc. District Court for the District of Oregon 16 September 2009 Case No. 08-1292-HU Cited as: *Qingdao v. P and S*	In para. 79

Wultz v. Bank of China Limited	In para. 60
District Court for the Southern District of New York	
17 April 2013	
Case No. 942 F. Supp. 2d 452	
Cited as: *Wultz v. Bank of China*	

Bible v. United Student Aid Funds	In para. 56
District Court for the Southern District of Indiana	
14 March 2014	
Case No. 1:13-cv-00575-TWP-TAB	
Cited as: *Bible v. United Student Aid Funds*	

INDEX OF ARBITRAL AWARDS

	ICC Case No. 9812 of 2009 ICC International Court of Arbitration Bulletin Vol. 20 No.2 69 2009 Cited as: *ICC 9812*	In para. 33
	ICC Case No. 16369 of 2011 Yearbook Commercial Arbitration 2014 pp. 169-215 2014 Cited as: *ICC 16369*	In paras. 106, 114
International Centre for Settlement of Investment Disputes (ICSID)	ICSID Case No. ARB/10/14 Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3013.pdf (consulted on 04.12.2018) Cited as: *ICSID ARB/10/14*	In para. 55
	ICSID Case No. ARB/10/01 Available at: https://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf (consulted on 04.12.2018) Cited as: *ICSID ARB/10/01*	In para. 55
	Methanex Corporation v. the United States of America Available at: https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (consulted on 20.11.2018) Cited as: *Methanex v. USA*	In para. 60

Permanent Court of Arbitration (PCA)	PCA Case No. AA 227 of 2014 Yukos Universal Limited v. the Russian Federation Available at: https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf (consulted on 04.12.2018) Cited as: *PCA AA 227*	In para. 55
Iran-United States Claims Tribunal IUSCT	IUSCT Case No. 567-213/215-3 Dadras International et al. v. Iran et al. Iran–U.S. Claims Tribunal Reports. Volume 31, p. 127 (1995) Cited as: *IUSCT 567-213/215-3*	In para. 77
Arbitration Institute of the Stockholm Chamber of Commerce (SCC)	SCC Case No. V (079/2005) RoslnvestCo Ltd. v. the Russian Federation Available at: https://www.italaw.com/sites/default/files/case-documents/ita0720.pdf (consulted on 04.12.2018) Cited as: *SCC V 079/2005*	In para. 55
Court of Arbitration for Sport (CAS)	CAS Case No. 2009/A/1879 Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano Available at: https://www.wada-ama.org/sites/default/files/resources/files/cas_2009_a_1879_valverde_v_coni_en_0.pdf (consulted on 04.12.2018) Cited as: *CAS 2009/A/1879*	In para. 60

	CAS Case No. 2011/A/2425 Available at: http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/97.pdf (consulted on 04.12.2018) Cited as: *CAS 2011/A/2425*	In paras. 56, 60
OTHER	Quintette Coal v. Japanese Steel Companies 28 May 1990, *unpublished* Secondary Source: Ferrario, p. 185, fn. 608 Cited as: *Quintette Case*	In para. 33

STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**"), the most renowned stud farm of Mediterraneo, and Black Beauty Equestrian ("**RESPONDENT**"), collectively the "**PARTIES**". RESPONDENT is a stud farm in Equatoriana. The PARTIES concluded a contract regarding the sale of frozen racehorse semen.

21 Mar 2017	RESPONDENT enquires about the availability of frozen semen from Nijinsky III, in order to establish a new breeding program. Meanwhile, RESPONDENT already planned to resell a significant amount of said doses.
24 Mar 2017	CLAIMANT offers RESPONDENT the requested doses of frozen semen at US$ 99,500 per dose, to be picked up by RESPONDENT.
28 Mar 2017	Surprisingly, RESPONDENT disagrees with the suggested price and the applicable law and asks CLAIMANT to deliver.
31 Mar 2017	CLAIMANT asks for the inclusion of a hardship clause and maintains that the risk regarding the delivery of the frozen semen remains with RESPONDENT.
12 Apr 2017	The PARTIES main negotiators were injured shortly after they had orally agreed on the need for a hardship clause and a dispute resolution clause.
6 May 2017	The PARTIES sign the Sales Agreement including a hardship clause, a choice of law clause in favour of Mediterranean law and the seat of arbitration.
19 Dec 2017	Equatoriana surprisingly imposes a 30% import tariff on agricultural products.
20 Jan 2018	CLAIMANT immediately contacts RESPONDENT to discuss a price increase, after learning that frozen semen is also affected by the tariff.
21 Jan 2018	RESPONDENT assures CLAIMANT that a solution would be found. CLAIMANT sends the last shipment and pays the tariff of US$ 1,500,000.
2 Feb 2018	CLAIMANT finds out that RESPONDENT has quietly been reselling the semen.
12 Feb 2018	In a meeting to find a solution for the tariffs, RESPONDENT's CEO storms out and refuses to renegotiate the price severing all ties with CLAIMANT.
2 Oct 2018	CLAIMANT is told that RESPONDENT argued for a price increase in a separate arbitral proceeding.

SUMMARY OF ARGUMENTS

1 CLAIMANT and RESPONDENT signed a Sales Agreement with the promise of entering into a fertile long-term relationship. The exceptional willingness of CLAIMANT to take a leap of faith and meet its contractual obligations by paying the colossal tariffs that suddenly came into effect upfront showed a remarkable strength of character. At the same time, RESPONDENT sought to undermine the agreement between the PARTIES from the outset by planning to resell the frozen semen without the necessary consent of CLAIMANT before the ink dried on the Sales Agreement.

Issue 3: CLAIMANT's upfront tariff payment requires contract adaptation.

2 Pursuant to the contractual Hardship Clause and the CISG, tariffs shall be borne by RESPONDENT. The PARTIES agreed RESPONDENT shall be responsible for any risks associated with the delivery carried out by CLAIMANT. When the tariffs came into effect, RESPONDENT gave the illusion of a faithful partner before stabbing CLAIMANT in the back by not paying the tariff as promised once the shipment was secured. Thereby the payment of the tariffs fell on CLAIMANT's shoulders, distorting the equilibrium of the contract. Hence, the Arbitral Tribunal should use its power to adapt the contract to give effect to the Sales Agreement.

Issue 2: The Arbitral Tribunal should use its discretion to admit the evidence.

3 In a separate arbitration, RESPONDENT felt entitled to contract adaptation, in response to the imposition of a tariff that was even lower than in the present case. The evidence will allow CLAIMANT to prove that the PARTIES had matching intents regarding the understanding of the Hardship Clause and the allocation of risks at the time of contract conclusion. RESPONDENT tries to hide mask its real intention by alleging that the evidence was obtained in an unlawful manner. However, CLAIMANT did not have any part in the disclosure of the evidence and excluding the evidence would violate CLAIMANT's right to be heard.

Issue 1: The Arbitral Tribunal has the power to adapt the Sales Agreement.

4 The PARTIES agreed on Mediterranean law to govern the Arbitration Agreement. Under Mediterranean law, arbitration agreements are interpreted in an adaptation friendly manner, empowering the arbitral tribunal to adapt a contract. During the contract negotiations both PARTIES agreed that an arbitral tribunal should have the power to adapt the Sales Agreement. The PARTIES based the Arbitration Agreement on a broad wording ensuring that any dispute will be heard in front of an arbitral tribunal. The additional inclusion of the Hardship Clause leaves no doubt that the Arbitral Tribunal is also empowered to adapt the Sales Agreement.

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION AND THE POWER TO ADAPT THE SALES AGREEMENT

5 CLAIMANT requests the Arbitral Tribunal to find that it has jurisdiction and the power to adapt the Frozen Semen Sales Agreement ("**Sales Agreement**") [*Exhibit C5, pp. 13f.*].

6 The Arbitral Tribunal has jurisdiction to hear the case **[A]**. Furthermore, the Arbitral Tribunal's power to rule on contract adaptation is based on clause 15 of the Sales Agreement ("**Arbitration Agreement**") [*Exhibit C5, p. 14, clause 15*] **[B]**, a conclusion supported by Danubian Arbitration Law ("**DAL**") **[C]**.

A. The Arbitral Tribunal has jurisdiction to hear the case

7 The general jurisdiction of the Arbitral Tribunal to hear the case is undisputed between the PARTIES [*PO2, p. 61, para. 48*]. However, RESPONDENT falsely denies the Arbitral Tribunal's specific jurisdiction and power to adapt the Sales Agreement [*Answer to the Notice of Arbitration, p. 31, para. 12*].

8 The Arbitral Tribunal is competent to decide on its own jurisdiction. This competence is determined by the law of the seat of arbitration ("**lex arbitri**") [*Born, p. 1533*]. In their Arbitration Agreement, the PARTIES chose Danubia as the seat of arbitration [*Exhibit C5, p. 14, clause 15*]. Danubia has adopted the Model Law [*PO1, p. 53*]. Therefore, the Danubian Arbitration Law applies as the lex arbitri. Pursuant to Art. 16(1) DAL "*the arbitral tribunal may rule on its own jurisdiction*" which reflects the well-established principle of competence-competence [*Born, p. 1047f.; Derains/Schwartz, p. 111f.; Girsberger/Voser, p. 134*]. Thus, the Arbitral Tribunal is authorised to rule on its own jurisdiction.

B. The Arbitral Tribunal has the power to adapt the Sales Agreement based on the Arbitration Agreement

9 The Arbitral Tribunal's power to rule on contract adaptation is determined by interpretation of the Arbitration Agreement. The law of Mediterraneo governs the interpretation of the Arbitration Agreement **[I].** The interpretation under Mediterranean Law reveals that the Arbitral Tribunal is empowered to adapt the Sales Agreement **[II]**.

I. Mediterranean law applies to the interpretation of the Arbitration Agreement

10 In clause 14 of the Sales Agreement, the PARTIES explicitly chose the law of Mediterraneo to govern the Sales Agreement [*Exhibit C5, p. 14, clause 14*].

11 The parties' intent must be assessed to determine the law applicable to an arbitration agreement [*FirstLink v. GT Payment; Kundan Singh v. Tanzania; Moses p. 76*], taking into consideration all circumstances of the case [*BCY v. BCZ; Mayer, p. 267*]. The circumstances thereby to be considered are international business practise, drafting history and an economic analysis [*cf. ICC 7929; cf. Fouchard, paras. 476, 1472; cf. Brekoulakis, p. 352*].

12 It is the PARTIES' intent that the choice of law for the Sales Agreement extends to the Arbitration Agreement **[1]**. This finding is based on the drafting history of the Sales Agreement **[2]** and an economic analysis of the PARTIES' business relationship **[3]**. Finally, the doctrine of separability allows for the application of Mediterranean law **[4]**.

1. The choice of Mediterranean law for the Sales Agreement extends to the Arbitration Agreement

13 When the parties have included an express choice of law in the contract, this is usually proof of a common intent of the parties to have their choice of law apply to all contract clauses, unless there is an apparent agreement to the contrary [*ICC 6840; Koller, para. 3/61; Born, p. 550*]. The "*prevailing view*" [*Berger II, p. 424, para. 20-57*] in both jurisprudence and legal literature confirms this [*ICC 2626; Sulamérica v. Enesa; BCY v. BCZ; India v. McDonnell; Redfern/Hunter, para. 3.12*]. Especially, when the arbitration agreement is a clause forming part of a main contract, "*the contracting parties intend their entire relationship to be governed by the same system of law*" [*BCY v. BCZ; cf. Born, p. 580; cf. Redfern/Hunter, para. 3.12*]. It is the exception and not the rule for parties to choose separate laws to apply to the contract on the one hand and the arbitration agreement on the other hand [*Bernadini, p. 197; Born, p. 491; Born II, para. 33f.*].

