SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

RUPRECHT-KARLS-UNIVERSITÄT HEIDELBERG

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

STELLA ELMENTALER • FELIX KEMMLING

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TABLE OF ABBREVIATIONS

Abbreviation	Explanation
AA	Arbitration Agreement
Answ.	Answer to the Notice of Arbitration
Art.	Article
BGH	Bundesgerichtshof (German Federal Supreme Court of Justice)
cf.	confer (compare)
CIF	Cost Insurance and Freight (ICC Incoterm)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CISG-online	Internet database on CISG decisions and materials, available at www.globalsaleslaw.org
cl.	clause
DAL	Danubian Arbitration Law
DAP	Delivered At Place (ICC Incoterm)
DDP	Delivered Duty Paid (ICC Incoterm)
Ed.	Edition
ed.	editor
eds.	editors
e.g.	exempli gratia (for example)
emph. ad.	emphasis added
et al.	et alii (and others)
et seq.	et sequens (and following)
et. seqq.	et sequentes (and following; more than one page/paragraph)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FSSA	Frozen Semen Sales Agreement
HKIAC Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration 2010
ibid.	ibidem (the same place)

i.e.	id est (that is)
LJ	Lord Justice
MCL	Mediterranean Contract Law
MfC	Memorandum for CLAIMANT
No.	Number
NoA	Notice of Arbitration
NYC	New York Convention
p.	page
PECL	Principles of European Contract Law
pp.	pages
para.	paragraph
paras.	paragraphs
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RotM	Rules of the Moot
sic	sic erat scriptum (thus was it written)
StGB	Strafgesetzbuch (German Criminal Code)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts 2016
U.S.C.	United States Code
USD	United States Dollar
v.	versus
Vol.	Volume

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STATEMENT OF FACTS

Phar Lap Allevamento (**CLAIMANT**), based in Mediterraneo, and *Black Beauty Equestrian* (**RESPONDENT**), based in Equatoriana, are businesses involved in the breeding of racehorses.

3/17	RESPONDENT inquires for the delivery of frozen semen from CLAIMANT's star stallion. CLAIMANT makes an offer for 100 doses and agrees to DDP delivery.
4/17	The Mediterranean people elect a president that had previously declared intentions to impose tariffs as part of his protectionist agenda.
10/4/17 - 11/4/17	RESPONDENT proposes choosing Equatoriana as the seat of arbitration and Equatorianian law to govern the arbitration clause in exchange for accepting Mediterranean law as governing the main contract. Referring to its internal policy, CLAIMANT suggests Danubia as a neutral seat of arbitration.
12/4/17	After a joint meeting, the Parties' initial negotiators, Ms. Napravnik and Mr. Antley, are injured in a car accident and consequently unable to finalise the contract.
6/5/17	The final version of the Frozen Semen Sales Agreement includes a hardship clause (cl. 12), a choice of Mediterranean law for the Sales Agreement (cl. 14) and an arbitration agreement with seat in Danubia (cl. 15). It is signed by Mr. Ferguson and Mr. Krone, who had finalised the contract on behalf of the Parties.
19/12/17	Equatoriana announces tariffs of 30 per cent on agricultural goods.
21/1/18	Ms. Napravnik asks for compensation for the tariffs affecting the final shipment. Mr. Shoemaker repeatedly emphasises his lack of authority regarding any legally binding agreements. After he states that RESPONDENT will fulfil its contractual obligations whatever they may entail, Ms. Napravnik orders the last delivery.
31/7/18	After failed renegotiations, CLAIMANT submits its Notice of Arbitration.
2/10/18	CLAIMANT informs the Tribunal about its intent to introduce a Partial Interim Award from an arbitration between RESPONDENT and a third party. It is unclear whether the evidence was originally obtained through a breach of confidentiality or an illegal hacking attack. CLAIMANT intends to purchase the award from a company with a questionable reputation against payment of USD 1,000.

SUMMARY OF ARGUMENT

It is unfortunate to bet on the wrong horse. It is even more unfortunate to bet on a horse that was never in the race. Yet, this is precisely the feat CLAIMANT has accomplished by requesting contract adaptation. Neither is the Tribunal empowered to adapt, nor do the relevant provisions in the contract and the CISG allow for an adaption in cases of hardship. This is irrespective of the fact that the Equatorianian tariffs did not even trigger a hardship situation, which is why in any event employing such an invasive remedy would be misplaced in the case at hand.

First, the Tribunal lacks the powers to adapt the contract. The present arbitration agreement is governed by the law of Danubia. Under Danubian law, the arbitration agreement cannot be interpreted as granting the Tribunal the power to adapt the contract. Even if Mediterranean law applied, the Tribunal would not be competent to adjust the purchase price. This is because the relevant *lex arbitri* only vests tribunals with adaptation powers if they are *expressly authorised* by the parties. However, there is no such express authorisation in the present case [**Part I**].

Moreover, CLAIMANT's reckless encouragement of illegal activities in order to obtain confidential and privileged information may under no circumstances be rewarded. Confidentiality as the centrepiece of arbitration must be protected from this kind of violation. It seems particularly odd that CLAIMANT would go to such lengths to unearth contents although they are of no substantial relevance to the present case [**Part II**].

Lastly, CLAIMANT is not entitled to any payment by RESPONDENT under cl. 12 FSSA or the CISG. Albeit economically understandable, CLAIMANT's attempt to conceal the inadequacies of its negotiators by inflating the significance of its original wishes remains a misrepresentation. The hardship clause allows for a clear-cut assessment of the situation: CLAIMANT assumed full risk by agreeing to shipment DDP and the only remedy provided for is an exemption from liability. Moreover, CLAIMANT is not suffering hardship in the sense of cl. 12 FSSA. Retaliatory tariffs are not comparable to health and safety requirements and the costs incurred by CLAIMANT do not constitute hardship by any acknowledged standard. The hardship clause derogates the potentially relevant CISG provisions and renders them inapplicable. No gap-filling mechanism may reasonably lead to contract adaption in such a case [**Part III**].

The fact that a horse was not signed up for the race does not necessarily mean that it is a bad horse. What it does mean, however, is that this horse will not win the race.

ARGUMENT

PART I: THE TRIBUNAL DOES NOT HAVE THE POWERS TO ADAPT THE CONTRACT

1 The Arbitral Tribunal ("the **Tribunal**") does not have the powers to adapt the Frozen Semen Sales Agreement ("**FSSA**"). Under the *lex arbitri*, which is the Danubian Arbitration Law ("**DAL**"), tribunals may only adapt contracts if expressly authorised by the parties [*cf. PO2-36*, *p. 60*]. The wording of cl. 15 FSSA, which is the present arbitration agreement ("**AA**"), does not contain such express authorisation. If Danubian law applies to the AA, CLAIMANT cannot rely on the surrounding circumstances in order to supplement this wording. This is because Danubian law follows the four corners rule which is largely understood like a merger clause under Art. 2.1.17 UPICC [*PO2-45*, *p. 61*]. Therefore, CLAIMANT and RESPONDENT ("the **Parties**") agreed that when applying Danubian law, "there is a high likelihood that the arbitration agreement [will] not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal" [*PO1-II(3)*, *p. 52*]. In the present case, it is Danubian law which applies to the AA, giving no ground for the Tribunal to adapt the FSSA [**I**]. Even if cl. 15 FSSA was governed by Mediterranean law, the Parties have not effectively empowered the Tribunal [**II**].

I. THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT IS THE LAW OF DANUBIA

2 Contrary to CLAIMANT's allegation [*MfC*, *para. 3*, *p. 15*], it is not the law of Mediterraneo, but the law of Danubia which governs the AA. CLAIMANT and RESPONDENT agree [*cf. MfC*, *para. 19*, *p. 13*] that the applicable law is to be determined in three steps: first, the Tribunal should examine whether or not the Parties have expressly or, second, impliedly chosen a law with regard to the arbitration agreement [*cf. Sulamérica v. Enesa*]. Third, in the absence of any choice, the Tribunal should identify the law with the closest connection to the arbitration agreement [*ibid.*]. Unlike submitted by CLAIMANT [*MfC*, *paras. 20 et seqq.*, *pp. 13 et seqq.*], the Parties have neither expressly nor impliedly chosen Mediterranean law as applicable to the AA [**A**]. On the contrary, their implied choice is in favour of Danubian law [**B**]. Alternatively, Danubian law is the law most closely connected to the AA [**C**]. Under Danubian law, the four corners rule cannot be altered with reference to international standards of interpretation [**D**].

A. THE PARTIES HAVE NOT CHOSEN MEDITERRANEAN LAW AS APPLICABLE

3 There is no indicator that the Parties have chosen Mediterranean law to govern the AA. Cl. 14 FSSA contains neither an express [**1**] nor an implied choice of law in this respect [**2**].

1. Cl. 14 FSSA constitutes no express choice of Mediterranean law

4 CLAIMANT postulates that cl. 14 FSSA, providing for Mediterranean law, constitutes an express choice of law with respect to the AA [*MfC*, *para*. *20*, *p*. *13*]. However, CLAIMANT does not seem to be convinced of this allegation itself because it admits that "the Tribunal is also open to determine the law of the seat of arbitration as the law applicable" [*MfC*, *para*. *21*, *p*. *14*]. Indeed, wording and position of cl. 14 FSSA point out that the provision merely determines the law governing the main contract (*lex causae*).

5 First, cl. 14 FSSA only concerns the "Sales Agreement", thereby referring to the substantive **sales** provisions of the contract (cl. 1-13 FSSA). These need to be distinguished from the *procedural* "arbitration agreement" (cl. 15 FSSA). This understanding of the term "Sales Agreement" finds support in the negotiations: RESPONDENT's initial negotiator Mr. Antley recognisably employed the term in the sense of "main contract". In his e-mail of 10 April 2017, he submitted the AA to Equatorianian law "[i]n light of the fact that the *Sales Agreement* is governed by the law of Mediterraneo" [*Exh. R 1*, *p*. *33*, *emph*. *ad*.]. Second, cl. 14 FSSA precedes the arbitration clause contained in cl. 15 FSSA. This indicates that, apart from the preceding cl. 1-13 FSSA, cl. 14 is not supposed to equally encompass the last provision of the contract (cl. 15 FSSA).

6 Also the negotiations reveal no reason why cl. 14 FSSA should equally govern the AA. In particular, CLAIMANT cannot argue that it made the application of Mediterranean law to cl. 15 FSSA a condition. Indeed, in her proposal of 11 April 2017, CLAIMANT's initial negotiator Ms. Napravnik highlighted that her offer "is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo" [*sic*; *Exh*. *R 2*, *p*. *34*]. However, from the perspective of a reasonable third person, this was a reference solely to Mediterranean law as *lex causae*. Ms. Napravnik stated that under her offer, Mediterranean law "remains" applicable. However, the e-mail exchange [*cf*. *Exh*. *C 3*, *p*. *11*; *Exh*. *C 4*, *p*. *12*; *Exh*. *R 1*, *p*. *33*; *Exh*. *R 2*, *p*. *34*] shows that the Parties had never contemplated to apply Mediterranean law to the AA. Hence, the law of Mediterraneo could not have *remained* applicable to cl. 15 FSSA. On the other hand, the Parties had considered Mediterranean law as *lex causae* [*cf*. *Exh*. *C 3*, *p*. *11*; *Exh*. *R 1*, *p*. *33*]. Thus, CLAIMANT's condition is reasonably to be understood as reference to the law governing the main contract.

2. Cl. 14 FSSA does not contain an implied choice of Mediterranean law

7 By reference to the judgement in *Sulamérica v. Enesa*, CLAIMANT argues that an express choice of Mediterranean law as *lex causae* would constitute an implied choice of law with respect to

the AA [*MfC*, *para. 22*, *p. 14*]. However, this view is widely objected to in international arbitration [**a**]. At least in the case at hand, it is also ill-founded [**b**].

a. CLAIMANT's assumption in favour of the *lex causae* is widely objected to

8 The assumption that the *lex causae* constitutes an implied choice of law for the arbitration clause is widely objected to among courts, tribunals and commentators; in fact, many voices adopt the opposite view, taking orientation on the seat when they determine the law applicable to an arbitration clause [*cf. C v. D*; *Philippines v. Philippine Air Terminals*; *FirstLink v. GT Payment*; *BGH (1984)*; *ICC No. 4392*; *ICC No. 4472*; *ICC No. 4604*; *ICC No. 5730*; *ICC No. 5832*; *ICC No. 14046*; DICEY/MORRIS/COLLINS, *para. 16-021*; GREENBERG/KEE/WEERAMANTRY, *para. 4.54*].

