SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG – 31st MARCH TO 7th APRIL 2019

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF ZURICH

ON BEHALF OF:	AGAINST:
Black Beauty Equestrian 2 Seabiscuit Drive Oceanside Equatoriana	Phar Lap Allevamento Rue Frankel 1 Capital City Mediterraneo
RESPONDENT	CLAIMANT

PATRIZIA CASTELLAZZI • TESSA DOUMA • VANESSA HUBER

MEIKE PAULETZKI • YVES TJON-A-MEEUW • DELILAH VON STRENG

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

%	per cent
a fortiori	with stronger reason
Art.	Article
Artt.	Articles
AT	Austria
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BE	Belgium
BV	Besloten Vennootschap met beperkte aansprakelijkheid (Dutch private company with limited liability)
CA	Canada
CESL	Common European Sales Law
cf.	confer (compare)
CH	Switzerland
ch.	chapter
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLOUT	Case Law on UNCITRAL Texts
Corp.	Corporation
DAL	Danubian Arbitration Law
DCFR	Draft Common Frame of Reference, 2008
DDP	Delivered Duty Paid
DE	Germany

ed.	edition
e.g.	*exempli gratia* (for example)
Ed(s).	Editor(s)
et al.	*et aliter* (and others)
et seq.	*et sequens* (and the following one)
et seqq.	*et sequentes* (and the following ones)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
GmbH	Gesellschaft mit beschränkter Haftung (private limited company)
GR	Greece
HKIAC	Hong Kong International Arbitration Center
HKIAC Rules 2013	Hong Kong Arbitration Rules, 2013
HKIAC Rules	Hong Kong Arbitration Rules, 2018
HS	Harmonized System
IBA	International Bar Association
ibid.	*ibidem* (in the same source)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC	International Court of Arbitration
ICCA	International Council for Commercial Arbitration
ICSID	International Center for Settlement of Investment Disputes
i.e.	*id est* (that is)
IN	India
in toto	entirely

Inc.	Incorporated
IT	Italy
JP	Japan
LLC	Limited Liability Company
Ltd.	Limited company
Llody's Rep	Lloyd's Law Reports
MfC	Memorandum for CLAIMANT (Ludwig-Maximilians-Universität München)
Model Law	UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments
Mr	Mister
Ms	Miss
No.	Number
NoA	Notice of Arbitration
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
NZ	New Zealand
OHADA	Organsiation pour l'Harmonisation en Afrique du Droit des Affaires (Organization for the Harmonization of Business Law in Africa)
p./pp.	page/pages
para./paras	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
PO 1	Procedural Order No. 1

PO 2	Procedural Order No. 2
Pte. Ltd.	Private Limited
RNoA	Response to the Notice of Arbitration
S.A.	Sociedad anónima (limited liability company)
S.A.S.	Société par actions simplifiée (simplified corporation)
SG	Singapore
S.p.A.	Società per azioni (limited company)
supra	above
UA	Ukraine
UCC	Uniform Commercial Code
UCCI	Ukrainian Chamber of Commerce and Industry
UK	United Kingdom of Great Britain and Northern Ireland
ultima ratio	the last resort
UN	United Nations Organisation
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
(U)PICC	UNIDROIT Principles of International Commercial Contracts 2016
US	United States of America
USD	United States Dollars
v.	versus
Vol.	Volume
WTO	World Trade Organization

INDEX OF AUTHORITIES

Cited as	Reference
AKSOY	AKSOY HÜSEYIN CAN, Impossibility in Modern Private Law, A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law, Cham 2014 *in para. 112*
ASHFORD	ASHFORD PETER, The IBA Rules on the Taking of Evidence in International Arbitration, A Guide, Cambridge 2013 *in para. 57*
ATAMER	ATAMER YESIM M. in: KRÖLL STEFAN/MISTELIS LOUKAS A./ PERALES VISCASILLAS MARIA DEL PILAR (Eds.), Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., Munich 2018, Art. 79 *in paras 112, 119, 128*
AUDIT	AUDIT BERNARD, La Vente International de Marchandises: Convention des Nations-Unies du 11 Avril 1980, Paris 1990 *in para. 112*
BALTHASAR	BALTHASAR STEPHAN, Best practice in international arbitration: comparative reflections on the UNCITRAL Model Law, in: BALTHASAR STEPHAN (Ed.), International Commercial Arbitration, International Conventions, Country Reports and Comparative Analysis, Munich/Oxford/Baden-Baden 2016, pp. 1-43 *in para. 32*

BEISTEINER	BEISTEINER LISA, The (Perceived) Power of the Arbitrator to Revise a Contract, The Austrian Perspective in: KLAUSEGGER CHRISTIAN et. al (Eds.), Austrian Yearbook on International Arbitration, Vienna 2014, pp. 77-122 *in para. 39*
BERGER, Arbitration Agreements	BERGER KLAUS PETER, Re-examining the Arbitration Agreement – Consensus or Confusion?, in: VAN DEN BERG ALBERT JAN (Ed.), International Arbitration 2006: Back to Basics? ICCA Congress Series, Vol. 13, 2007, pp. 301-334 *in para. 32*
BERGER, Gap-Filling	BERGER KLAUS PETER, Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense, Arbitration International, Vol. 17, 2001, pp. 1-18 *in para. 10*
BERGER/KELLERHALS	BERGER BERNHARD/KELLERHALS FRANZ, International and Domestic Arbitration in Switzerland, 3rd ed., Berne 2015 *in paras 56, 57*
BINDER	BINDER PETER, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 3rd ed., London 2010 *in paras 10, 73, 110*

BOBEI	BOBEI RADU BOGDAN, Transnational Commercial Contract Law, Concise Commentary on the UNIDROIT Principles of International Commercial Contracts 2016, Bucharest 2017 *in para. 16*
BORN	BORN GARY B., International Commercial Arbitration, Vol. I-III, 2nd ed., Alphen aan den Rijn 2014 *in paras 8, 10, 15, 23, 32, 35, 73, 103*
BORN, Agreements	BORN GARY B., International Arbitration and Forum Selection Agreements, Drafting and Enforcing, 5th ed., Alphen aan den Rijn 2016 *in para. 35*
BOYKIN/HAVALIC	BOYKIN JAMES H./HAVALIC MALIK, Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration, Transnational Dispute Management, Vol. 5, 2015 *in para. 71*
BRUNNER	BRUNNER CHRISTOPH, Force Majeure and Hardship under General Contract Principles, Exemption for Non-Performance in International Arbitration, International Arbitration Law Library, Vol. 18, Alphen aan den Rijn 2009 *in paras 96, 121, 122, 123*

BUND	BUND JENNIFER M., Force Majeure Clauses, Drafting Advice for the CISG Practitioner, Journal of Law and Commerce, Vol. 17, 1998, pp. 381-413 *in para. 122*
BUYDAERT	BUYDAERT MICHIEL, The Passing of Risk in the International Sale of Goods, A Comparison between the CISG and the INCOTERMS, 2013 Available at: https://cisgw3.law.pace.edu/cisg/biblio/buydaert.html#335 *in para. 80*
CHENG/JILANI/JOHNSON/ MACKINNON	CHENG AMY/JILANII HUZMA/JOHNSON KEITH/MACKINNON AMY, State of the Trade Wars, Tracking U.S. President Donald Trump's tariffs – and the retaliatory measures other countries are taking, Foreign Policy, 21 June 2018 Available at: https://foreignpolicy.com/2018/06/21/trump-tariffs-trade-war-us-eu-china/ *in para. 93*
CRAIG/PARK/PAULSSON	CRAIG WILLIAM LAURENCE/PARK WILLIAM W./PAULSSON JAN, International Chamber of Commerce Arbitration, 3rd ed., Dobbs Ferry 2000 *in para. 39*

CZERNICH	CZERNICH DIETMAR, The Law Applicable to the Arbitration Agreement, in: KLAUSEGGER CHRISTIAN et. al (Eds.), Austrian Yearbook on International Arbitration 2015, Vienna 2015, pp. 73-86 *in para. 32*
DANIEL	DANIEL G. H., Adaptation Clauses in North Sea Oil Supply Agreements, Journal of Energy and National Resources Law, Vol. 1, 1983, pp. 100-103 *in para. 101*
DA SILVEIRA	DA SILVEIRA MERCEDEH AZEREDO, Trade Sanctions and International Sales, An Inquiry into International Arbitration and Commercial Litigation, Alphen aan den Rijn 2014 *in paras 103, 114*
DICEY/MORRIS/COLLINS	LORD COLLINS OF MAPESBURY (Ed.), Dicey, Morris and Collins on the Conflict of Laws, Vol. 1-2, 15th ed., London 2012 *in paras 15, 23*
DIMATTEO, Excuse	DIMATTEO LARRY, Excuse, Impossibility and Hardship, in: DIMATTEO LARRY A./JANSSEN ANDRÉ/MAGNUS ULRICH/ SCHULZE REINER (Eds.), International Sales Law, Munich 2016, pp. 665-712 *in para. 112*

DIMATTEO, Impediment DIMATTEO LARRY, Contractual Excuse Under the CISG, Impediment, Hardship, and the Excuse Doctrines, Pace International Law Review, Vol. 27, 2015, pp. 258-305

in para. 113

DRAETTA/LAKE/NANDA DRAETTA UGO/LAKE RALPH B./NANDA VED P., Breach and Adaptation of International Contracts, An Introduction to Lex Mercatoria, Salem 1992

in para. 112

DRYMER/GOBEIL DRYMER STEPHEN L./GOBEIL VALÉRIE, Document Production in International Arbitration, Communicating Between Ships in the Night, Legitimacy, Myths, Realities, Challenges, ICCA Congress Series, Vol. 18, 2015, pp. 205-220

in para. 63

FAHIM NIA FAHIM NIA MOSTAFA, The Enforcement of Foreign Arbitral Awards, A Closer Look at the New York Convention, New York 2017

in paras 10, 73

FARNSWORTH FARNSWORTH, ALLAN E., in: BIANCA CESARE MASSIMO/BONELL MICHAEL JOACHIM (Eds.), Commentary on the International Sales Law: The 1980 Vienna Sales Convention, Milan 1987, Art. 8

in para. 47

FERRARI	FERRARI FRANCO, Trade Usage and Practices Established between the Parties, Article 9, in: FERRARI FRANCO/FLECHTNER HARRY/BRAND RONALD A., The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention, Munich/London 2004, pp. 191-205 *in para. 114*
FLAMBOURAS, Impossibility	FLAMBOURAS DIONYSIOS P., The Doctrines of the Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law, A Comparative Analysis, Pace International Law Review, Vol. 13, 2001, pp. 261-293 *in paras 114, 128*
FLAMBOURAS, Remarks	FLAMBOURAS DIONYSIOS P., Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108, 2002 Available at: https://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html *in para. 112*
FLECHTNER	FLECHTNER HARRY M., Uniformity and Politics: Interpreting and Filling Gaps in the CISG, in: MANKOWSKI PETER/ WURMNEST WOLFGANG, Festschrift für Ulrich Magnus zum 70. Geburtstag, Munich 2014, pp. 193-207 *in paras 113, 114, 128*

FONTAINE/DE LY	FONTAINE MARCEL/DE LY FILIP, Drafting International Contracts, An Analysis of Contract Clauses, Ardsley 2006 *in para. 103*
FOUCHARD/GAILLARD/ GOLDMAN	GAILLARD EMMANUEL/SAVAGE JOHN (Eds.), Fouchard, Gaillard, Goldman On International Commercial Arbitration, The Hague 1999 *in paras 35, 39, 105*
FRICK	FRICK JOACHIM G., Arbitration and Complex International Contracts, With Special Emphasis on the Determination of the Applicable Substantive Law and on the Adaptation of Contracts to Changed Circumstances, Zurich 2001 *in paras 102, 103*
GAMA	GAMA LAURO JR., CISG Advisory Council Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts, 2015 Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op17.pdf *in para. 115*
GARRO	GARRO ALEJANDRO M., CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, 2007 Available at: https://www.cisgac.com/cisgac-opinion-no7/ *in para. 131*

GILLETTE/WALT	GILLETTE CLAYTON P./WALT STEVEN D., The UN Convention on Contracts for the International Sales of Goods, 2nd ed., New York 2016 *in para. 113*
GIRSBERGER/VOSER	GIRSBERGER DANIEL/VOSER NATHALIE, International Arbitration, Comparative and Swiss Perspectives, 3rd ed., Zurich/Basel/Geneva 2016 *in para. 35*
GIRSBERGER/ZAPOLSKIS	GIRSBERGER DANIEL/ZAPOLSKIS PAULIUS, Fundamental Alteration of The Contractual Equilibrium under Hardship Exemption, Jurisprudence, Vol. 19, 2012, pp. 121-141 *in para. 123*
GLICK/VENKATESAN	GLICK IAN/VENKATESAN NIRANJAN, Choosing the Law Governing the Arbitration Agreement, in: KAPLAN NEIL/MOSER MICHAEL (Eds.), Jurisdiction, Admissibility and Choice of Law in International Arbitration, Liber Amicorum Michael Pryles, Alphen an den Rijn 2018, pp. 131-150 *in paras 19, 20*
GÖKSU	GÖKSU TARKAN, Schiedsgerichtsbarkeit, Zurich/St. Gallen 2014 *in para. 56*

GRÜSKE	GRÜSKE WERNER, Incoterms 2010, A Practical Guide, Practical Know-How for the Users of the INCOTERMS 2010 Official Rules, Torgau 2012 *in para. 80*
Hague Conference	Hague Conference on Private International Law, Commentary on the Principles on Choice of Law in International Commercial Contracts, The Hague 2015 *in para. 15*
HENDERSON	HENDERSON ALASTAIR, Lex Arbitri, Procedural Law and the Seat of Arbitration, Singapore Academy of Law Journal, Vol. 26, 2014, pp. 886-910 *in paras 7, 8, 9*
HOFMANN/ZUBERBÜHLER	HOFMANN DIETER/OETIKER CHRISTIAN/ROHNER THOMAS/ ZUBERBÜHLER TOBIAS, IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration, Zurich/Basel/Geneva 2012 *in paras 60, 65*
HOLTZMANN/NEUHAUS	HOLTZMANN HOWARD M./NEUHAUS JOSEPH E., A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Deventer 1989 *in para. 8*

HONNOLD	HONNOLD JOHN, Uniform Law for International Sales under the 1980 United Nations Convention, 4th ed., The Hague 2009 *in para. 119*
HOWARD JENKINS	HOWARD JENKINS SARAH, Exemption from Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment, Tulane Law Review, Vol. 72, 1998, pp. 2015-2030 *in para. 112*
IBA Commitee	IBA Committee, Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration Available at: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules %20and%20Guidelines *in para. 65*
ICC Incoterms	International Chamber of Commerce (ICC), Incoterms 2010: ICC Rules for the Domestic and the International Trade Terms, English-German Version, 2010 *in paras 80, 83, 84*
JARVIN	JARVIN SIGVARD, The Sources and Limits of the Arbitrator's Power, Arbitration International, Vol. 2, 1986, pp. 140-163 *in para. 6*

JOSEPH	JOSEPH DAVID Q.C., Jurisdiction and Arbitration Agreements and their Enforcement, 3rd ed., London 2015 *in paras 20, 30*
KESSEDJIAN	KESSEDJIAN CATHERINE, Competing Approaches to Force Majeure and Hardship, International Review of Law and Economics, Vol. 25, 2005, pp. 415-433 *in para. 114*
KRÖLL, Adaptation	KRÖLL STEFAN, Anpassung und Ergänzung von Verträgen durch Schiedsgerichte, Internationales Wirtschaftsrecht, Vol. 16, Dissertation University of Cologne, Cologne/Berlin/Bonn/Munich 1998 *in para. 101*
KRÖLL, Gap-Filling	KRÖLL STEFAN, Contractual Gap-Filling by Arbitration Tribunals, International Arbitration Law Review, Vol. 2, 1999, pp. 9-16 *in paras 38, 39, 50*
KÜHNER	KÜHNER DETLEV, The Revised IBA Rules on the Taking of Evidence in International Arbitration, Journal of International Arbitration, Vol. 27, 2010, pp. 667-677 *in paras 38, 39, 90*
LAVE	LAVE LESTER B., An Empirical Approach to the Prisoner's Dilemma Game, The Quarterly Journal of Economics, Vol. 76, pp. 424-436 *in para. 93*

LEE	LEE KATHRYN ELIZABETH, Discovery and Confidentiality Agreements, Stetson Journal of Advocacy and the Law, Vol. 2, 2015, paras 105-178 *in para. 63*
LEW/MISTELIS/KRÖLL	LEW JULIAN D. M./MISTELIS LOUKAS A./KRÖLL STEFAN, Comparative International Commercial Arbitration, The Hague 2003 *in paras 6, 23, 32*
LOOKOFSKY	LOOKOFSKY JOSEPH, Not Running Wild with the CISG, Journal of Law and Commerce, Vol. 29, 2011, pp. 141-169 *in paras 114, 131*
MAGNUS, BGB	MAGNUS ULRICH, in: VON STAUDINGER JULIUS, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), Vol. 2, 13th ed., Berlin 2018, Artt. 6 and 79 *in paras 116, 119*
MAGNUS, General Principles	MAGNUS ULRICH, General Principles of UN-Sales Law, Rabels Zeitschrift for Foreign and International Private Law, Hein Kötz in Honor of His 60th Birthday – Part. I, Vol. 59, 1995 *in paras 114, 130*