14 The PARTIES explicitly agreed that "*the Sales Agreement shall be governed by the law of Mediterraneo*" [*Exhibit C5, p. 14, clause 14*]. The use of the term "*Sales Agreement*" in clause 14 [*Exhibit C5, p. 14*] refers to the entire Sales Agreement including the Arbitration Agreement. RESPONDENT itself uses the term Sales Agreement when referring to the Arbitration Agreement [*Answer to the Notice of Arbitration, p. 30, paras. 7f.*]. Further, there is no apparent agreement indicating that the choice of law in clause 14 of the "*Sales Agreement*" [*Exhibit C5, p. 14, clause 14*] only refers to 14 of the 15 clauses. The Arbitration Agreement constitutes a part of the Sales Agreement and is not a free-standing agreement.

15 Contrary to RESPONDENT's opinion, the law of the seat of arbitration does not govern the interpretation of the Arbitration Agreement [*Answer to the Notice of Arbitration, p. 30, para. 6*]. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will be governed by the same law "*irrespective of the seat of arbitration*" [*Harisankar, p. 630*]. The

choice of the seat of arbitration is not sufficient to displace the parties' implied choice included in the express choice of law governing the sales contract [*Habas Sinai v. VSC Steel Coy*].

16 In conclusion, the PARTIES impliedly agreed for Mediterranean law to apply to the interpretation of the Arbitration Agreement, because they did not make any provisions to the contrary when expressly choosing the law of the Sales Agreement.

2. The drafting history of the Sales Agreement leads to an application of Mediterranean law to the Arbitration Agreement

17 To determine the law applicable to the interpretation of an arbitration agreement, all circumstances of the case including the drafting history need to be considered [*cf. BCY v. BCZ; Mayer, p. 267*].

- In the email dated **28 March 2017**, RESPONDENT agreed to "*accept the application of the Law of Mediterraneo"* [*Exhibit C3, p. 11, para. 4*]. RESPONDENT did not differentiate between the law applicable to the Sales Agreement and the Arbitration Agreement [*Exhibit C3, p. 11, para. 4*].
- In the email dated **10 April 2017**, RESPONDENT suddenly proposed the application of Equatorianian law for the Arbitration Agreement [*Exhibit R1, p. 33, para. 2*].
- In the email dated **11 April 2017**, CLAIMANT immediately rejected RESPONDENT's proposal and erased the choice of law regarding the Arbitration Agreement [*Exhibit R2, p. 34, para. 3*]. In this email to RESPONDENT, CLAIMANT stated to have an internal policy which "*requires special approval by the creditors' committee*" if a contract is submitted to foreign law [*Exhibit R2, p. 34, para. 2*]. Thereby, RESPONDENT was made aware that CLAIMANT had to apply its domestic Mediterranean law to the Sales Agreement including the Arbitration Agreement in order to avoid waiting for approval by its creditors' committee. RESPONDENT's interest in a quick performance [*Notice of Arbitration, p. 5, para. 6*] explains why RESPONDENT did not object to Mediterranean law governing the Arbitration Agreement.

18 Additionally, in light of RESPONDENT's prior experience with HKIAC arbitrations, not making use of the choice of law clause in the HKIAC Rules can be understood as an acceptance on behalf of RESPONDENT.

19 As opposed to all other major institutional arbitration rules [*Bernadini, p. 197*], the HKIAC model clause suggests including a specific choice of law governing the arbitration agreement [*http://www.hkiac.org/arbitration/model-clauses*]:

> "*Any dispute, […] 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 law of this arbitration clause shall be… (Hong Kong law).**
> *[…]*
> ***Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different.**" *(emph. add.)*

20 In at least one other HKIAC arbitration, RESPONDENT had been represented by the exact same legal counsel including Mr. Antley [*PO2, p. 60, para. 38*] and had used the HKIAC model clause including the model choice of law clause [*PO2, p. 60, para. 39*]. However, in the case at hand RESPONDENT's arbitration-experienced negotiators refrained from agreeing on an explicit choice of law regarding the Arbitration Agreement. This is because the law applicable to the Arbitration Agreement had not been a major concern of RESPONDENT. Rather, RESPONDENT's main strategy during the negotiations concentrated on the *"delivery and the non-acceptability of the courts of Mediterraneo*" [*Exhibit R3, p. 35, para. 1*]. Thus, RESPONDENT's conduct during the negotiations must be interpreted as an acceptance of Mediterranean law to govern the Arbitration Agreement.

21 RESPONDENT's acceptance of Mediterranean law to govern the Arbitration Agreement did not change after the unfortunate accident of Mr. Antley. RESPONDENT's new negotiator Mr. Krone found a note in Mr. Antley's negotiation file [*Exhibit R3, p. 35, para. 2*] and had access to Mr. Antley's email chain containing prior communication with CLAIMANT [*PO2, p. 55, para. 5*]. Although it was "*not completely clear*" to Mr. Krone what Mr. Antley meant in his note concerning the applicable law of the Arbitration Agreement [*Exhibit R3, p. 35, para. 4*], he did not attempt to clarify his uncertainties [*PO2, p. 55, para. 7*]. The negligence of RESPONDENT's legal team to clarify the situation should be held against RESPONDENT itself and not shifted onto CLAIMANT.

22 Thus, the drafting history of the Sales Agreement suggests applying the law of Mediterraneo to the Sales Agreement including the Arbitration Agreement.

3. Applying the same set of rules to the Arbitration Agreement contained in the Sales Agreement prevents unnecessary expenses

23 Reasonable business parties try to apply the same set of rules to prevent unnecessary expenses for legal advice in negotiations and dispute settlement [*cf. Delaume, p. 578; Gertz, p. 179; Welser, p. 153*]. Therefore, in case of an implied agreement any reasonable business parties prefer the application of the same law for the sales contract and the arbitration agreement.

24 Conserving financial resources was one of CLAIMANT's core issues since it is financially endangered [*Exhibit C8, p. 17, para. 6*] and tied to a strict restructuring plan [*PO2, p. 59, para. 29*]. When signing the Sales Agreement, RESPONDENT was aware of CLAIMANT's need to avoid unnecessary costs and for efficient contract performance [*PO2, p. 58, para. 22*]. Mandating different law firms in order to evaluate legal issues under different set of rules can increase the costs immensely. This stands in opposition to what reasonable business parties adhere to.

4. The doctrine of separability allows for the application of Mediterranean law to interpret the Arbitration Agreement contained in the Sales Agreement

25 Contrary to RESPONDENT's allegations [*Answer to the Notice of Arbitration, p. 31, para. 14*], the doctrine of separability allows for the application of Mediterranean law to interpret the Arbitration Agreement. The doctrine serves as a lifeline "*ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement*" [*BCY v. BCZ; Harbour Assurance v. Kansa Insurance; Fiona Trust v. Privalov; Born, p. 401*].

26 However, separability does not "*insulate the arbitration agreement from the substantive contract for all purposes*" [*Sulamérica v. Enesa*]. The purpose of the doctrine of separability is not to determine the law applicable to an arbitration agreement [*Glick/Venkatesan, p. 137*]. Instead, the doctrine of separability as adopted by Art. 16(1) DAL solely focusses on the validity of the Arbitration Agreement. Only "*[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.* […]," (*emph. add.*) [*Art. 16(1) DAL*]. Therefore, the independence of the arbitration agreement only refers to the validity but not to the law governing the arbitration agreement [*Glick/Venkatesan, p. 137*]. Thus, the doctrine of separability allows for the application of Mediterranean law to the Sales Agreement including the Arbitration Agreement.

27 In conclusion, Mediterranean law governs the interpretation of the Arbitration Agreement.

II. Interpretation under Mediterranean law reveals that the Arbitral Tribunal is empowered to adapt the Sales Agreement and determine a fair sales price

28 CLAIMANT will establish that the Arbitration Agreement empowers the Arbitral Tribunal to adapt the Sales Agreement. An arbitral tribunal determines the scope of an arbitration agreement by contract interpretation [*Born, p. 1343; Schwenzer/Jaeger, pp. 319, 322f.; Fouchard, para. 476*]. The relevant substantive law of Mediterraneo governing the interpretation of the Arbitration Agreement is the CISG **[1]**. An interpretation under the CISG reveals that the Arbitration Agreement provides for contract adaptation **[2]**.

1. The CISG as the relevant substantive law of Mediterraneo applies to the interpretation of the Arbitration Agreement

29 The CISG governs the interpretation of the Arbitration Agreement as it is an integral part of the law of Mediterraneo and was explicitly chosen by the PARTIES [*Exhibit C5, p. 14, clause 14*]. It is common understanding in jurisprudence and literature that the CISG is also applicable to the interpretation of arbitration agreements [*cf. PO1, p. 53; Epis-Centre v. La Palentina; Staudinger/Magnus, Art. 8, para. 21; Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 17; MüKoBGB/Gruber, Art. 8 CISG, para. 6; Schlechtriem/Schroeter, para. 208*].

2. An interpretation under the CISG reveals that the Arbitration Agreement provides for adaptation of the Sales Agreement by the Arbitral Tribunal

30 Under the subjective test of Art. 8(1) CISG, statements and conduct of the parties as well as provisions in contracts are to be interpreted according to the "*intent where the other party knew or could not have been unaware what that intent was*" [*Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, para 11; Lookofsky, p. 55*]. However, "*though formally placed in second position, practically speaking Art. 8(2) [CISG] contains the principal concept of interpretation in the convention*" [*Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, para. 20*; *Honnold/Flechtner, para. 107; Ferrari/Kieninger/Mankowski/Saenger, Art. 8, para. 2f.*].

31 Under Art. 8(2) CISG, the objective test is the hypothetical understanding of a reasonable third person of the same kind, placed in the same circumstances as the other party [*ICC 7331; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, para. 20; Huber/Mullis, pp. 12 ff.*]. Due consideration is to be given to all relevant circumstances of the case [*Art. 8(3) CISG*].

32 CLAIMANT will establish that a reasonable third person in the position of RESPONDENT would interpret the Arbitration Agreement to empower the Arbitral Tribunal to adapt the Sales Agreement, based on the wording **[a]**, the negotiations preceding the conclusion of the Sales Agreement **[b]** and the interpretation of the Arbitration Agreement in the context of the Hardship Clause **[c]**.

a) The Arbitral Tribunal is empowered to adaptation of the Sales Agreement based on the wording of the Arbitration Agreement

33 Arbitral tribunals generally interpret terms like "*any disputes*" broadly [*ICC 9812; J.J. Ryan Sons v. Rhone Poulenc Textile; Lew/Mistelis/Kröll, p. 151; Born p. 1347*]. This broad wording is considered as "*covering all differences and claims arising from a given contractual relationship*"

[*Lew/Mistelis/Kröll p. 153, fn. 98*]. It also includes the conflict between the parties on the adjustment of the price or of any other contract term [*Quintette Case*].

34 In the case at hand, the PARTIES based their Arbitration Agreement on the HKIAC model clause and referred "***any*** *disputes arising out of this contract*" (*emph. add.*) to arbitration [*Exhibit C5, p. 14, para. 15*]. CLAIMANT is asking for adaptation of the sales price agreed upon in the Sales Agreement [*Notice of Arbitration, p. 8; Exhibit C5, p 13*]. Thus, adapting the sales price is directly connected to the given contractual relationship, i.e. the Sales Agreement.

