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

FREIE UNIVERSITÄT BERLIN

MEMORANDUM FOR CLAIMANT

PHAR LAP ALLEVEMENTO V. BLACK BEAUTY EQUESTRIAN

On behalf of CLAIMANT

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo

Against RESPONDENT

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana

COUNSEL FOR CLAIMANT

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%	per cent
ANoA	Answer to Notice of Arbitration
BGH	Bundesgerichtshof (Germjn Federal Court of Justice)
C […]	CLAIMANT's exhibit
c.f.	*conferre*
CISG	United Nations Convention on Contracts for International Sale of Goods
et seq. / et seqq.	and the following
HKIAC	2018 HKIAC Administered Arbitration Rules
HKIAC 2013	2013 HKIAC Administered Arbitration Rules
i.e.	*id est*
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	*ibidem*
ICC	International Chamber of Commerce
in casu	*in the case at hand*
Ltd.	Limited company
No.	number/numbers
NoA	Notice of Arbitration
p. / pp.	page/pages
para. /paras.	paragraph/paragraphs
PICC	UNIDROIT Principles of International Commercial Contrasts
PO	Procedural Order
PO2	Procedural Order No. 2
R […]	RESPONDENT' s exhibit
ref.	reference
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollar
v.	versus

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- HKIAC Administered Arbitration Rules 2013
- HKIAC Administered Arbitration Rules 2018
- UNCITRAL Rules in Transparency in Treaty-based Investor-State Arbitration 2014
- UNIDROIT Principles 2016, UNIDROIT Principles of International Commercial Contracts (PICC)

STATEMENT OF FACTS

21 March 2017	RESPONDENT and CLAIMANT (**'Parties'**) first contact via email, where RESPONDENT asks CLAIMANT to provide an offer for 100 doses of frozen race horse semen of Nijinsky III.
24 March – 11 April 2017	CLAIMANT and RESPONDENT negotiate via email.
12 April 2017	The two main negotiators, Ms. Napravnik and Mr. Antley, are severely injured in an accident and had to be replaced for the finalisation of the contract finalisation of the contract.
06 May 2017	The sales agreement was signed by Mr. Ferguson and Mr. Krone in Mediterraneo.
20 May 2017	CLAIMANT sent the first shipment of 25 doses.
03 October 2017	CLAIMANT sent the second shipment of 25 doses.
15 November 2017	The import tariffs imposed by the Government of Mediterraneo take effect.
15 January 2018	The retaliatory import tariffs imposed by the Government of Equatoriana take effect.
20 January 2018	The Parties are informed that the tariffs imposed by the Government of Equatoriana also apply to frozen horse semen.
21 January 2018	A phone call between Ms. Napravnik and Mr. Shoemaker addressing the imposed tariffs and an adaptation of the purchase price take place via telephone.
23 January 2018	CLAIMANT sent the third shipment of the remaining 50 doses.
02 February 2018	CLAIMANT is approached by another breeder from Equatoriana and is told that the latter had bought Nijinski III semen from RESPONDENT.
12 February 2018	The meeting between the CEO's of both Parties and Ms. Napravnik and Mr. Shoemaker takes place in Equatoriana.
31 July 2018	As it became clear that no settlement can be reached, CLAIMANT submits its Notice of Arbitration (**'NoA'**).

24 August 2018	RESPONDENT submits its Answer to the Notice of Arbitration (**'ANoA'**).
02 /03 October 2018	Parties state their positions for the upcoming proceedings to the Arbitrators

INTRODUCTION

The case concerns two Parties, Phar Lap Allevamento (**'CLAIMANT'**) and Black Beauty Equestrian (**'RESPONDENT'**). CLAIMANT runs a tradition-steeped, renowned stud farm, located in Capital City, Mediterraneo, while RESPONDENT is a breeder specialised in race horses, localised in Oceanside, Equatoriana. Both Parties are unified in their passion for high-class equestrian sport which is evident through their success in the areas of show jumping, dressage and, most recently, horse racing.

The Parties concluded a sales contract on the delivery of frozen horse semen by CLAIMANT's award-winning stallion, Nijinski III in 2017. However, their smooth business relationship has been overshadowed by the newly imposed tariffs on the import of agricultural products in January 2018. CLAIMANT saw itself confronted with severe financial hardship due to the increased customs of 30 %, but still agreed to authorise further deliveries. By doing so, it relied on RESPONDENT's statement that the Parties will certainly find a solution regarding a price adaptation, emphasising their friendly and long-term business relationship.

To its great surprise, RESPONDENT's CEO, Ms. Kayla Espinoza, vehemently rejected re-negotiations during their next encounter and declared to stop all further cooperation with CLAIMANT. Most notably, she refused to pay for the surplus from the tariffs. Moreover, RESPONDENT resold Nijinski III's semen to third parties, breaching its contractual obligation.

RESPONDENT shows highly contradictory behaviour when refusing the Tribunals jurisdiction to decide on this matter (**Issue 1**), considering that it strongly advocated for it in a previous proceeding. CLAIMANT is clearly permitted to submit evidence from the said proceeding to prove this very fact (**Issue 2**). However, contractual as well as the statutory provisions obviously justify CLAIMANT's entitlement to a price adaptation of at least US$ 1,250,000 (**Issue 3**). CLAIMANT is deeply upset that the Partyies promising contractual relationship had to result in this arbitration. The honest merchant does not sell its morals.

ISSUE 1: THE TRIBUNAL DOES HAVE THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1 RESPONDENT'S claim that the Tribunal lacks jurisdiction to decide on this case has no grounds and shall be discarded. CLAIMANT will show that, firstly, the Arbitral Tribunal has the jurisdiction to decide on this case (**A.**) and that, secondly, it holds the powers to adapt the contract (**B.**).

A. The Tribunal Has the Jurisdiction to Decide on this Case

2 The Arbitral Tribunal has the jurisdiction to decide on this case because the Parties agreed to arbitrate in front of the Hong Kong International Arbitral Centre (**I.**). Moreover, the Arbitral Tribunal has the *Kompetenz-Kompetenz* to decide on its own jurisdiction (**II.**).

I. The Hong Kong International Arbitration Centre Was Explicitly Chosen

3 The Parties explicitly agreed to settle any dispute by arbitration administered by the Hong Kong International Arbitration Centre. In order for the Hong Kong International Arbitration Centre Administered Arbitration Rules ('HKIAC') to apply, they have to be incorporated effectively into the Parties arbitration agreement in order to apply, Article 1 (1) HKIAC. The latter describes an agreement to submit present or future disputes to arbitration [*Longman, 'arbitration agreement'*]. According to clause 15 of the sales agreement, the parties stated that 'any dispute arising out of this contract, […], shall be referred to and finally settled by arbitration administered by the Hong Kong International Arbitration Centre under the HKIAC' [*C5, p. 14, clause 15*]. Thus, the Parties agreed on arbitration before this Tribunal.

II. The Tribunal Has the *Kompetenz-Kompetenz*

4 Contrary to RESPONDENT's claim, the Arbitral Tribunal has the jurisdiction to decide on this case [ANoA, para. 12, p. 31]. This results from its *Kompetenz-Kompetenz* to decide on its own jurisdiction [*Berger, Int'l. Economic Arb., p. 351; De Boisséson, p. 715, para. 732; Graves/Jack/Davydan/Yelena in Kröll/Lew/Julian, p. 332, paras. 13 et seqq.; Besson/Poudre, p. 387*]. *Kompetenz-Kompetenz* is defined as the power of the arbitral tribunal to independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court [*UNCITRAL Explanatory Note*]. Arbitral Tribunals have therefore the authority to decide whether or not they have the jurisdiction to decide on a case, especially if the jurisdiction is unclear [*El Nasr v. Anglo French*]. The Tribunal is invited to take note of the fact that the parties explicitly agreed upon arbitration under the HKIAC [*supra, ref. 3*]. Pursuant to Article 19(1) HKIAC the Tribunal may rule over its own jurisdiction under the

HKIAC. In reference to Article 13(5) HKIAC to ensure a fair and efficient conduct of the arbitration, the Tribunal is kindly invited to confirm its jurisdiction.

III. Consequence

5 Hence, the Arbitral Tribunal has the jurisdiction to decide on this case.

B. The Tribunal Has the Power to Adapt the Contract

6 The Arbitral Tribunal has the power to adapt the contract. This is because Mediterranean law governs the arbitration agreement and its interpretation (**I.**). Moreover, Mediterranean law provides the Tribunal with the powers for adaptation pursuant to Article 6.2.3 (4) (b) Mediterranean Contract Law (**II.**). Even if Danubian law was applicable, the Arbitral Tribunal would still hold the powers to adapt the contract according to Article 6.2.3. (4)(b) Danubian Contract Law (**III.**).

I. The Law of Mediterraneo Governs the Arbitration Agreement

7 Even though otherwise alleged by RESPONDENT [*ANoA, p. 32, para. 16*] the law of Mediterraneo must govern the arbitration agreement and its interpretation. The applicable law must pass the three-stage inquiry established in the Sul America case [*Sul America v. Enesa, para. 9*]. When there is no explicit or implied choice of law made, the law with the closest and most real connection must be applied. It will govern the arbitration agreement and its interpretation [*Kröll/Miselis/Perales Viscasillas, Article 1, para. 17; Sul America v. Enesa, para. 25*]. Since there is no express (**1.**) or implied (**2.**) choice in the case at hand, the closest and most real connection can only be drawn to the law of Mediterraneo (**3.**).

1. The Parties Did Not Choose a Governing Law Explicitly

8 The Parties did not explicitly choose a law that governs the arbitration agreement. The arbitration clause contained in the Sales Contract does not include any statement regarding the applicable law. A choice of law clause is a contract provision specifying the jurisdiction for disputes arising from or relating to that contract [*Black, 'choice of law clause'*]. While other relevant details are contained – such as choice of the seat of arbitration, the arbitration rules and the administering arbitral institution – there is no choice of law for the arbitration agreement [*C5, p. 14, clause 15*].

2. The Parties Did Not Choose a Governing Law Impliedly

9 Contrary to RESPONDENT's ill-founded allegation, the law of Danubia does not govern the arbitration agreement and its interpretation as the parties did not make an implied choice of law [*ANoA, p. 31, para. 15*]. Firstly, Ms. Napravnik and Mr. Antley had a dispute about the choice of

law clause all throughout negotiations which was never settled (**a.**). Secondly, the email RESPONDENT refers to was not an acceptance to the choice of law. In fact, Ms. Napravnik expressed that she needed additional permission and, subsequently, did object to the suggested choice of law (**b.**).

a. The Parties Did Not Settle on a Specific Choice of Law

10 Neither the drafting history nor the witness statements indicate that the Parties have ultimately agreed on a specific choice of law.