MARGHITOLA	MARGHITOLA RETO, Document Production in International Arbitration, International Arbitration Law Library, Vol. 33, New York 2015 *in para. 56*
MASKOW	MASKOW DIETRICH, Hardship and Force Majeure, The American Journal of Comparative Law, Vol. 40, 1992, pp. 657-669 *in para. 103*
MCILWRATH/SAVAGE	MCILWRATH MICHAEL/SAVAGE JOHN, International Arbitration and Mediation, A Practical Guide, Alphen aan den Rijn 2010 *in para. 50*
MCKENDRICK	MCKENDRICK EWAN, in: VOGENAUER STEFAN (Ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd ed., Oxford 2015, Artt. 6.2.2 and 6.2.3 *in paras 119, 122*
MISTELIS	MISTELIS LOUKAS, in: KRÖLL STEFAN/MISTELIS LOUKAS A./ PERALES VISCASILLAS MARIA DEL PILAR (Eds.), Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., Munich 2018, Art. 6 *in para. 115*
MOSER/BAO	MOSER MICHAEL/BAO CHIANN, A Guide to the HKIAC Arbitration Rules, Oxford 2017 *in para. 56*

MOSES	MOSES MARGARET L., The Principles and Practice of International Commercial Arbitration, 3rd ed., Cambridge 2017 *in paras 10, 50*
MÜLLER	MÜLLER ANDREAS, Protecting the Integrity of a Written Agreement, A Comparative Analysis of the Parol Evidence Rule, Merger Clauses and No Oral Modification Clauses in U.S., English, German and Swiss Law and International Instruments (CISG, PICC, PECL, DCFR and CESL), International Commerce and Arbitration, Vol. 14, The Hague 2013 *in para. 16*
MÜLLER-CHEN	MÜLLER-CHEN MARKUS, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Art. 50 *in para. 130*
NOUSSIA	NOUSSIA KYRIAKI, Confidentiality in International Commercial Arbitration, A Comparative Analysis of the Position under English, US, German and French Law, Berlin/Heidelberg 2010 *in para. 60*
O'MALLEY	O'MALLEY NATHAN D., Rules of Evidence in International Arbitration, An Annotated Guide, London 2012 *in paras 57, 60, 65, 75*

OSTENDORF OSTENDORF PATRICK, International Sales Terms, 3rd ed., Munich 2018

in paras 80, 83

PAULSSON PAULSSON JAN, L'Adaptation du Contrat, Revue de l'Arbitrage, Vol. 1, 1984, pp. 249-257

in para. 39

PERALES VISCASILLAS, Art. 7 PERALES VISCASILLAS MARIA DEL PILAR, in: KRÖLL STEFAN/MISTELIS LOUKAS A./PERALES VISCASILLAS MARIA DEL PILAR (Eds.), Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., Munich 2018, Art. 7

in para. 114

PERALES VISCASILLAS, Interpretation PERALES VISCASILLAS MARIA DEL PILAR, Interpretation and Gap-Filling under the CISG, Contrast and Convergence with the UNIDROIT Principles, Uniform Law Review, Vol. 22, 2017, pp. 4-28

in paras 103, 114

PILKOV PILKOV KONSTANTIN, Evidence in International Arbitration: Criteria for Admission and Evaluation, Arbitration, Vol. 80, 2014, pp. 147-155

in para. 71

PILTZ	PILTZ BURGHARD, in: PILTZ BURGHARD/BREDOW JENS (Eds.), Incoterms Kommentar, Munich 2016, paras D-1 - D-529, A-200 - A-423 *in paras 80, 83, 84*
POUDRET/BESSON	POUDRET JEAN-FRANÇOIS/BESSON SÉBASTIEN, Comparative Law of International Arbitration, 2nd ed., London 2007 *in para. 8*
REDFERN/HUNTER	BLACKABY NIGEL/PARTASIDES CONSTANTINE/REDFERN ALAN/ HUNTER MARTIN (Eds.), Redfern and Hunter on International Arbitration, 6th ed., New York 2015 *in para. 56*
RIMKE	RIMKE JOEM, Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, in: Pace University International Law Review (Ed.), Review of the Convention and Contracts for the International Sale of Goods (CISG) 1999-2000, The Hague 2001, pp. 197-243 *in paras 112, 113, 124, 129*
RÖSLER	RÖSLER HANNES, Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law, European Review of Private Law, Vol. 15, 2007, pp. 483-513 *in paras 113, 123*

RUBINO-SAMMARTANO	RUBINO-SAMMARTANO MAURO, International Arbitration, Law and Practice, 3rd ed., Huntington New York 2014 *in para. 73*
SCHIFFERL/WONG	SCHIFFERL MARKUS/WONG VENUS VALENTINA, Decisions of the Austrian Supreme Court on Arbitration in 2013 and 2014 in: KLAUSEGGER CHRISTIAN et al. (Eds.), Austrian Yearbook on International Arbitration 2015, Vienna 2015, pp. 335-365 *in para. 23*
SCHMIDT-KESSEL	SCHMIDT-KESSEL MARTIN in: SCHLECHTERIEM PETER/ SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Art. 8 *in paras 42, 47*
SCHMITTHOFF	SCHMITTHOFF CLIVE, Hardship and Intervener Clauses, Journal of Business Law, 1980, pp. 82-91 *in para. 102*
SCHWENZER	SCHWENZER INGEBORG, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Artt. 77 and 79 *in paras 112, 128, 130*

SCHWENZER, Clausula	SCHWENZER INGEBORG, Die Clausula und das CISG, in: WIEGAND WOLFGANG/KOLLER THOMAS/WALTER HANS PETER (Eds.), Tradition mit Weitsicht, Festschrift für Eugen Bucher zum 80. Geburtstag, Berne 2009, pp. 723-741 *in paras 96, 122*
SCHWENZER, Force Majeure	SCHWENZER INGEBORG, Force Majeure and Hardship in International Sales Contracts, Victoria University of Wellington Law Review, Vol. 39, 2008, pp. 709-725 *in para. 123*
SCHWENZER/ FOUNTOULAKIS/DIMSEY	SCHWENZER INGEBORG/FOUNTOULAKIS CHRISTIANA/DIMSEY MARIEL, International Sales Law, 2nd ed., Oxford 2012 *in para. 42*
SCHWENZER/HACHEM	SCHWENZER INGEBORG/HACHEM PASCAL, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Artt. 6 and 7 *in paras 103, 115*
Secretariat 1984	United Nations Commission on International Trade Law, Composite Draft Text of a Model Law on International Commercial Arbitration, Note by the Secretariat, 1984, A/CN.9/WG.II/WP.50 *in para. 7*

Secretariat Commentary	United Nations Commission on International Trade Law, Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, 1997, A./CONF.97/5 *in paras 112, 121*
Secretary General 1985	United Nations Commission on International Trade Law, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretary General, 1985, A/CN.9/264 *in para. 8*
SLATER	SLATER SCOTT D., Overcome by Hardship, The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG, Florida Journal of International Law, Vol. 12, 1998, pp. 231-262 *in paras 112, 114*
SMEUREANU	SMEUREANU ILENA M., Confidentiality in International Commercial Arbitration, Alphen aan den Rijn 2011 *in para. 63*
STRASSER	STRASSER CHRISTOF, Grenzen der Auslegung von Schiedsvereinbarungen, Wirtschaftsrechtliche Blätter wbl: Zeitschrift für österreichisches und europäisches Wirtschaftsrecht, Vol. 26, 2012, pp. 601-606 *in para. 50*

TALLON TALLON DENIS, in: BIANCA CESARE MASSIMO/BONELL MICHAEL JOACHIM (Eds.), Commentary on the International Sales Law: The 1980 Vienna Sales Convention, Milan 1987, Artt. 6 and 79

in paras 112, 116

TWEEDDALE TWEEDDALE ANDREW/TWEEDDALE KAREN, Arbitration of Commercial Disputes, International and English Law and Practice, New York 2005

in para. 19

UNCITRAL Digest UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, New York 2012

in para. 10

UPICC Commentary International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT Principles 2016, Rome 2016

in paras 119, 129

VAN DEN BERG VAN DEN BERG ALBERT JAN, The New York Convention of 1958, Towards a Uniform Judicial Interpretation, Dissertation University of Rotterdam, The Hague/Deventer 1981

in para. 32

VAN OMMESLAGHE VAN OMMESLAGHE PIERRE, Les Clause de Force Majeure et d'Imprévision (Hardship) dans les Contrats Internationaux, Revue du Droit International et de Droit Comparé, Vol. 57, 1980, pp. 7-59

in para. 101

VENEZIANO VENEZIANO ANNA, UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court, Uniform Law Review, 2010, Vol. 15, pp. 137-149

in para. 131

VOETH/LENZING VOETH MARKUS/LENZING ALINE CHRISTINE, Renegotiations – Empirical Analysis of Impacts on Business Relationships, Journal of Business & Industrial Marketing, Vol. 32, 2017, pp. 541-552

in para. 104

VOGENAUER VOGENAUER STEFAN, in VOGENAUER STEFAN (Ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd ed., Oxford 2015, Art. 2.1.17

in para. 16

WAINCYMER WAINCYMER JEFFREY, Procedure and Evidence in International Arbitration, Alphen aan den Rijn 2012

in paras 6, 58, 71

WEIGAND WEIGAND FRANK-BERND, Practitioner's Handbook on International Commercial Arbitration, 2nd ed., New York 2009

in para. 8

Working Group	United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of its Seventh Session, New York 6 – 17 February 1984, A/CN.9/246 *in para. 7*
ZELLER	ZELLER BRUNO, Damages under the Convention on Contracts for the International Sale of Goods, 2nd ed., New York 2009 *in paras 114, 115*
ZUPPI	ZUPPI ALBERTO L., in: KRÖLL STEFAN/MISTELIS LOUKAS A./PERALES VISCASILLAS MARIA DEL PILAR (Eds.), Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., Munich 2018, Art. 8 *in para. 42*

INDEX OF COURT DECISIONS

Cited as	Reference
Austria	
CISG-Online 614	Gasoline and Gas Oil
[AT, 2001]	Supreme Court of Austria
	22 October 2001
	CISG-Online No. 614
	in paras 115, 116
Liquidation Case	Liquidation Case
[AT, 2013]	Supreme Court of Austria
	8 May 2013
	Case No. 6 Ob 47/13z
	in para. 23
Belgium	
CISG-Online 759	SA P. v. AWS
[BE, 2002]	District Court of Namur
	15 January 2002
	CISG-Online No. 759
	in para. 115
CISG-Online 1963	Scafom International BV. v. Lorraine Tubes S.A.S.
[BE, 2009]	Supreme Court of Belgium
	19 June 2009
	CISG-Online No. 1963
	in paras 119, 129

Canada

Noble China Case	Noble China Inc. v. Lei
[CA, 1998]	Ontario Court of Justice
	4 November 1998
	Case No. [1998] 81 O.T.C. 1 (GD)
	in para. 7
Dreyfus Case	Louis Dreyfus S.A.S. v. Holding Tusculum B.V.
[CA, 2008]	Superior Court of Québec
	8 December 2008
	Case No. [2008] QCCS 5903
	CLOUT Case No. 1049
	in para. 11

Germany

CISG-Online 261	Iron Molybdenum Case
[DE, 1997]	Higher Regional Court of Hamburg
	28 February 1997
	CISG-Online No. 261
	in paras 96, 112, 115

Greece

Sunflower Seed Case	Sunflower Seed Case
[GR, 2006]	Court of Appeals of Lamia
	2006
	Case No. 63/2006
	in para. 112

India

NTPC Case *[IN, 1992]*	National Thermal Power Company v. Singer Company and others Supreme Court of India 7 May 1992 Case No. [1992] 3 SCC 551 *in para. 30*

Italy

Nuova Fucinati Case *[IT, 1993]*	Nuova Fucinati v. Fondmetall International District Court of Monza 14 January 1993 CLOUT Case No. 54 *in para. 112*

Japan

Educational Corporation Case *[JP, 1994]*	Japan Educational Corporation v. Kenneth J. Feld District Court Tokyo 30 May 1994 in: Yearbook Commercial Arbitration XX-1995, Vol. 20, The Hague 1995, pp. 745-749 *in para. 23*

New Zealand

Rotoaria Forest Case	Trustees of Rotoaria Forest Trust v. Attorney-General
[NZ, 1998]	High Court of Auckland
	30 November 1998
	Case No. [1999] 2 NZLR 452
	CLOUT Case No. 658
	in para. 73
Tozer Case	Attorney-General v. Tozer (No. 3)
[NZ, 2003]	High Court of Auckland
	2 September 2003
	Case No. M1528-IM02
	in para. 73

Singapore

Front Row Investment Case	Front Row Investment Holdings (Singapore) Pte. Ltd. v. Daimler South East Asia Pte. Ltd.
[SG, 2010]	High Court of Singapore
	15 March 2010
	Case No. [2010] SGHC 80
	in para. 73
Daimler Case	Daimler South East Asia Pte. Ltd. v. Front Row Investment Holdings (Singapore) Pte. Ltd.
[SG, 2012]	High Court of Singapore
	31 July 2012
	Case No. [2012] SGHC 157
	in para. 9

FirstLink Case *[SG, 2014]*	FirstLink Investments Corporation Ltd. v. GT Payment Pte. Ltd. and others High Court of Singapore 14 May 2014 Case No. [2014] SGHCR 12 *in paras 19, 20*
Rals Case *[SG, 2016]*	Rals International Pte. Ltd. v. Cassa di Risparmio di Parma e Piacenza SpA. Court of Appeal of Singapore 5 September 2016 Case No. [2016] SGCA 52 *in para. 29*
BCY Case *[SG, 2016]*	BCY v. BCZ High Court of Singapore 6 November 2016 Case No. [2016] SGHC 249 *in para. 29*

Switzerland

Foldable Bridge Case *[CH, 2004]*	Foldable Bridge Case Federal Tribunal of Switzerland 7 January 2004 Case No. 4P.196/2003 *in para. 75*

CISG-Online 1740	Fruit and Vegetables Case
[CH, 2008]	Commercial Court of the Canton of Aargau
	5 February 2008
	CISG-Online No. 1740
	in para. 42
Boiler Case	Boiler Case
[CH, 2009]	Federal Tribunal of Switzerland
	19 February 2009
	Case No. 4A_539/2008
	in para. 73

United Kingdom

F Case	F and G Sykes (Wessex) v. Fine Fare Ltd.
[UK, 1967]	Court of Appeal of England and Wales
	1967
	in: [1967] 1 Lloyd's Rep 53
	in para. 38
Amin Rasheed Case	Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.
[UK, 1983]	High Court of Justice of England and Wales
	23 October 1983
	in: [1983] 2 Lloyd's Rep 365
	in para. 30

Naviera Case *[UK, 1988]*	Naviera Amazonica Peruana v. Compania Internacional De Seguors Del Peru Court of Appeal of England and Wales 1988 in: [1988] 1 Lloyd's Rep 116 *in para. 9*
Taylor Case *[UK, 1990]*	Taylor v. Vectapike Ltd. High Court of Justice of England and Wales 1990 in: [1990] 2 EGLR 12 *in para. 66*
Insurance Case *[UK, 1995]*	Insurance Company v. Lloyd's Syndicate High Court of Justice of England and Wales 1995 in: [1995] 1 Lloyd's Rep. 272 *in para. 66*
XL Insurance Case *[UK, 1999]*	XL Insurance Ltd. v. Owens Corning High Court of Justice of England and Wales 28 July 1999 in: [1999] 2 Lloyd's Rep. 500 *in para. 19*

Sonatrach Case *[UK, 2001]*	Sonatrach Petroleum Corporation v. Ferrell International Ltd High Court of Justice of England and Wales 4 October 2001 Case No. [2001] EWHC 481 *in para. 29*
C Case *[UK, 2007]*	C v. D Court of Appeal of England and Wales 5 December 2007 Case No. [2007] EWCA Civ 1282 *in para. 29*
Sulamérica Case *[UK, 2012]*	Sulamérica Cia Nacional De Seguros S.A. and others v. Enesa Engenharia S.A. and others Court of Appeal of England and Wales 16 May 2012 Case No. [2012] EWCA Civ 638 *in paras 19, 29, 30, 31*
Habas Sinai Case *[UK, 2013]*	Habas Sinai Ve Tibbi Gazlar Istishal Endustrisi AS v. VSC Steel Company Ltd. High Court of Justice of England and Wales 19 December 2013 Case No. [2013] EWCA 4071 *in para. 30*

United States of America

Wegematic Case *[US, 1966]*	United States v. Wegematic Corp. United States Court of Appeals, Second Circuit 5 May 1966 Case No. 360 F.2d 674 *in para. 96*
Maple Farms Case *[US, 1974]*	Maple Farms Inc. v. City School District of the City of Elmira Supreme Court of the United States 1 February 1974 Case No. 76 Misc.2d 1080 *in para. 96*
Florida Power & Light Case *[US, 1981]*	Florida Power & Light Co. v. Westinghouse Electric Corp. United States District Court, Eastern District of Virginia 25 June 1981 Case No. 517 F.Supp. 440 *in para. 96*
Freidco Case *[US, 1981]*	Freidco of Wilmington Del., Ltd. v. Farmers Bank of State of Delaware United States District Court, District of Delaware 12 November 1981 Case No. 529 F.Supp. 821 *in para. 96*

