SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

FRIEDRICH SCHILLER UNIVERSITY OF JENA

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

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LIST OF ABBREVIATIONS

ANoA	Answer to the Notice of Arbitration
Apr	April
Art./Arts.	Article/Articles
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
Aug	August
BGH	Bundesgerichtshof (German Federal Court of Justice)
cf.	compare with
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
Dec	December
Doc.	Document
Ed.	Editor
et al.	et allii/aliae/alia (and others)
et seq.	et sequens (and that which follows)
et seqq.	et sequentia (and those which follow)
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
Ex.	Exhibit
Feb	February
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
i.a.	Inter alia

ibid	In the same place
ICC Clause	ICC Hardship Clause
ICC	International Chamber of Commerce
i.e.	In other words
Inc.	Incorporated
Jan	January
Jul	July
Jun	June
Ltd.	Limited
Mar	March
MAL	Mediterranean Arbitration Law
MaRes	Mail from Respondent on 3 Oct 2018
MCL	Mediterranean Contract Law
Mr.	Mister
Ms.	Miss/Misses
No.	Number
NoA	Notice of Arbitration
Nov	November
NYC	New York Convention
Oct	October
OLG	Oberlandesgericht (German/Austrian Higher Regional Court)
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PICC	UNIDROIT Principles
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Q.B.	Queen's Bench Division (Law Report)
S.A.	Sociedade Anônima (Brasilian public limited company)
Sep	September
S.r.l.	Società a responsabilità limitata (Italian joint-stock company)
Tribunal	Arbitral Tribunal

UKHL	House of Lords Judgements
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States
Vol.	Volume

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HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
Mediterranean Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law
Mediterranean Contract Law	Verbatim Adoption of the UNIDROIT Principles
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
ULIS	1964 Convention relating to a Uniform Law on the International Sale of Good
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts 2016

STATEMENT OF FACTS

The Parties to these proceedings are **Phar Lap Allevamento** [*hereinafter CLAIMANT*] and **Black Beauty Equestrian** [*hereinafter RESPONDENT*].

CLAIMANT has a renowned stud farm located in Mediterraneo. Its most popular racehorse is Nijinski III. RESPONDENT is the first client that bought frozen racehorse semen from CLAIMANT.

RESPONDENT possesses famous broodmares and is located in Equatoriana. RESPONDENT aims to build up its own racehorse stable and to become one of the leading breeders of racehorses.

21 Mar 2017	RESPONDENT contacted CLAIMANT for the first time in order to discuss the sale of frozen racehorse semen.
24 Mar 2017	Although CLAIMANT does not usually sell high quantities of frozen semen, it agreed to sell the requested 100 doses to RESPONDENT. CLAIMANT clarified that the frozen semen may not be resold. CLAIMANT further suggested that in case of a dispute, Mediterranean courts should have jurisdiction and Mediterranean law should apply to the contract.
28 Mar 2017	RESPONDENT demanded delivery DDP (Delivery Duty Paid). It agreed to the application of Mediterranean law but suggested the jurisdiction of Equatorianian courts.
31 Mar 2017	CLAIMANT agreed to DDP. In return, it insisted to include a hardship clause into the contract. This was based on CLAIMANT's previous experience of hardship in 2014. Thus, CLAIMANT refused to pay for additional costs in this case associated with DDP.
10 Apr 2017	RESPONDENT sent its first draft of the dispute resolution clause to CLAIMANT. It provided for arbitration in Equatoriana and stated that the arbitration agreement should be governed by the law of Equatoriana.
11 Apr 2017	CLAIMANT suggested to change the seat of arbitration to Danubia, a neutral place. It omitted the choice of law for the arbitration agreement.
12 Apr 2017	The main negotiators, Ms. Napravnik (CLAIMANT) and Mr. Antley (RESPONDENT), met to discuss the dispute resolution clause and the hardship clause. The Parties agreed on an adaptation by the Tribunal if renegotiations fail. However, due to a serious car accident of the original negotiators, Mr. Ferguson (CLAIMANT) and Mr. Krone (RESPONDENT)

took over the negotiations. They were not aware of what had been discussed by the old negotiators.

6 May 2017 The Parties signed the Frozen Semen Sales Agreement [*hereinafter FSSA*]. Its hardship clause exempts CLAIMANT from liability in case of additional health and safety requirements or comparable unforeseen events. They added an arbitration clause providing for an arbitral seat in Danubia. They made no express choice of law for the arbitration clause.

Nov 2017 The President of Mediterraneo, Mr. Bouckaert, imposed 25% tariff upon agricultural products from Equatoriana.

19 Dec 2017 As a reaction, Equatoriana retaliated by imposing a 30% tariff on agricultural products from Mediterraneo, including racehorse semen.

20 Jan 2018 CLAIMANT informed RESPONDENT about the new tariff, which included racehorse semen. Additionally, CLAIMANT stated that it would be impossible for its company to bear the 30% tariff.

21 Jan 2018 Mr. Shoemaker (RESPONDENT) urged CLAIMANT to send the final instalment of 50 doses. He assured that in case the contract provides for an adaptation, they will find a solution for the additional costs.

23 Jan 2018 CLAIMANT delivered the last shipment and paid the 30% tariff.

12 Feb 2018 After finding out that RESPONDENT had resold the doses, CLAIMANT confronted RESPONDENT with this information. As a result, RESPONDENT aborted the negotiations and objected to pay the additional amount to cover the tariff.

31 Jul 2018 CLAIMANT initiated the arbitral proceedings at the HKIAC to adapt the contract.

2 Oct 2018 After CLAIMANT became aware of another arbitral proceeding of RESPONDENT, it informed the Tribunal. In that proceeding, RESPONDENT as the seller was negatively affected by the 25% tariff. RESPONDENT, therefore asked for an adaptation. CLAIMANT wants to use the partial interim award from the other case to prove RESPONDENT's contradictory behavior in the present proceeding.

3 Oct 2018 RESPONDENT objected to the submission of the partial interim award on the basis that CLAIMANT obtained it illegally, either leaked by former employees or through a hack of RESPONDENT's computer system.

SUMMARY OF ARGUMENTS

"A Horse! A Horse! My kingdom for a horse!" - Richard III (Shakespeare)

RESPONDENT desperately wanted our horse semen.
In return we do not ask for its kingdom, only for some extra money.

Issue A - The law of Mediterraneo is applicable to the arbitration agreement and the Tribunal has the power to adapt the contract under the arbitration agreement

The Parties impliedly chose the law of Mediterraneo to govern the arbitration agreement in accordance with Mediterranean Law. Even if Danubian Law, which is the law at the seat of arbitration, was applicable, the Parties impliedly chose the law of Mediterraneo as the law applicable to the arbitration agreement. Should the Tribunal find that there was no such choice by the Parties, Mediterranean Law applies to the arbitration agreement. This is because the arbitration agreement has the closest and most real connection with this law.

The arbitration agreement confers power on the Tribunal to adapt the contract when it is interpreted in the light of the Parties' intent and the law of Mediterraneo. Contract adaptation is, therefore, a "*dispute which arose out of the contract*" and therefore is covered by the Tribunals' power.

ISSUE B - CLAIMANT is entitled to the payment of US$ 1,250,000 under clause 12 FSSA or, alternatively, under the CISG

The hardship provision in the FSSA applies to the present situation as the imposed tariff is an unforeseen comparable event making performance more onerous as required by clause 12 FSSA. Additionally, CLAIMANT did not assume the risks of DDP in case of hardship. Hence, CLAIMANT can invoke hardship. Since the Parties agreed on contract adaptation as the specific hardship remedy, the Tribunal has to adapt the contract.

Alternatively, CLAIMANT can request a contract adaptation under the CISG. Following the legislative and drafting history of the CISG, hardship lies within the scope of Art. 79 CISG. As this article does not provides for the legal consequences of hardship, this gap has to be filled with Art. 6.2.3 PICC or Art. 6.2.3 MCL. Even if the Tribunal should assume that Art. 79 CISG does not cover hardship, the situation can be resolved as if the CISG had an internal gap

regarding hardship. Thus, the CISG has to be supplemented by the hardship provision of the PICC or the MCL. In conclusion, the Tribunal has the power to adapt the contract.

Both, an adaptation under clause 12 FSSA as well as under the CISG, results in restoring the equilibrium of the contract. Therefore, the Tribunal should oblige RESPONDENT to pay 25% of the tariff, i.e. US$ 1,250,000, while CLAIMANT assumes 5% of the tariff.

Issue C- Contrary to RESPONDENT's allegations, Art. 42 HKIAC 2013 does not prevent CLAIMANT from submitting the partial interim award

Art. 42 HKIAC 2013, which contains a rule on keeping the arbitral proceeding confidential, does not bind CLAIMANT as a third party. Furthermore, submission is not excluded by virtue of Art. 9.2 IBA Rules on the Taking of Evidence in International Arbitration. The evidence is relevant for the case and material to its outcome because it helps to determine RESPONDENT's intent in this proceeding. RESPONDENT's intent is relevant for the interpretation of the contract. On the other side, it is not relevant that the evidence has been obtained illegally because CLAIMANT was not involved in obtaining it and the interest in a just and right decision prevails.

ARGUMENT

ISSUE A – THE ARBITRAL TRIBUNAL HAS JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1 The arbitration agreement as well as its interpretation are subject to Mediterranean law (**A**). According to Mediterranean Law, the Arbitral Tribunal [*hereinafter Tribunal*] has the power and jurisdiction to adapt the contract **(B)**.

