Sixteenth Annual
Willem C. Vis East International Commercial Arbitration Moot
31st March – 7th April 2019

Memorandum for RESPONDENT

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

CARINA GRABNER • UTA MÜLDNER • JESSICA SCHNEEBERGER •
CHARLES ERIC SWANSON • MAXIMILIAN ZIMMER• JONAS ZINKAND

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INDEX OF ABBREVIATIONS

Apr	April
Art./Arts.	Article/Articles
A.S.	*Anonim Şirket* (Turkish Joint Stock Company)
Aug	August
CAS	Court of Arbitration for Sport
CA.P.C.	California Penal Code
CCL	The Criminal Law of the People's Republic of China
cf.	*conferre (*confer)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CMA	Computer Misuse Act (United Kingdom)
CMCA	Computer Misuse and Cybersecurity Act (Singapore)
Co.	Company
Corp.	Corporation
DAL	Danubian Arbitration Law (verbatim adoption of the Model Law)
DDP	Delivered Duty Paid (Incoterms 2010)
Dec	December
ed.	Edition
emph. add.	Emphasis added
et al.	*et alia* (and others)
ETS	European Treaty Series

Exhibit C	CLAIMANT's Exhibit (1-8)
Exhibit R	RESPONDENT's Exhibit (1-4)
f./ff.	*folio* (following)/ (and the following)
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
HKIAC Rules 2013	2013 Hong Kong International Arbitration Centre Administered Arbitration Rules
Hong Kong Moot Rules	The Rules of the 16th Vis Moot East
IBA	International Bar Association
IBA Rules	The IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
i.e.	*id est* (that is to say)
Inc.	Incorporation
IPC	French Intellectual Property Code
Jan	January
JUCPA	Japanese Unfair Competition Prevention Act
Ltd.	Limited
MCL	Mediterranean Contract Law (verbatim adoption of the UNIDROIT Principles)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006

MüKoBGB	*Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Munich Commentary on the German Civil Code)
MüKoHGB	*Münchener Kommentar zum Handelsgesetzbuch* (Munich Commentary on the German Commercial Code)
New York Convention/ NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y., 10 June 1958)
No.	Number
Nov	November
Oct	October
p./pp.	page/pages
para. /paras.	Paragraph/paragraphs
PCB	Penal Code of Brazil
PICC	UNIDROIT Principles for International Commercial Contracts
PLC	Public Limited Company
PO	Procedural Order
S.A.	*Sociedad Anónima* (Mexican Limited Company)
Sales Agreement	Frozen Semen Sales Agreement
Sales Part	Clause 1-14 of the Sales Agreement
SCC	Swiss Criminal Code
Sec.	Section
StGB	Strafgesetzbuch (German Criminal Code)
TPC	Turkish Penal Code

TRIPS	WIPO's Agreement on Trade-Related Aspects of Intellectual Property Rights
TSR	The Trade Secrets (Enforcement, etc.) Regulations 2018 (United Kingdom)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollar
U.S.C.	Title 18 of the United States Code (United States)
USA	United States of America
UWG	Gesetz gegen den unlauteren Wettbewerb (German Unfair Competition Act)
v.	versus
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"), collectively the "**PARTIES**". RESPONDENT is a modern and prospering stud farm in Equatoriana striving to establish a racehorse stable. CLAIMANT is an old stud farm incorporated in Mediterraneo. The following chronology summarises the course of events surrounding the PARTIES' contract for the sale of frozen racehorse semen.

March 2017	RESPONDENT enquires about the availability of frozen semen. CLAIMANT's initial offer provides for pick up by RESPONDENT, to which RESPONDENT objects. The PARTIES subsequently find common ground on an increased purchase price in exchange for CLAIMANT Delivering Duty Paid ("**DDP**").
10 Apr 2017 / 11 Apr 2017	RESPONDENT proposes an arbitration clause determining Equatoriana as the seat of arbitration and Equatorianian law to govern the Arbitration Agreement. In a counter proposal, CLAIMANT replaces Equatoriana with Danubia in the Arbitration Agreement.
12 Apr 2017	Without agreeing on any terms in regard to a transfer of powers upon the Arbitral Tribunal, the PARTIES' main negotiators are injured.
5 May 2017	The Mediterranean president appoints an ardent critic of free trade as "super"-minister of agriculture, trade and economics.
6 May 2017	The PARTIES sign the Frozen Semen Sales Agreement including the INCOTERM DDP and Danubia as the seat of arbitration without adding a provision regulating the adaptation of the contract.
15 Nov 2017	Mediterraneo imposes a 25% import tariff on agricultural products.
19 Dec 2017	Equatoriana responds with a 30% retaliatory tariff.
21 Jan 2018	RESPONDENT fulfils its contractual obligation by paying the second instalment of US$ 5,000,000. CLAIMANT fulfils its contractual obligation pursuant to DDP by sending the last shipment and paying the tariff.
31 July 2018	CLAIMANT surprisingly initiates an arbitral proceeding.
2 Oct 2018	CLAIMANT plans to unlawfully purchase a confidential award of an arbitration involving RESPONDENT from a company with a doubtful reputation.

SUMMARY OF ARGUMENTS

1 The PARTIES' contractual relationship was off to the races when they signed the Frozen Semen Sales Agreement and fulfilled their contractual obligations. However, things took a turn for the worse when CLAIMANT tried to change the rules of the race by demanding more than it was entitled to. In a desperate attempt to replenish its financial resources, CLAIMANT dragged RESPONDENT into an arbitral proceeding. CLAIMANT's behaviour peaks in its unjustified demand to submit a stolen award into the proceeding.

Issue 1: The Arbitral Tribunal is not empowered to adapt the Sales Agreement.

2 Contrary to the PARTIES' agreement, CLAIMANT conjures up the power of the Arbitral Tribunal to adapt the Sales Agreement out of thin air. In fact, the PARTIES chose Danubian law to govern the Arbitration Agreement in line with Danubia being the seat of arbitration. The PARTIES agree that the Arbitration Agreement is interpreted as to not include contract adaptation if Danubian law applies. Even if, as CLAIMANT alleges, Mediterranean law was applicable, the Arbitral Tribunal would not be empowered to adapt the Sales Agreement since an empowerment requires express authorisation. CLAIMANT must take off its blinders and face the truth that such an authorisation can neither be found in the Sales Agreement nor in the communication of the PARTIES.

Issue 2: The Arbitral Tribunal should not admit the illegally obtained award.

3 For reasons beyond comprehension, CLAIMANT attempts to submit an award that is neither relevant nor material to this arbitration. Moreover, the award was obtained illegally, rendering it inadmissible. CLAIMANT makes a meritless effort to wash its hand in innocence by blaming the very company it paid to do the dirty work. The award is protected by confidentiality, a trait of arbitration CLAIMANT gladly benefits from but is quick to deny RESPONDENT.

Issue 3: CLAIMANT is not entitled to any additional payment.

4 Allowing CLAIMANT to plunder RESPONDENT's funds after RESPONDENT already paid the purchase price would defy all logic. The 30%-Tariff does not fall under the Hardship Clause since the PARTIES agreed on DDP and thereby shifted the risks of tariffs onto CLAIMANT. In a futile attempt to amend the fair result of the negotiations, CLAIMANT tries to turn back the wheel of time by construing an imaginary case of hardship. Further, the CISG does not grant relief in cases of hardship. In any case, the prerequisites of hardship in contract as well as in law are neither fulfilled nor is the legal remedy adaptation. Therefore, CLAIMANT is not entitled to any additional payment neither by agreement nor by law.

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL NEITHER HAS THE JURISDICTION NOR THE POWER TO ADAPT THE SALES AGREEMENT

5 RESPONDENT respectfully requests the Arbitral Tribunal to dismiss the claim for an increased remuneration in the amount of US$ 1,250,000 because the Arbitral Tribunal lacks the required decision making power. Increasing the remuneration that the PARTIES originally agreed upon in the Frozen Semen Sales Agreement ("**Sales Agreement**") requires an adaptation of this contract. However, contract adaptation is not within the scope of the arbitration agreement included in clause 15 of the Sales Agreement ("**Arbitration Agreement**"), contrary to CLAIMANT's allegation [*Notice of Arbitration, p. 7, para. 16; cf. Claimant, para. 30*]. Any ruling of the Arbitral Tribunal involving contract adaptation would constitute a decision beyond its power and render the award unenforceable [*cf. Redfern/Hunter p. 584, paras. 10.45f.*].

6 The scope of the Arbitration Agreement is determined by interpretation. The interpretation of the Arbitration Agreement is governed by Danubian law **[A]** and reveals that the Arbitral Tribunal is not empowered to adapt the Sales Agreement **[B]**.

A. Danubian law is applicable to the interpretation of the Arbitration Agreement

7 Before interpreting an arbitration agreement in substance, it is necessary to identify the rules of law governing the interpretation. The law applicable to an arbitration agreement may be chosen by the parties or identified by reference to the seat of arbitration [*Fouchard, pp. 218f.*]. The applicable law also governs questions of interpretation [*Born, p. 635*].

8 At hand, the PARTIES impliedly chose Danubian law to govern the interpretation of the Arbitration Agreement **[I]**. Alternatively, it is a generally accepted principle in international arbitration that the choice of the seat will also determine the law applicable to the Arbitration Agreement **[II]**. In any case, the contractual choice of Mediterranean law does not pertain to the Arbitration Agreement because it is separate from the Sales Part **[III]**.

I. By agreeing on Danubia as the seat of arbitration, the PARTIES impliedly chose Danubian law to govern the interpretation of the Arbitration Agreement

9 Contrary to CLAIMANT's submission [*Claimant, paras. 6, 14*], no expressed choice of law can be found in the Arbitration Agreement [*Exhibit C5, p. 14, clause 15*]. In fact, the PARTIES impliedly chose Danubian law to govern the interpretation of the Arbitration Agreement by agreeing on Danubia as the seat of arbitration.

10 The parties to an arbitration agreement usually do not expressly determine a specific law applicable to the arbitration agreement [*cf. Mastrobuono v. Shearson; Fouchard, p. 222; Born, p. 590*]. Thus, any intent by the parties concerning the choice of law is essential [*Sale Contract Case; Born II, p. 835*] and must be assessed to determine the law applicable to an arbitration agreement by considering all circumstances of the case [*cf. ICC 7929; FirstLink v. GT Payment; Kundan Singh v. Tanzania; BCY v. BCZ; Mayer, p. 267; Fouchard, pp. 256, 826; Moses p. 76*].

11 Except in cases where parties make an express choice concerning the law governing the arbitration agreement, the choice of the seat of arbitration generally indicates an implied choice of law for the arbitration agreement [*ICC 7373; Petrasol v. Stolt; Bangladesh Chemical v. Stephens Shipping; Channel Tunnel v. Balfour Beatty; Habas Sinai v. VSC Steel Coy; XL Insurance v. Owens; Oldendorff v. Libera; Born, p. 511f.*]. The law of the seat prevails even if the underlying contract includes a choice-of-law clause on the substance [*XL Insurance v. Owens*].

12 By signing the Sales Agreement with Danubia as the seat of arbitration, the PARTIES' intent to have the Arbitration Agreement governed by Danubian law has materialised. This finding is supported by the drafting history of the Arbitration Agreement.

13 In the **email dated 10 April 2017**, RESPONDENT's negotiator Mr. Antley proposed a draft for the Arbitration Agreement largely based on the HKIAC model clause [*Exhibit R1, p. 33, para. 1*]. The clause proposed Equatoriana as the seat of arbitration and in accordance with the seat, determined Equatorianian law as the law applicable to the Arbitration Agreement [*Exhibit R1, p. 33, para. 2*]. Thereby RESPONDENT clarified its intent that the seat of arbitration and the law of the Arbitration Agreement should be uniform. RESPONDENT then asked "*whether [CLAIMANT] had any objections to the clause*" [*Exhibit R1, p. 33, para. 3*].