35 Therefore, the Arbitration Agreement's wording "*any disputes arising out of the contract*" covers the adaptation of the Sales Agreement.

b) During the negotiations RESPONDENT agreed to confer the power to adapt the Sales Agreement to the Arbitral Tribunal

36 Expressed consent for contract adaptation by the parties during the negotiations in conjunction with a broad arbitration agreement confers the power to adapt the contract upon an arbitral tribunal [*Beisteiner, p. 111*].

37 The Sales Agreement was mainly negotiated by CLAIMANT's Ms. Napravnik and RESPONDENT's Mr. Antley. At the meeting on 12 April 2017, Ms. Napravnik emphasized the importance of the possibility to adapt the Sales Agreement [*Exhibit C8, p. 17, para. 4*]. Mr. Antley agreed and said that it should be "*the task of the arbitrators to adapt the contract*" [*Exhibit C8, p. 17, para. 4*]. Both main negotiators consented to confer the power to adapt the Sales Agreement upon the Arbitral Tribunal in case the PARTIES could not agree on an amendment [*Exhibit C8, p. 17, para. 4*]. This is reflected by the note Mr. Antley left in his negotiation file [*Exhibit R3, p. 35, para. 3*]. In this note, he drew the connection between clause 12 of the Sales Agreement ("**Hardship Clause**") [*Exhibit C5, p. 14, clause 12*] and the Arbitration Agreement to clarify the Arbitral Tribunal's power to adapt the Sales Agreement. However, Ms. Napravnik even told Mr. Antley that "*from a legal point of view that was not necessary*" because it was already reflected in the contract [*Exhibit C8, p. 17, para. 4*].

38 After the car accident of the main negotiators on 12 April 2017, it fell upon Mr. Krone, as the head of RESPONDENT's legal department, to finish the negotiations [*Exhibit R3, p. 35, para. 4*]. Despite being aware of the note [*see supra, para. 21*], RESPONDENT never objected to the previous position of applying Mediterranean law [*Exhibit R3, p. 35, para. 4*]. Again, the negligence of RESPONDENT's legal team to communicate its uncertainties on time should not be held against CLAIMANT. Concluding, RESPONDENT never questioned the PARTIES agreement to confer the power to adapt the Sales Agreement upon the Arbitral Tribunal.

c) An Interpretation of the Arbitration Agreement in conjunction with the Hardship Clause reveals the Arbitral Tribunal's power to adapt the Sales Agreement

39 Contrary to RESPONDENT's allegations [*Answer to the Notice of Arbitration, p. 31, para. 13*], the including of a Hardship Clause sufficiently expresses the PARTIES' intention to grant the Arbitral Tribunal the power to adapt the Sales Agreement.

40 In the UNCITRAL Working Group, it was stated that the conferment of power upon an arbitral tribunal to adapt a contract does not have to be made expressly in the arbitration agreement [*UN Doc. A/CN.9/263, p. 58, para. 15*]. Rather, the power can derive from an interpretation of the arbitration agreement in context of the contract as a whole [*cf. Schlechtriem/Schwenzer/Schmidt-Kessel Art. 8, para. 30*]. If the underlying contract includes clauses allowing for adjustment during contract performance, arbitration agreements are interpreted to empower an arbitral tribunal to adapt the contract [*ICC 5754; Berger, pp. 8f.*].

41 The inclusion of the Hardship Clause shows the PARTIES' intent to address "*subsequent changes*" during the time of contract performance [*Exhibit C4, p. 12, para. 4*]. As the shipments of the frozen semen were split over a period of nine months [*Exhibit C5, p. 14, clause 8*], the PARTIES anticipated the need for readjustment in case such subsequent changes would occur by including the Hardship Clause [*Exhibit C4, p. 12, para. 4*]. Simultaneously with the agreement on readjustment, the PARTIES agreed on arbitration as their dispute resolution mechanism [*Exhibit C5, p. 14, para. 15*]. Thereby the PARTIES intended any disagreement in connection with the Hardship Clause to be settled before an Arbitral Tribunal in order to resolve all disputes solely by arbitration.

42 In contrast, if the Arbitration Agreement would not cover contract adaptation, any issue of adaptation would result in a split jurisdiction. Matters of contract adaptation would have to be resolved before a national court. This would counteract the PARTIES' intention, because when the PARTIES could not agree on the jurisdiction of state courts, arbitration became the only dispute resolution mechanism agreeable to them [*Exhibit C4, p. 12, para. 5*]. Consequently, an expressed conferral of power to adapt the contract is not necessary in the Arbitration Agreement. In the context of the Hardship Clause, adaptation falls within the scope of the Arbitration Agreement.

43 To conclude, the Arbitral Tribunal has the power to adapt the Sales Agreement. This results from the interpretation of the wording, the negotiations as well as the Arbitration Agreement in context of the Hardship Clause pursuant to Art. 8 (2),(3) CISG.

C. The Arbitral Tribunal is empowered to adapt the Sales Agreement by Art. 28(1) DAL

44 RESPONDENT might assert the Arbitral Tribunal lacks the power to adapt the Sales Agreement as an express agreement in the sense of Art. 28(3) DAL is missing [*PO2, p. 60, para. 36*]. However, the Arbitral Tribunal is empowered to adapt the Sales Agreement under Art. 28(1) DAL, because the law of Mediterraneo as the rules of law chosen by the PARTIES pursuant to Art. 28(1) DAL grants the Arbitral Tribunal with the power to adapt the Sales Agreement.

45 Pursuant to Art. 28(1) DAL, an arbitral tribunal should "*decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute*". If the chosen substantive law allows for a discretionary decision, using such discretion is merely application of the relevant law instead of a decision *ex aequo et bono* [*Electricity Case*; *Kröll II, p. 852*]. Art. 28(3) DAL can thereby only serve to broaden the arbitral tribunal's power but cannot restrict the power conferred upon the arbitral tribunal in Art. 28(1) DAL [*Schmidt-Ahrendts/Höttler, p. 272*].

46 The PARTIES chose the law of Mediterraneo as the law applicable to the Sales Agreement [*Exhibit C5, p. 14, clause 14*]. The law of Mediterraneo allows for contract adaptation in Art. 6.2.3 (4)(b) Mediterranean Contract Law ("**MCL**"). The MCL is a verbatim adoption of the PICC [*PO1, p. 53*].

47 As contract adaptation is a legal consequence set forth by the applicable substantive law, the Arbitral Tribunal will not apply contract adaptation as a measure *ex aequo et bono,* but apply Mediterranean law as chosen by the PARTIES. Therefore, the Arbitral Tribunal has the power to adapt the Sales Agreement pursuant to Art. 28(1) DAL.

CONCLUSION OF ISSUE 1

The Arbitral Tribunal has the power to adapt the Sales Agreement based on the Arbitration Agreement. The choice of law in clause 14 of the Sales Agreement extends to the Arbitration Agreement because the PARTIES intended to have the Sales Agreement including the Arbitration Agreement governed by the law of Mediterraneo. The relevant law of Mediterraneo to interpret the Arbitration Agreement is the CISG. An interpretation of the Arbitration Agreement under the CISG reveals that contract adaptation is a dispute arising out of the Sales Agreement.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM A THIRD-PARTY-ARBITRATION PROCEEDING

48 The partial interim award ("**External Evidence**") of an arbitration between RESPONDENT and a third party ("**Third-Party-Arbitration**") must be admitted to demonstrate RESPONDENT's contradictory behaviour and to guarantee CLAIMANT's right to be heard.

49 Prior to the present arbitration, RESPONDENT underwent arbitration with a third party. In this arbitration, RESPONDENT was in a position nearly identical to CLAIMANT's today: RESPONDENT was affected by 25% tariffs as a seller. When placed in the exact same situation, RESPONDENT – just as CLAIMANT does today – asked for a price adaptation. However, in the present proceedings, RESPONDENT refuses to grant the exact same right to CLAIMANT.

50 Not only does the External Evidence show RESPONDENT's contradictory behaviour, but it also demonstrates that the PARTIES in fact have a common understanding of price adaptation and hardship clauses. CLAIMANT is entitled to bring forward the evidence from the Third-Party-Arbitration pursuant to the lex arbitri, the DAL.

51 Pursuant to Art. 19(1) DAL in conjunction with Art. 22.2 HKIAC Rules, the Arbitral Tribunal should use its wide discretion to admit the External Evidence **[A]**. Negating CLAIMANT's request would prevent CLAIMANT from fully presenting its case and thus infringe its right to be heard **[B]**.

A. Pursuant to Art. 19(1) DAL in conjunction with Art. 22.2 HKIAC Rules the Arbitral Tribunal should admit the External Evidence

52 Pursuant to Art. 19(1) DAL *"the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*". The PARTIES chose the HKIAC Rules to govern the current arbitration proceedings [*Exhibit C5, p. 14, clause 15*]. Art. 22.2 HKIAC Rules stipulates that *"the arbitral tribunal shall determine the admissibility […] of evidence, including whether to apply strict rules of evidence*". Therefore, the applicable arbitration rules provide the Arbitral Tribunal with a wide discretion to decide on the admissibility of evidence.

53 At hand, the Arbitral Tribunal should use its discretion to allow the External Evidence even on the basis of the assumption, that this information has been obtained either through a breach of confidentiality agreement or a hack [*PO1, p. 53*]. Since neither a hack of RESPONDENT's computer system **[I]** nor a breach of confidentiality agreements unrelated to CLAIMANT **[II]** render the External Evidence inadmissible. In any case, the burden of proof lies with RESPONDENT to show that both possible ways of obtainment were inadmissible **[III]**.

I. The External Evidence should be admitted despite the fact that it might have been obtained through a hack of RESPONDENT's computer system

54 The Arbitral Tribunal should admit the External Evidence even if it had been obtained through a hack, because CLAIMANT itself neither participated in nor endorsed any hack that led to the disclosure **[1]**. Further, the External Evidence should be admitted as it is material to the decision in the present case **[2]**.

1. CLAIMANT neither participated in nor endorsed any hack to obtain the External Evidence

55 RESPONDENT mistakenly argues there is a procedural standard which precludes the introduction of the External Evidence because of its unlawful nature [*Email dated 3 Oct 2018, p. 51, para. 3*]. The procedural standard RESPONDENT alleged, however, is limited to criminal proceedings only [*Townes v. City of New York; Pennsylvania Board of Probation Parole v. Scott*]. This is because in criminal cases, the risk of an misuse of powers by the state is much higher than in civil cases [*Meyer-Hauser, p. 54*]. Therefore, arbitral tribunals often admit unlawfully obtained evidence while they are silent regarding the propriety of admitting such evidence [*PCA AA 227; SCC V 079/2005; ICSID ARB/10/14; ICSID ARB/10/01*].

56 Contrary to the inapplicable procedural standard alleged by RESPONDENT, evidence should be admitted irrespective of how it was obtained as long as the party seeking to introduce the evidence did not participate in its disclosure [*Persia International Bank v. Council; Bible v. United Student Aid Funds*; *Waincymer, p. 797; Boykin/Havalic, pp. 33, 35*]. In *Persia International Bank v. Council,* the court ruled in favour of the party seeking to introduce leaked documents because "*the applicant was not involved in the disclosure of the [documents]*" which is why "*the possibly unlawful nature of that disclosure cannot be held against it"*. In *CAS 2011/A/2425,* the tribunal found that there is no "*legal basis to exclude the disputed evidence"* because the party seeking to introduce evidence "*did not perform any illegal activity […] to obtain the [evidence]*". Therefore, such party is uncompromised, as is CLAIMANT.