A. THE ARBITRATION AGREEMENT IS SUBMITTED TO THE LAW OF MEDITERRANEO

2 An arbitration agreement is governed by the law expressly or impliedly chosen by the parties. In the case at hand, the Parties have not expressly agreed on the law applicable to the arbitration agreement [*Ex. C-5, p. 14, para. 14*]. However, they have impliedly done so by choosing the law of Mediterraneo as the law applicable to the main contract. In absence of an express choice of law, it is the tribunal that has to determine whether the parties have impliedly chosen a law applicable to the agreement [*Yu, p. 219*]. Normally, the arbitration agreement is a contract that is separate from the main contract [*Moses, p. 19*]. It is submitted to the law chosen by the parties [*Balthasar in: Balthasar, § 1, para. 21; Choi, p. 106*]. The law of Mediterraneo applies to the main contract [*Ex. C-5, p. 14*]. It also applies to the arbitration agreement, because the Parties impliedly chose the law of the main contract for their arbitration agreement (**I**). In case that the Tribunal should deny such an implied choice of law, the law of Mediterraneo is applicable as the law with the closest and most real connection to the arbitration agreement (**II**). Furthermore, even if the choice of law is interpreted according to Danubian Law, the Parties impliedly chose the law of Mediterraneo to apply to the arbitration agreement (**III**).

I. THE PARTIES IMPLIEDLY CHOSE MEDITERRANEAN LAW TO GOVERN THE ARBITRATION AGREEMENT

3 To determine whether the parties have impliedly chosen the law of the arbitration agreement, the tribunal interprets the contract as a whole under the substantive law applicable to the main contract [*Spigelman, p. 235*].

4 The Frozen Semen Sales Agreement [*hereinafter FSSA*] is governed by Mediterranean Law including the United Nations Convention on Contracts for the International Sale of Goods (1980) [*hereinafter CISG*] [*Ex. C-5, p. 14, para. 14*]. Thus, the choice of law clause must be interpreted based on Art. 8 CISG. According to Art. 8(1) CISG, any statements

that were made by a party have to be interpreted according to its intent "*where the other party knew or could not have been unaware what that intent was*". According to Art. 8(3) CISG the intent of a party has to be determined by considering "*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*".

5 RESPONDENT's first draft of the dispute resolution clause included an explicit choice of law for the arbitration agreement in favour of Equatoriana [*Ex. R-1, p. 33*]. In its response draft, CLAIMANT deleted the choice of law clause [*Ex. R-2, p. 34*]. CLAIMANT made it clear that submitting the contract to a foreign law requires approval by its creditor's committee [*Ex. R-2, p. 34*]. RESPONDENT had already accepted that the sales agreement should be governed by the law of Mediterraneo [*Ex. R-1, p. 33*]. Thus, only the law applicable to the arbitration agreement was still under consideration. Therefore, when rejecting the applicability of a foreign law, the only clause CLAIMANT could have referred to was the arbitration agreement. CLAIMANT agreed to apply a neutral procedural law at a neutral seat of arbitration. However, it did not agree to apply a foreign substantive law to the arbitration agreement [*Ex. R-2, p. 34*]. In fact, CLAIMANT stated explicitly that "*the offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo*" [*Ex. R-2, p. 34*]. "Sales Agreement" means the FSSA [*PO2, p. 61, para. 50c*].

6 Contrary to RESPONDENT's submissions [*ANoA, p. 32, para. 17*], the choice of law clause for the FSSA also determines which law applies to interpret the arbitration clause. The choice of law clause also applies to the arbitration agreement even if it appears in a separate clause above the original arbitration agreement in the contract. The contract must be interpreted as a whole under the CISG, meaning that, "*there is no hierarchy among contract terms*" [*Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 30*]. The position of the choice of law clause is therefore irrelevant. CLAIMANT clarified that it intended the law of Mediterraneo and not a foreign law to apply to the entire contract including the arbitration agreement in clause 15 FSSA.

7 RESPONDENT proposed that the law at the seat of arbitration should apply to the arbitration agreement [*Ex. R-1, p. 33*]. It submits that CLAIMANT would have needed to object explicitly in order to reject this proposal [*ANoA, p. 30, para. 6*]. According to the CISG, no objection is needed to reject an offer; instead, an offer must be accepted in order to be binding. Acceptance requires a statement that indicates approval of the offer

[*Art. 18(1) CISG*]. According to Art. 19(1) CISG "*[a] reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer*". CLAIMANT deleted the part of RESPONDENT's proposal which dealt with the law applicable to the arbitration agreement. Consequently, by its behaviour CLAIMANT rejected RESPONDENT's offer. Therefore, CLAIMANT made it clear that it did not intend foreign law to apply to the arbitration agreement.

8 If the Parties had intended to apply a different law to the arbitration agreement than to the main contract, they should have stated so explicitly. RESPONDENT alleges that the separability doctrine automatically leads to the application of a different law to the arbitration agreement [*ANoA, p. 31, para 14*]. However, this is not consistent with the common interpretation of that rule. An arbitration agreement is not necessarily void if the main contract is invalid according to Art. 19.2 HKIAC Administered Arbitration Rules [*hereinafter HKIAC Rules*] and Art. 16(1) Danubian Arbitration Law [*hereinafter DAL*]. The DAL is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration [*hereinafter UML*] [*PO1, p. 52, para. III.4*]. The separability doctrine does not provide that the arbitration agreement must necessarily stand separately [*Redfern/Hunter, para. 3.13*]. It merely allows the parties to choose a law different from the law of the main contract [*Redfern/Hunter, para. 3.13*]. The scope of the separability doctrine is limited to the question whether the arbitration agreement is valid [*Choi, p. 107 et seq.*]. In the case at hand, not the validity of the arbitration agreement, but its scope of application is in question [*NoA, p. 7, para 15; ANoA, p. 31, para. 12*]. Consequently, the separability doctrine is not applicable. Therefore, there is no differentiation between the law applicable to the main contract and the arbitration agreement.

II. EVEN IF THERE IS NO IMPLIED CHOICE UNDER MEDITERRANEAN LAW, THE LAW OF MEDITERRANEO IS APPLICABLE AS THE LAW WITH THE CLOSEST AND MOST REAL CONNECTION TO THE ARBITRATION AGREEMENT

9 If parties did not choose a law for the arbitration agreement, the law with the closest and most real connection to the arbitration agreement applies [*[2012] EWCA 638 (Comm), para. 26; Weigand/Baumann in: Weigand, para. 1.22*]. A close connection can be drawn from an overall view of several factors, such as the law governing the main contract [*Masser in: Arroyo, p. 2776*], one party's residence or the place where the contract was concluded [*Supreme Court of Pakistan, 10 Jun 1998, para. 61; Masser in: Arroyo, p. 2776*].

10 If the arbitration agreement is included in the same document as the main contract, the law chosen for the main contract shall be the law applicable to the arbitration agreement [*Supreme Court of Pakistan, 10 Jun 1998, para. 46*]. The law of the main contract governs the arbitration agreement, except if the latter is included in another document or the parties made an explicit choice of law for the arbitration agreement [*[2016] SGHC 249, para. 69 et seq.*]. In the case at hand, the arbitration agreement is within the FSSA [*Ex. C-5, p. 14*].

11 In addition, the FSSA was signed in Mediterraneo [*PO2, p. 56, para. 13*] This indicates that there is a close connection between the arbitration agreement and Mediterranean Law.

12 Danubia was only chosen as the place of arbitration because neither of the Parties has any connection to this country [*Ex. R-2. p. 34*]. If such neutrality is the main criteria for choosing the place of arbitration [*De-Ly in: Ferrari/Kröll, p. 6*], the parties only consider the procedural arbitration law. Neutrality does not establish any connection between the seat of arbitration and the arbitration agreement [*Leong/Tan, p. 77, para. 16*], because the substantive law is not determined to be neutral [*[2016] SGHC 249, para. 63*]. The parties regularly choose a substantive law they are familiar with [*Born, LaP, para. 45*]. Since the Parties have no connection to Danubia, there is no indication why the law at the seat should apply to questions governed by substantive law. Contrary to that, both the Equatorianian and the Mediterranean Contract Law are the UNIDROIT Principles on International Commercial Contracts 2016 [*hereinafter PICC*], including the CISG [*PO1, p. 52, para. 4*]. Therefore, both Parties are familiar with the substantive law.

13 In conclusion, there are no indications that the law at the seat should apply to the arbitration agreement. To the contrary, Mediterranean Law is the law with the closest and most real connection to the arbitration agreement. Thus, Mediterranean Law is applicable to the arbitration agreement.

III. EVEN UNDER THE FOUR CORNERS RULE CONTAINED IN THE DANUBIAN LAW, THE PARTIES IMPLIEDLY CHOSE THE LAW OF MEDITERRANEO

14 According to the four corners rule under the Danubian Law, if the wording is clear, any reliance on the drafting history or the preceding communication shall be excluded [*ANoA, p. 32, para. 16*]. This rule has the same effect as a merger clause under Art. 2.1.7 PICC [*PO2, p. 61, para. 45*]. Therefore, to determine the scope of the four corners rule under Danubian Law, the common interpretation of Art. 2.1.7 PICC can be taken into account. Following Art. 2.1.7 PICC, a contract which has an explicit clause on the terms on which

the parties agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. That does not exclude that one can use such statements to interpret the writing [*Vogenauer, in: Vogenauer, Art. 2.1.17 PICC, para. 6*].

15 In the present case it is disputed between the Parties whether the FSSA's choice of law covers the entire agreement or only the sales part [*NoA, p. 7, para. 15; ANoA, p. 31, para. 14*]. Clause 15 FSSA does not contain an explicit choice of law [*Ex. C-5, p. 14, para. 15*]. Accordingly, it is unclear whether the Parties intentionally left that choice out and intended the law of the main contract to apply or if they merely forgot it. This can be clarified by taking recourse to the negotiations [*see above, paras. 3-8*].

16 Consequently, even under Danubian Law, prior statements and agreements may be used to interpret the choice of law clause. After an interpretation of the clause in the light of the negotiations, it becomes clear that the Parties intended to apply Mediterranean Law also to the arbitration agreement.

B. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

17 Contrary to RESPONDENT's allegation [*ANoA, p. 31, para. 13*], the Tribunal may adapt the FSSA. To confer the power to adapt the contract on a tribunal, an express or implied agreement of the parties is necessary [*Beisteiner, pp. 79, 110 et seq.*]. Whether the parties have conferred the power to adapt the contract on the arbitrators depends on the substantive law applicable to the arbitration clause [*Kröll, p. 18; Berger, Power of Arbitrators, p. 11*]. Mediterranean Law governs the arbitration clause [*see above, paras. 2-16*]. This law interprets arbitration clauses widely [*NoA, p. 7, para. 15*].

18 The Mediterranean Arbitration Law [*hereinafter MAL*] is a verbatim adoption of the UML [*PO2, p. 57, para. 14*]. Contrary to Danubian Law [*cf. PO2, p. 60, para. 36*], Art. 28(3) MAL contains no general standard to be applied to the conferral of exceptional powers on the arbitral tribunal. The agreement to empower a tribunal to adapt a contract does not have to be made expressly but can also be made impliedly [*UN Doc. A/CN.9/263, p. 58, para. 15; Brunner, p. 496*]. Thus, parties do not need to expressly confer the power on the tribunal to adapt the contract under the MAL.

19 Only the general possibility of contract adaptation is governed by the lex arbitri [*Kröll, p. 18; Berger, Power of Arbitrators, p. 10*]. Under DAL, contract adaptation is generally possible [*PO2, p. 60, para. 36*].

20 The Tribunal has the power to adapt the FSSA, because the wording of the contract provides for it **(I)**. Even more, the Parties impliedly agreed to confer this power on the Tribunal **(II)**.

I. THE WORDING OF CLAUSE 15 FSSA GIVES THE TRIBUNAL THE POWER TO ADAPT THE CONTRACT

21 The arbitration clause states that "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration*" [*Ex. C-5, p. 14, para. 15*].

22 RESPONDENT's original draft of the arbitration clause was largely based on the HKIAC Model Clause [*Ex. R-1, p. 33*]. In comparison to this clause, RESPONDENT excluded the formulation "*any controversy, difference or claim", "relating to this contract*" and "*any dispute regarding non-contractual obligations arising out of or relating to it*". RESPONDENT claims that by changing the wording of the HKIAC Model Clause, it deleted any reference which could be interpreted as an empowerment for contract adaptation [*ANoA, p. 31, para. 13*].

23 Words such as, "*claims*"; "*differences*", "*disputes*" and "*controversies*" all have a broad meaning [*Redfern/Hunter, para. 2.60*]. Those general terms are used for illustrative reasons and to avoid any misinterpretation to restrict the jurisdiction of a tribunal [*Rajoo, p. 161*]. However, those formulations all have the same scope and cover any form of disagreement between the parties that may arise in arbitral proceedings [*Born, ICA, p. 1348*]. Consequently, it makes no difference that the term "*controversy, difference or claim*" was deleted during the negotiations.

24 Contrary to RESPONDENT's allegation [*ANoA, p. 31, para. 13*] it did not delete any reference within the HKIAC Model Clause which could be interpreted as an empowerment for contract adaptation. The expression "*disputes arising out of the contract*" has a broad meaning [*Born, ICA, p. 1354; Rajoo, p. 163*], which may be taken as covering all disputes that can be submitted to arbitration [*Redfern/Hunter, para. 2.61*]. The term "*disputes relating to the contract*" usually covers "*any matter, dispute, or claim having any material connection to the parties' contract or their actions under that contract*" [*Born, ICA, p. 1350*]. Therefore, "*disputes arising out of the contract*" and "*disputes in relation with the contract*" are both interpreted broadly and have the same scope [*Born, ICA, pp. 1350; 1353 et seq.*]. In contrast, the wording "*under this contract*" would cover only contractual

claims, i.e. claims where the cause of action is expressly laid down in the contract [*Redfern/Hunter, para. 2.61*]. Consequently, the Parties chose one of the widest formulations possible which also covers adaptation [*Rajoo, p. 163*].

25 Furthermore, in case of arbitration clauses which do not expressly authorise contract adaptation, arbitrators may at any rate resort to certain adaptation mechanisms [*Kröll, p. 167*]. These mechanisms must be dogmatically qualified as interpretation of the contract [*ibid.*]. If the parties intend to exclude adaptation from the contract, they have to state that explicitly [*Berger, Int. Wirtschaftsvertragsrecht, p. 9; Kröll, p. 167 et seq.*].

26 Consequently, the wording of the arbitration clause confers power on the Tribunal to adapt the FSSA.

II. THE PARTIES HAD THE COMMON INTENT THAT THE TRIBUNAL SHOULD ADAPT THE CONTRACT IN CASE THEY WERE NOT ABLE TO REACH AN AGREEMENT

27 To determine the content of a contract, not only its wording has to be taken into account, but also the intent of the Parties [*Art. 8(1) CISG*]. The law of Mediterraneo, under which the arbitration agreement must be interpreted [*see above, paras. 2-16*], includes the CISG [*PO1, p. 52, para. 4*]. According to Mediterranean jurisprudence, the CISG applies to the interpretation of the arbitration clause if the main contract is governed by the CISG [*PO1, p. 52, para. 4*]. Thus, the common intent of the Parties must be determined according to Art. 8 CISG [*Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 22*]. In order to determine this intent, all relevant circumstances of the case, especially the negotiations and any subsequent conduct of the parties, have to be taken into account [*Art. 8(3) CISG*].

28 It was Ms. Napravnik's and Mr. Antley's common intent that the Tribunal should adapt the contract if necessary (**1**). Should the Tribunal decide that the wording is not clear, the arbitration clause has to be interpreted to RESPONDENT's disadvantage because of the "*contra proferentem*" rule (**2**).

1. THE PREVIOUS NEGOTIATORS AGREED ON A CONTRACT ADAPTATION BY THE TRIBUNAL IF NECESSARY

29 The negotiation history, which must be taken into account to determine the Parties' intent [*see Art. 8(3) CISG*] reveals that both Parties intended to give the Tribunal power to adapt the contract. CLAIMANT's previous negotiator Ms. Napravnik told RESPONDENT's

previous agent Mr. Antley that it was important for CLAIMANT to have a mechanism for contract adaptation in the hardship clause or the arbitration clause [*Ex. C-8, p. 17*]. In Mr. Antley's view, an adaptation should be undertaken by the Tribunal in case the Parties could not agree on an amendment [*Ex. C-8, p. 17*]. Ms. Napravnik was of the same opinion and suggested including an express reference to this in the contract to avoid any ambiguity even though it was not legally necessary [*Ex. C-8, p. 17*]. Mr. Antley planned to prepare a proposal but was unable to do so due to the car accident [*Ex. C-8, p. 17*]. As shown above [*see above, para. 18*] an express agreement is not necessary [*UN Doc. A/CN.9/263, p. 58, para. 15; Brunner, p. 496*]. The drafting history shows that both Parties intended that the Tribunal should adapt the FSSA in case they could not reach an agreement. Additionally, this conversation took place after RESPONDENT allegedly narrowed down the HKIAC Model Clause [*cf. Ex. C-8, p. 17; Ex. R-1, p. 33*].

30 In addition, if the parties have chosen the substantive law of a jurisdiction which is open to contract adaptation, the power to adapt a contract is included in the arbitration clause [*Beisteiner, p. 110 et seq.*]. The parties expect the thereby chosen legal instruments to be enforced in the chosen forum [*Beisteiner, p. 110 et seq.*]. The FSSA contains a choice of law clause in favour of Mediterranean Law [*Ex. C-5, p. 14, para. 14*] and Mediterranean Law does not require an express authorisation regarding contract adaptation [*see above, para. 18*]. Consequently, the power to adapt the FSSA is included in the arbitration clause and an express authorisation is not necessary.

31 The change of negotiators does not affect the agreement between the Parties empowering the Tribunal to adapt the FSSA. As the arbitration clause is interpreted under Art. 8 CISG, all circumstances have to be taken into account without limitations [*Gruber in: Säcker et al., Art. 8 CISG, para. 16; Bodenheimer in: Gsell et al., Art. 8 CISG, para. 13*]. This means that all negotiations have to be taken into account [*Gruber in: Säcker et al., Art. 8 CISG, para. 16; Bodenheimer in: Gsell et al., Art. 8 CISG, para. 13*]. The new negotiators Mr. Ferguson and Mr. Krone did not discuss the arbitration clause, but merely adopted the draft of the relevant parts contained in the email of 22 Apr 2017 [*PO2, p. 55, para. 6*]. Consequently, they did not overturn the intent of the original negotiators concerning the Tribunal's power to adapt the contract. The Parties' intent at the time the contract was concluded was to confer the power to adapt the contract on the Tribunal.

2. IN ANY EVENT, THE CONTRA PROFERENTEM RULE APPLIES TO THE WORDING OF CLAUSE 15 FSSA

32 The "*contra proferentem*" rule states that the risk of an ambiguous wording has to be borne by the party drafting the clause [*BGH, 28 May 2014, p. 12, para. 21*; *Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 49*]. This means if there are several possible interpretations of a clause, the clause has to be interpreted at the expense of the author [*Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 49; Huber/Mullis, p. 15; Zuppi in: Kröll et al., Art. 8 CISG, para. 26*]. This rule underlies the CISG [*Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, para. 49*] and therefore applies to the arbitration agreement. RESPONDENT drafted the first paragraph of the arbitration agreement [*Ex. R-1, p. 33*], which was eventually inserted into the FSSA [*Ex. C-5, p. 14, para. 15*] without any alterations by CLAIMANT [*cf. Ex. R-2, p. 34*]. One way to understand the arbitration clause would be as covering contract adaptation by the Tribunal [*see above, paras. 21-26*]. RESPONDENT, however, claims that clause 15 FSSA does not cover contract adaptation [*ANoA, p. 31, para. 13*]. Nevertheless, if RESPONDENT intended to exclude contract adaptation by the Tribunal, it could have expressly clarified that in the contract. Thus, as the wording is ambiguous, the clause has to be interpreted to RESPONDENT's detriment. In this case, RESPONDENT now rejects contract adaptation but had the opportunity to avoid the ambiguous wording. Therefore, clause 15 FSSA has to be understood as giving power to the Tribunal.

