SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

FRIEDRICH SCHILLER UNIVERSITY OF JENA

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

COUNSEL FOR RESPONDENT

LUCAS IBERS · ELENA KRENN

KRISTIN PAUL · LUKAS TEPKE · JULIANE WILKE

JENA · GERMANY

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ALR	Australian Law Report
Apr	April
Art./Arts.	Article/Articles
A.Ş.	Anonim Şirket (Turkish public limited company)
Aug	August
BGH	Bundesgerichtshof (German Federal Court of Justice)
cf.	compare with
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
C-Memo	Memorandum for Claimant
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DDP	Delivered Duty Paid
Dec	December
Doc.	Document
Ed.	Editor
e.g.	exemplum gratia (for example)
et al.	et alli/aliae/alia (and others)
et seq.	et sequens (and that which follows)
et seqq.	et sequentia (and those which follow)
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
Ex.	Exhibit
Feb	February
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
HKIAC Model Clause	Arbitration under the HKIAC Administered Arbitration Rules Model Clause
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
IBA	International Bar Association

IBA Rules of Evidence	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	In the same place
ICC Hardship Clause	ICC Hardship Clause 2003
i.e.	In other words
IHR	Internationales Handelsrecht
Inc.	Incorporated
Jan	January
Jul	July
Jun	June
Ltd.	Limited
Mar	March
MAL	Mediterranean Arbitration Law
MaCl	Mail from CLAIMANT on 2 Oct 2018 [*p. 50*]
MaRes	Mail from RESPONDENT on 3 Oct 2018 [*p. 51*]
MCL	Mediterranean Contract Law
Mr.	Mister
Ms.	Miss
No.	Number
NoA	Notice of Arbitration
Nov	November
NYC	New York Convention
Oct	October
OLG	Oberlandesgericht (German Regional Court of Appeals)
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PICC	UNIDROIT Principles
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RdW	Recht der Wirtschaft
S.A.	Sociedade Anônima (Brasilian public limited company)
Sep	September

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

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in para. 3; 4; 5; 16; 49; 51

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in para. 47

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in para. 90; 91; 92

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in para. 18; 23; 43

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in para. 51

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in para. 41; 45

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in para. 79; 80; 81; 89; 92

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in para. 71

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in para. 12; 73; 80; 84; 89

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in para. 81; 91

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in para. 81; 90; 91

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in para. 25

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in para. 9; 20

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in para. 79; 89; 91

INDEX OF COURT DECISIONS

Austria

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22 Oct 2001
Case No.: 1 Ob 77/01g
RdW 2002, 276
cited as: *OGH, 22 Oct 2001*
in para. 73

England and Wales

House of Lords
Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Shell International Petroleum Co. Ltd.
23 Jun 1988
Case No.: 27 I.L.M. 1032
[1990] 1 A.C. 295
cited as: *Deutsche Schachtbau-und Tiefbohrgesellschaft v. Shell International*
in para. 11

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Sun Life Assurance Company of Canada, American Phoenix Life and Reassurance Company, Phoenix Home Life Mutual Insurance Company v. The Lincoln National Life Insurance Company
10 Dec 2004
Case No.: 2004 0545 A3; 2004 0547 A3
[2004] EWCA Civ 1660
cited as: *Sun Life v. Lincoln*
in para. 45

House of Lords
Lesotho Highlands Development Authority v. Impregilo SpA and Others
30 Jun 2005
Case No.: 2005 WL 1505127
[2005] UKHL 43
cited as: *Lesotho Highlands v. Impregilo Spa*
in para. 3

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C v. D
05 Dec 2007
Case No.: A3/2007/1697
[2007] EWCA Civ 1282
cited as: *C v. D*
in para. 15

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Sulamérica Cia Nacional De Seguros S.A. and others v. Enesa Engenharia S.A. and others
16 May 2012
Case No.: A3/2012/0249
[2012] EWCA Civ 638
cited as: *Sulamérica v. Enesa*
in para. 15

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Habaş Sınai ve Tıbbi Gazlar İstihsal Endüstri A.Ş.v. VSC Steel Company Ltd
19 Dec 2013
Case No.: 2012-1055
[2013] EWHC 4071 (Comm)
cited as: *Habas Sinai v. VSC Steel*
in para. 15

Germany

Bundesgerichtshof [Federal Supreme Court]
02 Dec 1996
Case No.: VIII ZR 306/95
NJW-RR 1997, pp. 690-692
cited as: *BGH, 2 Dec 1996*
in para. 74

OLG München [Higher Regional Court]
15 Sep 2004
Case No.: 7 U 2959/04
IHR 2/2005, p. 70-72
cited as: *OLG München, 15 Sep 2004*
in para. 44

Italy

Tribunale Civile di Monza
Nuova Fucinati S.p.A. v. Fondmetal International A.B.
14 Jan 1993
Case No.: D95-6362
CISG CLOUT Case 54
cited as: *Tribunale Civile di Monza, 14 Jan 1993*
in para. 79

Singapore

High Court of the Republic of Singapore
FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others
19 June 2014
Case No.: Summons No 5657 of 2013
[2014] SGHCR 12
cited as: *FirstLink v. GT Payment*
in para. 5; 16

Switzerland

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18 Jan 2017

Case No.: 4A_500/2015

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cited as: *BGH, 18 Jan 2017*

in para. 44

INDEX OF ARBITRAL AWARDS

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Second Preliminary Award
1971
Case No.: 1512
in: Yearbook Commercial Arbitration [1976], pp. 128-130
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1976
Case No.: 2520
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in para. 73

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Decision on the Proposal to disqualify Professor Philippe Sand, Arbitrator
05 May 2011
Case No.: ARB/10/14
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cited as: *Opic v. Venezuela*
in para. 50

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Award
02 Jul 2013
Case No.: ARB/10/01
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cited as: *Kilic v. Turkmenistan*
in para. 50

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Interim Decision
17 Jan 2017
Case No.: ARB/07/30
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cited as: *Conoco Phillips v. Venezuela*
in para. 50

Caratube International Oil Company LLP and Mr. Decincci Salah Hourani v. Republic of Kazakhstan
Award
27 Sep 2017
Case No.:ARB/13/13
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cited as: *Caratube v. Kazakhstan*
in para. 50

NAFTA (North American Free Trade Agreement)

Methanex Corporation v. United States of America

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3 Aug 2005

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cited as: *Methanex v. USA*

in para. 45; 47

Permanent Court of Arbitration

Yukos Universal Limtied (Isle of Man) v. The Russian Federation

Final Award

18 Jul 2014

https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf

cited as: *Yukos v. Russia*

in para. 50

INDEX OF LEGAL SOURCES

CISG	Convention on Contracts for the International Sale of Goods, Vienna 1980
Danubian Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law
Danubian Contract Law	Largely verbatim Adoption of the UNIDROIT Principles
Equatorianian Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC Clauses	International Chamber of Commerce Force Majeure Clause 2003 International Chamber of Commerce Hardship Clause 2003
Mediterranean Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law
Mediterranean Contract Law	Verbatim Adoption of the UNIDROIT Principles
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006

UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts, 2016

STATEMENT OF FACTS

The Parties [*hereinafter the Parties*] to this arbitration are **Black Beauty Equestrian** [*hereinafter RESPONDENT*] and **Phar Lap Allevamento** [*hereinafter CLAIMANT*].

RESPONDENT is a company located in Equatoriana. It possesses famous broodmare lines in the areas of show jumping and dressage. Aiming to become one of the leading breeders for racehorses, it intends to establish its own racehorse stable.

CLAIMANT operates the oldest and most renowned stud farm in Mediterraneo. As Nijinsky III is CLAIMANT's best racehorse, it is also used for breeding.

21 Mar 2017 RESPONDENT contacted CLAIMANT in order to discuss the sale of frozen racehorse semen of Nijinsky III.

24 Mar 2017 CLAIMANT agreed to enter into negotiations to sell 100 doses of frozen semen to RESPONDENT.

28 Mar 2017 RESPONDENT requests CLAIMANT to agree to the Incoterm "*Delivery Duty Paid*" [*hereinafter DDP*].

31 Mar 2017 CLAIMANT accepted DDP only in return for a price increase of US$ 1000 per dose. As RESPONDENT objected, they finally agreed on an additional payment of US$ 500 per dose.

10 Apr 2017 RESPONDENT proposed a first draft of the dispute resolution clause providing for arbitration in Equatoriana and the arbitration agreement to be governed by Equatorianian Law.

11 Apr 2017 CLAIMANT stated that it could agree only to a neutral seat of arbitration and suggested Danubia as the seat. Furthermore, it deleted the choice of law applicable to the arbitration agreement. CLAIMANT additionally proposed to include the ICC Hardship Clause 2003 [*hereinafter ICC Hardship Clause*].

12 Apr 2017 The main negotiators, Ms. Napravnik (CLAIMANT) and Mr. Antley (RESPONDENT), discussed the arbitration clause and the hardship clause in a meeting. RESPONDENT criticized the proposed ICC Hardship Clause as being too broad. Furthermore, Ms. Napravnik wanted to include an express empowerment for contract adaptation into the contract. After a car accident

of Mr. Antley and Ms. Napravnik, Mr. Ferguson (CLAIMANT) and Mr. Krone (RESPONDENT) continued the negotiations.

06 May 2017 The new negotiators signed the Frozen Semen Sales Agreement [*hereinafter FSSA*]. It contains an arbitration clause with seat in Danubia, but no express choice of law for the arbitration agreement. The hardship clause states "*The seller shall not be responsible [..] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*".

Nov 2017 Mediterraneo raised a 25% tariff on agricultural products from Equatoriana.

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

20 Jan 2018 CLAIMANT notified RESPONDENT about the new 30% tariff.

21 Jan 2018 Ms. Napravnik called Mr. Shoemaker to discuss a solution regarding the additional tariff. During the phone conversation Mr. Shoemaker stated that a contract adaptation would only be possible if the contract provided for it. CLAIMANT nevertheless authorized the shipment.

23 Jan 2018 CLAIMANT shipped the last instalment and paid the 30% tariff.

12 Feb 2018 The renegotiations between the Parties were unsuccessful. In the meeting CLAIMANT alleged that RESPONDENT breached the resale prohibition. Because of that, RESPONDENT's CEO broke up the negotiations.

31 Jul 2018 CLAIMANT initiated the arbitral process at the HKIAC to request an adaptation of the FSSA.

02 Oct 2018 CLAIMANT announced that it wants to submit documents as evidence from another HKIAC arbitration RESPONDENT is involved in. In the other arbitration process, RESPONDENT claims contract adaptation due to the 25% tariff imposed by Mediterraneo.

03 Oct 2018 RESPONDENT objected to CLAIMANT's request to submit the partial interim award and RESPONDENT's submission in the other proceeding, because they are confidential and had been illegally obtained.

SUMMARY OF ARGUMENTS

To enter into a contract with a DDP clause can be as risky as a horserace. One time you win, one time you lose. In this case, CLAIMANT risked it all, because it urgently needed the money. Now, CLAIMANT does not want to pay the price, but tries to change the rules of the contract.

ISSUE A – The law of Danubia governs the arbitration agreement and the Arbitral Tribunal lacks power to adapt the contract under the arbitration agreement.

CLAIMANT tries to change the rules by alleging that the law of the main contract also applies to the arbitration agreement. On the contrary, the doctrine of separability requires to determine the law applicable to the arbitration agreement separately from the law governing the underlying contract. Thus, the law of the main contract does not automatically apply to the arbitration agreement. Instead, the Parties impliedly chose Danubian Law to govern the arbitration agreement by selecting Danubia as the arbitral seat. Even if no choice of law has been made, the law of Danubia applies, because the arbitration agreement has the closest and most real connection to the law of the place of arbitration.