9 In order to circumvent the clear notion of these decisions, CLAIMANT seeks to distinguish them from the case at hand. It argues that those decisions concerned the validity of arbitration agreements and not their scope, thereby alleging that the cases "are not directly relevant to our analysis" [*MfC*, *para. 22*, *p. 14*]. However, it would be inconsistent to apply different laws to the validity and the scope of an arbitration agreement. Indeed, it is uniformly accepted that interpretation and validity of an arbitration clause *both* depend on the applicable law [*OLG Düsseldorf (1995)*; BORN, *p. 1398*; MILES/GOH, *p. 386*; DICEY/MORRIS/COLLINS, *para. 16-022*; WOLFF/*Wolff*, *Art. II*, *para. 42*]. Any other view would contradict the Parties' wish for uniformity [BORN, *p. 1398*]. Ultimately, CLAIMANT itself relies on arbitral awards concerning the validity of arbitration agreements, namely *ICC cases No. 6379* and *6752* [*cf. MfC*, *para. 22*, *p. 15*].

10 Furthermore, CLAIMANT submits that the aforementioned decisions were all motivated by the purpose not to invalidate the arbitration agreement, which is no issue in the present case [*MfC*, *para. 22*, *p. 14*]. Not only is this statement pure speculation; it can even be easily disproved with reference to case law. For example, in *C v. D*, the validity of the particular arbitration agreement was entirely undisputed. Yet, the court regarded the seat as the decisive factor to determine the governing law.

b. CLAIMANT's assumption finds no support in the facts of the case

11 Not only is there "no consensus on an appropriate presumptive choice of law for arbitration agreements" [*MfC*, *para. 22*, *p. 14*]. Also, there are no arguments supporting CLAIMANT's assumption in favour of the *lex causae*.

12 CLAIMANT cannot bring forward that parties are usually not aware that their arbitration clause

may at all be governed by a law other than the *lex causae*. In the case at hand, the Parties did indeed know about this possibility. This is evidenced by RESPONDENT's proposal of 10 April 2017 which contained an express choice of law clause for the AA [*Exh. R 1*, *p. 33*]. Since the succeeding negotiators, Mr. Krone and Mr. Ferguson, had access to the corresponding e-mail [*PO2-5*, *p. 55*], they also must have been aware of this issue. Neither can CLAIMANT hold that it would reduce complexities to apply the same law to both the main contract and the arbitration agreement. This is because CLAIMANT's approach would not reduce the number of relevant laws to one. Parties choose the *lex causae* for the main contract and the law of the seat for the arbitral procedure. Since both laws apply anyway, it is irrelevant in terms of complexity if one or the other law governs the arbitration agreement. Therefore, it is questionable which arguments at all remain to justify CLAIMANT's assumption.

13 Finally, the alleged assumption ignores that the main contract and the arbitration agreement concern entirely different interests. Namely, the main contract determines the contractual obligations as to be performed *in good will*, while the arbitration agreement regulates the procedural practice in case of a *dispute* [*FirstLink v. GT Payment*]. This illustrates that "nature and purpose [of an arbitration agreement] are very different" in comparison to a main contract [*Sulamérica v. Enesa*]. As a result, the motives for choosing the *lex causae* and the law governing the arbitration clause will typically differ [*cf.* FOUCHARD/GAILLARD/GOLDMAN, *para. 425*]. It is therefore unlikely that the Parties wanted their choice of the *lex causae* to equally encompass cl. 15 FSSA.

B. THE PARTIES HAVE IMPLIEDLY CHOSEN DANUBIAN LAW TO GOVERN CL. 15 FSSA

14 The Parties have impliedly chosen Danubian law as applicable to the AA. They sought to refer all matters related to arbitration to Danubian law [**1**]. Furthermore, it serves the Parties' wish for reasonable solutions to apply the law of the seat [**2**].

1. The Parties intended to refer all matters related to arbitration to the law of the seat

15 Choosing a particular seat of arbitration is the attempt to 'locate' all matters related to arbitration at this seat [*FirstLink v. GT Payment*]. Hence, parties expect the law of the seat to govern both the arbitration *procedure* as well as the arbitration *agreement*. In particular, the choice of a neutral seat indicates the wish to "disassociate the arbitration agreement from [the parties'] host state[s]" [BORN, *p. 518*], including the law applicable to it [*cf.* GLICK/VENKATESAN, *p. 145*].

16 In the present case, the Parties' intent to apply Danubian law is further evidenced by the negotiations: Mr. Antley underlined on several occasions that the dispute resolution mechanism

would serve as a counter-balance to the choice of Mediterranean law as *lex causae*. First, Mr. Antley demanded jurisdiction of Equatorianian courts [*Exh. C 3*, *p. 11*]. Later, he asked for Equatoriana as the seat of arbitration *and* Equatorianian law as governing the arbitration agreement [*Exh. R 1*, *p. 33*]. Only in exchange, he was ready to accept Mediterranean law as *lex causae* [*ibid.*]. It is true that Mr. Antley finally consented to Danubia as a seat of arbitration. But this was only in order to draft a dispute resolution clause in line with CLAIMANT's internal policy [*Exh. R 2*, *p. 34*]. It does not change the fact that the arbitration agreement in its entirety was supposed to counter-balance the choice of Mediterranean law as *lex causae*. Against this background, applying Mediterranean law to cl. 15 FSSA would undermine the equilibrium intended by the Parties. The only reasonable solution to uphold this equilibrium, notably a result of RESPONDENT's willingness to compromise, is to apply Danubian law to the AA.

2. Applying the law of the seat serves the parties' wish for reasonable solutions

17 In order to determine which law parties intended to govern the arbitration agreement, all their underlying interests need to be considered [*cf. FirstLink v. GT Payment*; GLICK/VENKATESAN, *p. 142*]. These interests, particularly consistency, coherence and efficiency, lean towards the law of the seat.

18 The choice of a seat constitutes the choice of a specific arbitration law [*cf.* REDFERN/HUNTER, *para. 3.37*; GREENBERG/KEE/WEERAMANTRY, *para. 2.13*]. National arbitration laws do not only contain provisions dictating the procedural practice, but likewise stipulations which address the validity of arbitration agreements [*cf. XL Insurance v. Owens Corning*]. For example, Art. 7(2) DAL contains a form requirement with regard to the validity of the arbitration agreement. In light of this, it is reasonable to take all further provisions regarding validity and interpretation from the legal system of the seat as well [*FirstLink v. GT Payment*; *XL Insurance v. Owens Corning*; GLICK/VENKATESAN, *pp. 142*, *145*]. Only this approach guarantees consistency and coherence when simultaneously applying the *lex arbitri* and further stipulations concerning validity and interpretation.

19 Moreover, the seat of arbitration determines which national courts supervise the arbitral tribunal [LEW/MISTELIS/KRÖLL, *para. 6-23*; DICEY/MORRIS/COLLINS, *para. 16-029*]. It is reasonable to let these courts apply their own national contract law when interpreting the arbitration agreement [*FirstLink v. GT Payment*]. For otherwise, courts would regularly have to engage expert witnesses to examine the case under a foreign law, which is costly and inefficient. Hence, parties have a shared interest that the competent court decides the case according to its own law, *i.e.* the law of the seat.

C. ALTERNATIVELY, DANUBIAN LAW IS MOST CLOSELY CONNECTED TO CL. 15 FSSA

20 If the Tribunal should find that the Parties have not chosen Danubian law to govern the AA, Danubian law still applies to cl. 15 FSSA. Under such circumstances, the arbitration clause is governed by the law to which it is most closely connected [*Sulamérica v. Enesa*; *FirstLink v. GT Payment*]. "[T]he answer is more likely to be the law of the seat of arbitration than the law of the underlying contract" [*C v. D*; *cf.* DICEY/MORRIS/COLLINS, *para. 16-016*; BORN, *p. 518*; FOUCHARD/GAILLARD/GOLDMAN, *para. 429*]. Even in *Sulamérica v. Enesa*, where CLAIMANT's assumption in favour of the *lex causae* is considered, Moore-Bick LJ held that the arbitration agreement "has its closest and most real connection with the law of the place where the arbitration is to be held". This finding does not only follow from the doctrine of separability [**1**] but also finds ample support in international arbitration regulations [**2**].

1. The doctrine of separability stipulates application of the law of the seat

21 It is well-established that under the doctrine of separability, the arbitration agreement forms an independent contract [*ICC No. 8938*; LEW/MISTELIS/KRÖLL, *para. 6-9*] which is separate from the substantive provisions [REDFERN/HUNTER, *para. 2.101*]. This is nowadays accepted as an overarching principle in international arbitration. Contrary to CLAIMANT's allegation, the doctrine does not only affect the arbitration agreement's validity [*MfC*, *para. 20*, *pp. 13 et seq.*]. In fact, it also has further implications [*cf.* BORN, *pp. 349 et seqq.*], in particular that the arbitration agreement is independent from the main contract in terms of the governing law [*cf.* BORN, *p. 475*]. Since the *lex causae* is consequently without influence on the arbitration agreement, the seat is the only remaining point of reference to determine the governing law. Thus, the law of the seat has the closest connection to the arbitration agreement [*cf.* BORN, *p. 517*; DICEY/MORRIS/COLLINS, *para. 16-021*].

2. In absence of a choice, international arbitration regulations apply the law of the seat

22 International arbitration regulations underline that in case parties have chosen no law, the arbitration agreement is governed by the law of the seat. In particular, Art. V(1)(a) New York Convention ("NYC") stipulates that in absence of a choice of law, the arbitration agreement must be valid "under the law of the country where the award was made", *i.e.* the law of the seat [*cf. ICC No. 5730*; WOLFF/*Borris*/*Hennecke*, *Art. V*, *para. 206*]. Naturally, the interpretation and the validity of an arbitration clause are both dependent on the governing law [*OLG Düsseldorf (1995)*; BORN, *p. 1398*; MILES/GOH, *p. 386*; WOLFF/*Wolff*, *Art. II*, *para. 42*]. Arguing that the arbitration agreement should be interpreted under different laws than the validity would greatly contradict the parties' wish for uniformity [BORN, *p. 1398*]. Therefore,

commentators agree that the choice of law rule in Art. V(1)(a) NYC equally applies to interpretation standards [*cf.* WOLFF/*Borris*/*Hennecke*, *Art. V*, *para. 206*; KRONKE ET AL./*Port*/*Bowers*/*Davis Noll*, *p. 272*].

23 Additionally, by choosing Danubia as a seat, the Parties have agreed on arbitration under the DAL. The latter contains conflict of laws rules in Art. 34(2)(a)(i) and in Art. 36(1)(a)(i) which are principally identical to Art. V(1)(a) NYC. Thus, it is clear that the conflict of laws rules chosen by the Parties point to the law of the seat if there is no choice of law.