CONCLUSION TO ISSUE A

33 Resulting from an implied choice of the Parties under Mediterranean Law, the arbitration agreement and its interpretation underlie the law of Mediterraneo. Even in the absence of an implied choice, Mediterranean Law governs the agreement as the law with the closest and most real connection to the arbitration agreement. In any event, even under the strict interpretation rules of Danubian Law, the Parties impliedly chose the application of Mediterranean Law to the arbitration agreement. Accordingly, the Tribunal has the power to adapt the FSSA. This interpretation is based on the broad wording of clause 15 FSSA and the common intent of both Parties to confer such power on the Tribunal. In any event, this interpretation follows from the "*contra proferentem*" rule.

ISSUE B – CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTION OF THE PRICE

34 The Tribunal may and should adapt the contract either under clause 12 FSSA (**A**) or the CISG (**B**), because CLAIMANT suffers from hardship. In order to adapt the contract, the Tribunal should restore the equilibrium of the contract by obliging RESPONDENT to pay US$ 1,250,000 to CLAIMANT (**C**).

A. CLAUSE 12 FSSA PROVIDES FOR A PRICE ADAPTATION DUE TO THE IMPOSED TARIFFS

35 Clause 12 FSSA exempts the seller from responsibility for hardship, if an event is "*caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C-5, p. 14, para. 12*]. In the case at hand, the Equatorianian government imposed a 30% tariff on agricultural products which also applies to frozen racehorse semen [*Ex. C-7, p. 16*]. Thus, the tariff constitutes a hardship situation according to clause 12 FSSA. Firstly, the Parties could not foresee the tariff when they concluded the contract (**I**). Secondly, the 30% tariff makes performance under the contract more onerous (**II**). Thirdly, the tariff is a comparable event in the sense of clause 12 FSSA (**III**). Fourthly, the Parties agreed on a delivery in accordance with the Incoterm "*Delivery Duty Paid*" [*hereinafter DDP*]. Nevertheless, they did not intend to burden CLAIMANT with additional costs arising from hardship situations (**IV**). Consequently, the Tribunal should adapt the contract, as the Parties provided for this remedy in case renegotiations fail (**V**).

I. IT WAS IMPOSSIBLE FOR THE PARTIES TO FORESEE THE 30% TARIFF

36 As clause 12 FSSA requires [*cf. Ex. C-5, p. 14, para. 12*], it was an unforeseen event that the government of Equatoriana imposed a 30% tariff on the import of agricultural products from Mediterraneo. The Equatorianian government was not known for retaliating with import restrictions in trade disputes [*NoA, p. 7, para. 19*]. However, this was a reaction to a 25% tariff imposed by the government of Mediterraneo, which was itself unexpected. Not even specialists anticipated that Mediterraneo would impose a 25% tariff upon agriculture products from Equatoriana [*Ex. C-6, p. 15*]. Even though the newly elected president of Mediterraneo indicated that he aimed to protect the agricultural sector [*NoA, p. 6, para. 9; Ex. C-6, p. 15*] the 25% tariff was unpredicted. Neither his strategy papers nor the election manifesto suggested that he would impose tariffs on Equatorianian products [*NoA, p. 6, para. 9*]. In addition, it was even more astonishing that Equatoriana retaliated by imposing the 30% tariff on all agricultural goods from Mediterraneo. The

Equatorianian government had never taken any retaliatory measures but tried to solve disputes amicably [*NoA, p. 7, para. 19*]. The same holds true for Mediterraneo as both states are WTO members [*Ex. C-6, p. 15; PO2, p. 61, para. 47*]. Additionally, neither Mediterraneo nor Equatoriana had imposed tariffs on agricultural products before [*PO2, p. 58, para. 25*]. In sum, the Parties had not foreseen that Equatoriana would impose a 30% tariff in Dec 2017 when they contracted the FSSA on 06 May 2017.

II. THE 30% TARIFF RENDERS THE CONTRACT MORE ONEROUS

37 The Parties agreed that clause 12 FSSA would apply if a particular event made the contract "*more onerous*" [*Ex. C-5, p. 14, para. 12*]. Usually, parties provide in hardship clauses that performance has to become "*excessively onerous*" [*Brunner, pp. 117, 389*]. The term "*excessively onerous*" requires that the costs of performance should increase by 80-100% [*Brunner, p. 432*]. However, the parties are free to choose a less strict wording and thereby to lower the threshold at which hardship is determined [*Brunner, p. 515*]. In the present case, the Parties chose the term "*more onerous*" [*Ex. C-5, p. 14, para. 12*], indicating a low threshold. Arts. 8(1), (3) CISG provide for interpretation on the basis of the negotiations to identify the threshold the parties intended to apply with this phrasing.

38 CLAIMANT clarified that, in its view, the commercial basis of the contract would be destroyed if the costs increased "*by up to 40%*" [*Ex. C-4, p. 12*]. This statement demonstrates that the Parties agreed to a lower than usual threshold for hardship. Hardship should arise as soon as the basis of the contract is destroyed. Even an increase in costs below 40% can render the contact more onerous because CLAIMANT indicated that hardship should be given if cost increase "*by up to 40%*" and not only starting at 40%. RESPONDENT was aware of CLAIMANT's intent. Mr. Krone, who finalized the contract for RESPONDENT, had access to the prior emails chain [*PO2, p. 55, para. 5*]. He even referred explicitly to the email of CLAIMANT when drafting clause 12 FSSA [*PO2, p. 56, para. 12*].

39 Furthermore, the performance of the contract has become "*more onerous*" as CLAIMANT would be forced to sell a part of its company to stay in business if it had to bear the additional 30% tariff [*PO2, p. 59, para. 29*]. A mere percentage is not always appropriate when determining whethefr hardship exists [*Girsberger/Zapolskis, p. 129 et seq.*]. In exceptional cases, such as the present one, the "*overall financial position*" of the aggrieved party is another decisive factor for the hardship question [*Brunner, p. 436 et seq.; Dalhuisen, p. 293*]. This applies to situations in which performing the contract in its

original form would financially endanger the affected party [*Dalhuisen, p. 293; Girsberger/Zapolskis, p. 129 et seq.*]. CLAIMANT was in financial difficulties from 2014 after it suffered hardship through a price increase of 40% when it sold three mares [*PO2, p. 58, para. 21*]. As a result of this, CLAIMANT had to take out two new bank loans in 2014 which could be prolonged only if CLAIMANT was profitable in 2017 and 2018 [*PO2, p. 59, para. 29*]. If CLAIMANT had to pay the whole tariff, it would be impossible for it to achieve the required profit of US$ 300,000 in 2018 [*PO2, p. 59, para. 29*] without selling off part of its business. Due to its financial situation, it is impossible for CLAIMANT to bear the additional cost resulting from the 30% tariff.

40 Because the Parties intended to apply a low hardship threshold and because it would result in CLAIMANT's financial ruin, the 30% increase in cost renders the contract more onerous.

III. THE TARIFF IS AN EVENT COMPARABLE TO HEALTH AND SAFETY REQUIREMENTS

41 RESPONDENT argues that clause 12 FSSA does not cover the 30% tariff [*ANoA, p. 32, para. 19*]. However, the tariff lies within the scope of "*comparable unforeseen events*". This term has to be interpreted according to Art. 8(1) CISG to determine what the Parties intended by including the formulation "*comparable unforeseen events*" in clause 12 FSSA. In particular, any interpretation must consider Ms. Napravnik's email [*Ex. C-4, p. 12*], as Mr. Krone referred to it while drafting the hardship clause [*PO2, p. 56, para. 12*].

42 The Parties intended clause 12 FSSA to apply not only to changes in health and safety requirements but also to other risks. This includes additional tariffs. As CLAIMANT explained in its email, that it was "*not willing to take over any further risks associated with changes in customs regulation or import restrictions*" [*Ex. C-4, p. 12*]. In 2014, Danubia imposed additional health and safety requirements on sales of horses which affected a sale between CLAIMANT and one of its customers [*PO2, p. 58, para. 21*]. In that sale, CLAIMANT had to bear the additional costs and nearly suffered bankruptcy. To avoid such unforeseen, additional costs in the present contract, CLAIMANT suggested including a hardship clause in the FSSA. It is clear that Ms. Napravnik's email encompasses the 30% import tariff as import tariffs fall under customs regulations [*Haas/Eschlbeck, p. 62*]. Consequently, CLAIMANT intended that import tariffs would be covered by the hardship clause and RESPONDENT was aware of that.

43 In her email, Ms. Napravnik indicated that she sought a hardship clause which would protect CLAIMANT from a recurrence of events such as happened in 2014 [*Ex. C-4, p. 12*]. In 2014, CLAIMANT was adversely affected by unexpected health and safety requirements. The present event is comparable to what happened in 2014. CLAIMANT could neither control the 30% tariff nor the health and safety requirements as they were both governmental measures. Moreover, as in 2014, the Danubian government imposed the strict health and safety requirements to prevent the spread of foot and mouth disease, CLAIMANT could import its goods only after a long period of quarantine [*PO2, p. 58, para 21*]. In the present case, the additional costs also occurred at the moment of importation [*Ex. C-6, p. 15*]. Furthermore, in both cases, the additional costs that led to hardship occurred when agricultural goods were sold

44 In conclusion, the wording of clause 12 FSSA covers the 30% tariff as it is a "*comparable unforeseen event*".

IV. THE PARTIES EXEMPTED CLAIMANT FROM ASSUMING ADDITIONAL COSTS IN CASE OF HARDSHIP

45 A party cannot invoke hardship as a ground for exemption if it assumed the risk of changed circumstances [*Brunner, p. 422*]. Under DDP, the seller is usually responsible for any costs and risks that arise in connection with the transport of the goods, including the duty to pay for import tariffs [*Piltz in: Piltz/Bredow, p. 570*]. As Incoterms like DDP do not provide for the seller's exemption in case of hardship, it would have to pay any additional costs [*Brunner, p. 132*]. The parties do not have to take the Incoterms as they are but may modify the terms [*Piltz in: Piltz/Bredow, p. 27*].