CLAIMANT further wants to adapt the contract to reclaim the additional costs. However, the Tribunal has no power under Danubian Law to adapt the contract as the FSSA lacks an express empowerment. Since the four corners rule applies for the interpretation of the arbitration agreement, an oral empowerment of the Tribunal as alleged by CLAIMANT is not possible. Even under Mediterranean Law the Tribunal is not empowered to adapt the contract, because the Parties did also not expressly empower the Tribunal.

ISSUE B – CLAIMANT should not be allowed to submit the Evidence from the other arbitral proceedings.

Now, CLAIMANT strives to dope his arguments with illegally obtained evidence. The admissibility of the Evidence should be assessed under the IBA Rules. Following Art. 9.2(a) IBA Rules the Evidence should be excluded, because it is neither relevant to the case nor material to its outcome. This is because both proceedings are factually and legally significantly different. Moreover, the Evidence should be barred for reasons of fairness according to Art. 9.2(g) IBA Rules, because it was obtained illegally. In addition, the Evidence should not be allowed under Art. 9.2(e) IBA Rules. The partial interim award is protected under Art. 42.1 HKIAC Rules 2013, which establishes a confidentiality agreement with a third party

in the sense of that provision. The confidentiality can also not be waived by joining the third party under Art. 27 HKIAC Rules. On the other hand, CLAIMANT's right to be heard is not violated by excluding the Evidence.

ISSUE C – CLAIMANT is not entitled to an additional payment of US$ 1,250,000 from RESPONDENT.

Additionally, CLAIMANT wants to push RESPONDENT aside from the racecourse by trying to shift the additional costs on to RESPONDENT. However, the tariff is not covered by the hardship clause in clause 12 FSSA. The additional costs do not result from an "*unforeseen event*" comparable to "*additional health and safety requirements*" as required by clause 12 FSSA. Furthermore, the fact that the costs of performance of the overall contract increased by 15%, does not constitute hardship. Consequently, the hardship clause does not exempt CLAIMANT from its responsibility for import clearance, which it has under the DDP agreement.

CLAIMANT is likewise not entitled to claim an additional payment under Art. 79 CISG. Firstly, the Parties derogated from this provision with their hardship clause contained in the FSSA. Secondly, Art. 79 CISG neither covers hardship nor provides for the remedy of a contract adaptation by the Tribunal. Even if the Tribunal should assume that Art. 79 CISG is applicable and covers hardship, the 30% tariff does not reach the threshold required for hardship. Even when considering the negotiations and CLAIMANT's financial difficulties, the threshold for hardship is still not met. Consequently, RESPONDENT is not obliged to pay the additional tariff.

ARGUMENT

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

1 Contrary to CLAIMANT's submission [*C-Memo, p. 3 et seqq., para. 5 et seqq.*], Mediterranean Law including the United Nations Convention on Contracts for the International Sale of Goods (1980) [*hereinafter CISG*] does not govern the arbitration agreement. Instead, it is subject to the law of the seat of arbitration, i.e. the law of Danubia (**A**). Regardless of whether Danubian or Mediterranean Law applies to the arbitration agreement, the Arbitral Tribunal [*hereinafter Tribunal*] lacks the power to adapt the Frozen Semen Sales Agreement [*hereinafter FSSA*] (**B**).

A. DANUBIAN LAW APPLIES TO THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

2 In CLAIMANT's view the choice of law for the main contract in clause 14 FSSA automatically extends to the arbitration agreement [*C-Memo, p. 4 et seq., para. 7 et seqq.*]. However, an arbitration agreement is a separate contract with which the parties agree to submit disputes concerning the main contract to arbitration [*Moses, p. 18 et seq.*]. Due to the separability doctrine, the law of the arbitration agreement must be determined separately from that applicable to the underlying contract (**I**). By choosing Danubia as the seat of arbitration [*Ex. C-5, p. 14, para. 15*], the Parties impliedly agreed on the law of Danubia to govern the arbitration agreement (**II**). Even if the Tribunal should assume that no choice of law has been made, Danubian Law governs the arbitration agreement as it is the law with the closest and most real connection to the arbitration agreement (**III**).

I. THE LAW OF THE MAIN CONTRACT DOES NOT AUTOMATICALLY APPLY TO THE ARBITRATION AGREEMENT

3 The separability doctrine treats an arbitration agreement as beeing separate from the main contract although it is included in the document of the underlying contract [*Exclusive Agent v. Manufacturer, para. 4; Lesotho Highlands v. Impregilo Spa, para. 21; Lew et al., para. 6-9*]. Since the doctrine is considered as "*one of the conceptual and practical cornerstones of international arbitration*" [*Born, ICA, p 350*], it is recognized by international conventions and most modern arbitration laws [*Lew et al., para. 6-16*]. In the present case, the arbitration laws of Danubia, Mediterraneo and Equatoriana embody the

separability doctrine as they verbatim adopted Art. 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 2006 [*hereinafter UML*] [*PO1, p. 53, para. III. 4.; PO2, p. 56 et seq., para. 14*]. Art. 16(1) UML provides that "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*".

4 According to CLAIMANT's submission [*C-Memo, p. 4 et seq., para. 7 et seqq.*], the doctrine of separability only ensures the validity of the arbitration agreement in case the main contract is invalid or non-existent. However, the doctrine additionally entails that the two separable agreements can be – and often are – governed by different laws [*Born, ICA, p. 479; Poudret/Besson, para. 178*]. Consequently, the law applicable to the arbitration agreement must necessarily be examined separately [*Born, ICA, p. 464*].

5 Firstly, this results from the different functions of the arbitration agreement and the main contract [*FirstLink v. GT Payment, para. 13; Born, ICA, p. 464*]. While the arbitration agreement provides a mechanism for settling disputes arising out of the underlying contract, the main contract governs the parties' rights and duties [*FirstLink v. GT Payment, para. 13*]. Most frequently, commercial parties submit their main contract to a law which they understand and are familiar with [*Born, LaP, p. 258*]. However, for arbitration agreements parties usually want the applicable law to be neutral. This shall ensure that each party has equal rights for the resolution of the dispute [*FirstLink v. GT Payment, para. 13*]. Thus, it appears that the parties generally choose the law governing the arbitration agreement for other reasons than the law for the main contract [*Fouchard/Gaillard/Goldman, p. 222*]. In the case at hand, Mediterranean Law governs the main contract [*Ex. C-5, p. 14, para. 14*]. Equatoriana and Mediterraneo adopted the UNIDROIT Principles on International Commercial Contracts 2016 [*hereinafter PICC*] [*PO1, p. 53, para. III. 4.*]. Therefore, both Parties are familiar with the applicable contract law. With regard to the dispute resolution, CLAIMANT itself proposed a neutral place of arbitration [*Ex. R-2, p. 34*]. Consequently, it cannot readily be assumed that the law of the arbitration agreement and the law of the underlying contract are identical.

6 Secondly, the concept of arbitration is fundamentally based on the principle of party autonomy [*Rosen, p. 599*]. Therefore, the parties are free in choosing the applicable law to the arbitration agreement [*Poudret/Besson, para. 178*]. In the present case, the Parties impliedly submitted the arbitration agreement to the law of Danubia [*infra, para. 8 et seqq.*]. Hence, the Parties' autonomy would be violated if their implied choice is not taken into account.

7 In light of the above, the separability doctrine prohibits to automatically assume that the law of the main contract also applies to the arbitration agreement.

II. THE PARTIES IMPLIEDLY SUBMITTED THE ARBITRATION AGREEMENT TO THE LAW OF DANUBIA

8 The arbitration agreement is subject to the law explicitly or impliedly chosen by the Parties [*Choi, p. 106*]. In the case at hand, the arbitration agreement in clause 15 FSSA contains no express choice of law [*Ex. C-5, p. 14, para. 15*]. CLAIMANT argues that the Parties intended the arbitration agreement to be governed by the law of the main contract, i.e. the CISG as a part of the Mediterranean Law [*C-Memo, p. 5 et seq., para. 10 et seqq.*]. However, when the Parties selected Danubia as the place of arbitration [*Ex. C-5, p. 14, para. 15*], they impliedly chose Danubian Law to govern the arbitration agreement. This follows from an interpretation of the choice of the seat under Danubian Law (**1**). Even if the choice of the arbitral seat is interpreted under Mediterranean Law, it constitutes an implied choice for Danubian Law (**2**).

1. UNDER DANUBIAN INTERPRETATION STANDARDS, THE PARTIES IMPLIEDLY CHOSE DANUBIAN LAW TO GOVERN THE ARBITRATION AGREEMENT

9 According to the jurisprudence of Danubian courts, the CISG is not applicable to arbitration agreements [*PO2, p. 60, para. 36*]. Therefore, the interpretation principles of the Danubian Contract Law [*hereinafter DCL*] apply to interpret the choice of the seat in clause 15 FSSA. The DCL is a largely verbatim adoption of the PICC [*PO2, p. 61, para. 45*]. The four corners rule, however, replaces Art. 4.3 PICC in the DCL [*ibid.*]. This rule applies to written contracts and has largely the same effects as a merger clause in the sense of Art. 2.1.17 PICC [*ibid.*]. Thus, a contract "*cannot be contradicted or supplemented by evidence of prior statements or agreements*" [*Art. 2.1.17 PICC*]. However, if the wording is unclear such statements or agreements can be used to interpret the writing [*Vogenauer in: Vogenauer, Art. 2.1.17 PICC, para. 6*]. Thus, it does not prevent a party from establishing the existence of an implied term in the contract [*Edel, p. 200*]. In the present case, it is unclear, whether the choice of the arbitral seat implies a choice of the law applicable to the arbitration agreement. Hence, the Tribunal can consider the negotiation history of the FSSA.

10 CLAIMANT argues that it clarified that Danubian Law could not govern the arbitration agreement since it is considered as a "*foreign law*" [*C-Memo, p. 5 et seq., para. 11*]. On the contrary, RESPONDENT could only understand CLAIMANT's proposal for Danubia to be the seat of arbitration as a choice of Danubian Law for the arbitration agreement. RESPONDENT

first suggested that the arbitral seat should be Equatoriana and Equatorianian Law applies to the arbitration agreement [*Ex. R-1, p. 33*]. Thereby it expressed its intent that the law of the arbitral seat should govern the arbitration agreement. In its answer CLAIMANT informed RESPONDENT that according to its internal policy, the creditors' committee has to approve any contract submitted to a "*foreign law*" [*Ex. R-2, p. 34*]. However, it declared that it could agree "*on arbitration in a neutral country*" and proposed Danubia as the arbitral seat [*ibid.*]. The choice of the place of arbitration is one of the most important elements of any arbitration agreement, because the law of the seat governs the entire arbitral proceedings [*Moser/Bao, para. 4.09 et seq.*]. In particular, the law of the seat defines the legal framework for the arbitration agreement, for instance with regard to the arbitrability of the dispute [*Moser/Bao, para. 4.10*]. Thus, the law of the arbitral seat has enormous legal and practical consequences for the parties' dispute resolution. Hence, RESPONDENT could have only understood CLAIMANT in the way that the neutral law of the seat should also govern the arbitration agreement. As a result, the choice of the arbitral seat in favour of Danubia implies that the law of Danubia applies to the arbitration agreement.