D. UNDER DANUBIAN LAW, THE FOUR CORNERS RULE CANNOT BE ALTERED WITH REFERENCE TO INTERNATIONAL STANDARDS

24 CLAIMANT attempts to avoid the narrow interpretation rules under Danubian law by referring to interpretation methods "accepted across jurisdictions" [*MfC*, *para. 7*, *p. 15*]. Namely, CLAIMANT submits that besides the wording of a contract, also the surrounding circumstances constitute an internationally accepted source of interpretation [*cf. MfC*, *paras. 10 et seq.*, *pp. 9 et seq.*]. It even alleges that as a consequence, "[a]pplying the law of Danubia to the [AA] does not affect the Tribunal's power to adapt" [*cf. MfC*, *Issue 3*, *III.*, *2.*, *heading*, *p. 15*]. However, no such international consent on the consideration of surrounding circumstances exists. While it is true that certain jurisdictions allow reference to extrinsic evidence when interpreting written contracts, others reject the surrounding circumstances as a source of interpretation, *e.g.* Danubia, Canada and the U.S. [*cf.* JENNINGS/ZUBER, *p. 105*; CORBIN, *p. 8*]. Also the fact that *English* courts might apply a softer version of the four corners rule [*cf. MfC*, *para. 10*, *p. 9*] has no bearing on interpretation under *Danubian* law. Thus, given that Danubian law governs the AA, the four corners rule cannot be overridden by so-called international interpretation rules. When consequently only considering the wording of the FSSA, the Parties agreed that "there is a high likelihood that the arbitration agreement [will] not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal" [*PO1-II(3)*, *p. 52*].

II. ALTERNATIVELY, THE ARBITRATION AGREEMENT FAILS TO FULFIL THE CONDITIONS FOR CONTRACT ADAPTATION AS SET OUT BY THE *LEX ARBITRI*

25 What is more, regardless which law governs the AA, the Parties have still not effectively empowered the Tribunal to adjust the FSSA. Three sources of law need to be considered *simultaneously* in order to examine whether or not a tribunal may adapt a contract: the arbitration agreement, the law governing the arbitration process (*lex arbitri*) and the *lex causae* [BERGER, *pp. 7 et seq.*; KRÖLL, *p. 19*]. Therefore, an arbitral tribunal may not adapt the contract if the relevant *lex arbitri* does not grant this competence [KRÖLL, *p. 20*; FRICK, *p. 193*;

ZWEIGERT/VON HOFFMANN, *p. 211*; PETER, *p. 165*; BERGER, *p. 12*]. In other words: "If the *lex arbitri* does not allow an arbitral tribunal to adapt a contract, any power to do so under the applicable substantive law becomes moot" [BRUNNER, *p. 493*]. If the tribunal adapts the contract without authorisation by the *lex arbitri*, the award may be set aside pursuant to Art. 34(2)(b)(i) DAL and is further unenforceable under Art. V(1)(c) or (2)(a) NYC [*cf.* BRUNNER, *p. 493*; FRICK, *p. 193*; BERGER, *p. 10*].

26 In the present case, the requirements for contract adaptation under the applicable *lex arbitri*, namely the DAL [*cf. Exh. C 5*, *p. 14*], are not fulfilled. The DAL principally permits contract adaptation by arbitral tribunals; however, Danubian courts, extracting a general standard from Art. 28(3) DAL, require that the parties **expressly authorise** the tribunal to adjust the contract [*PO2-36*, *p. 60*]. CLAIMANT is wrong when contending that an express authorisation is not necessary because this requirement would merely derive from "Danubian substantive law" which was not applicable to the main contract [*MfC*, *para. 24*, *p. 15*]. CLAIMANT overlooks that in fact, the necessity of an "express authorisation" does not result from Danubian Contract Law, but from Danubian *Arbitration* Law [*PO2-36*, *p. 60*]. It is therefore of utmost relevance to the present case. However, an express authorisation is missing in the case at hand [**A**]. Therefore, all further arguments which could be brought forward in favour of the Tribunal's competence to adapt the FSSA grasp at nothing [**B**].

A. THERE IS NO "EXPRESS AUTHORISATION" OF THE TRIBUNAL TO ADAPT THE FSSA

27 An "express authorisation" of the Tribunal to adapt the FSSA can neither be found in the contract [**1**], nor in Ms. Napravnik's and Mr. Antley's conversation of 12 April 2017 [**2**].

1. The contract contains no express authorisation to adapt the FSSA

28 CLAIMANT argues that the Tribunal was competent to adjust the FSSA because Art. 6.2.3(4)(b) of Mediterranean Contract Law ("**MCL**") provided for contract adaptation [*MfC*, *paras. 5*, *11*, *pp. 7*, *10*]. However, as outlined, a tribunal's competence to adapt the contract cannot exclusively be based on the provisions of the *lex causae* [*cf. supra para. 25*].

29 CLAIMANT further seems to argue that the hardship clause under cl. 12 FSSA contains an express authorisation of the Tribunal to adapt the contract [*cf. MfC*, *para. 5*, *p. 7*]. However, this would disregard the proper meaning of the term "express". Art. 28(3) DAL seeks to prevent that excessive powers of the tribunal are imposed on "unwary" parties [*Working Group A/CN.9/264*; *cf.* HUßLEIN-STICH, *p. 149*]. An express authorisation needs to be "explicit, doubtless and crystal clear" [MÜKOZPO/*Münch*, *§ 1051*, *para. 47*; BÖCKSTIEGEL ET AL./*Friedrich*, *§ 1051*, *para. 52*] in order to achieve this purpose. Since the analogy of Danubian

courts is based on Art. 28(3) DAL, the same standards must be applied with respect to contract adaptation by arbitral tribunals. Reading cl. 12 FSSA, there is no unambiguous indicator which either refers to contract adaptation or to the powers of the Tribunal. To the contrary, cl. 12 FSSA does not even provide for contract adaptation as a legal consequence [*cf. infra para. 82 et seqq.*]. Thus, cl. 12 FSSA cannot be deemed an express authorisation.

2. Ms. Napravnik's and Mr. Antley's conversation poses no express authorisation of the Tribunal to adapt the FSSA

30 Ms. Napravnik's and Mr. Antley's conversation of 12 April 2017 does not constitute an express authorisation of the Tribunal, either. Under Danubian contract law, reference to the conversation is not even admissible [*cf. supra para. 1*]. Even if the MCL, namely Art. 8 CISG, applied to the AA, the conversation would not constitute an express authorisation. First, Ms. Napravnik and Mr. Antley did not want their arrangement to be legally binding yet. This already ensues from the fact that "Mr. Antley promised that he would come back with a proposal the next morning" [*Exh. C 8, p. 17*]. The word "proposal" shows that the Parties wanted to address the issue in detail again later. Additionally, after the meeting, Mr. Antley noted on his "List of issues for further negotiations": "Connection of hardship clause with arbitration clause" [*Exh. R 3, p. 35*], thus referring to the matter of contract adaptation. This provides additional proof that the Parties did not regard their plan as final and binding. Ultimately, even Ms. Napravnik described the arrangement as merely "tentative" [*Exh. C 8, p. 17*]. CLAIMANT attempts to explain this use of the word "tentative" by contending that "the exact form and wording of the agreement had not been finalised" [*MfC, para. 29, pp. 16 et seq.*]. However, as every negotiator will agree, 'the devil is in the details'. Without a fixed wording, an agreement cannot be assumed to have been reached.

31 Second, any purported agreement would not have outlived the accident of 12 April 2017. CLAIMANT argues that the two successors "did not turn their minds to adaptation" and "[a]s a result, the original agreement […] remains binding on the parties" [*MfC, para. 36, p. 18*]. In fact, the reasoning must be the other way round: No one apart from Ms. Napravnik and Mr. Antley themselves was informed about the arrangement before the FSSA was signed [*cf. PO2-7, p. 55*]. An agreement unknown to the very parties it shall bind naturally has no legal implications. In fact, the people carrying responsibility for the content of the FSSA must be the ones who signed it, namely Mr. Ferguson and Mr. Krone. This is because after the accident, both Parties replaced their initial negotiators, knowing that they might not recover consciousness to explain their intentions in time [*cf. NoA-8, p. 5*; *Exh. C 8, p. 17*]. Any will generated by Ms. Napravnik and Mr. Antley therefore turns out to be irrelevant as long as the

signing negotiators did not adopt it. Indeed, as CLAIMANT stated [*cf. MfC*, *para. 36*, *p. 18*], Mr. Ferguson and Mr. Krone never considered permitting contract adaptation [*PO2-6*, *p. 55*].

32 In any case and contrary to CLAIMANT's allegation [*cf. MfC*, *paras. 34 et seq.*, *pp. 17 et seq.*], the purported agreement would be invalid as it is not in correspondence with the relevant form requirements. Art. II(1) NYC forces contracting states to recognise arbitration agreements only if they are "in writing". However, Ms. Napravnik's and Mr. Antley's oral agreement has never been fixed in any written document. CLAIMANT mistakenly believes it is either sufficient that Ms. Napravnik mentioned the agreement in her written witness statement [*MfC*, *para. 34*, *pp. 17 et seq.*] or that the agreement is alleged in CLAIMANT's NoA [*MfC*, *para. 35*, *p. 18*]. The form requirement in Art. II(1) NYC aims to protect parties from accidentally entering into arbitration and further aims to provide proof in case of an argument [KRONKE ET AL./*Schramm*/*Geisinger*/*Pinsolle*, *p. 74*; *cf.* WOLFF/*Wolff*, *Art. II*, *para. 78*]. Therefore, one-sided written documentation *after* an argument had already arisen cannot meet the conditions of Art. II(2) NYC. In conclusion, Ms. Napravnik's and Mr. Antley's arrangement cannot serve as an express authorisation to adapt the FSSA.

B. CLAIMANT'S FURTHER ARGUMENTS CANNOT OVERCOME THE OBSTACLE OF A MISSING EXPRESS AUTHORISATION

33 None of the further arguments CLAIMANT brings forward could change the fact that the Tribunal is not authorised to adapt the FSSA under the DAL. While all of them could potentially be taken into account when interpreting the AA, none of them are sufficient to fulfil the essential and unequivocal prerequisite of an **express authorisation** under the *lex arbitri*. First, the wording of cl. 15 FSSA ("any dispute arising out of this contract") may not categorically exclude adaptation [*MfC*, *paras. 8 et seq.*, *pp. 8 et seq*]. However, it does not contain an express authorisation for adaptation either and therefore has no bearing in the present case. The same is true for CLAIMANT's argument that the contract laws of both Parties' host countries allow for contract adaptation [*cf. MfC*, *para. 11*, *p. 10*].

34 Also, even when interpreting the AA 'liberally', considering that rational business people might not want to refer some disputes to separate dispute resolution [*cf. MfC*, *para. 13*, *p. 11*], the AA still does not contain an express authorisation. Neither can CLAIMANT rely on the principle of *effet utile*. The principle demands tribunals to "prefer the interpretation which gives meaning to the words, rather than that which renders them useless or nonsensical" [*ICC No. 1434*]. No matter if cl. 15 FSSA permits contract adaptation, the provision does not turn "useless or nonsensical" as it still allows the Tribunal to settle the Parties' disputes.

35 Finally, CLAIMANT argues that "an adaptation mechanism was important to [it] and there is no evidence that RESPONDENT would have let the entire sales agreement die over this issue" [*MfC*, *para*. *37*, *p*. *18*]. This statement turns out to be pure speculation not based on any evidence. Besides, if CLAIMANT had wanted to allow contract adaptation by the Tribunal, it would have been CLAIMANT's responsibility to include an express authorisation into the AA.

CONCLUSION ON PART I

36 The Tribunal does not have the power to adapt the FSSA. First, this results from the application of Danubian law to the arbitration agreement. Second, the Parties have not effectively empowered the Tribunal to adjust the FSSA in accordance with the *lex arbitri*.

PART II: CLAIMANT SHOULD NOT BE ALLOWED TO SUBMIT THE PARTIAL INTERIM AWARD AS EVIDENCE

37 CLAIMANT seeks to introduce as evidence a Partial Interim Award from different arbitration proceedings ("**PIA**"). The PIA was originally obtained through either a breach of confidentiality or an illegal hacking attack. CLAIMANT seeks to purchase the PIA from a company known for its doubtful reputation [*PO2-41*, *p*. *61*]. By submitting the PIA as evidence, CLAIMANT is violating principles of fairness and good faith. Thus, the PIA is inadmissible under the HKIAC Rules [**I**]. Excluding the PIA from evidence does not violate CLAIMANT's right to be heard [**II**].