46 CLAIMANT and RESPONDENT derogated from the usual risk allocation under DDP by including clause 12 FSSA. RESPONDENT suggested delivering the goods on the basis of DDP because it wanted to rely on CLAIMANT's expertise in the export and import documentation [*Ex. C-3, p. 11*]. CLAIMANT, however, was "*not willing to take over any further risks associated with such a change in the delivery terms*" [*Ex. C-4, p. 12*]. Accordingly, it suggested to include a hardship clause into the contract to be relieved from paying additional costs arising from certain unforeseeable events [*Ex. C-4, p. 12*]. RESPONDENT agreed to modify the standard DDP agreement by including the hardship clause [*PO2, p. 56, para. 8*]. Thereby, the Parties agreed that CLAIMANT should not take the risks of additional costs regarding import tariffs, where those costs constitute a

hardship situation. In the case at hand, the 30% tariff constitute hardship [*see above, paras. 36-44*]. Consequently, CLAIMANT can rely on the hardship exemption.

47 In sum, both Parties intended to exempt CLAIMANT from any unexpected costs it would have to take under DDP in case this constitutes hardship.

V. THE PARTIES INTENDED THAT THE TRIBUNAL SHOULD ADAPT THE CONTRACT IN CASE OF HARDSHIP

48 The Parties orally agreed that contract adaptation should be the legal consequence of clause 12 FSSA when they met on 12 Apr 2017. According to Art. 11 CISG a contract "*need not be concluded in or evidenced by writing and is not subject to any other requirement as to form*". It is also possible to refer to a witness statement to prove such an oral agreement [*Art. 11 CISG*]. On 12 Apr 2017, Ms. Napravnik (CLAIMANT) suggested to Mr. Antley (RESPONDENT) that the FSSA should provide for a mechanism assuring that the contract can be adapted in case of hardship. This should apply, where the Parties themselves fail to agree on an adaptation [*Ex. C-8, p. 17*]. Mr. Antley agreed and added that the Tribunal should be empowered to adapt the contract [*Ex. C-8, p. 17*]. Thus, both negotiators concluded an oral agreement that the Tribunal should be able to adapt the contract.

49 This oral agreement is valid notwithstanding clause 12 FSSA, which provides as a legal consequence that "*the seller shall not be responsible* [..] *for hardship*" [*Ex. C-5, p. 14, para. 12*]. While the legal consequence "*the seller shall not be responsible*" was already included as part of the preformulated force majeure clause, the new negotiators Mr. Krone and Mr. Ferguson only added the preconditions for hardship to this clause [*PO2, p. 55, para. 3 et seq.*]. This formulation usually relieves the seller from claims for damages in case of force majeure [*Brunner, p. 76 et seq.*]. This clause does not exclude, that in case of hardship, the Tribunal can also adapt the contract. This interpretation is supported by the drafting history of the hardship clause. The existing force majeure clause was only supplemented by the hardship clause [*ANoA, p. 30, para. 4*], indicating that the new negotiators had no specific agreement on the legal consequence of hardship. The new negotiators referred to Ms. Napravnik's email when drafting the clause [*PO2, p. 56, para. 12*] which concerns only the preconditions of hardship, not the legal consequence [*Ex. C-4, p 12*]. Accordingly, the new negotiators had no intent to define the exemption from damages as the exclusive remedy in case of hardship. The possibility of an adaptation

and the remedy of an exemption from liability can be chosen alternatively. In case a party cannot deliver the goods, it is exempted from liability for damages. In case the contract should still be performed, it needs to be adapted. Thus, the oral agreement on adaptation is still valid and not overturned by the written contract.

50 An exemption from damages is not possible in the present case as CLAIMANT has already timely delivered the frozen semen. However, the exclusion of any remedy and retention of the contract's original form would not be useful [*Brunner, p. 517*]. CLAIMANT clarified that it does not want to bear unexpected additional costs. Hence, it was not intended by the Parties to exclude any remedies for CLAIMANT. In the present case, the Parties failed to reach an agreement by renegotiating. As they were unable to reach a new understanding in light of the changed circumstances [*Ex. C-8, p. 18*], a contract adaptation has to be undertaken by the Tribunal.

B. IN ANY EVENT, THE CISG ENTITLES CLAIMANT TO THE PRICE ADAPTATION

51 Even if the Tribunal should assume that CLAIMANT cannot request an adaptation under clause 12 FSSA, the CISG empowers the Tribunal to adapt the contract. Art. 79 CISG covers hardship. As it does not regulate the legal consequence, it needs to be supplemented by Art. 6.2.3 PICC or Art. 6.2.3 MCL which allow for an adaptation of the purchase price (**I**). If the Tribunal finds that Art. 79 CISG does not cover hardship, there is a gap in the CISG which has to be filled with the specific hardship provisions offered by the PICC and the MCL (**II**)

I. ART. 79 CISG IN CONNECTION WITH ARTS. 6.2.3 PICC AND 6.2.3 MCL PROVIDES FOR AN ADAPTATION OF THE CONTRACT IN CASE OF HARDSHIP

52 Contrary to RESPONDENT's allegation [*ANoA, p. 32, para. 20*], CLAIMANT can rely on Art. 79 CISG for the legal consequences despite clause 12 FSSA, if the Tribunal should find that clause 12 FSSA does not regulate the legal consequence of hardship. Art. 6 CISG allows the parties to modify the provisions of the CISG by express or implied agreement [*Mistelis in: Kröll et al., Art. 6 CISG, para. 15*]. In this case, the contractual requirements replace the requirements of the CISG [*Achilles, Art. 6 CISG, para. 8*]. Where a hardship clause does not provide for a legal consequence, the Tribunal should apply the legal consequences provided by the applicable law [*Brunner, p. 517*]. In clause 12 FSSA, CLAIMANT and RESPONDENT defined the requirements for hardship [*Ex. C-5, p. 14, para. 12*]. With that the Parties impliedly deviated from the substantive prerequisites of

Art. 79(1) CISG. However, they did not deviate from Art. 79 CISG regarding the legal consequence. Hence, the Tribunal can apply Art. 79 CISG for the legal consequences.

53 Applying the substantive prerequisites of clause 12 FSSA, the 30% tariff causes hardship for CLAIMANT [*see above, paras. 36-47*]. Art. 79(1) CISG generally covers hardship situations (**1**). However, Arts. 6.2.3 PICC and 6.2.3 MCL, which allow for contract adaptation in case of hardship, should serve to supplement the legal consequences of Art. 79 CISG (**2**). Under those provisions, the Tribunal should adapt the contract (**3**).

1. ART. 79(1) CISG APPLIES TO HARDSHIP

54 Contrary to RESPONDENT's allegation [*ANoA, p. 32, para. 21*], hardship is governed by Art. 79 CISG. According to Art. 79 CISG, a party is exempted from liability if an impediment beyond this party's control arises. Even though Art. 79 CISG does not expressly name hardship, it constitutes an exempting impediment because it falls within the scope of Art. 79(1) CISG.

55 When looking at the drafting and legislative history, it becomes clear that the drafters of the CISG wanted to include hardship in the scope of Art. 79 CISG. The formulation "*impediment*" in the CISG was chosen to avoid an exemption in case of merely unprofitable performance [*Honnold, para. 432.2*]. By contrast, the predecessor of the CISG, the 1964 Convention relating to a Uniform Law on the International Sale of Good [*hereinafter ULIS*] had contained the wording "*circumstances*". Art. 74 ULIS was applicable to legal, physical and economic impossibility as well as in case performance becomes more difficult [*Rimke, p. 211*]. Although, the requirements for an exemption are narrower and more objective in the CISG, this different terminology is not intended to exclude hardship [*Garro in: Felemegas, p. 244*]. "*Impediment*" is a neutral formulation, which does not require the performance to be absolutely impossible [*Atamer in: Kröll et al., Art. 79 CISG, para. 80; Cass., 19 Jun 2009*]. Therefore, the wording "*impediment*" in Art. 79(1) CISG also includes hardship as an impediment [*CISG-AC Op. No. 7, para. 26*]. Moreover, it was proposed to include a provision, which enables a party to avoid or adapt a contract in the event of "*unexpected excessive damages*" [*CISG-AC Op. No. 7, para. 29*]. This proposal was however not taken up again in subsequent debates so that hardship was not discussed more specifically [*CISG-AC Op. No. 7, para. 29*]. Nonetheless, the fact that economic impossibility is able to exempt the debtor of liability

was the main view [*Schlechtriem/Butler, para 291*]. Consequently, the legislative and drafting history shows that Art. 79 CISG does include hardship.

56 Secondly, hardship lies within the scope of Art. 79 CISG as interpreted under Art. 7(1) CISG. The principal purpose of Art. 7(1) CISG is the uniform application of the CISG in international sales law [*Rimke, p. 65*]. In case hardship is not governed by the CISG, the Tribunal would have to apply national law [*Garro in: Felemegas, p. 243*]. Due to different domestic conflict of law rules, this would lead to a wide range of legal doctrines which deal with hardship [*CISG-AC Op. No. 7, para. 35*]. This contradicts the purpose of Art. 7(1) CISG.

57 As a result, hardship is governed by Art. 79 CISG as the provision considers hardship to be an exempting "*impediment*". Thus, a party can rely on Art. 79 CISG if a hardship situation occurs.