11 This can be inferred by looking at the email exchange the Parties had throughout the negotiations [*C3, p. 11; C4, p. 12; R1, p. 33; R2, p. 34*]. Mr. Antley expressed his concerns about the jurisdiction and applicable law of Mediterraneo in his email of 28 March 2017 [*C3, p. 11*]. In an attempt to compromise, Ms. Napravnik's counterproposal sought to choose arbitration in Mediterraneo instead of national civil courts [*C4, p. 12*]. Mr. Antley objected and proposed arbitration in Equatoriana [*R1, p. 33*]. Ms. Napravnik then made clear that a foreign jurisdiction and law was out of question for CLAIMANT. Therefore, she suggested a new arbitration clause to which RESPONDENT never answered [*R2, p. 34*]. Hence, during the negotiations the arbitration clause was at disposition and no conclusion was reached. Mr. Antley wrote in his note of 12 April 2017 that the parties must 'clarify in [the] arbitration clause that neutral venue and applicable law' have to be chosen [*R3, p. 35*]. The note displays that until the very end of the negotiations between Mr. Antley and Ms. Napravnik it was disputed which law should govern the arbitration agreement. Due to the accident on 12 April 2017 the two main negotiators were replaced. Their successors did not resume this issue [*C8, p. 17*]. A choice of law clause for the final arbitration agreement was omitted.

b. CLAIMANT Did Not Agree to RESPONDENT's Proposal

12 RESPONDENT misunderstands the circumstances. They do not give rise to a reasonable assumption of acceptance.

13 In the email of 10 April 2017 which RESPONDENT is referring to Mr. Antley proposed an arbitration clause that features a governing law in favour of the law of Equatoriana [*R1, p. 33*]. In her reply Ms. Napravnik emphasised CLAIMANT's internal policy under which she could not consent on arbitration under a foreign law without consulting the creditors' committee [*R2, p. 34*]. From RESPONDENT's point of view – the only relevant one in the case at hand – CLAIMANT did not have the permission to submit to the law of Danubia [*PO2, p. 56 et seq., para. 14*]. It could not have been aware of any internal accessory agreements between CLAIMANT and its negotiator Ms. Napravnik.

c. Consequence

14 An implied choice of law was not made in favour of Danubian law.

3. The Law of Mediterraneo Has the Most Real and Close Connection to the Agreement

15 The Law of Mediterraneo upholds the closest and most real connection to the arbitration agreement. When there is no express [*supra, ref. 8*] and no implied choice [*supra, ref.* 14] of law by the parties the third stage of the Sul America Test poses the question of what law has the closest and most real connection to the arbitration agreement [*Collins, vol. I, para. 16-001; Hamlyn & Co v. Talisker Distillery; Sul America v. Enesa; Morgan in Gottwald, p. 432, para. 8.2; Westlake, p. 258, para. 212*]. To determine the governing law, the arbitration clause cannot be inspected isolated [*Collins, vol. I, para. 16-020*]. Rather, all surrounding circumstances need to be considered, most notably the law governing the substantive contract [*Van Houtte/Looyens in Gottwald, p. 165, para 5. et seqq.., Sul America v. Enesa, paras. 11, 26*]. Thus, it will be shown that the explicit choice of law for the substantive contract strongly shows that the law of Mediterraneo governs the agreement (**a**) and that the seat of arbitration does not sufficiently indicate a choice of law (**b**). In any case, all other circumstances lead to the conclusion that Mediterranean law governs the arbitration clause (**c**).

a. The Choice of Law for the Substantive Contract Serves as an Indicator

16 In the absence of an express agreement, the law applicable to the substantive contract may be extended to the arbitration clause. The law governing the substantive contract indicates the Parties' intention that this law should also govern the arbitration agreement [*Sul America v. Enesa, paras. 11, 26; Collins, vol. II, para. 30-021, BGH VII ZR 83 u-84/66 8, p. 9; OLG Hamburg 11 Sch 6/01, para. 34*]. In the case at hand the Parties decided on the law of Mediterraneo to govern the substantive contract. The relevant passage can be found in Clause 14 of the Sales agreement 'This Sales agreement shall be governed by the law of Mediterraneo […]'. [*C5, p. 14, clause 14*]. Therefore, it must be assumed that the choice of law is also valid for the arbitration agreement, especially since they were both stipulated in one document [*Van Houtte/Looyens in Gottwald, p. 165, paras. 5 et seqq.*]. That conclusion is supported by the witness statement of Mr. Krone. He stated that at the time of concluding the contract he did not consider that the choice of law provision distinguishes between the main contract and arbitration agreement [*R3, p. 35*].

17 It is true that the *doctrine of separability* declares that main contract and arbitration clause are to be seen independently. However, the case at hand lies beyond the scope of the doctrine. Its purpose is to provide for quick and efficient proceedings [*Born, vol. I, p. 351*] by keeping null and void arbitration agreements from impairing the main contract and vice versa [*Westacre Invs. Inc. v.*

Jugoimport-SDPR Holdings Co.; Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp Ltd.; Granite Rock Co. v. Teamsters; Ets Raymond Gosset v. Carapelli] RESPONDENT overstretches the doctrine's scope by treating the main contract and arbitration agreement as separate agreements in all regards. However, it foils the overreaching goal of a smooth proceeding if the Parties' relationship is not governed by the same law.

18 This must especially apply if the choice of law clause for the main contract is located right before or after the arbitration clause [*Hausmann in Pfister, p. 365*], as it is in the disputed Sales agreement [*C5, p. 14., clauses. 14 et seq.*]. Hence, in this case the choice of law in favour of Mediterraneo also applies to the sales agreement as a whole.

b. The Seat of Arbitration Does Not Lead to a Choice of Law

19 RESPONDENT claims that the law of the place of arbitration should always govern the arbitration agreement [*ANoA, p. 31, para. 13*]. Although the Parties did agree on a seat of arbitration [*C5, p. 14, clause 15; R1, p. 33; R2, p. 34*], they could not agree on a choice of law [*supra, ref. 8,14*]. In cases where negotiations lead to a consensus in a choice of seat but not in a choice of law, a choice of seat is not to be seen as a choice of law for the arbitration agreement [*OLG DüDo WM 1971, 168*]. Therefore, the choice of place of arbitration does amount to a choice of law governing the arbitration agreement.

c. Additional Circumstances Favour the Law of Mediterraneo

20 Further circumstances point towards the law of Mediterraneo applying to the arbitration agreement and its interpretation. First of all, the contract was finalized and signed in Mediterraneo [*PO2, p. 56, para. 8*]. Secondly, the Sales agreement is based on an Industry Template from Mediterraneo. Thirdly, the Parties intended to connect the hardship and arbitration clause.

21 The contract was finalized and signed in Mediterraneo and therefore Mediterranean law applies to the interpretation of the arbitration clause. It is an indication that the parties focused heavily on Mediterraneo as their forum of choice and that the law of Mediterraneo shall govern the arbitration agreement [*El-Hakim in Gottwald, p. 850, paras. 8-10; Song in Gottwald, p. 651; Robinson v. Bland*]. If the parties wanted the law of the neutral place of arbitration to apply, it would be reasonable to assume that finalization and signing of the contract would occur in the respective country.

22 The contract used by the parties is based on an industry template from Mediterraneo which the Parties altered in order to fit their specific needs [*C2, p. 10, PO2, p. 55, para. 3*]. The reason to use a contract template is that the Parties do not have to consider all relevant legal details, as those are already included in pre-set form. Such templates are composed according to the law system that

shall apply to the contract. A Mediterranean contract template will therefore be drafted in accordance to the law of Mediterraneo. Even with the alterations the parties made to the contract, the structure does not substantially differ from the template. Had the parties wished for any other law to apply they would have chosen a template by the respective country.

23 It was the mutual intention of the Parties to connect the hardship and the arbitration clause [*R3, p. 35*] in order to have an adaptation mechanism in place. Connecting the two clauses would inevitably lead to the law of the substantive contract also governing the arbitration agreement. Mr. Antley's note indicates the Parties aim to connect the two clauses. Before this backdrop the law of Mediterraneo governs the arbitration agreement, highlighting the connection of the respective clause to the latter.

24 Considering the given circumstances, the only reasonable conclusion is to apply Mediterranean law to the arbitration agreement and its interpretation.

d. Consequence

25 The law of Mediterraneo has the closest and most real connection to the arbitration agreement.

4. Consequence

26 Therefore, the law of Mediterraneo governs the arbitration agreement and its interpretation.

II. The Law of Mediterraneo Grants the Powers to Adapt the Contract

27 The law of Mediterraneo which is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts ('PICC') [*PO1, p. 53, para. III (4)*] grants the Tribunal the powers to adapt the contract pursuant to Article 6.2.3(4)(b) PICC. If a tribunal finds hardship it may react through an adaptation of the contract according to Article 6.2.3 (4) PICC in order to restore the contractual equilibrium. Therefore, the Arbitral Tribunal does have the powers to adapt contracts under Mediterranean law.

III. Even the Law of Danubia Grants the Power of Adaptation to the Tribunal

28 Even if the Tribunal decides that Danubian law shall govern the arbitration agreement and its interpretation, the power of the Tribunal to adapt the contract would not be affected. This is possible because the parties authorised the Tribunal to adapt the contract (**1.**) and the evidence needed to find the true will of the parties is admissible regardless of the four corners rule (**2.**).

1. Authorisation of the Tribunal to Adapt the Contract

29 Other than stated by RESPONDENT, the Parties authorised the Tribunal to adapt the contract. Danubia incorporated a largely verbatim version of the UNIDROIT Principles [*PO2, p. 61, para. 45*], only specifying Article 6.2.3 (4)(b) by adding the additional requirement of the parties to authorise the tribunal to adapt the contract [*Ibid.*]. By including an arbitration agreement and requesting an adaptation mechanism, the parties authorised the Arbitral Tribunal to adapt the contract [*infra, ref. 106 et seqq.*].

2. The Four Corners Rule Does Not Apply

30 Other than stated by RESPONDENT, the Tribunal is entitled to refer to the drafting history when interpreting the contract, as the four corners rule does not apply.