I. THE AWARD IS INADMISSIBLE UNDER THE HKIAC RULES

38 Art. 22(2) HKIAC Rules reads: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence". It thereby grants the Tribunal discretion regarding the admissibility of evidence [*cf*. MOSER/BAO, *p*. *191*; ASHFORD, *p*. *146*; BORN, *p*. *2308*]. When executing this discretion, the Tribunal is to ensure fair and equal treatment of the parties [*cf.* O'MALLEY, *p*. *321*]. It is also called upon to weigh public interests in admission and exclusion of evidence against each other [*cf.* BLAIR/GOJKOVIĆ, *p*. *258*]. The parameters commonly considered in this assessment include the content, the origin and the relevance of the evidence [*cf. Caratube v. Kazakhstan*; BLAIR/GOJKOVIĆ, *pp*. *256 et seq*.].

39 As the HKIAC Rules offer no further guidance, RESPONDENT invites the Tribunal to refer to the IBA Rules when assessing the admissibility of the PIA. The IBA Rules represent best practice in the arbitration community. Even where parties have not explicitly chosen the IBA Rules, they are consistently relied on by tribunals to assess the admissibility of evidence [MOSER/BAO, *p*. *191*; ASHFORD, *p*. *12*; O'MALLEY, *paras*. *1.15*, *9.19*; EBERL/*Risse*/*Haller*, *p*. *123*, *para*. *27*].

40 The IBA Rules lay out several circumstances under which admissibility of evidence should be denied. Each of those factors by itself justifies the exclusion of evidence [ZUBERBÜHLER, *p. 171*]. Concerning the PIA, **three** of those grounds are met. For one, it contains **privileged** information pursuant to Art. 9(3) IBA Rules [**A**]. Moreover, it was **obtained illegally**, which constitutes a legal impediment under Art. 9(2)(b) IBA Rules [**B**]. Further, the evidence **lacks sufficient relevance** to the case and should be excluded under Art. 9(2)(a) IBA Rules [**C**].

A. THE EVIDENCE CONTAINS PRIVILEGED INFORMATION

41 The PIA is inadmissible because it is protected by evidentiary privilege. It is widely accepted in doctrine and case law that privileged information may under no circumstances be admitted into arbitration proceedings [*Caratube v. Kazakhstan*; *Libananco v. Turkey*; ASHFORD, *p. 147*; PILKOV, *p. 150*]. Even *Caratube v. Kazakhstan*, where evidence was wrongly admitted despite its illegal origins, confirms this notion. This is because even under the remarkably lenient approach in that case, the tribunal still did not admit documents protected by privilege [BLAIR/GOJKOVIĆ, *p. 255*]. This underlines just how inviolable evidentiary privilege is.

42 This principle is reflected by Art. 9(2)(b) IBA Rules, which lists privilege as a reason to exclude evidence. Art. 9(3) IBA Rules specifies which kinds of evidentiary privileges preclude admission. Art. 9(3)(a),(b) IBA Rules mention parallel settlement negotiations and conversations held for the purpose of giving legal advice as examples for situations that typically establish legal privileges. Art. 9(3)(c) IBA Rules then points out the crucial factor in this: the expectations of the parties [ASHFORD, *pp. 159 et seq.*]. The PIA was produced in the context of an arbitration proceeding in which both parties had agreed to confidentiality. Naturally, the parties expected the matters discussed during the proceeding to be protected from being shared with third parties.

43 More importantly, evidentiary privileges are characterised by a safe space, in which parties can make statements that will not be used against them. While this is certainly true for attorney-client-privilege and settlement negotiations, it is also a key feature of arbitration proceedings. Confidentiality in arbitration helps parties avoid damages to their public image [KAHLERT, *pp. 53 et seqq.*]. The ability to make statements without detrimental repercussions is one of the main incentives to choose international arbitration over litigation [REDFERN/HUNTER, *p. 30*]. It is also a considerable contributing factor to the flexibility and speed of arbitral proceedings, as parties can be more straightforward and open during the proceedings [BORN, *p. 2781*].

44 Confidentiality is therefore highly important to the operability of arbitration. Consequently, granting confidential information from arbitral proceedings the utmost protection, namely

evidentiary privilege, is in accordance with interests shared by the entire arbitration community. Allowing documents protected by arbitral confidentiality into evidence even just this once could create dangerous precedent, thereby undermining the whole purpose of commercial arbitration in the first place. Information protected by arbitral confidentiality agreements must therefore be considered privileged and consequently inadmissible.

B. THE UNLAWFUL NATURE OF ITS OBTAINMENT RENDERS THE EVIDENCE INADMISSIBLE

45 The Tribunal should exclude the PIA due to its unlawful obtainment. It is widely accepted that the illegal obtainment of a document constitutes a legal impediment pursuant to Art. 9(2)(b) IBA Rules [*Methanex v. United States*; *EDF (Services) v. Romania*; *ConocoPhillips v. Venezuela*; O'MALLEY, *p. 321*]. Therefore, the initial unlawful obtainment of the evidence renders it inadmissible [**1**]. Further and more importantly, CLAIMANT's own unlawful actions, namely its purchase of the PIA from a dubious company, will constitute a legal impediment [**2**].

1. The initial obtainment of the evidence renders it inadmissible

46 While it is unclear how the PIA was initially obtained, it has been established that it happened through either a breach of confidentiality [**a**] or an illegal hacking attack [**b**]. As either option renders the evidence inadmissible, this uncertainty should not affect the Tribunal's decision. Contrary to CLAIMANT's allegation [*MfC*, *para. 47*, *p. 21*], the possibility that the PIA was obtained through an unproblematic third source has been ruled out [*PO2-41*, *p. 61*].

a. A breach of confidentiality renders the Partial Interim Award inadmissible

47 Contrary to CLAIMANT's suggestion [*MfC*, *para. 49*, *p. 22*], it has been established that RESPONDENT's former employees were still under contractual obligation to keep the PIA confidential at the time of the breach [*PO2-41*, *p. 61*]. Their breach of confidentiality constitutes a legal impediment under Art. 9(2)(b) IBA Rules.

48 Art. 9(2)(b) IBA Rules not only mentions legal, but also *ethical* rules. While certainly not all violations of contractual obligations are also violations of fundamental ethical rules, the breach of an obligation as important as the duty to keep arbitral proceedings confidential clearly falls under this provision. In particular, RESPONDENT is not the only party affected by the breach. The other party involved in the proceeding has an equal right to confidentiality. Additionally, RESPONDENT's former employees also breached their obligation under Art. 45(2) HKIAC Rules, as they were also witnesses in the other proceeding [*PO2-41*, *p. 61*]. Therefore, it is highly important to eradicate any incentive that would facilitate such situations, especially when there are, just as in the present case, financial encouragements involved. By allowing the PIA

into evidence, the Tribunal would inevitably support a company that encourages such behaviour.

49 Furthermore, it should be noted that RESPONDENT has limited abilities to claim damages against its former employees. This is because it is unclear whether the evidence was even obtained through a breach of confidentiality and which employee is responsible for the breach [*PO2-41*, *p. 61*]. This leaves RESPONDENT largely unprotected.

b. An illegal hacking attack renders the Partial Interim Award inadmissible

50 An illegal hacking attack is undoubtedly a violation of the law and thereby constitutes a legal impediment pursuant to Art. 9(2)(b) IBA Rules. It would be a violation of good faith and equality to allow one party to benefit from evidence tainted by illegality [*Methanex v. United States*; *Iranian Hostages Case*; *EDF (Services) v. Romania*; *Libananco v. Turkey*].

51 By admitting illegally obtained evidence, the Tribunal would incentivise future parties to participate in such criminal behaviour instead of adhering to formal procedural rules. According to Art. 3(5) IBA Rules, the recipient of a request for document production has the possibility to object to such a request on a number of grounds. Along with the reasons for exclusion of evidence mentioned in Art. 9 IBA Rules, there are also several objections due to missing formalities. Admitting stolen evidence would lead to unwanted outcomes: evidence which a party could not acquire through the designated process could be stolen and then given to the requesting party, thereby circumventing the rules of document production. An arbitral tribunal should do its best to prevent such outcomes.

52 CLAIMANT argues that public interest favours the admission of the PIA [*MfC*, *para. 55*, *p. 23*]. However, this notion has only been shared in cases like *Caratube v. Kazakhstan*, where the tribunal argued that if the public was aware of certain information, it would be absurd not to acknowledge it. In contrast to information accessible to **every** person on the internet, *e.g.* through WikiLeaks [*cf. Caratube v. Kazakhstan*; *ConocoPhillips v. Venezuela*], the PIA clearly is **not** in the public domain. There is still only a very **limited** circle of people who are aware of the PIA. What is more, whoever wishes to obtain the PIA is required to make a considerable payment of USD 1,000. Consequently, an admission of the PIA despite its illegal origins cannot be justified by the same reasoning as in the aforementioned cases.

2. CLAIMANT itself would act unlawfully by paying a dubious company for the award

53 Even if the Tribunal should find that third party misconduct does not render evidence inadmissible, it is widely agreed that evidence unlawfully obtained by the party introducing it

is inadmissible [*Methanex v. United States*; BLAIR/GOJKOVIĆ, *p. 256*]. Contrary to CLAIMANT's submission [*MfC*, *para. 50*, *p. 22*], CLAIMANT itself would act unlawfully by buying the award. While CLAIMANT argues that it did not order the company to engage in the unlawful actions [*MfC*, *para. 50*, *p. 22*], this does not take away from the fact that CLAIMANT would still financially support criminal behaviour. What is more, it is a universally accepted principle that the purchase of stolen goods is highly unethical, if not even in itself illegal [*cf. § 259 StGB*; *18 U.S.C. § 2315*; *Code Pénal Art. 321-1*]. Buying documents obtained through theft or other unlawful behaviour therefore violates universally accepted ethical rules. In both possible scenarios, documents were taken without the consent of the entitled parties. As CLAIMANT is well aware of this illegality, the evidence must be excluded [*cf. Glencore v. Bolivia*]. Purchasing the PIA would be unlawful and CLAIMANT should not be rewarded for such improper behaviour.

C. THE EVIDENCE LACKS SUFFICIENT RELEVANCE TO THE CASE

54 Regardless of its unlawful origins, the evidence should be excluded for lack of sufficient relevance pursuant to Art. 9(2)(a) IBA Rules. This is because the key facts of the cases are inherently different and not comparable. Most notably, different laws are applicable to the arbitration agreements [*cf. supra paras. 1 et seqq.*]. The tribunal only confirmed its jurisdiction because the parties in the other proceedings chose Mediterranean law to be applicable, which they did not in the present case. Even if the Tribunal found that the law of Mediterraneo was applicable in both cases, the seat of arbitration and consequently the *lex arbitri* would still be different. In contrast to the DAL, Mediterranean law, the *lex arbitri* in the other proceeding [*PO2-39*, *p. 60*], does not require express authorisation for contract adaptation by tribunals. The PIA is also not relevant with regard to hardship requirements. Determining whether a situation constitutes hardship demands a case-by-case-analysis [*cf. infra para. 72*]. Therefore, drawing conclusions from the PIA is only possible if crucial aspects to the cases are identical to the present case. In the other proceedings, hardship was claimed with respect to different tariffs, a different contract, and different parties. Consequently, the two cases are not comparable. Even if they were, the Tribunal would still not be bound by the decision made in the other case, as decisions in arbitral proceedings do not have binding authority [ROGERS, *p. 37*, *fn. 198*].

55 Contrary to CLAIMANT's allegations [*MfC*, *para. 42*, *p. 20*], RESPONDENT's differing positions in the two cases are not a testament to any alleged attempts to mislead the Tribunal. While it goes without saying that a party should be precluded from making contradictory statements about the facts of a case, the same does not go for legal opinions. RESPONDENT's statements were made in regard to two completely different arbitration agreements and thus cannot be more than purely legal opinions [*cf.* DAVIS, *p. 201*] concerning the question of whether or not arbitral

tribunals should have jurisdiction and the powers to adapt a contract.