14 In its **answer dated 11 April 2017**, CLAIMANT stated it would "*largely accept [RESPONDENT's] proposal with an amendment as to the place of arbitration" (emph. add.)* [*Exhibit R2, p. 34, para. 3*]. The only change CLAIMANT asked for was to move the seat of arbitration to Danubia as a neutral venue. However, CLAIMANT never proposed a different choice of law for the Arbitration Agreement [*Exhibit R2, p. 34, para. 3*]. Thus, CLAIMANT accepted to apply Danubian law as the law of the seat of arbitration to the Arbitration Agreement.

II. Alternatively, according to generally accepted principles in international arbitration, the choice of the seat predetermines the law applicable to the Arbitration Agreement

15 Even if there was no choice of law regarding the Arbitration Agreement, the various legal doctrines applied by courts, arbitral tribunals and scholars determine the law of the seat to be the applicable law to the interpretation of the arbitration agreement.

16 First, the Arbitration Agreement is of procedural nature and therefore governed by the law of the seat of arbitration **[1]**. Second, the application of Danubian law to the interpretation of the Arbitration Agreement is the result of its close connection with Danubia as the seat of arbitration **[2]**. Third, Danubian law governs the Arbitration Agreement because the PARTIES chose a neutral venue **[3]**. Fourth, the application of Danubian law to the Arbitration Agreement is consistent with Art. 36(1)(a)(i) DAL and Art. V(1)(a) NYC **[4]**.

1. The Arbitration Agreement is of procedural nature and therefore governed by Danubian law as the law of the seat of arbitration

17 Arbitration agreements are of procedural nature because their main purpose is to serve as the basis for the conduct of an arbitral proceeding [*Jörg v. Jörg; Prütting/Gehrlein/Prütting, § 1029, para. 7; Rosenberg/Schwab/Gottwald, § 176, para. 9; Schmidt, p. 374; Stein/Jonas/Schlosser, § 1029, para. 2*]. As arbitration agreements mainly aim at facilitating an arbitral proceeding, they are governed by the law of the place where the arbitral proceeding is held; i.e. the law of the seat of arbitration [*Japan Educational Corporation v. Feld; Art. 48 Swedish Arbitration Act*]. Consequently, courts and tribunals apply the law of the seat of arbitration to arbitration agreements [*HCC Arbitration; ICC 5294; Owerri v. Dielle*; *Kukje Sangsa v. GKN*].

18 The Danubian jurisprudence considers arbitration agreements as procedural contracts [*PO2, p. 60, para. 36*]. Consequently, Danubian law as the law of the seat of arbitration should apply to the Arbitration Agreement.

2. Danubian law has the closest connection to the Arbitration Agreement

19 CLAIMANT correctly states [*Claimant, para. 8*] that absent any choice of law, courts and tribunals regularly consider the law with "*the closest and most real connection"* to determine the law applicable to the arbitration agreement [*Sulamérica v. Enesa; BCY v. BCZ; Habas Sinai v. VSC Steel Coy; ICC 6379; ICC 6719; ICC 5730*]. However, contrary to CLAIMANT's belief [*Claimant, para. 8*], Danubian law has the closest connection to the Arbitration Agreement.

20 A close connection between the law of the seat and the arbitration agreement exists because the latter mainly materialises at the seat of arbitration [*FirstLink v. GT Payment; Thai-Lao Lignite v. Government of Lao; Lew/Mistelis/Kröll, p. 122, para. 6-62; Born, p. 510*]. This is due to the fact that the seat of arbitration is "*the place where the arbitration is to be held and which will exercise the […] jurisdiction necessary to ensure that the procedure is effective*" [*Habas Sinai v. VSC Steel Coy*]. Therefore, the prevailing view acknowledges that an arbitration agreement is closer connected to the law of the seat of the arbitration than to any other domestic law [*ICC 5730; ICC 7154; C v. D; Abuja v. Meridien; Owerri v. Dielle; Bernardini, p. 201; Fouchard, p. 224; MüKoZPO/Münch,*

§ 1029, para. 37; Stein/Jonas/Schlosser, § 1029, paras. 10ff.]. Consequently, the law of the seat of arbitration applies to the arbitration agreement [*Organic Spelt Kernels Case; Plum Case; Cobalt Powder Case; Berger, p. 315; v. Hoffmann, pp. 60ff.; Reithmann/Martiny/Hausmann, para. 8.242; Stern, p. 571; Harisankar, p. 629; Art. 48 Swedish Arbitration Act*].

21 The close connection between the arbitration agreement and the seat of arbitration is reinforced if the parties include procedural provisions [*Berger, p. 315*]. At hand, the Arbitration Agreement contains procedural provisions such as the "*HKIAC*" as the arbitral institution, the number of arbitrators being "*three*" and the language of arbitration as "*English*" [*Exhibit C5 p. 14, clause 15*]. In contrast, CLAIMANT fails to show any connection of Mediterranean law to the Arbitration Agreement as its line of argumentation only relates to facts connected to the substantive part of the Sales Agreement [*Claimant, para. 8*].

3. Danubian law governs the Arbitration Agreement as the PARTIES chose a neutral venue

22 Applying the law of the seat holds particularly true in cases where the local law of one of the parties' home states governs a contractual relationship, but the arbitration agreement provides for arbitration at a neutral venue [*Born, p. 518*]. One of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution, detached from either of the parties or their respective home states [*Born, pp. 73f.*]. Empirical research reports that users of international arbitration identify neutrality as one of the most important benefits of arbitration [*Bühring-Uhle, p. 109; International Arbitration Survey 2013, p. 8; International Arbitration Survey 2010, p. 12*].

23 In accordance with international business practice, the PARTIES chose Danubia as a neutral seat as they could not agree where a dispute between them should be solved [*Exhibit C5 p. 14, para. 15; Exhibit R3 p. 35, para. 4*]. To facilitate neutrality as one of the main objectives of arbitration, the Arbitral Tribunal should apply Danubian law as a neutral set of rules to the interpretation of the Arbitration Agreement.

4. Danubian law governs the Arbitration Agreement as the law of the seat is applicable by default pursuant to Art. 36(1)(a)(i) DAL and Art. V(1)(a) NYC

24 The law governing the arbitral proceeding is the law of the seat of arbitration [*Redfern/Hunter, p. 166, para. 3.37*]. In their Arbitration Agreement, the PARTIES determined Danubia as the seat of arbitration [*Exhibit C5, p. 14, clause 15*]. Consequently, the Danubian Arbitration Law ("**DAL**"), a verbatim adoption of the Model Law [*PO1, p. 53*], is applicable to the arbitral proceeding as the lex arbitri. Aside from that, the New York Convention ("**NYC**") is applicable, as all countries involved are signatories [*Hong Kong Moot Rules, para. 20*].

25 Art. 36(1)(a)(i) DAL and the similar Art. V(1)(a) NYC define a two-part choice of law rule [*Berger, p. 315; Born II, p. 825*]. First, both articles emphasise that the arbitration agreement is governed by "*the law to which the parties have subjected [the arbitration agreement]*". Second, if there is no choice of law for the arbitration agreement, both articles determine that the arbitration agreement is governed "*under the law of the country where the award was made*" [*Born, pp. 498f.; Van den Berg, p. 294*]. Consequently, the law of the seat of arbitration governs the arbitration agreement by "*default*" [*Born, p. 495*]. It could be argued that Art. 36(1)(a) DAL and Art. V(1)(a) NYC are only mandatory for the post-award stage. However, applying said provisions in both the pre- and the post-award stage ensures the validity and enforceability of international arbitration agreements and awards [*Insurance v. Reinsurance; Della Sanara Kustvaart v. Fallimento Cap; Born, pp. 498f.; Van den Berg, p. 294; Lew/Mistelis/Kröll, pp. 118f., paras. 6-54f.; McMahon, p. 757*]. At hand, Danubian law governs the interpretation of the Arbitration Agreement as it is the "*law of the country where the award [will be] made*" [*Art. 36(1)(a)(i) DAL; Art. V*(1)(a) *NYC*]. Determining the law applicable to the interpretation of the Arbitration Agreement in line with the NYC also facilitates the enforceability of the award.

III. The contractual choice of Mediterranean law for the Sales Part does not govern the Arbitration Agreement because of its severability

26 Contrary to CLAIMANT's submission [*Claimant, paras. 6, 14*], the choice of law in clause 14 in the substantive part of the Sales Agreement ("**Sales Part**") does not encompass the Arbitration Agreement. Instead, in line with the widely-accepted doctrine of severability two different sets of rules govern the Sales Agreement and the Arbitration Agreement.

27 The effect of the doctrine is the legal separation of the arbitration agreement from the substantive contract even if it is physically included in the same agreement [*Born, p. 464; Czernich, p. 79; Berger, p. 319; Kröll II, p. 44*]. As a consequence, the determination of the relevant law to the arbitration agreement requires an analysis separate from the substantive contract [*ICC 6719; Fouchard, p. 222*].

28 The doctrine of severability applies because the PARTIES agreed on Danubia as the seat of arbitration which leads to the application of Art. 16(1) DAL [*Exhibit C5, p. 14, clause 15*]. In line with the doctrine, the PARTIES treated the choice of law for the Arbitration Agreement separately from the choice of law for the Sales Part [*Exhibit R1, p. 33; Exhibit R2, p. 34*]. CLAIMANT tries to paint the picture that RESPONDENT agreed, at an early stage in the negotiations, to have Mediterranean law apply to both the Sales Part and the Arbitration Agreement [*Claimant, para. 12*]. While the application of Mediterranean law to the Sales Part

was undisputed, RESPONDENT communicated to CLAIMANT that Mediterranean law should not apply outside the Sales Part. RESPONDENT first objected to the jurisdiction of Mediterranean courts [*Exhibit C3 p. 11, para. 3*] and later objected to Mediterraneo as the seat of arbitration [*Exhibit R1, p. 33, para. 2*]. This is supported by the final Sales Agreement, where the PARTIES arranged the Arbitration Agreement as a separate clause after the Sales Part with the choice of law in clause 14 [*Answer to the Notice of Arbitration, p. 31, para. 14*; *Exhibit C5, p. 14, clauses 14, 15*]. Hence, the choice of Mediterranean law for the Sales Part does not extend to the law of the Arbitration Agreement.

29 In conclusion, the PARTIES chose Danubian law to govern the Arbitration Agreement. Even if the Arbitral Tribunal found that there was no choice of law for the Arbitration Agreement, the law of the seat is applicable as the law governing the Arbitration Agreement.

B. The interpretation of the Arbitration Agreement reveals that the Arbitral Tribunal does not have the power to adapt the Sales Agreement

30 An interpretation of the Arbitration Agreement under Danubian law reveals that the PARTIES did not empower the Arbitral Tribunal to adapt the Sales Agreement **[I]**. Even if Mediterranean law applied to the interpretation, the Arbitration Agreement would not empower the Arbitral Tribunal to adapt the Sales Agreement **[II]**.

I. An interpretation of the Arbitration Agreement under Danubian law reveals that the Arbitral Tribunal is not empowered to adapt the Sales Agreement

31 The law that governs the interpretation of the Arbitration Agreement is the Danubian Contract Law **[1]**. An interpretation under the Danubian Contract Law reveals that the Arbitral Tribunal is not empowered by the PARTIES to adapt the Sales Agreement **[2]**.

1. Danubian Contract Law governs the interpretation of the Arbitration Agreement

32 CLAIMANT correctly considers the CISG to be applicable to the Sales Part [*Claimant, para. 1*], but mistakenly applies the CISG to interpret the Arbitration Agreement [*Claimant, para. 23*]. The Arbitration Agreement must be interpreted under Danubian Contract Law ("**DCL**"), a largely verbatim adoption of the UNIDROIT Principles for International Commercial Contracts ("**PICC**") [*PO2, p. 61, para. 45*]. Arbitration agreements are considered to be procedural contracts [*see supra, para. 17*]. As supported by the doctrine of severability, an arbitration agreement remains procedural in nature even if inserted into a substantive contract [*PO2, p. 60; para. 36; Kröll II, p. 45*] [*see supra, para. 27*]. As outlined by Art. 4 CISG, the CISG is only applicable to contracts of sale and does not extend to the interpretation of procedural

agreements [*Arts. 1-4 CISG; cf. Dörken v. Gutta; Kröll II, p. 45; Magnus, p. 838*]. Thus, the relevant law of Danubia to interpret the Arbitration Agreement is the DCL and not the CISG.

