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WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong
31 March – 7 April 2018
MEMORANDUM FOR CLAIMANT

RUHR-UNIVERSITY BOCHUM

On behalf of		Against
Phar Lap Allevamento Rue Frankel 1 Capital City, Mediterraneo	v.	**Black Beauty Equestrian** 2 Seabiscuit Drive Oceanside, Equatoriana
CLAIMANT		**RESPONDENT**

Jessica Adjoyi *Ferhat Alsaç* *Jona Donner*

Christina Luthe *Maximilian Schikorra* *Lennart Tollrian*

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INDEX OF ABBREVIATION

%	per cent
a contrario	on the contrary
a fortiori	with stronger reason
a priori	What comes first/ from before
Art.	article/ articles
C	CLAIMANT Exhibit
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
cl.	clause
CNoA	CLAIMANT Notice of Arbitration
ed.	edition
et al.	et alii (and others)
ex aequo et bono or *as amiable compositeur*	According to the right and good/ from equity and conscience
HK-Rules	HKIAC Rules administered Arbitration Rules 2018
ibid	ibidem (in the same source)
ICC	International Court of Commerce
inter partes	Between the parties
Ltd.	limited
No.	number
CNoA	Notice of Arbitration
NYC	New York Convention/ Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p./pp.	page/ pages
Pacta sunt servanda	Agreements must be kept
para./paras.	paragraph/ paragraphs
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2

R	Respondent Exhibit
ratio	reason/ reasoning
RNoA	RESPONDENT Answer to the Notice of Arbitration
ultima ratio	last resort
UNCITRAL ML	UNCITRAL Model law on International Commercial Arbitration
UNIDROIT	UNIDROIT Principles for international commercial contracts
USD	United States Dollar(s)
v.	versus

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STATEMENT OF FACTS

1 The Parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"), collectively referred to as "**the Parties**".

2 CLAIMANT operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. The company is registered in Capital City, Mediterraneo.

3 RESPONDENT is Black Beauty Equestrian, a company specialised on show jumping and international dressage competitions, located in Oceanside, Equatoriana, and known for its broodmare lines.

4 **On 21st March 2017** RESPONDENT first contacted CLAIMANT, inquiring about the availability of frozen semen from Nijinsky III, one of the most successful racehorses in history, to promote its newly started race horse breeding programme. RESPONDENT requested an untypically large amount of 100 doses of frozen semen as the Equatorianian government had only temporarily suspended a ban on artificial insemination for racehorses. It cited that any semen acquired during the lifting of the ban, could still be used after its reimposition.

5 **On 24th March 2017** CLAIMANT offered 100 doses of Nijinsky III's frozen semen, although the amount of 100 doses was unusual. Nevertheless, CLAIMANT was willing to provide the semen for 99,500 USD per dose, as it relied on RESPONDENT's good reputation at the time. However, CLAIMANT insisted that any resale to third parties could not be performed without its express written consent.

6 **On 28th March 2017** RESPONDENT generally agreed to the conditions, though it objected to the law applicable to the contract due to the belief that submitting disputes to the Law of Mediterraneo as well as Mediterranean courts would cause an imbalance in CLAIMANT's favour. RESPONDENT stated that it would generally accept the application of the Law of Mediterraneo, if the Courts of Equatoriana had jurisdiction. RESPONDENT further requested changes on the price and asked for delivery DDP because of CLAIMANT's experience in the transportation of frozen semen.

7 **On 31st March 2017** CLAIMANT declared to be open to renegotiate these issues. Regarding the dispute resolution mechanism, CLAIMANT offered to submit any disputes to arbitration. Furthermore, it was willing to handle the transportation of the semen referred to as "DDP", however without bearing all the associated risks. The price was adapted to solely cover the shipping fees while still allowing for a 5 % profit margin.

8 **On 12th April 2017** the Parties' main negotiators were injured in a car accident and thus unable to finalise the contract.

9 **On 6th May 2017** the Parties, represented by two new negotiators, concluded the Frozen Semen Sales Agreement ("**FSSA**"). The FSSA stipulated for the semen to be delivered in three shipments. The Parties agreed on a purchase price of 100,000 USD per dose. Moreover, the Parties had agreed upon arbitration and the contract to be governed by the law of Mediterraneo, including the CISG. In addition, the Parties incorporated a hardship clause in order to exempt CLAIMANT from liability regarding the delivery.

10 **On 20th May 2017** and **on 3rd of October 2017** RESPONDENT received the first two shipments without any problems.

11 **On 19th December 2017**, one month before the third shipment was due, the government of Equatoriana imposed retaliatory tariffs of 30 % on agricultural products including horse semen as a reaction to the previously imposed tariffs of Mediterraneo.

12 **On 20th January 2018** CLAIMANT was informed of the tariffs while preparing the last shipment. It immediately approached RESPONDENT in order to find a solution regarding the additional costs of the delivery.

13 **On 21st January 2018** RESPONDENT called CLAIMANT, assuring that the Parties would find a solution and requesting the third shipment to be delivered.

14 **On 23rd January 2018** CLAIMANT delivered the remaining 50 doses of semen and paid the additional costs resulting from the imposition of tariffs in advance, as RESPONDENT created the impression of accepting price adaptation.

15 **On 12th February 2018** the Parties had a meeting to discuss CLAIMANT's increased remuneration as well as RESPONDENT's breach of the contract through disregarding the resale prohibition. Yet, RESPONDENT refused to cooperate.

16 **On 2nd October 2018** CLAIMANT approached the Arbitral Tribunal in order to submit a recently rendered award from a comparable arbitral proceeding, RESPONDENT was involved in.

17 **On 3rd October 2018** RESPONDENT objected to the submission of the Award and denied the admissibility of the evidence alleging that it had been obtained either through a breach confidentiality or an illegal hack of RESPONDENT's computer systems.

SUMMARY OF ARGUMENTS

1 CLAIMANT is not liable for the imposed tariffs in Equatoriana and is therefore entitled to additional payments of 1,250,000 USD. This payment results from contract adaptation. Although the Parties agreed to submit all disputes arising out of the FSSA to arbitration, RESPONDENT claims that the Arbitral Tribunal lacks jurisdiction to decide on the question of contract adaptation. Furthermore, RESPONDENT wrongfully denies the payment as it erroneously claims that the imposition of tariffs does not fall under Clause 12 of the FSSA. RESPONDENT's allegations lack substance, especially because RESPONDENT itself, in a recent case, claimed contract adaptation when it was burdened with additional tariffs.

ISSUE 1:

2 The arbitration agreement is governed by the Law of Mediterraneo. In Clause 14 the Parties agreed on the application of Mediterranean law, including the CISG. As there is no choice of law clause in the arbitration agreement the law governing the matrix contract also governs the arbitration agreement. This is in line with the "Doctrine of Separability" as the laws do not necessarily have to differ. If Parties fail to designate a governing law in the arbitration clause, the express choice of law for the substantive contract constitutes an implied consent that the chosen law shall also govern the arbitration agreement. This is confirmed by the "Three Stages Doctrine" and is neither rebutted by the Parties choosing Danubia as the seat of the arbitration nor by any applicable provisions. Even if the Tribunal came to the conclusion that the Law of Danubia governed the arbitration agreement, it would still have the power to adapt the contract, as the "Four Corners Rule" is not applicable to incomplete arbitration agreements.

ISSUE 2:

3 The Arbitral Tribunal is empowered to declare evidence admissible without any restrictions, within its own discretion. Even though the evidence was assumingly obtained either through a breach of confidentiality or an illegal hack, it has to be declared admissible. CLAIMANT should be entitled to submit the Partial Interim Award as its content is uniquely comparable to the case at hand. Therefore, the Partial Interim Award should serve as precedent in this proceeding. The alleged breach of confidentiality does not render the award inadmissible as confidentiality agreements are solely binding *inter partes*. The obtainment of the award through

an alleged illegal hack has no effect on its admissibility, as arbitral proceedings do not adhere to domestic procedural standards.

ISSUE 3:

4 CLAIMANT is entitled to the payment of 1,250,000 USD under Clause 12 of the FSSA as it is not responsible for the imposed tariffs. The tariff imposition of 30 % constitutes a case of unforeseen hardship that is comparable to the events mentioned in Clause 12 of the FSSA. The Parties' agreement on the term "delivery DDP" does not exclude the claim, as the Parties deviated from the general understanding of "delivery DDP". Furthermore, CLAIMANT is entitled to the payment of 1,250,000 USD or any other amount resulting from an adaptation of the price under the CISG. The Parties agreed on a modification in the sense of Art. 29 (1) CISG, as the negotiators of both sides were of the mutual opinion that the contract had to be adapted. Even if the Tribunal should consider that the Parties did not agree upon contract adaptation, it has the power to adapt the contract and should do so to restore the commercial equilibrium between the Parties, according to Art. 6.2.3 UNIDROIT in connection with Art. 9 (2) CISG. Furthermore, Art. 79 CISG, which has not been excluded according to Art. 6 CISG, leads to the same result when considering Art. 7 (1) CISG or Art. 7 (2) CISG.

ARGUMENTS

A. The Tribunal has the jurisdiction under the arbitration agreement to adapt the contract.

1 The Arbitration agreement and its interpretation are governed by the Law of Mediterraneo, as it is the most appropriate law (**I.**). According to Mediterranean law, the Arbitral Tribunal has the power to adapt the contract (**II**.). Even if the law of Danubia shall govern the Arbitration agreement, a narrowly construction would not reach to a lack of jurisdiction by the Arbitral Tribunal (**III**.).