11 Contrary to CLAIMANT's submission [*C-Memo, p. 5, para. 8*], the Parties did not intend the choice of law in clause 14 FSSA to apply also to the arbitration agreement. Indeed, the choice of law clause for the main contract may be considered in order to determine the law applicable to the arbitration agreement [*Deutsche Schachtbau- und Tiefbohrgesellschaft v. Shell International, p. 310*]. Clause 14 FSSA states that "*[t]his Sales Agreement shall be governed by the law of Mediterraneo, including the [CISG]*" [*Ex. C-5, p. 14, para. 14, emphasis added*]. Consequently, the Parties intended to exclude the arbitration agreement from the scope of clause 14 FSSA. While discussing the dispute resolution clause, CLAIMANT merely stated that "*the law applicable to the Sales Agreement remains the law of Mediterraneo*" [*Ex. R-2, p. 34, emphasis added*]. While the Parties had already submitted the main contract to Mediterranean Law, the law governing the arbitration agreement was not yet clarified. Thus, by using the wording "*remains*" CLAIMANT could have only referred to the main contract. This is especially the case as CLAIMANT's statement as well as clause 14 FSSA refer to the "*Sales Agreement*", meaning only the sales part of the FSSA. Hence, neither RESPONDENT nor CLAIMANT intended the choice of law in clause 14 FSSA to apply to the arbitration agreement.

12 In case that the Tribunal assumes that it is unclear whether the wording "*Sales Agreement*" in clause 14 FSSA refers to the entire contract or merely to the sales part of it, the Tribunal should apply the contra proferentem rule. As the Parties purport to have chosen Mediterranean Law including the CISG to govern the main contract, clause 14 FSSA must

be interpreted according to Art. 8 CISG [*cf. Rühl, p. 476 et seq.*]. Art. 8 CISG acknowledges the contra proferentem rule according to which an ambiguous contract term should be interpreted to the detriment of the party which supplied it [*Schmidt-Kessel in: Schlechtriem/Schwenzer(2016), Art. 8 CISG, para. 49*]. The FSSA is based on an industry template from Mediterraneo, which CLAIMANT already used for the sale of frozen semen [*PO2, p. 55, para. 3*]. The Parties have to fill in certain blanks or alternatives to finalise their contract which are marked in italics or underlined [*ibid.*]. The wording of clause 14 FSSA is neither written in italics nor is it underlined [*Ex. C-5, p. 14, para. 14*]. Thus, CLAIMANT provided the wording of clause 14 FSSA. Consequently, the choice of law clause must be interpreted in CLAIMANT's disfavour so that it does not extend to the arbitration agreement.

13 In light of the above, the Parties impliedly agreed on Danubian Law to govern the arbitration agreement by choosing Danubia as the seat of arbitration.

2. UNDER MEDITERRANEAN INTERPRETATION STANDARDS, THE PARTIES INTENDED THE ARBITRATION AGREEMENT TO BE GOVERNED BY DANUBIAN LAW

14 Mediterranean courts apply the CISG to arbitration agreements if the underlying contract is subject to the CISG [*PO1, p. 53, para. III. 4.*]. Hence, under the law of Mediterraneo the choice of the arbitral seat has to be interpreted according to Art. 8 CISG. It reads that "*statements made by and other conduct of a party are to be interpreted according to its intent where the other party knew or could not have been unaware what that intent was*". In determining the parties' intent, Art. 8(3) CISG particularly permits to consider the negotiations. As shown above, the drafting history of the FSSA demonstrates that the Parties intended the law of the seat of arbitration to govern the arbitration agreement [*supra, para. 9 et seqq.*]. Thus, an interpretation under Mediterranean Law leads to the same result.

III. ABSENT A CHOICE OF LAW, THE LAW OF DANUBIA APPLIES AS THE LAW WITH THE CLOSEST AND MOST REAL CONNECTION TO THE ARBITRATION AGREEMENT

15 In case the Tribunal should assume that the Parties have neither explicitly nor impliedly agreed on the law applicable to the arbitration agreement, it has to be determined through an objective approach [*Yu, p. 219*]. CLAIMANT argues that even absent any choice of law, the arbitration agreement would still be subject to the CISG [*C-Memo, p. 8, para. 22 et seq.*]. In CLAIMANT's view the CISG is "*the most suitable law*" by promoting international uniformity and legal certainty [*ibid.*]. However, case law as well as the literature demonstrate that the proper law for the arbitration agreement is the one with the closest and

most real connection to the arbitration agreement [*C v. D., para. 22 et seq.; Sulamérica v. Enesa, para. 9; Habas Sinai v. VSC Steel, para. 101; Fouchard/Gaillard/Goldman, p. 222 et seq.*]. In the present case, this is the law of the seat of arbitration, i.e. Danubian Law.

16 Both, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) [*hereinafter NYC*] and the Danubian Arbitration Law [*hereinafter DAL*], contain provisions supporting a presumption in favour of applying the law of the place of arbitration. Art. V(1)(a) NYC as well as Arts. 36(1)(a)(i) and 34(2)(a)(i) DAL stipulate a choice of law rule applicable to arbitration agreements [*Balthasar in: Balthasar, §1 para. 21; Born, ICA, p. 526*]. They provide that in absence of any choice of law, the validity of the arbitration agreement must be determined according to the law of the arbitral seat. Since the validity of the arbitration agreement is strongly affected by the arbitral seat, the interpretation of the arbitration agreement should also follow the law of the seat to achieve consistency [*cf. FirstLink v. GT Payment, para. 15*]. Although the NYC primarily deals with the recognition and enforcement of arbitral awards, its approach is consistently applied before an award has been rendered [*Balthasar in: Balthasar, §1 para. 21; Born, ICA, p. 496 et seqq.*]. This is because the Tribunal has the duty to render an enforceable award [*Art. 13.10 HKIAC Administered Arbitration Rules 2018 [hereinafter HKIAC Rules]*] and, thus, must have regard to the provisions of the NYC already during the arbitral process. Consequently, the NYC as well as the DAL strongly confirm that absent a choice of law governing the arbitration agreement, the law of the arbitral seat applies.

17 Accordingly, the arbitration agreement has the closest and most real connection to Danubian Law as the law of the seat of arbitration. Hence, if the Tribunal should find that no choice of law has been made, the law of Danubia governs the arbitration agreement and its interpretation.

B. THE ARBITRATION CLAUSE DOES NOT PROVIDE FOR CONTRACT ADAPTATION

18 Contrary to CLAIMANT's submission [*C-Memo, p. 9 et seqq., para. 24 et seqq.*], the Tribunal has no power to adapt the contract. The prerequisites to confer power on the Tribunal derive from the law at the seat of arbitration [*Berger, Power of Arbitrators, p. 10; Kröll, Ergänzung und Anpassung, p. 18*]. The DAL requires the Parties to expressly empower the Tribunal [*PO2, p. 60, para. 36*]. However, under Danubian interpretation standards clause 15 FSSA does not include such an express empowerment (**I**). Even if the Tribunal should interpret the arbitration agreement under Mediterranean Law, clause 15 FSSA does not expressly empower the Tribunal to adapt the contract (**II**).

I. THE TRIBUNAL HAS NO POWER TO ADAPT THE CONTRACT UNDER DANUBIAN LAW

19 Art. 28 III DAL stipulates that the parties have to expressly empower the Tribunal to act as amiable compositeur or ex aequo et bono. Danubian courts consistently hold that Art. 28 III DAL contains a general standard regarding the empowerment of the Tribunal with exceptional powers [*PO2, p. 60, para. 36*]. This standard also applies to the question of an empowerment to adapt contracts [*ibid.*]. Thus, under Danubian law an express empowerment is necessary if the Tribunal should adapt the contract [*ibid.*]. However, the wording of clause 15 FSSA does not expressly refer to adaptation.

20 Furthermore, an oral empowerment as alleged by CLAIMANT [*C-Memo, p. 9, paras. 25 et seq.*], is not possible under Danubian Law. In CLAIMANT's view, there was an agreement between Mr. Antley and Ms. Napravnik, which must be used to interpret clause 15 FSSA [*C-Memo, p. 9, para. 26*]. According to the four corners rule, however, the negotiations cannot be considered when interpreting clause 15 FSSA. Under this rule, only the written document can be taken into account. The Tribunal may only have regard to external evidence if the wording is unclear [*Vogenauer in: Vogenauer, Art. 2.1.17 PICC, para. 6*]. In the present case, the wording of clause 15 FSSA, which deals with the power of the Tribunal, is not ambiguous. It does neither expressly nor impliedly cover adaptation [*infra, para. 24 et seqq.*]. Consequently, an empowerment of the Tribunal, taking the intent of Mr. Antley and Ms. Napravnik into account, is not possible.

21 Contrary to CLAIMANT's submission [*C-Memo, p. 14 et seq., para. 47 et seqq.*], the Danubian four corners rule does not violate the NYC. It argues that if the Tribunal excludes the oral evidence, it would declare the agreement between Mr. Antley and Ms. Napravnik to adapt the contract "*null and void*" [*C-Memo, p. 14, para. 47 et. seqq.*]. This would contradict a broad interpretation of Art. II(3) NYC [*ibid*]. Quite the contrary, not applying the four corners rule would contradict the NYC. According to Art. V(1)d NYC recognition and enforcement could be refused where the arbitral procedure was not in accordance with the agreement of the parties. As the Parties in this case agreed to apply Danubian Law, the Tribunal has to apply the four corners rule for the interpretation of arbitration agreements.

22 In light of the above, the Tribunal has no power to adapt the contract under Danubian Law.

II. EVEN IF MEDITERRANEAN LAW APPLIES TO INTERPRET CLAUSE 15 FSSA, THE TRIBUNAL IS NOT EMPOWERED TO ADAPT THE CONTRACT

23 Even if the Tribunal interprets clause 15 FSSA under Mediterranean Law, the requirements for an empowerment derive from the DAL [*cf. Berger, Power of Arbitrators, p. 10; Kröll,*

Ergänzung und Anpassung, p. 18]. Therefore, an express empowerment is still required. According to Mediterranean jurisprudence, a standard arbitration agreement usually suffices to confer power on the Tribunal to adapt the contract [*PO2, p. 60, para. 39*]. This is due to the broad interpretation of arbitration agreements under Mediterranean Law [*NoA, p. 7, para. 16*]. However, clause 15 FSSA cannot be considered as such a standard arbitration clause and does therefore not empower the Tribunal as alleged by CLAIMANT [*C-Memo, p. 10 et seq., para. 27 et seqq*.] (**1**). The power to adapt the contract does not result from the negotiations (**2**). Finally, CLAIMANT submits that adaptation must be possible because termination would lead to an unsatisfactory result [*C-Memo, p. 11 et seqq., para. 32 et seqq.*]. However, an unsatisfactory result does not justify jurisdiction of the Tribunal (**3**).

1. THE WORDING OF CLAUSE 15 FSSA DOES NOT INCLUDE THE TRIBUNAL'S POWER TO ADAPT THE CONTRACT

24 Contrary to CLAIMANT's allegation [*C-Memo, p. 10 et seq., para. 27 et seqq.*], clause 15 FSSA does not empower the Tribunal to adapt the contract. As the arbitration clause is the basic source of power for a tribunal [*Berger, Power of the Arbitrators, p. 8*], its wording is the starting point to determine the competence of the arbitrators. Clause 15 FSSA states that "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration […]*" [*Ex. C-5, p. 14, para. 15*]. This clause modifies the HKIAC Administered Arbitration Rules Model Clause [*hereinafter HKIAC Model Clause*] [*Ex. R-1, p. 33*]. Compared to the HKIAC Model Clause, the wording of clause 15 FSSA is significantly reduced. The Parties removed the words "*controversy, difference or claim*", "*relating to*" and "*any dispute regarding non-contractual obligations arising out of or relating to it*". This limitation of the wording of the HKIAC Model Clause already proves that RESPONDENT did not want a broad arbitration clause covering all possible claims.