2. An interpretation under the DCL containing the four corner rule reveals that the Arbitral Tribunal is not empowered to adapt the Sales Agreement

33 Arbitration agreements are interpreted narrowly under the DCL and the PARTIES agree "*there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal*" [*PO1, p. 52*]. CLAIMANT itself concedes that interpreting the Arbitration Agreement under Danubian law reveals that the Arbitral Tribunal is not empowered to contract adaptation [*Claimant, para. 18*]. Pursuant to Art. 4.3 DCL, a written contract must be interpreted according to the four corner rule [*PO2, p. 61, para. 45*]. The four corner rule "*as applied by the Danubian courts has largely the same effects"* as Art. 2.1.17 DCL [*PO2, p. 61, para. 45*]. On this basis, any interpretation is limited to the written contract and the writing "*cannot be contradicted or supplemented by evidence of prior statements*" [*Vogenauer/Vogenauer, Art. 2.1.17, para. 3*]. A party is precluded from referring to extraneous circumstances and submitting other evidence than the written contract [*Inntrepreneur v. East Crown*].

34 At hand, there are no indications in the written agreement that would suggest an authorisation of the Arbitral Tribunal to adapt the Sales Agreement [*Exhibit C5, pp. 13f.*]. By not conferring the power of contract adaptation upon the Arbitral Tribunal in the written agreement [*Exhibit C5, pp. 13f.*], the PARTIES intended to prevent the Arbitral Tribunal from adapting the Sales Agreement. As a consequence of the four corner rule, CLAIMANT is barred from referring to events prior to contract conclusion which can therefore not be considered [*Claimant, paras. 12, 20*]. Hence, the interpretation of the Arbitration Agreement under the DCL reveals that the PARTIES did not empower the Arbitral Tribunal to adapt the Sales Agreement.

II. Even if interpreted under Mediterranean law, the Arbitration Agreement would not empower the Arbitral Tribunal to adapt the Sales Agreement

35 The Arbitral Tribunal would not be empowered to adapt the Sales Agreement even if it followed CLAIMANT's plea to apply Mediterranean Contract Law ("**MCL**"), a verbatim adoption of the PICC [*PO1, p. 53*], or the CISG to the interpretation of the Arbitration Agreement [*Claimant, para. 20*]. Therefore, it is not decisive at hand whether Art. 4.3 MCL or Art. 8 CISG applies, even though the CISG is not applicable to the interpretation of the Arbitration Agreement [*see supra, para. 32*]. The mandatory lex arbitri and the individual circumstances of the case prevent contract adaptation even if the Arbitration Agreement is interpreted under the MCL or the CISG.

36 The Arbitral Tribunal's power to adapt the Sales Agreement requires express authorisation by the PARTIES **[1]**. The PARTIES did not expressly authorise the Arbitral Tribunal as the form requirement set forth by Art. 7(2) DAL is not met **[2]**. Even if the Arbitral Tribunal found a written agreement was not necessary, the PARTIES did not consent to contract adaptation **[3]**.

1. The Arbitral Tribunal's power to adapt the Sales Agreement requires express authorisation by the PARTIES

37 CLAIMANT alleges that the Arbitral Tribunal is empowered to adapt the Sales Agreement because the PARTIES chose Mediterranean law which allows for contract adaptation [*Claimant, paras. 22-24*]. However, the choice of Mediterranean law for the Sales Part is not an expressed authorisation. Contract adaptation interferes with the most basic principle of contract law – *pacta sunt servanda* [*ICC 1512; ICC 6281; Derains*]. To justify undermining the principle of *pacta sunt servanda* and to allow for direct interference into the core of a contract by third persons, the parties must expressly authorise the latter.

38 In the case at hand, both the mandatory Art. 28(3) DAL **[a]** as well as international arbitration practice **[b]** require express consent of the PARTIES to allow for contract adaptation.

a) The mandatory Art. 28(3) DAL requires express authorisation for contract adaptation

39 CLAIMANT mistakenly concludes that no mandatory provision of the applicable law prohibits contract adaptation [*Claimant, paras. 25-28*]. On the contrary, contract adaptation would only be possible if the PARTIES had expressly authorised the Arbitral Tribunal pursuant to the DAL as it is the procedural arbitration law of Danubia [*cf. Redfern/Hunter, p. 166, para. 3.37*].

40 Art. 28(3) DAL states that "*the arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*" *(emph. add.)*. Furthermore, Art. 36(2) HKIAC Rules allows for a decision by an arbitral tribunal as *amiable compositeur* or *ex aequo et bono* if the parties expressly agreed.

41 When acting as *amiable compositeur* or deciding *ex aequo et bono*, an arbitral tribunal bases its decision on reasonableness without being strictly bound by the law [*Kröll, pp. 213, 216; Stauder, p. 289*]. Contract adaptation is a decision based on reasonableness because an arbitral tribunal is not bound by the law of contract if there is no adaptation clause containing exact criteria on how to adapt [*cf. Kröll, p. 211*]. Therefore, when adapting a contract, an arbitral tribunal acts as *amiable compositeur* or *ex aequo et bono* [*cf. CAS 2014/A/3524*]. Thus, contract adaptation falls within the scope of Art. 28(3) DAL and requires that the arbitral tribunal is expressly authorised to adapt a contract [*cf. CAS 2014/A/3524; Seog-Ung O, pp. 116f.; Kröll, pp. 211ff.*]. This is in line with Danubian jurisprudence which considers Art. 28(3) DAL to contain a

general standard to be applied to the conferral of exceptional powers to arbitral tribunals [*PO2, p. 60, para. 36*]. Contract adaptation is an exceptional conferral of power as it allows arbitral tribunals to change the parties' contract based on the arbitral tribunal's discretion [*CAS 2014/A/3524*].

42 As Art. 28(3) DAL is mandatory and not subject to derogation [*MüKoZPO/Münch, § 1051, para. 3*], its violation would render an award unenforceable pursuant to Art. 36(1)(a)(iv) DAL. However, the Arbitral Tribunal is obliged to render an enforceable award that settles the dispute because the award shall be final and binding upon the PARTIES pursuant to Art. 35(2) HKIAC Rules.

b) General arbitration practice requires express authorisation for contract adaptation

43 According to Art. 19(1) DAL, "*the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*". Therefore, the Arbitral Tribunal is bound to follow any agreement of the PARTIES on the procedure. CLAIMANT itself proposed to conduct the current proceeding in accordance with international practice [*Claimant, para. 32*]. RESPONDENT hereby agrees to that. Hence, the Arbitral Tribunal may justifiably rely on international arbitral practice when assessing its power to adaptation of the Sales Agreement.

44 General arbitration practice underlines the need for express authorisation in order to adapt the Sales Agreement. The basic source of an arbitral tribunal's decision-making power is the arbitration agreement [*Redfern/Hunter, pp. 12f.; Berger II, p. 8*] as formulated in the traditional wording of arbitration agreements that "*all disputes arising out of […] are referred to arbitration*" [*Berger II, p. 8; Lew/Mistelis/Kröll, p. 151, para. 7-63; Born, p. 1347*]. However, with respect to the adaptation of contracts, the parties not only require a yes-or-no decision from the arbitrators but rather ask them to rewrite the contract [*Berger II, p. 8; cf. Kröll, p. 125*]. Therefore, an arbitral tribunal found that "*a tribunal cannot substitute itself for the parties"* to modify a contract "*unless that right is conferred upon it […] by the express consent of parties*" [*Aminoil Arbitration*]. As rewriting a contract is within the competence of the parties, the prevailing view requires express consent for an arbitral tribunal to adapt a contract [*Aminoil Arbitration; Bernardini II, p. 421; Berger III, p. 10; Kröll III, p. 458; Al Faruque, p. 155; cf. Kröll, p. 164*]. This consent is expressed in arbitration agreements by phrases comparable to: "*all disputes arising out of this contract <u>including</u> a change of the contract itself*" (*emph. add.*) [*ICC 7544*].

45 Absent an express authorisation by the parties, the principle of *pacta sunt servanda* prevails over contract adaptation [*ICC 6281; Fouchard, p. 25; Berger II, p.* 9]. To ensure the sanctity of contracts, parties are bound to fulfil their contractual duties [*ICSID ARB/05/1*]. Thus,

arbitrators are reluctant to overrule the principle of *pacta sunt servanda* in favour of contract adaptation without the parties' express authorisation [*ICC 1512; ICC 6281; Derains*].

2. The PARTIES did not expressly authorise the Arbitral Tribunal as the form requirement set forth by Art. 7(2) DAL is not met

46 CLAIMANT argues that the PARTIES can expressly authorise the Arbitral Tribunal to adapt the Sales Agreement by agreeing orally or inferring an agreement from the circumstances [*Claimant, para. 20*]. However, to expressly authorise an arbitral tribunal to adapt a contract, an agreement in writing observing the form requirements set out in Art. 7(2) DAL is mandatory [*Tenant Case; Stauder, p. 290*]. A written agreement is necessary to provide legal certainty to parties of an arbitration [*William Co. v. Chu Kong Agency; UNCITRAL Case Digest, p. 29; MüKoZPO/Münch, § 1031, para. 8*] since decisions based on equity such as contract adaptation are currently not known or used in all legal systems [*cf. UNCITRAL Case Digest, p. 121*]. To achieve legal certainty, parties must agree in writing if an arbitral tribunal shall adapt a sales contract.

47 In the case at hand there is no written agreement between the PARTIES to authorise the Arbitral Tribunal to adapt the Sales Agreement [*Exhibit C5, pp. 13f.*]. Therefore, the Arbitral Tribunal should not adapt the Sales Agreement.

3. Even if the Arbitral Tribunal found that a written agreement was not necessary, the PARTIES did not consent to contract adaptation

48 Even if the Arbitral Tribunal found that a written agreement was not necessary, consent by the PARTIES cannot be derived from the Arbitration Agreement **[a]** or the Hardship Clause **[b]**. Furthermore, the PARTIES neither consented orally to contract adaptation during the negotiations prior to conclusion of the Sales Agreement **[c]** nor did RESPONDENT declare its consent after the conclusion of the Sales Agreement **[d]**.

a) The PARTIES did not impliedly authorise the Arbitral Tribunal in the Arbitration Agreement

49 The PARTIES agreed on a narrow Arbitration Agreement without impliedly authorising the Arbitral Tribunal to adapt the Sales Agreement [*against Claimant, para. 22*]. The lack of consent becomes even more apparent if the Arbitral Tribunal considers the drafting history of the Arbitration Agreement to which CLAIMANT refers in its memorandum [*Claimant, para. 20*].

50 In the **email dated 10 April 2017**, RESPONDENT proposed to include an arbitration agreement based largely on the HKIAC model clause but "*narrowed down and streamlined […] the fairly broad wording of the clause*" [*Exhibit R1, p. 33, para. 1*].

While the HKIAC model clause reads:

> "*Any dispute, controversy, difference or claim arising out of or relating to this contract*" (*emph. add.*) [*www.hkiac.org/arbitration/model-clauses*].

RESPONDENT proposed the following wording:

> "*Any dispute arising out of this contract*" [*Exhibit R1, p. 33, para. 2*].

51 In the **email dated 11 April 2017**, CLAIMANT accepted the narrow wording [*Exhibit R2, p. 34*] that was later included in the final Arbitration Agreement [*Exhibit C5, p. 14, clause 15*]. The Arbitration Agreement states that a "*dispute arising out of [the] contract*" [*Exhibit C5, p. 14, clause 15*] is to be resolved by the Arbitral Tribunal. In case of a dispute regarding contract adaptation however, the Arbitral Tribunal would have to change the price clause of the Sales Agreement. This changes the contract itself and is therefore not a dispute that arises out of the contract [*cf. Berger II, p. 8; cf. Kröll, p. 125*].

b) The PARTIES did not impliedly authorise the Arbitral Tribunal in the Hardship Clause

52 Furthermore, the PARTIES did not authorise the Arbitral Tribunal to adapt the Sales Agreement in the wording regulating hardship within clause 12 of the Sales Agreement ("**Hardship Clause**"). While contract adaptation was briefly discussed by the PARTIES, it was impliedly rejected as it was not included in the final wording of the Hardship Clause [*Exhibit C8, p. 17, para. 4; Exhibit C5, p. 14, clause 12*] [*see infra para. 125*]. To the contrary, the Hardship Clause only reads: "*Seller shall not be responsible*" [*Exhibit C5, p. 14, clause 12*] without mentioning contract adaptation as a possible legal remedy.

c) RESPONDENT did not agree to confer the power to adapt the Sales Agreement upon the Arbitral Tribunal during the preceding negotiations

53 CLAIMANT puts the cart before the horse by alleging RESPONDENT agreed to contract adaptation during the preceding negotiations [*Claimant, para. 20*]. CLAIMANT asserts that on 12 April 2017, the PARTIES' initial negotiators agreed to provide the Arbitral Tribunal with the power to adapt the Sales Agreement [*Claimant, para. 20*; *Exhibit C8, p. 17, para. 4*].

