16th Annual Willem C. Vis International Commercial Arbitration Moot (East)

# MEMORANDUM FOR CLAIMANT


| On Behalf of: | Against: |
|---|---|
| **Phar Lap Allevamento** | **Black Beauty Equestrian** |
| Rue Frankel 1 | 2 Seabiscuit Drive |
| Capital City, Mediterraneo | Oceanside, Equatoriana |
| – CLAIMANT – | – RESPONDENT – |

Counsel for CLAIMANT

HUY NGUYEN • GRETA NIEHAUS • ANNE PHILIPPCZYK

OLIVER POLLAKOWSKY • OGUZHAN SAMANCI • SOPHIE STOEWE

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| | |
|---|---|
| Art. | Article |
| Artt. | Articles |
| cf. | Confer |
| diss. | Dissertation |
| e.g. | exempli gratia; for example (Latin) |
| eds. | Editors |
| et al. | et alia; and others (Latin) |
| et seq. | et sequens; and the following one (Latin) |
| et seqq. | et sequentia; and the following ones (Latin, pl.) |
| Exh. C. | Claimant's Exhibit |
| Exh. R. | Respondent's Exhibit |
| i.e. | id est; that is (Latin) |
| ibid. | ibidem; in the same place (Latin) |
| id. | idem; the same (Latin) |
| No. | Number |
| p. | Page |
| para. | Paragraph |
| paras. | Paragraphs |
| PO1 | Procedural Order No. 1 |
| PO2 | Procedural Order No. 2 |
| pp. | Pages |
| Stat. of Cl. | Statement of Claim |
| Stat. of Def. | Statement of Defence |
| v. | Versus |

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| 2013 HKIAC Rules | 2013 Hong Kong International Arbitrations Centre administered Arbitration Rules |
| CISG | UN Convention on Contracts for the International Sale of Goods |
| GATT Preamble | The Preamble of the General Agreement on Tariffs and Trade 1994 |
| HKIAC Rules | 2018 Hong Kong International Arbitrations Centre administered Arbitration Rules |
| IBA Guidelines | IBA Guideline on Conflicts of Interest in International Arbitration |
| Model Law | UNCITRAL Model Law on International Commercial Arbitration |
| New York Convention | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| New York Convention | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| PICC | UNIDROIT Principles of international Commercial Contracts 2016 |

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UNCITRAL Rules on Transparency

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In: Yearbook Commercial Arbitration 2000 - Volume XXV,

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# SUMMARY OF FACTS

The Parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**"). CLAIMANT is a company operating one of Mediterraneo's most prominent and oldest stud farms. RESPONDENT operates a stud farm in Equatoriana known for its pedigree racehorse mares.

| | |
|---|---|
| **21 March 2017** | RESPONDENT contacted CLAIMANT to express its interest in the purchase of 100 doses of frozen semen from stallion Nijinsky III. |
| **28 March 2017 – 11 April 2017** | CLAIMANT's Ms Napravnik and RESPONDENT's Mr Antley negotiated the terms of the Sales Agreement. CLAIMANT reluctantly agreed to take over delivery but highlighted its disapproval to any further risks associated with the change of delivery terms. |
| **12 April 2017** | Ms Napravnik and Mr Antley were severely injured during a car accident and were thus replaced by formerly uninvolved employees. |
| **6 May 2017** | The successors signed the Sales Agreement but failed to include their predecessors last open points on hardship and arbitration. CLAIMANT subsequently delivered two of three shipments. |
| **November – December 2017** | Mediterraneo's new president suddenly announced the imposition of 25 per cent tariffs on agricultural goods from Equatoriana. In an even more unforeseen turn of events, the government of Equatoriana retaliated with tariffs of 30 per cent. |
| **20 – 21 January 2018** | To the surprise of both parties, frozen race horse semen was also affected by the tariffs. CLAIMANT clarified his inability to bear the additional tariffs. RESPONDENT acknowledged this and emphasised their commitment to the business relationship. |
| **23 January 2018** | Relying on RESPONDENT's cooperativeness, CLAIMANT delivered the final shipment, paying the tariffs of 30 per cent. |
| **12 February 2018** | RESPONDENT suddenly refused to renegotiate the contract regarding the increased price CLAIMANT paid for delivery. |
| **31 July 2018** | After unsuccessful attempts to amicably solve the dispute, CLAIMANT initiated arbitration proceedings. |

# SUMMARY OF ARGUMENT

**1.** Throughout the contract negotiations and execution, CLAIMANT was always cooperative and interested in building a long-term business relationship with RESPONDENT. Regrettably, CLAIMANT soon had to learn that RESPONDENT was not the committed and fair business partner it had initially vowed to be.

**2.** Instead, RESPONDENT tries to ride two horses at once. In an arbitration with another party, RESPONDENT shares the same understanding of hardship as CLAIMANT. Yet, in the case at hand, facing the same situation, RESPONDENT vigorously denies any need to adapt the contract. Only by chance CLAIMANT became aware of this contradictory and inconsistent behaviour. At the annual breeder conference, CLAIMANT learned about the other arbitration. As the Partial Interim Award rendered in the other arbitration is material to the outcome of the case at hand, the Tribunal must admit the documents as evidence **[B]**. RESPONDENT cannot hide behind formalities.

**3.** Not enough, RESPONDENT's scheme continues. As RESPONDENT insisted, CLAIMANT agreed to deliver the semen instead of having it picked up at CLAIMANT's premises. However, CLAIMANT was only willing to accept these changed terms because RESPONDENT assured that CLAIMANT would not have to bear any further risks associated with the change. Exactly the scenario CLAIMANT was afraid of materialised. Out of the blue, RESPONDENT's home country Equatoriana imposed tariffs on agricultural goods including frozen horse semen increasing the cost of delivery by 15100 per cent. As time was of the essence, CLAIMANT paid the delivery costs relying on RESPONDENT's promise to find an agreement on the price. CLAIMANT could also reasonably rely on an adaptation of the price as not only the hardship clause in Clause 12 of the Sales Agreement **[C]**, but also under the CISG **[D]**, CLAIMANT is entitled for a price adaptation.

**4.** CLAIMANT's attempts to find an amicable solution failed due to RESPONDENT's lack of willingness to cooperate. To avoid any responsibilities, RESPONDENT tries to hinder the proceeding by challenging the jurisdiction of the Tribunal. The Parties' prior communication leaves no doubt that the Parties intended to empower the Tribunal to adapt the Sales Agreement. By insisting on the applicability of the law of Danubia, RESPONDENT tries to hide this intention. However, as the law of Mediterraneo applies to both the Sales Agreement and the Arbitration Agreement, the Tribunal must take this extraneous evidence into account and determine that it has the jurisdiction and the power to adapt the Sales Agreement **[A]**.

# ARGUMENT

## A. The Arbitral Tribunal has the jurisdiction and the power to adapt the Sales Agreement

**5.** The Arbitral Tribunal has the jurisdiction and the power to adapt the Sales Agreement. The power of the Tribunal derives from the Parties' Arbitration Agreement, contained in the Sales Agreement of 6 May 2017 ("**Sales Agreement**"). The interpretation of the Arbitration Agreement depends on the law governing the arbitration agreement. RESPONDENT argues that the law of Danubia is the law applicable to the Arbitration Agreement. The Danubian contract law excludes all extraneous evidence for the interpretation of the Arbitration Agreement [PO1, P. 51]. By insisting on the applicability of the law of Danubia, RESPONDENT tries to avoid revealing the Parties' communication, which indicates the Parties' true intention to empower the tribunal to adapt the Sales Agreement.

**6.** However, the applicable law to the Arbitration Agreement is the law of Mediterraneo **[I]**. In consequence, the Arbitration Agreement must be interpreted according to the CISG, granting the Tribunal the power to adapt the Sales Agreement **[II**]. In contrast to RESPONDENT's allegation, an express empowerment is not required **[III]**. Even if the Danubian Contract Law were applicable, the Tribunal would have the power to adapt the contract as the Parties referred "*[a]ny dispute arising out of this contract*" to arbitration ("**Arbitration Agreement**") [EXH. C5, P. 14, PARA. 15] **[IV]**.

### I. The Parties chose the law of Mediterraneo to govern the Arbitration Agreement

**7.** The applicable law to the Arbitration Agreement is the law of Mediterraneo. The Parties agreed that the Sales Agreement should be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods **("CISG")** [EXH. C5, P. 13, PARA. 14]. They did not include an express choice of law rule in the Arbitration Agreement. The Parties have impliedly chosen the law of Mediterraneo to govern the Arbitration Agreement **[1]**. RESPONDENT cannot argue that the doctrine of separability justifies a derogation from the implied choice of Mediterranean law **[2]**.

#### 1. The Parties impliedly chose the law of Mediterraneo to govern the Arbitration Agreement

**8.** The Parties impliedly chose the law of Mediterraneo to govern the Arbitration Agreement. The autonomy of the parties to decide on the law applicable to an arbitration agreement is an

overarching concept in international arbitration [BORN II, P. 59; HAYWARD, P. 56, PARA. 2.16; LEW/MISTELIS/KRÖLL, P. 412, PARA. 17.4]. Article V(1)(a) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") also recognises the importance of the intention of parties when determining the law applicable to the Arbitration Agreement.

**9.** Contrary to RESPONDENT's allegations [ANSWER, P. 31, PARA. 14], the Parties intended both the Sales Agreement and the Arbitration Agreement to be governed by the same law.

**10.** In international commercial arbitration proceedings, parties usually intend that their entire relationship be governed by the same law, in the absence of indications to the contrary [GRAFFI, P. 28; LEW, P. 143; REDFERN/HUNTER, P. 158, PARA. 3.12]. This is because the application of the same law to both the underlying contract and the arbitration agreement leads to less complexity [BORN, P. 454; GRAFFI, P. 30]. In the context of fast-paced international commerce and the corresponding risk of uncertainties, the parties are inclined to limit their choice to only one governing law [BORN, P. 453; GRAFFI, P. 30; REDFERN/HUNTER, P. 158, PARA. 312].