25 Contrary to CLAIMANT's allegation [*C-Memo, p. 10 et seq., para. 28 et seq*.], adaptation is not covered by the wording "*dispute arising out of this contract*" in clause 15 FSSA. Clause 15 FSSA is no standard arbitration clause that would suffice for contract adaptation under Mediterranean jurisprudence [*PO2, p. 60, para. 39*]. Standard arbitration clauses always contain linking phrases like "*relating to*" or "*in connection with*" [*American Arbitration Association Model Clause; HKIAC Model Clause; ICC Model Clause*]. In clause 15 FSSA the Parties deleted the linking phrase "*relating to*" and therefore extremely narrowed down the arbitration clause [*supra, para. 24*]. Thus, the Tribunal should not

consider the common Mediterranean jurisprudence but should determine independently, whether the wording of the remaining clause covers adaptation. The Parties agreed that only disputes "*arising out of*" the contract should be decided by the Tribunal. In case of an adaptation however, the Tribunal would create a new contractual claim [*A/CN.9/WG/II/WP.41, p. 86, para. 8*]. This new contractual claim would not anymore "*arise out of*" the original contract but from the creation of the Tribunal. Consequently, adaptation is not covered by clause 15 FSSA.

26 Furthermore, a "*dispute*" traditionally requires a "*yes or no decision*" from the arbitrator [*Berger, Power of the Arbitrators, p. 2*]. This is because the function of the tribunal is "*concentrated on the interpretation and application of contractual agreements*" [*UN Doc. A/CN.9/263, p. 58*]. This means, by interpreting the written contract a tribunal decides, whether a party has a claim or not. Contract adaptation is contrary to that. The tribunal does not merely interpret and apply the parties' agreement but instead adds new terms to the contract. This is generally an open decision and not a "*yes or no decision*" [*Berger, VJ, p. 1373*]. Thus, adaptation has a creative character [*Berger, Power of Arbitrators, p. 2; Al Faruque, p. 153 et seq.*]. If in the present case the contract should be adapted, the Tribunal would have to fix specific terms on the division of the 30% tariff between the Parties. This would go beyond a mere adjudication of a claim. Such an adaption is thus not covered by the wording "*dispute*".

27 As shown above, the wording of clause 15 FSSA does not cover contract adaptation.

2. THE POWER TO ADAPT THE CONTRACT DOES NOT ARISE FROM THE NEGOTIATIONS

28 Under Mediterranean Law, the interpretation rules of the CISG, meaning Art. 8 CISG, apply to the present case [*PO1, p. 53, para. III. 4.*]. Accordingly, it has to be determined, whether the Parties intended to empower the Tribunal [*Art. 8(1) CISG*]. CLAIMANT alleges that there was a binding agreement between Mr. Antley and Ms. Napravnik [*C-Memo, p. 9, para. 25 et seq.*]. However, the two negotiators did not agree to confer power on the Tribunal (**a**). Furthermore, the discussion on 12 Apr 2017 cannot be taken into account to interpret the contract (**b**). Additionally, the remaining circumstances do not indicate that the Parties wanted the Tribunal to adapt the contract (**c**).

a. THE MAIN NEGOTIATORS DID NOT ORALLY EMPOWER THE TRIBUNAL ON 12 APR 2017

29 CLAIMANT alleges that the Tribunal is empowered to adapt the contract because Mr. Antley and Ms. Napravnik agreed so in their meeting on 12 Apr 2017 [*C-Memo, p. 9, para. 26*]. However, there was never a binding oral agreement between the two main negotiators. The

first requirement for a binding agreement is an offer. According to Art. 14(1) CISG the offeror must have the intention to be bound in case of acceptance. Mr. Antley stated that in his view the Tribunal should "*probably [...] adapt the contract if the parties could not agree*" [*Ex. C-8, p. 17, emphasis added*]. The use of the word "*probably*" indicates that Mr. Antley's statement was not meant to be legally binding. Rather, he regarded this remedy as a possible solution which could be subject to further discussion. This is supported by the note Mr. Antley wrote after the meeting. In this note Mr. Antley lists "*[c]onnection of hardship clause with arbitration clause*" as one of the issues "*for further negotiations*" [*Ex. R-3, p. 35*]. This indicates that Mr. Antley was not of the opinion that the Parties had bindingly agreed on a contract adaptation during their meeting on 12 Apr 2017. The note rather supports that the Parties still had to discuss this possibility in further meetings. Moreover, Ms. Napravnik was also aware or at least should have been aware that Mr. Antley had not made a binding offer. The Parties agreed that Mr. Antley wanted to come back the next day with a proposal [*Ex. C-8, p. 17*]. Thus, there was no binding agreement between Mr. Antley and Ms. Napravnik.

b. CLAIMANT CANNOT RELY ON THE STATEMENTS EXCHANGED BETWEEN MR. ANTLEY AND MS. NAPRAVNIK TO INTERPRET CLAUSE 15 FSSA

30 Whether the Parties wanted adaptation by the Tribunal depends not only on clause 15 FSSA but also on clause 12 FSSA. According to Art. 8(1) CISG the intent of the Parties has to be taken into account. Mr. Antley and Ms. Napravnik were of the opinion that a certain connection between the hardship and dispute resolution clause would be necessary in case adaptation should be possible [*Ex. C-8, p. 17*]. However, at this time neither the hardship clause nor the arbitration clause had been finally drafted. Mr. Krone and Mr. Ferguson were the ones to finalise the contract including clauses 12 and 15 FSSA [*PO2, p. 55, paras. 4, 6*]. Therefore, Mr. Antley and Ms. Napravnik could not have had any intent regarding clauses 12 and 15 FSSA in their final version.

31 Furthermore, it cannot be assumed that Mr. Krone and Mr. Ferguson wanted that the oral statements of Mr. Antley and Ms. Napravnik should be used to interpret the contract. Mr. Krone and Mr. Ferguson considered the emails exchanged between the first negotiators [*PO2, p. 55, paras. 4, 5*] and Mr. Antley's note as much as possible when finalising the contract [*Ex. R-3, p. 35*]. Because they did not completely understand the note [*ibid*], they interpreted it to their own understanding. Therefore, it has to be assumed that Mr. Krone's and Mr. Ferguson's understanding prevails over the intent of the first negotiators. This is even more the case as it was not possible to speak with the first negotiators [*ibid*]. Because

of the graveness of their injuries [*ibid*] it was not even sure, if Mr. Antley would ever be able to explain his note or any oral agreement with Ms. Napravnik. Consequently, the statements of Mr. Antley and Ms. Napravnik, which were not know to Mr. Krone and Mr. Ferguson cannot be taken into account.

c. THERE ARE NO FURTHER INDICATIONS THAT THE PARTIES WANTED ADAPTATION

32 Taking all further circumstances into account shows that both Parties did not want adaptation. Even CLAIMANT did not intend to empower the Tribunal to adapt the contract. CLAIMANT suggested an inclusion of the ICC Hardship Clause 2003 [*hereinafter ICC Hardship Clause*] to relieve itself from additional risks [*Ex. R-2, p. 34*]. However, the ICC Hardship Clause does not include contract adaptation by a tribunal as a remedy. Rather, the ICC Hardship Clause empowers the tribunal only to terminate the contract in case the parties cannot agree during renegotiations. Hence, RESPONDENT had to understand a proposal of the ICC Hardship Clause as a proposal to restrict the power of the Tribunal. Consequently, both negotiators did not intend to empower the Tribunal to adapt the contract.

33 CLAIMANT alleges that Mr. Antley did not clarify that adaptation should be excluded from the contract [*C-Memo, p. 10, para. 27*]. However, CLAIMANT must have known or at least could not have been unaware of the fact that Mr. Antley wanted to exclude contract adaptation [*cf. Art. 8(1) CISG*]. The reduction of the HKIAC Model Clause by RESPONDENT [*supra, para. 24*] indicates that it did not intend to empower the Tribunal to adapt the contract. Mr. Antley suggested this limited arbitration clause because the "*Sales Contract was governed by Mediterranean law*" [*Ex. R-1, p. 33*]. Under Mediterranean Contract Law [*hereinafter MCL*] adaptation is possible [*PO2, p. 60, para. 39*]. As Mr. Antley knew that a hardship clause should be included [*Ex. C-4, p. 12*] and the MCL is an arbitration friendly law, he intended with the reduction that not all claims should be covered by clause 15 FSSA. Therefore, because of the limitation of the HKIAC Model Clause, CLAIMANT must have known that RESPONDENT did not want all disputes to be settled by arbitration. In particular, adaptation is excluded with this limited clause. As Mediterranean jurisprudence merely requires a standard arbitration clause to cover contract adaptation, CLAIMANT must have known that this limited arbitration clause does not cover adaptation. Consequently, CLAIMANT knew or could not have been unaware of RESPONDENT's intent.

34 Finally, including a hardship clause alone does not prove that the Parties wanted adaptation as a remedy. CLAIMANT alleges that a reasonable third person would have understood the inclusion of a hardship clause as an empowerment of the Tribunal [*C-Memo, p. 13, para. 42 et seqq.*]. However, a hardship clause does not per se empower the tribunal to adapt the

contract [*Bernini, p. 421*]. On the contrary, it depends on the individual hardship clause, whether adaptation is possible. Consequently, it has to be determined if adaptation under the hardship clause is possible [*da Silveira, p. 334*]. Clause 12 FSSA does not empower the Tribunal to adapt the contract [*infra, para. 56 et seqq.*]. Consequently, the inclusion of clause 12 FSSA itself does not prove the Parties intent that adaptation is possible.

3. THE POSSIBLE LEGAL REMEDIES ARE SETTLED BY THE ARBITRATION CLAUSE

35 CLAIMANT alleges that termination instead of adaptation would lead to an unsatisfactory result [*C-Memo, p. 11 et seqq., para. 33 et seqq*.]. This, supposedly, is because restitution of the contract would be necessary [*C-Memo, p. 12, para. 35*]. CLAIMANT alleges that a restitution would lead to additional tariffs, because RESPONDENT would have to send the frozen semen back to Mediterraneo subject to a 25% tariff [*C-Memo, p. 11 et seq., para. 32 et seqq*.]. Consequently, in CLAIMANT's opinion, adaptation must be possible to impede this unsatisfactory result [*C-Memo, p. 11 et seq., para. 32 et seqq*].

36 However, a possible unsatisfactory result cannot lead to an empowerment of the Tribunal. The only sources of an arbitrator's power are the agreement of the parties and the applicable law [*Allsop, p. 640; Jarvin, p. 140; Redfern/Hunter, p. 306*]. The applicable law is the procedural law at the seat of arbitration [*Allsop, p. 640*]. The DAL requires an express authorization, which is not given in the present case [*supra, paras. 19 et seqq.; 23 et seqq.*]. Consequently, even if the provided remedies lead to an unsatisfactory result, the Tribunal cannot adapt the contract.

CONCLUSION – ISSUE A

37 Due to the doctrine of separability the law governing the arbitration agreement is not automatically the same law as the one governing the underlying contract. In the case at hand the Parties explicitly chose Danubia to be the seat of arbitration and thereby intended the law of the arbitral seat to govern the arbitration agreement. In any event, Danubian Law applies as the law with the closest and most real connection to the arbitration agreement. Danubian Law requires an express empowerment of the Tribunal for a contract adaptation. The FSSA lacks such an express empowerment. Hence, the Tribunal cannot adapt the contract. Even under Mediterranean interpretation standards the arbitration clause does not expressly empower the Tribunal to adapt the contract.

ISSUE B – CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION

38 Contrary to CLAIMANT's submission [*C-Memo, p. 16 et seqq., para. 56 et seqq.*], the copy of the partial interim award and RESPONDENT's relevant submission from the other arbitral proceedings [*hereinafter the Evidence*] may not be submitted as evidence to the current proceedings. The Parties agreed on arbitration administered by the HKIAC [*Ex. C-5, p. 14, para. 15*]. Therefore, the admissibility of the Evidence must be determined according to the HKIAC Rules. According to Art. 22.2 HKIAC Rules, the Tribunal determines "*the admissibility, relevance, materiality and weight of the evidence*". As the HKIAC Rules do not provide detailed guidance, the Tribunal should have regard to established rules of evidence [*cf. Moser/Bao, para. 9.154*]. The IBA Rules on the Taking of Evidence in International Arbitration [*hereinafter IBA Rules*] are often referred to or adopted under the HKIAC Rules [*Moser/Bao, para. 9.155*]. Besides, the IBA Rules are widely recognized as international standard for the taking and evaluation of evidence [*Marghitola/Lew, p. 33*]. Hence, the Tribunal should apply the IBA Rules to the present case.