54 However, during these negotiations, RESPONDENT's initial representative Mr. Antley considered the issue of contract adaptation, yet deferred the final decision [*Exhibit C8, p. 17, para. 4*]. Mr. Antley's statement to return to CLAIMANT with an answer shows that he had not made up his mind regarding contract adaptation. Thus, an intention on behalf of RESPONDENT to authorise the Arbitral Tribunal to adapt the Sales Agreement does not exist and could not have been expressed later due to the car accident [*Exhibit C8, p. 17, para. 4*]. Further, the subsequent two negotiators finalising the Sales Agreement did not come to an

agreement on contract adaptation because RESPONDENT's new representative "*objected to transfer the power to the Arbitral Tribunal*" [*Exhibit R3, p. 35, para. 4*]. So far CLAIMANT has not brought forth reasons supporting the notion that the PARTIES agreed to empower the Arbitral Tribunal to adapt the Sales Agreement. Concluding, the PARTIES never agreed to vest the Arbitral Tribunal with the power to adapt the contract prior to the signing of the Sales Agreement.

d) RESPONDENT did not agree to contract adaptation after the conclusion of the Sales Agreement

55 Contrary to what CLAIMANT might assert, RESPONDENT did not agree to contract adaptation when it became clear that the tariffs imposed by Equatoriana also covered frozen racehorse semen. At hand, RESPONDENT was never interested in adaptation [*Answer to the Notice of Arbitration, p. 31, para. 18*]. In the telephone call on 21 January 2018, RESPONDENT's employee Mr. Shoemaker communicated the disapproval to CLAIMANT by stating that RESPONDENT "*never committed to any adaptation of the price*" and repeatedly emphasised that he did not have the "*required authority*" to grant adaptation [*Exhibit R4, p. 36, para. 4*]. Furthermore, RESPONDENT's Mr. Shoemaker clarified that it would have been within the PARTIES' prerogative to renegotiate the Sales Agreement and not the Arbitral Tribunal's [*Exhibit R4, p. 36, para. 4*]. Thereby RESPONDENT clarified that it objected to contract adaptation by a third party.

56 In summary, the PARTIES did not authorise the Arbitral Tribunal to adapt the Sales Agreement. Neither in the written agreement, before the signing of the Sales Agreement nor in subsequent communication, authorisation can be found. Even if played by CLAIMANT's rules, i.e. applying Mediterranean law, the Arbitral Tribunal is not empowered to adapt the Sales Agreement.

CONCLUSION ISSUE 1

The PARTIES' choice of Danubian law to govern the Arbitration Agreement is not affected by the choice of Mediterranean law for the Sales Part. In any case, Danubian law governs the Arbitration Agreement as it is the law of the seat which has the closest connection to the Arbitration Agreement.

The interpretation of the Arbitration Agreement under Danubian law reveals that the PARTIES did not empower the Arbitral Tribunal to adapt the Sales Agreement. Even under Mediterranean law, the Arbitral Tribunal would not be empowered to adapt the Sales Agreement because contract adaptation requires expressed authorisation. Such express authorisation by the PARTIES is nowhere to be found.

ISSUE 2: CLAIMANT IS BARRED FROM SUBMITTING EVIDENCE FROM THE OTHER ARBITRAL PROCEEDING

57 CLAIMANT announced it would introduce a partial interim award into evidence [*Email 2 Oct 2018, p. 50, para. 3*]. The partial interim award stems from an ongoing arbitration between RESPONDENT and a third party ("**Third-Party-Arbitration**") [*PO2, p. 60, para. 39*]. To acquire this award, CLAIMANT turned to a dubious company that got hold of it through illegal means [*Email 3 Oct 2018, p. 51, para. 3; PO2, pp. 60f., para. 41*]. CLAIMANT disregards RESPONDENT's lawful interest in the protection of confidential information [*Email 3 Oct 2018, p. 51, para. 3*] by planning to recklessly introduce a copy of the illegally obtained partial interim award ("**Stolen Award**").

58 The PARTIES chose the HKIAC Rules to govern the current arbitral proceeding [*Exhibit C5, p. 14, clause 15*]. Pursuant to Art. 22.2 HKIAC Rules, "*the arbitral tribunal shall determine the admissibility […] of evidence, including whether to apply strict rules of evidence*". Both PARTIES agree that the HKIAC Rules grant the Arbitral Tribunal the discretion to determine the conduct of the evidentiary proceeding and that international arbitration practice should guide its decision [*Claimant, para. 32*].

59 Among others, the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") reflect such international arbitration practice as evidentiary guidelines [*Born, p. 2348; Moser/Bao, Art. 22, para. 9.155; Hill, p. 89; Marghitola, pp. 33f.; Veeder, p. 321; Redfern/Hunter, para. 6.95; Welser/De Berti, p. 80; El-Ahdab/Bouchenaki, p. 98*] because they provide an efficient and fair process for the taking of evidence in international arbitration [*O'Malley, p. 9, para. 1.24; Müller, p. 84; Born, p. 2362*]. Thus, the Arbitral Tribunal should apply the IBA Rules in conformity with CLAIMANT's submission [*Claimant, paras. 44-53*].

60 The Stolen Award is inadmissible for several reasons: First, the Stolen Award is inadmissible since it was obtained illegally **[A]**. Second, regardless of its obtainment, the Stolen Award is inadmissible because it lacks sufficient relevance to the case and is not material for its outcome **[B]**. Third, the Stolen Award should be declared inadmissible in order to protect the confidential nature of arbitration **[C]**.

A. The Arbitral Tribunal should not admit illegally obtained evidence

61 The Stolen Award is inadmissible because arbitral proceedings should be kept free of illegally obtained evidence **[I]**. In particular, the Stolen Award is inadmissible because CLAIMANT will be involved in the illegal activity **[II]**.

I. The Stolen Award is inadmissible because arbitral proceedings should be kept free of illegally obtained evidence

62 The Stolen Award CLAIMANT attempts to submit was obtained through illegal means either by a hack of RESPONDENT's computer system or by a breach of contractual confidentiality obligations [*Email 3 Oct 2018, p. 51, para. 3; PO2, p. 61, para. 41*]. CLAIMANT argues that the Arbitral Tribunal should admit the Stolen Award because the exclusionary rule "*fruit of the poisonous tree*" doctrine is not applicable to arbitration [*Claimant, paras. 34, 35*].

63 International tribunals however are free to apply exclusionary rules such as the *fruit of the poisonous tree* doctrine to an arbitral proceeding [*Born, p. 2308; Reisman/Freedman, p. 753*]. It is within the discretion of arbitral tribunals to exclude evidence which is obtained in violation of good faith [*Methanex v. USA; ICSID ARB/06/8*]. Unlawful activity is against good faith and should justify the exclusion of evidence in order to prevent hackers and the like from being incentivised to commit a crime [*cf. Pitler, pp. 579f.*]. Hence, evidence which is obtained illegally should be excluded.

64 The Arbitral Tribunal should use its discretion to exclude the Stolen Award irrespective of whether it was obtained by a hack **[1]** or by a breach of confidentiality **[2]** because in both cases it was obtained illegally. At hand, the admission of Wikileaks cables in past arbitral proceedings does not confute the inadmissibility of the Stolen Award **[3]**.

1. If the Stolen Award was obtained through a hack, it would be inadmissible

65 In numerous jurisdictions, the hack of a computer system and the misappropriation of data constitute a crime [*cf. 18 U.S.C. § 1030, No. 2,848/1940 PCB, § 202a StGB, Sec. 1-3 CMA, Art. 286 CCL, No. 5237 TPC, Chapter 50a CMCA, Art. 4 ETS No. 185*]. Given the global condemnation of hacking, the Arbitral Tribunal should consider hacking to be illegal. Hence, if the Stolen Award was obtained by hacking RESPONDENT's computer system, it would have been obtained illegally [*Email 3 Oct 2018, p. 51, para. 1; PO1, p. 53*], rendering it inadmissible.

2. If the Stolen Award was obtained through a breach of confidentiality, it would be inadmissible

66 In numerous jurisdictions, the breach of confidentiality by employees constitutes a crime if the information in question falls within the ambit of trade secret protection [*cf. § 17(1),(2) UWG, CA.P.C. § 499c, Art. 2(1)(iv) JUCPA, Art. 219 CCL, L621-1 IPC, Art. 143.1 SCC*]. The protection of trade secrets is internationally codified in WIPO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). TRIPS is mandatory for all members of the WTO [*Overview: the TRIPS Agreement*], including

Mediterraneo and Equatoriana, where the PARTIES are located [*PO2, p. 61, para. 47*]. Art. 39(2) TRIPS defines trade secrets as information which is not easily accessible or generally known, has commercial value and is subject to reasonable measures to keep it secret.

67 First, the Stolen Award is not easily accessible as it is subject to the confidential Third-Party-Arbitration pursuant to Art. 42 HKIAC 2013 Rule [*Email 3 Oct 2018, p. 51, para. 1*].

68 Second, an arbitration award is qualified as having commercial value in the sense of Art. 39(2)(b) TRIPS if it is secret, e.g. protected by confidentiality agreements. The commercial value of the information contained in the Stolen Award stems from RESPONDENT's interests to keep the sales price of a mare secret [*PO2, p. 60, para. 39*] as any reasonable businessman has a vested interest in keeping its pricing policy confidential. The disclosure of RESPONDENT's pricing policy would undermine its future bargaining position.

69 Third, as the former employees were bound by a specific confidentiality agreement [*PO2, p. 61, para. 41*], RESPONDENT took steps considered reasonable pursuant to Art. 39(2) TRIPS to keep the Stolen Award secret [*cf. Busche/Peter/Wiebe, Art. 39, para. 23*].

70 Hence, the Stolen Award is a trade secret pursuant to Art. 39(2) TRIPS. Therefore, if the Stolen Award was obtained by RESPONDENT's employee breaching confidentiality, it would have been obtained illegally, rendering it inadmissible.

3. The admission of the Wikileaks cables by arbitral tribunals does not confute the inadmissibility of the Stolen Award

71 CLAIMANT states that the use of "*Wikileaks cables*" in other arbitral proceedings allow international tribunals a wide discretion [*Claimant, paras. 37-41*]. However, the present case is not comparable to the "*Wikileaks cables*" cases. In these cases, intelligence information was disclosed which was potentially of interest to the public because it might point to illicit activities of a government agency [*New York Times*]. In the present case however, the secret information in the Stolen Award does not show illicit activity of RESPONDENT and is of no interest to the public. Instead, the act of obtaining the information is illegal and therefore, the Stolen Award should not be admitted as evidence in the present arbitral proceeding.

II. CLAIMANT's involvement in the illegal activity renders the Stolen Award inadmissible

72 CLAIMANT cannot introduce the Stolen Award in a procedurally fair way because it would perpetuate illegal activities by buying the Stolen Award from a dubious company. Its involvement in the illegal activity renders its assertion of having "*clean hands*" [*Claimant, paras. 58-60*] meritless.