I. The Arbitration agreement and its interpretation are governed by the law of Mediterraneo.

2 The applicable law to an arbitration clause which should be agreed upon in the Arbitration agreement resolves the question whether the contract may be adapted. In the case at hand, a governing law is, however, not explicitly written down in the arbitration clause [*C4, p. 14, cl. 15*]. Given that a choice of law clause is missing, the question how the governing law shall be determined arises. RESPONDENT might allege that the general "separability presumption", under which an international Arbitration agreement is presumptively separable from the underlying contract, would prevent the applicability of Mediterranean law. However, this presumption does not lead to the result that the arbitration clause and the underlying contract are totally independent from each other. [*Flannery, p. 4*]. Instead, it is commonly accepted that the arbitration clause is generally governed by the same law as the main contract. [*ICC Case No. 6850; ICC Case No. 6752; ICC Case No. 6379; ICC Case No. 5294; ICC Case No. 3572*].

3 In the absence of a choice of law clause, Arbitral Tribunals and several jurisdictions determine the applicable law either by applying the law which has the most significant relationship to the case or with the aid of conflict of law rules [*Born, p. 473; Lew/Mistelis/Kröll, p. 427*].

4 The law of Mediterraneo applies to the Arbitration agreement, as it has the most significant relationship according to the Three Stages Doctrine (**1.**). Moreover, the applicability of Mediterranean law is not rebutted by the NYC or the UNCITRAL Model law (**2.**).

1. The law of Mediterraneo applies to the Arbitration agreement, according to the Three Stages Doctrine.

5 When determining the law that governs the Arbitration agreement, it is commonly accepted by Arbitral Tribunals to follow a pattern of enquiry which is called "Three Stages Doctrine"

[*Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai v. VSC Steel Coy; Redfern/Hunter, p. 160*]. Firstly, one has to consider the law expressly chosen by the parties. Secondly, in the absence of an express choice, a contract is governed by the law impliedly chosen by the parties. Thirdly, in the absence any choice by the parties' choice, the arbitration agreement is governed by the system of law with which it has its most real and substantial connection [*Redfern/Hunter, p. 160*].

6 In the case at hand, there is no express choice of law, however, the Parties impliedly agreed to apply the law of Mediterraneo (**a.**). If the Tribunal comes to the conclusion, that there is no implied choice of law, the arbitration clause is still governed by the law of Mediterraneo as it has the closest connection to the case (**b.**).

a. The Parties impliedly agreed on submitting the Arbitration agreement to be governed by the law of Mediterraneo.

7 If parties fail to designate a governing law in the arbitration clause, the express choice of law for the substantive contract constitutes an implied consent that the chosen law shall also govern the arbitration agreement [*Born, p. 516*]. It is reasonable to assume that the contracting Parties intend their entire relationship to be governed by the same law [*Redfern/Hunter, pp. 160-162*].

8 In *Sulamérica v. Enesa* the Court of Appeal stated that it should be "fair to start from the assumption that, in the absence of any indication to the contrary, the Parties intended the whole of their relationship to be governed by the same system of law" [*Sulamerica v. Enesa, p. 6, para. 11*]. Starting from that assumption, the Parties intended that the law governing the substantive contract should also govern the Arbitration agreement [*ibid*]. This was also adopted with particular clarity in several judicial decisions [*ICC Case No. 6379; Coffee Case; Peterson Farms v. C&M Farming; Tonicstar v. Am. Home Assur.; Arsanovia v. Cruz City; Sonatrach Petroleum v. Ferrell Int'l*]. In the case at hand, the Parties undisputedly submitted the substantive contract to Mediterranean law [*C4, p. 14, cl. 14*]. The parties did not see the necessity to deviate from the FSSA which applies Mediterranean law. Therefore, the express choice of law in the FSSA also applies to the Arbitration agreement. Thus, the Parties impliedly agreed on submitting the Arbitration agreement to be governed by the law of Mediterraneo.

9 RESPONDENT might argue that in the case of *Sulamerica v. Enesa*, the Tribunal decided in favour of the law governing the seat of arbitration, when determining the law governing the Arbitration agreement in the absence of an express choice of law. However, this decision was made due to the fact, that the law governing the matrix contact would have hindered the

enforcement of the Arbitration agreement [*Sulamérica v. Enesa, p. 12, para. 30*]. The problem of unenforceability does not arise in the case at stake since the Arbitration agreement is valid according to Mediterranean law. Consequently, the result of the case cannot be transferred to the case at hand. Therefore, the law of the seat does not rebut the presumption in favour of Mediterranean Law.

10 The presumption that the law governing the matrix contract also governs the Arbitration agreement solely has to be rebutted when the Parties clearly intended a different result [*Lew/Mistelis/Kröll, p. 107*]. Furthermore, RESPONDENT may allege that there is an implied agreement to submit the arbitration to Danubian law as Danubia is the seat of arbitration. However, the sole reason for the Parties to decide for an arbitration seated in Danubia, was to ensure that the arbitration takes place in a neutral venue [*R2, p. 34; PO2, p. 56, cl. 14*] and not to submit the proceedings to a different law. This is also supported by RESPONDENT's statement that it would not agree to a dispute resolution mechanism which provides for Mediterranean law and proceedings held in Mediterraneo [*C3, p. 11*]. As long as the seat for the dispute settlement was not in Mediterraneo, RESPONDENT was content with applying Mediterranean law [*ibid*]. The Parties only discussed whether Equatorianian or Mediterranean law shall apply [*C3, p. 11; C4 p. 12; R1, p. 33*]. Danubian law was never mentioned during the negotiations. Moreover, both Parties are already familiar with the choice of Mediterranean law. In fact, CLAIMANT generally applies Mediterranean law to its procedures, which can be inferred from the previous negotiations [*C2, p. 10; C3, p. 11*]. Additionally, RESPONDENT had already concluded an arbitration under Mediterranean law [*PO2, p. 60, cl. 39*]. It declared the law of Mediterraneo to be applicable to the Arbitration agreement in these proceedings and provided also for Arbitration in Mediterraneo [*PO2, p. 60, cl. 39*]. Taking this into consideration, RESPONDENT was familiar with Mediterranean law. Thus, no convincing reasons that can contradict the application of Mediterranean law are apparent.

11 Therefore, the fact that the Parties chose Danubia as the seat of Arbitration does not rebut the presumption that the Parties impliedly submitted the Arbitration agreement to Mediterranean law. Since the parties in this case failed to designate a governing law in the arbitration clause, the law governing the arbitration agreement is the same law that governs the contract. In conclusion, CLAIMANT and RESPONDENT have impliedly chosen Mediterranean law.

b. If the Tribunal comes to the conclusion that there is no implied choice of law, the arbitration clause is still governed by the Law of Mediterraneo as it has the closest connection to the case.

12 In the unlikely event that the Tribunal comes to the conclusion that the Parties did not impliedly agree on applying Mediterranean law, the arbitration agreement is governed by the system of law with which it has its most real and substantial connection [*Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai v. VSC Steel Coy; Redfern/Hunter, p. 160]*. The tribunals might give priority to the law of the seat, instead of applying the law governing the underlying contract, when one of the parties had a special interest in applying the law of the seat because the party itself was seated in the state in which the arbitration took place. [*Born, p. 518*]. Thus, there was a close connection between the seat and the arbitral proceedings. However, in the case at hand, no party has a comparable connection to Danubia, as it is a foreign country to both Parties. Therefore, the cases deciding in favour of the law governing the seat of arbitration are not comparable to the case at hand. Instead, if there is no other indication to the contrary, it is generally accepted that the law governing the contract is closer to the case than the law of the seat [*Sulamerica v. Enesa, para. 11, p. 6; Peterson Farms v. C&M Farming; Tonicstar v. Am. Home Assur.; Arsanovia v. Cruz City; Sonatrach Petroleum v. Ferrell Int'l*].

13 Taking into consideration, that the application of Danubian law has never been discussed during the Parties' negotiations [*see supra*] and the fact that Mediterranean law applies to the matrix contract, it would be unreasonable to assume that Danubian law has a closer connection to the case than the law of Mediterraneo. In conclusion, the arbitration agreement included in the FSSA will also be governed by the law of Mediterraneo.

2. The applicability of Mediterranean law is not rebutted by the NYC or the UNCITRAL Model law.

14 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") and the UNCITRAL Model law on International Commercial Arbitration ("UNCITRAL ML") are applicable, regardless of whether Danubian, Mediterranean or Equatorianian law applies [*PO2, p. 57, cl. 14*]. RESPONDENT may argue that Art. V (1) (a) NYC favours the applicability of Danubian law, as it is the law of the seat. The NYC stipulates that the agreement under which the award is made must be valid "under the law to which the Parties have subjected it", or failing any indication thereon, "under the law of the country where the award was made", which will be the law of the seat of the arbitration. A

similar rule is stipulated in Art. 34 (2) (a) UNCITRAL ML. However, in the case at hand the seat of the arbitration does not lead to the result that Danubian law is applicable. It is important to consider that a direct application of the NYC "can complicate the interplay between the international Conventions and the national laws" [*Lew/Mistelis/Kröll, p. 109*]. Requiring that the law of the arbitral seat governs the Arbitration agreement, regardless of the Parties' intentions, totally contradicts the principle of party autonomy [*Born, p. 513*]. Essentially, this approach ignores the contractual character of Arbitration agreements, which usually have their most significant connection to the underlying contract [*Born, pp. 517-518*]. In conclusion, an exclusive focus on the law of the arbitral seat as provided in Art. V (1) (a) NYC and Art. 34 (2) (a) UNCITRAL ML disregards the intimate connection between the Arbitration agreement and the underlying contract [*Fouchard/Gaillard/Goldman, p. 424*]. Thus, these Rules cannot not be considered in order to determine the law governing the arbitration agreement as these rules apply *ulitma ratio* if the Tribunal cannot find any significant law that is appropriate.