39 Art. 9.2 IBA Rules lists cases in which evidence should be excluded from the submission to arbitral proceedings. In line with this provision the Evidence should not be admitted by the Tribunal. The Evidence is neither relevant to the case nor material to its outcome within the meaning of Art. 9.2(a) IBA Rules (**A**). In addition, the Evidence may not be submitted according to Art. 9.2(g) IBA Rules, because it was obtained illegally (**B**). Furthermore, the Evidence should be excluded according to Art. 9.2(e) IBA Rules, because of its commercial confidentiality (**C**). Finally, the exclusion of the Evidence does not affect CLAIMANT's right to be heard, granted under Art. 13.1 HKIAC Rules (**D**).

A. THE EVIDENCE IS NEITHER RELEVANT TO THE CASE NOR MATERIAL TO ITS OUTCOME

40 According to Art. 9.2(a) IBA Rules, a tribunal shall exclude evidence which lacks "*sufficient relevance to the case or materiality to its outcome*". In the present case, the Evidence is neither relevant (**I**) nor material (**II**).

I. THE EVIDENCE IS NOT RELEVANT TO THE CASE

41 For a document to be relevant, it must be likely to prove the submission of a party [*Leisinger, p. 248*]. In CLAIMANT's view, the Evidence is relevant to the case, because it is supposed to prove that RESPONDENT behaves contradictorily [*C-Memo, p. 16, para. 56*]. Contrary to CLAIMANT's submission [*C-Memo, p. 18 et seq., para. 68 et seq.*], both cases

have various factual and legal differences. Accordingly, RESPONDENT's behaviour in the other case has no probative value for the present proceedings.

42 Firstly, the hardship clauses are not comparable. The contract in the other proceedings contains the standard ICC Hardship Clause [*PO2, p. 60, para. 39*]. On the contrary, the hardship clause in the FSSA is drafted individually and does not resemble the ICC Hardship Clause [*Ex. R-3, p. 35*]. RESPONDENT deemed the ICC Hardship Clause to be too broad and rejected its inclusion in the FSSA [*Ex. R-3, p. 35*]. As a consequence, Mr. Krone (RESPONDENT) and Mr. Ferguson (CLAIMANT) included a narrower hardship clause in the FSSA [*Ex. R-3, p. 35*]. Clause 12 FSSA is limited to "*hardship, caused by additional health and safety requirements or comparable unforeseen events*" [*Ex. C-5, p. 14, para. 12*]. On the contrary, the ICC Hardship Clause more generally speaks of "*an event beyond [the parties] control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract*". Consequently, the two clauses have different scopes, which cover different issues. Therefore, RESPONDENT does not behave contradictorily, when it denies hardship in the one arbitration and invokes it in the other.

43 Secondly, the two arbitrations are conducted under different procedural laws with different prerequisites for contract adaptation. The general possibility of contract adaptation is governed by the law at the seat [*Berger, Power of Arbitrators, p. 10; Kröll, Ergänzung und Anpassung, p. 18*]. The arbitral seat in the other arbitration is Mediterraneo [*PO2, p. 60, para. 39*], whereas in the present proceedings the seat is Danubia [*Ex. C-5, p. 14, para. 15*]. Thus, the applicable procedural law is different in both arbitral proceedings. Contrary to Mediterranean Law, the DAL requires an express authorisation for an arbitrator to adapt a contract [*PO2, p. 60, para. 36*]. Consequently, RESPONDENT does not act inconsistently if it requests an adaptation in the Mediterranean arbitration but rejects it in the Danubian arbitration, because it does so under two different applicable laws. Neither the facts of the cases nor the applicable laws are comparable. Therefore, CLAIMANT cannot prove with the evidence it wants to submit that RESPONDENT behaves contradictorily.

44 In addition, both under Art. 7 CISG and Art. 1.8 MCL a party may not act contradictorily to its previous behaviour [*ICC Award No. 2520, p. 993; OLG München, 15 Sep 2004, p. 71; BGH, 18 Jan 2017, para. 3.4*]. This principle of "*venire contra factum proprium*" requires that one party must have relied on a certain conduct of the other party [*cf. Magnus, p. 159*]. Then the other party cannot assert rights to the trusting party's detriment [*Brekoulakis/Lew/Mistelis, p. 130*]. However, CLAIMANT learned of the other arbitration after it commenced the arbitral proceedings at the HKIAC on 31 Jul 2018 [*cf. MaCl, p. 50*].

Therefore, CLAIMANT could not have built any trust in RESPONDENT to act in a certain way. Consequently, the Evidence is not relevant to the case under Art. 9.2(a) IBA Rules.

II. THE EVIDENCE IS NOT MATERIAL TO THE OUTCOME OF THE CASE

45 Evidence is material to the outcome of the case if it is able to impact the final award [*Methanex v. USA, Part II, Chapter H, p. 5, para. 10; O'Malley, para. 3.73*]. The evidence must be necessary to fully examine the factual allegations in order to draw a legal conclusion from the allegations [*Marghitola/Lew, p. 53*]. The Evidence CLAIMANT wants to submit would only prove a former legal evaluation of different factual circumstances by another arbitral tribunal. However, decision-making in international arbitration is not based on precedents [*Béguien, p. 7, para. 27*]. An arbitral tribunal can only be bound by the decision of another tribunal under the principle of "*res judicata*" where two cases involve the same parties and concern the same question of law [*Sun Life v. Lincoln, para. 53; Leisinger, p. 244*]. As the other arbitration is between RESPONDENT and a third party [*PO2, p. 60, para. 39*], the parties to the arbitrations are different. Consequently, the other partial interim award and the legal evaluation contained therein is not binding for the Tribunal in the present proceedings. Therefore, it cannot influence the outcome of the case.

46 Furthermore, "*material to the outcome*" excludes evidence which is merely supposed to put the opposing party in an unfavourable light, because no legal conclusions can directly be drawn from such an accusation [*Marghitola/Lew, p. 53*]. By introducing this Evidence, CLAIMANT attempts to reveal RESPONDENT's allegedly contradictory behaviour [*C-Memo, p. 16, para. 56*]. Therefore, CLAIMANT merely aims to weaken RESPONDENT's credibility. However, such evidence is inadmissible under Art. 9.2(a) IBA Rules. Consequently, the Evidence is not material to the outcome of the case.

B. THE ILLEGALLY OBTAINED EVIDENCE MAY NOT BE SUBMITTED TO THE PROCEEDINGS

47 Contrary to CLAIMANT's submission [*C-Memo, p. 17 et seq., para. 63*], the Evidence should not be admissible, even though CLAIMANT did not itself obtain it illegally. All parties to an arbitration are obliged to conduct the proceedings in good faith [*Art. 2A(1) DAL; cf. also Methanex v. USA, para. 54*]. According to Art. 13.1 HKIAC Rules, the Tribunal shall "*ensure equal treatment of the parties*". Those ideas are also embodied in Art. 9.2(g) IBA Rules. This provision requires that the tribunal shall not admit evidence when its inclusion would be unfair to one party [*O'Malley, para. 9.116*]. Evidence should be inadmissible if it was "*unlawfully obtained from the files of a party to the arbitration, although at no fault of the party seeking to introduce the evidence*" [*Boykin/Havalik, p. 35*]. In the present case,

the information was leaked either through a hack of RESPONDENT's computer system or by two former employees, which were under an obligation to keep the information secret [*MaRes, p. 51*]. Hence, the information was in any event obtained illegally from RESPONDENT, even though CLAIMANT is not responsible. Such evidence may only be admitted in case it is the "*the only evidence available and absolutely necessary to the party to prove its case*" [*Boykin/Havalik, p. 35*]. As shown above [*supra, paras. 41 et seqq.; 45 et seq.*], the Evidence is neither relevant to the case nor material to its outcome. CLAIMANT alleges that the tribunal in the *Corfu Channel Case* did not exclude the illegally obtained evidence [*C-Memo, p. 20, para. 76*]. However, the tribunal only considered the evidence, because its admissibility was never challenged by Albania [*Thirlway, p. 632*]. Consequently, CLAIMANT should not be allowed to submit the Evidence, notwithstanding the fact that it did not act illegally itself.

C. THE EVIDENCE IS INADMISSIBLE, BECAUSE IT IS CONFIDENTIAL

48 The Evidence should be excluded on grounds of confidentiality under Art. 9.2(e) IBA Rules (**I**). The confidentiality cannot be avoided by a joinder of the third party to the arbitration (**II**).

I. THE EVIDENCE IS CONFIDENTIAL IN THE SENSE OF ART. 9.2(E) IBA RULES

49 CLAIMANT alleges that it did not itself breach a confidentiality obligation regarding the Evidence and, thus, may submit the Evidence [*C-Memo, p. 17 et seq., para. 62 et seqq.*]. However, even under these circumstances, Art. 9.2(e) IBA Rules requires that evidence should be excluded on "*grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling*". This provision also covers documents which are under a confidentiality agreement with a third party [*Marghitola/Lew, p. 93; O'Malley, para. 9.86*]. However, the wording of this provision does not require a breach of a confidentiality obligation by one of the parties but merely the existence of a confidentiality agreement. In the present case, the Evidence is confidential under Art. 42.1 of the 2013 HKIAC Administered Arbitration Rules [*hereinafter HKIAC Rules 2013*], which binds the arbitrating parties. By choosing the applicable arbitration rules containing a confidentiality provision, the obligation is of a consensual nature [*Born, ICA, p. 2790, Smeureanu/Lew, p. 112, para. 3.2*]. Therefore, the Evidence is subject to a confidentiality agreement between RESPONDENT and the third party, which falls under Art. 9.2(e) IBA Rules.

50 CLAIMANT further alleges that the Evidence is not confidential anymore, because it has been published [*C-Memo, p. 21 et seq., para. 82 et seqq.*]. Hacked confidential information has

been found admissible if it had already become public information [*Ortiz*]. In the cases CLAIMANT cites, the illegal evidence had been published on WikiLeaks or comparable public websites [*Opic v. Venezuela, p. 10, para. 23; Kilic v. Turkmenistan, p. 58, para. 4.3.16; Yukos v. Russia, p. 379; para. 1189; Conoco Phillips v. Venezuela, p. 20, para. 72; Caratube v. Kazahstan, p. 42, para. 150*]. Those documents were available for free on a public domain. However, the Evidence in the present case is not publicly available. CLAIMANT still must pay US$ 1,000 in order to obtain the Evidence [*PO2, p. 60 et seq., para. 41*]. The Tribunal should not support a further distribution of confidential information. Consequently, the Tribunal should exclude the Evidence according to Art. 9.2(e) IBA Rules.

II. THE CONFIDENTIALITY CANNOT BE CIRCUMVENTED BY JOINING THE THIRD PARTY TO THE ARBITRATION

51 Contrary to CLAIMANT's submission [*MaCl, p. 50*], a joinder of the third party to the arbitration is not permissible under the HKIAC Rules. The joinder of an additional party causes a loss of confidentiality [*Born, ICA, p. 2568 et seq.; cf. also Leboulanger, p. 65*]. Two proceedings would be combined to a single one [*Redfern/Hunter, p. 149, para. 2.186*] including CLAIMANT, RESPONDENT and the third party. Consequently, evidence, including the partial interim award and RESPONDENT's relevant submission, would be available to all three parties. For a joinder according to Art. 27 HKIAC Rules the additional part must prima facie be "*bound by an arbitration agreement under [the HKIAC] Rules giving rise to the arbitration*" or "*all parties, including the additional party, [must] expressly agree*" [*Art. 27.1(a) HKIAC Rules*]. However, in the present case the third party neither agreed to a joinder nor is it a party to the arbitration agreement giving rise to the present proceedings, which is clause 15 FSSA. In addition, RESPONDENT also does not agree to a joinder [*MaRes, p. 51*]. Consequently, a joinder under Art. 27 HKIAC Rules is not possible. Therefore, CLAIMANT cannot access the Evidence by joining the third party and cannot avoid the confidentiality of the Evidence.