31 It may be true that 'reliance on the drafting history and preceding communication is excluded if the wording is clear' [*ANoA, p. 32, para. 16*]. The wording, however, is far from clear. From the perspective of an average reader, the undisputed solution should result directly from the contract [*AM Int. Inc. v. Graphic Man. Inc.*]. The contract though is not to be fully comprehended without looking at further evidence to shed light on its meaning and the will of the Parties.

32 While RESPONDENT tries to use the four corners rule to prohibit CLAIMANT to submit and use evidence in order to explore the true intent of the Parties it acts self-contradictory. RESPONDENT brings up external evidence itself and refers to the drafting history of the contract [*ANoA, p. 31, para. 15*]. RESPONDENT is going even further and includes handwritten notes in its exhibits [*R3, p. 35*]. Thus, not only acting contradictory, RESPONDENT also demonstrates the missing clarity of the contract and displays the need for extrinsic evidence to prevent misunderstandings.

33 Furthermore, disruptions add to missing clarity of the contract. In the negotiations between Ms. Napravnik and Mr. Antley they could not agree on all clauses of the contract before the car accident on 12 April 2017 [*C8, p. 17; R3, p. 35*]. Their successors in the transaction, Mr. Ferguson and Mr. Krone, could find a consensus and finally sign the contract [*Ibid*]. However, they were not familiar with the matter and could consequently not cover all issues left open. Hence, it is unreasonable to assume that the contract was conclusive and clear.

34 As time was limited for the Parties, both wanted to conclude the contract as swiftly as possible. Most importantly because CLAIMANT faced financial difficulties [*PO2, p. 59, para. 29*]. RESPONDENT already engaged in sale contracts for delivery of the frozen semen with third parties [*PO2, p. 57, para. 20, p. 59, para. 33*]. Therefore, the contract was conducted in a hasty manner disregarding crucial details that lead to the dispute at hand. The absence of a merger clause clearly

indicates that the contract is incomplete. Thus, the wording of the contract alone is insufficient for its interpretation.

35 In conclusion, the wording of the contract is highly ambiguous, and the four corners rule does not apply. Therefore, external evidence is admissible for the trial before the Arbitral Tribunal.

3. Consequence

36 Hence, even under Danubian contract law, if it is authorised and finds the existence of hardship, the Arbitral Tribunal has the power to adapt the contract and may act upon it.

IV. Consequence

37 Consequently, the Arbitral Tribunal has the power to adapt the contract.

C. Conclusion on Issue 1

38 The Tribunal has the jurisdiction to decide on this case. Furthermore, the Tribunal does have the power to adapt the contract.

ISSUE 2: EVIDENCE FROM THE OTHER ARBITRATION CAN BE SUBMITTED, REGARDLESS FROM ITS ORIGIN

39 RESPONDENT's doubts regarding the submission of evidence from the other arbitration proceedings in which CLAIMANT is involved must be discarded. CLAIMANT will demonstrate its entitlement to submit evidence in form of the Partial Interim Award or any other documents from the other proceedings (**A.**) Furthermore, in the case at hand, it is irrelevant whether the evidence was obtained through a hack or a breach of confidentiality agreement (**B.**). Moreover, since RESPONDENT acts in bad faith, its claims cannot be considered (**C.**).

A. Evidence from the Other Arbitration Proceedings Can Be Submitted

40 Evidence from the other arbitration proceedings can be submitted to the current arbitration. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('UNCITRAL Rules') are also applicable in international commercial arbitration. Hence, evidence from the other arbitration proceedings can be disclosed and consequently submitted under Article 3(1) UNCITRAL Rules (**I**). Even if the UNCITRAL Rules are not applicable, confidentiality is outweighed by a need for transparency in the case at hand. Rejecting the submission would be unproportionate (**II.**). Furthermore, pursuant to Article 9 IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') the exclusion of evidence is not possible since any legal

privilege was waived (**III.**). If RESPONDENT does not fulfil its duty to disclose, the information will nevertheless be brought to this Tribunals attention by joinder under Article 27(1) HKIAC (**IV.**).

I. The Submission Complies with the UNCITRAL Rules

41 CLAIMANT will show that contrary to RESPONDENT's allegations [*p. 51*] there is a general need for more transparency in international commercial arbitration. Therefore, the UNCITRAL Rules must be applied to commercial arbitration and consequently to both arbitration proceedings s(**1.**). According to Article 3(1) UNCITRAL Rules documents and awards of proceedings shall be made available to the public. Since none of the exclusions in Article 7 UNCITRAL Rules apply, the said evidence in question must be submitted (**2.**).

1. The UNCITRAL Rules Are Applicable in International Commercial Arbitration

42 The UNCITRAL Rules do apply in international commercial arbitration as well. For years arbitration experiences a permanent development towards more transparency, since institutions and the press started publishing decisions in parts or completely [*Levander, p. 510; Carmody, p. 97; Born, vol. II, p. 2821*]. Scholars and practitioners demand more transparency through the publication of awards at least in a *'redacted form'* [*Born, vol. II, p. 2822*]. The adoption of the UNCITRAL Rules was an additional step to reduce unsatisfactory results. However, their application to investor-state arbitration only is *'fundamentally problematic',* considering, that public interests are also addressed in commercial arbitration (**a.**) [*Euler, p. 43*]. In addition to this, more transparency leads to legal certainty (**b.**) *[Carmody, p. 171 et seqq.]*. Moreover, '*repeat players'* should not be the only beneficiaries to disputes being solved through commercial arbitration (**c.**) [*Carmody, p.175 et seqq.*]. If parties do not want the UNCITRAL Rules to cover their contract, they must expressively opt out [*Carmody, p. 177*]. This did not happen in this case. Consequently, the UNCITRAL Rules necessarily have to cover international commercial arbitration as well and are applicable to the proceeding in question.

a. Public Interests Are Addressed in International Commercial Arbitration

43 It is wrong to believe investor-state arbitration only addresses issues of public interest. Commercial arbitration disputes also have an impact on public policy since their awards are enforced in national courts and their consequences affect the public [*Argen, p. 235; Euler, p. 44; Carmody, p. 169 et seq.*]. The award in the current arbitration will be brought to domestic courts and will, thereby, affect the public. The proceedings concern the possibility to adapt sales contracts because of unforeseen import tariffs on agricultural products. Multiple traders depend on the outcome of the arbitration, since their businesses will be affected. Also, shareholders and creditors' interests must be considered [*Born, vol. II., p. 2830; Carmody p. 170*]. CLAIMANT must provide the agreed upon profits

to its credit granting bank since the accurate sale is a precondition for a new credit [*PO2, p. 59, para. 29*]. If the Arbitral Tribunal was not to decide in its favour CLAIMANT and its shareholders would lose their credit standing. As seen in the case of Equatoriana and Mediterraneo, politically motivated retaliatory measures not only affect a country's economy but easily lead to further governmental measures [*NoA, p. 6, paras. 9, 10; C6, p. 15*]. Therefore, a public interest in general and also in the case at hand, must be affirmed.

b. Inconsistent Results and Legal Uncertainty Must Be Avoided

44 Additionally, the application of written legal principles - like the UNCITRAL Rules - and the publication of awards lead to a consistent and effective arbitral jurisprudence. This grants legal predictability and certainty [P*oorooye/Feehily, p. 285*]. Parties would gain a better understanding of arbitration resulting in a decrease of appeals [*Born, vol. II., p. 2821; Reuben, p. 1085*]. They would be bound by their interpretation of facts in other proceedings and could not, like done by RESPONDENT, bypass and interpret them differently to avoid detriment. In the case at hand and in general, inconsistent results can be avoided when applying the UNCITRAL Rules.

c. Advantages for Repeat Players Must Be Eliminated

45 Furthermore, confidentiality in international commercial arbitration must be restricted so that parties, such as RESPONDENT, cannot gain a competitive advantage by participating in several arbitrations intentionally or unintentionally [*Carmody, p.175*]. These '*repeat players'* benefit from mutual proceedings by accumulating knowledge about arbitrators, institutions or legal frameworks. They gain insights into other market players' businesses and can easily develop successful strategies for potential further transactions [*Brown, p. 1008*.] However, all market participants should have the same knowledge on other businesses and similarly benefit from proceedings. Thus, awards must be published in accordance with the UNCITRAL Rules.

d. Consequence

46 For the above-mentioned reasons the UNCITRAL Rules must be applied.

2. According to Article 3(1) UNCITRAL Rules the Documents Shall Be Disclosed

47 According to Article 3(1) UNCITRAL Rules further documents and awards shall be made available to the public. During the drafting process the publication of 'orders and decisions' was replaced by 'orders and decisions and awards' which underlines an arbitral awards influential importance [*A/CN.9/760, p. 8*].

48 The exceptions in Article 7 UNCITRAL Rules, however, do not apply. Their general purpose is to balance public interests and the parties' right to a fair trial [*Euler, p. 250*]. As demonstrated in the case at hand, the public has an interest in the proceeding's result [*supra ref. 43*]. The right to a fair trial granted by Article 13(1) and 13(5) HKIAC would only be fulfilled if CLAIMANT was able to support its claim by submitting evidence. Thus, the award must be made available to the public and CLAIMANT may refer to it.

II. Rejecting the Submission Is Not Appropriate

49 Even without the application of the UNCITRAL Rules awards and documents from the other proceedings can be submitted when confidentiality is predominated by the importance of the evidence (**1.**) or overriding legal principles (**2.**). Moreover, RESPONDENT cannot be found worthy of protection since its claim is based on a misinterpretation of confidentiality (**3.**).

1. Transparency Predominates Confidentiality

50 CLAIMANT does not deny the existence of confidentiality in international commercial arbitration. Nevertheless, all facts of a case must be considered. Taking all facts in casu into account when balancing confidentiality and transparency, however, the latter is considerably more important.

51 Without doubt, a third party can obtain arbitral awards and further documents form other arbitration proceedings to submit them as precedential evidence to support its claim [*Gotham Holdings, LP v. Health Grades, Inc.*]. This is especially the case, when an award is decisive for the outcome of a current arbitration [*Fireman's v. Cunningham*]. According to Article 22(1) HKIAC the burden of proof even lies with CLAIMANT who is a third party to the other arbitration. Therefore, CLAIMANT is obliged to support its claim by producing the document. The submission of arbitral awards and documents from other arbitrations can only be denied if the party that wants to submit is able to meet its burden of proof without submitting. The party must not be burdened or disadvantaged without the submission of evidential material [*ITT Educ. Servs., Inc. v. Arce*]. The core of arbitration is to provide a functioning legal remedy. Therefore, parties need to provide further evidence than their own legal testimony [*Teamsters v. Troha*].