73 Parties to an arbitral proceeding have a fundamental right to be treated with equality by virtue of Art. 18 DAL [*Waincymer, p. 81, Raeschke-Kessler, p. 428*]. An arbitral tribunal's obligation to treat parties equally inherently implies the mandatory principle of procedural fairness [*O'Malley, p. 319, paras. 9.115f.*]. In the leading case on evidentiary procedure, the arbitral tribunal in *Methanex v. USA* stated that the parties owed "*a general legal duty to the other and to the Tribunal to conduct themselves in good faith*" and "*to respect the quality of arms between them*". A general rule under the principle of procedural fairness is that "*evidence gathered by a party through illegal means will be excluded from an arbitral proceeding*" [*O'Malley, p. 322, para. 9119; Methanex v. USA*; *ICSID ARB/05/13; ICSID ARB/06/8; ICSID ARB/08/12*].

74 Hence, a party's involvement in any illegal activity to obtain a procedural advantage is sanctioned on grounds of the principle of procedural fairness because "*a right cannot stem from a wrong*" [*Blair/Gojković, p. 256*]. In order to deter such undesirable conduct in arbitration, illegally obtained evidence must be excluded [*Waincymer, p. 797; Boykin/Havalic, pp. 33f.*]. In many jurisdictions, the act of using a trade secret knowing that it was acquired by wrongful means is sanctioned [*Art. 2(1)(vi) JUCPA; § 17(2) UWG; Sec. 17(1) TSR*]. The foregoing finds confirmation in Art. 9(2)(g) IBA Rules stating that evidence shall be excluded if there are "*considerations of [...] fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*". Moreover, CLAIMANT itself appeals to the Arbitral Tribunal to maintain procedural fairness pursuant to the IBA Rules [*Claimant, paras. 46f.*].

75 In defence, CLAIMANT asserts that it "*maintained clean hands as it was not involved in any illegal conduct in obtaining the evidence*" and "*merely learned of this evidence through a business contact*" [*Claimant, para. 59*]. While the latter may be true, CLAIMANT can only submit the evidence in question by buying the Stolen Award from a company with a doubtful reputation [*PO2, pp. 60f., para. 41*]. CLAIMANT is nevertheless willing to become part of the company's illegal actions by paying a considerable amount of money to get its hands on the Stolen Award during the arbitration proceedings [*PO2, pp. 60f., para. 41*]. Even if CLAIMANT did not personally hack RESPONDENT's computer system or pay one of RESPONDENT's employees to leak the Stolen Award, CLAIMANT would still bear responsibility by acquiring the Stolen Award in exchange for payment. CLAIMANT cannot pretend to have clean hands by merely outsourcing the 'dirty work' to a company that refuses to disclose its sources [*PO2, pp. 60f., para. 41*].

76 Consequently, to guarantee procedural fairness and preventatively sanction illegal activities, the Stolen Award should not be admitted as evidence because CLAIMANT is involved in the illegal activity [*against Claimant, paras. 58-60*].

77 Finally, the arbitrators to the present proceeding must ensure a fair proceeding pursuant to Art. 13.5 HKIAC Rules. They expressly committed themselves to this principle by signing the Arbitrator's Declaration of Acceptance [*Attachment, Email 1 Aug 2018, p. 24*]. If the Arbitral Tribunal admitted the Stolen Award, it would not only violate the requirement of a fair proceeding but foster the illegal obtainment of evidence for arbitral proceedings.

B. Regardless of its obtainment, the Stolen Award is inadmissible because it lacks sufficient relevance to the case and is not material for its outcome

78 In any event, the Stolen Award should be dismissed as the lack of relevance and materiality renders it inadmissible. When determining the admissibility of evidence to which a party objected, international practice suggests that arbitral tribunals should base their decision on the criteria of relevance and materiality [*Methanex v. USA; ICSID ARB/08/12; Pilkov, p. 148; Boykin/Havalic, pp. 34f.*]. Pursuant to Art. 9(2)(a) IBA Rules, relevance and materiality are acknowledged mandatory requirements for the admissibility of evidence [*Kubalczyk, p. 103; Kaufmann-Kohler/Bärtsch, p. 18*].

79 At hand, the introduction of the Stolen Award as evidence is neither relevant to the case **[I]** nor material to its outcome **[II]**.

I. The Stolen Award is not relevant to the case because the facts CLAIMANT attempts to introduce do not relate to the dispute at hand

80 A document is considered relevant if the submitting party convincingly articulates, why the facts contained in the evidence will support its allegations [*O'Malley, p. 56, para. 3.69; Kubalczyk, p. 103; Kaufmann-Kohler/Bärtsch, p. 18; Black's Law Dictionary, p. 284*]. There must be a logical connection between the evidence and the alleged facts it aims to prove [*Pilkov, p. 148*].

81 While CLAIMANT correctly acknowledges that relevance is a necessary criterion [*Claimant, para. 38*], it falsely asserts that the Stolen Award would demonstrate "*hypocritical business practices*" of RESPONDENT [*Claimant, paras. 31, 47, 66; Email 2 Oct 2018, p. 50, para. 2*]. However, CLAIMANT does not draw a direct conclusion from its allegations in its memorandum. In the oral hearing, CLAIMANT might allege that the Stolen Award would reveal RESPONDENT's intent to confer the power of contract adaptation upon an arbitral tribunal at the time of contracting. This would neglect the fact that RESPONDENT's legal opinion in the Third-Party-Arbitration lacks relevance in the current arbitration because both cases are different and not comparable.

82 First, the arbitration agreement of the Third-Party-Arbitration is governed by Mediterranean law [*PO2, p. 60, para. 39*] while the Arbitration Agreement at hand is governed by Danubian

law [*see supra, para. 29*]. The former is more likely to empower tribunals to adapt contracts whilst Danubian law is far more restrictive on contract adaptation [*PO1, p. 52*].

83 Second, the parties in the Third-Party-Arbitration agreed on the ICC hardship clause for scenarios of hardship [*PO2, p. 60, para. 39*] while CLAIMANT and RESPONDENT eventually included the individually negotiated Hardship Clause [*Exhibit C5, p. 14, clause 12*]. The ICC hardship clause used in the Third-Party-Arbitration contains renegotiation and termination as possible legal remedies [*ICC Hardship Clause 2003, para. 2*], whereas the Hardship Clause at hand only provides for exemptions from liability [*see infra, para. 125*].

84 Third, CLAIMANT does not have any information of RESPONDENT's negotiations with the third party about the delivery standard [*cf. PO2, p. 60, para. 39*]. The specific intention of CLAIMANT and RESPONDENT in regard to DDP must therefore be treated separately form the parties' intention in the Third-Party-Arbitration. CLAIMANT cannot draw a conclusion for its own arbitration from an incomplete understanding of a different proceeding.

85 The disclosure of the aforementioned information is only acceptable in this instance because RESPONDENT has been authorised by the opponent in the Third-Party-Arbitration to clarify the differences between the proceedings [*Email 3 Oct 2018, p. 51, para. 3*].

86 To conclude, the submission of the Stolen Award should be rejected as it is not relevant the case at hand. There is no logical connection between the Stolen Award and the contested matter in the present arbitration as it does not prove any intent on behalf of RESPONDENT.

II. The introduction of the Stolen Award is not material as it would not have any impact on the outcome of the case

87 If evidence is not considered relevant, it cannot have any impact on the outcome of the case and is consequently not material [*Pilkov, p. 149*]. As demonstrated, the Stolen Award lacks relevance to the case and is therefore not material to its outcome.

88 However, even if the Arbitral Tribunal found the Stolen Award to be relevant, the consideration of the Stolen Award would lack materiality. A document is material if it influences an arbitral tribunal's determination of issues in dispute [*Waincymer, p. 859; Yoon/Richardson, p. 139*; *Marghitola, p. 52; Kubalczyk, p. 103; cf. Kaufmann-Kohler/Bärtsch, p. 18*]. Consequently, evidence is only material where it has an impact on the legal evaluation, hence the outcome of the case [*cf. Pilkov, p. 149*].

89 At hand, the Stolen Award can only prove that RESPONDENT rightfully pursued its legal interest in a different legal proceeding. CLAIMANT's allegation that RESPONDENT thereby acted contradictory [*Claimant, paras. 33, 62*] is without any merits. However, contradictory

behaviour only exists if a party creates objective expectations and then acts in a manner that is incompatible with such expectations [*cf. Art. 1.8 PICC*]. At time of contract conclusion, CLAIMANT could not have acted in reliance on RESPONDENT's behaviour as CLAIMANT did not have any knowledge of the Third-Party-Arbitration [*Email 2 Oct 2018, p. 50, para. 2*]. Hence, RESPONDENT did not create any legitimate expectation towards CLAIMANT that it had the same legal opinion in the present arbitral proceeding as in the Third-Party-Arbitration. In fact, it is RESPONDENT's right to defend its legal interests based on its respective legal position. Thus, the Stolen Award is not material to the outcome of the case as it would not have any impact on the legal evaluation regarding contract adaptation.

90 Concluding, the Stolen Award is inadmissible because it is neither relevant nor material.

C. In any case, the Stolen Award should be declared inadmissible in order to give effect to the confidential nature of arbitration

91 Contrary to CLAIMANT's allegation [*Claimant, paras. 61-66*], the Stolen Award is inadmissible because it is protected by confidentiality. Irrespective of how the Stolen Award was obtained, either by hack or by breach of contractual confidentiality obligations, the leaked information resulted from the confidential Third-Party-Arbitration [*Email 3 Oct 2018, p. 51, para. 1*].

92 Pursuant to Art. 9(2)(e) IBA Rules, documents shall be excluded on grounds of commercial confidentiality. Commercial confidentiality encompasses trade secrets that companies intend to maintain secret [*Marghitola, p. 92; Zuberbühler, p. 180, para. 43*]. In particular, this includes documents which are subject to confidentiality agreements with third parties [*ICSID ARB/UNCT/07/1; Marghitola, p. 93; O'Malley, p. 302, para. 9.86*], such as arbitral awards. Confidentiality is a fundamental characteristic of arbitration [A*ita v. Ojjeh; Born III, p. 851; Neill, pp. 315f.; Knahr/Reinisch, p. 109; Wright, p. 157; Brown, pp. 971f.*] which supports the understanding that arbitral awards are subject to commercial confidentiality. The obligation of confidentiality is implied in arbitration due to the private nature [*International Coal v. Kristle Trading*; *Ali Shipping v. Shipyard Trogir; Smeureanu, p. 31*] and the sensitive information brought forth in arbitral proceedings [*Dolling-Baker v. Merrett; Hassneh Insurance v. Stuart J Mew*]. The HKIAC Rules even contain an express confidentiality provision in Art. 45 that prohibits the disclosure of any information in relation to the arbitration, including all types of awards [*Moser/Bao, Art. 42, para. 12.30*].

93 RESPONDENT and its opponent in the Third-Party-Arbitration went beyond the implied confidentiality inherent in arbitration and decided to conduct the proceeding "*under the HKIAC 2013 Rules*" in order to protect all information in relation to their arbitration [*Email*

3 Oct 2018, p. 51, para. 3]. The arbitral tribunal in the Third-Party-Arbitration has so far rendered the Stolen Award which is subject to the confidentiality of Art. 42 HKIAC Rules 2013 [*Email 3 Oct 2018, p. 51, para. 1*]. The Stolen Award contains a trade secret of RESPONDENT as it encompasses details of its pricing policy [*see supra, para. 70*]. Therefore, the Stolen Award is protected by commercial confidentiality pursuant to Art. 9(2)(e) IBA Rules. Hence, the Stolen Award should not be admitted as it would circumvent the confidentiality of the Third-Party-Arbitration.

CONCLUSION FOR ISSUE 2

In order to ensure the fairness of the proceeding and to avoid supporting illegal activities, the Arbitral Tribunal should use its discretion to decline the admission of the Stolen Award. The arbitration at hand and the Third-Party-Arbitration are not comparable and CLAIMANT attempts to present facts that have no impact on the outcome of the case at hand. Thus, the Stolen Award is inadmissible because it provides neither relevant nor material information for the Arbitral Tribunal. Furthermore, the general principle of confidentiality renders the Stolen Award inadmissible as evidence in the current arbitral proceeding.

ISSUE 3: NEITHER THE HARDSHIP CLAUSE NOR THE CISG ENTITLE CLAIMANT TO ANY ADDITIONAL PAYMENT

94 RESPONDENT respectfully requests the Arbitral Tribunal to find that CLAIMANT's claim to adapt the purchase price lacks any merit. RESPONDENT has fulfilled its obligation to pay the purchase price of US$ 5,000,000 for the last instalment of 50 doses of frozen semen [*Answer to the Notice of Arbitration, p. 31, para. 12*]. Beyond that, CLAIMANT is neither entitled to any additional payment under the Hardship Clause **[A]** nor under the CISG **[B]**.