Alimenta Case *[US, 1988]*	Alimenta (u.s.a.) Inc. v. Cargill Inc. United States Court of Appeals, Eleventh Circuit December 1988 Case No. 861 F.2d 650 *in para. 123*
Transrol Case *[US, 1991]*	Transrol Navegacao S.A. v. Redirekommanditselskaber Merc Scandia XXIX United States District Court, Southern District of New York 11 December 1991 Case No. 782 F.Supp. 848 *in para. 70*
Iran Aircraft Case *[US, 1992]*	Iran Aircraft Indus. v. Avco Corp. United States Court of Appeals, Second Circuit Case No. 980 F.2d 141 24 November 1992 *in para. 73*
Pennzoil Case *[US, 1998]*	Pennzoil Exploration and Production Co. v. Ramco Energy Ltd. United States Court of Appeals, Fifth Circuit 13 May 1998 Case No. 139 F.3d 1061 *in para. 37*

CISG-Online 342 *[US, 1998]*	MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino S.p.A. United States Court of Appeals, Eleventh Circuit 29 June 1998 CISG-Online No. 342 *in para. 43*
Chemical Case *[US, 1999]*	Lebanon Chemical Corporation v. United Farmers Plant Food Inc. United States Court of Appeals, Eighth Circuit 16 June 1999 Case No. 179 F.3d 1095 *in para. 37*
Reddam Case *[US, 2004]*	J. Paul Reddam et al. v. KPMG LLP United States District Court, Central District of California 14 December 2004 Case No. WL 3761875 *in para. 37*
Granite Rock Case *[US, 2010]*	Granite Rock Company v. International Brotherhood of Teamsters Supreme Court of the United States 24 June 2010 Case No. 130 S.Ct. 2847 *in para. 37*

Cape Flattery Case	Cape Flattery Ltd. v. Titan Maritime LLC
[US, 2011]	United States Court of Appeals, Ninth Circuit
	26 July 2011
	Case No. 647 F.3d 914
	in para. 37
LJL 33rd Street Case	LJL 33rd Street Associates LLC v. Pitcairn Properties Inc.
[US, 2013]	United States Court of Appeals, Second Circuit
	31 July 2013
	Case No. 725 F.3d 184
	in para. 71

INDEX OF ARBITRAL AWARDS

Cited as	Reference
Ad-hoc Arbitration	
Aminoil Case *[1982]*	The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL) in: Yearbook of Commercial Arbitration, 1984, p. 71 *in para. 103*
Methanex Case *[2005]*	Methanex Corporation v. United States of America Final Award of the Tribunal on Jurisdiction and Merits 3 August 2005 in: [2005] 44 ILM 1345 *in paras 57, 65*
Guyana Case *[2007]*	Guyana v. Suriname Procedural Order No. 4 12 October 2005 PCA Case No. 2004-04 *in para. 63*
Detroit Bridge Case *[2014]*	Detroit International Bridge Company v. Government of Canada Procedural Order No. 9 5 June 2014 PCA Case No. 2012-25 *in para. 63*

CIETAC Arbitration

CIETAC Case CISG/2006/06	Canned Oranges Case CIETAC Case No. CISG/2006/06 May 2006 *in para. 112*

Court of Arbitration of the Hamburg Chamber of Commerce

Chinese Goods Case [1996]	Chinese Goods Case Arbitral Tribunal Hamburg 21 March 1996 CLOUT Case No. 166 *in para. 112*

ICC Arbitration

ICC Case 4145 [1987]	ICC Case 4145 [1987] in: Yearbook of Commercial Arbitration (1987), p. 97 *in para. 32*
ICC Case 6149 [1990]	ICC Case 6149 [1990] in: Yearbook Commercial Arbitration (XX-1995), p. 41 *in para. 32*
ICC Case 7154 [1994]	ICC Case 7154 [1994] in: Collection of ICC Arbitral Awards (1991-1995), p. 555 *in para. 32*

ICC Case 8873 [1997]	ICC Case 8873 [1997] in: Collection of ICC Arbitral Awards (1996-2000), p. 501 *in para. 114*
ICC Case 12446 [2004]	ICC Case 12446 [2004] in: JOLIVET EMMANUEL, L'harmonisation du Droit OHADA de Contrats: l'Influence des Principes d'UNIDROIT en Matière de Pratique Contractuelle et d'Arbitrage, Uniform Law Review, Vol. 13, 2008, pp. 127-150, p. 145 *in para. 114*
ICC Case 16655 [2011]	ICC Case 16655 [2011] in: International Journal of Arab Arbitration, Vol. 4, 2012, p. 125 *in para. 56*
ICC Case 11869 [2011]	ICC Case 11869 [2011] in: Yearbook of Commercial Arbitration (2011), p. 47 *in para. 29*

ICSID

Noble Ventures Case [2005]	Noble Ventures Inc. v. Romania 12 October 2005 ICSID Case No. ARB/01/11 *in para. 56*

Merrill & Ring Case *[2008]*	Merrill & Ring Forestry LP v. Government of Canada Decision of the Tribunal on Production of Documents 18 July 2008 ICSID Case No. UNCT/07/01 *in para. 60*
Glamis Gold Case *[2009]*	Glamis Gold Ltd. v. United States of America 8 June 2009 *in para. 56*
EDF Services Case *[2009]*	EDF (Services) Limited v. Romania 8 October 2009 ICSID Case No. ARB/05/13 *in para. 57*

International Commercial Arbitration Court at the UCCI

Corn Case *[2012]*	Corn Case International Commercial Arbitration Court at the UCCI 23 January 2012 CLOUT Case No. 1405 *in para. 116*

INDEX OF LEGAL ACTS AND RULES

Cited as	**Reference**
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
DAL	Danubian Arbitration Law, adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
DDP	Delivered Duty Paid
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
HKIAC Model Clause	HKIAC Model Clause, 2018
HKIAC Rules 2013	Hong Kong Arbitration Rules, 2013
HKIAC Rules	Hong Kong Arbitration Rules, 2018
HS Nomenclature 2017	International Convention on the Harmonized Commodity Description and Coding System 2017 Available at: http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/hs-nomenclature-2017-edition.aspx
ICC Hardship Clause	ICC Hardship Clause, 2003
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
UPICC	UNIDROIT Principles of International Commercial Contracts, 2016

STATEMENT OF FACTS

Conclusion of Contract

The parties ("**Parties**") to this arbitration ("**Arbitration**") are Phar Lap Allevamento ("**CLAIMANT**"), seller of horse semen for artificial insemination based in Mediterraneo, and Black Beauty Equestrian ("**RESPONDENT**"), owner of a racehorse stable in Equatoriana. On **21 March 2017**, RESPONDENT contacted CLAIMANT, inquiring about racehorse semen. On **6 May 2017**, the Parties signed a contract ("**Contract**") which obligated CLAIMANT to ship three instalments of frozen semen for a total of 100 doses and RESPONDENT to pay the overall purchase price of USD 10,000,000. In their Contract, the Parties agreed on DDP delivery, meaning CLAIMANT assumed all risks and costs until the goods would arrive at RESPONDENT's place of business. The Parties also incorporated a narrow hardship clause ("**Hardship Clause**") into their Contract in order to exempt CLAIMANT from a limited number of risks. Tariffs are not mentioned as such a risk in the Hardship Clause.

Imposition of Tariffs

On **19 December 2017**, Equatoriana announced the imposition of a 30 % tariff on agricultural goods from Mediterraneo. Although CLAIMANT was responsible for the delivery of goods until their arrival at RESPONDENT's place of business, it immediately put the last shipment on hold when it found out about the tariff and the resulting additional costs on **20 January 2018**. Even though RESPONDENT had already payed the full purchase price and thus fulfilled its contractual obligations, it agreed to discuss the contract price again. CLAIMANT eventually delivered the last instalment on **23 January 2018**. At the Parties' meeting on **12 February 2018**, CLAIMANT nonetheless did not make any reasonable offer but expected RESPONDENT to bear the bulk of the additional costs. Thereafter, CLAIMANT never contacted RESPONDENT again but put the cart before the horse and directly resorted to arbitration.

Arbitration

In their Contract, the Parties agreed on an arbitration clause ("**Arbitration Agreement**"), which designates Danubia as the seat of arbitration. Accordingly, Danubian Arbitration Law ("**DAL**") is the *lex arbitri*. DAL requires express authorization for a tribunal to adapt a contract. Neither the Arbitration Agreement nor any other clause of the Contract contains such an express authorization. Regardless of this lack of authorization, CLAIMANT initiated arbitration proceedings on **31 July 2018**, requesting the tribunal ("**Tribunal**") to adapt the Contract and increase the purchase price by USD 1,250,000. Moreover, in an attempt to cast a poor light on RESPONDENT, CLAIMANT seeks to introduce the Partial Interim Award from an unrelated arbitration RESPONDENT is involved in. This award was originally obtained by illegal means. Despite full knowledge of its origin, CLAIMANT seeks to submit the award and is even willing to acquire it from a dubious intelligence firm to do so.

SUMMARY OF ARGUMENT

Issue A: The Tribunal does not have jurisdiction to adapt the Contract. CLAIMANT tries to make it seem as if it were only claiming ordinary remuneration for the delivery of goods. However, RESPONDENT has undisputedly paid the contractual price. By asking the Tribunal to adapt the Contract, CLAIMANT in fact demands more than what it is contractually entitled to. Since the Parties did not expressly authorize the Tribunal to adapt the Contract as required by DAL, the Tribunal does not have jurisdiction to do so. Even if no express authorization were required under DAL, the Tribunal would not have jurisdiction to adapt the Contract, as it is not impliedly authorized either. This follows from an interpretation of the Arbitration Agreement under Danubian Law. The same would result even if Mediterranean Law governed the Arbitration Agreement. Therefore, the Tribunal does not have jurisdiction to adapt the Contract.

Issue B: CLAIMANT is not entitled to submit evidence from the other arbitration proceedings. The Tribunal should not allow CLAIMANT to introduce the Partial Interim Award from an unrelated arbitration RESPONDENT is involved in. In seeking to introduce this illegally obtained evidence, CLAIMANT blatantly disregards the principles of good faith and fairness. In addition, the award reveals highly sensitive information regarding RESPONDENT's business transaction with a third party. Thus, compelling confidentiality interests preclude the admission of the evidence. Moreover, the evidence lacks any relevance, as the case underlying the other arbitration is entirely different from the one at hand. Lastly, RESPONDENT's right to equal treatment would be violated if the evidence were admitted since RESPONDENT's confidentiality obligations would prohibit it from correcting the misleading picture CLAIMANT tries to paint.

Issue C: CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price. CLAIMANT's case rests on its attempt to overcome its financial difficulties by conducting large-scale business without bearing the associated risks. Pursuant to its DDP obligation, CLAIMANT has to bear all tariff-related costs, including those caused by the 30 % tariff imposed by Equatoriana. By relying on the Hardship Clause and, alternatively, on Art. 79 CISG, CLAIMANT now tries to sidestep its DDP obligation. Even if the Tribunal were to find that the Hardship Clause was applicable, the requirements for hardship thereunder would not be fulfilled. Moreover, CLAIMANT cannot rely on Art. 79 CISG either since the Parties derogated from said provision and thereby excluded it. Even if the Tribunal were to find that Art. 79 CISG was applicable, the tariff imposed would not give rise to hardship under Art. 79 CISG. In any event, neither the Hardship Clause nor Art. 79 CISG allow for price adaptation by the Tribunal.

A. The Tribunal does not have jurisdiction to adapt the Contract

1 The Tribunal does not have jurisdiction to adapt the Contract since it was not authorized to do so. Jurisdiction is in dispute only as it relates to the Tribunal's power to adapt the Contract (*PO 2, p. 61 para. 48*). In the following, the term *"jurisdiction"* will hence be used to refer to this power. For the Tribunal to have jurisdiction to adapt the Contract, the *lex arbitri* requires an express authorization by the Parties. As the Tribunal is not expressly authorized as required by the *lex arbitri*, it does not have jurisdiction to adapt the Contract [**I**]. Even if the Tribunal were to decide that no express authorization was needed, the Tribunal would still not have jurisdiction as it is not impliedly authorized either [**II**].

I. The Tribunal is not expressly authorized as required by the lex arbitri

2 In the case at hand, the *lex arbitri* is undisputedly DAL (*PO 1, p. 53 para. 4; Exh. C 5, p. 14 para. 15*). Art. 28(3) DAL contains an express authorization requirement for contract adaptation by tribunals, which is not fulfilled in the present case [**1**]. Contrary to CLAIMANT's allegation (*MfC, para. 59*), the Tribunal must respect this express authorization requirement [**2**].

1. The express authorization requirement of Art. 28(3) DAL is not fulfilled

3 Art. 28(3) DAL reads: *"The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*". In the view of Danubian courts, this provision in general regulates the conferral of exceptional powers to a tribunal, i.e. it addresses cases in which a tribunal has broad discretion to decide a dispute (*cf. PO 2, p. 60 para. 36*). According to consistent jurisprudence in Danubia, contract adaptation is precisely such an exceptional power (*ibid.*). Thus, Art. 28(3) DAL requires an express authorization for a tribunal to adapt a contract (*PO 2, p. 60 para. 36; RNoA, p. 31 para. 13*).

4 In the case at hand, there is no such express authorization. The Parties' Arbitration Agreement reads: *"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration [...]"* (*Exh. C 5, p. 14 para. 15*). Since the Arbitration Agreeement does not mention contract adaptation with a single word, it cannot expressly authorize the Tribunal to adapt the Contract. Nor can an authorization be found elsewhere in the Contract (*cf. Exh. C 5, pp. 13 et seq.*). Consequently, the express authorization requirement of Art. 28(3) DAL is not fulfilled.

2. The Tribunal must respect the express authorization requirement of Art. 28(3) DAL

5 CLAIMANT cannot but concede that there is no express authorization for the Tribunal to adapt the Contract (*MfC, para. 59*). Yet, it attempts to escape the inevitable conclusion that no contract adaptation is possible by inviting the Tribunal to simply disregard the requirement of Art. 28(3) DAL. CLAIMANT alleges that *"the Tribunal may apply and interpret the law freely [. . .]"* (*ibid.*). On the contrary, the Tribunal is not free to apply the express authorization requirement but must respect it for the following reasons:

6 First, as pointed out above (*supra para. 3*), the express authorization requirement is part of the *lex arbitri*. The *lex arbitri* constitutes the legal framework which determines the limits of a tribunal's power (*JARVIN, pp. 149 et seq.; LEW/MISTELIS/KRÖLL, para. 12 et seq.; WAINCYMER, p. 68*). The Tribunal is thus bound by the express authorization requirement of Art. 28(3) DAL just like by any other provision of the *lex arbitri*.

7 Second, this holds particularily true because the express authorization requirement of Art. 28(3) DAL is mandatory. The mandatory nature of Art. 28(3) DAL becomes apparent from its drafting history. Since DAL is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), the drafting history of Art. 28(3) Model Law proves instructive. The Model Law drafters generally designated all non-mandatory provisions by including the phrasing "*unless otherwise agreed by the parties*" (*Secretariat 1984, para. 9; Working Group, para. 177; cf. Artt. 26 and 29 Model Law*). Art. 28(3) Model Law does not contain such language. Instead, it includes the wording *"shall"* which is recognized to indicate the mandatory character of a provision in the Model Law (*Noble China Case [CA, 1998]; HENDERSON, p. 900; cf. Art. 18 Model Law*). Thus, Art. 28(3) Model Law and, accordingly, Art. 28(3) DAL are mandatory.

8 The mandatory nature of the express authorization requirement in Art. 28(3) DAL is further corroborated by its purpose. Express authorization aims to protect parties from being submitted to arbitral tribunals with exceptional powers despite not having actively consented to it (*HOLTZMANN/NEUHAUS, p. 770; Secretary General 1985, para. 8; WEIGAND, para. 14.456*). This aim would not be realised if the requirement were non-mandatory. If that were the case, parties could expressly or impliedly derogate from the requirement (*BORN, pp. 2132 et seqq.; HENDERSON, p. 888; POUDRET/BESSON, paras 525 et seqq.; WEIGAND, paras 14.365 et seqq.*). Hence, a tribunal could assume a derogation of the provision and construe an authorization solely based on the circumstances. In that way, a party could find itself facing a tribunal with the power to adapt its contract without ever having considered this possibility. This would frustrate the purpose of protecting the parties. Accordingly, its purpose requires Art. 28(3) DAL to be mandatory. Thus, the Tribunal is bound by the express authorization requirement and cannot simply ignore it.

9 Third, even if Art. 28(3) DAL were non-mandatory, the Tribunal would have to respect the provision since the Parties did not derogate from it. CLAIMANT could argue in the further course of the proceedings that the Parties' choice of the HKIAC Rules (*Exh. C 5, p. 14 para. 15*) constituted a derogation from the express authorization requirement. Generally, a derogation from a non-mandatory provision of the *lex arbitri* is possible via a choice of arbitration rules if these rules differ in terms of content (*Naviera Case [UK, 1988]; Daimler Case [SG, 2012]; HENDERSON, pp. 896 et seqq.*). However, the Parties' choice of the HKIAC Rules cannot be construed as a derogation from the express authorization requirement of Art. 28(3) DAL since these rules do not address the issue of contract adaptation at all

(*cf. HKIAC Rules*). Hence, the Parties did not derogate from the express authorization requirement of Art. 28(3) DAL.

10 Finally, if the Tribunal were to disregard Art. 28(3) DAL, the award could be set aside pursuant to Art. 34(2)(a)(iv) DAL. This provision gives grounds for a set-aside of the award if the proceedings were not conducted in accordance with the *lex arbitri* (*BINDER, para. 7-021; BORN, p. 3270; MOSES, p. 236; UNCITRAL Digest, p. 156*). Furthermore, the enforcement of the award may be refused according to Art. V(1)(d) NY Convention (*BERGER, Gap-Filling, p. 10; BORN, p. 3576; FAHIMNIA, pp. 83 et seq.*).