52 If CLAIMANT is not able to submit documents or the award from the other arbitration, it would not only be burdened and disadvantaged. Moreover, it would not be able to support its claim at all and fulfil its duty pursuant to Article 22(1) HKIAC. Instead, CLAIMANT could only orally testify its knowledge about RESPONDENT's contradictory behaviour in another arbitration. This would not nearly have the same significance as the written submissions (Partial Interim Award and further documents). Hence, arbitration would not provide a functioning legal remedy.

53 Since the Partial Interim Award and further submissions from the other proceedings are the only evidence CLAIMANT can support its claim with, they are of overriding importance. The importance is stressed when examining the timeline of facts. CLAIMANT delivered the third shipment already on 23 January 2018 [*NoA, p. 6, para. 13; C5, p. 14, clause 8; C8, p. 18*] only to discover on 2 February 2018 that RESPONDENT was illegally reselling the frozen semen [*PO2, p. 57, para. 20*]. After confronting RESPONDENT's CEO, Ms. Espinoza, with the breach of contract ten days later, RESPONDENT refused the promised payment for the tariffs concerning the third shipment and a further cooperation [*C8, p. 18*]. From this moment on CLAIMANT was in theory entitled to arbitrate against RESPONDENT but in fact could not do so since evidentiary material to support its claim was missing. When CLAIMANT learned about RESPONDENT's contradictory behaviour in the other arbitration on 30 May 2018 and the rendering of the Partial Interim Award on 29 June 2018, it lost no time but requested for arbitration immediately on 31 July 2018 [*PO2, p. 60, paras. 39, 40*]. The evidentiary material in question is, therefore, of overriding importance as the whole arbitration is based on it. Thus, in the case at hand, transparency clearly predominates confidentiality and declining the submission would be unreasonably burdensome and unproportionate.

2. Article 13(1) and 13(5) HKIAC Grant a Fair Trial

54 According to Article 13(1) and 13(5) HKIAC a fair trial needs to be established.

55 Amongst the principle of transparency there are further generally accepted Principles like equal treatment and fair trial, laid down in Article 13(1) and 13(5) HKIAC. Such principles are the most important pillars in a legal regulatory framework [*Holtzmann, p. 564*]. They cannot be circumvented. Each party must be given equal opportunities to support its claim. If the rejection of evidence becomes *'an exclusion of justice'* unacceptable results are the outcome [*Shaughnessy, p. 469*].

56 RESPONDENT, however, does not want to submit any further evidence but hinder CLAIMANT from submitting its. Rejecting the submission of the only evidence CLAIMANT can support its claim would lead to unequal treatment. This will consequently result in an unfair trial. Therefore, in light of Article 13(1) and 13(5) HKIAC, the evidence must be submitted.

3. RESPONDENT Misinterprets the Term Confidentiality

57 RESPONDENT cannot be found worthy of protection since its allegations are based on a false understanding of the chosen framework and term confidentiality. RESPONDENT neither carefully examined the HKIAC 2013 which govern the other arbitration, nor the HKIAC 2018 which govern the case at hand [*p. 51*]. Therefore, it draws wrong conclusions about confidentiality.

58 Article 42(1) HKIAC 2013, likewise Article 45(1) HKIAC 2018 only protect against the voluntary disclosure of documents of one of the signing parties. Nevertheless, Articles 42(3)(b) HKIAC 2013 and 45(3)(b) HKIAC 2018 do not prevent the disclosure of documents if a party is obliged by law to do so. Therefore, the obligations of confidentiality are not binding upon a third party which is requesting documents, like CLAIMANT is [*Born, vol. II, p. 2821*]. Thus, RESPONDENT's allegations about confidentiality are based on a false understanding of the HKIAC. CLAIMANT could also require the evidence from the opponent through a subpoena in the arbitration or a later challenge [*Teamsters v. Troha*].

59 Additionally, both versions of the HKIAC imply a certain level of confidentiality but already include general exceptions. Thus, the possibility of exceptions cannot be surprising for RESPONDENT. In international commercial arbitration absolute confidentiality cannot be found in arbitration agreements [*Dolling-Baker v. Merret; Born, vol. II, p. 2818*]. This is the case with the used framework and arbitration agreement.

60 The purpose of confidentiality is to prevent the publication of business secrets [*Brown, p. 1008*]. However, in case of disclosure, CLAIMANT would not become aware of any of RESPONDENT'S business secrets it is not already aware of due to their mutual business relationship. This can easily happen if the public becomes aware of an arbitration [*Baxter Int'l, Inc. v. Abbot Lab; cf. Gierse, p. 467*]. Additionally, CLAIMANT wants to submit the Partial Interim Award in its own arbitration. Hence, the award would not be available to the public.

61 RESPONDENT'S allegations are clearly based on misinterpretations of the term confidentiality.

4. Consequence

62 As laid out, rejecting the submission is not appropriate.

III. Article 9 IBA Rules Does Not Lead to the Exclusion of Evidence

63 In addition, even Article 9 IBA Rules does not lead to the exclusion of evidence. Even though the parties did not adopt the IBA Rules explicitly they can be used as guidelines in developing and solving procedural issues [*IBA, Foreword, p. 3*]. According to Article 9(2) IBA Rules a tribunal shall on its own motion exclude evidence under certain circumstances. Yet, none of the provisions' requirements are met (**1.**). Additionally, neither legal impediment nor privilege were claimed and even if, they were waived by RESPONDENT (**2.**).

1. Article 9(2) IBA Rules Is Not Fulfilled

64 None of the exceptions laid down in Article 9(2) IBA Rules for excluding evidence are applicable to the case at hand.

65 If evidence lacks sufficiency and is not relevant to the case or material to its outcome, the said evidence can be excluded under Article 9(2)(a) IBA Rules. As demonstrated, the evidence is of an overriding importance since it can change the tribunals decision [*supra ref. 50 et seqq.*]. Also, evidence can be excluded due to Article 9(2)(e) IBA Rules on the ground of confidentiality. Again, CLAIMANT already showed that in the case at hand confidentiality it predominated in relation to transparency [*supra ref. 62*]. Additionally, evidence must be submitted on the grounds of proportionality, fairness and equal treatment as laid down in Article 9(2)(g) IBA Rules. These principles can only be achieved by the submission of the evidence [*supra ref. 54 et seqq.*]. Thus, the evidentiary material cannot be excluded on the grounds of Article 9(2)(a), 9(2)(e) and 9(2)(g) IBA Rules.

2. There Is No Legal Impediment or Privilege

66 Article 9(2)(b) IBA offers the possibility to exclude submissions due to legal impediment or privilege. RESPONDENT claims that potentially illegally obtained evidence should never be submitted, irrespective of how it was obtained [*p. 51*]. Such a claim is too broad and undermines the Tribunals discretion (**a.**). RESPONDENT did not expressively claim a privilege, only confidentiality [*p. 51*], yet any possible legal impediment or privilege has already been waived (**b.**).

a. RESPONDENT's Claim Is Not Defined Properly

67 A broad claim for a general evidentiary privilege is unfounded and RESPONDENT uses it to escape its obligations of disclosure [*Shaughnessy, p. 469*]. Privileges allow to keep certain information under special conditions confidential, without facing negative consequences [*Shterjova, p. 432*]. They cannot be broadly expanded to avoid the disclosure of documents. A party must examine *'document by document'* and provide reasonable *'legal citations'* why its confidentiality must be maintained [*Baxter Int. Inc. v. Abbott Lab.; Shaughnessy, 469*]. RESPONDENT, however, did not give any detailed reasoning. It broadly claims to exclude the evidence under any possible circumstances, thereby denying the Tribunals discretion on evidentiary issues according to Article 22(2) and 22 (3) HKIAC. Such a claim cannot be considered.

b. Any possible Legal Impediment or Privilege Was Waived

68 Even if the claim was considered a claim for a legal privilege, Article 9(3)(d) IBA Rules must be taken into account. According to this rule, RESPONDENT, however, waived any potential impediment or privilege due to earlier disclosure. This happened in the case at hand.

69 RESPONDENT used an outdated firewall which did not prevent the hack of the computer system [*PO2, p. 61, para. 42*]. Especially since electronic document production started replacing solely manual production of documents, attention needs to be drawn to *'earlier disclosure'*. To examine if such a waiver took place, all facts must be considered on a case-by-case-basis [*Ashford, p. 16 et seqq.*]. The Partial Interim Award could have been obtained through a hacking attack around 12 September 2018 [*p. 51*]. In this case it was earlier disclosed. RESPONDENT might argue, the hacking happened without its consent and against its will.

70 However, even an inadvertent waiver leads to the exclusion of privilege, since the party claiming privilege is *'responsible for guarding its confidentiality'* [*Ashford, p. 161; Ginsburg/Mosk, p. 352; Hundley, p. 266*]. Factors like the taken precautions to prevent an inadvertent waiver and the extent of the disclosed documents must be determined. RESPONDENT used an outdated firewall which did not properly secure the computer system and allowed the hacking attack [*PO2, p. 61, para. 42*]. Not securing the computer system where sensitive information is stored during an ongoing arbitration process is highly negligent. Also, a *'considerable'* amount was stolen [*p. 51*] which only underlines the carelessness of RESPONDENT. Therefore, even if a legal privilege could have been applied, RESPONDENT waived it pursuant to Article 9(3)(g) IBA Rules.

c. Consequence

71 If RESPONDENT's claim is interpreted as a privilege claim, it is, however, too broad and unfounded since RESPONDENT already waived any privilege according to Article 9(3)(2) IBA Rules.

IV. The Other Party Can Be Joined Under Article 27(1) HKIAC

72 Even if CLAIMANT was not entitled to submit the evidence, RESPONDENT's contrary behaviour could be brought to the Tribunal's attention by joining the opponent from the other arbitration proceeding under Article 27(1) HKIAC. Moreover, a Joinder limits the risk of inconsistent results and increases efficiency [*Platte, p. 77 et seqq.; Born, vol. II., p. 2567 et seq.*] Both disputes concern the adaptation of contracts due to unforeseen import tariffs on agricultural products. When legal issues are that similar, different arbitral decisions would be untenable. Moreover, all requirements for a joinder pursuant to Article 27 HKIAC are fulfilled.