2. THE TRIBUNAL SHOULD USE ARTS. 6.2.3 PICC OR 6.2.3 MCL TO SUPPLEMENT ART. 79 CISG BY WAY OF ART. 7(2) CISG

58 Even though Art. 79 CISG covers hardship situations, the Tribunal should be flexible in applying the legal consequences of Art. 79 CISG [*Brunner, p. 218*]. This provision limits the effect of exemptions to claims for damages. However, in case of hardship, the relevant question is whether the obligor can request an adaptation of the contract [*Atamer in: Kröll et al., Art. 79 CISG, para. 80*]. Therefore, the Tribunal *"should have the power to apply the legal consequences of Article 6.2.3(4) PICC instead of simply excusing the obligor according to Article 79(5) CISG"* [*Brunner, p 218*]. Since there is no specific provision which would allow to adapt the contract in case of hardship, the CISG has an internal gap in the remedies, within the meaning of Art. 7(2) CISG (**a**). To fill this gap, the Tribunal should either use Arts. 6.2.3 PICC or 6.2.3 MCL as supplement for Art. 79 CISG (**b**).

a. THE CISG HAS AN INTERNAL GAP REGARDING THE REMEDY OF ADAPTATION

59 According to Art. 7(2) CISG "*questions concerning matters governed by [the CISG] which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law*". Thus, Art. 7(2) CISG refers to internal gaps, i.e. matters governed by the Convention but not expressly settled by its text [*Perales Viscasillas in: Kröll et al., Art. 7 CISG, para. 56*]. On

the contrary, matters excluded from the CISG's scope constitute external gaps which have to be dealt with exclusively under the applicable domestic law [*ibid.*].

60 Art. 4 CISG states that the CISG governs the rights and obligations of the seller and the buyer. Adaptation can be such a right of the seller or the buyer. As hardship is governed by the CISG, its legal consequences must also be within the scope of the CISG. Additionally, Art. 4 CISG lists the issues which are in particular outside the scope of the CISG. According to this provision, the CISG does not regulate matters of validity and the ownership of goods. The remedy of adaptation is neither of both.

61 In conclusion, adaptation is a matter governed by the CISG but not expressly provided for in the CISG. Consequently, adaptation constitutes an internal gap within Art. 7(2) CISG.

b. ART 6.2.3 PICC OR ART. 6.2.3 MCL APPLY AS A GENERAL PRINCIPLE UNDERLYING THE CISG OR AS THE APPLICABLE DOMESTIC LAW

62 If a tribunal is faced with a matter considered to be a gap within the meaning of Art. 7(2) CISG, it should try to fill this gap primarily within the CISG by resorting to the general principles on which the CISG is based [*Perales Viscasillas in: Kröll et al.; Art. 7 CISG, para. 57*]. There is no principle underlying the CISG, out of which a claim for contract adaptation could arise. In those cases, the tribunal should resort to external principles of international sales law [*ibid.*]. The PICC are such external principles [*Perales Viscasillas in: Kröll et al.; Art. 7 CISG, para. 67*]. This solution is appropriate as the PICC contain international and uniform rules [*Kruisinga, p. 153; Magnus in: Staudinger, Art. 7 CISG, para. 14*]. Thus, the application of the PICC as a supplement avoids a resort to the national law and keeps "*the settlement of the disputes within its international legal habitat*" [*Garro, p. 1152 et seq.*]. By referring to the PICC fairness will be promoted instead of applying national law rules which are probably "*more accessible or familiar to one party than another*" [*Garro, p. 1153 et seq.*]. Therefore, the Tribunal should take the PICC into account to supplement the CISG. They regulate the legal consequences of hardship in Art. 6.2.3 PICC.

63 Even if the Tribunal should decide that the PICC cannot be used to interpret and supplement the CISG, Art. 6.2.3 MCL applies as the applicable national law. Absent any general principle, Art. 7(2) CISG states that recourse to the applicable national law is to be made through the application of the rules of private international law [*Magnus in: Staudinger, Art. 7 CISG, para 38*]. In the case at hand, Danubia, Mediterraneo and

Equatoriana have all verbatim adopted the Hague Principles on Choice of Law in International Commercial Contracts [*hereinafter Hague Principles*] their general conflict of law rules [*PO2, p. 61, para. 43*]. According to Art. 2(1) Hague Principles the law chosen by the parties governs the contract. The FSSA is governed by Mediterranean Law [*Ex. C-5, p. 14, para. 14*]. Thus, the MCL is the applicable domestic law. As the MCL is a verbatim adoption of the PICC [*PO1, p. 53, para. III.4*], it regulates the legal consequences of hardship in Art. 6.2.3 MCL. Thus, the Tribunal should use Art. 6.2.3 MCL to fill the gap within the CISG.

64 In view of the above, Art. 7(2) CISG results in applying either Art. 6.2.3 PICC or Art. 6.2.3 MCL should the Tribunal find that the CISG has an internal gap concerning legal consequences of hardship.

3. THE TRIBUNAL SHOULD ADAPT THE CONTRACT EITHER UNDER ART. 6.2.3 PICC OR ART. 6.2.3 MCL

65 In case of hardship the disadvantaged party can, in the first place, demand renegotiations according to Arts. 6.2.3(1) PICC and 6.2.3(1) MCL. If the renegotiations fail, the court can intervene if requested, according to Arts. 6.2.3(3) PICC and 6.2.3(3) MCL. The term "*court*" also includes tribunals as Arts. 1.11 PICC and 1.11 MCL clarify. The tribunal can intervene by either terminating or adapting the contract, if reasonable, according to Art. 6.2.3(4) PICC or Art. 6.2.3(4) MCL.

66 The imposition of the 30% tariff resulted in a hardship situation for CLAIMANT according to the prerequisites of clause 12 FSSA [*see above, paras. 36-47*]. To settle the hardship situation amicably, CLAIMANT initiated renegotiations with RESPONDENT [*PO2, p. 60, para. 35*]. After RESPONDENT broke off the renegotiations [*Ex. C-8, p. 18*], CLAIMANT requested an adaptation by the Tribunal [*NoA, p 7, para. 18 et seqq.*].

67 In the case at hand, the adaptation of the contract is the only reasonable consequence. It is preferred to adapt a contract rather to terminate it because it is milder and less interfering [*Brunner, p. 218*]. The termination of the contract would impose the full risk on one party [*Atamer in: Kröll et al., Art. 79 CISG, para. 83*]. In the present case, CLAIMANT would have to bear all costs for the tariff, if the Tribunal terminated the contract. As a result, CLAIMANT would be endangered to lose a part of its company by paying the whole tariffs [*PO2, p. 59, para. 29*]. On the other hand, RESPONDENT would not be financial endangered if it had to pay parts of the tariff [*PO2, p. 59, para. 30*]. As this is not an equitable solution,

tribunals should adapt contracts where it is possible [*McKendrick in: Vogenauer, Art. 6.2.3 PICC, para. 6; Schwenzer, p. 738*]. To terminate the contract would, further, ignore the risk allocation the Parties made in the contract. The Parties included the hardship because it was important for CLAIMANT not to be burdened with unexpected additional costs associated with DDP delivery [*see above, paras. 45-47*].

68 Consequently, the Tribunal should adapt the contract in sense of Art. 6.2.3(4)(b) PICC orArt. 6.2.3(4)(b) MCL to restore the equilibrium of the contract.

II. SHOULD THE TRIBUNAL FIND THAT HARDSHIP IS NOT REGULATED IN ART. 79 CISG CLAIMANT CAN INVOKE THE PICC OR THE MCL AS SUPPLEMENT

69 In case the Tribunal should assume that hardship is not an impediment within the meaning of Art. 79 CISG, the CISG has an internal gap in the sense of Art. 7(2) CISG. As a result, this gap needs to be filled by referring to general principles under the CISG or the applicable national law [*Art. 7(2) CISG*]. Those are either the PICC or the MCL [*see above, paras. 62 et seq.*].

70 Hardship falls within the ambit of the CISG, as it is governed by the CISG but not expressly settled in it. According to Art. 4 CISG, matters of validity and the ownership of goods are outside the scope of the CISG. Hardship is neither an issue of validity nor of ownership [*CISG-AC Op. No. 7, para. 36*; *Tribunale Civile di Monza, 14 Jan 1993*]. Rather, the most legal systems solve the hardship question like force majeure or impossibility [*CISG-AC Op. No. 7, para. 36*]. Moreover, as explained earlier [*see above, paras. 54-57*], the drafting and legislative history of Art. 79 CISG proves that the drafters of the CISG did not intend to leave the hardship question unsettled in the CISG [*CISG-AC Op. No. 7, para. 27 et seqq.; Garro in: Felemegas, Art. 79 CISG, p. 245*]. Consequently, hardship lies within the ambit of the CISG.

71 Therefore, Art. 7(2) CISG enables CLAIMANT to invoke the PICC as a general principle underlying the CISG [*see above, paras. 62-64*]. In addition to Arts. 6.2.3 PICC and 6.2.3 MCL, the requirements for hardship are defined in Arts. 6.2.2 PICC and 6.2.2 MCL. However, Art. 1.5 PICC as well as Art. 1.5 MCL enable the parties to vary particular provisions "*so as to adapt them to the specific needs of the kind of transaction involved*" by express or implied party agreement [*Off Cmt 1 and 2 to Art. 1.5 PICC, p. 13 et seq.*]. Since the Parties explicitly defined the circumstances triggering the hardship clause in the FSSA [*Ex. C-5, p. 14, para. 12*], they replace the

requirements of Arts. 6.2.2 PICC respectively 6.2.2 MCL. Hence, the Tribunal has to consider the conditions set out by clause 12 FSSA. Those are fulfilled in the present case [*see above, paras. 36-44*].

72 With regard to the legal consequences, the Tribunal may also resort to the PICC respectively the MCL. As shown above [*see above, para. 50*], the Tribunal should adapt the contract as the only reasonable option in the present case.