A. CLAIMANT is not entitled to any additional payment based on the Hardship Clause

95 The PARTIES' agreement on DDP excludes the 30% tariff imposed by Equatoriana ("**30%-Tariff**") from the scope of the Hardship Clause **[I]**. Even if the Hardship Clause covered tariffs, the 30%-Tariff would not fulfil its prerequisites **[II]**. In any case, the Hardship Clause does not provide for contract adaptation as a legal remedy **[III]**.

I. The PARTIES' agreement on DDP excludes the 30%-Tariff from the scope of the Hardship Clause

96 An event changing the circumstances surrounding a contract does not constitute hardship to the extent that a party assumed the risk for such a change [*Brunner, p. 422; Azerdo Da Silveira, p. 323*]. A hardship exemption is based on "*how much risk the disadvantaged party assumed*" [*United*

States v. Wegematic; cf. Claimant, para. 78]. The INCOTERM DDP is a specific rule to shift all risks involved in bringing the goods to the place of destination onto the seller [*Piltz/Bredow/Piltz, p. 571, para. D-502*]. Thus, by agreeing on DDP the seller assumes all risks.

97 At hand, the PARTIES agreed on DDP in the sense of the INCOTERMS 2010 because the PARTIES used the abbreviation DDP in the Sales Agreement **[1]**. In exchange, the PARTIES agreed on the Hardship Clause and CLAIMANT was financially compensated for the delivery DDP **[2]**. Furthermore, CLAIMANT would have had to object to DDP if it was not willing to assume the risk of tariffs **[3]**.

1. The PARTIES agreed on DDP in the sense of the INCOTERMS 2010

98 The PARTIES agreed on DDP as defined in the INCOTERMS 2010 [*PO2, p. 56, para. 10*] to regulate the delivery of the frozen semen [*Exhibit C5, p. 14, clause 8*]. The PARTIES thereby shifted all risks and costs associated with the delivery including the payment of the 30%-Tariff onto CLAIMANT [*against Claimant, para. 79*; *Notice of Arbitration, p. 7, para. 18*].

99 DDP in the sense of the ICC INCOTERMS 2010 means 'Delivered Duty Paid' and reads:

> "*The seller bears all costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import*" (*emph. add.*) [*ICC INCOTERMS 2010 edition, Guidance Note DDP*].

100 To establish the parties' understanding of DDP, the respective contract has to be interpreted by virtue of Art. 8 CISG [*Glass Fibre Cables Case; Magnus II, p. 846*]. As no common intent can be determined on basis of Art. 8(1) CISG, the parties' contractual statements have to be interpreted on basis of the objective test pursuant to Art. 8(2) CISG. Under Art. 8(2) CISG, the hypothetical understanding of a reasonable third person of the same kind placed in the same circumstances as the other party is decisive [*ICC 7331; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, para. 20; Huber/Mullis, pp. 12ff.*]. Due consideration is to be given to all relevant circumstances of the case [*cf. Art. 8(3) CISG*].

101 If parties use the established abbreviations of the INCOTERMS without any additions in their contract, there is a strong presumption that that parties agree to apply the latest edition of the INCOTERMS, as defined by the ICC [*Honnold/Flechtner, pp. 168f., para. 115; Kröll/Mistelis/Viscasillas/Erauw, Art. 67, paras. 30ff.; MüKoHGB/Schmidt, § 346, para. 114; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 9, para. 26; Staudinger/Magnus, Art. 8, para. 20*]. This presumption follows from the interpretation under Art. 8(3) CISG considering the Convention's international character in the sense of Art. 7(1) CISG [*Glass Fibre Cables Case; EBJS/Joost, § 346, para. 132; Baumbach/Hopt/Hopt, Appendix 6 (Incoterms), para. 18;*

v. Hoffmann II, p. 252]. Alternatively, an internationally unified interpretation of the parties understanding of the INCOTERMS is based on Art. 9(2) CISG [*BP Oil v. Empresa Estatal; Glass Fibre Cables Case; Honnold/Flechtner, pp. 168f.; Magnus/Lüsing, p. 7*].

102 The PARTIES agreed that the "*Seller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen*" [*Exhibit C5, p. 14, clause 8*] without any further additions to the term DDP. As the Sales Agreement is governed by the CISG, the term DDP has to be interpreted in the Convention's international sense. Therefore, the PARTIES included DDP in the sense of the INCOTERMS 2010 edition into the Sales Agreement [*PO2, p. 56, para. 10*].

2. In exchange for the delivery DDP, the PARTIES agreed on the Hardship Clause and CLAIMANT was financially compensated

103 CLAIMANT concedes that "*the imposition of tariffs is an obvious risk of DDP*" [*Claimant, para. 72*]. Insofar, RESPONDENT has no objections. However, contrary to CLAIMANT's submission the risk of tariffs was not shifted back onto RESPONDENT when the PARTIES included the Hardship Clause into the Sales Agreement [*Claimant, paras. 72-75*]. The PARTIES never intended to deviate from the original risk allocation as determined by DDP in the meaning of the INCOTERMS. Instead, the PARTIES agreed to financially compensate CLAIMANT in exchange for bearing all risks and costs associated with the DDP delivery of the frozen semen.

104 During the negotiations, CLAIMANT offered a delivery DDP for an additional payment of US$ 1,000 per dose [*Exhibit C4, p. 12, para. 3*]. Simultaneously CLAIMANT asked to be relieved from all risks associated with such a delivery but required that "*at minimum, a hardship clause should be included into the contract*" [*Exhibit C4, p. 12, para. 3*]. RESPONDENT immediately rejected CLAIMANT's proposal to be relieved from all risks as it "*was not acceptable for Respondent […] to pay a much higher price for receiving basically nothing*" [*Answer to the Notice of Arbitration, p. 30, para. 4*]. As a compromise, to split the risks associated with "*health and safety requirements*" [*Exhibit C4, p. 12, para. 4*], the PARTIES concentrated on the inclusion of a hardship clause [*Answer to the Notice of Arbitration, p. 30, para. 4*]. While the Hardship Clause should cover the risks caused by health and safety requirements, the PARTIES did not list tariffs as an event triggering hardship [*Exhibit C5, p. 14, clause 12*]. RESPONDENT instead agreed to financially compensate CLAIMANT in exchange for a delivery DDP clarifying that tariffs are excluded from the scope of the Hardship Clause.

105 Ultimately, CLAIMANT charged US$ 500 per dose for the delivery DDP even though the direct additional costs associated with transportation and DDP were only US$ 200 per dose [*PO2, p. 56, para. 8; Exhibit C5, p. 13*]. Consequently, RESPONDENT paid the remaining US$ 300 per

dose to CLAIMANT as a risk compensation for the additionally assumed risks. To bring this money to use, CLAIMANT could have invested the amount of US$ 30,000 for all 100 doses to take out a political risks insurance that covers the risk of import regulations [*cf. Habib-Deloncle; cf. ICLAS Yearbook, pp. 38, 70, 72, 80*].

106 To conclude, the PARTIES understanding of DDP to shift all risks and costs of the delivery onto CLAIMANT is supported by the financial compensation CLAIMANT received for the delivery and the inclusion of the Hardship Clause.

3. CLAIMANT would have objected to DDP if it was not willing to assume the risk of tariffs

107 RESPONDENT had no reason to doubt that CLAIMANT accepted DDP in the sense of the INCOTERMS. There are only eleven different terms in the INCOTERMS 2010 [*Piltz/Bredow/Piltz, p. 2, para. A-108*]. Among these terms, DDP is the only INCOTERM specifically allocating the risk concerning import tariffs towards the seller [*Piltz/Bredow/Piltz, p. 570, para. D-501*]. To the contrast, the guidance note for DDP explicitly advises the use of DAP (Delivered At Place) if the buyer should bear all risks and costs [*ICC INCOTERMS 2010 edition, Guidance Note DDP*]. Hence, considering that DDP is the most suitable term to reflect the PARTIES' agreement regarding the delivery conditions, any reasonable third person would have concluded that CLAIMANT was willing to assume the risk of tariffs. This applies even more considering that CLAIMANT had "*long internal discussions*" before it accepted DDP [*Exhibit C4, p. 12, para. 3*] and had previous experience with DDP [*PO2, p. 58, para. 21*].

108 In summary, DDP in the sense of the INCOTERMS 2010 shifts all costs and risks of the delivery onto the seller. By agreeing on DDP in the Sales Agreement, CLAIMANT assumed the risks for tariffs and must now bear the costs for the 30%-Tariff. This specific contractual risk allocation hinders the 30%-Tariff from falling within the scope of the Hardship Clause. Therefore, CLAIMANT is not entitled to any additional payment under the Hardship Clause.

II. Even if the Hardship Clause covered tariffs, the 30%-Tariff would not fulfil its prerequisites

109 CLAIMANT ignores that the application of the Hardship Clause is subject to prerequisites that the PARTIES agreed upon [*Claimant, paras. 72-76*]. The Hardship Clause reads:

> "*Seller shall not be responsible for [...] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Exhibit C5, p. 14, clause 12*].

110 The 30%-Tariff does not constitute hardship for CLAIMANT **[1]**. Further, the 30%-Tariff is neither comparable to additional health and safety requirements **[2]** nor was it unforeseen **[3]**.

1. The 30%-Tariff does not constitute hardship for CLAIMANT

111 Hardship is defined as a drastic change in circumstances leading to a fundamental alteration of the contractual equilibrium [*Azerdo Da Silveira, p. 323, para. 488; Ferrario, p. 83; Brunner, p. 423*]. A contract will generally be considered fundamentally altered in case of a 100% increase in the cost of performance or a corresponding decrease in value received [*Publicker Industries v. Union Carbide*; *Brunner, pp. 431ff.*]. Albeit such objective criteria, the threshold for the agreed upon Hardship Clause needs to be assessed according to Art. 8(2),(3) CISG.

112 The wording of the Hardship Clause was based on CLAIMANT's previous experience where a sudden price increase due to health and safety requirements affected its transaction [*PO2, p. 56, para. 12; Exhibit C5, p. 14, clause 12*]. In this transaction, CLAIMANT sold three mares for an overall price of US$ 8,000,000. After the conclusion of the contract, health and safety requirements led to an increase in costs of **40%** of the purchase price, i.e. **US$ 3,200,000** [*PO2, p. 58, para. 21*]. Thus, when negotiating the Hardship Clause the PARTIES' point of reference for hardship was a cost increase of 40%. CLAIMANT concedes that hardship requires performance to be "*excessively onerous*" [*Claimant, para. 83*].

113 At hand, the initial costs for the frozen semen were US$ 9,500,000 [*PO2, p. 59, para. 31*]. The 30%-Tariff led to additional costs of **US$ 1,500,000** for the last 50 doses [*Exhibit C7, p. 16, para. 1*]. This equates to a price increase of approximately **16%** in context of the entire Sales Agreement. Hence, the price increase of 16% neither meets the PARTIES' point of reference of 40% nor the objective criteria of 100%. While CLAIMANT's performance may be economically burdensome, it does not constitute hardship in the sense of the Hardship Clause.

2. The 30%-Tariff is not comparable to additional health and safety requirements

114 To assess the prerequisites of the Hardship Clause, it must be interpreted pursuant to Art. 8 CISG [*see supra, para. 100*]. CLAIMANT does not examine health and safety as a requirement [*Claimant, paras. 72-76*], although it itself first introduced these requirements as a prerequisite for the application of the Hardship Clause [*Exhibit C4, p. 12, para. 4*].

115 At first, CLAIMANT proposed to rely on the ICC-Hardship Clause [*Exhibit R3, p. 34, para. 6*]. However, this model clause was too broad for RESPONDENT [*PO2, p. 56, para. 12*]. To achieve a fair compromise, RESPONDENT narrowed down the wording of the Hardship Clause considering CLAIMANT's previous experience with health and safety requirements [*PO2, p. 56, para. 12*]. CLAIMANT experienced increased costs due to a "*long quarantine time*" and "*additional tests*" [*PO2, p. 58, para. 21*]. Thus, the finally agreed upon Hardship Clause requires a potential

hardship event to be "*caused by additional health and safety requirements or comparable […] events*" [*Exhibit C5, p. 14, clause 12*].