73 Since in both sale contracts the Parties expressly agreed upon the HKIAC either in their 2013 or 2018 edition [*p. 51; PO1, p. 52, II*], the proceedings were conducted under the same rules as required by Article 27(1)(a) HKIAC. The possibility to request a joinder can be no surprise for RESPONDENT. Pursuant to Article 27(3) HKIAC a joinder can be raised even after the 'Statement of Defence' was submitted if exceptional circumstances require to do so. Only in his email, when preparing for the telephone conference, CLAIMANT referred to the possibility of a joinder [*p. 51*]. He did not officially request it at that time, since it was promised to receive a copy of the award [*p. 50*]. Only later CLAIMANT learned that Mr. Velazquez was not able to fulfil this promise [*PO2, p. 60 et seq., para. 41*]. Taking this fact and the outstanding relevance of the award into account, exceptional circumstances cannot be denied. Therefore, the request can still be raised in accordance with Article 27 (3) HKIAC.

74 According to Article 27(1)(b) HKIAC all parties must expressly agree to the joinder. The opponent in the other proceedings might find CLAIMANT's claim taken out of context. It did, however, neither disagree with a joinder nor mentioned any confidentiality violation [*p. 51*]. RESPONDENT only criticizes formalities about the interpretation of Article 42 HKIAC 2013 [*Ibid.*], which were already invalidated above [*supra ref. 72 et seq.*]. It never referred to the possibility of a joinder nor refused one. There is no reason why the parties should not agree on a joinder.

75 Even if not all parties expressively agree tribunals can, especially when considering the exceptional circumstances, allow a joinder due to their own discretion [*Castello/Digón, p. 111 et seqq.*] Thus, all requirements are met, and the other party can be joined to the arbitration.

V. Consequence

76 CLAIMANT is entitled to submit the partial interim award and further documents from the other proceeding since confidentiality is no issue in the case at hand and any legal privilege was waived. Additionally, the opponent from the other proceedings can be joined to the arbitration.

B. Improper Origin of Evidence at Hand Is of No Importance

77 RESPONDENT wants to exclude evidence regardless if it was obtained through a breach of confidentiality, an illegal hack, a common purchase or found online in the worldwide web [*p. 51*]. This is misleading for Article 22(2) HKIAC grants the Tribunal broad discretion on evidentiary issues. The law of evidence must be determined individually in every case, considering all relevant facts [*Shaughnessy, p. 455*]. Strict rules of evidences should be since the Tribunal is the only instance reviewing material facts [*Pietrowski, 374 et seqq.*]. Therefore, strict evidentiary rules like the *'Fruit of the poisonous tree doctrine'* are not applicable (**I.**). Other than alleged by RESPONDENT, it needs to be

considered that CLAIMANT was not involved in obtaining this evidence (**II.**). Furthermore, the relevance of the evidence must be taken into account (**III.**). Additionally, the evidence was already in the public domain (**IV.**).

I. Exclusionary Rules of Evidence Are Not Applicable

78 RESPONDENT claims the evidence cannot be submitted since it is illegally obtained, hereby impliedly referring to the '*Fruit of the poisonous tree doctrine*'. This legal principle became part of American Criminal Law Procedure since otherwise a violation of the 4th Amendment of the U.S. Constitution would occur [*Nardone v. United States; Beulke/Swoboda, p. 107*]. However, extending purely domestic principles to international commercial arbitration is not appropriate. This is provided by Article 9 (3)(d) IBA Rules which requires to consider the disputing parties different legal and ethical background and balance them to establish an equal and fair trial. In addition to this malfeasance the principle does not cover civil law cases like the current one [*Townes v. City of New York*].

II. CLAIMANT Was Not Involved in the Obtaining

79 RESPONDENT falsely claims it should be irrelevant whether CLAIMANT was involved in obtaining evidence [*p. 51*]. In international arbitration, the issue of parties' involvement is dealt with in detail, as it has a considerable influence on the admissibility of evidence. If a party is not involved in the disclosure of certain documents, it is acting with '*clean hands*' [*Bible v. United Student Aid Funds, Inc.*]. The doctrine developed in Investor-State Arbitration is largely accepted in an international context and should, therefore, also apply to international commercial arbitration [*cf. Yesilirmak, p. 185, 233; Moloo, p. 40*]. Thus, 'the possibly unlawful nature of disclosure cannot be held against this party' [*Persia International Bank v. Council*]. The non-involvement serves as a strong indicator for the admissibility of evidence [*Methanex Corporation v. United States of America*]. CLAIMANT was not involved in the hacking attack. Moreover, CLAIMANT only accidently learned in a conversation with the CEO of a regular customer at the annual breeder conference about RESPONDENT's contradictory behaviour in the other arbitration [*PO2, p. 60, para. 40*]. CLAIMANT has to buy the award from a company which provides intelligence on the horseracing industry [*PO2, p. 60 et seq., para. 41*]. But it is only forced to do so since Mr. Velazquez could not fulfil his promise to organise a copy of the Partial Interim Award [*Ibid.*]. Therefore, CLAIMANT could not comply with its duty to provide submissions according to Article 22(1) HKIAC. An ordinary purchase cannot be classified as involvement in unlawful obtainment. The fact that CLAIMANT was not involved in the obtainment indicates the admissibility of the evidence.

III. Relevance of the Evidence at Hand Is Prevailing

80 Regardless from a parties' involvement in the obtaining, factors like the relevance of the evidence and the point of time of its obtainment must be evaluated [*Methanex Corporation v. United States of America; Boykin, p. 34*]. According to Article 22(3) HKIAC, the Tribunal may even require a party to produce documents if the Tribunal determines them to be relevant to the case and material to its outcome. As demonstrated the evidence is essential for CLAIMANT in order to meet its burden of proof. The documents in question reveal RESPONDENT'S contradictory behaviour, which leads to a reinterpretation of all facts. Therefore, RESPONDENT tries to prevent the submission. It cannot be denied that the evidentiary material is relevant to the case and material to its outcome. In addition to this, documents from the other arbitration would provide an insight into how Mr. Antley usually deals with further sales contracts, especially his habit on including adaptation mechanisms, since he also negotiated the other sale which is being arbitrated [*PO2, p. 60, para. 39*]. Additionally, if the documents were obtained through the hacking attack, this happened already before the proceedings. Hence, the Tribunal is kindly asked to approve the submission of evidence.

IV. Evidence Was already in the Public Domain

81 Evidence which is already in the public domain can be submitted even if its obtaining was unproper. RESPONDENT denies this standard by claiming the evidence cannot be submitted even if it was made available in the worldwide web [*p. 51*]. Analogously to the Wikileaks Cases a document which is in the public domain cannot be privileged [*RosInvestCo UK Ltd. v. The Russian Federation; Hulley v. The Russian Federation; Persia International Bank v. Council; Bible v. United Student Aid Funds, Inc*]. Access to the award is granted through a company. Everyone can buy the award for US$ 1,000 [*PO2, p. 60 et seq., para. 41*]. The evidence is, therefore, already available in the public domain and can be submitted.

V. Consequence

82 Applying a strict rule of evidence like the Fruit of the poisonous tree doctrine undermines the broad discretion of the Tribunal. Additionally, CLAIMANT was not involved in obtaining what strongly points towards the admissibility of the evidence at hand. Additionally, the relevance and availability of the evidence only leaves room for one conclusion: the acceptance of the submission.

C. RESPONDENT Acts in Bad Faith

83 In any case, the submission is possible due to RESPONDENT's behaviour in bad faith. All claims in international arbitration must be raised in good faith [*Ginsburg/Mosk, p. 382; Berger, p. 502; Cheng, p. 105*]. As demonstrated, it is the Arbitral Tribunal's decision which rules of evidence including

legal privileges should apply [*supra ref. 71*]. Nevertheless, RESPONDENT claims for a general recognition of privilege or confidentiality, irrespectively of how the evidentiary material was obtained. Such a strict rule on evidence cannot even be found in the arbitration laws of neither Equatoriana, Mediterraneo, nor Danubia [*PO2, p. 61, para. 46*]. Consequently, RESPONDENT wants to apply a level of confidentiality and legal security which is not even granted by its own country's legal system. RESPONDENT raises an inappropriate claim which it should be fully aware of.

84 Furthermore, RESPONDENT exploits CLAIMANT'S trust from the very beginning of the negotiations. Not only was RESPONDENT lying about the profitable resale of semen or having any interest in a long-term cooperation [*C1, p. 9; C3, p. 11; C8, p. 18; PO2, p. 56, para. 11; p. 57, para. 20; p. 59, para. 33*]. Moreover, it also deliberately created the impression it would bear the additional costs for the tariffs [*C8, p. 17*]. In addition to this, RESPONDENT took advantage of CLAIMANT's critical financial situations since this subject was raised during the price negotiations [*PO2, p. 58, para. 22*]. Thus, RESPONDENT does not act in good faith and any possible claim must be discarded.

D. Conclusion on ISSUE 2

85 CLAIMANT is entitled to submit evidence from the other arbitration proceedings, even on the basis of the assumption that this evidence had been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT'S Computer systems.

ISSUE 3: CLAIMENT IS ENTITLED TO THE PAYMENT OF US$ 1,250,00 DUE TO THE 30% TARIFFS

86 RESPONDENT erroneously believes that CLAIMANT'S claim for increased remuneration is completely baseless. Due to hardship CLAIMANT is entitled to an increased price of US$ 1,250,000 for the third shipment under clause 12 of the sales agreement (**A.**) and under Article 79 United Nations Convention on Contracts for the International Sale of Goods ('CISG') (**B.**).

A. CLAIMANT Is Entitled to the Payment of US$ 1,250,000 under Clause 12 of the Agreement and the Arbitral Tribunal's Power to Adapt the Contract

87 RESPONDENT wrongly argues that clause 12 of the sales contract does not cover the present situation. By incorporating a hardship clause into the contract, CLAIMANT assured coverage for situations like the present. On 31 March 2017 Ms. Napravnik requested the incorporation of a hardship clause into the sales contract. RESPONDENT accepted the need for a hardship clause and finally such a provision was incorporated into the contract. CLAIMANT will prove that the existing

hardship clause covers the present situation (**I.**). Moreover, the appropriate remedy is an adaptation of the contract and, therefore, the remuneration by this Arbitral Tribunal (**II.**).