11 This is illustrated by the *Dreyfus Case [CA, 2008]*. Just like DAL, the Canadian adoption of the Model Law – the Commercial Arbitration Act – requires in its Art. 28(3) express authorization for the conferral of exceptional powers on tribunals, including for the tribunal to act as *amiable compositeur*. The tribunal in that case had ordered the termination of the contract although the parties had not agreed on this remedy. The court found that thereby the tribunal had acted as *amiable compositeur* without the required express authorization by the parties. Therefore, the court decided that the tribunal had violated the *lex arbitri* and set aside the award pursuant to Art. 34(2)(a)(iv) Commercial Arbitration Act. Likewise, if the Tribunal were to adapt the Contract in the case at hand despite lacking the required express authorization by the Parties, the award would violate the *lex arbitri* and could be set aside according to Art. 34(2)(a)(iv) DAL. Contrary to CLAIMANT's allegation (*MfC, para. 59*), the Tribunal therefore cannot simply disregard Art. 28(3) DAL.

12 In light of the above, the Tribunal must respect the express authorization requirement of Art. 28(3) DAL. Since said requirement is not fulfilled, the Tribunal does not have jurisdiction to adapt the Contract.

II. In any event, the Tribunal is not impliedly authorized either

13 Even if the Tribunal were to find that no express authorization was required, the Tribunal would still not have jurisdiction to adapt the Contract as it is not impliedly authorized either. In order to ascertain whether there is an implied authorization for the Tribunal to adapt the Contract, the scope of the Arbitration Agreement must be established. To this end, the Arbitration Agreement must be interpreted in line with the law by which it is governed. The law governing the Arbitration Agreement is Danubian Law as it was chosen by the Parties [**1**] or, in the alternative, as the law with the closest connection [**2**]. An interpretation of the Arbitration Agreement under Danubian Law shows that there is no implied authorization for the Tribunal to adapt the Contract [**3**]. Even if the Arbitration Agreement were governed by Mediterranean Law, an interpretation thereunder would also show that the Tribunal is not authorized to adapt the Contract [**4**].

1. The Parties agreed on Danubian Law to govern the Arbitration Agreement

14 The Parties agreed on Danubian Law and not, as CLAIMANT alleges (*MfC, paras 13 et seqq.*), on Mediterranean Law to govern their Arbitration Agreement. This is revealed by their choice of Danubia as the seat of arbitration [**a**]. Even a consideration of the means of interpretation invoked by CLAIMANT shows that the Parties agreed on Danubian Law to govern the Arbitration Agreement [**b**].

a) The Parties' choice of Danubia as the seat shows that they agreed on Danubian Law

15 Whether parties have made a choice of law is established according to the law which they purportedly agreed on (*DICEY/MORRIS/COLLINS, para. 32-108; cf. Hague Conference, para. 6.2; cf. BORN, p. 566*). Since the Parties purportedly agreed on Danubian Law, this law is the starting point for the determination of the Parties' choice of law for their Arbitration Agreement.

16 Under Danubian Law, the so-called four corners rule governs the interpretation of arbitration agreements (*PO 1, p. 52 para. II; RNoA, p. 32 paras 16 et seq.*). Pursuant to the Danubian understanding of this rule, arbitration agreements must be interpreted independently from the contract in which they are contained, i.e. within their own four corners (*ibid.*). Moreover, the rule has an effect similar to Art. 2.1.17 UPICC which provides that the negotiation history cannot be considered for the contradiction or the supplementation of a contract (*PO 2, p. 61 para. 45; cf. Art. 2.1.17 UPICC; cf. BOBEI, p. 115; cf. MÜLLER, p. 254; cf. VOGENAUER, Art. 2.1.17, paras 4 et seq.*). However, the Danubian four corners rule is even stricter than Art. 2.1.17 UPICC and also excludes extraneous evidence for the mere interpretation of contracts (*PO 1, p. 52 para. II; RNoA, p. 32 para. 16*). Thus, in essence, the Danubian four corners rule restricts the interpretation of contracts to their wording.

17 An interpretation of the Arbitration Agreement applying the four corners rule shows that the Parties agreed that Danubian Law would apply. This holds true for the following reasons:

18 First, contrary to CLAIMANT's allegation (*MfC, paras 13 et seqq.*), the choice of law for the underlying Contract does not extend to the Arbitration Agreement. Since the Arbitration Agreement must be interpreted independently under the four corners rule, this choice of law in favour of Mediterranean Law does not apply to the Arbitration Agreement. CLAIMANT's argument is therefore misconceived.

19 Second, the choice of Danubia as the seat of arbitration shows that the Parties wanted Danubian Law to govern their Arbitration Agreement. The Arbitration Agreement includes the phrase: *"The seat of arbitration shall be Vindobona, Danubia"* (*Exh. C 5, p. 14 para. 15*). When parties choose a seat of arbitration, there is a general presumption that they intend the law of the seat to govern their arbitration agreement (*XL Insurance Case [UK, 1999]; Sulamérica Case [UK, 2012]*). It is even argued that the choice of the seat is by itself sufficient to determine the law applicable to the arbitration agreement, just as it is sufficient to determine

the *lex arbitri* (GLICK/VENKATESAN, *pp. 144 et seq.*). This is because parties evidently intend, when choosing the seat of arbitration, that the law of this state apply to their arbitration (*XL Insurance Case [UK, 1999]; Sulamérica Case [UK, 2012]; FirstLink Case [SG, 2014];* TWEEDDALE, *para. 7.38*). The parties' intent would not be effectuated if certain aspects of the arbitration, such as the interpretation of the arbitration agreement, were governed by a different law (GLICK/VENKATESAN, *p. 144*). Hence, the parties' choice of the seat entails *"that the parties intended [the law of the seat] to govern all aspects of the arbitration agreement"* (*Sulamérica [UK, 2012]*). Thus, the Parties' choice of Danubia as the seat indicates that they wanted Danubian Law to apply to their Arbitration Agreement.

20 Third, the aforementioned reasoning holds even more true because the Parties chose Danubia as the seat for a specific purpose. As CLAIMANT points out (*MfC, para. 53*), the Parties agreed on Danubia as the seat of arbitration because it is a neutral country (*PO 2, pp. 56 et seq. para. 14*). This choice in favour of neutrality would not be realised if one party's national law governed certain aspects of the arbitration, such as the interpretation of the arbitration agreement (*FirstLink Case [SG, 2014];* GLICK/VENKATESAN, *p. 144; cf.* JOSEPH, *para. 6.31*). Thus, by choosing Danubia as a neutral seat, the Parties also intended Danubian Law as a neutral law to govern their Arbitration Agreement.

21 Therefore, the Parties agreed on Danubian Law to govern the Arbitration Agreement.

b) *Even the means of interpretation invoked by CLAIMANT show that the Parties agreed on Danubian Law to govern the Arbitration Agreement*

22 CLAIMANT's argument in favour of Mediterranean Law relies on the choice of law in the underlying Contract and the negotiation history (*MfC, paras 13 et seqq.*), both of which cannot be considered under the Danubian four corners rule. However, even if these means of interpretation were taken into account, the conclusion would still be that the Parties chose Danubian Law to govern the Arbitration Agreement:

23 The choice of law in the underlying Contract in favour of Mediterranean Law (*Exh. C 5, p. 14 para. 14*) is of no relevance according to the *lex arbitri*, which holds that an arbitration agreement is legally separate from the contract in which it is contained (*RNoA, p. 31 para. 14; cf. Art. 16 DAL*). In fact, an arbitration agreement concerns a different subject-matter than the underlying contract, since it is deemed a procedural contract (*PO 2, p. 60 para. 36; cf. Educational Corporation Case [JP, 1994]; cf. Liquidation Case [AT, 2013]; cf.* SCHIFFERL/WONG, *p. 337*). As such a separate and different contract, the arbitration agreement can be governed by a different law than the underlying contract (BORN, *p. 464;* DICEY/MORRIS/COLLINS *para. 16-012;* LEW/MISTELIS/KRÖLL, *para. 6-23*). Since the Parties in fact agreed on a different law, i.e. Danubian Law (*supra paras 19 et seqq.*), the choice of law in the underlying Contract is irrelevant for the Arbitration Agreement.

24 Besides the choice of law for the underlying Contract, CLAIMANT relies on the negotiation history for its argument in favour of Mediterranean Law (*MfC, paras 18 et seqq.*). In fact, the negotiation history shows the opposite, namely that the Parties intended to have Danubian Law govern the Arbitration Agreement. The negotiations were conducted by CLAIMANT's Mr Ferguson and RESPONDENT's Mr Krone (*Exh. C 8, p. 17; Exh. R 3, p. 35*). They had taken over this function from CLAIMANT's Ms Napravnik and RESPONDENT's Mr Antley who were replaced due to a car accident (*ibid.*). The new negotiators had full access to their predecessors' e-mails (*PO 2, p. 55 paras 5 et seq.*). In fact, Mr Ferguson and Mr Krone drafted the Arbitration Agreement precisely based on these e-mails (*ibid.*). Hence, their understanding of the e-mails determines the Parties' intent regarding the law applicable to the Arbitration Agreement.

25 The issue of the applicable law was mentioned in two of the Parties' e-mails, dated 10 and 11 April 2017 respectively. In its e-mail dated 10 April 2017, RESPONDENT proposed a draft for the Arbitration Agreement which designated Equatoriana as the seat of arbitration and Equatorianan Law as the law governing the Arbitration Agreement. Thus, it proposed that the seat of arbitration and the applicable law should correspond (*Exh. R 1, p. 33*). In its counterproposal of 11 April 2017, CLAIMANT communicated that it equally intended the seat and the applicable law to correspond: CLAIMANT changed the seat to Danubia and sent only this modification back to RESPONDENT, designating it as the *"relevant part"* (*Exh. R 2, p. 34*). Thereby, CLAIMANT expressed that it did not consider it necessary to include an express reference to the law applicable to the Arbitration Agreement, as long as the seat was determined. CLAIMANT's counterproposal could hence only be understood as continuing the Parties' understanding that the applicable law should correspond to the seat, i.e. to designate Danubia and Danubian Law. In the same vein, CLAIMANT's Mr Ferguson and RESPONDENT's Mr Krone, when drafting the Arbitration Agreement based on these e-mails, could only have intended that the applicable law should correspond to the seat, meaning that Danubian Law should govern the Arbitration Agreement.

26 This is further corroborated by CLAIMANT's statement in the same e-mail that its counterproposal was under "*the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo"* (*Exh. R 2, p. 34*). In its preceeding e-mail, RESPONDENT had already accepted that the *"Sales Agreement is governed by the law of Mediterraneo"* (*Exh. R 1, p. 33*), meaning this issue had been settled. Hence, CLAIMANT's statement could only be understood as indicating a contrast to the Arbitration Agreement: The law governing the underlying Contract would *"remain"* Mediterranean Law, whereas the law applicable to the Arbitration Agreement had changed to Danubian Law. Therefore, when the successors read these e-mails, they could only have concluded that Danubian Law should apply to the Arbitration Agreement. Thus, when drafting the Arbitration Agreement, they must have intended that Danubian Law would govern it.

27 CLAIMANT disputes this conclusion by invoking an internal policy prohibiting a choice of foreign laws that it had communicated to RESPONDENT in its e-mail of 10 April 2017 (*MfC, para. 20*). Yet, this policy does not affect the common intent of the Parties established above (*supra paras 24 et seqq.*). In fact, CLAIMANT's policy does not apply to arbitration agreements if the arbitration takes place in a neutral country, which is precisely the case with the choice of Danubia as the seat of arbitration (*PO 2, pp. 56 et seq. para. 14*). Thus, this policy cannot be invoked *vis-à-vis* RESPONDENT to deny the application of Danubian Law. Therefore, even the means of interpretation invoked by CLAIMANT show that the Parties agreed on Danubian Law.

28 Consequently, the Parties agreed on Danubian Law to govern the Arbitration Agreement.

2. In the alternative, Danubian Law governs the Arbitration Agreement as the law with the closest connection

29 Even if the Tribunal were to find no choice of law in favour of Danubian Law, the latter would nevertheless govern the Arbitration Agreement. Absent an express or implied choice of law, an arbitration agreement is governed by the law to which it has the closest connection (*Sonatrach Case [UK, 2001]; C Case [UK, 2007]; ICC Case 11869 [2011]; Sulamérica Case [UK, 2012]; BCY Case [SG, 2016]; Rals Case [SG, 2016]*). Contrary to CLAIMANT's allegation (*MfC, paras 24 et seqq.*), the law with the closest connection is not Mediterranean Law but Danubian Law.

30 CLAIMANT alleges (*MfC, paras 25 et seq.)* that the establishment of the closest connection primarily depends on the law governing the substantive contract. It thereby mainly relies on the *Sulamérica Case [UK, 2012]* and the *Habas Sinai Case [UK, 2013]*. However, in both cases put forward by CLAIMANT, the courts ultimately found that the law having the closest connection and therefore governing the arbitration agreement was the law of the seat (*Sulamérica Case [UK, 2012]*; *Habas Sinai Case, [UK, 2013]*). In its argument, CLAIMANT fails to recognize that the law of the underlying contract is only one indication amongst many and is not by itself determinative of the closest connection. Instead, it can easily be outweighed by indications to the contrary (*NTPC Case [IN, 1992]; Habas Sinai Case [UK, 2013]; JOSEPH, para. 6.31*). The choice of a different country for the seat of arbitration is precisely such a contrary indication outweighing the choice of law in the underlying contract (*Amin Rasheed Case [UK, 1983]; Sulamérica Case [UK, 2012]; Habas Sinai Case [UK, 2013]*).

31 This is illustrated by what is perhaps the most prominent case regarding the law applicable to arbitration argeements, the *Sulamérica Case [UK, 2012]*. A contract between an English and a Brazilian company contained a choice of law for the underlying contract in favour of Brazilian Law as well as an arbitration agreement designating London as the seat. The court, in a first step, concluded that there was no express or implied choice of law regarding the law governing the arbitration agreement. In applying a closest connection test, the court then decided that English Law governed the arbitration agreement despite

the express choice of law in the underlying contract because "*[the arbitration agreement] has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law*" (*Sulamérica Case [UK, 2012]*). Applied to the case at hand, this means that the Parties' Arbitration Agreement has its closest connection with Danubian Law.

32 The notion that the law of the seat represents the law with the closest connection to an arbitration agreement is also reflected in Artt. 34(2)(a)(i) DAL and V(1)(a) NY Convention. These provisions imply that, absent a choice of law, the law of the seat governs the arbitration agreement (*ICC Case 6149 [1990]; BALTHASAR, para. 21; BORN, pp. 499 and 526; CZERNICH, p. 81; LEW/MISTELIS/KRÖLL, para. 6-69; VAN DEN BERG, pp. 127 and 291*). The reason for this default rule is that the seat of arbitration is regarded as the place of performance of arbitration agreements, which establishes the closest connection with the law of the seat (*ICC Case 4145 [1987]; ICC Case 7154 [1994]; BERGER, Arbitration Agreements, p. 315*). Therefore, the Arbitration Agreement has its closest connection with Danubian Law.

33 Consequently, the Arbitration Agreement is most closely connected to Danubian Law. As a result, Danubian Law governs the Arbitration Agreement even absent a choice of law.

3. An interpretation of the Arbitration Agreement under Danubian Law shows that the Tribunal is not authorized to adapt the Contract

34 As demonstrated (*supra paras 14 et seqq.*), Danubian Law governs the Arbitration Agreement and its interpretation. An interpretation of the Arbitration Agreement under Danubian Law shows that the Tribunal is not authorized to adapt the Contract. As laid out (*supra para. 16*), the four corners rule in Danubian Law excludes all extraneous evidence for interpretation purposes, meaning the interpretation of contracts including arbitration agreements is limited to their wording. Therefore, CLAIMANT's argument based on an oral discussion that allegedly shows the Parties' intent to authorize contract adaptation (*MfC, para. 33*) as well as its argument regarding the Arbitration Agreement's purpose (*MfC, para. 53*) are of no consequence. An interpretation of the Arbitration Agreeement restricted to its wording shows that the Parties did not authorize the Tribunal to adapt the Contract:

35 The Arbitration Agreement between the Parties is based on the HKIAC Model Clause (*cf. Exh. C 5 p. 14 para. 15*). However, the Parties made a number of crucial modifications to the wording of the Model Clause. Parties usually do not adapt model clauses but tend to incorporate them verbatim in their contract (*BORN, Agreements, p. 53; BORN, p. 1343; FOUCHARD/GAILLARD/GOLDMAN, para. 313; GIRSBERGER/VOSER, para. 112*). Thus, the Parties' modification of the Model Clause must be attributed particular importance. These modifications – illustrated below – demonstrate the Parties' intent not to authorize the Tribunal to adapt the Contract.

36

The Parties' Arbitration Agreement	The HKIAC Model Clause
Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration [...]	Any dispute, **controversy, difference or claim** arising out of **or relating to** this contract, including the existence, validity, interpretation, performance, breach or termination thereof **or any dispute regarding non-contractual obligations arising out of it or relating to it** shall be referred to and finally resolved by arbitration [...]

37 First, the Parties' decision to delete the Model Clause's phrase *"relating to"* and instead only include *"arising out of"* shows their intent to establish a narrow Arbitration Agreement. The wording *"relating to"* is understood to encompass a broad range of disputes, whereas "*arising out of*" must be construed narrowly (*Pennzoil Case [US, 1998]; Chemical Case [US, 1999]; Reddam Case [US, 2004]; Granite Rock Case [US, 2010]; Cape Flattery Case [US, 2011]*). Hence, the fact that the Parties chose a wording substantially more restrictive than that of the Model Clause shows their firm intent to provide for a narrow Arbitration Agreement.