15 Even if the Tribunal considers these Rules anyway, it should take into consideration that according to both provisions, the seat is decisive if the Parties fail to indicate otherwise [*similar in: Art. V (1) (a) NYC; Art. 34 (2) (a) UNCITRAL ML*]. As stated above, the Parties impliedly chose Mediterranean law [*see supra, p.2ff.*].

16 Contrary to RESPONDENTS allegations [*PO2, p. 60, cl. 36*], Art. 28 UNCITRAL ML does not answer the question which law applies to the Arbitration agreement. Art. 28 (3) UNCITRAL ML provides that the Arbitral Tribunal shall decide *ex aequo et bono* or *as amiable compositeur* only if the Parties have expressly authorised it to do so. In this regard, it must be emphasised that this provision only refers to the merits and does not apply to the question which law governs the Arbitration agreement. As stated in the heading of Art. 28 UNCITRAL ML, it is "applicable to substance of dispute".

17 Therefore, neither the NYC nor the UNCITRAL ML rebut the applicability of Mediterranean law.

II. According to Mediterranean law, the Arbitral Tribunal has the power to adapt the contract.

18 The law of Mediterraneo provides for a broad interpretation of Arbitration agreements and leads to the Tribunal's power to adapt the contract (**1.**). This is also affirmed by considering the choice of law rules (**2.**).

1. The law of Mediterraneo leads to the Tribunal's power to adapt the contract.

19 The majority of jurisdictions interpret international Arbitration agreements in the light of a "pro-arbitration" approach [*Born, p. 1326*]. If Parties decide to settle their disputes with arbitral proceedings, they intend that the Arbitral Tribunal has full jurisdiction to decide all arising disputes [*Sonatrach v. K.C.A. Drilling; Coffee Case*].

20 RESPONDENT may argue that the wording "arising out of" [*C4, p. 14, cl. 15*] has to be interpreted narrowly. However, most modern national courts and tribunals decide in favour of liberal interpretations of the "arising out of" formula, consistent with the more general pro-arbitration rule of interpretation [*Born, p. 1354*]. Even if the Tribunal were to consider that the frase "arising out of the contract" solely supplies the tribunal with jurisdiction regarding the claims explicitly stated in the contract, this would not prevent that a pro-arbitration approach would enable the Tribunal to decide on the question of contract adaptation. In addition, the Tribunal should consider that there is a general presumption stating that if an Arbitration agreement covers some of the Parties' disputes, related claim also fall under the Arbitration agreement [*Born, p. 1326; see also Art. 8, Art. 34(2)(a)(iii) and 36(1)(a)(iii) UNCITRAL ML; Art. V (1) (c)* NYC *which speak in favour of liberal approaches to the interpretation of Arbitration agreements*].

21 Therefore, the term "arising out of the contract" grants the Tribunal the power to decide on questions concerning contract adaptation.

2. The choice of law rules lead to the same result.

22 When considering the choice of law rules, the applicable Hague Principles on choice of law in International Commercial Contracts ("HCCH") do not address arbitration agreements (**a.**). However, the CISG and the UNIDROIT Principles for International Commercial Contracts ("UNIDROIT") empower the Tribunal to adapt the contract (**b.**).

a. The HCCH rules are not applicable to the Arbitration agreement.

23 Mediterraneo, Danubia and Equatoriana adopted the HCCH as general Conflict of law Rules [*PO2, p. 61, cl. 43*]. According to Art. 1 (3) (b) HCCH, these principles do not address the law governing arbitration agreements. Consequently, these principles do not regulate the Tribunal's power.

b. The CISG as well as the UNIDROIT lead to the result that the Tribunal has the power to adapt the contract.

24 There is consistent jurisprudence in Mediterraneo that the CISG not only applies to the sales contract, but also to the conclusion and interpretation of the Arbitration agreement [*PO1, p. 52*]. Pursuant to Art. 8 (1) CISG, statements must be interpreted according to the intent of the Parties. According to Art. 8 (3) CISG, the negotiations must be taken into account to determine the will of the parties as demanded by Art. 8 (1) CISG [*MüKo HGB, Art. 8, para. 13; MüKo BGB, Art. 8, para. 16, 20; Ferrari/Kieninger/Mankowski, Art. 8, para. 5; Schlechtriem/Schwenzer, Art. 8, para. 32; Kröll/Mistelis/Viscasillas, Art. 8, paras. 29*]. Ms. Napravnik and Mr. Antley saw the necessity to implement a mechanism for contract adaptation into the FSSA [*C8, p. 17*]. During the first discussion of the adaptation clause, Mr. Antley had explicitly stated that the arbitrators should adapt the contract in case the Parties were unable to reach a solution. [*ibid*]. Unfortunately, the Parties failed include an adaptation Clause into the FSSA due to the car accident [*ibid*]. Nevertheless, it was the Parties' intent according to Art. 8 (1) (3) CISG.

25 In addition, the UNIDROIT also emphasise the Tribunal's power to adapt the contract [*Povrzenic, para. 4*]. Tribunals increasingly refer to the UNIDROIT when parties failed to choose a governing law for the arbitration agreement given that the UNIDROIT is closely connected to the system of interpretation and gap filling deriving from the CISG [*Perales Viscasillas, p. 4*]. According to Art. 4.1 UNIDROIT, a contract term has to be construed from the literal sense and from parties' intention. RESPONDENT might argue that if the Parties intended to submit disputes regarding contract adaptation to arbitration, they would have stipulated it in the Arbitration agreement. It is true that the Parties reduced the broad wording of the Model Clause of the Hong Kong International Arbitration Centre ("HKIAC") by deleting any reference which could be interpreted as an empowerment for contract adaptation [*C4, p. 14, cl. 15*]. However, both negotiators, who took over the proceedings, cannot remember with sufficient certainty why they did not include a clause concerning the law applicable to the Arbitration agreement [*PO2, p. 55, cl. 6.*]. It is very likely that they just had forgotten to stipulate provisions for a governing law. Mr. Krone admitted, that Mr. Antley agreed upon the application of the law of Mediterraneo [*R3, p. 35*]. Therefore, the initial intention of the first negotiators is still decisive when interpreting the actual wording of the Arbitration agreement according to Art. 4 (1) UNIDROIT. Additionally, it derives from Art. 6.2.3 (4) (b) UNIDROIT that the Tribunal has power to adapt the contract if its requirements are fulfilled. In conclusion,

the CISG and the UNIDROIT empower the Tribunal to adapt the contract under Mediterranean law.

III. Even if the law of Danubia shall govern the Arbitration agreement, a narrowly construction would not lead to a lack of jurisdiction of the Arbitral Tribunal.

26 The "Four Corners Rule" which is contained in Danubian Contract law does not apply to contracts which appear to be incomplete (**1.**). Taking into consideration Art. 28 (3) UNCITRAL ML, the Arbitral Tribunal has still the power to adapt the contract, as the Parties agreed on a conferral of powers (**2.**).

1. The "Four Corners Rule" does not apply to contracts which appear to be incomplete.

27 The "Four Corners Rule" is, contrary to RESPONDENT's drawn conclusion, not applicable to the Arbitration agreement, as it is incomplete. The rule states that, if a document appears to be complete, the Arbitration agreement is limited to its wording and no external evidence may be relied upon [*PO1, p. 52*]. According to Art. 2.1.17 UNIDROIT, applied by Danubian Courts [*PO2 p. 61, cl. 45*], a contract in writing, which contains a clause indicating that the writing completely embodies the terms on which the Parties have agreed upon, cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the written agreement. The application of the "Four Corners Rule" requires a complete arbitration agreement. It is common ground that arbitration agreements provide a choice of law clause [*Khatchadourian; Herbert Smith Freehills*]. This indicates that in the absence of a choice of law clause, the Arbitration agreement appears to be incomplete. In the case at hand, the missing choice of law clause renders the document incomplete [*C4, p. 14*]. Therefore, an essential requirement for the application of the "Four Corners Rule" is not given in the case at hand. Consequently, the "Four Corners Rule" is not applicable.

2. According to Art. 28 (3) UNCITRAL ML, the Arbitral Tribunal has the power to adapt the contract, as the Parties agreed on a conferral of powers.