D. THE REJECTION OF THE EVIDENCE DOES NOT VIOLATE CLAIMANT'S RIGHT TO BE HEARD

52 Contrary to CLAIMANT's allegation [*C-Memo, p. 16 et seq., para. 59 et seq.*], barring the evidence does not violate its right to be heard. Art. 13.1 HKIAC Rules indeed contains the right to be heard [*Moser/Bao, para. 9.17*]. However, this right does not exist without limitations [*Moser/Bao, para. 9.17*]. According to Art. 22.2 HKIAC Rules the tribunal

"*shall determine the admissibility, relevance, materiality and weight of the evidence*". Accordingly, under the HKIAC Rules the Tribunal may limit the allowed scope of evidence [*cf. Moser/Bao, para. 9.15; Redfern/Hunter, para. 6.14*]. For this the Tribunal may also take into account the IBA rules [*supra, para. 38*]. As shown above [*supra, paras. 41 et seqq.; 45 et seq.*], the Evidence is neither relevant to the case nor material to its outcome under Art. 9.2(a) IBA Rules. Therefore, CLAIMANT can reasonably present its case without submitting the Evidence from the other proceedings. Consequently, CLAIMANT's right to be heard would not be violated.

CONCLUSION – ISSUE B

53 The IBA Rules should be applied by the Tribunal to determine the admissibility of the Evidence. Under those Rules, the Evidence should be excluded, because it is neither relevant to the case nor material to its outcome. As both cases are factually and legally different, RESPONDENT does not behave contradictorily. In addition, the Evidence is inadmissible, because it is confidential. Even though there is only a confidentiality obligation between RESPONDENT and the third party, the IBA Rules protect such a confidentiality. This confidentiality cannot be waived by a joinder of the third party, because the requirements of a joinder under Art. 27 HKIAC are not met. The Evidence should be excluded for reasons of fairness as it was obtained illegally. This holds true even though it was not CLAIMANT who acted illegally. Furthermore, the exclusion of the Evidence does not violate CLAIMANT's right to be heard, because it is still able to reasonably present its case.

ISSUE C – CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE

54 CLAIMANT is not entitled to the additional payment of US$ 1,250,000 from RESPONDENT resulting out of an adaptation of the price under clause 12 FSSA (**A**). RESPONDENT is likewise not obliged to pay the additional amount resulting from an adaptation of the contract under the CISG (**B**).

A. A PRICE ADAPTATION IS NOT POSSIBLE UNDER CLAUSE 12 FSSA

55 Adaptation is not contained in clause 12 FSSA as a possible remedy for hardship (**I**). Furthermore, the Equatorianian tariff does not result in hardship under the specific requirements of clause 12 FSSA (**II**).

I. CLAUSE 12 FSSA DOES NOT PROVIDE FOR ADAPTATION

56 CLAIMANT assumes that adaptation of the contract by the Tribunal could be the only possible remedy if hardship occurs and the renegotiations fail [*C-Memo, p. 23, paras. 88 et seqq.*]. However, the duty to renegotiate does not oblige the Parties to reach an agreement [*Kröll, Adaptation, p. 448*]. If the Parties renegotiate without agreeing, the contract remains as it is [*ibid.*]. A hardship clause that does not provide for the power to adapt the contract by the tribunal allocates the risks of a specific event to the party negatively affected by it [*Ferrario, p. 152*]. In such a case, the parties impliedly accepted that the equilibrium of the contract may change [*Ferrario, p. 138*]. Clause 12 FSSA does not entail the possibility to adapt the contract by the Tribunal. Although the Parties fulfilled their duty to renegotiate, they could not find an agreement [*PO2, p. 60, para. 35*]. Since there is no explicit adaptation clause, the Parties accepted that the equilibrium of the contract may change. Therefore, CLAIMANT as the party that is negatively affected by the tariff has to bear this tariff.

57 Arbitrators, in general, tend not to intervene in the contract if hardship occurs, unless the contract has an explicit adaptation clause [*Ferrario, p. 138*]. This follows from the strict application of the pacta sunt servanda principle [*Ferrario, p. 138*]. The pacta sunt servanda principle states that the contract has to be respected as it is [*van Houtte, p. 107*]. Therefore, if there is no definite clause that provides for the remedy of adaptation, arbitrators are generally reluctant in assuming that the parties wanted this remedy to apply [*Fouchard/Gaillard/Goldman, p. 25*; *Kröll, Adaptation, p. 457*]. This is because under Art. V1(c) NYC an award may be repealed, if a tribunal adapts a contract without having power to do so. Clause 12 FSSA does not indicate that the Tribunal may adapt the contract. As the pacta sunt servanda principle applies and the clause does not empower the Tribunal to adapt the contract, adaptation of the contract through the Tribunal under clause 12 FSSA is not possible.

58 Additionally, if the Parties wanted that clause 12 FSSA allows for adaptation, they must have made that clear in the contract. Contracts that are concluded and executed in a limited time frame, e.g. short-term contracts, must be as precise as possible regarding the predictability of future risks and events by the parties [*Ferrario, p. 162*]. In general, it can be assumed that parties in international contracts are professionals [*Indian Cement Company v. Pakistani Bank, p. 129; Fouchard/Gaillard/Goldman, p. 25*]. Therefore, they take the precautions they regard as necessary in the contract for changes in circumstances [*ibid.*] Since the Parties did not provide for adaptation in their contract, it can be assumed

that they did not regard adaptation as a necessary mechanism for changed circumstances. Therefore, clause 12 FSSA does not confer power on the Tribunal to adapt the contract.

II. THE PAYMENT OF THE TARIFF DOES NOT CONSTITUTE HARDSHIP FOR CLAIMANT UNDER CLAUSE 12 FSSA

59 Clause 12 FSSA states that the "*Seller shall not be responsible […] for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C-5, p. 14, para. 12*]. Contrary to CLAIMANT's allegation [*C-Memo, p. 23 et seq., para. 91*], clause 12 FSSA does not cover the present case, i.e. the 30% tariff. RESPONDENT made clear during the negotiations that it would accept only a very narrow hardship clause. It rejected the proposed ICC Hardship Clause as being too broad [*PO2, p. 56, para. 12*]. Finally, the Parties agreed on the inclusion of a narrow hardship clause into the force majeure clause [*Ex. R-3, p. 35*]. The tariff is no "*unforeseen event"* comparable to health and safety requirements as required by clause 12 FSSA (**1**). The increase in costs of performance by 15% does not constitute hardship under clause 12 FSSA (**2**). CLAIMANT must bear the tariff, because the Parties agreed on Delivery Duty Paid [*hereinafter DDP*] (**3**).

1. THE TARIFF IS NEITHER AN "UNFORESEEN EVENT" NOR "COMPARABLE TO HEALTH AND SAFETY REQUIREMENTS" AS REQUIRED BY CLAUSE 12 FSSA

60 Clause 12 FSSA states that the seller shall not be responsible for "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C-5, p. 14, para. 12*]. Contrary to CLAIMANT's submission [*C-Memo, p. 24 et seqq., para. 93 et seqq.*], the tariff is neither comparable (**a**) nor an unforeseen event (**b**).

a. THE TARIFF IS NOT COMPARABLE TO HEALTH AND SAFETY REQUIREMENTS

61 CLAIMANT argues that the tariff as well as the health and safety requirements are governmental measures and were not in control of one of the Parties [*C-Memo, p. 24, para. 95*]. Furthermore, it states that both events caused sudden increases in costs [*C-Memo, p. 24 et seq., para. 96*]. However, these commonalties are not sufficient to make the tariff comparable to health and safety requirements as required by clause 12 FSSA.

62 The Parties included the wording "*additional health and safety requirements and comparable unforeseen events*" because of the bad experiences CLAIMANT made in 2014 [*PO2, p. 58, para. 21*]. CLAIMANT nearly suffered bankruptcy due to expensive tests that

had been necessary because of a foot and mouth disease in Danubia [*PO2, p. 58, para. 21*]. It sold three mares DDP to farms in Danubia [*ibid.*]. These horses were held in quarantine and had to undergo additional tests before they could be delivered [*ibid.*]. This increased the costs of performance by 40% of the original sales price [*ibid.*]. Because of that incident, CLAIMANT wanted to add a clause in the contract. This clause was designed to protect CLAIMANT from increased costs arising from tests due to additional health and safety requirements because of diseases as well as comparable events. However, the Equatorianian tariff is not comparable to the events in Danubia in 2014. Firstly, the Equatorianian tariff was not imposed to protect the country from a disease or any other plague. Secondly, the tariff did not go along with additional tests or quarantine. Instead, the Equatorianian tariff has been imposed only as a retaliation measure to the Mediterranean tariff [*Ex. C-6, p. 15*]. The Mediterranean tariff as a mere protectionist measure has no sufficient commonalities with "*health and safety requirements*" and is therefore not comparable.

b. THE TARIFF IS NO UNFORESEEN EVENT IN TERMS OF CLAUSE 12 FSSA

63 Additionally, the tariff was not unforeseen as CLAIMANT alleges [*C-Memo, p. 25, para. 99 et seq.*]. An unforeseen event is an event that is so improbable that reasonable parties could not foresee it [*Da Silveira, p. 325*]. On the contrary, it can be described as foreseen if the parties discussed this event and the problem linked to it [*Brunner, p. 159*]. Ms. Napravnik mentioned "*import restrictions*" and "*customs regulation*" in her email [*Ex. C-4, p. 12*]. The term "*import restrictions*" refers inter alia to tariffs. Therefore, the event was not unforeseen or improbable as the Parties already discussed the issue. An event cannot be unforeseen if the Parties were aware of that event and the problems deriving out of it.

64 Furthermore, certain risks that are commonly associated with international commerce cannot lead to a hardship situation [*Da Silveira, p. 325*]. As soon as an event has taken place before and the parties are aware of it, they must take it into account [*ibid.*]. Mediterraneo elected the new president Mr. Bouckaert in Apr 2017 [*ibid.*]. He already announced a more protectionist approach in Jan 2017, especially for national agricultural products, in his election program [*ibid.*]. Furthermore, the president appointed Ms. Frankel as his "*superminister*" for agriculture, trade and economics on 5 May 2017 [*PO2, p. 58, para. 23*]. Ms. Frankel was an outspoken protectionist for years, advocating that the access of foreign agricultural products has to be limited [*ibid.*]. That was immediately before the contract was concluded on 6 May 2017 [*Ex. C-5, p. 13*]. Therefore, tensions regarding the free trade between Mediterraneo and Equatoriana were to be expected. Even if the imposition of tariffs might be unusual for Equatoriana as one of the biggest supporters of free trade [*Ex. C-6,*

p. 15], the Equatorianian government has already answered to restrictions with retaliatory measures before [*Ex. C-6, p. 15*]. Therefore, the tariff is something that the Parties could have been aware of.