I. The Hardship Clause of the Sales Agreement Incorporates the Present Situation

88 In the following shall be demonstrated that clause 12 of the sales agreement has to be interpreted broadly, since it was the Parties' intention to protect CLAIMANT from any additional risks. By incorporating the hardship clause into the sales contract CLAIMANT wanted to protect itself from additional unforeseen risks, including risks as the current imposition. The 30% tariffs are covered by the wording of the hardship clause and their imposition was unforeseen (**1.**). In any case, clause 12 is applicable according to the Parties' intent (**2.**). Furthermore, CLAIMANT did not assume any contractual risks for changed circumstances (**3.**). Finally, the 30% tariffs make the contract more onerous (**4.**).

1. The Tariffs Are Covered by the Wording of the Hardship Clause and Were Unforeseen

89 Clause 12 of the sales contract speaks of 'comparable unforeseen events'. As will be described at this point, the tariffs can be understood as such. The term 'comparable unforeseen event' must be understood in relation to the 'health and safety requirements' mentioned in the very same clause. Ms. Napravnik reminded RESPONDENT of a past situation in which additional health and safety requirements massively changed the grounds of the contract [*C4, p. 12*]. CLAIMANT experienced changed circumstances which almost resulted in insolvency after additional health and safety requirements led to an increased price of 40% in 2014 [*PO2, p. 58, para. 21*].

90 CLAIMANT aimed to protect itself from such unforeseen risks. By mentioning this experience from 2014 and adding to the wording of the clause 'comparable unforeseen events' it becomes clear that the hardship clause incorporates all similar events having the same impact on CLAIMANT. After the incident in 2014 CLAIMANT only remained in business 'through extensive restructuring measures and a considerable cut of the work force' [*C8, p. 17*]. This means that the experienced 40% price increase had a substantial economic impact on CLAIMANT. The 30% tariffs imposed by the government in the present situation are comparable in this regard. The increased requirements of health and safety amounting to a 40% higher price and the 30% higher import tariffs are indeed comparable.

91 Furthermore, the imposed 30% tariffs on the last shipment were unforeseen. The Government of Equatoriana is known for being one of the biggest supporters of the free trade system [*C6, p. 15*]. This is particularly true in times like the present when having a Prime Minister from the Progressive Liberals [*NoA, pp. 7 et seqq., para. 19*].

92 Only once a similar restriction was imposed under a Prime Minister from the National Party [*C6, p. 15*]. While there have been previous restrictions imposed by other countries effecting imports, these never ended in direct retaliatory measures [*Ibid*]. Even though the newly elected President of Mediterraneo indicated a more protectionist approach during his election campaign, the measures taken by him surprised most analysts [*Ibid*]. Especially the broad range of goods covered by the tariffs has been most surprising [*PO2, p. 58, para. 23*]. Until 2018 Equatoriana and Mediterraneo have never had imposed tariffs on agricultural products or horse semen [*PO2, p. 58, para. 25*].

93 A further aspect that clearly proves the unforeseeable nature of the tariffs is the speed in which both countries proceeded with the tariffs. The Government of Mediterraneo imposed the 25% tariffs on 15 November 2017 announcing them only days earlier [*PO2, p. 58, para. 23*]. The surprising retaliatory measure of 30% tariffs by the Government of Equatoriana was announced on 19 December 2017 and took effect on 15 January 2018 [*PO2, p. 58, para. 25*]. This is why the measures taken by Equatoriana can be characterized as a 'prompt and severe retaliation' [*C6, p. 15*].

94 In consequence, this means that the current situation is covered by the wording of the clause being a comparable unforeseen event.

2. In any Case, after the Parties Intent Determined by Article 8(1) CISG, this Hardship Clause Covers the 30% Tariffs

95 The hardship clause in the sales contract covers the current situation in light of the Parties intent. On 31 March 2017 Ms. Napravnik requested the incorporation of a hardship clause into the sales contract. CLAIMANT and RESPONDENT agreed on the need for such a clause and incorporated it into the existing force majeure clause. The relevant part of the hardship clause states the following: 'neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*C5, p. 14, clause 12*].

96 CLAIMANT'S email from 31 March 2017 informed RESPONDENT that it was not willing to take any further risks associated with the change in delivery terms. In particular, CLAIMANT stated that it did not want to bear risks associated with changes in customs regulation or import restrictions [*C4, p. 12*]. This email shows that CLAIMANT clearly stated the purpose of the hardship clause. According to Article 8(1) CISG a statement made by a party has to be interpreted according to the party's intent where the other party knew what this intent was. In this case CLAIMANT clearly stated its intent of absolving itself from further risks, especially the abovementioned changes in customs regulation that would incorporate the 30% tariffs imposed by the Government. RESPONDENT knew about this intent especially since CLAIMANT mentioned the past experience both had with unforeseen additional health and safety requirements [*Ibid*]. The predicament that the tariffs have

not specifically been introduced into the hardship clause was due to their unforeseen and sudden nature.

3. CLAIMANT Did Not Assume any Contractual Risks for Changed Circumstances

97 Generally, the obligor bears the risk for changed circumstances [*Brunner, p. 423*]. However, due to the default-rule of a hardship exemption the obligor does not have to bear the associated risks [*Ibid*]. Whether CLAIMANT assumed the risk for a fundamental change in the contract's equilibrium has to be analysed by means of contract interpretation [*Ibid, p. 424*]. As explained above, both Parties incorporated the hardship clause to protect CLAIMANT. The fact that RESPONDENT and CLAIMANT agreed on a Delivery Duty Paid ('DDP') delivery does not eradicate the application of the default rule. When CLAIMANT and RESPONDENT agreed on a DDP delivery, it was not intended to allocate all import and export risks in CLAIMANT'S responsibility. Rather, CLAIMANT'S business knowledge was the decisive factor. The intention was to benefit from CLAIMANT'S experience in the transportation of frozen semen [*NoA, p. 7, para. 18*]. Furthermore, CLAIMANT was able to fulfil the transportation to favourable terms and comply with numerous export and import formalities [*Ibid*].

98 There is no hint in the entire negotiation process from which it becomes clear that the Parties intended to burden CLAIMANT. To the contrary, CLAIMANT and RESPONDENT agreed on protecting CLAIMANT with the hardship clause. This leads to the conclusion that by referring to the term DDP both Parties wanted to profit from CLAIMANT'S shipping experience. They did not, however, intent to incorporate a DDP delivery and all its consequences into the sales contract. This also becomes clear since certain risks associated with a typical DDP delivery have been removed [*PO2, p. 56, para. 8*].

4. The Delivery of the Third Shipment Became Onerous

99 The last requirement of the contractual hardship clause is the onerousness of the impediment. This means that the fulfilment of the last shipment has to become burdensome for CLAIMANT. Here the delivery of the third shipment becomes excessively onerous, since it became 30% more expensive destroying CLAIMANT'S 5% profit margin [*C8, p. 17*]. CLAIMANT experienced financial difficulties in the past two years and only managed to remain in business by restructuring and reducing the work force [*Ibid*].

100 While RESPONDENT receives the last shipment and has no additional costs, CLAIMANT had to pay 30% more money to deliver the shipment and loses the 5% profit. No monetary percentage should be established to determine the threshold for hardship. Rather, hardship situations shall be

established and determined on a case to case basis analysing the disadvantaged party's situation [*Schwenzer, p. 716*]. This can be derived from the second edition of the UNIDROIT Principles in 2004, where no exact recommendation was given to determine a threshold for hardship, while the previous edition contained a monetary recommendation [*Ibid.*]. This leads to the conclusion that no exact threshold exists or should exist in order to establish hardship. Consequently, whether there is hardship or not has to be considered by interpreting the individual case [Ibid.].

101 In cases of possible financial ruin, the threshold for finding hardship can be lowered [*Brunner, p. 438 et seq.; Brunner/Sgier in Brunner, UN-Kaufrecht, p. 700, para. 31*]. Such a financial ruin is imminent for CLAIMANT. The 30% tariffs lead CLAIMANT to immense financial hardship and are impossible for it to bear [*C8, p. 17*]. As stated above CLAIMANT experienced financial problems within the last two years and barely remained in business. Since 2014 CLAIMANT makes losses mainly due to the necessary restructuring measures [*PO2, p. 59, para. 29*]. The restructuring plan between CLAIMANT and its creditors provided that it must become profitable again by 2017 [*Ibid*]. The prolongation of the two main credit lines depends on CLAIMANT'S profitability in 2017 and 2018 [*Ibid*]. Due to the 30% tariffs this profitability is endangered if CLAIMANT has to shoulder the US$ 1,250,000 [*Ibid*]. The sales agreement between CLAIMANT and RESPONDENT was intended to provide CLAIMANT with a profit of US$ 180,000 in 2017 and US$ 300,000 in 2018 [*Ibid*]. Without the revenues from the agreement's negotiations for a new credit line will be extremely difficult.

102 These circumstances prove that the 30% tariffs have an extreme financial impact on CLAIMANT, especially since its profit has been destroyed. Therefore, the imposition of 30% tariffs made the last shipment of 50 doses excessively more onerous for CLAIMANT and lead CLAIMANT into bankruptcy.

5. Consequence

103 Consequently, CLAIMANT'S situation is covered by clause 12 of the sales agreement.

II. The Arbitral Tribunal Has the Power to Adapt the Contract

104 The Arbitral Tribunal has the power to adapt the contract in connection to clause 12 due to hardship. RESPONDENT cannot argue that it would have never entered into a contract the financial dimension of which depends on the discretion of the arbitrators [*ANoA, p. 32, para. 19*]. It is, however, precisely what RESPONDENT did. The Parties authorised this Arbitral Tribunal to adapt the contract and consequently the price by, firstly, integrating an arbitration agreement into the contract (**1.**) and, secondly, requesting an adaptation mechanism by connecting the hardship clause with the arbitration clause (**2.**).

1. The Arbitration Agreement Empowers this Arbitral Tribunal

105 The Parties included an arbitration agreement into their contract which is governed by the law of Mediterraneo [*supra, ref. 26*]. Pursuant to this arbitration agreement 'any disputes arising out of this contract (...) shall be referred to and finally resolved by arbitration (...)' [*C5, p. 14, clause 15*]. Since the law of Mediterraneo governs the interpretation of this arbitration agreement it is open to a broad interpretation [*NoA, p. 7, para. 16*]. This means that the phrase 'disputes arising out of this contract' has to be interpreted broadly and, therefore, covers this situation. This dispute over increased remuneration for the last shipment arises out of the sales contract and has to be resolved through arbitration in front of this Arbitral Tribunal. The adaptation claim is covered by this arbitration clause.