28 According to Danubian jurisdiction Art. 28 (3) UNCITRAL ML stipulates that the Arbitral Tribunal solely has jurisdiction to decide on contract adaptation if the Parties agreed on a conferral of powers [*PO2, p. 60, cl. 36*]. Art. 28 (3) UNCITRAL ML furthermore requires that the parties expressly authorise the arbitral tribunal to decide on matters regarding contract

adaptation. According to Art. 6.2.3 (4) (b) UNIDROIT, which constitutes a different wording under Danubian Contract law [*PO2, p. 61, cl. 45*], the tribunal has generally the power to adapt the contract if authorised. In order to establish that the Parties expressly authorised the Tribunal to decide on contract adaptation one has to consider that Ms. Napravnik explicitly stated that "it was important to have a mechanism in place which would ensure an adaptation of the contract" [*C8, p. 17*]. Mr. Antley replied that the Tribunal should have the power to adapt the contract [*ibid*]. This conversation constitutes an expressly authorisation of the Arbitral Tribunal which is underlined by the fact that Mr. Krone admitted that he would have objected to transfer power to the Arbitral Tribunal [*R3, p. 35*]. With this statement Mr. Krone conceded that there had been an express authorisation of the Tribunal by Mr. Antley and Ms. Napravnik beforehand which he was not aware of. Therefore, the preliminary negotiators Ms. Napravnik and Mr. Antley expressly empowered the Tribunal to decide on contract adaptation. The authorisation of the Tribunal is also underlined by the wording of the Arbitration agreement in Clause 15 of the FSSA [*C5, p. 14*]. As the Parties stated the Arbitral Tribunal has jurisdiction regarding "any dispute arising out of this contract" they agreed to authorise the Tribunal for any and all disputes, including the adaptation of the contract. RESPONDENT may argue that there is an obligation to authorise by written agreement according to Art. 7 (2) UNCITRAL ML. However, Art. 7 (2) UNCOTRAL ML only requires that the arbitration agreement shall be in writing. In the case at hand the parties wrote down the arbitration agreement in Clause 15 FSSA. Thus, the requirement of a written agreement does only refer to the whole arbitration agreement and has been fulfilled by the Parties. Therefore, there is no necessity to put the authorisation of the Tribunal in writing. Consequently, the Arbitral Tribunal has the power to adapt the contract under Danubian law.

IV. Conclusion

29 The Arbitration agreement is governed by the law of Mediterraneo. According to Mediterranean law the Arbitral Tribunal has the power to adapt the contract. Even if the law of Danubia shall govern the Arbitration agreement, the Arbitral Tribunal would still have the power to adapt the contract.

B. CLAIMANT is entitled to submit evidence from the other arbitration proceedings that RESPONDENT is involved in.

30 RESPONDENT wrongfully denies the admissibility of crucial evidence that was obtained either through an assumed breach of confidentiality or an assumed illegal hack. First of all, the Tribunal has the power to declare evidence admissible according to its own discretion (**I.**). Secondly, the evidence must be declared admissible by the Arbitral Tribunal as it is of utmost importance to the proceedings and the alleged obtainment through either a breach of confidentiality or an illegal hack is no sufficient ground to exclude the evidence (**II.**).

I. The Tribunal has the power to declare evidence admissible according to its own discretion.

31 In accordance with the principle of party autonomy the Parties of the arbitration may freely decide what standards the proceedings shall be based upon, including the boundaries of admissibility [*Born pp. 2130; Holtzmann/Neuhaus pp. 565*]. In the case at hand, the Parties agreed to conduct proceedings under the HK-Rules [*PO1, p. 52*]. According to Art 22.2 of the HK-Rules, "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence (...)". Thus, in principle, Parties are *a priori* entitled to submit any evidence the Tribunal deems admissible. This would lead to a very broad approach on factfinding, which is, however, in line with most other arbitration rules on the admissibility of evidence (for example the ICDR International Arbitration Rules, AAA Commercial Arbitration rules and LCIA Arbitration Rules [*Sussman pp. 2*]). With no further rules specifying what the boundaries of admissibility may be, arbitrators "(...) will read or listen to whatever the Parties wish to put forward, even over the objections of the other party. They approach the task of evaluating evidence more by assessing the weight to be given to it, rather than its admissibility". [*Lew/Mistelis/Kröll, pp. 22-45*]. This is only restricted in case both Parties deem the evidence to be inadmissible [*UN second working group report, para. 59*]. If certain evidence is subject to contrary stipulations by the parties, the tribunal is to adopt its own rules of evidence [*see supra*]. The Parties of this arbitration neither agreed on rules of evidence being used nor agreed on the evidence from the other proceedings to be inadmissible [*p. 50*]. Thus, the Tribunal is in no way restricted in its evaluation of the evidence.

32 Of course, not all evidence can be declared admissible to the proceedings, since this would diminish the efficiency of the arbitration. However, a broad interpretation of the admissibility requirement does not inhibit the arbitrators in their own decision-making. On the contrary, the

broad interpretation is necessary to give the Tribunal opportunity to choose between pieces of evidence it considers to be most useful and not to be restricted on a limited number of documents in advance. In other words: With a broader admissibility comes a greater variety of evidence the tribunal may choose from to aid in their fact-finding.

33 Therefore, the application of Art. 22.2 HK-Rules leads to the conclusion that the Tribunal has the power to declare any evidence admissible according to its own discretion.

II. The evidence from the other arbitration proceedings must be declared admissible by the Arbitral Tribunal.

34 Firstly, the evidence was not obtained in a way that would render it inadmissible under the assumption that it was obtained through the breach of a confidentiality agreement (**1.**). Secondly, even if the evidence had its origin in an illegal hack it should be declared admissible (**2.**).

1. The evidence was not obtained in a way that would render it inadmissible under the assumption that it was obtained through the breach of a confidentiality agreement.

35 RESPONDENT is of the opinion, that the confidentiality agreement from its previous arbitration should prevent the submission of the evidence in these proceedings [*PO1, p. 51*]. This is not the case as RESPONDENT itself cannot prevent the disclosure to the Tribunal (**a.**). Furthermore, due to the crucial importance to the proceedings the Tribunal must come to the conclusion that the evidence submitted by CLAIMANT is admissible (**b.**).

a. RESPONDENT cannot prevent the disclosure of the evidence to the Tribunal.

36 CLAIMANT is not bound by the confidentiality agreement of the other arbitration. The confidentiality agreement is a contract that is binding to all Parties of the particular arbitral proceedings [*Biwater Gauff v. Tanzania, para. 115*]. It is only binding to these participants of the proceedings and not third parties [*Born, p. 2789*]. This is also reflected in the legal consequences of the confidentiality clause: The most commonly used remedy for a breach of confidentiality is an injunction against the breaching party [*Arroyo, M., p. 2539, para. 46*]. In certain cases it may even be sentenced to pay damages to the other party [*Fouchard/Gaillard/Goldman, p. 774*]. This shows that the confidentiality agreement is not a right which prevents everyone from passing on confidential information but rather a relative

right the parties could enforce against each other to deter the contracting parties from passing on information.

37 Therefore, the breach might possibly allow for RESPONDENT to take steps against his employees. However, what the confidentiality agreement does not allow for is an injunction against third parties, who were never subject to the confidentiality agreement. It becomes apparent that RESPONDENT has sufficient legal remedies. As a result, it should not be to CLAIMANT's detriment that RESPONDENT negligently employs people who obviously cannot be trusted.

38 Given that CLAIMANT is not bound by the confidentiality agreement, RESPONDENT can in no way prohibit the submission of evidence from the previous arbitration.

b. Due to the crucial importance to the proceedings, the Tribunal must come to the conclusion that the evidence submitted by CLAIMANT is admissible.

39 It has already been established that the tribunal is perfectly within its rights to declare the evidence admissible, since it may declare almost any evidence admissible [*see supra*]. Nevertheless, it also has to weigh the interests of the disclosing party against those of the party opposing the submission, to decide what evidence is crucial to the case and should be admitted [*Waincymer, pp. 744*]. Most notably among these interests, the tribunal must adhere to the mandatory procedural requirements such as settling the dispute effectively while treating the parties fairly and equally as provided in Art. 13.1 HK-Rules. With regards to the effectiveness and expeditiousness of the proceedings, the evidence from the other arbitration would undoubtedly speed up the proceedings at hand. Taking into account that the two cases are uniquely comparable, the Partial Interim Award could serve as a precedent by showing the line of argument of the other award. In both cases the seller was subject to an unforeseen increase of import taxes, both claimants called for increased remuneration under the hardship clause of the respective contract and both arbitrations are subject to the law of Mediterraneo [*PO2, p. 60, cl. 39*].

40 In addition, the submission of the other award would show how unreliable and opportunistic RESPONDENT is, since he was of exactly the same opinion as CLAIMANT, when he was in his position. Now though, RESPONDENT claims that there are neither grounds for the jurisdiction of the tribunal, nor for increased remuneration. This inconsistency obviously shows that there are substantial merits to CLAIMANT's argumentation; otherwise RESPONDENT

wouldn't have used the same line of argument when it was in his interest. This extremely high probative value of the evidence further substantiates its admissibility.

41 Moreover, there are no grounds RESPONDENT could reasonably rely upon, regarding the inadmissibility of the evidence. RESPONDENT does not even have a legitimate interest to enforce an obligation of confidentiality. CLAIMANT is already aware of the arbitration proceedings and the facts of this arbitration, as are the members of the Tribunal [*PO2, p. 60, cl. 39*]. Furthermore, the current proceedings are confidential according to Art. 45.1 HK-Rules, with the result that any submission would remain within the limited circle of participants of this arbitration who are already aware of the content of the evidence. Lastly, there is also no commercial or other sensitive information included in the award, that CLAIMANT is interested in or might gain an advantage from [*for a similar case see Case No. ACJ003, JN014, para. 7; Bancoult II Case, para. 36*].

42 RESPONDENT's bad faith gets particularly apparent while comparing its facts of the other arbitration with those of the current dispute [*pp. 49; 50; 60*]. RESPONDENT's behavior raises the suspicion that it is determined on deterring the Tribunal from inquiring further into this matter by presenting the facts in a manner that would make them seem irrelevant to the proceedings: Ms. Fasttrack stated, that in the previous arbitration RESPONDENT "(...) had been affected by the unforeseen tariffs of 25% imposed by the president of Mediterraneo" and had "itself asked for an adaptation of the price invoking an unforeseeable change of circumstances". RESPONDENT's lawyer contested this and claimed that "the allegations by CLAIMANT do not reflect reality and are taken out of context". Yet, the facts later identified by the tribunal [*PO2, p. 60, cl. 39*] clearly support CLAIMANT's account of the other arbitration. Ultimately, this serves to highlight the fact that any concerns RESPONDENT may have in this direction are only presumed as RESPONDENT's real concern is in fact only for the Tribunal not to render their decision by taking into account its inconsistencies. If the Tribunal were to exclude CLAIMANT's evidence this would effectively lead to it rendering the award without having all the relevant facts and the proceedings being more onerous and time consuming.