56 The ability to change one's position on questions of law is an important feature in the exercise of legal rights [*cf.* SCHREIBER, *p. 327*]. What is more, a party would be severely disadvantaged if it was prohibited from taking a legal position just because it at one point in a different proceeding took a diverging position on the same legal question [DAVIS, *p. 221*]. This would strongly contradict the principle of equality and fairness between the parties that is emphasised by both Art. 13(5) HKIAC Rules and Art. 9(2)(g) IBA Rules. It would also compromise a tribunal's opportunity to reconsider disputed and abstract legal questions [*ibid.*].

57 The understanding that there is nothing wrong with taking varying positions on questions of pure law is also reflected by the IBA Guidelines on Conflicts of Interest in International Arbitration. Art. 4(1) of the IBA Guidelines places "previously expressed legal opinions" on the Green List. The list includes "situations where no appearance and no actual conflict of interest exists". If the offering of opinions on abstract legal questions does not disqualify even arbitrators who are required to be impartial, then partisan actors, the parties to an arbitration, should not be precluded from changing their positions on strictly legal matters, either.

II. EXCLUDING THE EVIDENCE DOES NOT VIOLATE CLAIMANT'S RIGHT TO BE HEARD

58 As the PIA was unlawfully obtained and is protected by privilege, the Tribunal is justified and even obliged to exclude it from evidence. Contrary to CLAIMANT's suggestion [*MfC*, *para. 44*, *p. 20*, *para. 56*, *p. 23*], excluding the PIA from evidence cannot violate CLAIMANT's right to be heard [*cf.* PILKOV, *p. 150*]. National courts consistently accept a tribunal's wide discretion regarding the exclusion of evidence [WOLFF/*Scherer*, *pp. 299 et seq.*]. As a result, there is no risk that the award could be set aside under the DAL or deemed unenforceable under the NYC.

CONCLUSION ON PART II

59 The PIA includes highly confidential and privileged content. Its initial obtainment by a third party was unlawful, and an eventual obtainment through CLAIMANT would be unlawful as well. What is more, the PIA has no relevance to the current proceedings whatsoever. Weighing this complete lack of relevance against the PIA's highly problematic obtainment and extremely confidential content, it becomes clear that an exclusion of the PIA from evidence is imperative.

PART III: CLAIMANT IS NOT ENTITLED TO A PAYMENT OF USD 1,250,000 RESULTING FROM AN ADAPTATION OF THE PURCHASE PRICE

60 CLAIMANT is not entitled to an adaptation of the contract under cl. 12 FSSA [**I**]. The CISG does not provide for an adaptation, either [**II**]. CLAIMANT's request for damages is inadmissible [**III**].

I. CLAIMANT IS NOT ENTITLED TO A PRICE ADAPTATION UNDER CL. 12 FSSA

61 RESPONDENT respectfully submits that CLAIMANT is not entitled to an adaptation of the purchase price pursuant to cl. 12 FSSA. Neither are the prerequisites of the hardship clause met [**A**], nor does it provide for the requested remedy of contract adaptation [**B**].

A. THE PREREQUISITES OF THE HARDSHIP CLAUSE, CL. 12 FSSA, ARE NOT MET

62 CLAIMANT submits that the prerequisites of cl. 12 FSSA are met [*MfC*, *para. 44*, *p. 30*]. This displays CLAIMANT's faulty and inaccurate understanding of hardship in general and, more importantly, the hardship clause. The burden of proof lies with the party invoking hardship [MASKOW, *p. 664*], in this case CLAIMANT. The narrow wording does not apply to tariffs such as the ones at hand [**1**]. Furthermore, the cost increase that followed the imposition of tariffs has not made performance "more onerous" in the sense of cl. 12 FSSA [**2**].

1. Cl. 12 FSSA does not cover the tariffs imposed by Equatoriana

63 Cl. 12 FSSA only covers situations "caused by additional health and safety requirements or comparable unforeseen events". Contrary to CLAIMANT's allegation [*MfC*, *para. 71*, *p. 26*], the Equatorianian tariffs are not "health and safety requirements" as they were imposed in a trade war unrelated to public health concerns. Cl. 12 FSSA does not cover the tariffs as they were neither comparable to "health and safety requirements" [**a**] nor "unforeseen" [**b**].

a. The tariffs are not comparable to "health and safety requirements"

64 Contrary to CLAIMANT's allegation [*MfC*, *para. 77*, *p. 27*], two events cannot be comparable in the sense of cl. 12 FSSA simply because they increase the costs for CLAIMANT and thus have a similar effect. Every conceivable hardship scenario increases the obligor's costs. The "comparability" requirement was meant to make cl. 12 FSSA more restrictive than the "broad" ICC Hardship Clause by narrowing down the types of events that could qualify as hardship [*Answ.-4*, *p. 30*; *Exh. R 3*, *p. 35*; *PO2-12*, *p. 56*]. Moreover, the effect of an event is addressed in an independent requirement ("more onerous"). Under CLAIMANT's interpretation, the "comparability" requirement would be without effect since any increase in costs that fulfils the "onerousness" requirement would automatically satisfy the "comparability" requirement too.

65 CLAIMANT furthermore argues that the term "health and safety requirements" was introduced by RESPONDENT "with reference to the risks" mentioned in Ms. Napravnik's e-mail [*Exh. C 4*, *p. 12*] which suggested "change[s] in delivery terms […] in particular […] in customs regulation or import restrictions" and "unforeseeable health and safety requirements" [*Exh. C 4*, *p. 12*]. CLAIMANT asserts that therefore *all* the risks mentioned in that e-mail must be

comparable to each other [*MfC*, *para*. *73 et seq*., *p*. *27*]. During the negotiations, CLAIMANT brought up "changes in customs regulation or import restrictions" [*Exh. C 4*, *p. 12*] as events it did not want to be responsible for, yet the final hardship clause did not include this option. It must be inferred from these facts that the opposite of CLAIMANT's argument holds true: The "customs regulations" were considered and *discarded* as an event falling under cl. 12 FSSA.

66 CLAIMANT submits that tariffs are comparable to health and safety requirements in that both measures seek to "protect the domestic agricultural business" [*MfC*, *para*. *77*, *p*. *27*]. The tariffs did not serve a purpose comparable to that of health and safety requirements. The latter preserve the health of a country's population while tariffs serve purely economic purposes by protecting domestic industries. Both parties had CLAIMANT's "past experiences" in mind when introducing the wording of "health and safety requirements". CLAIMANT had undergone a quarantining of livestock, not exactly an event comparable to tariffs. Not every protective act of state can be treated equally, just like a seatbelt requirement cannot be likened to a state subsidy because both "secure" certain interests within a nation. Furthermore, the Equatorianian tariffs, the ones that affected the fulfilment of the FSSA, were a *retaliatory measure*. By definition, their sole purpose was to reciprocate another government's policy and not, as submitted by CLAIMANT [*cf*. *MfC*, *paras*. *71 et seq*., *p*. *26*], to address any biosecurity risks. Likewise, the Mediterranean tariffs aimed solely at strengthening the agricultural sector [*PO2-23*, *p. 58*].

b. The imposition of tariffs was not unforeseeable

67 Contrary to CLAIMANT's allegation [*MfC*, *paras. 83 et seqq.*, *pp. 28 et seq.*], it could have foreseen the emergence of a trade dispute involving Mediterraneo at the time of the conclusion of the contract on 6 May 2017. An event is foreseeable when a diligent obligor could have recognised its occurrence due to the current circumstances [BRUNNER/*Sgier*, *Art. 79*, *para. 39*]. It has been observed that unforeseeability might be very difficult to prove as "even *embargoes* […] *are increasingly foreseeable* in the modern commercial environment" [LOOKOFSKY, *p. 139*, *emph. ad.*]. The fact that CLAIMANT brought up "changes in […] import restrictions" during the negotiations shows that such changes had been considered. The political changes in Mediterraneo, CLAIMANT's country of residence, foreshadowed the upcoming trade dispute. Mr. Bouckaert, who had championed protectionism for months, was elected president on 25 April 2017 [*Exh*. *C 6*, *p*. *15*], eleven days before contract conclusion. He even appointed Ms. Frankel, one of the most outspoken critics of free trade, as "superminister" with sweeping powers on 5 May 2017 [*PO2-23*, *p*. *58*]. At the latest, this heralded trade disputes affecting cross-border sales.

2. The tariffs did not make performance more onerous in terms of cl. 12 FSSA

68 CLAIMANT as the disadvantaged party has to prove a disequilibrium of the contract [*cf.* GIRSBERGER/ZAPOLSKIS, *p. 125*], but fails to show that performance has become "more onerous" under cl. 12 FSSA. The term "more onerous" as employed in the contractual hardship clause requires that a situation of hardship has occurred. The extent of the increased costs does not suffice to rely on the notion of hardship [**a**], especially considering that CLAIMANT has assumed the risk and obligation to comply with import restrictions [**b**]. Furthermore, the financial situation of the Parties does not prove a disequilibrium [**c**].

a. The additional costs incurred by CLAIMANT do not constitute hardship

69 It is RESPONDENT's submission that the threshold of hardship is not met by the additional costs. Assuming a case of hardship has a massive impact on the contract. As an exception to the basic principle of *pacta sunt servanda* it requires "compelling reasons" [*ICC No. 1512*]. One of the most important aspects is the scale of the cost increase. Even when a party is making losses rather than its expected profits, performance still has to be rendered [*cf. Official Comment UPICC 2016 Ed.*, *Art. 6.2.1*, *Cmt. 1*]. The tariffs amounted to 30 per cent of the third shipment or 15 per cent of the overall contract value. The latter is the more appropriate yardstick for a comprehensive assessment of the contractual balance because it makes little sense to arbitrarily break down the contract and inspect only the one directly affected component. Either way, the cost increase is far from any acknowledged threshold for hardship.

70 There are no reported cases in international arbitration or litigation where cost increases of 50 per cent or less have sufficed to affirm a disbalance in the contract [GIRSBERGER/ZAPOLSKIS, *p. 126*; VAN HOUTTE, *p. 190*]. This is supported by arbitral practice and case law: tribunals have found that neither 13 per cent [*ICC No. 6281*], 30 per cent [*Nuova Fucinati v. Fondmetal International*], 44 per cent [*Japan Shipping Exchange*] nor 25-50 per cent [*ICC No. 2508*] constitute hardship. In *Scafom International v. Lorraine Tubes*, which CLAIMANT cites to support its position [*MfC*, *para. 68*, *p. 26*], the costs had also risen by over 70 per cent.

71 The Official Comment on Art. 6.2.2 UPICC of 1994 stated that "50% or more of the cost or the value of the performance" would likely be sufficient. The UNIDROIT Working Group later suggested to delete those figures as they had been "criticised in legal writings as being too low" [*UPICC Working Group 2003*, *p. 15*]. Although the specific numbers vary, most scholars also suggest that at least 50 [MASKOW, *p. 662*] or 100 per cent [DA SILVEIRA, *p. 347*] price increases are necessary to establish hardship. BRUNNER suggests, after a comparative analysis of different national approaches, that for international contracts, alterations of 100-125 per cent of the costs

mark the threshold [*pp. 428*, *432*]. Other scholars even suggest percentages ranging from 150 to 200 per cent to be necessary [SCHWENZER, *p. 717*]. Thus, as difficult as it may be to draw the line where exactly hardship is reached, it is evident that a 15 or even 30 per cent price increase falls short of any acknowledged threshold. It is worth noting that all those figures are discussed in cases where there had not even been a specific risk assumption.

b. CLAIMANT's assumption of risks dictates a higher hardship threshold

72 The assumption of risk in the case at hand indicates a particularly high threshold for hardship. Hardship requires that the circumstances of performance have fundamentally changed. This must be scrutinised on a case-by-case basis, taking into account "the often decisive specifics", in particular the contractual risk allocation [DA SILVEIRA, *pp. 347 et seq.*]. A comprehensive look at different codifications confirms the crucial relevance of this criterion: Art. 6.2.2 UPICC and Art. 6:111 PECL specifically presuppose that the party invoking hardship has not assumed the risk of the change of circumstances. Thus, a party which has wholly or partially assumed the risk can only rely on hardship when the alteration is proportionate to the extent of risk assumption, namely greater than 100 per cent [BRUNNER, *p. 432*]. The higher the risk assumed by a party, the greater the alteration has to be.