**11.** Arbitral tribunals have regularly applied the law of the underlying contract to the arbitration agreement [ICC CASE 6850; ICC CASE. 6752; ICC CASE 6379; ICC CASE 11869]. For example, in the ICC Case No. 11869 the arbitral tribunal applied the choice of English law to the substantive contract as well as the arbitration agreement. In *Sulamérica v Enesa* it was held that express choice of a law governing the substantive contract strongly indicated the intention of the parties to submit their arbitration agreement to the same law. In addition, courts in other jurisdictions, such as Germany and India, consistently apply the law of the underlying contract to the arbitration agreement [GERMAN SUPREME COURT, 28.11.1963; APPELLATE COURT HAMBURG, 17.2.1989; *NTPC V SINGER COMPANY*]

**12.** In clause 14 of the Sales Agreement [EXH. C5, PARA. 14, P. 14], the Parties expressly subjected the Sales Agreement to the law of Mediterraneo. This express choice regarding the law applicable to the Sales Agreement constitutes an implied choice of Mediterranean law as the law governing the Arbitration Agreement.

**13.** The Parties provided for a single choice of law to govern both the Sales Agreement and the Arbitration Agreement. This is reflected in the Parties' negotiations. Mr Antley, the prime negotiator on RESPONDENT's side, suggested Equatoriana as seat of arbitration and wished to submit the Arbitration Agreement to the law of Equatoriana [EXH. R1, P. 33]. Ms Napravnik, the prime negotiator on the side of CLAMAINT, rejected this proposal and referred to

CLAIMANT's internal policy requiring special approval, if contracts are submitted to a foreign law [EXH. R2, P. 34]. Thereby Ms Napravnik made clear that she had no authority to decide on a law other than the law of Mediterraneo in the absence of special consent. Ms Napravnik signalled that the place of arbitration in a neutral country, i.e. Danubia, would be acceptable. However, she deleted the part in the proposed arbitration clause which stated that Danubian law is applicable to the Arbitration Agreement. It was therefore an intentional decision to exclude the reference to the law applicable to the Arbitration Agreement.

**14.** If the Parties had intended to submit the Arbitration Agreement to another law than the one governing the Sales Agreement, they would have included such an express reference. CLAIMANT is aware that one of the distinct features of the HKIAC model clause is the explicit reference to the law governing the Arbitration Agreement [MOSER/BAO, P. 46, PARA. 4.21]. However, the Parties derogated from this model clause by deleting this express reference. Consequently, the Parties intended both the Sales Agreement and the Arbitration Agreement to be governed by the same law, namely the law of Mediterraneo.

**2. RESPONDENT cannot argue that the doctrine of separability justifies a derogation from the implied choice of Mediterranean law**

**15.** Contrary to RESPONDENT's allegations [ANSWER, P. 31, PARA. 14], the doctrine of separability does not contradict the applicability of the law of Mediterraneo to the Arbitration Agreement. The Parties agreed to conduct the proceedings under the 2018 Hong Kong International Arbitration Centre Rules ("**HKIAC Rules**") [EXH. C5, P. 13, PARA. 15; PO1, P. 51, PARA. II]. According to Art. 19.2 HKIAC Rules and Art. 16(1) Danubian Arbitration Law, the doctrine of separability states that *"an arbitration agreement which forms part of a contract, […] shall be treated as an agreement independent of the other terms of the contract."* However, the doctrine of separability does not mean that the law applicable to the Arbitration Agreement must necessarily be different from the law governing the underlying substantive contract [ICC CASE 4131; BORN, P. 476]. As expressed in the third sentence of Art. 19.2 HKIAC Rules, the purpose of the doctrine is to merely enable arbitral tribunals to decide on their jurisdiction on the basis of the arbitration agreement, even if a party challenges the validity of the substantial contract. [BORN, P. 391; LEW/MISTELIS/KRÖLL, P. 102, PARA. 6.9; REDFERN/HUNTER, P. 104, PARA. 2101].

## II. The Arbitral Tribunal has the power to adapt the Sales Agreement under the Arbitration Agreement

**16.** The Arbitral Tribunal has the power to adapt the Sales Agreement under the Arbitration Agreement. The Parties agreed that the Sales Agreement should be governed by the law of Mediterraneo, including the CISG [EXH. C5, P. 13, PARA. 14]. There is consistent jurisprudence in Mediterraneo that in contracts governed by the CISG, the CISG also applies to the interpretation of an arbitration clause contained in such contracts [PO1, P. 52, PARA. 4]. RESPONDENT explicitly stated that arbitrators should adapt the contract **[1]**. A reasonable person would also have understood the Arbitration Agreement to encompass claims for price adaptation **[2]**.

### 1. RESPONDENT explicitly stated that arbitrators should adapt the Sales Agreement

**17.** Contrary to RESPONDENT's allegations [ANSWER, P. 31, PARA. 13], it was the intention of the Parties to empower the Arbitral Tribunal to adapt the price. The powers of the Arbitral Tribunal derive primarily from the Arbitration Agreement [KRÖLL, P. 167; REDFERN/HUNTER, P. 308 ET SEQ., PARA. 5.14]. The Arbitration Agreement must be interpreted in accordance with Art. 8 CISG. Article 8(1) CISG stipulates that statements and other conduct by one party must be interpreted considering the party's intent where the other party knew or could not have been unaware of the intent. This is also applicable to the interpretation of contracts when the contract is embodied in a single document [SECRETARY COMMENTARY, P. 19, PARA. 2]. As the Arbitration Agreement is a contract, Art. 8(1) CISG applies to the interpretation of the Arbitration Agreement.

**18.** The contractual negotiations reveal the intention of the Parties to empower the Arbitral Tribunal to adapt the Sales Agreement. Before the accident on 12 April 2017, CLAIMANT's Ms Napravnik and RESPONDENT's Mr Antley, the main negotiators of the Sales Agreement, discussed the relevant parts of the Sales Agreement which the Parties had not agreed on [EXH. C8, P. 17]. Ms Napravnik mentioned to Mr Antley that for CLAIMANT it was important to have a mechanism in place which ensured an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment [EXH. C8, P. 17]. Mr Antley replied that it should be the task of the arbitrators to adapt the Sales Agreement in case of disputes [IBID.]. Thus, at this point, the negotiators agreed that the arbitrators are empowered to adapt the contract.

**19.** To avoid any doubts as to the powers of the arbitrators, the Parties intended to include an express reference into the contract. Only due to the prime negotiators' severe car accident,

such an express reference was not included. After the accident, Mr Krone took over the negotiations on RESPONDENT's side [EXH. R3, P. 35]. Mr Krone aimed to draft the contract exactly like Mr Antley intended in his notes [EXH. R3, P. 35]. The only reason he did not expressly empower the Tribunal was that he did not understand the note left by Mr Antley and had no opportunity to discuss the issue with him. In light of this and the clear intention expressed by the negotiators, Mr Krone's objection to the transfer of power, one month after the dispute arose, is not credible.

**20.** In addition, both CLAIMANT and RESPONDENT come from countries where it is possible for courts and arbitral tribunals to adapt contracts. Both Mediterranean and Equatorianian contract law are a verbatim adoption of the corresponding provision of the UNIDROIT Principles of International Commercial Contracts **("PICC").** In cases of hardship, Art. 6.2.3(4)(b) PICC empowers courts to adapt contracts. By not expressly including the power of arbitrators to adapt the Sales Agreement, the Parties intended the Tribunal to have equal powers as under their respective laws. All in all, the Parties intended to empower the Tribunal to adapt the Sales Agreement, so that the Tribunal can and should adjust the price of the semen.

**2. A reasonable person would have also understood the Arbitration Agreement as to encompass claims for a price adaptation**

**21.** A reasonable person would have also understood the Arbitration Agreement as to encompass claims for a price adaptation. According to Art. 8 (2) CISG, statements made by a party should be interpreted following the understanding of a reasonable person of the same kind as the recipient in the same circumstances [KRÖLL/MISTELIS/P.VISCASILLAS, ART. 8, PARA. 2]. The Parties agreed on the Arbitration Agreement referring *"[a]ny dispute arising out of this contract*" to arbitration [EXH. C5, P. 14, PARA. 15].

**22.** The phrase "*arising out of*" must be interpreted broadly, including claims for price adaptation **[a]**. Claims for a price adaptation are not excluded by the removal of the phrase "or relating to" from the Arbitration Clause **[b]**. In any case, uncertainties as to the Arbitration Agreement must be resolved *contra proferentum* **[c]**.

**a) The phrase "*arising out of*" must be interpreted broadly, including claims for price adaptation**

**23.** The phrase "*arising out of*" must be interpreted broadly, including all claims which "*touch matters*" covered by the underlying contract [*AM. RECOVERY V. COMPUTERIZED THERMAL IMAGING; SWEET DREAMS V. DIAL-A-MATTRESS*]. This is consistent with the pro-arbitration

presumption. According to this presumption, one must interpret arbitration agreements expansively and construe them so as to encompass the respective disputed claim in case of doubt [ICC CASE 14046; *FIONA TRUST V PRIVALOV]*. As the Parties did not expressly exclude the claim in question, they intended claims for an adaptation of the price to fall within the scope of the Arbitration Agreement.

**24.** Any other interpretation would lead to a separate proceeding concerning the price adaptation before a separate arbitral institution or court. However, a reasonable person would have understood the Arbitration Agreement as to encompass claims for a price adaptation, since the Parties have a justified interest in submitting all contractual claims to one, and not multiple forums. Needless to say, that resolving the same dispute in multiple forums only causes unnecessary costs and delays. Thus, a reasonable person would not think that the Parties referred claims for a price adaptation to another institution or court.