43 Thus, the Tribunal can only come to the conclusion that it is absolutely necessary to admit the Partial Interim Award, even under the assumption that it may have been obtained through a breach of confidentiality.

2. Even if the evidence had its origin in an illegal hack, it should be declared admissible.

44 In general, the same rules of evidence and standards of admissibility apply [*see supra*], regardless of whether the evidence is allegedly obtained through a breach of confidentiality or an illegal hack. Thus, the arguments on the necessity of admitting the evidence from above may be conferred to this issue without losing their significance. Yet, when dealing with illegally obtained evidence, one may initially be of the opinion that this should somehow be treated differently. The notion that it is at all problematic to submit illegally obtained evidence stems largely from some domestic legal traditions, where illegally obtained evidence is often considered to be inadmissible [*Ortiz, para. 4*].

45 RESPONDENT may allege that allowing a party to rely on such evidence in court might encourage law breaking. In the context of state court proceedings this *ratio* may have considerable merits. However, it is utterly inappropriate for international commercial arbitration. The Arbitral Tribunal ought primarily to investigate the truth in an efficient way to dissolve disputes between private parties and not pursue public interests on a national level. Thus, it has to be recognised that some of the principles of national courts do not apply and others have a significantly different weight in arbitral proceedings. For example, the tribunal must lay even more emphasis on the search of the truth and the efficiency of the proceedings than common domestic courts [*Sivasspor Kulübü v. UEFA, p. 39*].

46 Furthermore, the illegal action in the case at hand was neither committed by CLAIMANT nor committed by hackers on behalf of CLAIMANT and also not in the hopes of influencing the judgment of the Tribunal in any way [*PO2, p. 61, cl. 41*]. Therefore, RESPONDENT's argument is baseless as the lawbreaking was not committed by CLAIMANT whatsoever.

47 Arbitral Tribunals have also recognised the necessity of applying different standards than those used in domestic proceedings. Namely in the cases of *Sivasspor Kulübü v. UEFA* and *Caratube v. Kazakhstan*, the tribunals have not shied away from deeming extraordinarily relevant evidence admissible even though it was obtained through illicit means [*Sivasspor Kulübü v. UEFA; Caratube v. Kazakhstan*]. In this arbitration evidence was obtained through wiretapping the telephone of one of the parties, yet, the evidence was still declared admissible due to its high probative value [*Sivasspor Kulübü v. UEFA, p. 33, 39*]. As the Court of Arbitration for Sport stated: "Even if evidence may not be admissible in a civil or criminal state court, this does not automatically prevent a sport federation or an arbitration tribunal from taking such evidence into account". While *Sivasspor Kulübü v. UEFA* demonstrates the foundation for the

admissibility of illegally obtained evidence, *Caratube v. Kazakhstan* provides reasonable criteria other tribunals may rely upon. In present case, the Tribunal should take into consideration that the facts of the cases are remarkably similar. In *Caratube v. Kazakhstan* the claimants intended to submit documents which had been made publicly available in the course of the "Kazakhleaks" affair [*Sussman, pp. 6*]. Hackers had gained access to 60.000 confidential documents by hacking Kazakhstan's IT system [*Sussman, pp. 6*]. The tribunal established the following criteria for the admissibility of illegally obtained evidence: In general, confidential documents that have been made publicly available have to be declared admissible, if they are "relevant and material to the dispute" [*Ross, p. 4; Ortiz, p. 5*]. The Tribunal solely excluded evidence that is covered by attorney-client privilege [*Caratube v. Kazakhstan, para. 159, 166*]. In the course of other hacking scandals other tribunals have come to recognize this as the key aspects under which to ascertain the admissibility of illegally obtained evidence [*Boykin/Havalic, pp. 33*]. The evidence CLAIMANT wants to submit fulfills every criteria the tribunals have established. Firstly, the evidence is publicly available according to the understanding of the tribunal in *Caratube v. Kazakhstan*. The tribunal in *Caratube v. Kazakhstan* may have spoken of "public availability", however, it can safely be assumed that any legal obtainment by the submitting party falls under this term as this is the standard many other tribunals have adopted as well [*Boykin/Havalic, pp. 33*]. While the evidence may not be available to anybody free of charge, the Partial Interim Award is being sold in the public domain by a legally registered company [*PO2, p. 61, para. 41*]. Therefore, anybody interested in acquiring the information could do so by legal means. The relevant issue in this instance is that CLAIMANT had no involvement, whatsoever, in illegal actions pertaining to the obtainment of the evidence. Thus, the evidence is publicly available in accordance with the criteria established by the tribunal. Secondly, as CLAIMANT has extensively emphasized the evidence is also extraordinarily relevant to the dispute [*see supra*]. Concerning possible grounds for exclusion, the Partial Interim Award CLAIMANT seeks to submit is not covered by legal professional privilege. Legal professional privilege requires confidential client-attorney communications to be included in a document [*Hwand/Chung, p. 627*]. However, arbitral awards are potentially public documents, as it is common that they are published during enforcement proceedings and therefore naturally do not include client-attorney communications [*Hassneh Insurance v. Steuart J. Mew*]. The admission or the Partial Interim Award is thus also not excluded under the criteria established by the *Caratube v. Kazakhstan* tribunal.

48 Therefore, it is obvious that even if the evidence had its origin in an illegal hack it should be declared admissible since this is in line with general practice and standards in international arbitration.

III. Conclusion

49 The Arbitral Tribunal has the power to declare the evidence from the other arbitration proceedings admissible. Even though the evidence was assumingly obtained either through a breach of confidentiality or an illegal hack it still has to be declared admissible.

C. CLAIMANT is entitled to additional payment 1,250,000 USD.

50 This results from Clause 12 of the FSSA (**I.**) and also under the provisions of the CISG (**II.**).

I. CLAIMANT is entitled to the payment of 1,250,000 USD or any other amount resulting from an adaptation of the price under Clause 12 of the FSSA.

51 In Clause 12 of the FSSA the Parties had agreed that the seller shall not be responsible "for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*C5, p. 14*]. The state of Equatoriana imposed 30% tariffs on agricultural products as well as horse semen, which CLAIMANT paid when delivering the third instalment [*C8, p. 18*]. This payment led to a loss of 1,250,000 USD, constituting a loss of 25 % in relation to the price for the third instalment [*PO2, p. 59, para. 29*].

52 As the case at hand constitutes hardship (**1.**), that is comparable to the imposition of additional health and security requirements (**2.**), came unforeseen (**3.**) and not excluded by the "delivery DDP" agreement (**4.**), CLAIMANT is entitled to a remuneration of the 1,250,000 USD.

1. The imposition of tariffs constitutes a case of hardship.

53 The Parties did not include a definition for hardship into Clause 12 of the FSSA. Therefore, Clause 12 of the FSSA must be interpreted in accordance with Art. 8 CISG (**a.**) and the UNIDROIT (**b.**), which leads to the result that the imposition of tariffs can be subsumed to the term hardship of hardship.

a. The interpretation under Art. 8 CISG leads to a case of hardship.

54 Pursuant to Art. 8 (1) CISG, statements must be interpreted according to the intent of the parties. Even though Art. 8 (1) CISG only says that statements and other conduct of a party must be interpreted, it is uncontested that Art. 8 CISG also governs the interpretation of contracts [*T Kft.*

v. H. GmbH; *Bianca/Bonell, Art. 8, para. 1.1; Enderlein/Maskow, Art. 8, para. 2.3; Honnold/Flechtner, Art. 8, para. 105*; *Ferrari/Kieninger/Mankowski, Art. 8, para. 1; Schlechtriem/Schwenzer, Art. 8, paras. 3, 21*]. In accordance with Art. 8 (3) CISG negotiations must be taken into account in order to determine the will of the parties as demanded by Art. 8 (1) CISG [*MüKo HGB, Art. 8, para. 13; MüKo BGB, Art. 8, paras. 16, 20; Ferrari/Kieninger/Mankowski, Art. 8, para. 5; Schlechtriem/ Schwenzer, Art. 8, para. 31; Kröll/Mistelis/Viscasillas, Art. 8, para. 1*]. CLAIMANT intended that hardship shall be defined as an event that destroys the commercial basis of the deal [*CNoA, p. 7 No. 19; C4, p. 12*]. This is evident due to CLAIMANT's statement of facts and the e-mail correspondence between the Parties when CLAIMANT told RESPONDENT that it is not willing to take all risks like the imposition of tariffs and therefore insisted on the adaptation clause [*ibid*]. RESPONDENT could not have been unaware of the fact that CLAIMANT intended to define hardship in this way in the FSSA, since CLAIMANT explicitly told RESPONDENT that subsequent changes, like an increasement of the price through tariffs, must be addressed with a hardship clause [*C4, p. 12*]. To underline its intent for the expanse of the term hardship, CLAIMANT even gave RESPONDENT an example for the kinds of cases that it does not want to be held responsible for. CLAIMANT shared its experience with RESPONDENT regarding a former case where a price increase of 40 % due to unforeseeable health and safety requirements destroyed the commercial basis of the contract [*C4, p. 12*]. Since RESPONDENT did not contradict to these explanations in the subsequent negotiations, CLAIMANT had to understand this as approval by RESPONDENT. Therefore, considering CLAIMANT's intent according to Art. 8 (1), (3) CISG and the lack of dissent from RESPONDENT's side, the term "hardship" must be defined as an event that destroys the basis of the contract.