73 Consequently, if the Tribunal should assume that Art. 79 CISG regulates neither the prerequisites nor the legal consequences of hardship, the Tribunal should apply the hardship provisions of the PICC or the MCL to supplement the CISG. Under these provisions the Tribunal should adapt the contract.

C. TO RESTORE THE EQUILIBRIUM OF THE CONTRACT, RESPONDENT HAS TO PAY US$ 1,250,000 TO CLAIMANT

74 As either clause 12 FSSA [*see above, paras. 35-50*] or the CISG [*see above, paras. 51-73*] empower the Tribunal to adapt the contract, it should apportion the additional amount resulting from the 30% tariff so that CLAIMANT has to bear US$ 250,000 [*i.e. 5%*].

75 When adapting the contract, the Tribunal has to make sure that the party who does not suffer from hardship, has to assume all the costs which are not bearable for the aggrieved party [*Brunner, p. 499*]. This makes it necessary, to take into account the financial situation as well as the individual contract, in particular the original risk allocation in the contract [*Brunner, pp. 499, 501; Kröll, p. 148*]. Additionally, the Tribunal should consider, how the Parties would have split the additional costs if they had known or foreseen the hardship situation by interpretation under Art. 8(1) CISG [*Brunner, p. 500*]. Taking all those factors into account, CLAIMANT can merely bear 5% of the tariff.

76 The Parties would have agreed that RESPONDENT has to bear the majority of the costs if they had known about the tariff at the time of formation of the contract. Due to CLAIMANT's difficult financial situation, caused by a hardship event in 2014 [*PO2, p. 58, para. 21*], CLAIMANT would not have agreed to a contract without profit. As CLAIMANT had to prolong its credits, it would have insisted on RESPONDENT bearing the majority of the costs. On the other hand, RESPONDENT would have agreed to pay a higher price for the semen. Firstly, RESPONDENT wanted to build up its own racehorse breeding program [*Ex. C-1, p. 9*]. Thus, it needed semen from the best racehorses. As Nijinsky III is a famous world class stallion, RESPONDENT had a high interest to buy his semen [*Ex. C-1, p. 9*].

Secondly, the ban on artificial insemination was only temporarily lifted [*NoA, p. 5, para. 6; Ex. C-1, p. 9*]. As RESPONDENT was afraid that the ban would soon become effective again, it would have agreed to a higher price.

77 The original risk allocation in the contract supports the result that RESPONDENT has to bear the majority of the costs. It is important to consider which party took the majority of risks in the overall contract [*Brunner, p. 499*]. A closer look at the FSSA reveals that RESPONDENT bears the majority of the contractual risks. According to Art. 2, 3, and 7 of the FSSA, RESPONDENT bears the full risk for the use of the semen. RESPONDENT has no live foal guarantee as well as no guarantee for the success of fertilizing [*Ex. C-5, p. 14, paras. 2, 3, 7*]. Furthermore, RESPONDENT bears the risk of lost shipment and delays in case of force majeure [*Ex. C-5, p. 14, para. 12*]. In this case, CLAIMANT is not liable for any damages RESPONDENT might incur. Another indication for the risk allocation is that RESPONDENT pays the price in instalments before the semen is shipped [*Ex. C-5, p. 14, para. 5*]. If the semen becomes lost or cannot be shipped, RESPONDENT bears the risk not to be able to reimburse the pre-paid purchase price in case of a bankruptcy of CLAIMANT. On the other hand, CLAIMANT only bears the risk during transportation, which is additionally restricted in case of hardship and force majeure [*Ex. C-5, p. 14, para. 12*]. In view of the above, RESPONDENT bears the majority of the risks.

78 Taking the financial situation and the risk allocation into account, CLAIMANT has to pay only 5% of the tariff. Consequently, we respectfully request the Tribunal to adapt the contract and to order Respondent to pay US$ 1,250,000 or any other amount the Tribunal deems appropriate resulting out of that.

CONCLUSION TO ISSUE B

79 The imposition of the 30% tariff constitutes a hardship situation for CLAIMANT in the meaning of clause 12 FSSA. In case of hardship, Mr. Antley and Ms. Napravnik agreed to empower the Tribunal to adapt the contract. Hence, the Tribunal should restore the equilibrium of the contract. Alternatively, CLAIMANT can demand an adaptation according to Art. 79 CISG in connection with Art. 6.2.3 PICC or Art. 6.2.3 MCL. Even if the wording of Art. 79 CISG does not cover hardship, the specific hardship provisions in the PICC or the MCL entitles the Tribunal to adapt the contract. As the tribunal can adapt the contract either way, RESPONDENT should assume a payment of US$ 1,250,000.

ISSUE C – CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

80 CLAIMANT is entitled to submit the partial interim award from RESPONDENT's other arbitral proceeding as evidence to the present proceeding. According to the HKIAC Rules and the IBA Rules on the Taking of Evidence in International Arbitration [*hereinafter IBA Rules*] the evidence is admissible (**A**). Even if the evidence was obtained illegally, it may be submitted (**B**).

A. THE EVIDENCE IS ADMISSIBLE ACCORDING TO HKIAC RULES AND THE IBA RULES

81 The Tribunal has the power to exclude or admit evidence in the proceeding pursuant to Arts. 22.2 and 22.3 HKIAC Rules. Thereby, it has the discretion to decide which evidence can be submitted to the proceeding or shall be excluded. It has the power to determine the relevance, admissibility, weight and materiality of the evidence [*Moser/Bao, Art. 22.2 HKIAC Rules, para. 9.153*]. Where the HKIAC Rules do not give the tribunal clear guidance on how to evaluate the admissibility of evidence in international arbitration, the IBA Rules must be taken into account (**I**). Following the IBA Rules, the evidence from RESPONDENT's other arbitral proceeding is admissible (**II**).

I. THE IBA RULES ARE APPLICABLE AND MUST BE CONSIDERED TO DETERMINE THE ADMISSIBILITY OF THE EVIDENCE

82 The HKIAC Rules themselves do not dictate a standard to determine if the evidence is admissible. To determine the admissibility of the evidence, the IBA Rules can be considered [*Moser/Bao, Art. 22.2 HKIAC Rules, para. 9.154; cf. Born, ICA, p. 2311*]. In arbitration in general and under the HKIAC Rules, the IBA Rules are often adopted or referred to [*Moser/Bao, Art. 22.2 HKIAC Rules, para. 9.155*]. They are widely accepted as internationally applicable standard in arbitration [*Marghitola/Lew, p. 33*]. Consequently, the Tribunal should apply the IBA Rules to determine the admissibility of the evidence.

II. FOLLOWING THE IBA RULES, THE EVIDENCE FROM RESPONDENT'S OTHER ARBITRAL PROCEEDING IS ADMISSIBLE BECAUSE IT IS NOT CONFIDENTIAL

83 In general, a tribunal shall take as much evidence as it deems necessary to reach a just and well-supported decision [*Blair, p. 239*]. Art. 9.2 IBA Rules lists reasons in which the tribunal should exclude evidence from a proceeding. In this case, none of these grounds for exclusion apply. The evidence is material and relevant in terms of Art. 9.2(a) IBA

Rules (**1**) and the evidence contains no information justifying commercial or technical confidentiality in terms of Art. 9.2(e) IBA Rules (**2**).

1. THE PARTIAL INTERIM AWARD IS RELEVANT TO THE CASE AND MATERIAL TO ITS OUTCOME IN TERMS OF ART. 9.2(A) IBA RULES

84 Following Art. 9.2(a) IBA Rules the Tribunal should exclude any evidence that is not relevant to the case or material to its outcome. The partial interim award is relevant to the present case (**a**) and material to its outcome (**b**).

a. THE PARTIAL INTERIM AWARD IS RELEVANT TO THE CASE TO PROVE RESPONDENT'S CONTRADICTORY BEHAVIOUR

85 Evidence is relevant to the case if it might be necessary for a party to prove its allegations [*O'Malley, p. 269*]. However, it is sufficient if it is prima facie relevant, i.e. likely to be relevant [*McLachlan et al., para. 19*; *O'Malley, pp. 55, 268 et seq*.]. Thereby, the relevance to the outcome must not be proven at the point in time the tribunal admits the evidence [*O'Malley, pp. 55, 268 et seq.*].

86 The partial interim award is relevant to the case because it proves RESPONDENT's contradictory behaviour in the other proceeding. Contradictory statements can undermine the credibility of the alleging party [*Waincymer, p. 789*] The partial interim award undermines RESPONDENT's credibility and shows that it behaves contradictory because of two reasons:

87 First, RESPONDENT claims that in the present proceeding the Tribunal could not adapt the contract because the wording of the arbitration clause and the hardship clause did not allow for it [*ANoA, p. 32, para. 19*]. To the contrary, RESPONDENT demands an adaptation of the contract under the ICC Hardship Clause [*hereinafter ICC Clause*] in the other proceeding [*PO2, p. 60, para. 39*]. Similar to clause 12 FSSA between CLAIMANT and RESPONDENT, the ICC Clause does not contain an express authorisation for the tribunal to adapt the contract [*ICC Clause 2.a*]. Therefore, RESPONDENT behaves contradictory in denying a contract adaptation without express authorisation in one proceeding and in the other proceeding asking for one.

88 Second, on the one hand, RESPONDENT claims that it suffers hardship in the other proceeding due to a tariff of 25% [*PO2, p. 60, para. 39*]. The ICC Clause requires for a hardship situation that the performance of RESPONDENT's contractual duties has become

"*excessively onerous*" [*ICC Clause 2.a*].The event which affects the CLAIMANT's performance in the present proceeding is a tariff of 30% [*Ex. C-7, p. 16*]. Contrary to the ICC Clause, clause 12 FSSA requires only that the performance has become "*more onerous*" [*Ex. C-5, p. 14, para. 12*]. If the performance becomes "*excessively onerous*", as required by the ICC Clause, by an increase of the price of 25%, it is "*a fortiori*" also "*more onerous*" as required by the FSSA, if the price increases by 30%. If RESPONDENT claims that 25% is hardship, it behaves contradictorily in claiming that 30% is not.