38 Second, the deletion of the reference to "*any [...] controversy, difference or claim*" from the Model Clause shows that the Parties' did not intend to authorize the Tribunal to adapt the Contract. As the table above illustrates, they had already excluded *non*-contractual claims from the scope of their Arbitration Agreement by deleting the phrase *"or any dispute regarding non-contractual obligations"* from the Model Clause. Hence, the additional deletion of the terms "*any [...] controversy, difference or claim*" can only be understood as excluding certain contractual claims from the scope of the Arbitration Agreement. The deleted terms are generally understood as being broader in scope than the term "*dispute*" and more likely to cover contract adaptation (*F Case [UK, 1967]; KRÖLL, Gap-Filling, p. 9*). Thus, the fact that the Parties deliberately deleted these terms indicates that they did not intend to authorize the Tribunal to adapt the Contract.

39 Third, contrary to CLAIMANT's allegation (*MfC, para. 45*), the remaining term "*dispute*" does not cover claims for contract adaptation. A dispute requires the adjudication of pre-existing rights, meaning the tribunal is asked to come to a yes-or-no decision regarding the parties' rights under a contract (*KRÖLL, Gap-Filling, p. 5; cf. BEISTEINER p. 84; cf. BERGER, Gap-Filling, p. 2*). In contrast, a claim for contract adaptation asks a tribunal to intervene in the contractual equilibrium established by the parties and, in fact, to rewrite the contract at its discretion (*CRAIG/PARK/PAULSSON, p. 114*; *FOUCHARD/GAILLARD/GOLDMAN, para. 34; PAULSSON, p. 251*). Thus, a claim for contract adaptation does not constitute a *"dispute"* (*ibid.*). This notion is also reflected in the *lex arbitri*: While Art. 7 DAL recognizes that parties may submit a "*dispute"* to arbitration by any arbitration agreement, Art. 28(3) DAL requires express authorization for contract adaptation (*supra para. 3*). This mirrors the general understanding that the

term "*dispute*" in its ordinary meaning does not cover claims for contract adaptation. Hence, the Parties' deliberate restriction to the term *"dispute"* shows that they did not intend to include contract adaptation in the scope of the Arbitration Agreement and did not authorize the Tribunal to adapt the Contract.

40 Consequently, an interpretation of the Arbitration Agreement under Danubian Law reveals that the Tribunal is not authorized to adapt the Contract.

4. In the alternative, an interpretation of the Arbitration Agreement under Mediterranean Law shows that the Tribunal is not authorized to adapt the Contract

41 Even if the Tribunal were to find that Mediterranean Law governed the Arbitration Agreement, the Tribunal would not be authorized to adapt the Contract. In contrast to Danubian Law, Mediterranean Law allows reliance on extraneous evidence for the interpretation of arbitration agreements. Contrary to CLAIMANT's allegation (*MfC, paras 28 et seqq.*), an interpretation of the Arbitration Agreement, considering such extraneous evidence, reveals that the Tribunal is not authorized to adapt the Contract.

42 Under Mediterranean Law, arbitration agreements that are contained in sales contracts governed by the CISG are interpreted according to the latter (*PO 1, p. 53 para. 4*). Pursuant to Art. 8(1) CISG, the parties' common intent is primarily relevant for the interpretation of an agreement (*CISG-Online 1012 [CH, 2005]; SCHWENZER/FOUNTOULAKIS/DIMSEY, p. 60; ZUPPI, Art. 8 para. 17*). If the parties' common intent cannot be established, an agreement has to be interpreted according to the understanding of a reasonable third person of the same kind placed in the same external circumstances pursuant to Art. 8(2) CISG (*CISG-Online 1740 [CH, 2008]; SCHMIDT-KESSEL, Art. 8 para. 25; ZUPPI, Art. 8 para. 23*). For an interpretation, all surrounding circumstances, including the negotiation history, must be considered, as set out in Art. 8(3) CISG (*CISG-Online 342 [US, 1998]; SCHMIDT-KESSEL, Art. 8 para. 32*).

43 The conclusion that the wording of the Arbitration Agreement shows that the Parties did not authorize the Tribunal to adapt the Contract (*supra paras 35 et seqq.*) is equally valid under Mediterranean Law. Moreover, the negotiation history, which may additionally be considered under Mediterranean Law, shows that the Parties did not authorize the Tribunal to adapt the Contract [**a**]. Lastly, CLAIMANT's argument regarding the purpose of the Arbitration Agreement is not persuasive [**b**].

a) The negotiation history shows that the Tribunal is not authorized to adapt the Contract

44 As mentioned above (*supra para. 24*), the negotiations were conducted by CLAIMANT's Mr Ferguson and RESPONDENT's Mr Krone. It was them who agreed on the Hardship Clause and the Arbitration Agreement and concluded the final Contract (*PO 2, p. 55 para. 4; Exh. C 5, p. 14*). They did not intend to authorize the Tribunal to adapt the Contract, which is shown by the following considerations:

45 First, during their negotiations the successors never addressed an adaptation of the Contract (*PO 2, p. 55 para. 6*). To RESPONDENT's Mr Krone it was always clear that he did not want to authorize the Tribunal to increase the price upon its discretion (*Exh. R 3, p. 35*). CLAIMANT's Mr Ferguson never communicated any understanding to the contrary (*cf. ibid.*). Even if Mr Ferguson had in fact intended to authorize an adaptation of the Contract by the Tribunal, of which there is no indication, RESPONDENT's Mr Krone could not have possibly known about this. Thus, a common intent of the Parties as to authorize contract adaptation by the Tribunal cannot be established. Moreover, given the fact that contract adaptation had never been part of the Parties' discussions, a reasonable third person would not have understood the Arbitration Agreement as authorizing contract adaptation by the Tribunal.

46 Second, a consideration of the e-mails of the former negotiators, to which their successors had access (*PO 2, p. 55 para. 5*), leads to the same conclusion. In these e-mails, there is no indication whatsoever that the Tribunal should be authorized to adapt the Contract (*cf. Exh. R 1, p.33; cf. Exh. R 2, p. 34*). In fact, the e-mails can only be understood to corroborate the Parties' intent to have a narrow Arbitration Agreement since RESPONDENT expressly stated that it "*narrowed down [...] the fairly broad wording*" of the HKIAC Model Clause and CLAIMANT accepted this modification (*ibid.*). Thus, a consideration of the e-mails shows that the Parties did not authorize the Tribunal to adapt the Contract.

47 Finally, CLAIMANT's allegation that a conversation between its Ms Napravnik and RESPONDENT's Mr Antley showed that the Parties authorized contract adaptation (*MfC, paras 33 and 80*) is misguided. It is the parties' common intent at the time of conclusion that matters for the interpretation of the contract (*FARNSWORTH, Art. 8 para. 2.2*; *SCHMIDT-KESSEL, Art. 8 para. 19*). Neither Ms Napravnik nor Mr Antley actually concluded the final Contract or the Arbitration Agreement (*PO 2, p. 55 para. 4; Exh. C 5, p. 14*). Instead, the matter was handled by CLAIMANT's Mr Ferguson and RESPONDENT's Mr Krone (*supra para. 24*). Neither of them could possibly have known about any oral discussion regarding contract adaptation between Ms Napravnik and Mr Antley. Hence, it cannot be argued based on the oral discussion of the former negotiators that the Parties authorized the Tribunal to adapt the Contract.

48 Therefore, the negotiation history shows that the Tribunal is not authorized to adapt the Contract.

b) CLAIMANT's argument as to the purpose of the Arbitration Agreement is not persuasive

49 CLAIMANT argues that the purpose of the Arbitration Agreement shows that the Tribunal is authorized to adapt the Contract (*MfC, para. 53*). Its argument rests on the assumption that the Parties intended to refer all possible disputes to arbitration and avoid a split of jurisdiction at all costs (*ibid.*). From this, CLAIMANT infers that a claim for contract adaptation must also fall under the Arbitration Agreement (*ibid.*). This argument is not persuasive for the following reasons:

50 First, it cannot simply be assumed that a claim for contract adaptation should be treated like any other claim. A claim for contract adaptation is fundamentally different from an ordinary dispute because an adaptation constitutes a considerable external intervention in the parties' agreement (*supra para. 39*). The specifics of the adaptation of the contract are left entirely to the discretion of the deciding body (*KRÖLL, Gap-Filling, p. 12*). Thus, the general concern that arbitration may deprive parties of an adequate possibility of appeal (*MCILWRATH/SAVAGE, para. 2.019; MOSES p. 5; cf. STRASSER, p. 603*) becomes particularly pertinent. Therefore, CLAIMANT's allegation that claims for contract adaptation should be treated like any other claim is misconceived.

51 Second, CLAIMANT ignores that the Parties did in fact agree on a split of jurisdiction: They deliberately excluded non-contractual claims from the scope of the Arbitration Agreement by deleting the respective wording from the Model Clause (*supra paras 35 et seqq.*). In addition, they also narrowed down the scope of the Arbitration Agreement regarding contractual claims (*ibid.*). The purpose of the Arbitration Agreement was thus not to provide for one single forum for any dispute that might arise, but only to submit selected contractual claims to the Tribunal. Thus, CLAIMANT's conclusion that all possible claims, and accordingly those for contract adaptation, must be covered by the Arbitration Agreement is erroneous. Therefore, contrary to CLAIMANT's allegation, the purpose of the Arbitration Agreement does not suggest that a claim for contract adaptation must fall within its scope.

52 Consequently, an interpretation of the Arbitration Agreement under Mediterranean Law reveals that the Parties did not authorize the Tribunal to adapt the Contract.

53 In light of the above, the Tribunal is not authorized to adapt the Contract, no matter which law governs the Arbitration Agreement.

Conclusion Issue A:

The Tribunal does not have jurisdiction to adapt the Contract because it is not expressly authorized as required by the *lex arbitri*. Such an express authorization cannot be found anywhere in the Contract. Even if no express authorization were required, the Tribunal would not have jurisdiction to adapt the Contract, as the Parties did not impliedly authorize it either. This results from an interpretation of the Arbitration Agreement under Danubian Law, by which it is governed. However, the same result follows from an interpretation under Mediterranean Law. Thus, there is no authorization for the Tribunal to adapt the Contract, irrespective of which law governs the Arbitration Agreement. Therefore, the Tribunal does not have jurisdiction to adapt the Contract.

B. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings

54 CLAIMANT seeks to introduce a Partial Interim Award from unrelated arbitration proceedings RESPONDENT is involved in. CLAIMANT concedes that this award has been obtained by improper means, either through an illegal hack or a breach of confidentiality (*MfC, para. 135*). The Tribunal should not allow CLAIMANT to introduce this award as evidence [**I**]. If it did, the proceedings would be tainted by a serious procedural irregularity and RESPONDENT's right to equal treatment would be violated [**II**].

I. The Tribunal should not allow CLAIMANT to introduce the evidence

55 The Partial Interim Award from the unrelated proceedings should not be allowed into the present proceedings on three independent grounds: The award has been obtained illegally [**1**]. In addition, compelling confidentiality interests of RESPONDENT and the other involved party preclude the admission of the evidence [**2**]. Lastly, the evidence should not be admitted because it is not relevant to the case [**3**].

1. The evidence has been obtained illegally

56 The Tribunal should not allow the introduction of the evidence in question since it has been obtained illegally, a fact CLAIMANT is fully aware of. The Tribunal has broad discretion to decide on the admissibility of evidence. Pursuant to Artt. 22(3) HKIAC Rules and 19(2) DAL, this discretion entails the power to exclude any evidence that parties seek to introduce. When exercising its discretion, the Tribunal should consider the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") which are recognized to reflect international arbitration practice (*BERGER/KELLERHALS, para. 1313; GÖKSU, para. 1542; KÜHNER, p. 667; REDFERN/HUNTER, para. 6.95*). They are frequently used even where the parties did not explicitly refer to them (*Noble Ventures Case [2005]; Glamis Gold Case [2009]; ICC Case 16655 [2011]; MARGHITOLA, p. 33; MOSER/BAO, para. 9.155*).

57 The grounds for exclusion of evidence are set forth in Art. 9.2 IBA Rules. Art. 9.2(g) IBA Rules provides that tribunals may exclude evidence based on considerations of fairness. This provision has successfully been invoked against the admission of illegally obtained evidence (*Methanex Case [2005]; EDF Services Case [2009]; O'MALLEY, paras 9.117 et seqq.*). In this context, it has been held that tribunals should not admit evidence that has been obtained contrary to the principles of good faith and fairness (*EDF Services Case [2009]; ASHFORD, para. 9-67; BERGER/KELLERHALS, para. 1207; WAINCYMER, p. 797*).

58 In the case at hand, CLAIMANT fundamentally disrespects the principles of good faith and fairness by seeking to introduce evidence it knows was illegally obtained. The Partial Interim Award is currently in the possession of an intelligence firm which has a doubtful reputation as to the methods it uses to gather information (*PO 2, pp. 60 et seq. para. 41*). The award was originally obtained either through an illegal

hack of RESPONDENT's computer systems or through a breach of confidentiality by two of RESPONDENT's employees and then passed on to said intelligence firm (*ibid.*). It is this intelligence firm that CLAIMANT intends to buy the Partial Interim Award from (*ibid.*). CLAIMANT must have suspected some impropriety from the outset, as the company refused to disclose its source (*ibid.*). It has known for a fact that the Partial Interim Award was illegally obtained at least since RESPONDENT's original objection (*cf. e-mail by Ms Fasttrack, p. 51*). Nevertheless, CLAIMANT continues to pursue its introduction. This demonstrates that CLAIMANT is not merely a passive beneficiary of others' illegitimate activities but an active participant in furthering the impropriety and downright illegality surrounding the evidence in question.

59 Consequently, as the evidence was obtained illegally, its introduction would run counter to the principles of good faith and procedural fairness pursuant to Art. 9.2(g) IBA Rules. As a result, CLAIMANT should not be allowed to introduce the Partial Interim Award into the present proceedings.

2. The evidence is of compelling commercial confidentiality

60 The Tribunal should not allow CLAIMANT to introduce the evidence in question due to compelling confidentiality interests. Art. 9.2(e) IBA Rules provides that tribunals may exclude evidence on grounds of commercial confidentiality they consider to be compelling. This provision applies to evidence which a party has a reasonable interest in keeping confidential (*O'MALLEY, para. 9.84*). Art. 9.2(e) IBA Rules applies to information about business transactions with third parties and price calculations (*Merrill & Ring Case [2008]*; *HOFMANN/ZUBERBÜHLER, p. 180*). Moreover, the conclusion of a confidentiality agreement indicates confidentiality within the meaning of Art. 9.2(e) IBA Rules (*NOUSSIA, p. 22*).

61 The Partial Interim Award from the other proceedings is of compelling commercial confidentiality according to Art. 9.2(e) IBA Rules. The award stems from arbitration proceedings conducted under the HKIAC Rules 2013. The parties to these proceedings agreed to confidentiality pursuant to Art. 42.1 HKIAC Rules 2013 (*e-mail by Ms Fasttrack, p. 51*). As CLAIMANT concedes (*MfC, para. 138*), the Partial Interim Award is covered by this agreement and thus confidential. Moreover, the Partial Interim Award includes a statement of facts of the case which provides sensitive information about RESPONDENT's business transaction with a third party (*PO 2, p. 60 para. 39*). In particular, it reveals the amount charged for one of RESPONDENT's top-class mares in combination with the specific delivery terms (*ibid.*). This information would enable CLAIMANT to draw inferences regarding RESPONDENT's cost structure and price calculations. Thus, RESPONDENT has a resonable interest in keeping the award confidential. This is even more true *vis-à-vis* CLAIMANT, as the two Parties are competitors in several fields (*NoA, p. 4 paras 1 et seqq.*). The same goes for the counterparty in the other proceedings: Having bought one of RESPONDENT'S promising mares (*e-mail by Mr Langweiler, p. 50*), the counterparty must be involved in the equestrian industry. Since it is domiciled in Mediterraneo, CLAIMANT is its direct competi-

tor. Thus, the counterparty in the other proceedings also has a reasonable interest in keeping the evidence confidential. Hence, the Partial Interim Award is of compelling commercial confidentiality according to Art. 9.2(e) IBA Rules and the Tribunal should not allow it into the present proceedings.

62 Contrary to CLAIMANT's allegation (*MfC, para. 154*), the Tribunal's decision on the admissibility of the Partial Interim Award directly impacts the confidentiality interests at stake. CLAIMANT argues that RESPONDENT's confidentiality interests would not be affected by the Tribunal's decision on the admissibility of the evidence because CLAIMANT could purchase a copy regardless of this decision (*ibid.*). This is an erroneous conclusion: If the Tribunal does not allow CLAIMANT to submit the Partial Interim Award, it is unlikely that CLAIMANT will take the financial and reputational risk of acquiring it in the first place, meaning it will never learn its precise contents. Thus, the Tribunal's decision on the admissibility of the Partial Interim Award has immediate effect on the confidentiality interests involved.