55 In order to determine whether the commercial basis of the deal is destroyed, the case *Scafom v. Lorraine* must be taken into consideration [*Lorraine Tubes v. Scafom International*]. In *Scafom v. Lorraine*, the Belgium Supreme Court decided that a post contractual price increase of 70 % for the seller shall constitute such a contract basis destroying event. Even though this amount is higher than CLAIMANT's performance increasement costs of 30 %, the basis of the FSSA must be seen as destroyed in the present case as well. One has to take into consideration, that the claimant in *Scafom v. Lorraine* was a reseller who did nothing more than betting on the market price. The sole risk a reseller has to take into account is price fluctuation. Therefore, it was reasonable for the tribunal to conclude that a price increasement of 70 % was sufficient to rule that the basis of the contract had been destroyed regarding a case for a simple resale. In the

present case, however, the threshold must be lowered. CLAIMANT has much more obligations and risks than a common reseller: It is the breeder of stallions with excellent pedigree and responsible to produce high-quality semen [*CNoA, p. 4, No. 1*]. In order to reach such quality CLAIMANT had to become an expert in the demanding and cost intensive field of freezing and transporting semen. Contrary to the reseller in *Scafom v. Lorraine*, CLAIMANT does not make "easy money" by a simple short sale of goods betting on the market price he obtained from another seller. Thus, it is reasonable to determine the 30 % performance cost increasement as a contract destroying event.

56 RESPONDENT may argue that the increasement of tariffs does not constitute hardship in the sense of Clause 12 of the FSSA as the negotiators who finalised the contract were unaware of the former negotiators' intent to qualify tariff increasements as hardship in Clause 12. However, Mr. Ferguson and Mr. Krone, who finalised the contract, had full access to the prior emails chain [*PO2, p. 55, cl. 5*]. Therefore, RESPONDENT cannot rely on the actual lack of knowledge with the result that the change of negotiators does not lead to a different understanding of hardship. Consequently, the tariff increasement constitutes a case of hardship with regard to Art. 8 (1) (3) CISG.

b. An interpretation of the hardship clause under UNIDROIT leads to the same result.

57 Art. 6.2.2 UNIDROIT stipulates guidance regarding the interpretation of contracts. According to this provision a case of hardship is given when the occurrence of events fundamentally alters the equilibrium of the contract, either because the costs of a party's performance has increased or because the value of the performance a party receives has diminished. In the present case, there has been an occurrence of events in form of the establishment of tariffs, that fundamentally altered the equilibrium of the contract because the costs of CLAIMANT's performance had increased by 30 % and RESPONDENT breached the resale prohibition disrupting the equilibrium even further [*C8, p. 18; PO2, p. 57, cl. 20; PO2, p. 59, cl. 33*]. The predisposed equilibrium of the contract would have been that RESPONDENT receives first class Nijinsky III semen and CLAIMANT receives 10,000,000 USD, making a 5 % profit margin in return. However, due to the imposed tariffs the 5 % profit margin vanished and CLAIMANT made a tremendous loss of 25 % instead [*CNoA, p. 7, No. 18*] while RESPONDENT received the frozen semen. Moreover, RESPONDENT sold the semen to third parties and breached the contract [*ibid*]. This has a huge impact on CLAIMANT. Not only did RESPONDENT destroy CLAIMANT's monopoly position for the best frozen semen on the market by selling it to at

least ten buyers [*PO2, p. 57, cl. 20*] - making a profit of approximately 300,000 USD by selling at least 15 doses - but also destroyed the price tag by making it so easily available. Furthermore, it must be taken into consideration that the other buyers did not have to take over any of the tariffs since CLAIMANT paid the tariffs for all semen. Moreover, with breaching the FSSA, RESPONDENT highly endangered CLAIMANT's position in the equestrian sport, since CLAIMANT lost control over the distribution of the Nijinsky III semen. Consequently, it can be expected that in the future there will be dozens of first-class progenies from Nijinsky III all over the world, destroying CLAIMANT's supremacy in the equestrian sport as well as in the breeding market. As a conclusion, RESPONDENT did not only receive first class semen for a very low price, but also sold it to at least ten other buyers, making a tremendous profit and destroyed CLAIMANT's position on the market. Therefore, the equilibrium of the contract is destroyed which leads to the result that an interpretation under 6.2.2 UNIDROIT proves that a case of hardship is given.

2. The hardship is a comparable event within the meaning of Clause 12 of the FSSA.

58 The tariffs imposed by Equatoriana constitute a comparable event within the wording of Clause 12. Pursuant to Art. 8 (1), (3) CISG and Art. 4.1 (1) UNIDROIT, statements and other conduct by the parties have to be interpreted regarding their intent. The intended definition for the term "comparable" can be construed from the given examples "health and safety requirements". These examples stipulate events that cannot be influenced by the parties and are established by the government. Tariffs are also established by the government and are beyond the parties' control. In order to classify tariff imposition as an event that is beyond the Parties' control, the Tribunal has to take into consideration that the purpose of the tariff-imposition is to protect the country's economy from price war by making foreign products too expensive and therefore unattractive. The purpose of health and safety requirements is to protect the country from diseases. Therefore, and even though the protected areas may differ, not only health and safety requirements serve the purpose of stabilising and protecting the country, but also tariffs. Thus, the imposition of tariffs is comparable to the establishment of additional health and safety requirements.

3. The imposition of tariffs came unforeseen.

59 Foreseeability must be judged against the background of an objective standard [*Kröll/Mistelis/Viscasillas, Art. 8, para. 52*]. In accordance with Art. 8 (2) CISG it is the

reasonable person of the same kind in the position of the seller, which has to be taken into account in order to interpret parties' statement or conduct. The establishment of the new tariffs surprised even analysts, since Equatoriana has always been an ardent supporter of free trade [*C 6, p. 15*]. The Equatorianian Government usually invoked WTO dispute resolution mechanisms instead of retribution measures [*C6, p. 15*]. Therefore, it was not possible for a reasonable third person to see such impositions coming.

60 RESPONDENT might argue that there had been protective tariffs in Equatoriana before, when the prime minister belonged to the National Party and therefore the impositions at hand could not be classified as unforeseeable [*CNoA, p. 7, No. 19*]. It is evident that this argument cannot convince when looking at the case *Raw Materials v. Manfred Forberich* [*Raw Materials v. Manfred Forberich*]. In that case the arbitrators decided that the freezing of the ports in St. Petersburg was an unforeseeable event because it was the worst winter in sixty years and therefore the seller was not liable for not performing. The tribunal ruled that the event was unforeseeable even though this was not the first time that the ports froze. They justified this with the argument, that it was the first time in sixty years that the ports froze to this extent and therefore it was unforeseeable. This is similar to the case at hand. The tariffs that RESPONDENT might refer to were different from the ones present. This is because, firstly, the former tariffs were of remarkably lower extent and secondly, tariffs to the present extent have never been raised in the history of Equatoriana beforehand. Following the judgement of *Raw Materials v. Manfred Forberich*, the tariffs imposed in the case at hand have to be considered as unforeseen, even if the country of Equatoriana had imposed them in the past for one time. Therefore, the imposition of tariffs constitutes an unforeseen event.

4. The agreement on delivery DDP does not lead to a different result.

61 RESPONDENT may argue that even if the requirements of Clause 12 are met, the agreement on delivery DDP would exclude the claim. However, due to the preliminary negotiations, it is evident, that CLAIMANT did not want to bear all the risks that might occur when agreeing on delivery DDP. In accordance with Art. 8 (1) CISG, the intent of the parties must be taken into consideration with the result that the Parties deviated from the term delivery DDP (**a.**). Furthermore, the Parties did not agree on the general agreement of DDP in accordance with the INCOTERMS 2010, but on a customised version (**b.**).

a. An interpretation under Art. 8 (1) CISG does not exclude the claim.

62 In accordance with Art. 8 (1) CISG, statements and other conduct by the parties have to be interpreted to their intent and further pursuant to Art. 8 (3) CISG all circumstances must be taken into account. In the present case, there is no evidence that would lead to CLAIMANT's intention in taking the burden for all risks deriving from an agreement on DDP. CLAIMANT told RESPONDENT that he will not take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions [*C4, p. 12*]. Moreover, CLAIMANT once performed under a DDP agreement with the result that it had to pay 40 % more than expected due to the establishment of additional health and safety requirements in Danubia, as the receiving country of the goods [*PO2, p. 58, cl. 21*]. This performance nearly resulted in CLAIMANT's insolvency [*PO2, p. 58, cl. 21*]. As one of the leading industries in the equestrian sport and breeding, RESPONDENT had to be aware of this, especially because CLAIMANT told it that there had been such a case in the past [*C4, p. 12*].

63 If CLAIMANT had actually intended to take over such high risks, it would not have raised the price per dose by only 500 USD, but instead would requested a price increasement that covers the risks for performing delivery DDP. Therefore, it is evident that the clause regarding the term delivery DDP does not burden CLAIMANT with all associated risks.

b. The agreement on delivery DDP does not exclude the claim as the Parties deviated from the definition in the sense of the INCOTERMS 2010.

64 According to the INCOTERMS 2010 edition [*PO2, p. 56, cl. 10*], the seller must bear all costs of delivery and all risks regarding customs until the buyer has received the goods. The only reason the Parties agreed upon delivery DDP was benefit from CLAIMANT's experience on delivery and the urgency of the delivery [*C3, p. 11*]. Therefore, the parties chose the term delivery DDP but deviated from its usual meaning.