57 CLAIMANT was not involved in the hack of RESPONDENT's computer system [*Email dated 2 Oct 2018, p. 50, para. 2*], which was easily accessible because RESPONDENT neglected to update its firewall [*PO2, p. 61, para. 42*]. The party to blame for the disclosure of the External Evidence is the hacker himself [*PO2, p. 61, para. 41*].

58 A parallel may also be drawn to the protection of trade secrets. It already is doubtful whether the External Evidence could qualify as 'protected information' because RESPONDENT did not take reasonable steps under the circumstances, such as updating its firewall, to keep it secret

[*WIPO*]. But even if it was to be assumed that it falls under the protection of trade secrets, the owner of the trade secret in general may only claim the protection against the violator – the hacker in the present case – and not any third person using the information who was unaware of the protection [*WIPO*].

59 CLAIMANT did not disclose the External Evidence itself, but rather had only learned about the External Evidence at the annual breeder conference from one of its customers [*PO2, p. 60, para. 40*]. Thus, CLAIMANT was not involved in the disclosure of the External Evidence [*PO2, p. 61, para. 41*]. The action of an unrelated third party should not restrict CLAIMANT's access to the External Evidence.

2. Weighing the interests of the PARTIES should result in the External Evidence being admissible as it is material to the decision in the present case

60 In the case at hand, there are no rules regarding improperly obtained evidence [*PO2 p. 61, para. 46*]. Absent such rules, arbitral tribunals weigh the interests of the parties when deciding over the admission of improperly obtained evidence [*CAS 2009/A/1879; CAS 2011/A/2425; Methanex v. USA; Arroyo/Noth/Haas, p. 1553, para. 32; Boykin/Havalic, pp. 34f.*]. Whenever the evidence in question is material to an issue and may be the only way to prove someone's case, the decision about the admission is based on a case-by-case weighing of interests [*Paternity Case; Football Federation of Ukraine Case; Wultz v. Bank of China; Horvath/Meyer-Hauser/Wirz, p. 145; Boykin/Havalic, pp. 34f.*]. In the *Football Federation of Ukraine Case* an arbitral tribunal admitted illegally obtained evidence since the objecting party's interest in protecting private information was considered less vital than the goal of the other party trying to establish the truth. This can go as far as in the *Corfu Channel Case* where the plaintiff introduced evidence obtained through its own illegal action. The court still found that the interest to establish the truth was of enough importance to outweigh the interest in protecting private information.

61 The External Evidence is material for the outcome of the case. It should be admitted because CLAIMANT's interest in establishing the truth **[a]** outweighs RESPONDENT's interest in protecting private information **[b]**.

a) The External evidence is material for the outcome of the case

62 The External Evidence proves that the PARTIES had matching intents regarding the understanding of *"DDP"* and the Hardship Clause at the time of contract conclusion. The matching intentions can be determined by comparing RESPONDENT's behaviour in the Third-Party-Arbitration with the present arbitration. Both arbitration proceedings are

governed by the HKIAC and Model Law. Both contracts as well as the respective arbitration agreements are governed by Mediterranean law [*PO2, p. 60, para.*39][*see supra, para. 27*]. Both business relationships were struck by unforeseen tariffs. Both contracts contain a hardship clause without express authorization to adapt the contract [*PO2, p. 60, para. 39*].

63 In the Third-Party-Arbitration, RESPONDENT argues in favour of contract adaptation under the ICC hardship clause in response to the 25% tariffs [*PO2, p. 60, para. 39*], just as CLAIMANT is arguing in favour of price adaptation now. Switching roles, RESPONDENT suddenly seems to conveniently adapt its understanding of hardship clauses. Despite its contrary argument in the other arbitration, in the present case RESPONDENT fiercely objects to adaptation as a legal consequence of the Hardship Clause [*Answer to the Notice of Arbitration p. 32, para. 19*]. Furthermore, RESPONDENT's original understanding in regard to *"DDP"* was that the seller does not have to bear tariffs. For this reason, RESPONDENT demanded a price adaptation in the Third-Party-Arbitration, despite there also being a *"DDP"* delivery [*PO2, p. 60, para. 39*].

64 Judging by its behaviour in the other arbitration, it follows that at the time of contract conclusion RESPONDENT understood contract adaptation as the legal consequence of the Hardship Clause in case of tariffs. Therefore, the External Evidence proving RESPONDENT's true intentions regarding the Hardship Clause in the Sales Agreement is material to the outcome of the case.

b) RESPONDENT's interest in protecting private information lacks sufficient significance

65 At no point does RESPONDENT establish any reasons why the External Evidence would reveal sensitive information that could harm its business [*cf. Email dated 3 Oct 2018, p. 51*]. In any case, pursuant to Art. 45 HKIAC Rules, RESPONDENT's interest in keeping information private would stay protected because all parties involved have accepted confidentiality of the proceedings [*Moser/Bao, Art. 42, para. 12.31*].

66 Consequently, RESPONDENT's objections are lacking any substance while the External Evidence is material for CLAIMANT, in fact material to finding the truth in the present arbitration. CLAIMANT's interest to introduce the External Evidence therefore outweighs RESPONDENT's objections. Hence, the Arbitral Tribunal should admit the External Evidence.

II. There are no confidentiality concerns preventing the Arbitral Tribunal from admitting the External Evidence

67 RESPONDENT alleges a breach of the confidentiality agreement between RESPONDENT and its former employees [*Email dated 3 Oct 2018, p. 51, para. 3*] as well as of Art. 42 HKIAC 2013

Rules *(now Art. 45 HKIAC Rules)* in the Third-Party-Arbitration [*Email dated 3 Oct 2018, p. 51, para. 1*]. Neither of those alleged breaches affect the admissibility of the External Evidence.

68 The mentioned confidentiality agreements are only binding upon RESPONDENT and a third party. This agreement does not have a legal effect for CLAIMANT, nor does it bar CLAIMANT from introducing the External evidence in the present arbitration **[1]**. RESPONDENT rather misuses confidentiality as a strategy to prevent a factual based ruling **[2]**.

1. The alleged confidentiality obligations only bind RESPONDENT and a third party but not CLAIMANT

69 First, the confidentiality rule of the HKIAC between RESPONDENT and a third party does not prevent the admissibility of evidence in the case at hand. The wording of Art. 42.1 HKIAC 2013 Rules *"unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information" (emph. add.)* is unambiguous in that it applies solely to the parties of the respective arbitration this rule applies to. Confidentiality agreements in arbitration only have a relative effect between the contracting parties [*Esso Australia v. Plowman*; *Frohloff, p. 102f.*; *Born, p. 860f.; Brown, p. 1004*].

70 Second, the contractual confidentiality agreement between RESPONDENT and its employees does not prevent the admission of evidence. It is possible that the External Evidence was disclosed by one of two former employees of RESPONDENT bound by confidentiality obligations towards their employer [*Email dated 3 Oct 2018, p. 51, para. 3*]. In case of a breach of a contractual confidentiality agreement, the possible legal consequences can only affect the party who breached the obligation and not an unrelated third party [*cf. Born p. 2789*]. CLAIMANT is not subject to the contractual confidentiality obligations between RESPONDENT and its employees. Thus, if one of RESPONDENT's former employees breached its contractual confidentiality obligations in relation to RESPONDENT [*Email dated 3 Oct 2018, p. 51, para. 3; PO2 p. 61, para. 41*], this cannot affect the admissibility of the External Evidence in the present arbitration.

71 Neither the confidentiality rule of the HKIAC arbitration between RESPONDENT and a third party nor any contractual confidentiality obligations between RESPONDENT and its former employees prevent the admissibility of the External Evidence.

2. RESPONDENT misuses confidentiality as a strategy to prevent a factual based ruling

72 The External Evidence should be admitted, even if the Arbitral Tribunal was to consider overdrawing the meaning of one of the confidentiality agreements onto CLAIMANT.

73 Various exceptions disrupt the general rule of confidentiality in arbitration [*Oxford Shipping v. Nippon Yusen Kaisha; Dolling-Baker v. Merrett; Hassneh Insurance v. Stuart J Mew; Esso Australia v. Plowman; Bulgarian Foreign Trade Bank v. Trade Finance*]. Among others, the confidentiality in arbitration is disrupted where the "*interests of justice*" requires disclosure. The "*interest of justice*" exception is primarily recognised to ensure that the decision of a particular case is based on accurate evidence [*London & Leeds Estates v. Paribas; Ali Shipping v. Shipyard Trogir; Shipping Lines v. Universal Schiffahrtsgesellschaft; Teekay Tankers v. STX*]. If a more accurate assessment of the case can be achieved by disclosing confidential information, the confidentiality of arbitral proceedings should not be an impediment [*Kemp; cf. Ali Shipping v. Shipyard Trogir*]. When inconsistent arguments are stated in different arbitrations and this wrongdoing is later cloaked in confidentiality, "*the interest of justice*" exception allows for disclosure [*Kemp; Shackleton, p. 125*]. While a party may legitimately be concerned about its trade secrets becoming public [*Brown, p. 1008; Fouchard, p. 693*], the legitimacy of the interest ceases to exist when confidentiality is misused as a strategy [*Shackleton, p. 126*].

74 The introduction of the External Evidence would not lead to any of RESPONDENT's business secrets being exposed. As the External Evidence is only a partial interim award on jurisdiction, there is no decision on the merits of the case [*PO2, p. 60, para. 39*]. Rather only RESPONDENT's opposing legal standing in the Third-Party-Arbitration would be revealed [*PO2, p. 60, para. 39*]. This information has already been spread at the annual breeder conference [*PO2, p. 60, para. 40*]. Consequently, any confidentiality concerns of RESPONDENT are a false pretence to mask its opposing legal standing in the Third-Party-Arbitration. RESPONDENT strategically misuses the confidentiality of the Third-Party-Arbitration, failing to bring forth any reason that support an actual interest in keeping the information confidential [*cf. Email dated 3 Oct 2018, p. 51*]. Thereby RESPONDENT tries to prevent a factual based ruling in the present arbitration. However, the Arbitral Tribunal could only decide the present case accurately by admitting the External Evidence. The External Evidence would reveal RESPONDENT's true intentions regarding the Hardship Clause in the Sales Agreement [*see supra, para. 62-69*]. Thus, the "*interest of justice*" exception allows for disclosure because RESPONDENT tries to cloak its inconsistent line of argumentation in confidentiality concerns.

III. The burden of proof lies with RESPONDENT to show that the External Evidence was obtained in an inadmissible way

75 As demonstrated, the External Evidence is admissible regardless of whether it was obtained by a hack or by the disclosure of RESPONDENT's former employee, as neither a hack nor a confidentiality breach can be attributed to CLAIMANT.

76 Even if the Arbitral Tribunal found that either the hack or the confidentiality breach would lead to inadmissibility, it is up to RESPONDENT to prove that it was this inadmissible obtainment that disclosed the External Evidence.

77 In arbitration, evidence which is presented to the tribunal is admissible until an objecting party can prove otherwise [*IUSCT 567-213/215-3; Marossi, p. 442; Reisman/Freedman, p. 739*]. This is supported by Art. 22.1 HKIAC Rules that reads "*each party shall have the burden of proving the facts relied on to support its claim or defence*". It is the objecting party relying on the inadmissibility of evidence that gains an advantage from the exclusion. Consequently, RESPONDENT needs to prove the inadmissibility to support its defence.