2. The Parties' Intent Was to Connect the Arbitration Clause with the Hardship Clause Empowering this Arbitral Tribunal through an Adaptation Mechanism

106 The connection of the arbitration clause with the contractual hardship clause should be interpreted in accordance with the intent of the Parties. Article 8 CISG serves as an interpretation tool. This is possible since there is consistent jurisprudence in Mediterraneo that arbitration clauses in sales contracts governed by the CISG may be interpreted in light of the Convention [*PO1, p. 53, para. III (4)*]. Article 8(3) CISG states how the intent of a party shall be determined: 'in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'.

107 Moreover, CLAIMANT must have manifested this 'actual intent' in some way for it to be recognizable for RESPONDENT [*Office furniture case; LG Hamburg No. 5 O 543/88; Kröll/Mistelis/Perales Viscasillas, p. 150, para. 8*].

108 Ms. Napravnik requested an adaptation mechanism and RESPONDENT acknowledged this request [*C8, p. 17*]. During the formation of the sales contract both Parties agreed that an adaptation mechanism will be necessary to address changes and unforeseen circumstances [*Ibid*]. RESPONDENT agreed to CLAIMANT's proposal to incorporate an adaptation clause into the contract. Mr. Antley – RESPONDENT'S lead negotiator at the time – suggested an adaptation should be placed in the power of the Arbitrators if no agreement could be reached [*Ibid*]. This leads to the conclusion that both Parties intended to connect the arbitration clause with the hardship clause empowering this Arbitral Tribunal. It was intended that Mr. Antley would return with a proposal the next day which did not happen due to the accident. It becomes clear that RESPONDENT knew

of CLAIMANT'S intent to integrate an adaptation mechanism into the contract and furthermore accepted the request.

109 In any case, in line with Article 8(1) CISG RESPONDENT could not have reasonably been unaware of CLAIMANT'S intent. There was a note left by Mr. Antley titled 'List of further negotiations' mentioning a 'connection of hardship and arbitration clause' [*R3, p. 35*]. Mr. Krone, the negotiator who replaced Mr. Antley after the accident acknowledged this note.

110 Even if, Mr. Krone could not deduce what Mr. Antley meant with his note, he should have tried to investigate the meaning behind this [*Schmidt-Kessel in Schlechtrim/Schwenzer, p. 202, para. 16*]. Mr. Krone's assertion that he would have objected to transfer the powers to the Arbitral Tribunal to increase the price upon its discretion [*R3, p. 35*]. The relevant time for acknowledging statements is during the time a statement is made [*Magnus in Staudinger, p. 217, para. 15; Schlechtriem/Schwenzer CISG, Article 8, para. 8*]. Ms. Napravnik discussed the need for an adaptation mechanism that Mr. Antley acknowledged [*supra ref. 107*]. Mr. Antley suggested that in his view it should be the task of the Arbitrators to adapt the contract if CLAIMANT and RESPONDENT could not agree [*C8, p. 17*].

111 Following the above mentioned it becomes clear that the Parties authorised the Arbitral Tribunal to adapt the contract in situations of hardship and changed circumstances.

112 In any case, pursuant Article 8(2) CISG statements made by the parties are to be interpreted according to a reasonable third person's understanding [*Treibacher Industrie, AG v. Allegheny Technologies Inc; Health Care Case*]. It clearly arises out of the negotiation process that the parties agreed to connect the arbitration clause with the hardship clause. Both Parties agreed in the course of the negotiation that a mechanism was necessary and that the Arbitral Tribunal may adapt the contract in case changed circumstances appeared [*C8, p. 17*].

III. Consequence

113 Contrary to RESPONDENT'S claim reliance on the hardship clause is possible. CLAIMANT is entitled to the payment of at least US$ 1.250.000 resulting from an adaptation of the price under clause 12 of the sales agreement.

B. CLAIMANT Is Entitled to an Increased Price for the Last Shipment of at least US$ 1,250,000 due to Hardship under Article 79 CISG and the PICC

114 CLAIMANT is entitled to an adaptation of the price under Article 79(1) CISG. RESPONDENT wrongly argues that Article 79 CISG is not applicable due to derogation. CLAIMANT will prove that Article 79 CISG does regulate hardship and that there is a remedy that would lead to an adaptation

of the contract by the Arbitral Tribunal. Article 79 CISG is applicable next to the contractual hardship clause (**I.**), hardship does fall within the scope of Article 79(1) CISG (**II.**). The UNIDROIT Principles provide the necessary remedy to adapt the remuneration (**III.**). Furthermore, CLAIMANT's situation constitutes hardship under Article 6.2.2 PICC (**IV.**) and this Arbitral Tribunal has the power to adapt the contract under Article 6.2.3(4)(b) PICC (**V.**).

I. Article 79(1) CISG Applies Next to the Contractual Hardship Clause

115 RESPONDENT is mistaken when asserting that CLAIMANT cannot rely on Article 79 CISG and that this constitutes a derogation according to Article 6 CISG. [*ANoA, p. 32, para. 20*]. The hardship clause was introduced into the contract to protect CLAIMANT from unforeseen risks. Thus, the clause was not meant to be exhaustive and prevent the applicability of Article 79 CISG. CLAIMANT'S request for a hardship clause arose from a previous experience with unforeseen changed circumstances. This shows that CLAIMANT'S intent was not to create an exhaustive list of hardship situations but, rather, an additional layer of protection. The Parties' intent has to be analysed according to Article 8(3) CISG. When consulting all previous negotiations and requests for such a clause by CLAIMANT it becomes clear that the clause was meant to expand protection, not to limit it. The Parties did not pre-empt Article 79 CISG by agreeing to formulate a force majeure and a hardship clause. Article 79 CISG is not excluded from the rule of Article 6 CISG. Nevertheless, Article 79 CISG and a contractual hardship clause can apply cumulatively [*OLG Hamburg No. 277; DiMatteo/Janssen/Magnus/Schulze, p. 702, para. 115*].

116 Consequently, clause 12 of the sales contract does not contain an exhaustive list of situations that may constitute hardship. In the case at hand there is no derogation that would exclude the application of Article 79 CISG.

II. Article 79(1) CISG Includes Cases of Hardship as Being an Impediment

117 Contrary to RESPONDENT'S assertion Article 79(1) CISG does regulate hardship and therefore applies to CLAIMANT'S present predicament.

118 Article 79(1) CISG speaks of an 'impediment beyond his control'. This means that even though there is no express mention of the word hardship in Article 79(1) CISG or the rest of the CISG, hardship does qualify as such an 'impediment beyond his control' and can therefore be read into the Convention [*Schwenzer, 713; Lookofsky, p. 157; Schlechtriem/Schwenzer CISG, p1142, para. 31; Brunner, p. 213*]. The requirements for hardship, can be derived from Article 79 (1) CISG (*Kröll/Mistelis/Perales Viscasillas, p. 1072, para. 81*]. There must be changed circumstances disturbing the contractual equilibrium which are out of CLAIMANT'S sphere of control [*Ibid.*]. Furthermore, CLAIMANT must not have assumed the risk for such an event [*Ibid*]. In addition, Article 79(1) CISG

requires the impediment to be unforeseen when concluding the contract. The CISG Advisory Council defines hardship under Article 79 CISG as follows: 'A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (hardship), may qualify as an impediment under Article 79(1)' [*CISG-AC No. 7*, *para. 3.1*].

119 'In a situation of hardship under Article 79 CISG, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based' [*CISG-AC No. 7, para. 3.2*]. The 'further relief' mentioned by the CISG Advisory Council is to be interpreted as a special relief tailored for situations of hardship, for instance renegotiation [*Lookowsky, p. 162*].

120 Consequently, Article 79 (1) CISG includes hardship under the term impediment.

III. Since Article 79 CISG Does Not Contain an Appropriate Remedy for a Price Adaptation this Gap Is Filled by Applying the PICC to Supplement the CISG

121 As explained above hardship falls within the scope of Article 79 CISG and qualifies as an impediment. However, the appropriate remedy for hardship is not found by only relying on the Convention. Instead, this gap in Article 79(1) CISG is filled by the application of the UNIDROIT Principles to supplement the CISG [*Bonell, Two complementary instruments, p. 110; Bund p. 391*]. This is due to the fact that the matter of hardship is governed by Article 79(1) CISG but not remedied. Since no further remedy or resolve are provided within the Convention, the matter of hardship and, therefore, Article 79 CISG are open to be settled in conformity with general principles as stated in Article 7(2) CISG. Also, the Arbitral Tribunal may provide further relief consistent with the CISG and the general principles on which it is based [*CISG-AC No. 7, para. 3.2*].

122 In the case Scafom International BV v. Lorraine Tubes S.A.S. the court relies on the application of the UNIDROIT Principles in order to find a remedy that misses in Article 79 CISG [*Scafom International BV v. Lorraine Tubes S.A.S.*]. Resulting from this decision a reliance on the UNIDROIT Principles to supplement the CISG is possible. Due to the silence in the CISG concerning an appropriate remedy for hardship a reliance on the UNIDROIT Principles to supplement the CISG constitutes a fair measure [*Perillo, p. 113; Garro, p. 1184*].

123 Furthermore, the UNIDROIT Principles were consulted to fill this gap in the CISG in several ICC awards [*ICC 8817/1997; ICC Award 11638/2002; ICC Award 12097/2003; ICC Award 12460/2004*]. Consequently, the Articles 6.2.1, 6.2.2 and 6.2.3 PICC will apply to the CLAIMANT's hardship situation.

124 In any case, the UNIDROIT Principles became part of the sales contract as the contract law of Mediterraneo is an adoption of these principles [*PO1, p. 53, para. III (4)*]. This means that its provisions also became part of the sales contract. Consequently, the UNIDROIT Principles

provisions on hardship became part of the contract and may therefore supplement the CISG [*Rimke, p. 240*].

IV. CLAIMANT'S Situation Constitutes Hardship under Article 6.2.2 PICC since all Requirements Are Fulfilled

125 The UNIDROIT Principles supplement the CISG. They enumerate the requirements that have to be met in order to rely on hardship. CLAIMANT will prove that the tariffs fundamentally alter the equilibrium of the contract (**1.**). In addition, the tariff imposition occurred or become known after the conclusion of the contract (**2.**). Furthermore, the event was unforeseen and beyond CLAIMANT'S control (**3.**). Lastly, CLAIMANT did not assume the risk for such an event (**4.**).