63 Lastly, the protective measures advocated by CLAIMANT (*MfC, paras 156 et seqq.*) do not represent an adequate alternative to the complete exclusion of the Partial Interim Award. CLAIMANT argues that the Tribunal could provide a summary of the evidence or redact sensitive passages (*MfC, para. 157*). However, as indicated by the cases brought forward by CLAIMANT (*ibid.*), these protective measures are only effective in the context of document production (*cf. Guyana Case [2007]; cf. Detroit Bridge Case [2014]; cf. DRYMER/GOBEIL, p. 212; cf. SMEUREANU pp. 171 et seq.; cf. LEE, para. 172*). In these cases, it is the party whose confidentiality is at stake that submits the documents, meaning the counterparty does not know the confidential content yet. In the case at hand, however, it is CLAIMANT who seeks to introduce the confidential document. Thus, CLAIMANT would already be aware of its contents and RESPONDENT's confidentiality interests would be violated, no matter whether the Tribunal subsequently ordered a protective measure. In other words, any protective measure would be moot. Therefore, the protective measures CLAIMANT advocates do not represent an adequate alternative to the complete exclusion of the evidence.

64 Consequently, the Partial Interim Award is of compelling commercial confidentiality pursuant to Art. 9.2(e) IBA Rules. As a result, the Tribunal should not allow it into the present proceedings.

3. The evidence is not relevant to the present case

65 According to Art. 9(2)(a) IBA Rules, evidence should not be allowed if it lacks sufficient relevance to the case (*Methanex Case [2005]*; *HOFMANN/ZUBERBÜHLER, p. 177; IBA Committee, Art. 9; O'MALLEY, para. 9.07*). CLAIMANT advances two grounds for the purported relevance of the Partial Interim Award (*MfC, paras 36, 81 and 142*). As the following considerations demonstrate, neither of these grounds is persuasive:

66 First, CLAIMANT alleges that the Partial Interim Award is relevant for the interpretation of the Arbitration Agreement and the Hardship Clause (*MfC, paras 36 and 81*). This allegation is misguided. The award from one arbitration may be relevant for interpretation purposes in another arbitration only where the two cases concern comparable factual and legal issues. In fact, even in very similar cases, such awards are often deemed irrelevant (*Taylor Case [UK, 1990]; Insurance Case [UK, 1995]*). This is illustrated by the *Taylor Case [UK 1990],* decided in the High Court of Justice of England and Wales. In that case, a landlord had concluded leases containing identical covenants with a number of tenants. One of these covenants ultimately gave rise to disputes between the landlord and several tenants, leading to a number of arbitrations. The landlord sought to introduce the award from one of those arbitrations into another for the interpretation of the covenant in question. However, the court did not allow the introduction of the award from the other arbitration since it did not consider it sufficiently relevant for the interpretation of the respective covenant. Thus, the court held that the award could not influence the interpretation of the contract despite the fact that the legal bases in the two cases were identical.

67 This reasoning must apply *a fortiori* in the present case. The case underlying the other arbitration is entirely different in law and fact from the one at hand, meaning the Partial Interim Award cannot be of any relevance for the interpretation of the Contract. These differences are shown in the following table:

68

Third party v. RESPONDENT (*PO 2, p. 60 para. 39*)	**CLAIMANT v. RESPONDENT** (*Exh. C 5 pp. 13 et seq.*)
HKIAC Model Clause with all additions	HKIAC Model Clause substantially narrowed down
Mediterraneo as seat of arbitration	Danubia as seat of arbitration
Arbitration Agreement governed by Mediterranean Law	Arbitration Agreement governed by Danubian Law
Sale of a living animal	Sale of frozen semen
ICC Hardship Clause, enumerating possible remedies	Individually negotiated Hardship Clause, silent on remedies

69 As illustrated, the nature of the sale, the underlying legal framework as well as the parties' dispute resolution clauses differ fundamentally in the two cases. Hence, they are neither comparable in fact nor in law. The award can therefore not possibly influence the present proceedings and, in particular, the interpretation of the Arbitration Agreement and the Hardship Clause. Thus, the Partial Interim Award is not relevant to the present case and should not be admitted pursuant to Art. 9.2(a) IBA Rules.

70 Second, CLAIMANT alleges that the evidence is relevant to the present case because it ostensibly shows that RESPONDENT took contradictory positions on the effects of the respective arbitration agreements and hardship clauses in the two proceedings (*MfC, para. 142; e-mail by Mr Langweiler, p. 50*). To allow any inference of inconsistent behaviour, the two cases must be comparable in law and fact (*cf. Transrol Case [US, 1991]; cf. WAINCYMER, p. 789*). As shown above (*supra paras 67 et seqq.*) this is not the case here. Thus, the Partial Interim Award cannot be relevant to show any alleged contradictory behaviour on RESPONDENT's part. Therefore, it should not be admitted pursuant to Art. 9.2 (a) IBA Rules.

71 Finally, contrary to CLAIMANT's suggestion (*MfC, para. 134*), the Tribunal should not admit the Partial Interim Award and then decide on its weight. The potentially prejudicial effect of evidence must be considered when deciding on its admissibility. An impression cannot be undone even if it is later decided that this impression never should have been made (*BOYKIN/HAVALIC, p. 35*; *PILKOV, p. 151*). A case that illustrates this consideration is the *LJL 33rd Street Case [US, 2013]*, decided by the United States Court of Appeals for the Second Circuit. In arbitration proceedings, a tribunal had excluded several pieces of evidence on grounds of hearsay and unreliability. The Court of Appeals held that the tribunal had been right to exclude this evidence from the outset due to its potentially prejudicial effect instead of admitting it and then deciding on its weight. The same holds true in the case at hand: The misleading picture that would be created by the Partial Interim Award would be highly prejudicial to RESPONDENT, irrespective of a subsequent determination regarding its weight. What has been read cannot be unread and there would be a risk of a lingering – though baseless – notion that RESPONDENT acted improperly in some way. Therefore, the Tribunal should not allow CLAIMANT to introduce the irrelevant and misleading evidence in the first place.

72 In light of the above, the Tribunal should not allow CLAIMANT to submit the Partial Interim Award in the present proceedings.

II. If the Tribunal were to allow the introduction of the evidence, RESPONDENT's right to equal treatment would be violated

73 If the Tribunal were to allow CLAIMANT to introduce the evidence in question, RESPONDENT's right to equal treatment would be violated because RESPONDENT could not adequately present its case. The right to equal treatment - set forth in Artt. 18 DAL and 13.1 HKIAC Rules - prescribes that parties must have an equal opportunity to adequately present their case (*Rotoaria Forest Case [NZ, 1998]; Boiler Case [CH, 2009]; BINDER, para. 5-008; BORN, pp. 2173 and 3233*). A violation of this right may lead to a set-aside of the award pursuant to Art. 34(2)(a)(ii) DAL (*cf. Tozer Case [NZ, 2003]; cf. Boiler Case [CH, 2009]; cf. Front Row Investment Case [SG, 2010]; BINDER, para. 7-019*). Additionally, the award may be

refused enforcement pursuant to Art. V(I)(b) NY Convention (*Iran Aircraft Case [US, 1992]; FAHIM NIA, pp. 75 et seqq.; RUBINO-SAMMARTANO, p. 1442*).

74 If CLAIMANT were allowed to introduce the Partial Interim Award, RESPONDENT could not adequately present its case. The other arbitration proceedings are conducted under the HKIAC Rules 2013, meaning RESPONDENT is bound by confidentiality pursuant to Art. 42 HKIAC Rules 2013 (*e-mail by Ms Fasttrack, p. 51*). Due to this confidentiality obligation, RESPONDENT could not adequately respond to CLAIMANT's arguments by giving the necessary context, i.e. the legal and factual details underlying the other arbitration. Hence, RESPONDENT would be fighting with one hand tied behind its back. In contrast, CLAIMANT could cherry-pick which parts of the Partial Interim Award to submit and thus paint an entirely misleading picture. This is not merely a theoretical concern: Even the counterparty in the other arbitration proceedings – which has no incentive to misrepresent the facts to RESPONDENT's benefit – has authorized RESPONDENT to state that "*CLAIMANT's allegations do not reflect reality and are taken out of context*" (*e-mail by Ms Fasttrack, p. 51*). Hence, if the evidence were admitted, RESPONDENT would not have an equal opportunity to present its case. Therefore, RESPONDENT's right to equal treatment would be violated and the resulting award could be set aside and refused enforcement.

75 Lastly, CLAIMANT alleges that its right to be heard would be violated if the Partial Interim Award were not allowed into the proceedings, leading to the risk of a set-aside (*MfC, para. 141*). However, an exclusion of irrelevant evidence does not violate the right to be heard of the party seeking to introduce it (*Foldable Bridge Case [CH, 2004]; O'MALLEY, para. 9.07*). As laid out above (*supra paras 65 et seqq.*), the evidence is not relevant to the present case. Therefore, CLAIMANT's right to be heard would not be violated if the Partial Interim Award were not allowed into the proceedings.

76 In light of the above, CLAIMANT is not entitled to submit the Partial Interim Award from the other proeedings.

Conclusion Issue B:

The Tribunal should not allow the Partial Interim Award into the present proceedings on three independent grounds. First, the award has been obtained illegally, as CLAIMANT is fully aware. Second, compelling confidentiality interests preclude its admission. Third, the Partial Interim Award is not relevant to the present case. If the Tribunal were to nevertheless admit the evidence, RESPONDENT's right to equal treatment would be violated and the award could be set aside and refused enforcement. Therefore, CLAIMANT is not entitled to submit evidence from the other arbitration proceedings.

C. CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price

77 CLAIMANT asks for an adaptation of the Contract price in the amount of USD 1,250,000 because its last delivery was affected by the 30 % tariff imposed by Equatoriana (*MfC, paras 62 et seqq.*). When CLAIMANT found out about the tariff three days prior to delivery, it promptly put the last shipment of goods on hold (*Exh. C 7, p. 16*). At this time, RESPONDENT had already paid the entire purchase price and thus fulfilled its contractual obligation. Nevertheless, CLAIMANT refused to perform the Contract unless RESPONDENT would agree to pay an additional amount yet to be determined (*ibid.*). Even though CLAIMANT was obligated to pay the tariff pursuant to the Parties' agreement on DDP, RESPONDENT was open to discussing the price issue once the last shipment had been delivered (*Exh. R 4, p. 36*). Eventually, CLAIMANT delivered the last instalment. Afterwards, it never made a reasonable proposal regarding cost sharing but brazenly expected RESPONDENT to bear all additional costs.

78 Contrary to its allegation (*MfC paras 62 et seqq.*), CLAIMANT is not entitled to additional payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under the Hardship Clause [**I**]. Equally, CLAIMANT is not entitled to such additional payment under the CISG [**II**].

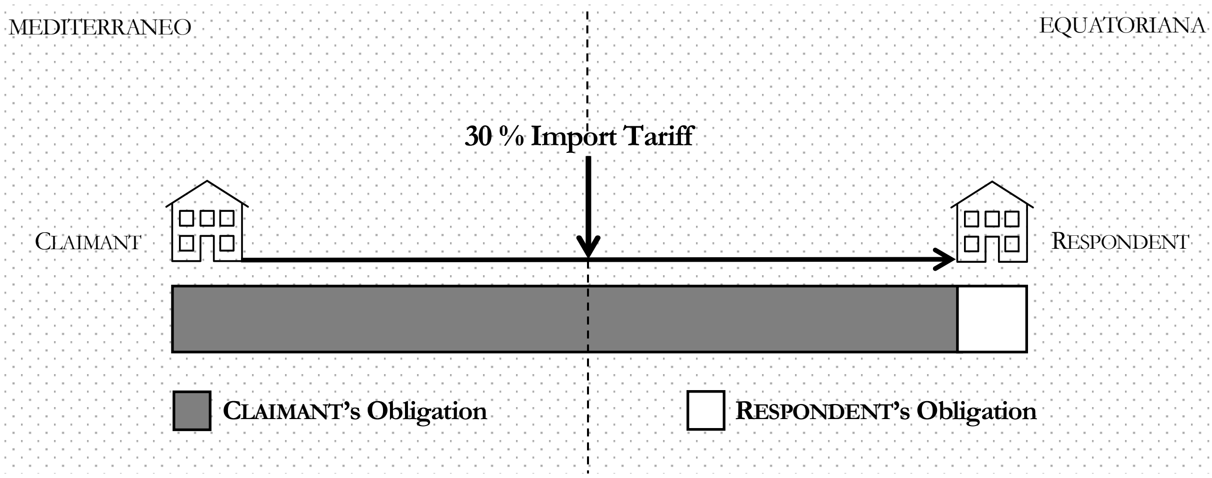
I. CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under the Hardship Clause

79 CLAIMANT's allegation that it is entitled to payment of USD 1,250,000 under the Hardship Clause (*MfC, paras 63 et seqq.*) is unfounded. In fact, CLAIMANT must bear the costs resulting from the 30 % tariff imposed by Equatoriana due to the Parties' agreement on DDP [**1**]. Even if the Tribunal were to find that the tariff fell under the Hardship Clause, the respective requirements for hardship would not be met [**2**]. Even if the tariff gave rise to hardship under the Hardship Clause, the Tribunal should not adapt the price [**3**].

1. CLAIMANT must bear the tariff-induced costs due to the Parties' agreement on DDP

80 Contrary to its allegation (*MfC, paras 70 et seqq.*), CLAIMANT contractually assumed the risk of the 30 % tariff imposed by Equatoriana under the Parties' agreement on DDP. The Parties undisputedly included the Incoterm 2010 DDP in their Contract and agreed on RESPONDENT's place of business as the place of delivery (*Exh. C 5, p. 14 para. 8; PO 2, p. 56 para. 10*). DDP imposes all risks and costs of delivery, including import duties, on the seller (*ICC Incoterms 2010, A 6, p. 76; BUYDAERT, para. 4.7.2; GRÜSKE, p. 88; OSTENDORF, para. 223; PILTZ, para. D-506*). The 30 % tariff imposed by Equatoriana is an import duty and thus falls within CLAIMANT's obligation under DDP, as illustrated below:

81



82 Contrary to CLAIMANT's allegation (*MfC, para. 71*), the Parties did not exempt CLAIMANT from this DDP obligation by incorporating the Hardship Clause in their Contract. This is shown by an interpretation of the Contract pursuant to Art. 8 CISG. For this interpretation, the Parties' common intent at the time of conclusion of the Contract is decisive (*supra para. 42*). As CLAIMANT's Mr Ferguson and RESPONDENT's Mr Krone concluded the Contract on behalf of the Parties, it is their intent that matters (*supra para. 47*). Since they drafted the Contract based on the e-mail exchange between their predecessors, these e-mails need to be considered as well (*ibid.*). The Parties did not exempt CLAIMANT from its DDP obligation to bear import-related tariffs, as is shown by the following considerations:

83 First, the wording of the Contract shows that the Parties did not exempt CLAIMANT from its DDP obligation to bear import-related tariffs. If parties agree on DDP, a seller can only be exempted from bearing import-related tariffs if there is an express agreement to that effect (*ICC Incoterms 2010, p. 205; cf. OSTENDORF, para. 284; cf. PILTZ, para. A-309*). In the case at hand, neither the Hardship Clause nor any other provision of the Contract mentions the exclusion of tariffs with a single word. The Hardship Clause states that "*[the] seller [CLAIMANT] shall not be responsible [...] for hardship, caused by additional health and safety requirements or comparable unforeseen events [...]*" (*Exh. C 5, p. 14 para. 12*). Thus, the wording of the Contract shows that the Parties did not exempt CLAIMANT from its DDP obligation to bear tariffs.

84 Second, a systematic interpretation of the Contract demonstrates that the Parties did not exempt CLAIMANT from its obligation under DDP to bear tariffs. The Parties agreed on clause 10 which states that RESPONDENT should be responsible "*for all tank rental and handling fees associated with delivery of the semen from the storage facility and return of the shipping container*" (*Exh. C 5, p. 14 para. 10*). Such transportation costs normally fall within the seller's obligation under DDP (*ICC Incoterms 2010, p. 203; cf. PILTZ, para. D-2*). However, the Parties expressly exempted CLAIMANT from said obligation (*Exh. C 5, p. 14 para. 10*). Had the Parties intended to exempt CLAIMANT from import tariffs, they would have done so in the same manner, i.e. by including an express clause in the Contract. However, such a clause cannot be found an-

ywhere in the Contract. Thus, a systematic interpretation of the Contract demonstrates that CLAIMANT was not exempted from its obligation under DDP to bear import tariffs.

85 Third, contrary to CLAIMANT's allegation (*MfC, para. 71*), the negotiation history further corroborates that the Parties did not exempt CLAIMANT from its DDP obligation to bear import-related tariffs. RESPONDENT insisted on the inclusion of DDP in the Contract as it considered a smooth delivery crucial to the deal (*Exh. C 3, p. 11; Exh. R 3, p. 35*). CLAIMANT accepted DDP in its e-mail dated 31 March 2017 but requested that "*given the additional costs associated with a DDP delivery, we [CLAIMANT] would need to increase the price by USD 1,000 per dose*" (*Exh. C 4, p. 12*). In addition, CLAIMANT insisted on a hardship clause to be relieved from "*any further risks associated with such a change in delivery terms*" (*ibid.*). RESPONDENT was not willing to accept paying a higher price of USD 1,000 per dose for DDP while CLAIMANT would be exempted from "*any further risks*" by a hardship clause (*ibid.; RNoA, p. 30 para. 4*). In the end, RESPONDENT accommodated CLAIMANT's wish to include a hardship clause but only for a limited number of risks, i.e. "*health and safety requirements or comparable unforeseen events making the contract more onerous*" (*Exh. C 5, p. 14 para. 12*). In return, CLAIMANT settled for a price increase of USD 500 per dose resulting in a final price of USD 100,000 per dose and agreed to deliver DDP (*Exh. C 5, p. 14 para. 8*). Thus, the negotiation history further corroborates that the risks associated with DDP had been accepted by CLAIMANT and that it was only exempted from limited risks stipulated in the Hardship Clause.