65 Consequently, the imposition of the 30% tariff was no unforeseen event.

2. THE INCREASE OF COSTS BY 15% DOES NOT CONSTITUTE HARDSHIP

66 The tariff increases the costs of performance for CLAIMANT by only 15% and not 30%, contrary to CLAIMANT's submission [*C-Memo, p. 26 et seq., para. 104 et seqq.*] (**a**). This 15% cost increase does not constitute a hardship situation under clause 12 FSSA (**b**).

a. THE TARIFF INCREASES THE COSTS OF PERFORMANCE BY ONLY 15%

67 CLAIMANT states that the tariff increases the costs of performance by 30% [*C-Memo, p. 26, para. 104*]. That does not reflect the facts of the present case. For its calculation, CLAIMANT considered only the last 50 doses that were shipped. The price for 50 doses is US$ 5,000,000. The tariff increases the costs by US$ 1,500,000. That constitutes an increase of costs by 30%. To determine if the performance becomes excessively burdensome and therefore results in hardship, the contract as a whole and not just a part of it must be considered [*cf. Brunner, p. 426*]. Thus, the percentage for hardship has to be calculated considering the whole contract [*ibid.*]. In total, CLAIMANT shipped 100 doses [*Ex. C-5, p. 14, para. 8*]. The overall price for all 100 doses was US$ 10,000,000 [*Ex C-5, p. 14, para. 6*]. The additional cost of US$ 1,500,000 are 15% of US$ 10,000,000. That means that the tariff increases the costs only by 15%.

b. THE TARIFF DOES NOT CONSTITUTE HARDSHIP IN TERMS OF CLAUSE 12 FSSA

68 Most hardship clauses, such as the ICC Hardship Clause, provide that hardship is given, where the costs of performance become "*excessively onerous*" [*Brunner, pp. 177, 398(1), 423*]. This wording requires a cost increase of the performance by 100-125% [*Brunner, p. 432*]. The Parties in the present case have chosen the wording "*more onerous*" [*Ex. C-5, p. 14, para. 12*]. Contrary to CLAIMANT's submission [*C-Memo, p. 26, para. 105*], this wording does not lower the threshold for hardship to 15%. Generally, hardship may be invoked if the equilibrium of the contract is fundamentally altered [*Brunner, p. 423*]. The object and purpose of hardship is to react to situations where the performance of the contract becomes excessively burdensome to one party [*ibid.*]. Even if the parties did have the intention to lower the threshold, it should not already apply if the performance becomes more expensive. In no case was a cost increase by 15% sufficient to

constitute hardship [*Brunner, p. 427*]. Furthermore, during the negotiations, RESPONDENT clarified that it wants a narrow, i.e. restrictive hardship clause to apply to the FSSA [*Ex. R-3, p. 35*].

69 Furthermore, it can be assumed that if a party increases its profit margin during the negotiations in comparison to its normal profit margin, this also increases the risks that the party took over regarding unforeseen contingencies [*Brunner, p. 433*]. In such a case the threshold for hardship increases [*Brunner, p. 433*]. CLAIMANT received US$ 500 per dose additionally for a delivery DDP [*PO2, p. 56, para. 8*] whereas the price increase deriving from DDP was only US$ 200 [*PO2, p. 56, para. 8*]. Therefore, CLAIMANT made an additional profit of US$ 300 resulting out of the DDP. Since CLAIMANT increased its profit margin due to a delivery DDP, CLAIMANT also took over risks regarding unforeseen contingencies due to the delivery of the frozen semen.

70 Contrary to CLAIMANT's submission [*C-Memo, p. 27, para. 106*], the fact that it would suffer financial difficulties by bearing the tariff does not influence the question, whether hardship is given. A party's financial situation lies within its own responsibility [*Brunner, p. 436*]. That risk may not be shifted to the contracting partner. If RESPONDENT had to pay the additional tariff it would be as if RESPONDENT is burdened by the financial situation of CLAIMANT.

3. SINCE THE PARTIES AGREED ON DDP, THEY ALLOCATED THE RISK OF IMPOSED TARIFFS TO CLAIMANT

71 The Parties agreed on a delivery DDP in clause 8 FSSA on the condition of a price increase of US$ 500 per dose [*PO2, p. 56, para.* 8]. DDP means that the seller is responsible for the import clearance, which also includes tariffs [*Piltz in: Piltz/Bredow, p. 581*]. DDP is the only Incoterm dealing with import clearance and allocates all costs arising thereof to the seller [*Piltz in: Piltz/Bredow, p. 576*]. If the parties want to reallocate the costs, the contract must unambiguously provide for such a reallocation [*Piltz in: Piltz/Bredow, p. 572, 593*]. Since there is no derogation from DDP concerning import tariffs in the contract, the hardship clause does not cover the present situation. Hence, CLAIMANT is not exempted from its responsibility under clause 8 FSSA to pay the tariff required for the delivery of the goods to Equatoriana.

B. RESPONDENT IS NOT OBLIGED TO PAY ANY ADDITIONAL AMOUNT RESULTING FROM AN ADAPTATION UNDER THE CISG

72 Contrary to CLAIMANT's submission [*C-Memo, p. 28 et seqq., para. 112 et seqq.*], RESPONDENT is not obliged to pay US$ 1,250,000 pursuant to Art. 79 CISG. By including the hardship clause in the FSSA the Parties excluded the application of Art. 79 CISG (**I**). Even if the Tribunal finds that the Parties did not derogate from the CISG's application, Art. 79 CISG does neither cover the 30% tariff nor provide for the remedy of a price adaptation (**II**).

I. THE HARDSHIP CLAUSE CONSTITUTES A DEROGATION FROM ART. 79 CISG IN THE SENSE OF ART. 6 CISG

73 Contrary to CLAIMANT's submission [*C-Memo, p. 29, para. 115 et seqq.*], by including clause 12 FSSA into the contract, the Parties have provided for an individual regulation of changed circumstances. Because of that, an application of Art. 79 CISG is excluded pursuant to Art. 6 CISG. According to Art. 6 CISG, parties may "*derogate from or vary the effect*" of provisions of the CISG by an express or implied agreement [*Machine Case, para. 7; OGH, 22 Oct 2001; Mistelis in: Kröll et al., Art. 6 CISG, para. 15; Schwenzer/Hachem in: Schlechtriem/Schwenzer(2016), Art. 6 CISG, para. 3*]. According to Art. 8 CISG, whether the parties derogated from the Convention must be determined by interpretation of the party agreement [*Ferrari, p. 742; Schlechtriem/Schroeter, paras. 49, 57a*]. Statements made by the parties must be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Art. 8(2) CISG*]. A reasonable person of the same kind as RESPONDENT would have understood that the hardship clause should exhaustively regulate CLAIMANT's liability in case of changed circumstances.

74 The party autonomy is a prevailing principle of the Convention [*cf. BGH, 2 Dec 1996, p. 691; Ferrari, p. 738 et seq.; Martiny in: MüKoBGB, Art. 6 CISG, para. 75*]. Therefore, if the Parties provide for a regulation of a certain situation, which is also regulated by CISG, the party agreement overrides the provision in the CISG [*cf. Bodenheimer in: BeckOGK, Art. 7 CISG, para. 21; Ferrari in: MüKoHGB, Art. 7 CISG, para. 46*]. Clause 12 FSSA [*supra, para. 59*] as well as Art. 79 CISG address the case of changed circumstances. CLAIMANT expressly stated that it wanted to include the hardship clause to address subsequent changes [*Ex. C-4, p. 12*]. In a previous case, CLAIMANT relied on the regulation by law without adding a hardship provision to the contract. In the end, it was unsatisfied

with the outcome because of a cost increase [*ibid.*]. CLAIMANT feared that it would not have been exempted from liability according to Art. 79 CISG, if in the present case a foot and mouth disease would have appeared again and increased the costs. Thus, it wanted to regulate what should happen in case of changed circumstances in the contract [*cf. ibid.*]. Therefore, a reasonable person of the same kind as RESPONDENT in the same circumstances would have expected that the hardship clause should be the only regulation for subsequent changes and no recourse should be taken to the CISG. Consequently, the Parties derogated from, Art. 79 CISG.

75 CLAIMANT assumes that the hardship clause is exemplary for what should happen if changes appear subsequently [*C-Memo, p. 29, para. 117*]. It argues that the formulation "*comparable unforeseen events*" relating to "*health and safety requirements*" in the hardship clause shows that the Parties intended the clause to be illustrative rather than exhaustive [*ibid.*]. For this reason, it maintains that the Parties did not derogate from the CISG [*ibid.*]. However, the phrase "*comparable unforeseen events*" only refers to "*health and safety requirements*" since it is placed after it. Because of that, it merely shows that the Parties did not want to limit the hardship clause to health and safety requirements but also to comparable events. To the contrary, it does not show any Parties' intent that the hardship clause itself shall supplement Art. 79 CISG. Thus, besides the hardship clause there cannot be further provisions for changed circumstances. Consequently, what should be hardship and what legal consequences are available must be derived from the hardship clause. That means that a recourse to Art. 79 CISG is not possible anymore.

76 In conclusion, clause 12 FSSA derogates from Art. 79 CISG in the sense of Art. 6 CISG. For this reason, CLAIMANT cannot invoke Art. 79 CISG in the present case.

77 CLAIMANT invokes that clause 12 FSSA regulates only changed circumstances for which CLAIMANT shall not be responsible and does not address RESPONDENT's liability [*C-Memo, p. 29, para. 117*]. CLAIMANT asserts that if the hardship clause derogated from Art. 79 CISG, this would prevent RESPONDENT from relying on Art. 79 CISG in a case of hardship [*ibid.*]. However, pursuant to Art. 6 CISG the parties may derogate from parts of an article and not only fully exclude articles of the CISG [*cf. Schlechtriem/Schroeter, paras. 49, 57a*] Consequently, the parties can also derogate from Art. 79 CISG regarding the responsibility of one party, i.e. in the present case, the seller. Therefore, in any case, the Parties derogated at least from the liability of CLAIMANT in case of changed circumstances.

II. EVEN IF THE PARTIES DID NOT DEROGATE FROM ART. 79 CISG, CLAIMANT CANNOT DEMAND US$ 1,250,000 UNDER ART. 79 CISG

78 Art. 79 CISG does not cover hardship (**1**). Even if the Tribunal finds that Art. 79 CISG covers hardship, CLAIMANT cannot invoke hardship as it has already performed (**2**) and the 30% tariff does not constitute hardship for CLAIMANT (**3**). Furthermore, Art. 79 CISG does not provide for the remedy of price adaptation by the Tribunal (**4**).

1. ART. 79 CISG DOES NOT REGULATE HARDSHIP

79 CLAIMANT alleges that it is widely recognized that Art. 79 CISG covers hardship [*C-Memo, p. 28, para. 113*]. However, the wording and legislative history of Art. 79 CISG support that Art. 79 CISG does not cover hardship [*Tribunale Civile di Monza, 14 Jan 1993; Honnold/Flechtner, para. 432.2; Lee, p. 389; Petsche, p. 156; Zeller, p. 160*].

80 Firstly, the wording of Art. 79 CISG requires that the failure to perform is "*due to*" an impediment. This means that the impediment must be the exclusive and direct cause for the failure to perform and no action or omission by the party may be involved [*cf. Brunner, p. 340; Petsche, p. 157; Schwenzer in: Schlechtriem/Schwenzer(2016), Art. 79 CISG, para. 16*]. However, financial causes, such as the imposition of tariffs, allow a party to reach an autonomous decision to deliver or not [*cf. Petsche, p. 157*]. A non-performance would not be caused exclusively by the impediment but rather also by a party's decision [*ibid.*]. Thus, the failure to perform would not be "*due to*" the impediment [*ibid.*]. Consequently, the wording of Art. 79 CISG prefigures that it does not cover hardship.