1. The 30% Tariffs Fundamentally Alter the Equilibrium of the Sales Contract

126 The equilibrium of the contract is fundamentally altered when the cost of performance increases [*Vogenauer, p. 717, para. 2; Bonell, p. 328*]. This requirement is fulfilled in the CLAIMANT'S impediment. The imposition of the 30% tariffs on agricultural products and, therefore, on the last shipment of 50 doses increased CLAIMANT'S cost by US$ 1,250,000. As described above CLAIMANT underwent grave financial difficulties during the past few years barely remaining in business. The tariffs increase the price for CLAIMANT dramatically. The 30% tariffs make the contract more onerous fundamentally altering its equilibrium reaching the limit of sacrifice [*Plate, p. 10*]. While CLAIMANT had to bear all risks and pay the tariffs, RESPONDENT did not pay any surplus and resold the doses to a higher price. The equilibrium of the contract is distorted gravely. While CLAIMANT faces insolvency, RESPONDENT would not be financially endangered if it bore the additional costs [*PO2, p. 59, para. 30*].

2. The Tariffs Have Become Known after the Conclusion of the Sales Contract

127 The sales contract was finalized and signed on 6 May 2017 [*C5, p. 14*]. The announcement of the newly imposed tariffs took place in December 2017 [*PO2, p. 59, para. 28*]. Therefore, the tariffs have become known after the conclusion of the sales contract.

3. The Tariffs Could Not Have Been Reasonably Taken into Account by CLAIMANT and Are beyond CLAIMANT's Control

128 This requirement closely corelates with a requirement of foreseeability [*Bonell, p. 329*]. At the conclusion of the contract in May 2017 the tariffs could not have been taken into account by any of the Parties. The tariffs as well as the retaliation surprized even informed circles [*C6, p. 15*]. The retaliation was most unforeseen, since previous restrictions imposed by other countries never resulted in direct retaliatory measures before [*Ibid.*]. The reaction of the Equatorianian government

was surprising and characterized as 'a prompt and severe retaliation' [*Ibid.*]. This means that the tariff imposition cannot be classified as a gradual change in circumstances, since the retaliation by the Equatorianan Government happened after only a very short period of negotiations and surprised everyone [*NoA, p. 6, para. 9, C6, p. 15*].

129 The tariffs have also been beyond CLAIMANT'S control since it does not have any influence on the politics of the countries and the measures taken by foreign governments. The imposed tariffs are state interventions that lie beyond a party's control [*Schlechtriem/Schwenzer CISG, p. 1137, para. 18*].

4. The Risks Have Not Been Assumed by CLAIMANT

130 The risks of a possible tariff imposition have lastly not been assumed by CLAIMANT. In an email Ms. Napravnik informed Mr. Antley that CLAIMANT was not willing to take any further risks associated with the change in delivery terms [*C4, p. 12*]. Specifically, Ms. Napravnik referred to changes in customs regulations and import restrictions [*Ibid*]. Thus, the 30% tariffs imposed by the Government of Equatoriana are covered by the risks CLAIMANT explicitly did not assume. The Parties intent, when deciding on a DDP delivery, was not to burden CLAIMANT with all risks associated with such a delivery , but to benefit from the CLAIMANT'S expertise in such transactions.

5. Consequence

131 To conclude, in the case at hand there is hardship as described in Article 6.2.2 PICC.

V. The Arbitral Tribunal Has the Power to Adapt the Price under Article 6.2.3 (4)(b) PICC

132 It has been elaborated earlier that this Arbitral Tribunal has the power to adapt the contract in the current situation. The appropriate remedy is restoring the contractual equilibrium, by means of price adaptation. Renegotiations between CLAIMANT and RESPONDENT failed (**1.**). Furthermore, the Arbitral Tribunal may adapt the price due to Article 6.2.3 (4)(b) PICC (**2.**).

1. Previous Renegotiations Between the Parties for a Price Adaptation Failed due to RESPONDENT'S Bad Faith

133 First of all, the disadvantaged party is entitled to request renegotiations in order to adapt the contract. Article 6.2.3(1) PICC states that the request must be made without undue delay and indicate the grounds on which it is based. Ms. Napravnik was informed by the customs officials of Equatoriana about the tariffs in January 2018, while preparing the last shipment [*C7, p. 16*]. On 20 January 2018 Ms. Napravnik wrote to Mr. Shoemaker requesting a solution to the 30% tariffs on agricultural products applying to the last shipment [*Ibid.*]. The aforementioned demonstrates,

that CLAIMANT requested renegotiations after being informed about the tariffs and informed RESPONDENT on what grounds the request is based.

134 In any case, the disadvantaged party does not lose the right to request renegotiations because it fails to act without undue delay [*Bonell p. 334*].

135 RESPONDENT was obliged to renegotiate in good faith [*Perillo, p. 129*]. Mr. Shoemaker reassured Ms. Napravnik that a solution would be reached through negotiation [*C8, p. 18*]. However, in a meeting on 12 February 2018 the RESPONDENT'S CEO Ms. Espinoza stopped further negotiations and refused to pay the additional amount resulting from the tariffs [*Ibid.*]. CLAIMANT delivered the last shipment in January 2018 thinking that RESPONDENT accepted to adapt the price. Because of Article 6.2.1 PICC CLAIMANT could not, in any case, refuse the last delivery even though negotiations started, fulfilling its contractual obligation conforming to *pacta sunt servanda* [*Plate, p. 1; Kröll/Mistelis/Perales Viscasillas, p. 1070, para. 78; DiMatteo/Janssen/Magnus/Schulze, p. 701, para. 114*].

136 Throughout negotiations RESPONDENT assured CLAIMANT that it was aiming for a long-term contract. CLAIMANT and RESPONDENT agreed on the fact that RESPONDENT was not permitted to resell the doses shipped by CLAIMANT [*C5, pp. 13 et seq.*]. RESPONDENT, however, insisted on certain dates and shipments exactly because it always intended to resell a number of doses to a third party [*PO2, p. 56, para. 11*]. RESPONDENT'S conduct proves that it did not renegotiate in good faith. In accordance with the principles of good faith RESPONDENT had to negotiate in a constructive manner subject to their benchmark [*cf. Article 1.7 PICC*] and the duty of co-operation [*cf. Article 5.1.3 PICC; Bonell, p. 335*]. The renegotiations should not constitute a tactical manoeuvre [*Ibid*].

137 Mr. Shoemaker knew that CLAIMANT would not deliver if the request for renegotiations would have been denied [*R4, p. 36*]. Even though he was not involved in the negotiation of the contract, he was introduced to Ms. Napravnik as the person responsible for the racehorse breeding program including all questions concerning the sales agreement [*PO2, p. 59, para. 32*]. Thus, he cannot absolve himself from all responsibilities and distance himself from the statements he made towards Ms. Napravnik. Mr. Shoemaker reassured Ms. Napravnik that 'if the contract provides for an increased price in the case of such a high additional tariffs we will certainly find an agreement on the price' [*R4, p. 36*]. He read this sentence of a note that was prepared for this conversation [*Ibid*].

138 In addition, Mr. Shoemaker was present at the meeting on 12 February 2018 as Ms. Napravnik counterpart for RESPONDENT [*PO2, p. 60, para. 35*]. The only conclusion that can be drawn is that Mr. Shoemaker should have been informed and prepared to discuss the situation with her. All these circumstances indicate that RESPONDENT was not interested in a long-term relationship with

CLAIMANT. The goal of RESPONDENT was to receive the third shipment in order to resell the doses for 20% higher than charged by CLAIMANT [*NoA, p. 8, para. 20*]. RESPONDENT used the request for renegotiation as a tactical manoeuvre and obstructed fruitful price negotiations.

139 In conclusion, CLAIMANT and the RESPONDENT could not agree by renegotiating. This is due to RESPONDENT lack of good faith.

2. The Arbitral Tribunal Has the Power to Adapt the Price and Restore the Contractual Equilibrium

140 As explained above, renegotiation between CLAIMANT and RESPONDENT failed. According to Article 6.2.3(4)(b) PICC the court may adapt the contract with a view to restoring its equilibrium. This means that the arbitral tribunal will seek for a fair distribution of the losses [*Bonell, p. 336*]. A price adaptation may be involved [*Ibid.*]. This Arbitral Tribunal is respectfully asked to adapt the price, deriving the power to do so from Article 6.2.3(4)(b) PICC.

141 Since hardship is governed by Article 79 CISG but not settled the UNIDROIT Principles supplement the CISG and provide the desired remedy. Article 6.2.3(4)(b) PICC states that the court may adapt the contract in case it finds hardship and previous negotiations failed. CLAIMANT's situation constitutes hardship. The Arbitral Tribunal has the power to adapt the price in order to establish the equilibrium of the contract. Since restoring the contractual equilibrium also involves a price adaptation, CLAIMANT is entitled to the price of at least US$ 1,250,000. This price constitutes a fair amount in order to re-establish the contractual equilibrium, considering that CLAIMANT relinquishes its 5% profit, i.e. US$ 250,000.

VI. Consequence

142 In conclusion, CLAIMANT is entitled to the payment of at least US$ 1,250,000 resulting from an adaptation of the price under Article 79(1) CISG and the UNIDROIT Principles.

C. Conclusion on Issue 3

143 CLAIMANT's claim is based upon clause 12 of the sales agreement and Article 79(1) CISG. CLAIMANT is entitled to the increased remuneration of at least US$ 1,250,000 for the last shipment.

PRAYER FOR RELIEF

For the above reasons, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal to find that

I. RESPONDENT must pay the remaining purchase price in the amount of at least US$ 1,250,000.

II. the law of Mediterraneo governs the arbitration agreement.

III. CLAIMANT is entitled to submit the Partial Interim Award and further submissions from the other arbitration proceeding.

IV. RESPONDENT must bear the costs of the arbitration.

Certificate

Berlin, 06 December 2018

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

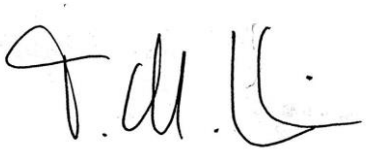
Helena Dierckx

Helen Klabe

Clara Seitz

Inès Schroeder

Fabian Weimer



Tamara Wendrich