78 In the case at hand, it cannot be proven how the evidence was obtained [*PO2, p. 61, para. 41*]. Therefore, if even one of the two possible ways was admissible the Arbitral Tribunal should admit the evidence.

B. The External Evidence must be admitted to avoid a violation of CLAIMANT's right to be heard

79 Pursuant to Art. 18 DAL *"each party shall be given a full opportunity of presenting his case*". The right to be heard also applies on the grounds of Art. V(1)(b) New York Convention. According to Art. V(1)(b) New York Convention, an arbitral award is unenforceable if a party is denied the opportunity to be heard in a meaningful manner [*Qingdao v. P and S; Iran Aircraft v. Avco*]. The mandatory right to be heard is only upheld, if each party is given the opportunity to present the material facts and its view of the case [*Gbangbola & Lewis v. Smith Sherriff; Soh Beng Tee v. Fairmount Development; Waincymer, p. 751; O'Malley, para. 9.115; Girsberger/Voser, p. 220*].

80 Presenting the material facts in the case at hand includes presenting the External Evidence. CLAIMANT has a material interest in establishing that the PARTIES had matching intents in regard to the understanding of *"DDP"* and the Hardship Clause at the time of contract conclusion. If the External Evidence was not admitted, it would infringe upon CLAIMANT's right to be heard as the evidence is material for CLAIMANT to present its full case [*see supra,*

para. 63]. An award rendered in violation of the right to be heard is flawed and challengeable pursuant to Art. V(1)(b) New York Convention.

81 Therefore, the Arbitral Tribunal should admit the External Evidence to ensure CLAIMANT's right to be heard and thereby secure the enforceability of the award.

CONCLUSION OF ISSUE 2

The Arbitral Tribunal should use its power to admit the External Evidence which is of paramount importance to reveal RESPONDENT's true understanding of hardship clauses. Any insinuation that CLAIMANT should be held responsible for a third-party action, be it a hack or a confidentiality breach, is a baseless attempt at hiding evidence that is material to the outcome of the case. CLAIMANT therefore requests the Arbitral Tribunal to allow the submission of the evidence, simultaneously ensuring the enforceability of the award rendered.

ISSUE 3: CLAIMANT IS ENTITLED TO PAYMENT OF US$ 1,500,000

82 CLAIMANT respectfully requests the Arbitral Tribunal to adapt the Sales Agreement based on the Hardship Clause **[A]**. Alternatively, the Arbitral Tribunal should adapt the Sales Agreement under Arts. 79(1), 7 CISG or under Arts. 6.2.2, 6.2.3 MCL **[B]**. In all cases, CLAIMANT is entitled to payment of US$ 1,500,000 due to an increase of the purchase price for the last 50 doses based on the adaptation of the Sales Agreement **[C]**.

A. The Arbitral Tribunal should adapt the Sales Agreement based on the Hardship Clause

83 RESPONDENT is obliged to bear the 30% tariff imposed by Equatoriana ("**30%-Tariff**") as the prerequisites of the Hardship Clause are fulfilled **[I]**. The PARTIES' reference to "*DDP"* in the Sales Agreement does not exclude the 30%-Tariff from the scope of the Hardship Clause **[II]**. The Hardship Clause provides for adaptation of the Sales Agreement as remedy **[III]**.

I. RESPONDENT is obliged to bear the 30%-Tariff as the prerequisites of the Hardship Clause are fulfilled

84 Pursuant to the Hardship Clause, CLAIMANT "*shall not be responsible for […] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [*Exhibit C5, p. 14, clause 12*]. The 30%-Tariff constitutes hardship **[1]** and is caused by an unforeseen event comparable to health and safety requirements **[2]**.

1. The 30%-Tariff constitutes hardship in the sense of the Hardship Clause

85 Hardship is defined as a drastic change in circumstances surrounding the agreement of the parties [*Azerdo Da Silveira, p. 323, para. 488; Ferrario, p. 83*]. A change in circumstances is

usually considered drastic if the performance of the contract has become excessively onerous [*Schwenzer, p. 714*]. However, the parties may agree on a lower threshold of hardship [*Brunner, p. 424; Kröll, p. 146*].

86 At hand, the PARTIES agreed on a lower threshold of hardship. In the Hardship Clause the PARTIES agreed that hardship only requires the performance of the Sales Agreement to become "*more onerous*" compared to the high threshold of "*excessively onerous*" **[a]**. The low threshold of Hardship is fulfilled, as the 30%-Tariff makes the performance of the Sales Agreement more onerous for CLAIMANT **[b]**.

a) The PARTIES agreed on a low threshold of hardship in the Hardship Clause

87 Analysing the drafting history of the Hardship Clause reveals that the PARTIES set a low threshold of hardship. To assess the threshold of hardship, the Hardship Clause needs to be interpreted according to Art. 8(2),(3) CISG.

88 During the negotiations, CLAIMANT first proposed the ICC hardship clause 2003 to RESPONDENT [*Exhibit R2, p. 34, para. 5*]. Pursuant to the ICC hardship clause 2003, a party must fulfil its "*contractual duties even if events have rendered performance more onerous*" (*emph. add.*) and may only rely on hardship if "*contractual duties [have] become excessively onerous*" (*emph. add.*). However, in the Sales Agreement the PARTIES implemented a different wording, stating that hardship applies whenever the performance of the seller becomes "*more onerous*" (*emph. add.*) [*Exhibit C5, p. 14, clause 12*]. CLAIMANT informed RESPONDENT in an email dated 31 March 2017 that hardship should encompass any event endangering the commercial basis of the deal, and clarified that CLAIMANT was not willing to take over any risks endangering its financial viability [*Exhibit C4, p. 12, para. 4*]. Therefore, RESPONDENT suggested the wording "*more onerous*" for the Hardship Clause [*PO2, p. 56 para. 12*]. Consequently, any event rendering the commercial basis of the deal void must be considered as making the performance more onerous and fulfilling the low threshold of hardship set by the PARTIES.

b) The 30%-Tariff fulfils the low threshold set for hardship

89 The 30%-Tariff makes the Sales Agreement *"more onerous*" than originally intended because CLAIMANT's upfront payment in the amount of US$ 1,500,000 destroys the commercial basis of the deal. Based on the Sales Agreement, CLAIMANT was set to earn a profit of 5%. The 30%-Tariff has fallen solely on CLAIMANT's shoulders, leaving it with a loss of 25% in the amount of US$ 1,250,000 for the last 50 doses [*Notice of Arbitration, p. 7, para. 18*]. This enormous loss would destroy the commercial basis of the deal and would render the Sales

Agreement more onerous than intended. Thus, the 30%-Tariff constitutes hardship as it fulfils the low threshold of the Hardship Clause.

2. The 30%-Tariff is caused by an unforeseen event comparable to health and safety requirements

90 The 30%-Tariff is caused by an event comparable to health and safety requirements **[a]** and is unforeseen in the sense of the Hardship Clause **[b]**.

a) The 30%-Tariff is comparable to additional health and safety requirements

91 The drafting history of the Hardship Clause reveals that the 30%-Tariff is comparable to "*health and safety requirements*" [*Exhibit C5, p. 14, clause 12*] in the sense of the Hardship Clause. In 2014, CLAIMANT's performance of a previous contract was affected by governmental health and safety requirements in response to an aggressive disease. As a consequence, CLAIMANT's cost increased by 40%, destroying the commercial basis of the deal [*Exhibit C4, p. 12, para. 4; PO2, p. 58, para 21*]. Therefore, CLAIMANT made it clear to RESPONDENT that it was not willing to assume any further risks, especially risks associated with "*changes in customs regulation or import restrictions*" (*emph. add.*) [*Exhibit C4, p. 12, para. 4*]. With reference to CLAIMANT's previous experience, RESPONDENT accepted CLAIMANT's conditions when suggesting the final wording of the Hardship Clause [*cf. PO2, p. 56, para. 12*]. In order to express these conditions, the final wording included "*health and safety requirements or comparable (unforeseen) events*" (*emph. add.*) [*Exhibit C5, p. 14, clause 12*].

92 Taking this mutual understanding of the PARTIES into account, the 30%-Tariff fulfils the prerequisite of being an event comparable to health and safety requirements. Tariffs are customs regulations and the main source of import restrictions [*Mankiw/Taylor, p. 397*]. As such they are governmental measures binding any affected party just as health and safety requirements. Comparable to the health and safety requirements of 2014, the 30%-Tariff increased CLAIMANT's costs significantly [*Exhibit C4, p. 12, para. 4; PO2, p. 58, para. 21*]. Additionally, both governmental measures attempt to protect the respective countries' agricultural sector. Considering these factors, the 30%-Tariff is an event comparable to health and safety requirements.

93 In conclusion, the prerequisites of the Hardship Clause are met. The 30%-Tariff is an unforeseen event comparable to health and safety requirements making the Sales Agreement more onerous than originally intended. Therefore, CLAIMANT is not responsible to bear the 30%-Tariff.

b) The 30%-Tariff is caused by an unforeseen event

94 An event is unforeseen if the disadvantaged party could not reasonably have taken the event into account at the time of contract conclusion [*Azerdo Da Silveira, p. 323, para. 488*]. Before the PARTIES signed the Sales Agreement on 6 May 2017, they never took the imposition of tariffs into account.

95 First, Equatoriana had always been an ardent supporter of free trade [*Exhibit C6, p. 15, para. 2*]. In particular, the currently governing Progressive Liberals had never imposed retaliation tariffs before [*Notice of Arbitration, p. 7, para. 19*]. Equatoriana had always tried to solve disputes amicably or by invoking the relevant WTO dispute resolution mechanism, making the 30%-Tariff unforeseeable even for expert circles [*Exhibit C6, p. 15, para. 2*].

96 Second, even if an agricultural tariff was generally foreseeable, a tariff on racehorse semen was not. Usually, racehorse breeding is categorised differently from other farm animals [*Notice of Arbitration, p. 6, para. 11*]. At hand, the agricultural tariff surprisingly included racehorse semen [*Exhibit C7, p. 16, para. 1*]. The 30%-Tariff was of such extraordinary nature that even one month after it had been announced [*PO2, p. 58, para. 25*], the employees of the Equatorianian ministry were oblivious to the fact that racehorse semen was affected by the 30%-Tariff [*Exhibit R4, p. 36, para. 2*]. If even the employees of the ministry were unaware, CLAIMANT could not have been expected to anticipate racehorse semen being subject to any agricultural tariffs when signing the Sales Agreement nine months earlier.

97 Third, the 30%-Tariff even surpassed the 25% tariffs of Mediterraneo which it retaliated against. The average worldwide tariff in 2015 was 4.6% [*German Federal Agency for Civic Education*]. The 30%-Tariff is seven times higher than the average tariff which is why the size of the 30%-Tariff was also unforeseeable.

98 The 30%-Tariff as such, the fact that it covered racehorse semen and its size proves that it was unforeseeable for anyone, including CLAIMANT.

II. The PARTIES' reference to *"DDP"* in the Sales Agreement does not exclude the 30%-Tariff from the scope of the Hardship Clause

99 Contrary to RESPONDENT's assertion [*Answer to the Notice of Arbitration, p. 30, para. 4*], the 30%-Tariff is covered by the Hardship Clause as CLAIMANT did not assume the risk for tariffs by referring to *"DDP"* in the Sales Agreement.