73 CLAIMANT has fully assumed the obligation to comply with import regulations and associated risks. Issues concerning import restrictions such as tariffs rest in CLAIMANT's sphere of risk. CLAIMANT's obligation to pay all charges related to customs clearance follows from including DDP in the FSSA [*cf. cl. 8 FSSA*; *Incoterms*, *DDP*, *Art. A6c.*]. This obligation cannot be shifted towards RESPONDENT simply because this risk has materialised. Due to this assumption of risk, the threshold of hardship has to be even higher than already established for average cases.

74 The Incoterms have a very specific meaning in order to clarify the "distribution of functions, costs and risks" [RAMBERG, *p. 16*] and to avoid "costly misunderstandings, clarif[y] tasks, costs and risks involved" [LAZĂR, *p. 145*]. The Incoterms specifically state that under DDP "the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to *pay any duty for both export and import* and to carry out all customs formalities" [*Incoterms*, *DDP*, *Guidance Note*, *emph. ad.*]. The Parties have made this definition of "DDP" applicable to their contract.

75 Contrary to CLAIMANT's submission [*MfC*, *paras. 97 et seqq.*, *pp. 31 et seq.*], the Parties have not varied from the meaning of DDP. Although it is generally possible to amend the meaning of an Incoterm, the Parties never agreed on such an amendment. Once again, CLAIMANT tries to fabricate one of its proposals into an agreement between the Parties. It alleges that "it was

clearly the intention of the parties […] that certain risks had been removed" [*MfC*, *para. 102*, *p. 32*]. CLAIMANT has only proven that it *mentioned* its reluctance to take over further risks. RESPONDENT, however, never agreed to this proposal.

76 RESPONDENT made clear that *instead of* releasing CLAIMANT from all "risks associated with [DDP] delivery" [*Exh. C 4*, *p. 12*], cl. 12 FSSA should regulate "*some*" risks directly [*Answ.-4*, *p. 30*]. CLAIMANT thus realised this was an either-or-situation. Evidently, the Parties opted for a hardship clause rather than relieving CLAIMANT of the risks. Thus, there has not been an agreement to deviate from DDP.

77 This is supported by case law. In *Nocino v. Beston*, the parties had agreed on the Incoterm CIF (Cost Insurance and Freight). The buyer then argued that due to subsequent communication, where it had brought up storage requirements, the parties had deviated from CIF and the seller had assumed those storage obligations. However, the court found that this was not sufficient to assume that the parties had modified the Incoterm. Similarly, CLAIMANT merely brought up the possibility to be relieved of specific risks, which was rejected by RESPONDENT in favour of a different solution, namely the hardship clause. CLAIMANT initially agreed on DDP and, after realising the responsibilities attached to it, is now trying to distort what the Parties intended.

78 Furthermore, if the Parties had wanted to use the general conditions of DDP, but at the same time relieve CLAIMANT of the obligation to cover import costs (and associated risks), they could have simply chosen the Incoterm DAP. DAP essentially stipulates the same obligations as DDP with the particular difference that under DAP, the *buyer* has to clear the goods for import [*Incoterms*, *DAP*, *Guidance Note*; *Incoterms*, *DDP*, *Art. B6d.*]. The Incoterms themselves specifically advise DAP, and not DDP, if the Parties intend the *buyer* to bear the risk of import clearance [*Incoterms*, *DDP*, *Guidance Note*]. Referring to *Nocino v. Beston*, JOHNSON finds that a subsequent variation of the Incoterm "seems unlikely, because the parties could have simply used a different term that more closely approximated their bargain" [*p. 416*]. This is even more compelling in the given case where CLAIMANT contends that the Parties expressly opted for DDP and deviated from it *at the same time* rather than simply choosing the "right" Incoterm right away. Thus, had only practical considerations such as urgency and CLAIMANT's experience been concerned [*MfC*, *para. 100*, *p. 31*], the Parties would have chosen DAP.

c. The Parties' financial situations do not indicate a contractual disbalance

79 CLAIMANT asserts that its alleged risk of financial ruin justifies lowering the hardship threshold [*MfC*, *para. 68*, *p. 26*]. However, a party is responsible for its financial capacities [*Secretariat Commentary*, *Art. 65*, *Comm. 10*; STAUDINGER/*Magnus*, *Art. 79*, *para. 18*]. Establishing

changed circumstances in reliance on "the question of economic ruin [would] unduly favour parties without resources" [ZWEIGERT/KÖTZ, *p. 521*, *emph. ad.*]. It can only become relevant in exceptional cases where the altered circumstances would lead to a financial ruin and possible bankruptcy [GIRSBERGER/ZAPOLSKIS, *p. 131*]. Especially when the financial difficulties of a party are "due to a lack of managerial skills", the threshold shall not be lowered [GIRSBERGER/ZAPOLSKIS, *p. 131*]. CLAIMANT's difficulties are the result of exactly that, years of unsuccessful business decisions, and not solely a result of the tariffs [*PO2-29*, *p. 59*]. CLAIMANT even concedes that the costs "would not financially endanger CLAIMANT", but only make negotiating a credit line more difficult [*MfC*, *para. 67b*, *p. 25*]. Any grave consequence could be averted by selling some assets, which may be inconvenient but not untenable. RESPONDENT cannot be expected to save CLAIMANT from the results of its own business policy.

80 RESPONDENT does not unjustly profit from the tariffs. CLAIMANT's allegation that the value of the goods has increased due to the tariffs [*cf. MfC*, *para. 67c*, *p. 25*] is pure speculation. CLAIMANT did not and cannot prove that the value of foals or the value of the frozen semen has improved. The fact that RESPONDENT had revenue from different transactions is also of no relevance. In conclusion, it cannot be established that a contractual disbalance has arisen.

81 For these reasons, RESPONDENT should not bear the costs of tariffs. CLAIMANT asserts that this would "equalise the equilibrium of the FSSA" [*MfC*, *para. 67c*, *p. 25*]. However, the contractual balance has not been overturned or even been altered by the imposition of the tariffs. CLAIMANT assumed the risk to conform with import restrictions in the FSSA itself [*cf. cl. 8 FSSA*]. The cost increase that occurred is the materialisation of these risks. There is no reason to deny that this risk allocation has turned out somewhat favourable for RESPONDENT. However, this was a built-in feature of the contract as it was negotiated at arms' length and thus viewed by both Parties as agreeable in relation to the overall terms. Thus, there is no disbalance between the Parties that has to be adjusted by subsequently overturning the result of their negotiations.

B. CL. 12 FSSA DOES NOT ALLOW FOR AN ADAPTATION OF THE PURCHASE PRICE

82 In addition, cl. 12 FSSA does not grant the remedy requested by CLAIMANT, *i.e.* contract adaptation. The wording "Seller shall not be responsible […] for hardship" must be construed under Art. 8 CISG as an exemption from liability [**1**]. Neither the use of a hardship clause in itself nor trade usages indicate otherwise [**2**].

1. Cl. 12 FSSA only provides for an exemption from liability

83 CLAIMANT's submission that cl. 12 FSSA allows for price adaptation [*MfC*, *paras. 87 et seqq.*, *pp. 29 et seqq.*] misjudges the remedy enshrined in this clause. Interpretation in accordance

with Art. 8(1) and Art. 8(2) CISG provides that the legal consequence of cl. 12 FSSA is an exemption of liability. Both the objective reasonable person standard set forth in Art. 8(2) CISG [**a**] and the subjective intent of the Parties [**b**] show this.

a. Interpretation of cl. 12 FSSA shows that it only grants an exemption from liability

84 The starting point for an interpretation under Art. 8(2) CISG must be the wording [SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, *Art. 8*, *para. 13*]. Art. 8(2) CISG provides for an objective reasonable person test [*ibid.*, *Art. 8*, *para. 20*]. A reasonable person in CLAIMANT's situation would have understood the wording of cl. 12 FSSA to only grant an exemption from liability. Although the wording of the clause provides that the seller is not "responsible", this should be read as *not liable*. This is because the word "responsible" is widely used synonymously with "liable" [*Black's Law Dictionary*; *Merriam-Webster*, *responsible*, *No. 1*].

85 Moreover, RESPONDENT submits that "not liable" was the *only plausible meaning* for the force majeure section of cl. 12 FSSA and must have the *same meaning* with regard to the hardship section. This is essentially because the term "shall not be responsible […]" originally related *only* to force majeure in the contract template. The hardship wording in italic print was later implanted into this template by the signing negotiators [*PO2-3*, *p. 54*; *PO2-12*, *p. 56*]. With regard to force majeure, reading the term as "not liable" is the *only plausible meaning* because, strikingly, *all* common force majeure clauses [*cf. Art. 79 CISG*; *Art. 7.1.7 UPICC*; *Art. 8:108 PECL*; *ICC Force Majeure Clause 2003*] stipulate an exemption from liability as their legal consequence [*cf.* SCHWENZER, *p. 717*; VOGENAUER/KLEINHEISTERKAMP/ *Kleinheisterkamp*, *Art. 7.1.7*, *Rn. 26*]. There is no indication why force majeure should be dealt with differently in cl. 12 FSSA than in virtually every comparable context.

86 Now that the "original meaning" of the term has been established, RESPONDENT submits that this meaning must extend to the hardship section as well, just as the term "not responsible" relates to both parts of the sentence equally. The hardship section itself does not indicate anything to the contrary and it appears unlikely that one term was intended to mean different things within the same contractual provision. One can therefore conclude that the hardship part was never given a separate remedy from the force majeure part. Instead, hardship situations were assigned to a pre-existing legal consequence, which was exemption from liability.

87 It is worth noting that this is a perfectly reasonable solution, too. For instance, according to SCHWENZER, hardship and an exemption from liability are quite compatible. She states that, not only in cases of actual impossibility (force majeure) but also in cases of hardship, the obligor will primarily be relieved from its obligation to pay damages [*pp. 719 et seq.*].

88 Having established that the language of the contract itself only provides for an exemption, RESPONDENT requests the Tribunal to strictly adhere to this wording and abstain from supplementing the contract with a remedy it does not provide for. This view is supported by an arbitral award of the *Arbitration Court of the Japan Shipping Exchange*: the tribunal denied the right to terminate the contract as this was not provided for in the contract. The contract's hardship clause stated that in case of excessive changes in commodity prices, a party could request to consult with the other about an amendment of the overall price. The court held that although the principle of the change of circumstances *would* allow termination, the fact that the relevant clause remained silent on termination forestalled a possibility to request termination. Correspondingly, cl. 12 FSSA only provides for an exemption from liability as a remedy for hardship and leaves no room to apply other remedies, most notably contract adaptation.

b. This is also supported by the subjective intent of the Parties

89 The same understanding of cl. 12 FSSA is reached when interpreting it under Art. 8(1) CISG. The provision provides that a contract has to be "interpreted according to [the] intent" of the party making a statement if the other party knew or ought to have known of this intent. CLAIMANT argues that it is relevant that the initial negotiators discussed adaptation as a possible remedy to hardship [*cf. MfC*, *para. 26*, *p. 15*; *para. 92*, *p. 30*]. RESPONDENT, however, submits that the second negotiators did not share such intent and did not implement it into cl. 12 FSSA.

90 Cl. 12 FSSA was drafted by the *second* negotiator for RESPONDENT, Mr. Krone [*PO2-4*, *p. 55*], thus his intent is decisive insofar as it was apparent to CLAIMANT [*cf. Art. 8(1) CISG*]. The relevant point in time when interpreting a statement or contract is the time at which it is made [STAUDINGER/*Magnus*, *Art. 8*, *para. 15*]. It was clearly RESPONDENT's understanding that the hardship prerequisites would simply be added into the force majeure clause, making its remedy applicable [*cf. supra para. 85 et seq.*]. Likewise, CLAIMANT "agreed on the inclusion of a narrow hardship reference into the force majeure clause" [*Exh. R 3*, *p. 35*]. Thus, subjective interpretation under Art. 8(1) CISG corresponds with the results of the objective interpretation.