65 Besides, Clause 10 of the FSSA states that some costs connected with the transport should be carried by the buyer [*C5, p. 14*]. This again leads to the result that it was the Parties' intent to differ from the meaning of delivery DDP in the sense of INCOTERMS 2010.

5. Conclusion on Issue C. I.

66 CLAIMANT is entitled to the payment of 1,250,000 USD under Clause 12 of the FSSA as it is not liable for the imposed tariffs. Due to the fact that CLAIMANT suffers from several severe

disadvantages, not only because of the imposition of tariffs, but also because of RESPONDENT's behaviour when reselling the semen, CLAIMANT is also entitled to further payment. Given CLAIMANT's gracious attitude it waives its claim for additional payment in the amount of 250,000 USD, 5 % profit margin, as CLAIMANT shows good will to resolve the dispute swiftly without losses.

II. CLAIMANT is entitled to the payment of 1,250,000 USD or any other amount resulting from an adaptation of the price under the CISG.

67 CLAIMANT is entitled to the payment as the Parties agreed on contract modification in the sense of Art. 29 CISG (**1.**). In addition, Art. 6.2.3 UNIDROIT leads to contract adaptation with the same result (**2**.). Moreover, the application of Art. 79 CISG provides for payment as well (**3.**).

1. CLAIMANT is entitled to the payment under Art. 29 (1) CISG.

68 Art. 29 (1) CISG attains application and provides the parties with the opportunity for performing a contract adaptation. Parties can explicitly or impliedly agree on contract adaptation [*Ferrari/Kieninger/Mankowski, Art. 29, para. 8a*]. The intent to modify a contract can be expressed by the behaviour of the parties and can be determined as an implied agreement [*Kröll/Mistelis/Viscasillas, Art. 29 para. 8*]. In *Macromex v. Globex International*, the seller announced that the shipment would be delayed. Yet, the buyer demanded the delivery anyway, although the parties agreed upon a specific date of delivery. This conduct was deemed to be a modification of the contract in the sense of Art. 29 (1) CISG by implied agreement with the content of changing the date of delivery. In the case at hand, CLAIMANT informed RESPONDENT about its additional costs due to the imposed tariffs in Equatoriana [*C7, p. 16*]. Nevertheless, RESPONDENT demanded the third shipment to be authorised. Therefore, the facts of both cases are uniquely comparable and the decision of the tribunal in *Macromex v. Globex International* can be transferred to the case at hand. Mr. Shoemaker stated that he understood CLAIMANT's problem and ensured that the Parties "will certainly find an agreement on the price" [*R4, p. 36*]. Therefore, it was reasonable for CLAIMANT to assume that the Parties impliedly agreed upon contract adaptation. If RESPONDENT argued that the Parties did not impliedly agree on contract adaptation, this would mean that RESPONDENT only made such a statement because it knew that CLAIMANT would not deliver without knowing that he would be compensated. This is underlined by the fact that RESPONDENT

would not have been able to resell the semen in order to fulfil its contractual obligations with another buyer if the third instalment had not been delivered in time [*C8, p. 18; R4, p. 36; PO2, p. 56, cl. 11; PO2 p. 59, cl. 33*]. Thus, the Parties impliedly agreed on the fact that the third instalment shall only be delivered under the premise that RESPONDENT would discharge for CLAIMANT's additional costs.

69 RESPONDENT argues that Mr. Shoemaker did not have the required authority to agree on the adaptation of the FSSA [*RNoA, p. 30, No. 10*]. However, RESPONDENT introduced Mr. Shoemaker as the person responsible for the racehorse breeding program including all questions concerning the FSSA [*PO2, p. 59, cl. 32*]. Therefore, as the responsible person, it is obvious that Mr. Shoemaker in fact had the authority to agree on an adaptation of the FSSA or at least CLAIMANT had to understand it this way. This is underlined by the fact that Mr. Shoemaker had been present at the meeting on 12th February 2018, where the Parties wanted to solve the conflict regarding contract adaptation at the senior management level, including the Parties' CEOs [*PO2, p. 60, cl. 35*]. Even if the Tribunal considered Mr. Shoemaker's statement in January 2018, where he stated that he was not a lawyer and not involved in the negotiations of the contract [*R4, p. 36*], it should take into account that this statement happened months after he had been introduced as responsible contact person [*PO2, p. 59, cl. 32*]. RESPONDENT acts in bad faith when it on the one hand introduces Mr. Shoemaker as the authorised person and on the other hand claims that he was never in the position to give any binding declarations. In addition, RESPONDENT at no point revoked its statement from November 2017. It therefore cannot rely on consequences resulting from an apparent lack of authority. Thus, Mr. Shoemaker's alleged lack of authority has no effect on the agreed upon contract adaptation.

70 Consequently, the Parties impliedly agreed on a contract modification in the sense of Art. 29 (1) CISG and therefore CLAIMANT is entitled to the payment of 1,250,000 USD.

2. Art. 6.2.3 UNIDROIT is a trade usage in the sense of Art. 9 (2) CISG and leads to contract adaptation.

71 According to Art. 9 (2) CISG "the Parties are considered (…) to have impliedly made applicable to their contract (...) a usage of which the parties knew or ought to have known and which in international trade is widely known". Art. 6.2.3 UNIDROIT is such trade usage within the meaning of Art. 9 (2) CISG and leads to contract adaptation when applied [*Schlechtriem/Schwenzer, Art. 9, para. 26; Russia I Case; Russia II Case; ICC Case No. 9479; ICC Case No. 10021*]. Art. 6.2.3 UNIDROIT deals with hardship and its consequences.

Pursuant to Art. 6.2.3 (1) UNIDROIT, parties are entitled to request renegotiations for dispute resolution. If the parties cannot find a solution during these renegotiations, tribunals are empowered to "adapt the contract with the view to restoring its equilibrium" in accordance with Art. 6.2.3 (4) (b) UNIDROIT. In order to determine whether the parties knew or ought to have known of the international trade usage the decision by a Swiss Court provides reasonable guidance [*W. T. GmbH v. P. AG*]. According to the court's decision it can be assumed that parties had implicitly made trade usages applicable to their contract if these usages are recognised under the law of the parties' home states [*ibid*]. In the case at hand, both Parties were aware that their home countries' Contract law is a verbatim adoption of the UNIDROIT [*PO1, p. 52*]. Therefore, Art. 6.2.3 UNIDROIT applies as trade usage pursuant to Art. 9 (2) CISG and entitles CLAIMANT to request renegotiations.

72 As elaborated above, renegotiations led to an implied agreement according to Art. 29 (1) CISG, which grants CLAIMANT the right to demand payment [*see supra*]. However, if the Tribunal decides that the Parties failed to renegotiate, it is empowered to adapt the contract in order to restore the equilibrium. Art. 6.2.3 (4) (b) UNIDROIT grants the tribunal the right to terminate the contract or to adapt the contract. In the case at hand, the tribunal should rule within its discretion with the result that the contract has to be adapted as this would be in accordance with the Parties general will to uphold the FSSA.

73 In order to restore the equilibrium, the Tribunal must conclude that CLAIMANT is at least entitled to payment in the amount of 1,250,000 USD according to Art. 9 (2) CISG in connection with Art. 6.2.3 UNIDROIT.

3. The application of Art. 79 CISG leads to contract adaptation.

74 According to Art. 79 CISG a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. Art. 79 CISG, however, does neither mention hardship nor does it mention contract adaptation in its legal consequences. Nonetheless, it is widely accepted that the term "hardship" can be applied under the wording "impediment" of Art. 79 CISG [*Kröll/Mistelis/Viscasillas, Art. 79, para. 79; CISG Advisory Council No. 7*]. Impediment is defined as an uncontrollable external incident, but does not necessarily mean that a party's performance is impossible [*Brunner, Art. 79 para. 22; CISG Advisory Council No. 7*]. While it was not impossible for CLAIMANT to deliver the semen it,

however, was held accountable for the tariff increase. As elaborated beforehand the increased tariffs constitute hardship [*see supra*] and therefore fall under the wording "impediment".

75 In addition, the wording of Art. 79 CISG might evoke the impression that its legal consequences do not contain contract adaptation. However, when interpreting Art. 79 CISG in observance of good faith in international trade in accordance with Art. 7 (1) CISG (**a.**), it would lead to the result that this principle also has to be used "as the basis for remedies, such as renegotiation or adjustment of contract, in cases of hardship or contractual disequilibrium due to supervening circumstances" [*Arroyo, C., p. 30*]. Furthermore, the lack of a possibility to adapt contracts when directly applying Art. 79 CISG must be seen as a gap that has to be filled along the lines of Art. 7 (2) CISG in connection with the UNIDROIT (**b.**) [*Lorraine Tubes v. Scafom International*]. The application of Art. 6 CISG does not exclude the claim (**c.**)

a. The application of Art. 7 (1) CISG within the legal consequences of Art. 79 CISG leads to contract adaptation.