100 DDP in the sense of the INCOTERMS 2010 stands for 'Delivered Duty Paid' which generally means that the seller delivers the goods to the buyer bearing the costs and risks involved

[*Schlechtriem/Schwenzer/Schwenzer, Appendix I, p. 1366*]. Nevertheless, the parties may deviate from the definitions of the INCOTERMS 2010 [*Piltz/Bredow/Piltz, p. 27; DiMatteo/Magnus/Piltz, p. 282, para. 56*]. The parties individual understanding of DDP *("**DDP**")* needs to be determined by interpretation pursuant to Art. 8(2),(3) CISG taking all relevant circumstances into account [*cf. Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, para. 22*].

101 At hand, the reference to *"DDP"* was only made to profit from CLAIMANT's expertise in the transportation of racehorse semen and with clearance of import and export documents [*Notice of Arbitration, p. 7, para. 18*], because DDP is the only INCOTERM which intends for the seller to handle the import formalities [*cf. Schlechtriem/Schwenzer/Schwenzer, Appendix I*].

102 Originally, CLAIMANT suggested RESPONDENT picks up the frozen semen at its premise and considered RESPONDENT to be responsible for the transportation [*Exhibit C2, p. 10, para. 4*]. Later, RESPONDENT refused to pick up the frozen semen and instead expected CLAIMANT to deliver the frozen semen to Equatoriana [*Exhibit C3, p. 11, para. 2*]. CLAIMANT then only took the delivery upon itself because RESPONDENT did not have any experience with the transportation of frozen semen [*Exhibit C3, p. 11, para. 3*]. CLAIMANT was able to carry out the transportation to much more affordable terms due to past transportation experiences [*Notice of Arbitration, p. 7, para. 18*]. In particular, the PARTIES wanted CLAIMANT to handle the export and import formalities because CLAIMANT could ensure a speedy and non-problematic compliance with the required paperwork [*Notice of Arbitration, p. 7, para. 18; Exhibit C3, p. 11, para. 3*].

103 However, before signing the Sales Agreement, CLAIMANT informed RESPONDENT that delivery was only acceptable if *"additional costs associated with a DDP delivery*" were borne by RESPONDENT [*Exhibit C4, p. 12, paras. 3,4*]. This understanding is also reflected in the Sales Agreement where the PARTIES shifted all *"tank rental and handling fees associated with delivery of the semen"* onto RESPONDENT [*Exhibit C5, p. 14, clause 10; PO2, p. 56, para.* 8]. The PARTIES thereby regulated foreseeable risks regarding the delivery in the Sales Agreement. As the 30%-Tariff was unforeseeable [*see supra, para. 98*], no specific clause was included to regulate tariffs. CLAIMANT communicated its unwillingness to assume *"any further risks associated with such a change in the delivery terms"* [*Exhibit C4, p. 12, paras. 3, 4*]. RESPONDENT did not object to CLAIMANT's explicit conditions in regard to costs and risks. Therefore, the PARTIES mutual understanding of *"DDP"* was that the delivery would be executed by CLAIMANT with the costs and risks being borne by RESPONDENT. The PARTIES understanding of *"DDP"* is supported by the External Evidence [*see supra, para. 63*]. showing that in the Third-Party-Arbitration

RESPONDENT relied on its respective hardship clause when tariffs occurred even though DDP was agreed upon [*PO2, p. 60, para. 39*].

104 Contrary to what RESPONDENT may assert, the US$ 500 CLAIMANT charged per dose for delivery *"DDP"* [*PO2, p. 56, para. 8*] was no payment to assume any risks for the imposition of tariffs. If CLAIMANT would have assumed the risk for any tariffs, it would have charged a significantly higher price for the delivery. The Sales Agreement has a volume of US$ 10,000,000 in total, based on 100 doses of frozen semen at a sales price of US$ 100,000 per dose [*Exhibit C5, p. 13*]. Hypothetically taxing this volume with the worldwide average tariff in 2015 of 4.6% [*see supra, para. 97*], CLAIMANT would have to pay tariffs in the amount of US$ 460,000. Thus, had CLAIMANT assumed any risks in exchange for payment, it would have charged at least **US$ 460,000**. In contrast, CLAIMANT merely charged US$ 500 per dose delivery *"DDP"*, i.e. **US$ 50,000** [*PO2, p. 56, para. 8*]. Seeing how disproportionate the expected average risk was in comparison to the charged amount, it would be ill-advised to conclude CLAIMANT assumed any risks for tariffs. In conclusion, the PARTIES reference to *"DDP"* does not exclude the 30%-Tariff from constituting an event in the sense of the Hardship Clause.

III. The legal consequence of the Hardship Clause is the adaptation of the Sales Agreement

105 Contrary to RESPONDENT's allegation [*Answer to the Notice of Arbitration, p. 32, para. 19*], the PARTIES intended the legal consequence of the Hardship Clause to be adaptation of the Sales Agreement.

106 The purpose of a hardship clause is to adapt the parties' rights and duties to changed circumstances [*Weick, p. 299*] rather than to avoid the contract [*ICC 16369; Zaccaria, p. 137*]. This is in line with the general principle of upholding contracts governed by the CISG, stating that avoidance of contracts should only be granted as a last resort [*Designer Clothes Case; Schlechtriem/Schwenzer/Schwenzer/Hachem, Art. 7, para. 35*]. Thus, contract adaptation is acknowledged as the favourable legal consequence of a hardship clause. However, if the legal consequence is disputed between the parties, both prior negotiations and subsequent conduct must be taken into account to interpret the parties' intent at time of contract conclusion by virtue of Art. 8(2),(3) CISG [*Kröll/Mistelis/Viscasillas/Zuppi, Art. 8, para. 29*].

107 At hand, it was the PARTIES' intent that contract adaptation is the legal consequence of the Hardship Clause **[1]**. Even if the Arbitral Tribunal would conclude that the intent of the PARTIES is unclear, the Hardship Clause must be interpreted contra proferentem **[2]**.

1. According to the PARTIES' intent the most favourable legal consequence of the Hardship Clause is contract adaptation

108 During the negotiations both PARTIES considered contract adaptation to be the most favourable legal consequence. CLAIMANT's Ms. Napravnik insisted "*to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree upon on an amendment*" [*Exhibit C8, p. 17, para. 4*]. RESPONDENT's Mr. Antley confirmed that it should be "*the task of the arbitrators to adapt the contract if the Parties could not agree*" in case of hardship [*Exhibit C8, p. 17, para. 4*]. Based on this intent, CLAIMANT's Ms. Napravnik even told RESPONDENT's Mr. Antley that *"from a legal point of view [it] was not necessary"* to specify the legal consequence of the Hardship Clause [*Exhibit C8, p. 17, para. 4*].

109 The PARTIES' subsequent conduct clarifies that the Hardship Clause provides for contract adaptation rather than termination. When it became clear that frozen semen is covered by the 30%-Tariff, RESPONDENT still insisted on the delivery instead of terminating the contract [*Exhibit R4, p. 36, para. 3*]. This was indicated by RESPONDENT's Mr. Shoemaker in his call with CLAIMANT's Ms. Napravnik the day before the last shipment. In this call RESPONDENT clearly stated that the PARTIES would "*certainly find an agreement on the price*" [*Exhibit R4, p. 36, para. 4*]. Thereby RESPONDENT evoked the impression that the Sales Agreement would be adjusted in response to the 30%-Tariff. Based on this promise, CLAIMANT sent the last shipment because it justifiably relied on RESPONDENT's cooperation to adjust the Sales Agreement. RESPONDENT willingness to adjust the Sales Agreement is supported by the fact that its investors were keen to see RESPONDENT's racehorse breeding programme commence as soon as possible [*Notice of Arbitration, p. 5, para. 6*]. RESPONDENT preferred adaptation over termination as the latter would lead to a time-consuming search for an adequate supplier of frozen semen and the ensuing negotiations. Thus, termination of the Sales Agreement would result in a setback of RESPONDENT's breeding programme negating the interests of its investors. Furthermore, RESPONDENT resold parts of the last shipment to other breeders [*PO2, p. 59, para. 33*]. Hence, RESPONDENT was not interested in terminating the Sales Agreement because it would have been liable either towards CLAIMANT or other breeders.

110 The PARTIES intention during the negotiations as well as their subsequent conduct affirm that the legal consequence of the Hardship Clause is adaptation of the Sales Agreement.

2. In case of doubt the Hardship Clause must be interpreted contra proferentem

111 The doctrine of contra proferentem is an internationally acknowledged principle derived from Arts. 7(2), 8 CISG [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 41*], stipulating that

uncertainty in the interpretation of a contract clause shall be borne by the party drafting the particular clause [*Bowling Alleys Case; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, para. 49; Schroeter, p. 176*]. Since RESPONDENT drafted the final wording of the Hardship Clause [*PO2, p. 56, para. 12*], RESPONDENT should bear the risk of a possible lack of clarity.

112 In summary, the Arbitral Tribunal should adapt the Sales Agreement as the 30%-Tariff fulfils the prerequisites of the Hardship Clause. The PARTIES reference to *"DDP"* does not relieve RESPONDENT from bearing the risks associated with delivery. Finally, the adaptation of the Sales Agreement is the only legal consequence favourable to both PARTIES.

B. Alternatively, the Arbitral Tribunal should adapt the Sales Agreement under Arts. 79(1), 7 CISG or under Arts. 6.2.2, 6.2.3 MCL

113 Even if the Arbitral Tribunal was to find that the Hardship Clause does not provide for contract adaptation, the Arbitral Tribunal should adapt the Sales Agreement under the CISG.

114 Despite the term *"hardship"* not being expressly used in the Convention, the issue of hardship is in fact covered by the CISG [*CISG-AC Opinion No. 7, para. 3.1*]. The prevailing view in both literature and practice supports this understanding [*ICC 16369; Scafom v. Lorraine Tubes; Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 79; Staudinger/Magnus, Art. 79, para. 24; Honnold/Flechtner, Art. 79, para. 432.2; Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 31; Schlechtriem/Schroeter, para. 678; Brunner, p. 213; Azerdo Da Silveira, p. 329*].

115 Pursuant to Art. 7(2) CISG, if a matter is governed by the CISG but not expressly settled, the matter can either be resolved "*in conformity with the general principles on which [the CISG] is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law*" (*emph. add.*) [*Art. 7(2) CISG*]. First, hardship can be dealt with by applying Art. 79(1) CISG in conjunction with the general principles of the CISG **[I]**. Second, if the Arbitral Tribunal does not believe hardship to be covered by Art 79 CISG, the rules of private international law would point to the applicability of Arts. 6.2.2, 6.2.3 MCL **[II]**.

I. The Arbitral Tribunal should adapt the Sales Agreement based on Art. 79(1) CISG in conjunction with its general principles laid down in Art. 7 CISG

116 At hand, the 30%-Tariff fulfils the prerequisites of Art. 79(1) CISG regarding hardship **[1]** and the application of Art. 79(1) CISG is not excluded by the Hardship Clause of the Sales Agreement **[2]**. Pursuant to Art. 79(1) CISG in conjunction with the principle of good faith (Art. 7 CISG), the legal consequence is the adaptation of the Sales Agreement **[3]**.