89 This contradiction undermines RESPONDENT's credibility. Therefore, the partial interim award is at least likely to be relevant.

b. THE PARTIAL INTERIM AWARD IS MATERIAL TO THE OUTCOME OF THE CASE BECAUSE IT IS NECESSARY FOR CLAIMANT IN ORDER TO PRESENT ITS CASE

90 Evidence is material to the outcome of a case if it might influence the tribunal in rendering the award [*O'Malley, p. 58*]. The evidence must be necessary for a complete consideration of the factual issues [*Marghitola/Lew, p. 53; Waincymer, p. 859*]. *"To be necessary does not mean that the case cannot be won without it but that the case cannot be presented optimally without it"* [*Waincymer, p. 859*]. In order to consider the facts completely, the Tribunal should use as much evidence as possible. This is necessary, because the Tribunal's purpose is to develop a just and right decision [*Blair, pp. 239, 258*], since there is no appeal on facts of an arbitral award [*Blair, p. 239*]. Appeals on awards before a state court only deal with questions of procedural law [*cf. Art. V(1) NYC; Art. 34(2) UML*] Accordingly, especially in arbitration, each party must be able to present its case entirely [*Art. 18 DAL*]. The partial interim award is necessary to prove that RESPONDENT behaves contradictorily in the other proceeding. The previous behaviour of a party allows the Tribunal to draw conclusions about the credibility of this party. In the case at hand, RESPONDENT's previous behaviour gives a hint to its own understanding of hardship. Under a stricter formulation it invokes hardship under a lower threshold of 25% instead of 30% as in this proceeding. Hence, the fact that RESPONDENT behaved contradictorily in the other proceeding might influence the Tribunal's decision in the present proceeding. Therefore, the evidence is material to the outcome of the case.

91 Consequently, the evidence should not be excluded based on Art. 9.2(a) IBA Rules because it is relevant to the case and material to its outcome.

2. ART. 9.2(E) IBA RULES DOES NOT PREVENT CLAIMANT FROM SUBMITTING THE PARTIAL INTERIM AWARD

92 According to Art. 9.2(e) IBA Rules, the Tribunal shall exclude any evidence on the grounds of commercial or technical confidentiality which it finds to be compelling. The partial interim award which CLAIMANT wants to submit is neither technically nor commercially confidential (**a**). Even if the partial interim award was commercially or technically confidential, the confidentiality is not compelling (**b**).

a. THE PARTIAL INTERIM AWARD IS NOT CONFIDENTIAL

93 RESPONDENT claims that Art. 42 HKIAC Rules 2013 contains an express obligation to keep the proceedings confidential [*MaRes, p. 50*]. Following Art. 42.1 HKIAC Rules 2013, no party may publish or disclose any information regarding the arbitration or the award made in the arbitration. However, CLAIMANT, as non-party to the other proceeding, is not bound by Art. 42 HKIAC Rules 2013 and is therefore allowed to bring in the partial interim award (**aa**). The award is also not commercially or technically confidential in terms of Art. 9.2(e) IBA Rules (**bb**).

aa. ART. 42 HKIAC 2013 DOES NOT BIND CLAIMANT BECAUSE IT IS A THIRD PARTY

94 Art. 42.1 HKIAC Rules 2013 applies pursuant to Art. 42.2 HKIAC Rules 2013 to emergency arbitrators, experts, witnesses and the secretary of the arbitral tribunal [*Moser/Bao, Art. 42.2 HKIAC Rules, para. 12.31*]. This enumeration is exhaustive and, therefore, Art. 42.2 HKIAC Rules 2013 does not apply to third parties [*Born, ICA, p. 2821; Moser/Bao, Art. 42.2 HKIAC Rules, para. 12.31*]. Thus, the confidentiality obligation is only binding on persons directly involved in the proceedings and not third parties [*Born, ICA, p. 2788 et seq.*]. Consequently, CLAIMANT is not bound by Art. 42 HKIAC Rules 2013, because it is not a party in the other proceeding. Thus, CLAIMANT can submit the partial interim award, even though there is a confidentiality agreement between RESPONDENT and its customer regarding the arbitration.

bb. THE PARTIAL INTERIM AWARD IS NOT COMMERCIALLY OR TECHNICALLY CONFIDENTIAL IN TERMS OF ART. 9.2(E) IBA RULES

95 The purpose of Art. 9.2(e) IBA Rules is to protect business secrets [*O'Malley, p. 301; Raeschke-Kessler, p. 413; cf. Noussia, p. 24*]. Business secrets are the financial inner workings of a company, formulas, know-how and trade secrets [*O'Malley, p. 301*].

Art. 9.2(e) IBA Rules applies when a party uses great efforts to keep certain evidence from disclosure to business contacts or the public [*cf. O'Malley, p. 301*].

96 RESPONDENT did not use great efforts to keep the partial interim award from becoming public or available to business contacts. The partial interim award was easy to access because RESPONDENT had used an outdated firewall to protect it [*PO2, p. 61, para. 42*]. Therefore, Art. 9.2(e) IBA Rules does not apply for the partial interim award. Furthermore, there are no indications that the partial interim award contains information about financial inner workings, formulas, know-how or any trade secrets [*cf. PO2, p. 60, para. 39*]. Consequently, the partial interim award does not contain confidential evidence in terms of Art. 9.2(e) IBA Rules.

b. EVEN IF THE PARTIAL INTERIM AWARD IS COMMERCIALLY OR TECHNICALLY CONFIDENTIAL, THE CONFIDENTIALITY IS NOT COMPELLING

97 If evidence is commercially or technically confidential, a tribunal still has discretion to admit it to the proceeding [*O'Malley, p. 304*]. The confidentiality of evidence is compelling only if there is a legitimate need to keep it secret [*O'Malley, p. 301*]. The purpose of Art. 9.2(e) IBA Rules - to protect business secrets - would not be frustrated if the Tribunal allowed CLAIMANT to submit the partial interim award. Information is not a business secret anymore if it is publicly available. The partial interim award can already be accessed, because it can be bought from a company that provides intelligence to the racehorse industry [*PO2, p. 60, para. 41*]. Accordingly, it is not secret anymore and does not meet the requirements to be protected under Art. 9.2(e) IBA Rules.

98 The party which objects to the submission of evidence must offer a clear explanation of the negative effects expected if the evidence is disclosed [*O'Malley, p. 302*]. RESPONDENT has offered no explanation as to why disclosing the evidence will have any negative effect. Therefore, even if the Tribunal finds that the partial interim award is confidential, the confidentiality is not compelling. Consequently, the Tribunal should not exclude the partial interim award because of Art. 9.2(e) IBA Rules.

III. IT HAS NO IMPACT ON THE ADMISSIBILITY OF THE EVIDENCE THAT IT HAS BEEN OBTAINED ILLEGALLY

99 RESPONDENT claims that the evidence should be inadmissible because it has been obtained illegally [*MaRes, p. 50*]. Neither institutional rules, nor the Mediterranean, Danubian or

Equatorianian Arbitration Law contain an explicit rule on how to treat illegally obtained evidence [*PO2, p. 61, para 46*]. However, CLAIMANT should be allowed to submit the evidence because CLAIMANT was not involved in obtaining the evidence unlawfully

100 If a party did not participate in the illegal acquisition of the evidence, the tribunal should consider the evidence as "*prima facie*" admissible [*Blair, p. 256*]. To prevent parties from engaging in illegal actions in order to gain documents, the Tribunal should exclude the evidence if the party took part in obtaining the evidence illegally [*cf. Blair, p. 256*]. The partial interim award was either obtained through a hack of RESPONDENT's computer system or through disclosure by two of RESPONDENT's former employees [*MaRes, p. 50*]. CLAIMANT was not involved in either of these actions and was, therefore, not involved in the illegal acquisition. Instead, CLAIMANT heard about the proceeding at a conference from a business partner that had been working for the other party in RESPONDENT's arbitration with its Mediterranean customer. However, this business partner was not directly involved in this proceeding [*PO2, p. 60, para. 40*]. After CLAIMANT was aware of the main issues in dispute, it arranged an opportunity to buy the partial interim award from a company that provides intelligence in the racehorse sector [*PO2, p. 61, para. 41*]. None of the actions CLAIMANT undertook to achieve the evidence are prohibited by law. Therefore, CLAIMANT was not involved in any illegal actions when obtaining the evidence. Accordingly, there is no reason to reject the interim award.

CONCLUSION TO ISSUE C

101 CLAIMANT should be entitled to submit the evidence, since it is admissible. None of the grounds for an exclusion under the IBA Rules are applicable. The Tribunal needs to consider the partial interim award to reach a just and right decision. Furthermore, as CLAIMANT was not involved in illegally obtaining the evidence, it is admissible. Consequently, the Tribunal should allow CLAIMANT to submit the partial interim award as evidence.

REQUEST FOR RELIEF

In light of the foregoing, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal to find that:

(1) The arbitration agreement shall be interpreted in accordance with Mediterranean Law;

(2) The Tribunal has the power to adapt the contract;

(3) CLAIMANT is entitled to US$ 1,250,000 resulting from a price adaptation under clause 12 FSSA or under the CISG;

(4) The evidence from the other arbitral proceeding can be submitted by CLAIMANT.

Certificate and Choice of Forum

To be attached to each Memorandum

I Lukas Tepke, on behalf of the Team for (name of School) Friedrich-Schiller University of Jena hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☒ Our School is competing in both Vis East Moot and Vienna Vis Moot.

- ☒ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

- ☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)
  - ☐ Vis East Moot in Hong Kong, or
  - ☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Friedrich Schiller University of Jena

Name Lukas Tepke

Signature