76 Art. 7 (1) CISG states, that the interpretation of the CISG has to be done with regard to its international character and the observance of good faith in international trade. Good faith "requires the Parties to do, not what has been exactly promised, but rather that which is fair and reasonable under the circumstances" [*Mazzcano, p. 3*]. The interpretation of Art. 79 CISG within the principles of good faith, fair dealing, *pacta sunt servanda* and cooperation in the performance of the contract according to Art. 7 (1), (2), 60 (a) CISG and "the principle of adjustment or adaptation of contracts" in case of hardship, which derives from Art. 50 CISG [*Flechtner, p. 236*], leads to the parties' duty to renegotiate contract terms to restore the balance of performances. The *ratio* of Art. 79 CISG would be contradicted, if it did not provide for consequences to restore the equilibrium between the parties according to the distributed responsibilities. In other words: A party that made arrangements, although it was not responsible to do so, must be granted the right to reimburse itself as this would be in line with the principle of good faith. It is only fair and just to determine the Parties' responsibilities according to their contractual sphere of risk. The Parties implemented Clause 12 of the FSSA with the intention that risks occurring with the transportation of the semen would not be to CLAIMANT's detriment [*see supra*]. Therefore, Clause 12 of the FSSA stipulates CLAIMANTs non-liability and points out that the costs are within RESPONDENT's sphere of risk. CLAIMANT paid the tariffs, although it was not obliged to do so [*see supra*]. It was only reasonable for CLAIMANT to rely on RESPONDENT's statement that they "will certainly find

an agreement on the price" [*R4, p. 36*]. RESPONDENT acts in bad faith when denying the claim for additional payment and arguing that the tax imposition is solely CLAIMANT's responsibility as this would lead to an unequal and unjustified distribution of responsibilities according to Art. 79 CISG.

77 Therefore, CLAIMANT is entitled to demand payment in the amount of 1,250,000 USD according to Art. 79 CISG in connection with Art. 7 (1) CISG.

b. Art. 7 (2) CISG leads to an adaptation of the FSSA along the lines of 6.2.3 UNIDROIT.

78 Even if the Tribunal is not convinced by the application of Art. 7 (1) CISG in connection with Art. 79 CISG, the application of Art. 7 (2) CISG leads to contract adaptation as well. Art. 7 (2) CISG resolves problems that arise from issues not expressly determined by the Convention by applying general principles on which the CISG is based on or secondary recourses to Domestic law as determined by the rules of private international law of the forum [*Honsell, Art. 7, para. 12; Kröll/Mistelis/Viscasillas CISG, Art. 7, para. 52; Aluminium Case*]. These general principles are incorporated in the UNIDROIT [*Lorraine Tubes v. Scafom International; UNIDROIT Preamble, para. 5*].

79 Art. 7 (2) CISG must be considered as the CISG contains a gap regarding the question of contract adaptation in case of hardship. Art. 79 CISG is the only provision that deals with uncontrollable external incidents. Therefore, all events constituting hardship must be evaluated based on this provision [*Lindström, pp. 1*]. However, Art. 79 CISG neither expressly mentions hardship as a requirement nor contract adjustment as its legal consequences, but only excludes parties from claiming damages as a remedy [*see supra*]. In light of the aforesaid, the question whether hardship leads to a contract adaptation is not regulated which leads to a gap that has to be filled in accordance with Art. 7 (2) CISG [*Kröll/Mistelis/Viscasillas, Art. 79, para. 80; Lorraine Tubes v. Scafom International; Dai, p. 131*]. Pursuant to Art. 7 (2) CISG, general principles must be considered first. It is controversial whether the term "general principles" only refers to the principles of the CISG itself, or to external international principles as well. However, both interpretations lead to the same result: If the tribunal decides that only internal principles of the CISG are covered by Art. 7 (2) CISG, an enforcement arises out of the general principle of good faith [*see supra*]. If the Tribunal decides that external international principles are to be considered as well, an enforcement to adapt the contract arises along the UNIDROIT. The application of UNIDROIT is confirmed by an arbitration proceeding where the tribunal

decided that the UNIDROIT "are principles in the sense of Art. 7 (2) CISG" [*Netherlands Case, para. 26*]. Furthermore, the fact that the UNIDROIT shall be such a principle in the sense of Art. 7 (2) CISG is constituted in the UNIDROIT Preamble [*UNIDROIT Preamble, para. 5*]. When assessing the matter of contract adaptation 6.2.3 UNIDROIT applies [*Lorraine Tubes v. Scafom International*]. As elaborated beforehand the application of Art. 6.2.3 (4) (b) UNIDROIT leads to contract adaptation [*see supra*].

80 RESPONDENT may allege that the UNIDROIT cannot be seen as general principles on which the CISG is based as the UNIDROIT came into force after the CISG. However, the purpose of the Convention is to provide a framework which leads to unified results in international disputes [*Kröll/Mistelis/Viscasillas, Art. 79, para. 79; Momberg Uribe, p. 214*]. As the individual National laws significantly differ from each other, this purpose would be contradicted, if a gap within the CISG led to the application of National laws [*ibid*]. Considering the differences between national legal systems with regard to the acceptance, the requirements and the effects of hardship or a change of circumstances it would result in uncertainty for the parties, if the courts rely on Domestic law to decide a dispute [*ibid*]. Therefore, the only possibility to uphold the purpose of uniformity is the application of the UNIDROIT. Although the UNIDROIT came into force after the CISG, this cannot weaken that the general purpose of the Convention has to outweigh purely formalistic arguments that lack substantial value.

81 Even if the Tribunal applied the subordinate rules of private international law, as required by Art. 7 (2) CISG, it would still come to the conclusion that CLAIMANT is entitled to the payment due to contract adaptation. The HCCH constitute the rules of private international law [*PO2, p. 61, cl. 43*]. Given that Art. 1 (3) HCCH does not provide an exception for the applicability of questions regarding the substance of a dispute, they are applicable. According to Art. 2 (1) HCCH "a contract is governed by the law chosen by the Parties". In Clause 14 of the FSSA, the Parties agreed upon the applicability of the law of Mediterraneo, including the CISG [*C5, p. 14*]. As elaborated above numerous provisions of the CISG lead to contract adaptation [*see supra*].

82 Therefore, CLAIMANT is entitled to additional payment according to Art. 79 CISG in combination with Art. 7 (2) CISG.

c. The claim is not excluded by Art. 6 CISG.

83 Contrary to RESPONDENT's allegations, Art. 79 CISG has not been excluded by the Parties according to Art. 6 CISG. In order to exclude the application of the CISG, the parties have to

explicitly agree upon that [*Russia III Case; Cedar Petrochemicals v. Dongbu Hannong Chemical; BP Oil v. Empresa; Travelers Casualty v. Saint-Gobain Technical Fabrics*]. In the listed cases, the application of the CISG resolved from the Convention's own scope of application according to Art. 1 CISG. It is even more persuasive to demand an explicit exclusion of provisions of the CISG, if parties explicitly agreed on the application of the Convention in its entirety. The problem whether the parties have excluded provisions of the CISG arises in cases where the CISG applies according to the chosen National law [*Kröll/Mistelis/Viscasillas, Art. 6, paras. 17, 18*]. In the case at hand, the Parties explicitly agreed on the application of the CISG in Clause 14 of the FSSA [*C5, p. 14*]. At no point did the Parties explicitly talk or reach an agreement regarding the exclusion of any provisions of the CISG. RESPONDENT's allegation is baseless as RESPONDENT itself is well aware of the lack of an explicit agreement. This is underlined by the fact that RESPONDENT contradicts itself when arguing on the one hand that the hardship clause is an implied exclusion of Art. 79 CISG and on the other hand argues that hardship is not encompassed in Art. 79 CISG whatsoever. RESPONDENT claims that CLAIMANT could not rely on Art. 79 CISG as the inclusion of the force majeure and hardship Clause would constitute a derogation in the sense of Art. 6 CISG [*RNoA, p. 32, No. 20*]. This is, however, not true as the Parties did not provide for a special regulation by including the force majeure and hardship Clause into the FSSA.

84 Furthermore, the exclusion of the CISG is the exceptional case and therefore the party that wants to rely on the exclusion has to prove that the parties agreed on the exclusion in a clear and unambiguously way [*BeckOK BGB, Art. 6, para. 9; Schlechtriem/Schwenzer, Art. 6, para. 38*]. If a party intends to rely on the exclusion of the CISG it has to prove the relevant circumstances that constitute an express agreement to exclude provisions of the CISG [*ibid*]. RESPONDENT did not deliver any proof regarding a clear and unambiguous behaviour of the Parties to exclude Art. 79 CISG.

85 Therefore, Clause 12 of the FSSA does not exclude the application of Art. 79 CISG and does not constitute a derogation in the sense of Art. 6 CISG.

4. Conclusion on Issue C II.

86 CLAIMANT is entitled to an additional payment of at least 1,250,000 USD or any other amount resulting from an adaptation of the price under the CISG. This is because the parties agreed on contract adaptation in the sense of Art. 29 CISG. In addition, Art. 6.2.3 UNIDROIT stipulates for contract adaptation and is applicable as trade usage within the meaning of Art. 9 (2) CISG.

Furthermore, Art. 79 CISG, which has not been excluded in the sense of Art. 6 CISG, leads to the same result when considering Art. 7 (1) CISG and Art. 7 (2) CISG within the legal consequences of Art. 79 CISG.

REQUEST FOR RELIEF

87 CLAIMANT respectfully requests the Arbitral Tribunal to declare that:

88 **A.** The law of Mediterraneo governs the Arbitration agreement and that the Arbitral Tribunal has jurisdiction to adapt the contract [**Issue 1**].

89 **B.** CLAIMANT is entitled to submit evidence from the other arbitration proceedings [**Issue 2**].

90 **C.** CLAIMANT is entitled to the payment of 1,250,000 USD [**Issue 3**].

DECLARATION OF INDEPENDENCE

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

Bochum, 6 December 2018

Jessica Adjoyi	Ferhat Alsac	Jona Donner
Christina Luthe	Maximilian Schikorra	Lennart Tollrian