91 Furthermore, one cannot implement the discussion between Mr. Antley and Ms. Napravnik into the contract [*cf. supra para. 31*]. Supplementing the wording of cl. 12 FSSA with their understanding would disregard the intent of the actual drafters of the hardship clause. The initial negotiators were never able to implement their understanding into the contract due to the accident [*Exh. C 8*, *p. 17*]. Neither Mr. Antley's note [*Exh. R 3*, *p. 35*] nor the previous correspondence to which the second negotiators had access [*PO2-5*, *p. 55*] addressed the issue. On the contrary, the subsequent negotiators from both Parties did not discuss the issue of

contract adaptation [*PO2-6*, *p. 55*] and were thus unable to adopt any prior ideas.

2. The mere use of a hardship clause or trade usages do not indicate otherwise

92 Contrary to CLAIMANT's submission [*MfC*, *para. 88*, *p. 29*], the fact that the Parties included a hardship clause cannot suffice to assume that they wanted to include adaptation. If anything, one could, debatably, assume an obligation to conduct negotiations in good faith after the circumstances have changed [PERILLO, *p. 25*]. However, parties cannot be forced to reach an agreement [SCHMITTHOFF, *p. 87*]. If negotiations fail, "the [contract] will continue to stand in its original form, unless the parties have provided otherwise" [ZACCARIA, *p. 154*; *cf. Japan Shipping Exchange*]. Such a duty to renegotiate would have been fulfilled by RESPONDENT, irrespective of the fact that the Parties eventually could not reach an agreement.

93 A different interpretation cannot be based on trade usages, either. The burden of proving a usage lies with the party who wishes to rely on it [*OLG Dresden (1998)*; STAUDINGER/*Magnus*, *Art. 79*, *para. 33*]. CLAIMANT simply alleges that "there is an international trade usage" that allows the court to adapt the contract, thus clearly falling short of fulfilling this burden of proof.

II. CLAIMANT IS NOT ENTITLED TO PAYMENT OF USD 1,250,000 UNDER THE CISG

94 In order to bypass the fact that the hardship clause does not serve its interests, CLAIMANT tries to have recourse to the CISG. However, the CISG was derogated by cl. 12 FSSA which provides a special regulation for the problem of changed circumstances [**A**]. Therefore, any approach to solve cases of hardship under the CISG is not applicable to the case at hand. Even if the CISG was applicable, Art. 79 CISG would not allow for contract adaptation [**B**]. Also, Art. 50 CISG would not empower Tribunals to adapt a contract [**C**]. This remedy could furthermore neither be based on gap filling under Art. 7(2) CISG [**D**] nor on trade usages under Art. 9(2) CISG [**E**].

A. CL. 12 FSSA DEROGATES THE CISG WHICH IS THEREFORE INAPPLICABLE TO HARDSHIP

95 Any approach to solve cases of hardship under the CISG is not applicable to the case at hand. CLAIMANT misunderstands the role the Parties have allocated to cl. 12 FSSA. The Parties provided for a special and conclusive regime to address changed circumstances when they included cl. 12 FSSA. This constitutes a derogation in the sense of Art. 6 CISG and renders any existing default solution for hardship under the CISG moot.

96 It is widely recognised that the use of a hardship clause indicates a derogation from the CISG [BRUNNER/*Sgier*, *Art. 79*, *para. 52*; SCHLECHTRIEM/SCHWENZER/*Schwenzer*, *Art. 79*, *para. 57*; MüKoBGB/*Huber*, *Art. 79*, *para. 33*]. For example, a special regulation for changed circumstances and the assumption of risk "will preclude the court from applying Art. 79"

[KRÖLL ET AL./*Atamer*, *Art. 79*, *para. 89*]. Such is the case here.

97 This is also supported by the Parties' intentions. In contrast to CLAIMANT's interpretation [*MfC*, *para. 106*, *p. 33*], the Parties did not intend to supplement the CISG. They wanted to *exclude* it. Where parties conscientiously draft a clause, they intend it to be conclusive in order to achieve legal certainty [*cf.* FUCCI, *p. 40*]. Cl. 12 FSSA is the custom-made result of the negotiation process. It was aimed at making hardship situations as specific and determinable as possible [*cf. Exh. R 5*]. Cl. 12 FSSA is a narrower version of the ICC Hardship clause [*Exh. R 3*, *p. 35*]. It was included as a reaction to the DDP clause and provides clear examples. This distinguishes it from other hardship clauses which are often included as mere boilerplate terms [BRUNNER, *p. 383*]. Properly negotiated clauses such as the one at hand all the more constitute a derogation from the CISG. This shows that the Parties did not want the CISG to regulate the implications of hardship. Creating the certainty was all the more reasonable as the CISG does not provide for an unambiguous solution for hardship.

98 Moreover, CLAIMANT cannot rely on the assertion that cl. 12 FSSA does not derogate from the CISG because it lacks a legal consequence [*MfC*, *para. 106*, *p. 33*]. As shown above [*cf. supra paras. 82 et seqq.*], cl. 12 FSSA stipulates an exemption from liability in cases of hardship. The CISG is thus not applicable in the case at hand to solve the issue of hardship.

B. IF THE CISG WAS APPLICABLE, ART. 79 CISG WOULD NOT ALLOW FOR ADAPTATION OF THE FSSA

99 CLAIMANT bases its claim specifically on Art. 79(1) CISG [*cf. MfC*, *paras. 116 et seqq.*, *pp. 35 et seqq.*] Even if the CISG was applicable, the price increase at hand would not meet the hardship standard under Art. 79 CISG [**1**]. In any case Art. 79 CISG would not allow for adaptation of the FSSA [**2**].

1. The prerequisites of Art. 79 CISG would not be met

100 The prerequisites of Art. 79 CISG – non-performance, no risk assumption, unforeseeability and insurmountability – are not met. Art. 79 CISG provides for exemption from liability in case a party fails "to perform any of his obligations". Its basic premise is thus that the obligor has "not or not properly performed" [SCHLECHTRIEM/SCHWENZER/*Schwenzer*, *Art. 79*, *para. 6*]. However, CLAIMANT delivered the third shipment without delay and free of defects. Therefore, it cannot rely on the exemption laid down in Art. 79 CISG. Moreover, the provision cannot apply where the relevant event stems from the obligor's sphere of risk [*ibid.*, *Art. 79*, *para. 12*]. CLAIMANT had assumed all risks associated with import duties under DDP [*cf. supra paras. 72 et seqq.*]. In addition, the tariffs were not unforeseeable [*cf. supra para. 67*].

101 CLAIMANT does not fulfil its burden of proof to show that it could not reasonably have been expected to overcome the tariffs' consequences. In fact, the circumstances support the opposite assumption, namely that CLAIMANT could have overcome the consequences of the event by delivering the shipment sooner. The Equatorianian tariffs were announced on 19 December 2017 by executive order and came into effect on 15 January 2018. The third shipment was scheduled for 22 January 2018. Thus, had the delivery taken place one week earlier, the tariffs could have been avoided. CLAIMANT had just short of one month to prepare a sensible mode of delivery. There is no indication that the "production" of the good takes a long time and if it did, the larger part of the third shipment must have already been in stock at this time. Considering these facts, it seems reasonable to expect a flexibility of at least one week. CLAIMANT's risk to ensure a seamless delivery encompassed the responsibility to investigate the scope of the tariffs in time, rather than being surprised by the customs authorities two days ahead of the shipment.

2. Art. 79 CISG does not provide for contract adaptation as legal consequence

102 Even casting aside all the above-mentioned shortcomings of CLAIMANT's approach, contract adaptation is simply not the legal consequence prescribed by Art. 79 CISG. CLAIMANT tries to elude the fact that cl. 12 FSSA does not provide for contract adaptation. By stating that it "is entitled to a remedy under Art. 79 [CISG]" [*MfC*, *Issue 3*, *II. 3.*, *heading*, *p. 39*], CLAIMANT misses the point that if it was entitled to a remedy, which RESPONDENT contests, it did not make any use of it. Properly invoking Art. 79 CISG would have meant for CLAIMANT to deny delivery of the last shipment and to rely on an exemption from any claim for damages under Art. 74(1) CISG.

103 The wording of Art. 79(1) CISG is clearly limited to an *exemption from liability*. Therefore, it does not include any further remedy [HONNOLD/FLECHTNER, *p. 629*; VENEZIANO, *p. 143*; LOOKOFSKY, *Running Wild*, *p. 158*; KOFOD, *section 4*]. Nowhere in Art. 79 CISG is there a term that would allow to add any other legal consequence. This is supported by the systematic structure of the CISG: Art. 79(1) CISG was placed in the section for "exemptions". Adaptation is a modification of contract terms. It does not exempt any party from fulfilling its obligations.

104 In particular, this view is supported by legislative history. The *travaux préparatoires* of the CISG prove that several efforts to introduce rudiments of conventional hardship doctrines were discarded. A separate provision allowing parties facing "excessive difficulties" to demand adaptation or termination was in fact considered. However, it was actively rejected [HONNOLD, *p. 350*]. This shows that the drafters of the CISG rejected contract adaptation as a conceivable legal consequence. By granting an exemption from liability, the CISG provides a sufficient

mechanism to solve hardship cases [SCHWENZER, *p. 724*; LOOKOFSKY, *Running Wild*, *p. 158*].

C. IF THE CISG WAS APPLICABLE, ART. 50 CISG WOULD NOT ALLOW FOR CONTRACT ADAPTATION EITHER

105 CLAIMANT infers from the possibility of price reduction in Art. 50 CISG that contract adaptation is possible under the CISG [*MfC*, *para. 140*, *pp. 39 et seq.*]. It relies on the idea of SCHLECHTRIEM that price reduction is also a kind of price adaptation [FLECHTNER, *Transcript*, *p. 236*]. However, SCHLECHTRIEM himself adds "that [price reduction] has an entirely different function" [*ibid.*]. Firstly, price reduction is exclusive to the buyer, Art. 50 CISG. Secondly, it requires non-conformity of goods, namely a deficit in the seller's risk sphere. Hardship on the other hand stems from outside both parties' spheres of influence. Thirdly, price reduction can be declared by the buyer to take effect, whereas adaptation requires the decision of a court. This shows that price reduction and contract adaptation in cases of hardship are two entirely different remedies. Art. 50 CISG cannot be viewed as a basis for contract adaptation in the CISG.

D. IF THE CISG WAS APPLICABLE, GAP FILLING UNDER ART. 7(2) CISG WOULD NOT ALLOW FOR CONTRACT ADAPTATION

106 CLAIMANT tries to justify an adaptation of the FSSA by relying on a gap in the CISG [*MfC*, *paras. 142 et seqq.*, *p. 40 et seq.*]. Even if the CISG was applicable to the case at hand, gap filling under Art. 7(2) CISG would not allow for contract adaptation. Again, CLAIMANT tries to compensate a hardship clause that does not provide for the desired remedy. The CISG does not contain a gap concerning contract adaptation in case of hardship [**1**] and even assuming such a gap, neither internal [**2**] nor external gap filling [**3**] allow for adaptation.

1. The CISG does not contain a gap regarding contract adaptation in case of hardship

107 Regarding contract adaptation as a mechanism to resolve cases of hardship, the CISG does not contain a gap. Art. 7(2) CISG defines a gap as a matter governed but not expressly settled by the CISG. However, where a topic has deliberately been left out or where the drafters did not want to grant a certain remedy, there is no gap [PAAL, *p. 68*]. The corresponding remedy is simply not available. Concerning the issue of contract adaptation, this is exactly what happened when the CISG was drafted. As seen above [*cf. supra para. 104*], the drafters of the CISG rejected a proposal to that extent. Similarly, a Norwegian proposal to grant the right to avoid the contract if circumstances radically change during a temporary impediment was not adopted [HONNOLD, *p. 350*]. The drafters of the CISG deliberately refused any approach to address the issue of hardship and any legal consequences that might be attached to it. Thus, the absence of

contract adaptation as legal remedy for hardship "merely reflects the Convention's rejection" [FLECHTNER, *Hardship Doctrine*, *p. 9*] and cannot support the assumption of a gap.