1. The 30%-Tariff fulfils the prerequisites of Art. 79(1) CISG regarding hardship

117 The prevailing view in both literature and practice accepts that the exemption reflected in Art. 79(1) CISG does not only apply in cases of impossibility but also in situations of hardship [*Scafom v. Lorraine Tubes; Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 31; MüKoBGB/Huber, Art. 79 CISG, para. 21; Brunner, pp. 418f.; Ishida, pp. 380f.*]. The hardship exemption can be considered as a particular case of the force majeure excuse contained in Art. 79(1) CISG because both aim at solving parallel problems. Thus, the prerequisites of the hardship exemption can be deduced from Art. 79(1) CISG [*Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 81; Brunner, p. 419*].

118 The prerequisites of Art. 79(1) CISG regarding hardship are fulfilled because the 30%-Tariff constitutes an impediment **[a]** beyond CLAIMANT's control **[b]**. The 30%-Tariff could not have reasonably been expected at contract conclusion **[c]**. Further, CLAIMANT did not assume the risk for the 30%-Tariff in the Sales Agreement **[d]**.

a) The 30%-Tariff constitutes an impediment in the sense of Art. 79(1) CISG

119 Impediments are objective circumstances that prevent a party's performance. That includes acts of god, natural disasters, as well as acts of authorities by governments such as trade restrictions [*MüKoBGB/Huber, Art. 79 CISG, para. 10-11*]. Hardship that *"fundamentally alter[s] the equilibrium of the contract"* is an impediment covered by Art. 79(1) CISG [*Brunner, p. 221; Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 81*]. The contractual equilibrium is defined as the contractual balance of rights and obligations [*Melis, p. 215*]. An alteration of the contractual equilibrium is fundamental, if the original circumstances at the time of contract conclusion have changed and performance of the contract has become excessively onerous [*Schwenzer, p. 714*]. In order to determine whether the performance has become excessively onerous, changed circumstances leading to the obligor's impending financial ruin must be considered [*Brunner, p. 435*; *cf. Fucci, p. 23*]. Especially, if the affected contract represents a significant part of the obligor's revenue, the financial impact of changed circumstances can become disastrous [*Brunner, p. 435; Fucci, p. 26*]

120 The 30%-Tariff came crashing down on CLAIMANT, leaving it with a loss of 25%, i.e. US$ 1,250,000 [*Notice of Arbitration, p. 7, para. 18*][*see supra, para. 89*]. CLAIMANT has been making losses since 2014 because of the high interest payments for building new stables, necessitating a restructuring plan. CLAIMANT will not be able to keep its restructuring plan if it has to bear the US$ 1,500,000, because the success of the restructuring plan depends on the revenue from the Sales Agreement [*PO2, p. 59, para. 29*]. If the restructuring plan fails,

CLAIMANT's creditors will not grant a new line of credit [*PO2, p. 59, para. 29*]. Thus, the 30%-Tariff would lead to CLAIMANT's impending financial ruin [*Exhibit C8, p. 17, para 6*].

121 The impending financial ruin is exacerbated because as an economic consequence of the semen being resold by RESPONDENT [*PO2, p. 57, para. 20*], the net worth of Nijinsky III's semen will drastically decrease. CLAIMANT, as the owner of the star stallion Nijinsky III, formally had a monopoly on the superior semen. A monopolistic position allows the seller to set a fixed price with a certain profit margin [*Mankiw/Taylor, pp. 395f.*]. The profit, which CLAIMANT achieves with Nijinsky III's semen, is above the ordinary profit for the semen from other stallions [*PO2, p. 57, para. 20*]. Due to the reselling of the semen, CLAIMANT's higher profit margin for Nijinsky III's semen proves elusive. More competitors are enabled to offer the same product to a lower price thereby undermining CLAIMANT's monopolistic position. Additionally, CLAIMANT cannot control the recipient mares anymore. The semen might be used on mares with an uncertain pedigree which is likely to lead to unsuccessful offspring. The reduced reputation of Nijinsky III's semen leads to a decreased net worth of Nijinsky III.

122 The 30%-Tariff fundamentally altered the equilibrium of the Sales Agreement as it entails CLAIMANT's impending financial ruin. The impending financial ruin is magnified under the aspect that the reselling of the frozen semen also decreases the net worth of Nijinsky III. As the 30%-Tariff fundamentally altered the equilibrium of the Sales Agreement, it is an impediment covered by Art. 79(1) CISG. RESPONDENT supports this view when naming the 30%-Tariff an *"impediment"* itself [*Answer to the Notice of Arbitration, p. 32, para. 19*].

b) The 30%-Tariff is beyond CLAIMANT's control

123 Impediments are beyond the control of the obligor if they are external to its sphere of influence [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 12; Staudinger/Magnus, Art. 79, para. 17*]. The imposition of the 30%-Tariff is a governmental measure. As a private company, CLAIMANT cannot control the imposition of governmental measures such as tariffs. Therefore, the 30%-Tariff constitutes an impediment beyond CLAIMANT's control.

c) The 30%-Tariff could not reasonably be expected at contract conclusion

124 Impediments must be unforeseeable for the obligor to fall under Art. 79(1) CISG [*Baasch Andersen/Mazotta/Zeller, p. 708*]. An impediment is unforeseeable if neither party could reasonably expect it at the time of contract conclusion [*MüKoBGB/Huber, Art. 79 CISG, para. 8*]. As demonstrated above, the 30%-Tariff was impossible to be foreseen by either of the PARTIES [*see supra, para. 98*].

d) CLAIMANT did not assume the risk for the 30%-Tariff in the Sales Agreement

125 Finally, a party is only exempted pursuant to Art. 79(1) CISG if the risk for the unforeseen impediment was not contractually shifted on this party [*MüKoHGB/Mankowski, Art. 79 CISG, para. 21*]. At hand, RESPONDENT tries to rely on the reference to *"DDP"* in the Sales Agreement to argue that CLAIMANT bears the risk of any tariffs [*Answer to the Notice of Arbitration, p. 30, para. 4*]. However, as shown above the PARTIES' reference to *"DDP"* does not indicate a changed risk allocation relating to the imposition of tariffs [*see supra, para. 103-113*]. The PARTIES only used the term *"DDP"* to take advantage of CLAIMANT's experience in the delivery and the associated formalities. Still, they did not shift the burden to bear the 30%-Tariff on CLAIMANT.

2. The Hardship Clause does not exclude the application of Art. 79(1) CISG

126 Contrary to RESPONDENT's allegation, the application of Art. 79(1) CISG was not excluded by implementing the Hardship Clause [*Answer to the Notice of Arbitration, p. 32, para. 20*]. Pursuant to Art. 6 CISG, parties can only derogate from the CISG based on a mutual consent [*Kröll/Mistelis/Viscasillas/Mistelis, Art. 6, para. 15; Schlechtriem/Schwenzer/Schwenzer/Hachem, Art. 6, para. 10*]. The burden to prove the mutual consent lies with the party that, relies on a derogation from the CISG [*Schlechtriem/Schroeter, p. 30, para. 55; Staudinger/Magnus, Art. 6, para. 75*].

127 There is no agreement between the PARTIES to derogate from Art. 79(1) CISG. The inclusion of the Hardship Clause cannot be viewed as such an agreement. The aim of the Hardship Clause is to regulate cases of hardship comparable to "*health and safety requirements*" [*Exhibit C5, p. 14, clause 12*]. In these cases, the threshold for the Arbitral Tribunal to adapt the Sales Agreement is low only requiring the performance to be "*more onerous* [*Exhibit C5, p. 14, clause 12*]. Therefore, the Hardship Clause requires a low threshold but has a narrow scope of application. Meanwhile, Art. 79(1) CISG regulates all cases of hardship but requires the performance to be "*excessively onerous*". Hence, Art. 79(1) CISG per se requires a high threshold but has a broad scope of application. The purpose of the Hardship Clause was not to exclude all cases of hardship which may fall under the broader scope of Art. 79(1) CISG. The latter provision rather serves as a fall-back line for all scenarios including those not covered by the Hardship Clause. In case of doubt, the burden lies with RESPONDENT to prove that CLAIMANT intended to derogate from Art. 79(1) CISG. Therefore, the Hardship Clause is applicable alongside Art. 79(1) CISG.

3. Pursuant to Art. 79(1) CISG in conjunction with the principle of good faith (Art. 7 CISG) the legal consequence is the adaptation of the Sales Agreement

128 As the prerequisites of Art. 79(1) CISG are fulfilled, the case at hand necessitates the adaptation of the Sales Agreement as the legal consequence.

129 Art. 79(1) CISG grants exemption from liability, if the obligation has not yet been fulfilled [*Honsell/Magnus, p. 1066, para. 1*]. However, where the obligor fulfils its obligation, Art. 79(1) CISG does not expressly grant a remedy. This would lead to the grotesque consequence that a party is punished with a loss of remedies for performing its contractual obligations. Therefore, in case of hardship, Art. 79(1) CISG in conjunction with the principle of good faith serves as a legal basis for contract adaptation [*Beer Case; CISG-AC Opinion No. 7, comment, para. 40*; *Schwenzer, p. 724; Brunner, p. 214; Ishida, p. 381*; *Brunner, p. 218f.*; *Staudinger/Magnus, Art. 79, para. 24b*]. To execute a contract in good faith means to execute it according to the parties' common intent [*Ferrario, p. 154*]. It would undermine the principle of good faith if "*only one party bears the consequences of the unexpected change, while the other is permitted to act opportunistically, unjustly enriching himself by taking advantage of his partner's hardship*" [*Nassar, p. 219*]. Instead, acting in good faith entails the re-establishment of the contractual equilibrium allowing the parties' intent to finally emerge.

130 CLAIMANT adhered to the principle of good faith by delivering the last shipment [*Exhibit C8, p. 18, para. 8*] despite being exempted from its performance obligation, pursuant to Art. 79(1) CISG. CLAIMANT's contractual performance should not result in a punishment in form of a loss of remedies. In response, RESPONDENT would have had the duty to work with CLAIMANT in order to reach an agreement that restored the contractual equilibrium. By aborting the renegotiations [*Exhibit C8, p. 18, para. 9*], RESPONDENT left CLAIMANT out in the cold and forced CLAIMANT to carry the burden of the Sales Agreement that was fundamentally shifted towards RESPONDENT [*see supra, para. 122*].

131 RESPONDENT urged CLAIMANT to send the last shipment before the beginning of the breeding season on 1 February 2018 [*Exhibit R4, p. 36, para. 4*]. Contrary to RESPONDENT's promise to only use the semen for the mares agreed upon in the Sales Agreement, it resold the semen against the contractual arrangements [*PO2, p. 56, para. 11*]. This unilateral enrichment grossly contradicts the principle of good faith.

132 The 30%-Tariff fulfils the prerequisites of Art. 79(1) CISG and the existence of the Hardship Clause does not exclude the application Art. 79(1) CISG. The Arbitral Tribunal should re-

establish the contractual equilibrium in conformity with Art. 79(1) CISG in conjunction with the principle of good faith by adapting the Sales Agreement.

II. Alternatively, the rules of private international law would lead to an adaptation of the Sales Agreement under Arts. 6.2.2, 6.2.3 MCL

133 Even if the Arbitral Tribunal were to decide that the general principles of the CISG do not resolve the question of hardship, Art. 7(2) CISG points to the law applicable under the rules of private international law. At hand, the rules on private international law are the Hague Principles on Choice of Law in International Commercial Contracts [*PO2 p. 61, para. 43*]. Pursuant to Art. 2(1) of the Hague Principles "*[a] contract is governed by the law chosen by the parties*". The PARTIES chose Mediterranean law [*Exhibit C5, p. 14, clause 14*] which contains a specific provision on hardship in Arts. 6.2.2, 6.2.3 MCL. The five prerequisites of Art. 6.2.2 MCL are met **[1]**. Consequently, Art. 6.2.3 MCL allows the Arbitral Tribunal to adapt the Sales Agreement **[2]**.