116 Additionally, the 30%-Tariff is not comparable to health and safety requirements. Health and safety requirements are measures that a government must implement to protect the safety of people and animals [*Preamble WHO Constitution*]. In contrast, the decision to impose tariffs is based on a political consideration of governments. The purpose of the 30%-Tariff was to serve as "*retaliation by the Government of Equatoriana*" [*Exhibit C6, p. 15, para. 2*] in response to the 25% tariff by Mediterraneo. This measure was a deliberate decision of the Equatorianian government to demonstrate sovereignty and power but not mandatory to protect the people. Therefore, the 30%-Tariff is not comparable to health and safety requirements.

3. The 30%-Tariff could have been foreseen

117 Contrary to CLAIMANT's allegation [*Claimant, para. 69*], the 30%-Tariff could have been foreseen before the PARTIES signed the Sales Agreement on 6 May 2017. In fact, CLAIMANT took the imposition of tariffs into account by assuming the risk for tariffs due to a delivery DDP **[a]**. In any case, the 30%-Tariff could have been foreseen as it was a retaliatory measure of the Equatorianian government in reaction to the tariffs imposed by Mediterraneo **[b]**.

a) CLAIMANT took the imposition of tariffs into account by assuming the risk for tariffs

118 The question whether an event fulfils the prerequisite of unforeseeability must be "*considered in the framework of the issue of risk assumption by a party*" [*Brunner, p. 157; Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 50*]. If a party should have taken into account or specifically foreseen an event at the time of contract conclusion, it is deemed to have assumed the risk for the occurrence of such an event [*Brunner, p. 156; MüKoHGB/Mankowski, Art. 79, para. 39*]. Accordingly, a party is excluded from claiming an event to be unforeseen in case it agreed on an INCOTERM that precisely regulates and allocates the risks arising from such events to a party [*cf. Kröll/Mistelis/Viscasillas/Erauw, Art. 66, para. 35*].

119 By agreeing on a delivery DDP in the Sales Agreement [*Exhibit C5, p. 14, clause 8*], the PARTIES considered the imposition of tariffs as a possibility. The inclusion of an INCOTERM regulating tariffs contradicts CLAIMANT's allegation [*Claimant, para. 69*] that the 30%-Tariff was unforeseen. Thus, CLAIMANT must have considered the imposition of the 30%-Tariff as it assumed the risk for tariffs by agreeing to DDP.

b) In any case, the 30%-Tariff could have been foreseen as it was a retaliatory measure of the Equatorianian government in reaction to the tariffs imposed by Mediterraneo

120 For an event to be unforeseen or unforeseeable it is not enough that it occurs outside of a party's sphere of control [*Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 50*]. Pursuant to Art. 8(2),(3) CISG, it is decisive whether the obligor could have reasonably taken the event into account at the time of contracting [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 14; Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 52; cf. Azerdo Da Silveira, p. 323, para. 488*].

121 In January 2017, before the PARTIES' negotiations even started, the President of CLAIMANT's home country Mediterraneo already announced in his election programme a "*preference for a more protectionist approach […] to agricultural products*" [*Exhibit C6, p. 15, para. 2*]. On 5 May 2017, before the Sales Agreement was signed, the Mediterranean President followed up his announcement by appointing "*one of the most ardent critics of free trade*" as a "*superminister for agriculture, trade and economics*" [*PO2, p. 58, para. 23*]. For years, the superminister had been lamenting "*that the farmers of Mediterraneo were treated badly in other markets*" and advocated to limit "*the access of foreign agricultural products to the Mediterranean market*" [*PO2, p. 58, para. 23*]. From the outset, the Mediterranean President's hostility towards free trade loomed over the negotiations starting on 21 March 2017 [*Exhibit C1, p. 9*] and his appointment of a free trade critical minister was publicly announced before contract conclusion [*PO2, p. 58, para. 23*]. Thus, CLAIMANT could have foreseen a tariff imposed by Mediterraneo even though as a governmental measure, it was outside of CLAIMANT's control [*against Claimant, paras. 105f.*].

122 Furthermore, CLAIMANT, as an international player in the agricultural business [*Notice of Arbitration, p. 4, para. 1*], must have been aware of Equatoriana's retaliatory measures. Since political measures can impact CLAIMANT, it is expected to have an inherent self-interest in staying informed about relevant political developments. Therefore, CLAIMANT must be informed about the current political situation in the field of agriculture and trade. Apart from that, CLAIMANT could have considered the 30%-Tariff at time of contracting based on the recent development in international trade. It has become more common to impose tariffs on foreign agricultural products [*PO2, p. 58, para. 23; The Guardian*]. Even the government of Equatoriana, a supporter of free trade, has invoked "*direct retaliatory measures*" in response to tariffs in the past [*Exhibit C6, p. 15, para. 2*]. Therefore, CLAIMANT should have considered that its international trades could be affected by retaliatory tariffs of foreign governments, making the 30%-Tariff foreseeable. This conclusion suggests itself in a more protectionist world of trade where the principle of 'what goes around comes around' seems to apply.

123 In conclusion, the 30%-Tariff does not fulfil the prerequisites of the Hardship Clause as the additional payment of the 30%-Tariff does not constitute hardship for CLAIMANT. The 30%-Tariff is neither comparable to health and safety requirements nor was it unforeseen. Thus, CLAIMANT is not entitled to any additional payment under the Hardship Clause.

III. In any case, the Hardship Clause does not provide for contract adaptation as a legal remedy

124 CLAIMANT wrongly resorts to legal remedies not set forth in the Hardship Clause [*Claimant, paras. 77, 81*]. Thereby CLAIMANT ignores that an arbitral tribunal may only rule on contract adaptation if such remedy is explicitly mentioned in the respective hardship clause [*cf. ICC 8873; Zaccaria, p. 154*; *cf. Schmitthoff, p. 88*]. If the wording of a hardship clause does not provide legal remedies for a hardship event, it is common arbitral practice that arbitral tribunals reject contract adaptation [*ICC 2478; ICC 5953; ICC 8873; Zaccaria, pp. 159f.*]. From a procedural view, in line with the lex arbitri, contract adaptation also requires expressed written authorisation [*see supra, para. 41*].

125 At hand, the Hardship Clause does not contain contract adaptation as a legal remedy [*Exhibit C5, p. 14, clause 12*]. Contract adaptation was briefly discussed by the PARTIES but impliedly rejected as it was not included in the final wording of the Hardship Clause [*Exhibit C8, p. 17, para. 4; Exhibit C5, p. 14, clause 12*]. Instead, the PARTIES included exemption from liability as the legal remedy by including clause 12 of the Sales Agreement that reads the "*Seller shall not be responsible […] for hardship*" [*Exhibit C5, p. 14, clause 12*]. This wording stems from the force majeure excuse in clause 12 of CLAIMANT's standard sales agreement into which the hardship wording was inserted [*PO2, p. 56, para. 12; Exhibit C2, p. 10, para. 5*]. The typical legal remedy for force majeure clauses is exemption from liability and not contract adaptation [*Brunner, pp. 75f.*]. When the PARTIES inserted the wording for hardship into clause 12 of the Sales Agreement, they did not amend the legal remedy. Thus, exemption from liability constitutes the legal remedy of the Hardship Clause [*against Claimant, paras. 84, 87*].

126 To conclude, the 30%-Tariff is excluded from the scope of the Hardship Clause because CLAIMANT assumed the risk for any tariff by agreeing on DDP. Even if the Hardship Clause would cover tariffs, the 30%-Tariff does not fulfil the prerequisites of the Hardship Clause. In any case, contract adaptation is not the legal remedy of the Hardship Clause.

B. CLAIMANT is not entitled to any payment under the CISG

127 The Sales Agreement cannot be adapted under the CISG. First, the CISG deliberately excludes hardship **[I]**. Second, even if the Arbitral Tribunal would find that the CISG applies in cases

of hardship, the 30%-Tariff does not constitute hardship by virtue of Art. 79(1) CISG **[II]**. Third, even if the Arbitral Tribunal considers Art. 6.2.2 MCL to be applicable to hardship, its prerequisites are not fulfilled **[III]**.

I. The CISG deliberately excludes hardship

128 The CISG does not grant relief in cases of hardship [*against Claimant, para. 99*]. Hardship was omitted from the CISG deliberately as the drafters did not intend for the CISG to grant relief for hardship situations [*Nuova Fucinati v. Fondmetal; Flambouras, p. 278; Aksoy, p. 109; Rösler, p. 502; Carlsen; Petsche, p. 155; Honnold/Flechtner, p. 629, para. 432.2; Kessedjian, p. 419*]. During the drafting of the CISG, a proposal to include hardship in the scope of the CISG was explicitly rejected [*Garro, p. 1182; Rösler, p. 503; Schlechtriem, p. 96*]. Nevertheless, CLAIMANT tries to argue that the PICC could supplement the CISG regarding hardship [*Claimant, paras. 108, 109*]. However, reading hardship into the CISG, despite the clear intentions of the drafters, would overstretch the scope of the CISG [*Rösler, p. 503; Kessedjian, p. 419*].

129 First, Section IV of the CISG is headed "*exemptions*". This heading suggests that all exemptions of performance available under the CISG are listed. Therefore, Arts. 79, 80 CISG are an exhaustive list of rules exempting performance [*Petsche, p. 159; cf. Lookofsky, p. 442*].

130 Second, the deliberate omission of hardship from the CISG is further supported by the fact that the remedies provided in Art. 79 CISG deviate from those normally provided in cases of hardship, such as termination [*Honnold/Flechtner, p. 629, para. 432.2; Petsche, p. 160*]. The UNIDROIT principles, in order to deal with hardship appropriately, entitle the affected party to renegotiations [*Art. 6.2.3(1) PICC*]. Art. 79 CISG on the other hand grants exemption from liability. If hardship was supposed to be regulated by the CISG, the remedy provided would have been different.

131 Third, reading hardship into the CISG as a matter governed but not settled, would allow the application of domestic law pursuant to the second alternative of Art. 7(2) CISG. This would lead to a variety of solutions, since every domestic law resolves hardship differently [*Carlsen*]. Allowing such results would neglect the principle of uniformity set out in Art. 7 CISG [*Petsche, p. 163; Gotanda, p. 112; Carlsen*]. The goal of uniformity is to create a common denominator for international business practice, independent from national differences [*Kröll/Mistelis/Viscasillas/Viscasillas, Art. 7, para. 17; Schwenzer II, p. 110*].

132 Concluding, hardship was deliberately omitted from the CISG. Hence, there is no relief for hardship under the CISG.

II. Even if the Arbitral Tribunal found that the CISG applies to cases of hardship, the 30%-Tariff would not constitute hardship in the sense of Art. 79(1) CISG

133 By including the Hardship Clause into the Sales Agreement, the PARTIES excluded the application of Art. 79(1) CISG **[1]**. Even if the Arbitral Tribunal does not consider Art. 79(1) CISG to be excluded, its prerequisites would not be fulfilled **[2]**. In any case, the legal remedy of Art. 79(1) CISG is exemption from liability and not contract adaptation **[3]**.

1. The inclusion of the Hardship Clause excludes the application of Art. 79(1) CISG pursuant to Art. 6 CISG

134 Even if the Arbitral Tribunal considered Art. 79 CISG to cover hardship, the PARTIES expressed their desire to derogate from the Convention in the sense of Art. 6 CISG and excluded Art. 79(1) CISG by including the Hardship Clause [*against Claimant, para. 117*]. Pursuant to Art. 6 CISG, the parties of a contract governed by the CISG can derogate from any provision in the Convention [*Kröll/Mistelis/Viscasillas/Mistelis, Art. 6, para. 8; Schlechtriem/Schroeter, pp. 26ff., paras. 45ff.; Staudinger/Magnus, Art. 6, para. 48*]. An implied derogation from Art. 79(1) CISG in the sense of Art. 6 CISG can be found in force majeure and hardship clauses [*Staudinger/Magnus, Art. 79, para. 2; Würdinger/Baetge, Art. 79, para. 5; cf. Flambouras, p. 283*]. Such clauses regulate the exemption of the obligor more specifically than the abstract wording of Art. 79(1) CISG.