**b) Claims for a price adaptation are not excluded by the removal of the phrase "or relating to" from the Arbitration Agreement**

**25.** A reasonable person in Ms Napravnik's position would not have understood the removal of the phrase "*or relating to*" to have the effect of excluding claims for a price adaptation. Authorities have held that the words "relating to" lead to a substantial extension of the comprised claims, so that antitrust claims, claims for misrepresentation, and even claims under another contract are within the scope of the arbitration clause [*JANIN V SOCIÉTÉ ENCORE*; *NOKIA V AU OPTRONICS; X LTD. V Y LTD.*; SWISS FEDERAL SUPREME COURT, 20.09.2011]. In the case at hand, however, the claim for an adaptation of the price is a contractual claim, which requires interpretation of the Sales Agreement. Thus, a reasonable person would not understand the removal of the phrase "or relating to" as an exclusion of claims for price adaptation.

**c) In any case, the Arbitration Agreement must be interpreted *contra proferentem***

**26.** In any case, Art. 8(2) CISG incorporates the *contra proferentem* rule [KRÖLL/MISTELIS/P. VISCASILLAS, ART. 8, PARA. 24]. The *contra proferentem* rule provides that ambiguities as to the meaning of a contractual term need to be interpreted against the drafter [KRÖLL/MISTELIS/P. VISCASILLAS, ART. 8, PARA. 26]. As it was RESPONDENT's Mr Antley who proposed the wording of the Arbitration Agreement, uncertainties as to whether the claim for an adaptation of the price is covered by the Arbitration Agreement must be interpreted *contra proferentem*, i.e. against RESPONDENT.

**27.** For these reasons, a reasonable person would have also understood the Arbitration Agreement as to encompass claims for a price adaptation.

### III. Even if Danubian contract law is the law governing the Arbitration Agreement, the Tribunal has the power to adapt the Sales Agreement

**28.** Even if Danubian contract law is the law governing the Arbitration Agreement, the Tribunal has the power to adapt the Sales Agreement. According to Danubian contract law, all extraneous evidence for the interpretation of contracts should be excluded [PO1, P. 51]. As a result, arbitration agreements are to be interpreted narrowly [IBID.]. Hence, only the written contract is used to assess the intention of the parties.

**29.** In the contract, the Parties referred "*[a]ny dispute arising out of this contract, including the […] interpretation thereof*" to arbitration [EXH. C5, P. 14, PARA. 15]. This wording is unambiguous and refers any dispute arising of the Sales Agreement to the Tribunal. The present dispute between CLAIMANT and RESPONDENT arose during renegotiations on 12 February 2018. CLAIMANT demanded payment from RESPONDENT for the additional costs caused by the tariffs. RESPONDENT's CEO Ms Espinoza refused any further cooperation with CLAIMANT, alleging that the request from CLAIMANT would have no basis in the Sales Agreement [EXH. C8, P. 18]. Thus, the arising dispute between the Parties results from different interpretations of the Sales Agreement. The Parties could not solve the dispute amicably. Hence, CLAIMANT raised a claim [NOTICE, P. 4], aiming to resolve the dispute. There is no reason to deny the Tribunal's jurisdiction, as the Arbitration Agreement explicitly refers such disputes to arbitration.

### IV. The applicable rules of procedure do not require an express empowerment of the Arbitral Tribunal to adapt the Sales Agreement

**30.** The applicable rules of procedure do not require an express empowerment of the Tribunal to adapt the Sales Agreement. As the seat of arbitration is Danubia, the *lex arbitri* is the Danubian Arbitration Law, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**").

**31.** Danubian courts interpret Art. 28(3) Danubian Arbitration Law as to contain a general standard that must be applied to the conferral of exceptional powers to arbitral tribunals. However, the power to adapt the Sales Agreement is not such an exceptional power **[1]**. In any event, the Tribunal must give effect to the expectations of the Parties **[2]**.

**1. Adapting the Sales Agreement is part of the inherent power of tribunals to interpret contracts**

**32.** The power to adapt the Sales Agreement is not an exceptional power. If the adaptation derives from an interpretation of the contract, then the Tribunal has the power to adapt the contract [KRÖLL, P. 167]. This does not require an express reference, as the interpretation of contracts is an inherent power of tribunals [IBID.]. Without such a power, an intervention by an arbitral tribunal would be practically impossible [IBID.]. A power without the means to implement the result of its exercise would be pointless. The adaptation of the Sales Agreement is a result of its interpretation. The proper interpretation of clause 12 of the Sales Agreement (**"Hardship Clause"**) [EX. C5, P. 14, PARA. 12] requires the power of the Tribunal to adapt the Sales Agreement. If CLAIMANT "*shall not be responsible […] for hardship*" [IBID.], the price must necessarily be adjusted. As the adaptation of the price is merely a consequence of an interpretation of the Sales Agreement, it cannot be considered an exceptional power.

**2. In any event, the Tribunal must consider that the Parties did not expect an express empowerment as a requirement**

**33.** In any event, the Tribunal must consider that the Parties did not expect an express empowerment as a requirement. Irrespective of whether Art. 28(3) Danubian Arbitration Law is a mandatory provision, the interpretation of this provision by Danubian courts cannot override the intention of the Parties. To promote predictability, arbitrators may diverge from judges in the application of national law [PARK, P. 61; PETSCHE, PARA. 1.3.2]. The "*arbitrators must show fidelity to shared expectations expressed in contract or treaty, fixing their eyes on existing norms rather than proposals for the law as it should be*" [PARK, P. 61]. In fact, parties choose to refer disputes to arbitration instead of the ordinary courts precisely because they intend arbitrators to deal with the special needs of the parties and the particularities of the case [BERGER, P. 15].

**34.** From the wording of Art. 28(3) Danubian Arbitration Law, one cannot conclude that this provision contains a general standard for the conferral of exceptional powers. According to Art. 2A(1) Danubian Arbitration Law, when interpreting a provision, "*regard is to be had to its international origin and to the need to promote uniformity in its application"*. Thus, the Parties could expect that the interpretation of Art. 28(3) Danubian Arbitration Law is consistent with the internationally accepted interpretation of the provision. As the arbitration laws of both Mediterraneo and Equatoriana are a verbatim adoption of the Model Law [PO2, P. 57, PARA. 14] and do not require an express conferral of the power to adapt a contract, the

Parties did not intend to be bound by such an unexpected interpretation of Art. 28(3) Model Law.

**35.** CLAIMANT's Ms Napravnik merely knew that the Danubian Arbitration Law is largely an adoption of the Model Law [PO2, P. 57, PARA. 14]. She could not have known about this specific interpretation of Art. 28(3) by Danubian courts. In fact, the Parties precisely chose arbitration because they did not intend to submit their disputes to the ordinary courts in Danubia. In consequence, when applying the *lex arbitri* the Tribunal must consider that the Parties did not expect an express empowerment as a requirement.

## V. Conclusion

**36.** The Tribunal has the jurisdiction and the power to adapt the Sales Agreement. Under the applicable Mediterranean rules of interpretation, the Arbitration Agreement must be interpreted broadly and an express conferral of power to adapt the price is not necessary. Even if the Danubian law were applicable and the Tribunal had to interpret the Arbitration Agreement narrowly, the Arbitration Agreement would confer to the Tribunal the jurisdiction and the power to adapt the price.

## B. The Tribunal must admit the Award from the other arbitration proceedings as evidence

**37.** CLAIMANT must be allowed to submit the Partial Interim Award ("**Award**") from the other arbitration proceeding in order to fully present its case. In the other proceeding between RESPONDENT and a third party, RESPONDENT shares the same legal opinion as CLAIMANT with regard to the qualification of the imposition of tariffs as hardship. By challenging the admissibility of the Award, RESPONDENT tries to conceal its contradictory behaviour.

**38.** The Tribunal must admit the Award from the other arbitration proceeding as evidence. When deciding on the admissibility of evidence the Tribunal has a broad discretionary power **[I]**. The Tribunal must use this power to admit the Award as evidence, since it is material to the outcome of this case **[II]**. The Tribunal is not hindered to admit the evidence because the submission does not violate the confidentiality with regard to the other arbitration proceeding **[III]**. Furthermore, the illegal behaviour of third parties cannot prevent CLAIMANT from submitting the Award as evidence, especially because CLAIMANT played no part in its illegal obtainment **[IV]**. Finally, CLAIMANT's interest in transparency outweighs RESPONDENT's interest in confidentiality **[V]**.

### I. The Tribunal has a broad discretionary power when deciding on the admissibility

**39.** The Tribunal has a broad discretionary power when deciding on the admissibility of evidence. Pursuant to Art. 22.2 HKIAC Rules, the Tribunal is not bound by any strict rules of evidence [MOSER/BAO, P. 191, PARA. 9.153]. The broad wording of Art. 22.2 HKIAC Rules states that tribunals "*shall determine the admissibility, relevance, materiality and weight of the evidence"*. Thus, the HKIAC Rules envisage that arbitrators possess virtually unfettered discretion with regard to procedural matters and can decide freely over any submissions or requests made by the parties [BORN, P. 2307 ET SEQQ. MOSER/BAO, P. 190, PARA. 9.150]. In absence of any set procedural rules on the procurement of evidence, tribunals must find an approach which is best suited for the needs of the individual case [BORN, P. 2342]. Consequently, the Tribunal has a broad discretionary power to decide on the admissibility of evidence.

### II. The Tribunal must admit the Partial Interim Award as it is material to the outcome of the case

**40.** The Tribunal must admit the Partial Interim Award as it is material to the outcome of the case. The Tribunal must admit material evidence in order to give effect to CLAIMANT's right to

fully present its case and to assess the dispute properly **[1]**. The Award CLAIMANT seeks to submit is material to the outcome of the present case **[2]**. Lastly, if the Tribunal does not admit the evidence CLAIMANT intends to submit, the final arbitral award will not be enforceable **[3]**.