108 CLAIMANT relies on the judgement in *Scafom International v. Lorraine Tubes* by the Belgian *Hof van Cassatie* [*MfC*, *para. 138*, *p. 39*]. However, the *Hof van Cassatie* mishandled the gap-filling mechanism to implement its preferred legal remedy in Art. 79 CISG, which contradicts the unifying character of the CISG. The *Hof van Cassatie* found that Art. 79 CISG provides a solution for hardship, namely the exemption from liability. Nevertheless, it assumed a gap with reference to the legal consequences of hardship. Thus, the court "hallucinated" [FLECHTNER, *Hardship Doctrine*, *p. 12*] a gap although Art. 79 CISG *did* provide for a specific legal consequence. This questionable reasoning should not be applied in the case at hand. Therefore, with regard to the remedy of hardship situations, there is no gap within the CISG.

2. Even assuming a gap, internal gap filling would not allow for contract adaptation

109 Internal gap filling under Art. 7(2) CISG does not allow for contract adaptation. First, a duty to renegotiate and, if necessary, adapt a contract [*cf. MfC*, *para. 139*, *p. 39*] cannot be based on the principle of good faith. This proposal ignores the wording of Art. 7(1) CISG which reads as follows: "[in] the *Interpretation* of this Convention regard is to be had to […] the observance of good faith" [*emph. ad.*]. The principle of good faith is thus limited to the *interpretation* of the provisions of the CISG. It does not enable the creation of entirely new obligations between the parties [SCHLECHTRIEM/SCHWENZER/*Hachem*, *Art. 7*, *para. 17*], such as contract adaptation.

110 But even if one derived a duty to renegotiate between the Parties from the principle of good faith, this does not allow the Tribunal to adapt the contract. The duty of good faith can only oblige the parties to renegotiate the contract terms with each other, thereby exercising their party autonomy (once again). This mechanism ensures that the parties acknowledge each other's positions and do not prematurely terminate the contract. However, this is very different from forcing the parties to submit the result to a tribunal, *i.e.* an external instance [*cf.* MASKOW, *p. 663*]. Limiting party autonomy in such an intrusive manner cannot be based on an elusive concept like the observance of good faith.

111 Contrary to CLAIMANT's submission [*MfC*, *para. 143*, *p. 40*], the UPICC model law cannot be used to fill an internal gap under Art. 7(2) CISG. Consequently, the UPICC do not implant a power to adapt contracts into the CISG. There are two reasons why the UPICC do not constitute a general principle underlying the CISG in terms of Art. 7(2) CISG. Formally, this is because the UPICC were drafted *after* the CISG [SLATER, *p. 249*]. Materially, it is because the UPICC are an external legal framework and as such cannot serve as underlying principles

[HUBER/MULLIS/*Huber*, *pp. 35 et seq.*; FERRARI, *p. 16*; PAAL, *pp. 82 et seq.*].

112 What is more, the CISG is an international legal framework which was formally adopted by legislative bodies. It has binding legal force in all member states and was the result of complex negotiations and compromises. These would be undermined if the UPICC, which have been the result of an entirely different process and not are meant to be legally binding [SLATER, *fn. 134*], were used indiscriminately to supplement the CISG.

113 Moreover, hardship provisions in the UPICC are not universally accepted [*ICC No. 12446*; VENEZIANO, *p. 144*]. Rather, the solution of contract adaptation in the UPICC appears "almost shocking" to lawyers from Common Law traditions [FLECHTNER, *Hardship Doctrine*, *p. 7*]. Contract adaptation by courts can thus not be viewed as a general principle underlying the CISG. Therefore, gap filling under Art. 7(2) CISG does not reveal a power to adapt the FSSA.

3. Even assuming a gap, external gap filling would not allow for contract adaptation

114 Furthermore, turning to the MCL as the otherwise applicable domestic law does not allow for adaptation. Firstly, domestic law is only applicable by external gap filling as a last resort [SCHLECHTRIEM/SCHWENZER/*Hachem*, *Art. 7*, *para. 42*]. Thus, if the Tribunal accepts RESPONDENT's view that the CISG settles the issue of hardship by providing a specific remedy in Art. 79 CISG, a recourse to domestic law is not possible. However, even assuming an external gap, the relevant provision under the domestic law, Art. 6.2.3(4)(b) MCL, would not allow for adaptation of the FSSA in the case at hand. This is because the prerequisites of hardship under Art. 6.2.2 MCL are not met, namely the occurrence of an event that fundamentally alters the equilibrium of the contract.

115 By simply stating that "the fundamental equilibrium of the contract shifted" [*MfC*, *para. 146b*, *p. 41*], CLAIMANT avoids to properly scrutinise the meaning of the term "fundamental". The term sets a high threshold for hardship under the MCL and ensures that the hardship doctrine will operate in narrow limits [VOGENAUER/KLEINHEISTERKAMP/*McKendrick*, *Art. 6.2.2*, *para. 5*]. As seen above [*cf. supra para. 71*], the historic development of Art. 6.2.2 UPICC shows that a cost increase of 15 or 30 per cent is insufficient to constitute hardship under the MCL. After at first "an alteration amounting to 50 % or more" [*Official Comment 1994 Ed.*, *Art. 6.2.2*, *Cmt. 2*] had been deemed as sufficient to constitute hardship, this notion was later dropped from the official UPICC comment because the 50 per cent threshold was criticised, *inter alia*, for being too low [*UPICC Working Group 2003*, *p. 15*]. Consequently, it must be assumed that the threshold for hardship under the MCL is typically an alteration in performance cost exceeding 50 per cent.

116 As seen above [*cf. supra para. 67*], CLAIMANT could have taken the imposition of the tariffs into account. Particularly, shortly before the contract was concluded, the newly elected president had announced a more protectionist trade policy [*Exh. C 6*, *p. 15*]. CLAIMANT must have been even more alarmed when Equatoriana appointed a new superminister for agriculture and trade, well renowned for her protectionist attitude in international trade [*PO2-23*, *p. 58*]. CLAIMANT did not address the issue and signed the FSSA shortly after these prominent events.

117 Also, CLAIMANT assumed the risk of the occurrence of such tariffs under Art. 6.2.2 MCL. Whether or not a risk was assumed depends on the contract itself [*Official Comment 2016 Ed.*, *Art. 6.2.2*, *Cmt. 3.d*]. As shown above, CLAIMANT has agreed to shipment DDP. This expresses the contract's risk balance under which CLAIMANT "bears all the costs and risks […] *to pay any duty for both export and import*." [*Incoterms*, *DDP*, *Guidance Notes*]. CLAIMANT has thus assumed the risk of occurrence of the imposition of Equatorianian tariffs [*cf. supra para. 73*].

118 Consequently, the imposition of tariffs leading to a price increase of 30 per cent of the third shipment and 15 per cent of the overall value does not constitute hardship under Art. 6.2.2 MCL. CLAIMANT is thus not entitled to price adaptation under Art. 6.2.3(4)(b) MCL.

E. ADAPTATION CANNOT BE BASED ON ART. 6.2.3 UPICC AS A TRADE USAGE

119 Even if the CISG was applicable, the Parties would not have impliedly agreed on Art. 6.2.3 UPICC as a trade usage under Art. 9(2) CISG [*cf. MfC*, *para. 153*, *p. 43*]. This would require Art. 6.2.3 UPICC to be widely known to and regularly observed by parties. However, the hardship provisions in the UPICC are "far from being universally accepted" [VENEZIANO, *p. 144*]. Rather, it is "almost inconceivable" that Common Law courts would overrule an agreement two parties have reached [FLECHTNER, *Hardship Doctrine*, *p. 7*]. This proves that Art. 6.2.3 UPICC does not reflect a trade usage.

120 Even if the Tribunal considered Art. 6.2.3(4)(b) UPICC to be a trade usage, it would only be applicable if the Parties have not agreed otherwise [*cf. Art. 9(2) CISG*]. As demonstrated above [*cf. supra paras. 95 et seqq.*], cl. 12 FSSA conclusively governs situations of hardship and consciously derogates from any other hardship regime. Thus, the Parties agreed to exclude any trade usage that would apply to hardship by negotiating and inserting the contractual hardship clause.

III. THE CLAIM FOR DAMAGES IS INADMISSIBLE UNDER ART. 18.1 HKIAC RULES

121 Because neither the FSSA nor the CISG provide the relief sought by CLAIMANT, it submits an additional claim for damages under Art. 74 CISG for breach of contract [*MfC*, *paras. 1 et seqq.*,

pp. 43 et seq.]. As CLAIMANT had originally requested a payment of USD 1,250,000 resulting from *contract adaptation* in its Notice of Arbitration [*NoA-18 et seqq.*, *pp. 7 et seq.*, *emph. ad.*], it apparently seeks to supplement its claim under Art. 18.1 HKIAC Rules. RESPONDENT asks to declare this request inadmissible pursuant to Art. 18.1 HKIAC Rules because it is inappropriate under the circumstances. In its Procedural Order No. 1, the Tribunal asked clear questions, namely: "Is CLAIMANT entitled to the payment of USD 1,250,000 or any other amount *resulting from an adaptation of the price*?" [*PO1-III.1.c*, *p. 53*, *emph. ad.*]. Damages do not result from price adaptation but constitute an entirely different remedy. The Tribunal made clear that "**[n]o further** questions going to the merits of the claim should be addressed" [*ibid.*]. For this reason, the claim for damages should be declared inadmissible by the Tribunal. Therefore, CLAIMANT's recourse to an alleged post-contractual agreement is void. These concerns were only raised in the context of claims for damages [*MfC*, *paras. 107 et seqq.*, *pp. 33 et seqq.*].

CONCLUSION ON PART III

122 CLAIMANT is not entitled to an additional payment under cl. 12 FSSA or the CISG. The requirements of the contractual hardship clause are not met, and it would only provide for an exemption from liability as a remedy. The CISG may not be consulted on questions of hardship since it was derogated from by the contractual hardship clause. None of CLAIMANT's gap-filling approaches are applicable. Lastly, CLAIMANT's requests for damages are inadmissible.

ADDENDUM

RESPONDENT kindly asks the Tribunal to recognise that CLAIMANT's Memorandum considerably exceeds the permissible number of pages. The Parties' written submissions must be "in accordance with the Rules of the Moot" ("**RotM**") [*PO1-III-3*]. According to para. 52 of the RotM, Memoranda may not be longer than 35 pages "including any statement of facts, argument or discussion and any conclusion" [*RotM*, *para. 52*]. Yet, the Memorandum submitted by CLAIMANT stretches over a grand total of 43 pages [*MfC*, *pp. 4 - 46*]. Art. 18 UNCITRAL Model Law and Art. 13.1 HKIAC Rules establish the principle of equal treatment of the parties. This principle requires both parties to receive "an **equal opportunity to present written submissions and to respond to each other's submissions**" [*Vera-Jo Aryeh v. Iran*, *emph. ad.*]. RESPONDENT will continue to comply with the RotM and respectfully requests the Tribunal to exercise its discretion in order to address the resulting disadvantage.

REQUEST FOR RELIEF

Based on the aforesaid, RESPONDENT respectfully requests the Honourable Tribunal to grant the relief set out herein below:

1) The claim is inadmissible for lack of jurisdiction and powers;
2) The Partial Interim Award is inadmissible as evidence;
3) CLAIMANT is not entitled to an additional payment in the amount of USD 1,250,000;
4) CLAIMANT shall reimburse RESPONDENT for the costs incurred in this arbitration.

Heidelberg, 24 January 2019
Counsel for **RESPONDENT**

Stella Elmentaler
Felix Kemmling
Marcus Nonn
Tim Robers
Maren Vogel

Certificate and Choice of Forum

To be attached to each Memorandum

I Marluis Lieberknecht, on behalf of the Team for (name of School) University of Heidelberg 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) University of Heidelberg

Name Marluis Lieberknecht

Signature M. Lieberknecht