1. The prerequisites of Art. 6.2.2 MCL are fulfilled

134 The first prerequisite of Art 6.2.2 MCL is fulfilled if the contractual equilibrium is fundamentally altered. In the case at hand, the 30%-Tariff shifted the contractual equilibrium excessively towards the sole benefit of RESPONDENT [*see supra, para. 122*].

135 Second, Art. 6.2.2(a) MCL requires the hardship event to take place after contract conclusion. Whilst the Sales Agreement was already concluded on 6 May 2017 [*Exhibit C5, p. 13*], the 30%-Tariff came into effect on 15 November 2017 [*PO2 p. 58, para.* 23]. Thus, the hardship event took place after contract conclusion.

136 Third, under Art. 6.2.2(b) MCL, the hardship event needs to be unforeseeable to a certain degree [*Vogenauer/McKendrick, Art. 6.2.2, para. 13*]. The 30%-Tariff in the case at hand was completely unforeseeable [*see supra, para. 98*].

137 Fourth, Art. 6.2.2(c) MCL states that the hardship event must be beyond the control of the disadvantaged party. Acts of governments are generally beyond the control of a party [*Vogenauer/McKendrick, Art. 6.2.2, para. 14*]. The 30%-Tariff is an act of a foreign government and therefore beyond CLAIMANT's control. [*see supra, para. 123*]

138 Finally, under Art. 6.2.2(d) MCL there is no hardship if the disadvantage party took the risk for the hardship event. CLAIMANT did not assume the risk for the 30%-Tariff [*see supra, para. 103-113*]. Consequently, the 30%-Tariff constitutes hardship under Art 6.2.2 MCL.

2. The legal consequence of Art. 6.2.2 MCL is the adaptation of the Sales Agreement pursuant to Art. 6.2.3 MCL

139 In case of hardship in the sense of Art. 6.2.2 MCL, the primary legal consequence pursuant to Art. 6.2.3(1) MCL is renegotiation between the parties [*Vogenauer/McKendrick, Art. 6.2.3, para. 1*]. Immediately after learning that the 30%-Tariff also includes racehorse semen, CLAIMANT contacted RESPONDENT on 20 January 2018 to start renegotiations [*Exhibit C7, p. 16, para. 2*]. Initially RESPONDENT made CLAIMANT believe that "*[they] would certainly find an agreement on the price*" [*Exhibit R4, p. 36, para. 4*]. RESPONDENT's CEO then abruptly ended the renegotiations in a meeting on 12 February 2018 [*Exhibit C8, p. 18, para. 9*] and the renegotiations ultimately failed.

140 In case of failed hardship renegotiations, either party can resort to an arbitral tribunal [*Vogenauer/McKendrick, Art. 6.2.3, para. 5*]. Under Art. 6.2.3(4) MCL, a contract can be terminated or adapted. When determining the remedy, an arbitral tribunal should resort to contract adaptation whenever possible [*Vogenauer/McKendrick, Art. 6.2.3, para. 6*]. In the case at hand, adaptation is the solution which fits the PARTIES' interests most [*see supra, para. 108-122*]. As the prerequisites of Art. 6.2.2 MCL are met, the Arbitral Tribunal should adapt the Sales Agreement pursuant to Art. 6.2.3 MCL.

C. The Arbitral Tribunal should adapt the purchase price of the Sales Agreement by US$ 1,500,000 but not less than US$ 1,250,000 in total for the last 50 doses

141 Having established that the Arbitral Tribunal should adapt the Sales Agreement under either the Hardship Clause, Arts. 79(1), 7 CISG or Arts. 6.2.2, 6.2.3 MCL, CLAIMANT will demonstrate that the correct price increase is US$ 30,000 per dose (i.e. US$ 1,500,000 in total). CLAIMANT is entitled to an additional payment of US$ 1,500,000 for the last shipment of 50 doses of frozen semen based on the PARTIES' agreement **[I]**. Alternatively, CLAIMANT is entitled to payment of US$ 1,500,000 based on the hypothetical intentions of the Parties **[II]**. Even if the Arbitral Tribunal considers the amount of US$ 1,500,000 inappropriate, it should under no circumstances increase the sales price by less than US$ 1,250,000 for the last 50 doses of frozen semen **[III]**.

I. CLAIMANT is entitled to payment of US$ 1,500,000 for the last 50 doses of frozen semen based on the PARTIES' risk allocation in their agreement

142 To establish the correct price increase, the parties' contractual allocation of risk must be taken into account [*Vogenauer/McKendrick, Art. 6.2.3, para. 7*]. A fair price increase does not require that both parties carry the same amount [*Vogenauer/McKendrick, Art. 6.2.3, para. 7*].

143 At the time of contract conclusion, CLAIMANT charged a price of US$ 100,000 per dose. In the email dated 24 March 2017, CLAIMANT clarified towards RESPONDENT that it was not willing to assume any further risks or costs, especially not "*risks associated with […] changes in customs regulation or import restrictions*" [*Exhibit C4, p. 12, paras. 3f.*]. Tariffs are customs regulations and the main source of import restrictions [*Mankiw/Taylor, p. 397*]. With reference to the risks mentioned by CLAIMANT, RESPONDENT accepted CLAIMANT's conditions when suggesting the final wording of the Hardship Clause [*PO2, p. 56, para. 12*]. Furthermore, RESPONDENT did not object to CLAIMANT's unwillingness to bear tariffs. In line with Arts. 7(1) CISG, 2.1.6 PICC and international trade practice, silence and non-objection of a party is considered as acceptance [*Kröll/Mistelis/Viscasillas/Ferrari, Art. 18, paras. 10f.; Vogenauer/Anderson, Art. 2.1.6, para. 15*]. Therefore, RESPONDENT must pay the 30%-Tariff.

II. Alternatively, CLAIMANT is entitled to payment of US$ 1,500,000 based on the hypothetical intentions of the PARTIES

144 Even if the Arbitral Tribunal finds that there is a lack of agreement as to which PARTY should bear the 30%-Tariff, RESPONDENT bears the 30%-Tariff based on the hypothetical intentions of the PARTIES. To determine the correct price increase, the hypothetical intention must be considered as it reflects what the parties would have agreed upon if they had foreseen the event causing hardship at the time of contract conclusion [*Brunner, p. 500; cf. Ishida, p. 371*].

145 If CLAIMANT had foreseen the 30%-Tariff, it would only have been willing to sell the frozen semen for a price of US$ 130,000 per dose to ensure its profit of US$ 5,000 per dose. This is because CLAIMANT always refused to bear further costs associated with customs regulation and import restrictions [*see supra, para. 103*]. However, RESPONDENT would have accepted the sales price of US$ 130,000 per dose due to the high demand of frozen semen in Equatoriana. The high demand is based on the fact that Equatoriana only insured the use of all frozen semen acquired during the lifting of the ban on artificial insemination until 1 July 2019 [*PO2 p. 57, para. 17*]. Therefore, RESPONDENT as well as all other buyers of frozen racehorse semen in Equatoriana were under considerable time pressure. Furthermore, RESPONDENT's investors were keen to see RESPONDENT's racehorse breeding programme commence as soon as possible [*Notice of Arbitration, p. 5, para. 6*]. This is because horse racing is extremely popular in Equatoriana and the growth rate of the connected business sector has in the last five years never been below 4% per year [*Notice of Arbitration, p. 5, para. 4*].

146 In conclusion, the Arbitral Tribunal should adapt the sales price of the last 50 doses to US$ 130,000 per dose as this reflects the price the PARTIES would have agreed upon if they had foreseen the imposition of the 30%-Tariff.

III. Under no circumstances should the Arbitral Tribunal adapt the Sales Agreement by less than US$ 1,250,000

147 In case the Arbitral Tribunal considers the amount of US$ 1,500,000 inappropriate it should under no circumstances increase the sales price by less than US$ 1,250,000 for the last 50 doses of frozen semen.

148 Contract adaptation should guarantee that performance at least becomes bearable for the aggrieved party [*ICC 2508; Brunner, p. 499*]. What is bearable depends on the circumstances of the individual case [*cf. Kröll p. 147*]. In the case at hand, the Sales Agreement would be unbearable for CLAIMANT if it was obliged to bare the 30%-Tariff alone. For performance of the Sales Agreement to become bearable, CLAIMANT needs at least an adaptation to the amount of US$ 125,000 per dose. This is because the success of CLAIMANT's restructuring plan is dependent on CLAIMANT making profits in the years 2017 and 2018 [*PO2, p. 59, para. 29*]. CLAIMANT had planned to make a profit of US$ 300,000 in 2018. This profit largely consists of the profit from the last shipment of the Sales Agreement, i.e. US$ 250,000. If CLAIMANT wants to fulfil its restructuring plan, it needs to make at least a small profit in 2018. With a payment of US$ 1,250,000 from RESPONDENT, CLAIMANT would be able to make at least a small overall profit of US$ 50,000 in 2018 and meet its restructuring plan [*PO2, p. 59, para. 29*]. Consequently, CLAIMANT's financial existence would not be endangered anymore which would dissolve the situation of hardship. That result is also fair, considering CLAIMANT would than break even for the last 50 doses of the Sales Agreement, erasing its losses but also resigning its profit margin of 5%.

149 Thus, CLAIMANT requests the Arbitral Tribunal to adapt the price of the frozen semen at the very least to US$ 125,000 for the 50 doses of the last shipment. This corresponds to a price increase of US$ 1,250,000 in total.

CONCLUSION ISSUE 3

The 30%-Tariff falls within the scope of the Hardship Clause as it makes the contract performance more onerous for CLAIMANT and is comparable to health and safety requirements. The PARTIES reference to *"DDP"* does not exclude the application of the Hardship Clause to the 30%-Tariff as the PARTIES agreed that RESPONDENT would bear the risks of the delivery. The Arbitral Tribunal should adapt the Sales Agreement as it is the most favourable legal consequence for both PARTIES.

Alternatively, the Arbitral Tribunal should adapt the Sales Agreement under Arts. 79(1), 7 CISG. The 30%-Tariff fulfils the prerequisites of Art. 79(1) CISG regarding hardship and requires adaptation of the Sales Agreement as the legal consequence. In any case, Arts. 6.2.2, 6.2.3 MCL provide for contract adaptation when hardship occurs.

The Arbitral Tribunal should adapt the Sales Agreement by increasing the sales price in the amount of US$ 1,500,000.

REQUEST FOR RELIEF

In light of the foregoing submissions CLAIMANT respectfully requests the Arbitral Tribunal

To adjudge and declare that:

- The arbitral tribunal has jurisdiction and the power to adapt the sales agreement under Mediterranean law (**Issue 1**).
- CLAIMANT is entitled to submit evidence from the other arbitration proceeding (**Issue 2**).
- CLAIMANT is entitled to payment of US$ 1,500,000 resulting from an adaptation of the price under
    a. clause 12 of the contract and (**Issue 3A**)
    b. under the CISG (**Issue 3B**)

Mannheim 6 December 2018

CERTIFICATE

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

CARINA GRABNER

UTA MÜLDNER

JESSICA SCHNEEBERGER

CHARLES ERIC SWANSON

MAXIMILIAN ZIMMER

JONAS ZINKAND