**1. The Tribunal must apply a wide standard of materiality to give effect to CLAIMANT's rights and to assess the dispute properly**

**41.** The Tribunal must apply a wide standard of materiality to give effect to CLAIMANT's rights and to assess the dispute properly. Article 31.1 HKIAC Rules states that the parties must have a reasonable opportunity to fully present their case. This is in line with the basic principle of due process which includes the parties' right to equal treatment and the opportunity to be heard [O'MALLEY, PARA. 1.12]. Moreover, the purpose of taking evidence is to *"assist the arbitral tribunal in determining disputed issues of fact"* [GIRSBERGER/VOSER, P. 237, PARA. 977; REDFERN/HUNTER, PARA. 6.75].

**42.** According to Art. 22.2 HKIAC Rules, the Tribunal must determine the materiality of the evidence. It is general practice to apply a wide standard when evaluating the materiality [BÜHLER/DORGAN, P. 28, PARA. 103, *METHANEX* PARTIAL AWARD, PARA. 167]. If there is any possibility that the evidence is material to the outcome of the case, the evidence must be admitted. The tribunal shall only exclude evidence at the outset when it is already apparent to be irrelevant or redundant [BORN, P. 2311]. It is therefore sufficient that the Award appears to have some use to advance a party's case. Hence, the applicable standard of materiality requires CLAIMANT to prove that the Award is *"sufficiently connected to a relevant contention"* [ASHFORD, PARA. 3-37]. Thus, the Tribunal must apply a wide standard of materiality in order to give effect to CLAIMANT's right to fully present its case and to assess the dispute properly.

**2. The Award CLAIMANT seeks to submit as evidence is material to the outcome of the present case**

**43.** The Award CLAIMANT seeks to submit as evidence is material to the outcome of this case. First, the Award gives guidance to the Tribunal to assess RESPONDENT's understanding of hardship, which is necessary to evaluate the claim at hand. The Award is from another arbitration RESPONDENT was a party to and it deals with an international sales agreement of agricultural goods [PO2, P. 60, PARA. 39]. In that case, the shipment was affected by tariffs in the same way as the semen shipment from CLAIMANT to RESPONDENT. Not only do the cases have a factual similarity, but they also address the same legal question. In the other

proceeding, RESPONDENT claimed a price adaptation due to the imposition of tariffs as a case of hardship and thereby took on the same position as CLAIMANT in the present proceeding. A price adaptation based on an unforeseen change of circumstances appeared to be indispensable to RESPONDENT. RESPONDENT's line of argumentation is thereby identical to the one used by CLAIMANT in the present case. As a result, RESPONDENT cannot substantiate this understanding while at the same time it denies price adaptation in the present case. What is more, RESPONDENT was only faced with 25 per cent tariff in the other case. In contrast, CLAIMANT faces 30 per cent tariffs. Therefore, similarly to RESPONDENT's reasoning in the other arbitration proceeding, CLAIMANT should be granted price adaptation.

**44.** The Award shows that RESPONDENT argues inconsistently on both opposing sides of an argument. In other words, RESPONDENT tries to ride two horses at once and the Tribunal should not tolerate such a behaviour. In conclusion, the Award is material to the present case as it gives guidance to the Tribunal to assess RESPONDENT's understanding of hardship.

### 3. If the Tribunal does not admit the evidence CLAIMANT intends to submit, the final arbitral award will not be enforceable

**45.** If the Tribunal does not admit the evidence CLAIMANT intends to submit, the final arbitral award will not be enforceable. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards governs the enforceability of arbitral awards [MOSER/BAO, P. 20, PARA. 2.29 ET SEQ.]. Article V(1)(b) of this Convention provides that the "*[r]ecognition and enforcement of the award may be refused, [if] (…) [t]he party against whom the award is invoked was (…) unable to present his case*". If the parties are not permitted to present the most relevant evidence, then this would amount to a violation to this provision [JANA/ARMER/KRANENBERG, P. 248]. Thus, if the Tribunal does not admit the evidence CLAIMANT intends to submit, the final arbitral award bears the risk of non-enforcement.

**46.** For these reasons, the Tribunal must admit the Award as evidence since it is material to the outcome of the case.

## III. The submission does not violate the confidentiality of the other arbitration

**47.** Furthermore, the submission does not violate the confidentiality of the other arbitration proceeding. RESPONDENT alleges that there is an express duty of confidentiality regarding the other proceeding which CLAIMANT would breach if it submitted the Award [LETTER BY FASTTRACK, 3 OCT 2018, P 50, PARA. 1]. However, contrary to RESPONDENT's argumentation,

this obligation does not influence the present case. The duty of confidentiality only binds the parties listed in Art. 42.2 2013 HKIAC Rules. Article 3.5 2013 HKIAC Rules defines "*parties*" as Claimant, Respondent and additional parties. CLAIMANT was not involved in the other proceeding and is therefore not a party to that particular arbitration. Consequently, the duty arising out of Art. 42 2013 HKIAC Rules does not bind CLAIMANT.

**48.** Similarly, there is no breach of confidentiality on CLAIMANT's part if RESPONDENT's former employees had disclosed the information contained in the Award. RESPONDENT holds for likely that two of its former employees spread the confidential information [LETTER BY FASTTRACK, 3 OCT 2018, PARA. 3]. However, the employment contract only binds the parties who have signed it. CLAIMANT has never been a party to this employment contract. Consequently, CLAIMANT does not breach any confidentiality agreement by submitting the Award. Thus, the submission of the Award as evidence does not violate the confidentiality of the other proceeding.

## IV. The illegal behaviour of third parties cannot prevent CLAIMANT from submitting the Award as evidence

**49.** The illegal behaviour of third parties cannot prevent CLAIMANT from submitting the Award as evidence. It is generally possible to admit illegally obtained evidence **[1]**. Moreover, CLAIMANT was not involved in the obtainment of the documents and has no bad faith regarding the Award **[2]**.

### 1. It is generally possible to admit illegally obtained evidence

**50.** Contrary to RESPONDENT's view [LETTER BY FASTTRACK, 3 OCT 2018, P. 50, PARA. 3], it is generally possible to admit illegally obtained documents as evidence. There is no presumption in arbitration that suspends the suitability of illegally obtained materials as evidence in arbitral proceedings [REISMAN/FREEDMAN, P. 738 ET SEQ.; O'MALLEY, P. 322, PARA. 9.119]. This was also found in *Methanex Corporation v USA*, where the tribunal indicated that illegally obtained evidence is not, as a rule, inadmissible [IRETON, P. 236].

**51.** Furthermore, two decisions rendered by the International Court of Justice demonstrate that even outside of arbitration, where courts have less discretionary power, illegally obtained evidence can be admitted. For example, in *Caratube International v. Republic of Kazakhstan*, the tribunal admitted data which was illegally obtained by way of example through the hacking of a computer network, as evidence [*CARATUBE*, P. 46, PARA. 170 ET SEQQ.; BRIGITTA, PARA. 1].

**52.** Further, in the *Corfu Channel Case,* the court admitted unlawfully obtained evidence even though the party bringing it was the one who had improperly obtained it [IRETON, P. 234; *CORFU CHANNEL*, PARAS. 6, 27, 51]. If an admission is possible in international law proceedings, it must be possible in arbitration all the more, since tribunals generally have broader discretionary powers. Therefore, it is generally possible to admit illegally obtained evidence.

**2. CLAIMANT was not involved in the obtainment of the documents and has no bad faith regarding the Award**

**53.** CLAIMANT was not involved in the obtainment of the documents and has no bad faith regarding the Award. Under Art. 9.2(g) IBA Rules on the Taking of Evidence in International Arbitration **("IBA Rules"),** evidence can be excluded for reasons of procedural fairness when the parties' behaviour amounts to "bad faith". The notion of "good faith" under the IBA Rules is anchored in No. 3 of its Preamble [ASHFORD, PARA. 9 ET SEQQ.] and addresses cooperation in procedural matters [O'MALLEY, P. 222 ET SEQQ.].

**54.** The Tribunal should apply the IBA Rules as they reflect international best practices [REDFERN/HUNTER, PARA. 6.95; BORN, P. 2347 ET SEQQ.; ICC CASE NO. 16655]. They aim to supplement institutional rules such as the HKIAC Rules [PREAMBLE IBA RULES; LEW/MISTELIS/KRÖLL, PARAS. 22.5, 22.24; REDFERN/HUNTER, PARA. 6.85] and are "*one of the generally accepted mainstays of international commercial arbitration*" [KREINDLER, P. 157; BORN, P. 2349; MOSES, P. 173 ET SEQQ.; GIRSBERGER/ VOSER, PARA. 986].

**55.** Cases where evidence was precluded for reasons of "bad faith" in the sense of Art. 9.2(g) IBA Rules must be distinguished from the case at hand. For example, in *Methanex* the tribunal held that certain illegally obtained documents collected by the Claimant were inadmissible because the Claimant lacked good faith in acquiring the data. In *Methanex*, personal and business documents had been acquired via intentional trespass into the Respondent's office. The Claimant even sifted through dumpsters and rubbish bins. The present case is entirely different as CLAIMANT has not perpetrated such a degree of wrongdoing or "*reckless disregard*" [O'MALLEY, P. 321, PARA. 9.117] for the law and has therefore not acted in bad faith.

**56.** In case of a breach of confidentiality under an employment contract, this is purely the responsibility of the employees breaching the agreement and can in no way be attributed to CLAIMANT. The nature of illegality was a purely contractual one. As it was found in *Methanex,* the rule of exclusion is not applied in such cases [O'MALLEY, P. 322, PARA. 9.119;

ENRON CREDITORS, PARA. 178]. The same must apply in the present case, since the Award was obtained by an illegal hack only made possible by RESPONDENT's outdated firewall [PO2, P. 61, PARA. 42]. In times of cybersecurity risks and industrial espionage, participants in international arbitral proceedings must take the necessary steps to ensure that computer systems are protected and cybersecurity policies are in place [DE WESTGAVER, PARA. 11].