86 Consequently, the Parties did not exempt CLAIMANT from its DDP obligation for tariffs. As a result, CLAIMANT has to bear the additional costs of USD 1,500,000 due to the tariff imposed by Equatoriana.

2. In any event, the tariff does not give rise to hardship under the Hardship Clause

87 Even if the Tribunal were to find that the Parties exempted CLAIMANT from its DDP obligation to bear tariffs by including the Hardship Clause, the 30 % tariff imposition by Equatoriana would not give rise to hardship as the requirements of said clause are not met. The Hardship Clause covers "*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (*Exh. C 5, p. 14 para. 12*). Said clause has to be interpreted pursuant to Art. 8 CISG. Accordingly, the Parties' common intent and, in the alternative, a reasonable third person's understanding at the time of conclusion of the Contract is decisive (*supra para. 42*). CLAIMANT bears the burden of proof for hardship, i.e. that the imposed tariff fulfils all requirements of the Hardship Clause cumulatively. Its case fails for three independent reasons: The tariff imposed by Equatoriana does not constitute a "*comparable event*" [**a**], it was foreseeable [**b**] and it did not render the Contract "*more onerous*" [**c**].

a) The imposition of the tariff does not constitute a "comparable event"

88 The Hardship Clause requires a "*comparable event*" to "*additional health and safety requirements*" in order to give rise to hardship (*Exh. C 5, p. 14 para. 12*). Contrary to CLAIMANT's allegation (*MfC, paras 75 and 89*), the imposition of the 30 % tariff by Equatoriana does not constitute such a "*comparable event*":

89 When drafting the Hardship Clause, the Parties agreed on the wording "*health and safety requirements or comparable [...] events*" (*Exh. C 5, p. 14 para. 12*). The reason why they included this wording was CLAIMANT's experience with health and safety requirements for the import of goods (*Exh. C 4, p. 12*). CLAIMANT told RESPONDENT that it had previously sold three mares DDP to a buyer in Danubia. This transaction was affected by Danubia's newly imposed health and safety requirements due to the latest foot and mouth disease crisis and resulted in expensive tests for CLAIMANT (*ibid.; PO 2, p. 58 para. 21*). Against this background, RESPONDENT drafted the Hardship Clause and the Parties agreed on the wording "*health and safety requirements or comparable [...] events*" (*Exh. C 5, p. 14 para. 12*). Thus, a hardship event has to be comparable to "*health and safety requirements*" as experienced by CLAIMANT.

90 The 30 % tariff imposed by Equatoriana does not constitute such a "*comparable event*" as its features are not comparable to "*health and safety requirements*". These requirements, which led to additional costs for CLAIMANT, pursued the purpose of protecting public health from possible contagion (*Exh. C 4, p. 12*). The tariff imposed by Equatoriana, however, did not pursue the purpose of protecting public health in any way but constituted a mere retaliation to Mediterraneo's previously imposed tariff (*Exh. C 6, p. 15*). In addition, said health and safety requirements were specifically product-related. Namely, they were related to living animals as potential carriers of foot and mouth disease (*Exh. C 4, p. 12; PO 2, p. 58 para. 21*). The tariff imposed by Equatoriana, however, was neither specifically product-related nor confined to a limited group of products such as living animals. Instead, it targeted the full range of agricultural goods without making any distinctions (*Exh. C 6, p. 15*). Therefore, the imposition of the 30 % tariff by Equatoriana does not constitute a "*comparable event*" to "*health and safety requirements*".

b) The tariff imposed was foreseeable at the time of conclusion of the Contract

91 The Hardship Clause requires an event to be "*unforeseen"* in order to give rise to hardship (*Exh. C 5, p. 14 para. 12*). Contrary to CLAIMANT's allegation (*MfC, paras 75 and 89*), the 30 % tariff imposed by Equatoriana was in fact foreseeable at the time of conclusion of the Contract:

92 First, the tariff imposed by Mediterraneo, which led to Equatoriana's retaliatory tariff, was foreseeable at the time of conclusion of the Contract on 6 May 2017. Mediterraneo's newly elected president had already announced his protectionist approach towards the agricultural sector in his election program in January 2017 (*NoA, p. 6 para. 9; Exh. C 6, p. 15*). After his election on 25 April 2017, the president appointed an ardent critic of free trade as superminister for agriculture on 5 May 2017 (*PO 2,*

p. 58 para. 23). These developments, which happened right before the conclusion of the Contract, marked a major policy shift. The tariff imposition on agricultural goods by Mediterraneo was thus foreseeable.

93 Second, it was foreseeable that Equatoriana would retaliate against a tariff imposition on agricultural goods by Mediterraneo. Equatoriana had already resorted to retaliatory measures against previous restrictions from other countries (*Exh. C 6, p. 15*). Even before the imposition of Mediterraneo's tariff, a general fear of a complete unraveling of the international trading system had persisted (*ibid.*). In fact, it is normal that if one country imposes tariffs in a system of free trade it would be disadvantageous for other countries not to follow suit (*LAVE, p. 424*). This is also illustrated by the ongoing retaliatory tariffs between the United States of America and the People's Republic of China (*CHENG/JILANI/JOHNSON/MACKINNON*). It was thus foreseeable that after years of flourishing free trade, a possible tariff imposition on agricultural goods would destroy trust and lead Equatoriana to impose retaliatory measures (*ibid.*).

94 Third, contrary to CLAIMANT's allegation (*MfC, para. 89*), it was also foreseeable that retaliatory tariffs on "*agricultural goods*" would apply to frozen racehorse semen. Frozen racehorse semen is categorized as an "*agricultural good*" by the WTO (*HS Nomenclature 2017, HS-0511.99 – other animal products*), to which both Mediterraneo and Equatoriana are member states (*PO 2, p. 61 para. 47*). Any participant of international trade in the horse sector should know of the WTO classification of its own products and should thus be aware that a tariff on agricultural goods covers frozen racehorse semen. Therefore, the tariff imposed by Equatoriana was foreseeable at the time of conclusion of the Contract.

c) The tariff imposed did not render the Contract "more onerous"

95 The Hardship Clause requires an event to make the Contract "*more onerous"* in order to give rise to hardship (*Exh. C 5, p. 14 para. 12*). Contrary to CLAIMANT's allegation (*MfC, paras 76 et seqq.*), the additional costs of USD 1,500,000 due to the tariff imposed did not render the Contract "*more onerous*".

96 In their Hardship Clause, the Parties did not define a threshold as to when the Contract is rendered "*more onerous*" (*C 5, p. 14 para. 12*). If parties do not set a threshold, an increase in costs of performance of at least 100 % is required in order to amount to hardship (*Maple Farms Case [US, 1974]; CISG-Online 261 [DE, 1997]; BRUNNER, p. 432*). The relevant cost increase should be calculated by comparing the additional costs after the occurrence of the hardship event to the initially expected costs, i.e. the contract price including the profit margin (*BRUNNER, p. 433*). Further, if a hardship event does not affect all instalments of a contract, reference should nonetheless be made to the whole contract price in order to decide whether performance was rendered more onerous (*Wegematic Case [US, 1966]*; *Florida Power & Light Case [US, 1981]*; *Freidco Case [US, 1981]; BRUNNER, p. 462; cf. SCHWENZER,*

Clausula, p. 729). In the case at hand, the whole Contract consisted of three instalments with total costs of USD 10,000,000 (*100 doses x USD 100,000 per dose*; *Exh. C 5, p. 14*). The tariff resulted in additional costs of USD 1,500,000 on the last instalment. Compared to the total contractual volume of USD 10,000,000 the tariff only caused a 15 % cost increase (*USD 1,500,000 / USD 10,000,000*). This 15 % cost increase does by far not reach the general threshold of at least 100 % increase.

97 Even if the Tribunal were to find that the Parties agreed on a threshold for hardship, such a threshold would still not be met in the present case. During the negotiations, CLAIMANT mentioned its previous experience with a 40 % cost increase in another business transaction, which had destroyed the commercial basis of the deal (*Exh. C 4, p. 12*). RESPONDENT then drafted the Hardship Clause based on this correspondence (*PO 2, p. 56 para. 12*). Thus, even if the Tribunal were to assume that the Parties had set a lower threshold, it could not be lower than 40 %. However, this threshold would not be met either. The 15 % cost increase on the whole Contract is nowhere near this 40 % threshold. Even if only the purchase price of the last instalment of USD 5,000,000 (*50 doses x USD 100,000*) were considered, the respective 30 % cost increase (*USD 1,500,000 / USD 5,000,000*) would still not meet this threshold. Therefore, the tariff imposed did not render the Contract "*more onerous*".

98 Consequently, the 30 % tariff imposed by Equatoriana was neither a "*comparable event*", nor was it "*unforeseen*", nor did it render the Contract "*more onerous*". As a result, it does not give rise to hardship under the Hardship Clause.

3. In any event, the Tribunal should not adapt the price under the Hardship Clause

99 Even if the Tribunal were to find that the tariff imposed gave rise to hardship under the Hardship Clause, it should not adapt the price. The Hardship Clause does not provide for an adaptation of the price by the Tribunal, but only for renegotiations between the Parties on the price [**a**]. Even if the Tribunal were to find that the Hardship Clause provided for adaptation as *ultima ratio* upon failure of renegotiations, the Tribunal should not adapt the price as renegotiations between the Parties have not yet begun, let alone been completed [**b**].

a) The Hardship Clause does not provide for price adaptation by the Tribunal, but for renegotiations between the Parties

100 CLAIMANT alleges that the Hardship Clause provides for price adaptation by the Tribunal (*MfC, paras 78 et seqq.*). This allegation is erroneous, as the Hardship Clause is entirely silent on remedies (*Exh. C 5, p. 14 para. 12*). Equally, no other provision of the Contract contains any indication on the available remedies (*Exh. C 5, pp. 13 et seq.*). CLAIMANT alleges (*MfC, paras 49 et seq.*) that the Parties nonetheless intended to provide for price adaptation by the Tribunal. To substantiate this allegation, it relies on a conversation between its Ms Napravnik and RESPONDENT's Mr Antley (*ibid.*). As demonstrated above

(*supra para. 47*), this conversation bear no relevance for the interpretation of the Contract since it did not occur between the negotiators who concluded the Contract. In fact, these negotiators did not touch upon the issue of price adaptation nor were they even aware of their predecessors' conversation (*ibid.*). Thus, the Hardship Clause does not provide for price adaptation by the Tribunal.

101 Despite its silence on remedies, the Hardship Clause needs to grant a remedy as it would otherwise be impractical (*DANIEL, p. 102; KRÖLL, Adaptation, p. 138; SCHMITTHOF, p. 88; VAN OMMESLAGHE, p. 52*). Contrary to CLAIMANT's allegation (*MfC, paras 78 et seqq.*), the Hardship Clause does not provide for price adaptation by the Tribunal, but only for renegotiations between the Parties:

102 First, CLAIMANT alleges that price adaptation by a tribunal constitutes "*standard practice*", thus being sufficiently uniform and established to apply although not provided for in a contract (*MfC, para. 84*). This does not hold true as hardship clauses are generally assumed to grant renegotiations between the parties, rather than price adaptation (*DRAETTA/LAKE/NANDA, p. 194; FRICK, p. 180; SCHMITTHOFF, p. 87*). Hence, renegotiations between the parties, not price adaptation by a tribunal constitute "*standard practice*".

103 Second, the principle of party autonomy further corroborates that a silent hardship clause is more likely to provide for renegotiations between the parties than for price adaptation by a tribunal. Party autonomy is crucial to contracts governed by the CISG (*Art. 6 CISG; DA SILVEIRA, p. 339; FONTAINE/DE LY, p. 480; PERALES VISCASILLAS, Interpretation, p. 17; SCHWENZER/HACHEM, Art. 7 para. 32*). In fact, party autonomy is not only important in international sales contracts but also in commercial arbitration, where it constitutes an overriding principle (*BINDER, paras 5-013 et seqq.; BORN, pp. 84 and 2130; FOUCHARD/GAILLARD/GOLDMAN, para. 304*). Price adaptation by a tribunal challenges this overriding principle as it puts a tribunal in the parties' position and empowers it to alter a contract without their consent (*cf. Aminoil Case [1982]; FRICK, p. 192; MASKOW, p. 663*). In contrast, renegotiations do not interfere with party autonomy as they allow parties to find a case-specific solution instead of being subjected to a tribunal's notion of an appropriate solution (*cf. VOETH/LENZING, p. 549*). Pursuant to this principle, the Hardship Clause's silence on remedies can only be interpreted as providing for renegotiations between the Parties, not for price adaptation by the Tribunal.

104 Therefore, the Hardship Clause does not provide for price adaptation by the Tribunal, but for renegotiations between the Parties.

b) In any event, renegotiations between the Parties as a prerequisite to price adaptation by the Tribunal have not yet begun, let alone been completed

105 Even if the Tribunal were to find that the Hardship Clause provided for price adaptation as *ultima ratio*, it should not adapt the Contract. Renegotiations between the Parties have not yet begun, let alone been

completed. In the case at hand, the subject for renegotiations would be the specific amount of price adaptation. However, in its e-mail dated 20 January 2018 CLAIMANT only mentioned the tariff and the resulting 30 % cost increase (*Exh. C 7, p. 16*). During the Parties' subsequent phone call, CLAIMANT did not specify the amount it requested (*Exh. C 8, p. 18; Exh. R 4, p. 36*). Hence, price adaptation could have been any amount between USD 1 and USD 1,500,000. Thus, further communication on the amount was needed. Since the subject for renegotiations was never touched upon, renegotiations between the Parties have not yet begun.

106 Even if the Tribunal were to find that renegotiations between the Parties have begun, they have not yet been completed. Contrary to CLAIMANT's allegation (*MfC, para. 92*), renegotiations between the Parties did not come to an end at their meeting on 12 February 2018. Even though the Contract does not include a provision regarding a price increase, RESPONDENT was willing to meet CLAIMANT on 12 February 2018 in order to renegotiate (*PO 2, p. 60 para. 35*). However, at this meeting CLAIMANT did not even mention the additional tariff-induced costs and the Parties left without an agreement (*cf. Exh. C 8, p. 18*). After this meeting, CLAIMANT never re-contacted RESPONDENT to find a solution on the matter even though renegotiations in complex situations, such as the present one, are rarely concluded at the parties' first meeting. Therefore, renegotiations between the Parties as a prerequisite to price adaptation by the Tribunal have not been completed at the Parties' meeting on 12 February 2018.

107 Consequently, the Hardship Clause does not provide for price adaptation by the Tribunal, but only for renegotiations between the Parties. Even if it provided for price adaptation as *ultima ratio*, the Tribunal should not adapt the price as renegotiations have not yet begun, let alone been completed.

108 In light of the above, CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under the Hardship Clause.

II. In any event, CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under the CISG

109 As demonstrated (*supra paras 87 et seqq.*), CLAIMANT cannot rely on the Hardship Clause to escape its obligation under DDP to bear the 30 % tariff imposed by Equatoriana. Equally, it cannot rely on Art. 79 CISG to do so. CLAIMANT alleges that it is entitled to payment of USD 1,250,000 under Art. 79 CISG (*MfC, paras 97 et seqq.*). However, Art. 79 CISG does not apply as it does not regulate hardship and, in any event, was derogated from and thereby excluded by the Parties [**1**]. Even if Art. 79 CISG applied, the tariff imposed would not give rise to hardship under Art. 79 CISG as the respective requirements are not met [**2**]. In any event, the Tribunal should not adapt the price [**3**].

1. CLAIMANT cannot rely on Art. 79 CISG

110 CLAIMANT cannot rely on Art. 79 CISG since said provision does not regulate hardship [**a**]. Even if the Tribunal were to find that Art. 79 CISG regulated hardship, it would not be applicable to the case at hand as the Parties derogated from and thereby excluded it [**b**].

a) Art. 79 CISG does not regulate hardship

111 Art. 79 CISG states that a party will be exempted from liability for a failure to perform an obligation if it proves that the failure was due to an impediment beyond its control. CLAIMANT alleges that Art. 79 CISG regulates hardship in conjunction with Artt. 6.2.2 et seq. UPICC (*MfC, paras 103 et seqq.*). This allegation is erroneous for the following reasons:

112 First, Art. 79 CISG is not applicable to the case at hand since it only covers non-performance, i.e. cases of "*force majeure*". Art. 79(1) CISG sets forth that a party is "*not liable for **failure to perform** any of his obligations […]*" (*emphasis added*). Hence, Art. 79 CISG only addresses non-performance (*AKSOY, p. 109; ATAMER, Art. 79 CISG, para. 1; BUND, p. 386; HOWARD JENKINS, p. 2024; SCHWENZER, Art. 79 para. 16; Secretariat Commentary, Art. 65 para. 1*). This definition of Art. 79(1) CISG is consistent with the concept of "*force majeure*", under which a contract cannot be performed (*TALLON, Art. 79 para. 2.6*). In contrast, in cases of "*changed circumstances*", i.e. hardship, performance is still possible (*CIETAC Case CISG/2006/06; DIMATTEO, Excuse, para. 86; RIMKE, p. 200 et seq.; cf. FLAMBOURAS, Remarks, ch. 7*). Contrary to CLAIMANT's allegation (*MfC, paras 103 et seqq.*), Art. 79 CISG thus regulates "*force majeure*" but not "*hardship*". This is further corroborated by many courts and the majority of academic opinion supporting that hardship cannot constitute an impediment under Art. 79(1) CISG (*Nuova Fucinati Case [IT, 1993]; CISG-Online 261[DE, 1997]; Sunflower Seed Case [GR, 2006]; cf. Chinese Goods Case [1996]*; *AKSOY, p. 109; AUDIT, para. 182; FLAMBOURAS, Remarks, ch. 7; SLATER, p. 253; TALLON, Art. 79 para. 3.1.2*). In the case at hand, CLAIMANT delivered the last instalment on 23 January 2018 (*Exh. C 8, p. 18*) and hence performed. Thus, Art. 79 CISG is not applicable to the case at hand as performance was evidently possible.