135 The PARTIES made use of their autonomy to deviate from a provision in the CISG by including clause 12, consisting of the Hardship Clause and a force majeure clause, in the Sales Agreement to regulate the exemption of the obligor [*Exhibit C5, p. 14, clause 12*]. The PARTIES understood the Hardship Clause to be narrow [*Exhibit R3, p. 35, para. 4; PO2, p. 56, para. 12*]. This narrow understanding is supported by the wording of the Hardship Clause which only applies in case of "*events comparable to health and safety requirements*" [*Exhibit C5, p. 14, clause 12*]. Contrary to this narrow understanding, Art. 79(1) CISG seeks to encompass any impediment preventing the performance. The PARTIES sought to limit this broad scope by agreeing on the more specific Hardship Clause. This agreement would be undermined by the broad scope of Art. 79(1) CISG. Therefore, the Hardship Clause excludes the application of Art. 79(1) CISG.

2. Even if Art. 79(1) CISG applied, the 30%-Tariff would not fulfil the prerequisites

136 Even if the Arbitral Tribunal applied Art. 79(1) CISG to cases of hardship, the prerequisites of Art. 79(1) CISG are not fulfilled [*against Claimant, paras. 94, 103, 106*]. The application of Art. 79(1) CISG is precluded, since CLAIMANT assumed the risk for the 30%-Tariff by

agreeing to DDP **[a]**. Even if the PARTIES did not exclude Art. 79(1) CISG, the 30%-Tariff does not constitute an impediment **[b]**, was neither unforeseeable **[c]** nor unavoidable **[d]**.

a) CLAIMANT assumed the risk for the 30%-Tariff by agreeing on DDP

137 The application of Art. 79(1) CISG is precluded if a party assumed the risk for the occurrence of a specific event [*Stolen Touareg Case; Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 89; MüKoHGB/Mankowski, Art. 79, para. 21; cf. Brunner, p. 117*]. The PARTIES agreed on DDP in the sense of the INCOTERMS 2010 [*see supra, para. 98*]. CLAIMANT thereby assumed the risk and is obligated to pay the 30%-Tariff. Hence, by including DDP, the contractual risk allocation precludes the application of Art. 79(1) CISG.

b) The 30%-Tariff does not constitute an impediment

138 Contrary to CLAIMANT'S allegation [*Claimant, para. 103*], the 30%-Tariff does not constitute an impediment in the sense of Art. 79 CISG.

139 An impediment in the sense of Art. 79(1) CISG is an external circumstance making the performance impossible for the obliged party [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 12; Jenkins, p. 1225*]. That includes natural disasters such as earthquakes and man-made disasters like war [*MüKoBGB/Huber, Art. 79 CISG, paras. 10f.*]. An extreme price increase may constitute an impediment only under exceptional circumstances [*Berger IV, p. 537, para. 24-66*]. A price increase is extreme if the ultimate limit of sacrifice for a party has been exceeded [*CISG-AC Opinion No. 7, comment, para. 38; Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 31; Berger IV, p. 536, para. 24-65*]. The obligor is only exempted under Art. 79(1) CISG in case the impediment is the sole causal reason for the ultimate limit of sacrifice to be exceeded [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 16; Bamberger/Roth/Saenger, Art. 79, para. 3*]. Courts or tribunals refrain from adaptation when the price increased by less than 50% [*ICC 6281; ICC 2508; Iowa Electric v. Atlas; Vital Berry Marketing v. Dira-Frost; Nuova Fucinati v. Fondmetal*]. *Schwenzer* even argues that a ground of exemption can only be constituted by a price increase of at least 150-200% [*Schwenzer, pp. 716f.*]. It is even possible that a change of circumstances leading to a price increase of 300% is not sufficient for Art. 79(1) CISG to apply [*Iron Molybdenum Case*].

140 At hand, the cost increase of 30% is far less than the required threshold of hardship in the sense of Art. 79(1) CISG. Bearing the 30%-Tariff does not scratch the surface of CLAIMANT's limit of sacrifice as it already paid the tariff and its stud farm is still running [*against Claimant, para. 100; Exhibit C8, p. 18, para. 8*]. A new line of credit is available to CLAIMANT by selling the dressage part of its company [*PO2, p. 59, para. 29*]. Therefore, the payment of the

30%-Tariff would not be unbearable for CLAIMANT as it would be able to survive with the main part of its business intact.

141 CLAIMANT covers "*all areas of the equestrian sport*" [*Notice of Arbitration, p. 4, para. 1*] and is thereby able to give up a fraction of its business without suffering extreme consequences. The breeding of racehorses, especially the stallion Nijinsky III, is what CLAIMANT "*is particularly known for*" [*Notice of Arbitration, p. 4, para. 3*]. Hence, any alleged threat to CLAIMANT's financial survival [*Claimant, paras. 99, 100*] is entirely dependent on its willingness to take the necessary steps. Additionally, the 30%-Tariff is not the sole causal reason for CLAIMANT's financial problems because CLAIMANT was already experiencing financial difficulties before the 30%-Tariff [*Exhibit C8, p. 17, para. 6; PO2, p. 59, para. 29*].

142 In any case, all arguments based on the restructuring plan are irrelevant to the case. The restructuring plan requires CLAIMANT to make a profit in the 2018 financial year [*PO2, p. 59, para. 29*]. International accounting standards do not permit the accounting of contingent assets if they are dependent on future events outside of a companies' control [*IFRS-HB/von Oertzen, § 10, paras. 73f.*]. The decision by the Arbitral Tribunal is outside of CLAIMANT's control and the ensuing award will be rendered at the earliest in 2019. Hence, CLAIMANT could not post a profit in 2018 as the award is a contingent asset. Thus, CLAIMANT will not be able to fulfil the requirements related to its restructuring plan.

143 Concluding, an increase of solely 30% is not sufficient to constitute an impediment.

c) The 30%-Tariff was not unforeseeable

144 As demonstrated above, the 30%-Tariff was not unforeseeable [*see supra, paras. 117-122*] considering the general "*unravelling of the international trading system*" [*Exhibit C6, p. 15, para. 4*].

d) The 30%-Tariff was not unavoidable

145 After briefly announcing the prerequisite of unavoidability, CLAIMANT neglects to examine the prerequisite in its entirety [*Claimant, paras. 104-106*]. The impediment needs to be unavoidable and cannot be substituted with the prerequisite of unforeseeability. At hand, the 30%-Tariff and its consequences were not unavoidable.

146 Art. 79(1) CISG exempts from liability only if the obligor could not reasonably be expected to avoid or overcome the impediment or its consequences [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 11; Bianca/Bonell/Tallon, Art. 79, para. 2.6.4; Kröll/Mistelis/Viscasillas/Atamer, Art. 79, paras. 43, 54*]. For example, the impediment would be unavoidable if there was an embargo on imports because then the obligor would have no possible way to get the good into the country [*Brunner, p. 207*]. In contrast, the obligor is expected to overcome an

impediment even if the incurred costs are very high and result in a loss, as long as the ultimate limit of sacrifice is not exceeded [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 15; Piltz, p. 218, para. 4-244; Würdinger/Baetge, Art. 79, para. 19; Güllemann, p. 218*].

147 The impediment in question was not unavoidable since CLAIMANT was still able to deliver the frozen semen to RESPONDENT [*Exhibit C8, p. 18, para. 9*]. CLAIMANT simply overcame the impediment by paying the 30%-Tariff [*Exhibit C8, p. 18, para.* 8]. This payment may result in a loss for CLAIMANT. However, CLAIMANT's ultimate limit of sacrifice was not exceeded [*see supra, para. 140*]. Therefore, the 30%-Tariff and its consequences were not unavoidable, since CLAIMANT was able to perform its obligation and overcome the incurred costs.

3. Even if the 30%-Tariff fulfilled the prerequisites of Art. 79(1) CISG, contract adaptation would not be a possible legal remedy

148 Contrary to CLAIMANT's allegation, contract adaptation is not a legal remedy of Art. 79(1) CISG [*Claimant, para. 95*]. Art. 79(1) CISG regulates changed circumstances comprehensively and contract adaptation should have "*no application in contracts governed by the CISG*" [*Honnold/Flechtner, p. 629, para. 432.2; Rimke, p. 219*]. Instead, the legal remedy of Art. 79(1) CISG is the exemption from paying damages for the obligor if the performance of the contract is impossible due to an "*unforeseeable and insurmountable impediment*" [*Kröll/Mistelis/Viscasillas/Atamer, Art. 79, para. 13; Berger IV, pp. 539f., para. 24-69; Schlechtriem/Schwenzer/Schwenzer, Art. 79, para. 6*].

149 The wording of Art. 79(1) CISG demonstrates that contract adaptation is not the legal remedy. In fact, Art. 79(1) CISG states that a "*party is not liable for a failure to perform any of his obligations*". Introducing other legal remedies that are not part of the CISG would be counterproductive to the need for a unified interpretation of the Convention. The Convention therefore provides exemption from performance as the only legal remedy of Art. 79(1) CISG [*Berger IV, pp. 539f., para. 24-69*].

150 In conclusion, Art. 79(1) CISG is excluded by the Hardship Clause, its prerequisites are not fulfilled and in any case, the legal remedy of Art. 79(1) CISG is not the adaptation of contracts.

III. Even if the Arbitral Tribunal considered Art. 6.2.2 MCL to be applicable, its prerequisites would not be fulfilled

151 Contrary to CLAIMANT's submission [*Claimant, paras. 110, 111*], the prerequisites of Art. 6.2.2 MCL are not fulfilled. First, Art 6.2.2 MCL requires the contractual equilibrium to be fundamentally altered. At hand, the 30%-Tariff is not sufficient to constitute a fundamental alteration of the contractual equilibrium [*see supra, paras. 111,112*]. Second, under

Art. 6.2.2(b) MCL, the hardship event needs to be unforeseeable [*Vogenauer/McKendrick, Art. 6.2.2, para. 13*]. However, the 30%-Tariff in the case at hand was not unforeseeable [*see supra, paras. 117-122*]. Third, under Art. 6.2.2(d) MCL there is no hardship if the disadvantaged party assumed the risk for the hardship event. CLAIMANT assumed the risk for the 30%-Tariff [*see supra, para. 108*]. Since three of the five prerequisites of Art. 6.2.2 MCL are not met, the Arbitral Tribunal cannot adapt the Sales Agreement pursuant to Art. 6.2.3 MCL.

CONCLUSION ISSUE 3

The Hardship Clause does not cover the 30%-Tariff since the PARTIES agreed on DDP and thereby shifted the risks of tariffs upon CLAIMANT. Alternatively, the prerequisites of the Hardship Clause are not fulfilled as the 30%-Tariff is neither comparable to additional health and safety requirements nor was it unforeseen. In any case, the legal remedy of the Hardship Clause would be exemption from liability and not contract adaptation.

In addition, the Arbitral Tribunal cannot adapt the Sales Agreement under Arts. 79(1), 7 CISG. The CISG contains no relief for hardship. Even if the CISG governed hardship, the inclusion of the Hardship Clause by the PARTIES excludes the application of Art. 79(1) CISG. Further, the 30%-Tariff does not fulfil the prerequisites of Art. 79(1) CISG.

REQUEST FOR RELIEF

In light of the foregoing submissions RESPONDENT respectfully requests the Arbitral Tribunal to adjudge and declare that:

- The Arbitral Tribunal does not have jurisdiction and power to adapt the Sales Agreement under either Danubian law or Mediterranean law (**Issue 1**).
- CLAIMANT is not entitled to submit evidence from the other arbitral proceeding (**Issue 2**).
- CLAIMANT is not entitled to any payment since the price cannot be adapted under
    a. clause 12 of the contract and (**Issue 3A**)
    b. under the CISG (**Issue 3B**)

Mannheim 24 January 2019

CERTIFICATE

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

CARINA GRABNER

UTA MÜLDNER

JESSICA SCHNEEBERGER

CHARLES ERIC SWANSON

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