**57.** Even if CLAIMANT were involved in the improper obtainment, the evidence would still be admissible. An illegal method of obtainment does not automatically result in inadmissibility of evidence [O'MALLEY, P. 752; IRETON, P. 234]. The *Corfu Channel Case*, where the court admitted evidence unlawfully obtained by the Claimant, demonstrates that even an involvement in the illegal obtainment does not preclude CLAIMANT from submitting the evidence. As a result, since CLAIMANT was not involved in the retrieval, CLAIMANT has standing to submit the evidence all the more.

## V. CLAIMANT's interest in transparency outweighs RESPONDENT's interest in confidentiality

**58.** After assessing the Parties' opposing interests, the Tribunal must admit the Award as evidence. Justice is achieved best by using all available and relevant evidence [AMOLE/COLSTON, PARA. 3]. Thus, *"the need to pursue the truth behind the parties' conflicting allegations"* [TAWIL/LIMA, CH. 2] must guide the Tribunal. It would be against the idea of doing justice if relevant evidence were not admitted [VON SCHLABRENDORFF/ SHEPPARD, PARA 8.1]. Considering CLAIMANT's strong interest in transparency, the Tribunal must admit the Award as evidence **[1]**. RESPONDENT cannot refute this interest, as there is no sufficient interest in non-submission based on either confidentiality or privilege **[2]**.

### 1. CLAIMANT has a strong interest in transparency which mandates the admission of the material evidence

**59.** CLAIMANT has a strong interest in transparency which mandates the admission of material evidence. This interest in transparency, i.e. obtaining information about a decisional process [ROGERS, P. 1307], has to be taken into account when deciding upon the admissibility. The prevailing principles of transparency as now codified in the UNCITRAL Transparency Rules shall guide the Tribunal in that decision. The UNCITRAL Transparency Rules provide for public access to documents produced during Investor-State Arbitration with the objective to make arbitration more public and open [HAY, P. 218]. The purpose of transparency is to disclose information to third parties who are affected by, but not part of an arbitration proceeding. This reasoning must equally apply to commercial arbitration when there is a

comparable interest at hand. The Award from the other arbitration affects CLAIMANT's case. It demonstrates RESPONDENT's contradictory and inconsistent behaviour, who is here vigorously denying any need to adapt the contract due to a change of circumstances. The principles of transparency must especially apply to cases where one of the disputing parties is involved in another arbitration dealing with the same dispute under the same institution as the two cases are linked.

**60.** The Tribunal should also note that the balance between confidentiality and transparency is recently leaning towards the latter [HAY, P. 229]. There is a tendency towards a systematic publication of arbitral awards, under a *"public interest in the development of arbitral case law, in the enhancement of the quality of arbitration, and in providing transparency and predictability to the business community"* [MOURRE, P. 65]. However, CLAIMANT does not even wish to have the Award made public, but only to submit the evidence to the Tribunal. All in all, CLAIMANT's strong interest in transparency mandates the submission of the material documents.

**2. RESPONDENT cannot show sufficient interest in the preclusion of the evidence**

**61.** RESPONDENT cannot show sufficient interest in the preclusion of the evidence. The information contained in the Award has already been disclosed **[a]**. In addition, the "level of confidentiality" would remain the same after admission **[b]**. Furthermore, privileged information is no obstacle to the admission of the Award **[c]**.

**a) The admission of the Award as evidence does not lead to a loss of confidentiality**

**62.** The admission of the Award as evidence does not lead to a loss of confidentiality. First, the information contained in the Award has already been disclosed. Once the information is accessible to the general public, it ceases to be confidential. For example, in *Symbion Power v Vence,* the Court found that information available on a webpage is not confidential anymore. In the present case, the documents containing the Partial Interim Award from the other arbitration are available for purchase. Moreover, the fact that the information was circulated orally at the annual Breeder's conference [LETTER BY LANGWEILER, 2 OCT 2018, P. 49] shows that the industry is aware of the information.

**63.** Second, the "level of confidentiality" would remain the same after the admission of the Award as evidence. Article 45.1 HKIAC Rules ensures that all information relating to the present arbitration proceeding is confidential. Furthermore, according to Art. 9.4 of the IBA Rules, arbitral tribunals can take measures to ensure confidentiality. Only the Parties to this proceeding have access to the information and are moreover under the obligation to keep

them confidential. This prevents any further circulation of the information and preserves the level of confidentiality as it was before the submission of the Award as evidence. Therefore, neither RESPONDENT nor its opposing party in the other arbitration proceeding would suffer any disadvantage with regard to confidentiality by the admission of the evidence.

### 3. Even if the Award contained privileged information, the Tribunal can still admit it

**64.** Even if the Award contained privileged information, the Tribunal can still admit it. In *Tidewater Investment v Venezuela* [PARA. 2], the Parties requested the production of potentially privileged information. There, even in light of this potential privilege, the tribunal considered these documents as admissible [IRETON, P. 236]. Although this case is an investment arbitration case, the tribunal applied an international standard on the taking of evidence, namely the IBA Rules.

**65.** Moreover, the Tribunal can also order the production of a redacted version of the award [MOURRE, P. 60]. In this way, the privileged information is protected and the evidence does not lose its materiality. CLAIMANT respects privileged information and is only interested in showing that RESPONDENT behaved contradictorily.

## VI. Conclusion

**66.** The Tribunal must admit the Award as evidence. The Tribunal has a broad discretionary power when deciding on the admissibility of evidence. It must use this power to admit the Award since the evidence is material to the outcome of the present case. Furthermore, issues of confidentiality or illegal obtainment do not hinder the admission of the evidence. CLAIMANT's interest in transparency outweighs RESPONDENT's interest in confidentiality. For these reasons, CLAIMANT respectfully requests the Tribunal to admit the evidence.

## C. The Tribunal must adapt the price pursuant to the Hardship Clause

**67.** The Arbitral Tribunal must adapt the contract pursuant to the Hardship Clause. CLAIMANT and RESPONDENT signed the Sales Agreement on 6 May 2017 concerning 100 doses of frozen racehorse semen [EXH. C5, P. 13]. On 19 December 2017, one month before the last shipment, the government of Equatoriana, RESPONDENT's home country, unexpectedly imposed 30 per cent tariffs on agricultural products. Surprisingly, the tariffs also covered frozen racehorse semen. Therefore, the goods subject to the Sales Agreement were affected by the tariffs [EXH. C6, P.15]. For such a situation, the Sales Agreement contains the Hardship Clause enabling for contract adaptation. Because of the imposition of tariffs, CLAIMANT incurred higher costs, namely USD 1,500,000 which it must not bear. As RESPONDENT refuses to renegotiate the contract [EXH. C8, P. 18], the Tribunal must adapt the price. In contrast to RESPONDENT's allegation the imposition of the tariffs qualifies as hardship within the scope of Hardship Clause, which allows for a price adaptation.

**68.** The Tribunal must adapt the price pursuant to the Hardship Clause. The Hardship Clause covers the imposition of tariffs **[I]** and provides for the remedy of price adaptation **[II]**.

### I. The Hardship Clause covers the imposition of tariffs

**69.** The Hardship Clause covers the imposition of tariffs by the Equatorianian government. This is because the imposition of tariffs falls under the wording of the Hardship Clause **[1]**. In addition, RESPONDENT accepted CLAIMANT's request to limit CLAIMANT's liability concerning import restrictions **[2]**. Moreover, the Parties share the same understanding of hardship since the imposition of tariffs qualifies as hardship in their respective legal system **[3]**.

#### 1. The imposition of tariffs falls under the wording of the Hardship Clause

**70.** The wording of the Hardship Clause encompasses the imposition of the tariffs by the Equatorianian government. The Hardship Clause states that the "*[s]eller shall not be responsible [...] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" [EXH. C5, P.14, PARA. 12].

**71.** The imposition of tariffs can be compared to the imposition of additional health and safety requirements since they are both unforeseeable and make the contract more onerous. As governmental interventions, they are both politically influenced and come as a reaction to an unforeseeable change of circumstances. For example, the statutory health and safety requirements were a reaction to a newly discovered foot and mouth disease [PO2, P. 58, PARA. 21]. Likewise, the imposition of tariffs by Equatoriana was a reaction to the imposition of

tariffs by Mediterraneo. The measures taken by the newly elected president of Mediterraneo "*surprised most analysts as they went beyond the worst expectations*" [EXH. C6, P. 15]. Especially the imposition of tariffs on agriculture seemed to experts "*to be more a mockery of the system than a good faith effort to justify the controversial tariffs within the boundaries of the existing system*." [EXH. C6, P. 15]. Moreover, Mediterraneo has never tried before to protect their farmers by tariffs of a comparable size. The imposition of tariffs is therefore comparably unforeseen to the imposition of additional health and safety requirements.

**72.** Furthermore, the imposition of tariffs by Equatoriana was even more surprising than the additional health and safety requirements, as it was extraordinary and came as complete surprise to both Parties [EXH. C6, P. 15; PO2, P. 58, PARA. 23]. Equatoriana has always been an ardent supporter of free trade and had only once taken retaliatory measures against the imposition of tariffs. No Prime Minister from the currently governing Progressive Liberals has ever imposed retaliatory tariffs [EXH. C6, P. 15].

**73.** The imposition of tariffs was further unforeseeable because Mediterraneo and Equatoriana are both part of the World Trade Organization [PO2, P. 61, PARA. 47]. The members of the World Trade Organisation have agreed to a "*substantial reduction of tariffs and other barriers to trade*" [GATT PREAMBLE, PARA. 1].

**74.** Lastly, the tariffs made the performance for CLAIMANT significantly more onerous. Not only did they cause an additional cost of USD 1,500,000 but they also completely destroyed CLAIMANT's profit margin [NOTICE, P. 7, PARA 18].