113 Second, there is no gap for hardship either in Art. 79 CISG or in any other CISG provision (*contrary to MfC, paras 113 and 122*). In fact, during the drafting process of the CISG the issue of hardship had been considered, but a respective provision was deliberately omitted (*DIMATTEO, Impediment, p. 274*; *RIMKE, p. 220 et seqq.; RÖSLER, p. 503*). This intentional omittance of hardship indicates that it should be excluded not only from the scope of the impediment under Art. 79 CISG, but indeed from the CISG itself (*FLECHTNER, p. 203 et seq.; GILLETTE/WALT, p. 312; cf. ZELLER, p. 164*). Thus, there is no gap for hardship in the CISG.

114 Third, even if the Tribunal were to find a gap for hardship in the CISG, it could only be filled by principles stipulated *in* the CISG (*PERALES VISCASILLAS, Art. 7 paras 52 et seq.; cf. MAGNUS, General Principles,*

para. 4). Contrary to CLAIMANT's allegation (*MfC, paras 121 et seqq.*), the UPICC do not represent such principles. In fact, hardship cannot be imported into the CISG via the UPICC (*FLECHTNER, p. 204*; *SLATER, p. 261; ZELLER, p. 164*) as they constitute an external set of rules independent from the CISG (*KESSEDJIAN, p. 420*; *LOOKOFSKY, p. 168; PERALES VISCASILLAS, Interpretation, pp. 19 et seq.; SLATER, pp. 250 et seq.*). The application of external principles like the UPICC would undermine the intent of the contracting parties who would then always have to be alert to an application of remote principles that they might not even have been aware of (*FLAMBOURAS, Impossibility, p. 288*). This would stretch the parties' intent to have the CISG govern their contractual relationship. Since the UPICC are also not considered established international practice, parties would have to refer to these principles explicitly in their contract (*ICC Case 8873 [1997]; ICC Case 12446 [2004]; FERRARI, p. 204; RIMKE, pp. 232 et seq.; cf. DA SILVEIRA, p. 338*). In the case at hand, there is no indication that the Parties wanted to apply the UPICC. CLAIMANT may thus not rely on the UPICC to stretch Art. 79 CISG in such a way that it becomes suitable for its case. Therefore, Art. 79 CISG does not regulate hardship.

b) In any event, the Parties derogated from Art. 79 CISG and thereby excluded it

115 Even if the Tribunal were to find that Art. 79 CISG regulated hardship, CLAIMANT could not rely on Art. 79 CISG as the Parties derogated from and thereby exluded it. Pursuant to Art. 6 CISG, parties may derogate from and thereby exclude a provision by either express or clear implied agreement (*CISG-Online 261 [DE, 1997]; CISG-Online 614 [AT, 2001]; CISG-Online 759 [BE, 2002]; MISTELIS, Art. 6 paras 15 et seq.; SCHWENZER/HACHEM, Art. 6, para. 27; cf. GAMA, para. 2.26*). CLAIMANT alleges that any hardship event not covered by the Hardship Clause is to be dealt with under Art. 79 CISG (*MfC, paras 98 et seqq.*). This conclusion is erroneous. The Parties derogated from Art. 79 CISG by incorporating the Hardship Clause into their Contract. In doing so, they fully excluded Art. 79 CISG. This is shown by an interpretation of the Contract pursuant to Art. 8 CISG.

116 First, the wording demonstrates that the Hardship Clause excludes Art. 79 CISG. A party agreement supersedes the CISG if it regulates a matter more specifically (*CISG-Online 614 [AT, 2001]; Corn Case [2012]; MAGNUS, BGB, Art. 6 para. 41; TALLON, Art. 6 para. 2.3.2*). The requirements of the Hardship Clause are more specific than those of Art. 79 CISG. The Hardship Clause requires a "*comparable event*" (to "*health and safety requirements*"), whereas Art. 79 CISG merely requires any "*impediment*" in order to give rise to hardship. Hence, the Parties deliberately limited the scope of hardship scenarios. Thus, the wording demonstrates that the Parties intended to exhaustively regulate selected situations of hardship in their tailored Hardship Clause and thereby exclude Art. 79 CISG.

117 Second, this conclusion is further corroborated by the negotiation history. The fact that the Parties narrowed down the scope of application of the Hardship Clause shows their intent to derogate from and

thereby exclude Art. 79 CISG. In its first proposal, CLAIMANT suggested incorporating the ICC Hardship Clause into the Contract (*Exh. R 2, p. 34*). RESPONDENT rejected this, however, as it considered the ICC Hardship Clause too broad (*Exh. R 3, p. 35*). Subsequently, the Parties agreed to include "*a narrow hardship reference into the force majeure clause*" (*ibid.*). In order to narrow down the scope of application of the ICC Hardship Clause, RESPONDENT used the term "*comparable event*" when drafting the Hardship Clause for the Contract (*Exh. C 5, p. 14 para. 12*). However, under the ICC Hardship Clause, as well as under Art. 79 CISG in conjunction with Art. 6.2.2 UPICC, "*any event*" can amount to hardship. Thus, both provisions share an equally broad scope of application. Since the Parties considered the scope of the ICC Hardship Clause to be too broad, it can be concluded that they did not want to apply Art. 79 CISG either. Therefore, the Parties intentionally derogated from and thereby excluded Art. 79 CISG.

118 Consequently, the Parties derogated from Art. 79 CISG and thereby excluded it when they incorporated the Hardship Clause. As a result, CLAIMANT cannot rely on Art. 79 CISG.

2. In any event, the tariff does not give rise to hardship under Art. 79 CISG

119 Even if the Tribunal were to find that Art. 79 CISG and the UPICC applied, the 30 % tariff imposed by Equatoriana would not give rise to hardship under Art. 79 CISG. The requirements for hardship under Art. 79 CISG are – if at all – developed in conjunction with Art. 7(2) CISG and Art. 6.2.2 UPICC (*supra para. 114*). They set out that the event giving rise to hardship must have been unforeseeable and the respective risk must not have been assumed by the disadvantaged party. In addition, the event must have fundamentally altered the equilibrium of the contract (*CISG-Online 1963 [BE, 2009]; ATAMER, Art. 79 para. 81; HONNOLD, Art. 79 para. 432.2; UPICC Commentary, Art. 6.2.2 para. 2*). CLAIMANT bears the burden of proof for hardship under Art. 79 CISG, i.e. that the tariff imposed fulfils all requirements thereunder cumulatively (*MAGNUS, BGB, Art. 79 para. 66; MCKENDRICK, Art. 6.2.3*). Contrary to CLAIMANT's allegation (*MfC, paras 106 et seqq.*), none of the requirements are met. The 30 % tariff imposed by Equatoriana was foreseeable and the respective risk was assumed by CLAIMANT [**a**]. Furthermore, it did not fundamentally alter the equilibrium of the Contract [**b**].

a) The tariff imposed was foreseeable and the respective risk was assumed by CLAIMANT

120 To give rise to hardship under Art. 79 CISG, an event must not only be unforeseeable but the respective risk must also not have been assumed by the disadvantaged party. An event is considered unforeseeable if a third person could not reasonably be expected to have taken the event into account at the time of conclusion of the contract (*Art. 79(1) CISG*). As stated above (*supra paras 91 et seqq.*), the tariff imposed was foreseeable at the time of conclusion of the Contract. A third person could thus reasonably be expected to have taken the tariff into account.

121 Furthermore, a party assumes a risk if it guarantees to perfrom the respective obligation (*BRUNNER, p. 117; Secretariat Commentary, Art. 65 para. 5*). Its responsibility to perform said obligation then even extends to events beyond its sphere of control (*ibid.*). In the case at hand, CLAIMANT guaranteed a delivery DDP and thereby assumed the risk of import-related tariffs (*supra para 80*). As the 30 % tariff imposed by Equatoriana is precisely such an import-related tariff, CLAIMANT is responsible for the resulting additional costs (*ibid.*). Since CLAIMANT assumed this risk by its DDP obligation, the fact that the tariff imposed was a governmental measure beyond its control is of no relevance (*contrary to MfC, paras 107 et seq.*). Therefore, the tariff imposed was foreseeable and the respective risk was assumed by CLAIMANT.

b) The tariff imposed did not fundamentally alter the equilibrium of the Contract

122 To give rise to hardship under Art. 79 CISG, an event has to fundamentally alter the contractual equilibrium. Contrary to CLAIMANT's allegation (*MfC, para. 108*), the tariff imposed did not fundamentally alter the equilibrium of the Contract. An alteration of the contractual equilibrium is expressed as a cost increase for the seller (*BRUNNER, p. 426; MCKENDRICK, Art. 6.2.2 para. 2*). As CLAIMANT concedes (*MfC, para. 107*), this requirement is particularly strict. The standard threshold at which a cost increase is considered to fundamentally alter the contractual equilibrium is at least 100 % (*supra para. 96*), frequently even 150 – 200 % (*SCHWENZER, Clausula, p. 731*). Further, the required cost increase relates to the whole contract, not to isolated instalments thereof (*supra para. 96*). In the case at hand, the imposition of the tariff by Equatoriana resulted in a 30 % cost increase on the last instalment, but only in a 15 % cost increase on the whole Contract (*supra para. 96*). This cost increase is nowhere near the standard threshold of at least 100 % and hence did not fundamentally alter the equilibrium of the Contract.

123 Even if the Tribunal were to apply a subjective threshold, there are no circumstances allowing for a lower threshold. Impending financial ruin of the aggrieved party may lower the threshold in exceptional cases (*BRUNNER, p. 435; GIRSBERGER/ZAPOLSKIS, pp. 131 et seqq.; SCHWENZER, Force Majeure, p. 716*). However, self-inflicted financial ruin cannot constitute such an exceptional case (*RIMKE, p. 200; RÖSLER, p. 485*). Contrary to CLAIMANT's allegation (*MfC, paras 90 et seqq.*), its present situation does not justify a lower threshold as its impending financial ruin is caused by its own mismanagement with regards to its investment and restructuring measures (*PO 2, p. 58 para. 21 and p. 59 para. 29*). Moreover, lowering the threshold would be inequitable as it would unduly favour CLAIMANT. A low threshold is not permissible if it unduly favours the aggrieved party, i.e. shifts the burden on the other party solely because the latter has more resources (*Alimenta Case [US, 1988]; BRUNNER, p. 436*). In the case at hand, CLAIMANT attempts to shift the burden on RESPONDENT just because the latter would have enough resources to bear the additional costs (*cf. PO 2, p. 59 para. 30*). Simply put, RESPONDENT should not have to bear the

consequences of CLAIMANT's questionable business-decisions. Thus, CLAIMANT's financial situation does not justify a lower threshold.

124 Even if the standard threshold were lowered, it could not be lowered to an extent that would be reached by the present cost increase. In the case at hand, the cost increase was 30 % (on the last instalment) or 15 % (on the whole Contract) respectively. A deviation from the standard threshold of at least 100 % to 30 % or 15 % would be entirely disproportionate. Thus, the standard threshold cannot reasonably be lowered to be reached by the present cost increase.

125 Therefore, the tariff-induced cost increase did not fundamentally alter the equilibrium of the Contract.

126 Consequently, the tariff imposed was foreseeable and the respective risk was assumed by CLAIMANT. Furthermore, it did not fundamentally alter the equilibrium of the Contract. As a result, the tariff does not give rise to hardship under Art. 79 CISG.

3. In any event, the Tribunal should not adapt the price under Art. 79 CISG

127 Even if the Tribunal were to find that the tariff imposed gave rise to hardship under Art. 79 CISG, it should not adapt the price. Art. 79 CISG does not provide for price adaptation by the Tribunal [**a**]. Even if the Tribunal were to find that Art. 79 CISG provided for adaptation as *ultima ratio* upon failure of renegotiations, it should not adapt the price because renegotiations between the Parties have not yet begun, let alone been completed [**b**].

a) Art. 79 CISG does not provide for an adaptation of the price by the Tribunal

128 As CLAIMANT concedes (*MfC, para. 111*), Art. 79 CISG is silent on the remedies available and does not provide for price adaptation by the Tribunal. In fact, Art. 79(5) CISG only exempts the aggrieved party from paying damages (*ATAMER, Art. 79 para. 16; SCHWENZER, Art. 79 para. 50*). Even if the Tribunal were to find that the CISG regulated hardship and that the respective gap for remedies had to be filled by the principles underlying the CISG, the CISG would still not provide for price adaptation by a tribunal (*FLECHTNER, p. 201*). In fact, neither the legislative history nor the language of the CISG imply general principles allowing for price adaptation (*FLAMBOURAS, Impossibility, p. 287; RIMKE, p. 240*). CLAIMANT's allegation (*MfC, paras 112 et seqq.*) that price adaptation by a tribunal can be construed based on three different legal bases is incorrect:

129 First, Art. 6.2.3(4)(b) UPICC cannot provide for a valid basis for price adaptation by the Tribunal (*contrary to MfC, paras 121 et seqq.*). The UPICC as external provisions cannot be read into the CISG (*supra para. 114*). In any event, Art. 6.2.3(4)(b) UPICC grants renegotiations between the Parties as the primary remedy and price adaptation by a tribunal as *ultima ratio* (*Art. 6.2.3(1)-(3) UPICC; UPICC Commentary, Art. 6.2.3 para. 6*). This was stated prominently in the Scafom International Case (*CISG-Online*

1963 [BE, 2009]) where the court, relying on the UPICC, did not adapt the price but ordered the parties to renegotiate. Thus, Art. 6.2.3(4)(b) UPICC cannot serve as a basis for price adaptation by the Tribunal.

130 Second, price adaptation by the Tribunal cannot be construed based on Artt. 50 and 77 CISG (*contrary to MfC, paras 114 et seqq.*). These provisions cover very specific situations, i.e. price adjustment for non-conforming goods (*MÜLLER-CHEN, Art. 50 paras 1 et seqq.*) and the duty to mitigate losses in case of a breach of contract (*SCHWENZER, Art. 77 paras 1 et seq.*). Hence, they do not constitute general principles (*MAGNUS, General Principles, para. 5*), let alone principles applicable to the fundamentally different situation of hardship. In any event, they only cover situations in which one of the parties did not adequately fulfil its contractual obligations. In the case at hand, however, both Parties fulfilled their obligations: RESPONDENT paid the purchase price and CLAIMANT delivered the goods (*Exh. C 8, p. 18*). Thus, price adaptation by the Tribunal cannot be based on Artt. 50 and 77 CISG.

131 Third, price adaptation by the Tribunal cannot be derived from the principle of good faith in Art. 7(1) CISG (*contrary to MfC, paras 118 et seqq.*). If anything, the principle of good faith provides for renegotiations (*GARRO, para. 40; LOOKOFSKY, p. 164; VENEZIANO, p. 125*). However, if renegotiations fail "*there are no guidelines under the Convention for a court or arbitrator to 'adjust' or 'revise' the terms of the contract*" (*GARRO, para. 40*). Thus, price adaptation by the Tribunal cannot be derived from the principle of good faith.

132 Therefore, Art. 79 CISG does not provide for price adaptation by the Tribunal. At most, it provides for renegotiations between the Parties with a view to adapting the price.

b) In any event, renegotiations between the Parties as a prerequisite to price adaptation by the Tribunal have not yet begun, let alone been completed

133 Even if the Tribunal were to find that Art. 79 CISG provided for price adaptation as *ultima ratio*, it should not adapt the price, as renegotiations between the Parties have not yet begun, let alone been completed (*supra paras. 105 et seq.*). Therefore, the Tribunal should not adapt the price.

134 In light of the above, CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price under the CISG.

Conclusion Issue C:

CLAIMANT has to bear the additional costs resulting form the 30 % tariff imposed by Equatoriana pursuant to its DDP obligation. Even if the Tribunal were to find that the Hardship Clause applied, CLAIMANT would not be entitled to additional payment since the tariff does not give rise to hardship under the Hardship Clause. CLAIMANT cannot rely on Art. 79 CISG either since it does not regulate hardship. In any event, the Parties derogated from and thereby excluded Art. 79 CISG by agreeing on the Hardship Clause. Even if Art. 79 CISG applied, the tariff does not give rise to hardship thereunder. In any event, neither the Hardship Clause nor Art. 79 CISG allow for an adaptation of the price by the Tribunal. Thus, CLAIMANT is not entitled to payment of USD 1,250,000 or any other amount resulting from an adaptation of the price.

PROCEDURAL REQUEST

Counsel, on behalf of RESPONDENT, respectfully requests the Tribunal not to allow the introduction of the Partial Interim Award submitted as evidence by CLAIMANT.

REQUEST FOR RELIEF

Counsel, on behalf of RESPONDENT, respectfully requests the Tribunal:

1. To dismiss the claim as inadmissible for a lack of jurisdiction;
2. To reject the claim for additional remuneration of USD 1,250,000 raised by CLAIMANT;
3. To order CLAIMANT to pay RESPONDENT's costs incurred in this Arbitration.

Respectfully submitted on 24 January 2019 by

Patrizia Castellazzi Tessa Douma Vanessa Huber

Meike Pauletzki Yves Tjon-A-Meeuw Delilah von Streng

We hereby confirm that only the persons whose names are listed above have written this memorandum.