81 Secondly, also the legislative history of the CISG supports the view that hardship is not covered by Art. 79 CISG [*Bach in: BeckOGK, Art. 79 CISG, para. 36*]. None of the proposals to include situations where the market price increases, into Art. 79 CISG, were approved [*cf. A/32/17, para. 460*]. Quite contrary, multiple suggestions including such a content have been rejected [*Bach in: BeckOGK, Art. 79 CISG, para. 36; Petsche, p. 159 et seq.; A/CN.9/100, para. 106 et seq.; A/32/17, para. 458 et seqq.*]. This indicates that the legislator did not want to include the concept of hardship into Art. 79 CISG.

82 Consequently, the wording and the legislative history point out that Art. 79 CISG does not cover hardship.

2. EVEN IF ART. 79 CISG COVERS HARDSHIP, CLAIMANT CANNOT INVOKE HARDSHIP ANYMORE AS IT HAS ALREADY PERFORMED

83 The wording of Art. 79 CISG requires a "*failure to perform*". However, in the present case, CLAIMANT was still able to perform and did even deliver the frozen semen after the tariff had been imposed [*Ex. C-8, p. 18*]. Thus, a requirement of Art. 79 CISG is not fulfilled [*cf. C-Memo, p. 32 et seq., para. 132 et seqq.*]. According to CLAIMANT, it was not relevant in the present case that CLAIMANT has performed, because RESPONDENT insisted on immediate delivery [*C-Memo, p. 32 et seq., para. 132 et seqq.*]. Certainly, RESPONDENT's negotiator Mr. Shoemaker expressed its wish to receive the doses in time [*Ex. C-8, p. 18*]. However, contrary to CLAIMANT's submission [*C-Memo, p. 33, para. 134*], the only thing he expressed was that he thinks a solution would be found if the contract provides for a contract adaptation [*Ex. C-8, p. 18*]. Furthermore, Mr. Shoemaker told CLAIMANT that he cannot authorize an additional payment [*ibid.*]. In full knowledge of these facts CLAIMANT made an autonomous choice to send the final shipment. Therefore, CLAIMANT cannot invoke that it relied on a promise that the contract will be adapted. Consequently, contrary to CLAIMANT's submission [*C-Memo, p. 32, para. 129*], the "*failure to perform*" as required by Art. 79 CISG is not expendable.

3. THE 30% TARIFF DOES NOT CONSTITUTE HARDSHIP IN TERMS OF ART. 79 CISG

84 Even if the Tribunal finds that Art. 79 CISG includes hardship, the preconditions for hardship under Art. 79 CISG would not be fulfilled. For hardship to be given, the outermost limit of sacrifice must be reached [*cf. CISG AC Opinion No. 7, para. 28; Huber in: MüKoBGB, Art. 79 CISG, para. 21; Kröll et al., Art. 79 CISG, para. 82; Schwenzer in: Schlechtriem/Schwenzer(2016), Art. 79 CISG, para. 1*]. This threshold is usually met, where the performance costs increase by at least 100 to 125% [*Brunner, p. 432; cf. Schwenzer in: Schlechtriem/Schwenzer(2013), Art. 79 CISG, para. 30;*]. As the 30% tariff only affects the last 50 doses of the shipment [*Ex. C-8, p. 17*], CLAIMANT's overall performance cost increased by 15% [*supra, para. 66 et seqq.*]. CLAIMANT states that such an increase already constitutes hardship [*C-Memo, p. 30 et seq., para. 121 et seqq.*]. The 15% increase in the case at hand is not even one sixth or one eight of the usual threshold of 100 to 125%. Therefore, the tariff does not constitute hardship.

85 According to CLAIMANT's submission, the threshold of 100-125% can be lowered when the party would otherwise be financially ruined [*C-Memo, p. 30, para. 121*]. Firstly, the author which CLAIMANT cites states that a "*somewhat smaller alteration of the equilibrium of the*

contract" may be enough for hardship when the economic existence of the disadvantaged party would be seriously and effectively endangered [*Brunner, pp. 432, 438 et seq.*]. CLAIMANT wants to lower the threshold of 100-125% to 15%. This would mean a reduction of the threshold to just one sixth or even one eight of the original threshold. This is more than just a somewhat smaller threshold.

86 Secondly, the party's financial situation generally lies within its own responsibility [*supra, para. 70; Brunner, p. 436*]. Further, CLAIMANT would not be financially ruined when paying the tariff. CLAIMANT fears to be forced to sell its dressage part to prolong its credit line [*PO2, p. 59, para. 29*]. Additionally, this burden was not exclusively caused by the tariff. CLAIMANT made losses from 2014 to 2017 and took a credit in 2013 with a high interest rate to expand its business [*ibid.*]. Becoming profitable was a condition for the credit extension [*ibid.*]. Furthermore, CLAIMANT burdened itself by investing heavily in new stables the year before [*PO2, p. 58, para. 21*]. Thus, CLAIMANT already laid the basis in the past for the problems which it is facing now. The return of an investment correlates with the risks taken [*cf. Brunner, p. 433; Mankowski in: MüKoHGB, Art. 79 CISG, para. 38*]. If somebody takes a risk, it also must expect possible consequences if the risk materializes [*Mankowski in: MüKoHGB, Art. 79 CISG, para. 38*]. This can even include to relinquish parts of its business [*cf. Bach in: BeckOGK, Art. 79 CISG, para. 46; Schwenzer in: Schlechtriem/Schwenzer(2013), Art. 79 CISG, para. 14*]. If CLAIMANT takes a credit to make more profit, it has to face the consequences if the risk materializes, i.e. for example that it must sell its dressage part. Consequently, the risky management of CLAIMANT's business should not lead to a disadvantage for RESPONDENT.

87 CLAIMANT maintains that already a price increase of 5% would constitute hardship, because it already destroys the commercial basis of the deal [*C-Memo, p. 27, para. 106, C-Memo, p. 31, para. 123*]. CLAIMANT stated that an increase in the cost of performance by up to 40% could destroy the commercial basis of the deal [*C-Memo, p. 27, para. 106; Ex. C-4, p. 12*]. Therefore, CLAIMANT assumes that this statement must be used to interpret Art. 79 CISG, because RESPONDENT did not object to this [*ibid.*]. However, CLAIMANT itself suggested to discuss the issue about the hardship clause on 12 Apr 2017 in a personal meeting [*Ex. C-4, p. 12*]. Thus, the threshold for hardship should have been subject to further discussions. On that day, the Parties had only time to exchange their views on what still had to be finalized and various wishes. [*Ex. C-8, p. 17*]. Therefore, it was clear to both Parties that the negotiations were not definite at this point at the time. Due to the car accident, further discussion could not take place between Ms. Napravnik and Mr. Antley [*Ex. C-8, p. 17*].

Thus, CLAIMANT's proposal for a decreased threshold for hardship cannot be used to interpret the contract.

88 Therefore, the 30% tariff in the case at hand does not constitute hardship in terms of Art. 79 CISG.

4. ART. 79 CISG DOES NOT PROVIDE FOR AN INCREASE OF THE CONTRACT PRICE BY THE TRIBUNAL

89 The Tribunal is not entitled to adapt the contract of the Parties because Art. 79 CISG does not provide for the remedy of contract adaptation. Thus, even if the Tribunal finds that the 30% tariff constitutes hardship, CLAIMANT is not entitled to claim a contract adaptation under the CISG. The legal consequence of Art. 79(1) CISG is that a party is not liable for a failure to perform any of its obligations. This means that the party does not have to pay damages for breaches of contract that are due to the impediment [*Petsche, p. 159; Schwenzer in: Schlechtriem/Schwenzer(2016), Art. 79 CISG, para. 1*]. On the contrary, Art. 79 CISG does not provide the remedy of contract adaptation [*Kröll et al., Art. 79, para. 86; Schlechtriem/Schroeter, para. 682; Zeller, p. 153*].

90 Further, the legislative history of the CISG supports this argument. In the Working Group of UNCITRAL it was proposed to allow a party to claim adjustment of a contract when unexpected "*excessive damages*" occur [*cf. CISG-AC Op. No. 7, para. 29; VDC 1980, para. 52 et. seqq.; A/32/17, para. 458*]. This proposal was considered but not approved [*cf. CISG-AC Op. No. 7, para. 29; cf. VDC 1980, para. 52 et. seqq.; A/32/17, para. 460; Flechtner, p. 98;*]. Therefore, adaptation is not part of the CISG.

91 CLAIMANT alleges that the CISG contains a gap because "*the appropriate remedies for hardship*", i.e. a contract adaptation is not governed by Art. 79 CISG [*C-Memo, p. 34, para. 137*]. CLAIMANT assumes that the "*concept of hardship without any possible remedies would be a toothless tiger*" [*ibid.*]. Firstly, this interpretation does not take into account that Art. 79 CISG already provides for a remedy in case of "*hardship*" [*supra, para. 89*]. Only because there is not the remedy of a contract adaptation does not mean that there is a gap in the Convention [*Flechtner, p. 97 et seq.*]. The reason that the CISG does not include this remedy is that it is a remedy which is common only in the Civil Law tradition and not the Common Law tradition [*ibid.*]. To assume that the absence of such a remedy in the CISG is a gap would lead to importing domestic laws into the CISG [*cf. Zeller, p. 160*]. It was a deliberate choice of the Working Group to not in incorporate such a remedy [*cf. Bach in:*

BeckOGK, Art. 79 CISG, para. 36; Flechtner, p. 98; A/CN.9/100, para. 106 et seq.; A/32/17, para. 458 et seqq.].

92 Secondly, it is not a gap because Art. 79 CISG is contained in Part III, Chapter 5, Section IV of the CISG. The title of this Section "*Exemptions*" indicates that all possible exemptions for non-performance shall be covered in this Section [*Petsche, p. 159*]. Therefore, it can be assumed that the remedies which the Section provides are exhaustive [*Petsche, p. 159*]. Furthermore, according to Art. 7(1) CISG the CISG must be interpreted considering the need to promote uniformity in its application. To ensure legal certainty and uniformity it is necessary to assume that the provisions about exemptions and grounds for avoidance are exhaustive [*cf. Flechtner, p. 98; Petsche, p. 159*]. Consequently, Art. 79 CISG does not contain a gap.

93 Therefore, CLAIMANT cannot invoke a contract adaptation under Art. 79 CISG.

CONCLUSION – ISSUE C

94 The tariff is not an event covered by clause 12 FSSA. It was neither "*comparable*" to "*health and safety requirements*" nor "*unforeseen*" as required by clause 12 FSSA. Furthermore the 30% tariff only increases CLAIMANT's performance costs by 15%. This cost increase is not enough to reach the limit for hardship. Since the Parties agreed on DDP in clause 8 FSSA, CLAIMANT has to bear the additional costs resulting from the tariff. Furthermore, CLAIMANT is not entitled to an additional payment under Art. 79 CISG. Art. 79 CISG is not applicable as the Parties derogated from it with the hardship clause in the sense of Art. 6 CISG. Furthermore, Art. 79 CISG does not even cover hardship. Even if Art. 79 CISG was applicable and would cover hardship, CLAIMANT ceased its right to invoke Art. 79 CISG when performing. Even when considering CLAIMANT's financial difficulties and the negotiations, the threshold cannot be lowered to such an extent. Thus, the requirements of Art. 79 CISG are not fulfilled. Consequently, RESPONDENT is not obliged to reimburse the costs paid by CLAIMANT.

REQUEST FOR RELIEF

On behalf of RESPONDENT, for the stated reasons Counsel for RESPONDENT respectfully requests the Arbitral Tribunal to declare that:

(1) The Tribunal has no power to adapt the contract under the arbitration agreement and that Danubian Law applies to the interpretation of the arbitration agreement;

(2) CLAIMANT may not submit the Evidence from the other arbitral proceedings RESPONDENT is involved in;

(3) CLAIMANT is neither under clause 12 FSSA nor under the CISG entitled to a price adaptation or an additional payment.

Certificate and Choice of Forum

To be attached to each Memorandum

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

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

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

Name Lukas Teplie

Signature