**75.** In conclusion, clause 12 of the Sales Agreement covers the imposition of tariffs because it is formulated in an abstract manner and falls within *"comparable unforeseen events making the contract more onerous".*

### 2. RESPONDENT accepted CLAIMANT's request to limit CLAIMANT's liability concerning import restrictions

**76.** RESPONDENT accepted CLAIMANT's request to limit CLAIMANT's liability concerning import restrictions. Pursuant to Art. 18(1) CISG silence or inactivity in itself does not amount to acceptance. However, the same provision states that silence or inactivity coupled with the offeree's conduct may indicate assent. In the negotiation of the Sales Agreement, RESPONDENT proposed for CLAIMANT to make use of CLAIMANT's greater experience in shipment of frozen semen, including the necessary export and import documentation [EXH. C3, P. 11]. Claimant accepted a delivery DDP but immediately stated that it is "*not willing to take over any further risks associated with such a change in delivery terms, in particular not*

*those associated with […] import restrictions"* [EXH. C4, P. 12]. Even though RESPONDENT did not explicitly address this request, it agreed by conduct. The following negotiations between the Parties only concerned the arbitration clause and not DDP [EXH. R1, P. 33; EXH. R2, P. 34]. In this regard, RESPONDENT only wanted to discuss the "last open points" [EXH. R1, P. 33] and did not address CLAIMANT's request to limit its liability. Consequently, the continuation of the negotiations constitute assent by RESPONDENT. This is also evidenced in the finally concluded Sales Agreement which reflects this very risk assumption in the Hardship Clause as proposed by CLAIMANT [EXH. C5, P. 14]. Respondent thus accepted CLAIMANT's request to limit its liability concerning import restrictions

**3. The Parties share the same understanding of hardship since the imposition of tariffs qualifies as hardship in their respective legal system**

**77.** The Parties share the same understanding of hardship since **t**he imposition of tariffs qualifies as hardship under their respective legal system, falling therefore within the scope of the Hardship Clause. The general contract law in both Equatoriana and Mediterraneo is a verbatim adoption of PICC [PO1, P. 52 PARA. 4]. Both CLAIMANT's and RESPONDENT's jurisdictions share the same understanding of hardship. As a result, this indicates both Parties' intention to adopt this understanding in their Hardship Clause.

**78.** The imposition of tariffs falls under the hardship provision of Art. 6.2.2 PICC, as CLAIMANT could not have reasonably taken the imposition of the tariffs into account **[a].** Further, the imposition of tariffs fundamentally altered the equilibrium of the Sales Agreement **[b].** Lastly, CLAIMANT could neither control **[c]** nor assume the risk associated with the tariffs **[d].**

**a) The imposition of the tariffs could not have reasonably been taken into account**

**79.** The imposition of the tariffs could not have reasonably been taken into account by CLAIMANT. To assess what a party could have reasonably been taken into account, the circumstances at the time the contract was concluded and the foreseeability of events must be considered [BRÖDERMANN, P. 179, PARA. 3]. When the Parties concluded the Sales Agreement, there was no indication of the imposition of tariffs by the government of Equatoriana. The tariffs were not only announced seven months after the Parties signed the Sales Agreement but also came as a complete surprise even to informed circles [PO2, P. 58, PARA 25; EXH. C6, P.15]. The government of Equatoriana had always been an ardent supporter of free trade and amicable solutions [NOTICE, PARA. 10, P. 6; EXH. C6, P. 15]. It was also very unlikely that tariffs would be imposed on race horse semen. Unlike the domestic market for agricultural products, the market for horse breeding is virtually non-existent [PO2, PARA. 19, P. 57]. Thus the domestic

market for race horse semen does not need protection. Therefore, CLAIMANT could not have reasonably taken the imposition of tariffs into account.

**b) The imposition of tariffs fundamentally alters the equilibrium of the Sales Agreement**

**80.** The imposition of tariffs fundamentally alters the equilibrium of the Sales Agreement by increasing the cost of CLAIMANT's performance, namely the delivery of the goods. In practice, a fundamental alteration manifests itself in a substantial cost increase for one party's performance [UNIDROIT COMMENTARY, P. 219]. It is important to bear in mind that in the present case we are not dealing with an increase of the market price of the goods but with an increase of the delivery costs due to an imposition of tariffs. The tariffs are not an expression of shifts in market value, but a regulatory measure increasing only delivery costs.

**81.** In order to determine the cost increase, the Tribunal must consider the purpose of Art. 6.2.2. PICC, which presumes that the obligor could not reasonably take the events causing the alteration of contract equilibrium into account. The provision thus aims to protect the obligor from unforeseeable risks. Therefore, the Tribunal must consider which costs were "*reasonably foreseeable"* at the time the contract was concluded [EISENBERG, P. 245; APPELLATE COURT HAMBURG, 28.2.1997; ISHIDA, P. 373]. Therefore, the factor of cost increase depends on the ratio between the reasonably foreseeable costs and the costs that actually incurred.

**82.** CLAIMANT bore delivery costs of USD 200 per dose [PO2, P. 56, PARA. 8] which is USD 10,000 USD in total for all 50 delivered doses. Unlike expectable shifts in market prices, the imposition of tariffs by Equatoriana was not reasonably foreseeable [C.I.3.a]. Therefore, CLAIMANT could not be reasonably expected to assume additional delivery costs. Thus, the reasonably foreseeable costs for delivery remain USD 10,000 in total. Comparing this number to the additionally imposed USD 1,500,000 the factor of cost increase is 15100 per cent. Cost increases in such dimensions surmount even the highest proposed number of 200 per cent many times over [SCHWENZER, P. 717]. RESPONDENT, on the other hand, did not bear any additional costs. Therefore, the cost increase regarding CLAIMANT's performance is a fundamental alteration of the contract equilibrium.

**c) The imposition of tariffs was beyond CLAIMANT's control**

**83.** CLAIMANT could not control the imposition of the tariffs. Article 6.2.2 PICC provides that, for a contract to be adapted, the event needs to be beyond the control of the disadvantaged party. Acts of governments are generally beyond the control of the contracting parties [VOGENAUER/MCKENDRICK, ART. 6.2.2., P. 721, PARA. 14; BRUNNER, ART. 79, PARA. 19;

STAUDINGER/MAGNUS, ART. 79, PARA. 28]. In the present case, the tariffs were imposed by the government of Equatoriana. CLAIMANT is a private business with no connection to the government and had therefore no control over the imposition of tariffs.

**d) CLAIMANT did not assume the risk of the imposition of tariffs**

**84.** According to Art. 6.2.2. lit. d PICC, hardship is excluded when the obligor has assumed the risk under the contract. The Sales Agreement does not include such assumption of risk. As shown above [C.I.2], RESPONDENT accepted CLAIMANT's request to limit CLAIMANT's liability concerning import restrictions. As a result, the final version of the Hardship Clause reflects CLAIMANT's interest in limiting its liability. Thus, the Hardship Clause restricts the clause concerning the delivery terms. Thus, CLAIMANT did not assume the risk of the imposition of tariffs.

**85.** Consequently, since all the requirements are fulfilled, the imposition of tariffs falls within the hardship provision in Art. 6.2.2 of PICC. Thus, the imposition of tariffs qualifies as hardship in the Parties' respective legal system as well as in the Hardship Clause.

**86.** Thus, as the imposition of tariffs qualifies as hardship in the Parties' respective legal system, it also qualifies as hardship in the Hardship Clause

**II. The Hardship Clause includes price adaptation as a remedy**

**87.** The Hardship Clause includes price adaptation as a remedy. The wording of the Hardship Clause provides for a price adaptation **[1]**. This also results from the Parties' negotiations and conduct **[2]** as well as from their intention to mirror the effect of Art. 6.2.3. PICC in the Hardship Clause **[3]**.

**1. The contract must be adapted in order to realise the contractual allocation of risks.**

**88.** The Hardship Clause provides that the "*[s]eller shall not be responsible […] for hardship*" [EXH. C5, P. 14, PARA. 12]. Therefore, in the event of CLAIMANT not being responsible for the imposition of tariffs, there must be an appropriate remedy. Otherwise the hardship clause would be dysfunctional. As a consequence, the price must be adapted according to the wording of the Hardship Clause.

**2. The Parties' conduct reflects their intention to enable price adaptation**

**89.** The Parties' conduct reflects their intention to enable price adaptation. According to Art. 8(3) CISG, all relevant circumstances of the case including the negotiations and subsequent conduct are to be considered to determine the intent of the parties. RESPONDENT's

employee Mr Shoemaker informed CLAIMANT's main negotiator Ms Napravnik that "*if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price"* [EXH. R4, P. 36]. The phrase to *"certainly find an agreement on the price"* can only lead to the conclusion that RESPONDENT's Mr Shoemaker considered a price adaptation possible. After all, hardship clauses mainly aim at contract adaptation [KONARSKI, P. 423]. Thus, CLAIMANT could only understand RESPONDENT's Mr Shoemaker to be willing to adapt the price. In consequence, the Parties' conduct reflects their intention to enable price adaptation.

### 3. The Parties intended the Hardship Clause to have the same effect as hardship under the PICC

**90.** The Parties had the same understanding of hardship under Art. 6.2.3 PICC as it is the same provision in their respective legal systems [PO1, P. 52, PARA. 4]. Thus, the Parties share the same understanding as to the effects of hardship. According to Art. 6.2.3(4)(b) PICC, the Tribunal can adapt the contract to restore the contract equilibrium as it is the only reasonable measure to be conferred from the Hardship Clause.

**91.** Therefore, the Hardship Clause provides for contract adaptation as a remedy.

## III. Conclusion

**92.** The wording of the Hardship Clause covers the imposition of tariffs. This is evidenced in the Parties' agreement to limit CLAIMANT's liability concerning import restrictions. In addition, their respective legal systems also qualify this imposition as hardship. As the Hardship Clause provides for the remedy of price adaptation and all its requirements are met, the Tribunal must adapt the price.

## D. The Tribunal must adapt the price under the CISG

**93.** Moreover, the Tribunal must adapt the contract pursuant to Art. 79 CISG **[I]**. Even if the Tribunal holds that Art. 79 CISG does not provide for price adaptation, the principles underlying the CISG fill this gap pursuant to Art. 7(2) CISG **[II]**.

### I. The Tribunal must adapt the contract pursuant to Art. 79 CISG

**94.** Article 79 CISG is applicable **[1]**. The prerequisites of Art. 79 CISG are met **[2]** and Art. 79 CISG provides for contract adaptation as a remedy **[3]**. The Tribunal must therefore adapt the contract.

#### 1. Article 79 CISG is applicable

**95.** The underlying thought of Art. 79 CISG is that parties should only be liable for the risks they could reasonably take into account when concluding the contract and fixing the contract price [KRÖLL/MISTELIS/P. VISCASILLAS, ART. 79, PARA. 2; COMMERCIAL COURT ZURICH, 26.4.1995]. Reasons of equity demand for an intervention in the legal relationship between CLAIMANT and RESPONDENT, as the unexpected imposition of tariffs in Equatoriana could not be reasonably taken into account and deeply disturbed the contractual balance.

**96.** Contrarily to RESPONDENT's allegation [ANSWER, P. 32, PARA. 20], the application of Art. 79 CISG is neither expressly nor impliedly excluded. First, the Hardship Clause does not contain any express exclusion from Art. 79 CISG. Second, the parties are only likely to have implicitly excluded Art. 79 CISG if the contractual clause is conclusively worded and has a narrower scope than Art. 79 CISG [DIMATTEO/JANSSEN/MAGNUS/SCHULZE, P. 702]. The Hardship Clause is not conclusively worded. If the Hardship Clause was meant to constitute a conclusive scope and thus exclude Art. 79 CISG, the wording would be narrow instead. Consequently, the Parties did not exclude Art. 79 CISG, but rather intended the Hardship Clause to be concurrently applicable to Art. 79 CISG.

#### 2. The prerequisites of Art. 79 CISG are met as the imposition of the tariffs is an "*impediment*" within the meaning of Art. 79 CISG

**97.** The imposition of the tariffs is an "*impediment*" within the meaning of Art. 79 CISG. First, an "*impediment*" does not require the performance to be impossible **[a]**. Second, the imposition of tariffs is an "*impediment*" as it made CLAIMANT's performance excessively onerous **[b]**.

**a) An "*Impediment*" does not require the performance to be absolutely impossible**

**98.** Although CLAIMANT was still able to perform its obligation, the imposition of tariffs constitutes an "*impediment*". An "*impediment*" under Art. 79 CISG does not require the performance to be impossible. First, the wording of Art. 79 CISG and its drafting history do not limit Art. 79 CISG to cases of absolute impossibility **[i]**. Second, limiting Art. 79 CISG to cases of absolute impossibility contradicts the purpose of Art. 79 CISG **[ii]**.

**(i) The wording of Art. 79 CISG and its drafting history do not limit this provision to cases of absolute impossibility**

**99.** The wording of Art. 79 CISG and its drafting history do not limit this provision to cases of absolute impossibility. The language of Art. 79 CISG is not the language of impossibility [SCHLECHTRIEM, P. 104]. The Oxford Dictionary defines "*impediment*" as "*something that impedes, hinders, or obstructs.*" [OXFORD DICTIONARY, 'IMPEDIMENT']. The literal interpretation of the word impediment thus naturally covers circumstances that only exacerbate performance. A narrow interpretation of "*impediment*" is not necessary since the additional prerequisites of Art. 79 CISG modify and tailor the word's field of application more narrowly [ISHIDA, P. 356].

**100.** RESPONDENT cannot argue that changes during the drafting history of Art. 79 CISG aimed to limit this provision to cases of absolute impossibility. The wording of the draft was changed from "*circumstances*" to "*impediment*" [BIANCA/BONELL/TALLON, ART. 79, P. 579]. This change only aimed to exclude the possibility of exemption due to a mere increase of difficulty [IBID.]. It cannot be concluded from this change that an "*impediment*" in the sense of Art. 79 CISG is only an event that absolutely prevents performance [SCHLECHTRIEM, P. 102; RIMKE, P. 225; ADVISORY COUNCIL OPINION 7, PARA. 28]. The language of the final version of Art. 79 CISG still leaves room for exemptions that are not limited to absolute impossibility of performance [HONNOLD, PARA. 432.2]. Thus, the wording of Art. 79 CISG and its drafting history do not limit this provision to cases of absolute impossibility.

**(ii) Limiting Art. 79 CISG to cases of absolute impossibility contradicts its purpose**

**101.** Limiting Art. 79 CISG to cases of absolute impossibility contradicts its purpose. Article 79 CISG is based on the value judgement that a party should only bear the risks it could reasonably take into account during contract conclusion [KRÖLL/MISTELIS/P.VISCACILLAS/ATAMER, ART. 79, PARA. 2]. Whether the performance is still possible or not is therefore irrelevant. Furthermore, there are rarely cases where the

delivery of goods is suddenly impossible. In the context of international trade, it is virtually always possible to procure goods [BRUNNER II, P. 215].

**102.** Moreover, RESPONDENT cannot argue that Art. 79 CISG is conceptually designed to only include *force-majeure*-cases, and therefore impossibility of performance, as it would neglect the very purpose of the CISG. The CISG is as a uniform law which aims to remove legal barriers that arise from different social, economic and legal systems of the world [KONERU, P. 115 ET SEQ.; WINSOR, P. 87]. The word "*impediment*" has been chosen to explicitly avoid domestic legal terms such as impossibility or *force majeure* and to summarise them in its generic wording instead [NAGY, P. 64; ZACCARIA, P. 162 ET SEQ.]. A narrow interpretation of the Art. 79 CISG would therefore contradict the purpose of this deliberate choice of words [KOFOD, PARA. 3.1.2.]. Therefore, limiting Art. 79 CISG to cases of absolute impossibility contradicts the purpose of Art. 79 CISG.

**b) The imposition of tariffs is an impediment as it made performance excessively onerous for CLAIMANT**

**103.** The imposition of tariffs is an impediment as it made the performance excessively onerous for CLAIMANT. Article 79 CISG is not limited to cases of absolute impossibility, but also covers cases where performance has become excessively onerous [ADVISORY COUNCIL OPINION 7; SCHLECHTRIEM, ART. 79, P. 102; DIMATTEO/JANSSEN/MAGNUS/SCHULZE, P. 675; BRUNNER II, P. 213; HONNOLD, ART. 79, PARA 432.2]. In order to determine if the performance has become excessively onerous, the Tribunal must assess the particular circumstances of the case [BRUNNER, ART. 79, PARA. 26]. First, the impediment must have led to unreasonably high costs of performance [SCHLECHTRIEM/SCHWENZER, ART. 79, PARA. 30; BRUNNER, ART. 79, PARA. 25; APPELLATE COURT HAMBURG, 28.02.1997]. Moreover, the Tribunal must consider whether the performance would seriously threaten the obligor's financial existence [BRUNNER, ART. 79, PARA. 26; SCHLECHTRIEM/STOLL, ART. 79, PARA. 25].

**104.** First, the imposition of tariffs led to unreasonably high costs for CLAIMANT. Considering the ratio between the delivery costs which CLAIMANT could reasonably expect and the costs actually incurred, CLAIMANT must be exempted from liability. CLAIMANT cannot be reasonably expected to shoulder a cost increase of 15100 per cent [C.I.3.b]. Second, if CLAIMANT is not reimbursed for the additional costs already paid, CLAIMANT's financial existence is seriously threatened. CLAIMANT has been making losses since 2014 and its restructuring plan would be seriously endangered if CLAIMANT had to bear the additional tariffs [PO2, PARA. 29, P. 59]. In order to acquire further credit lines to avoid bankruptcy,

CLAIMANT would have to sell its dressage part to its biggest competitor [PO2, PARA. 29, P. 59]. Yet, selling this business would be as fatal as bankruptcy. CLAIMANT operates a centre of excellent equestrian sports training. Dressage is an important part of this business since it is the "*ultimate expression of horse training*" [FÉDÉRATION ÉQUESTRE INTERNATIONALE]. Losing this significant sector to CLAIMANT's biggest competitor would deeply impair CLAIMANT's beleaguered situation by seriously draining its sources of revenue and thereby severely threatening the financial existence of CLAIMANT. The imposition of tariffs therefore made CLAIMANT's performance excessively onerous.

**3. Art. 79 CISG provides for price adaptation as a remedy**

**105.** Article 79 of the CISG provides for an adaptation of the price as a remedy. According to Article 7(1) CISG, the Tribunal must consider the principle of good faith when interpreting the CISG. The good faith principle permeates the whole text of the Convention and imposes the parties to consider the interests of the other contracting party due to their cooperative relationship [KRÖLL/MISTELIS/P.VISCACILLAS, ART. 7 PARA. 25; STAUDINGER/MAGNUS, ART. 79, PARA. 24]. This way the proper remedy to restore the balance between the parties may be inferred [ADVISORY OP. 7; PARA. 40; HONNOLD, P. 15; DIMATTEO/JANSSEN/MAGNUS/SCHULZE, P. 668]. Article 79 CISG in conjunction with the principle of good faith demands a right to adapt the contract in cases where the performance obligor the performance has become excessively onerous [BRUNNER, ART. 79 PARA. 27; MÜKO/HUBER, ART. 79, PARA. 21; KEIL, P. 191; RUDOLPH, P. 399]. This view has been explicitly affirmed by the CISG Advisory Council [ADVISORY COUNCIL OPINION 7, PARA. 40].

**106.** If CLAIMANT had not performed, thus causing a loss for RESPONDENT, CLAIMANT would not be liable for non-performance and exempted from paying damages under Art. 79 CISG. However, now that CLAIMANT did perform, so that RESPONDENT did not incur loss and even made a profit, CLAIMANT should be exempted from liability all the more. Adapting the price to achieve this result is in accordance with the purpose Art. 79 CISG to protect the parties from unforeseeable risks. Consequently, in such cases, price adaptation should be granted. This is even more so when one party has deliberately neglected the other party's interests as RESPONDENT did when it breached the contract by selling the semen to third parties.

**107.** Therefore, considering the principle of good faith in interpreting Art. 79 CISG, the Tribunal must adapt the contract.

## II. Even if the Tribunal holds that the CISG does not provide for price adaptation, the principles underlying the CISG fill the gap pursuant to Art. 7(2) CISG

**108.** Even if the Tribunal holds that the CISG does not provide for price adaptation, the gap must be filled pursuant to Art. 7(2) CISG **[1]**. The general principles of the CISG provide for price adaptation **[2]**.

### 1. The CISG contains a gap that must be filled pursuant to Art. 7 (2) CISG

**109.** If the Tribunal holds that the CISG does not provide for price adaptation, the CISG contains a gap that needs to be filled pursuant to Art. 7(2) CISG. This provision stipulates that internal gaps should be filled in regard to the principles on which the CISG is based. The purpose of Art. 7(2) CISG is to resolve problems resulting from issues not expressly regulated in the CISG [KRÖLL/MISTELIS/P.VISCASILLAS, ART. 7, PARA. 52].

**110.** In the drafting process of the CISG, the discussions only focused on excluding the possibility of exemption due to mere increase of difficulty of performance [FISCHER, P. 212]. There was no differentiated exchange of views regarding the degree of aggravation of performance [IBID.]. Thus, it was not thoroughly discussed what would be the consequences of extremely extraordinary situations. However, there is a broad consensus that in extraordinary situations where the obligor cannot be equitably expected to perform, an exemption from the harsh result of strict liability is needed [IBID.]. If the Tribunal holds that Art. 79 CISG does not cover such situations, the CISG consequently contains an internal gap.

### 2. The general principles of the CISG provide for contract adaptation as a remedy

**111.** The Tribunal must adapt the contract considering the principle of good faith **[a]** as well as the PICC **[b]**.

#### a) Considering the principle of good faith, the Tribunal must adapt the price

**112.** The principle of good faith provides for contract adaptation. Good faith does not only serve as means to interpret the CISG but also as a widely recognized general principle of the CISG [*ALUMINUM CASE*; *DULCES LUISI V SEOUL INT.*; *BONAVENTURE V PAN AFRICAN EXPORT*; KRÖLL/MISTELIS/P.VISCASILLAS, ART. 7, PARA. 58]. As a general principle, good faith may impose additional duties to the parties [RUIZ, P. 141].

**113.** First, as a result of the good faith principle, contracts must be adapted when there is a contractual imbalance. Such an imbalance emerges when the performance of the obligor has become excessively onerous. In the case at hand, the cost of CLAIMANT's performance

increased by 15100 per cent [C.I.3.b]. Moreover, CLAIMANT's financial existence is severely threatened [D.I.2.b]. Thus, CLAIMANT's performance has become excessively onerous.

**114.** Second, similar to the prohibition of contradictory behaviour manifested in Art. 29(2) and Art. 62 CISG [WITZ/SALGER/LORENZ/WITZ, ART. 7, PARA. 14], good faith prohibits the parties from acting in a way that misleads the other party. In a ruling of the Belgium Court of Appeal, it was held that deviating from a pre-contractual letter of intent is "*irreconcilable with the rule of good faith which, in international trade, should always be observed according to Art. 7(1) CISG*" [APPELLATE COURT GENT, 15.5.2002].

**115.** In the present case, RESPONDENT gave the impression of willingness to renegotiate and adapt the contract. In a telephone call on 21 January 2018, Mr Shoemaker stated on behalf of RESPONDENT that he was certain that a solution would be found through negotiation [EXH. C8, P. 18]. He did so in emphasising RESPONDENT's interest in a long-term business relationship with CLAIMANT [IBID.]. This gave CLAMANT the impression that RESPONDENT would bear the additional costs of the tariffs similar to concluding a letter of intent. Without this conduct, CLAIMANT would have never agreed to pay the tariffs. Nevertheless, after having received all the shipments, RESPONDENT denied any attempts to renegotiate the contract [IBID.]. Such contradictory behaviour is not in line with the concept of good faith in international trade. RESPONDENT should therefore accommodate CLAIMANT's interests in the light of good faith. Consequently, as renegotiations have failed, the Tribunal must adapt the price.

**b) Considering the PICC, the Tribunal must adapt the price**

**116.** The PICC, as part of the general principles of the CISG, provide for contract adaptation. The PICC are part of the general principles on which the CISG is based in the sense of Art. 7(2) CISG. The Tribunal can take recourse to the PICC under Art. 7(2) CISG which is permissible and good practice [BONELL, P. 25; MAGNUS, P. 492 ET SEQ., HUBER/MULLIS, P. 35.]. The Preamble of the PICC states that it can be used to "*interpret or supplement*" in cases of incompleteness or unclarity of international uniform law instruments such as the CISG.

**117.** The Tribunal can draw on the UNIDROIT Principles under Art. 7(2) to grant an appropriate remedy to CLAIMANT's case, namely price adaptation. An ICC tribunal in 2007 [ICC CASE 1333] was faced with the problem that neither the CISG nor the applicable national Russian law specified the sought-after remedy of specific performance. It hence took recourse to UNIDROIT Principles "*as a supplementary source of rules of law reflecting contemporary international trends which provide sound solutions to international commercial disputes"* [IBID., ABSTRACT PARA. 3]. Under the CISG provision in conjunction with the PICC, it was

able to give the appropriate relief to the buyer. CLAIMANT's case lies similarly, as it seeks a remedy which is not expressly contained in CISG, but in Art. 6.2.3 lit. 4(b) PICC [BONELL, P. 18].

**118.** Tribunals in other arbitral proceedings have also used PICC in this manner, stating in one case it was "*perfectly suited to resolving the dispute*" [ICC CASE 8817]. CLAIMANT's case is of a similar nature, concerning a contract between two internationally acting companies who are familiar with rulebooks such as the PICC since their respective legal system is a verbatim adoption of the PICC [PO1, P. 52, PARA. 4]. Other awards confirm that this approach is possible and common practice [ICC CASE 1332; ICC CASE 8128; ICC CASE 12097; ICC CASE 8502]. The Tribunal is therefore able to draw on instruments like the PICC under Art. 7(2), and it must do so to find an appropriate and commercially apt remedy to suit CLAIMANT's case.

**119.** The imposition of tariffs falls within the hardship provision of Art. 6.2.2 PICC as shown above [C.I.3]. CLAIMANT could not have reasonably taken the imposition of the tariffs into account**.** Further, the imposition of tariffs fundamentally altered the equilibrium of the Sales Agreement. Lastly, CLAIMANT could neither control nor assume the risk associated with the tariffs. As the prerequisites of Art. 6.2.2 PICC are fulfilled, the Art. 6.2.3 lit. 4(b) PICC provides for the remedy of contract adaptation. The Tribunal should apply this remedy to the case at hand to fill the gap in the CISG.

### III. Conclusion

**120.** CLAIMANT has not only a contractual claim, but also a statutory claim for price adaptation under the CISG. In the present case, Art. 79 CISG is applicable and provides for contract adaptation for CLAIMANT. Even if the Tribunal holds that Art. 79 CISG does not provide for price adaptation, the Tribunal must adapt the price considering the principle of good faith and the PICC. Therefore, the Tribunal must adapt the price.

## E. Justification for the amount claimed

**121.** Previously, CLAIMANT suggested an amount of only USD 1,250,000 [NOTICE, P. 8]. It had here subtracted its expected profit margin as a gesture of goodwill since CLAIMANT was of the impression that RESPONDENT was willing to cooperate in a fair resolution of the dispute.

**122.** However, RESPONDENT has expressed its complete negligence for the contractual relationship by breaching the Sales Agreement [NOTICE, P. 5, PARA. 6; PO2, P. 57, PARA. 20]. Therefore, CLAIMANT requests compensation in accordance with the full compensation principle as anchored in Art. 74 of the CISG [ADVISORY COUNCIL OPINION NO. 6; SCHLECHTRIEM/SCHWENZER, ART. 74, PARA. 2].

**123.** CLAIMANT is entitled to an amount of USD 1,500,000. The originally agreed price of the last shipment was USD 5,000,000. The imposition of 30 per cent tariffs increased the price to USD 6,500,000. The Tribunal must adapt the price accordingly in order to enable full compensation. Therefore, as provided in the table below, CLAIMANT is entitled to an additional payment of USD 1,500,000.

| | | |
|---|---|---|
| **Value of shipment** | USD 5,000,000 | |
| **Tariffs paid by CLAIMANT** | USD 5,000,000 x 0.30 | **USD 1,500,000** |
| **Subtracting CLAIMANT's profit margin** | USD 5,000,000 x 0.05 | - USD 250,000 |
| | **Originally requested amount:** | USD 1,250,000 |
| **Adding CLAIMANT's profit margin** | USD 5,000,000 x 0.05 | + USD 250,000 |
| | **Amount warranting full compensation:** | **USD 1,500,000** |

# REQUEST FOR RELIEF

**124.** For the above reasons, Counsel for CLAIMANT respectfully requests the Tribunal to

1. find that the Arbitral Tribunal has the jurisdiction and the power to adapt the contract;
2. admit the Award from the other arbitral proceeding as evidence;
3. find that CLAIMANT is entitled to the payment of USD 1,500,000 resulting from an adaptation of the price under the Hardship Clause and under the CISG.

HUY NGUYEN

GRETA NIEHAUS

ANNE PHILIPPCZYK

OLIVER POLLAKOWSKY

OGUZHAN SAMANCI

SOPHIE STOEWE

BERLIN, 6 DECEMBER 2018