16th Willem C. Vis (East)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2018 – 2019

MEMORANDUM FOR BLACK BEAUTY EQUESTRIAN

RESPONDENT

UNIVERSITY OF COLOGNE

CENTER FOR TRANSNATIONAL LAW (CENTRAL)

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

COUNSEL:

PAULA BILLEN CATALINA GOMEZ CELINA LAY JOHANNA UEBERBERG

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&	and
%	percent
AC	Advisory Council
AG	Aktiengesellschaft (stock company, Germany, Switzerland)
AGB	Allgemeine Geschäftsbedingungen (general terms and conditions, Germany)
ANA	Answer to the Notice of Arbitration
Art.	Article
BGB	Bürgerliches Gesetzbuch (civil code, Germany)
cf.	confer
CISG	United Nations Convention on the International Sale of Goods
Cl.	Claimant
Corp.	Corporation
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
e.g.	exempli gratia (for example)
ed(s).	editor(s)
edn.	edition
et al.	and others
Ex.	exhibit
EXW	Ex Works
f(f).	and the following
FS	Festschrift (liber amicorum)
FSSA	Frozen Semen Sales Agreement
HGB	Handelsgesetzbuch (commercial code, Germany)

HKIAC	Hong Kong International Arbitration Centre
i.e.	id est (that means)
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICAC	International Commercial Arbitration Court
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporation
INCOTERMS	International Commercial Terms
infra	see below
Int'l	International
LLP	Limited Liability Partnership
Ltd.	Limited
MCL	Mediterranean Contract Law
Mr.	Mister
Ms.	Misses
MüKo	Münchener Kommentar
Nat'l	National
No.	Number
NoA	Notice of Arbitration
NV	Naamloze Vennootschap (stock company, Belgium)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
Oct.	October
OK	Online Kommentar (online commentary)
OLG	Oberlandesgericht (higher regional court, Germany)
P.O.	Procedural Order

p(p).	page(s)
para(s).	paragraph(s)
Q&A	Questions and Answers
Resp.	Respondent
SARL	Société à responsabilité limitée (limited liability company, France)
SAS	Société par actions simplifiée (simplified joint-stock company, France)
sec.	section
supra	see above
U.S.(A.)	United States of America
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US$	United States Dollar(s)
v	versus (against)
Vol.	Volume
ZPO	Zivilprozessordnung (code of civil procedure, Germany)

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ICSID

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HKIAC 2013 Rules	2013 Administered Arbitration Rules, Hong Kong International Arbitration Centre (HKIAC) of 1 November 2013
HKIAC 2018 Rules	2018 Administered Arbitration Rules, Hong Kong International Arbitration Centre (HKIAC) of 01 November 2018
IBA Rules	2010 IBA Rules on the Taking of Evidence in International Arbitration, International Bar Association (IBA)
INCOTERMS	2010 International Commercial Terms, International Chamber of Commerce (ICC)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958
The Hague Principles	Principles on Choice of Law in International Commercial Contracts of 19 March 2015

TransLex-Principles	TransLex Principles, Center for Transnational Law (CENTRAL)
UNCITRAL Model Law/ DAL	UNCITRAL Model Law on International Commercial Arbitration of 07 July 2006
UPICC/MCL	UNIDROIT Principles of International Commercial Contracts 2016

STATEMENT OF FACTS

1. **Black Beauty Equestrian** (*hereinafter Black Beauty or RESPONDENT*) and **Phar Lap Allevamento** (*hereinafter CLAIMANT*) are **the Parties** to this arbitration.
2. Our client, Black Beauty, is a company located in Equatoriana. It is highly acclaimed for its broodmare lines. Three years ago, Black Beauty established a racehorse stable and has since become a rising star in this field.
3. CLAIMANT owns a stud farm located in Mediterraneo and is well-known for its expertise in the field of racehorse breeding and artificial insemination.
4. The Parties first came into contact at Equestrian World in **2016**. On **21 March 2017**, our client approached CLAIMANT to acquire 100 doses of frozen semen from Nijinsky III, a racehorse from CLAIMANT's breeding programme. On **24 March 2017**, CLAIMANT responded to this inquiry and offered to provide the frozen semen in several instalments EXW. On **28 March 2017**, our client objected to EXW delivery and suggested DDP delivery. Furthermore, it rejected CLAIMANT's condition to submit disputes to the domestic courts of Mediterraneo. Instead, our client suggested submitting disputes to Equatorianean courts.
5. On **31 March 2017**, CLAIMANT agreed to DDP delivery. At the same time, it objected to the jurisdiction of the Equatorianean courts and proposed arbitration in Mediterraneo. Mr. Antley, our client's main negotiator, rejected this proposal on **10 April 2017** and instead suggested arbitration in Equatoriana. He also presented a first draft of the arbitration agreement. This draft provided for the arbitration agreement to be governed by the law of Equatoriana, *i.e.* the law of the seat of arbitration. **The day after**, CLAIMANT accepted this proposal with an amendment as to the seat of arbitration, suggesting Danubia as a neutral country instead.
6. On **12 April 2017**, Mr. Antley and Ms. Napravnik, CLAIMANT's main negotiator, were involved in a serious car accident and became unable to negotiate the final details of the contract. For the time being, they had to be replaced by Mr. Julian Krone on behalf of our client and Mr. John Ferguson for CLAIMANT.
7. On **25 April 2017**, Ian Bouckaert, who during his campaign had advocated for protectionist measures regarding the agriculture sector of Mediterraneo, was elected as President of Mediterraneo. He assigned Ms. Cecil Frankel, one of the most ardent critics of free trade and an outspoken protectionist, as his "superminister" for agriculture, trade and economics on **5 May 2017**.
8. On **6 May 2017**, the Parties concluded the Frozen Semen Sales Agreement (*hereinafter FSSA*). They agreed on the delivery of 100 doses of frozen semen for a purchase price of US$ 10,000,000, to be paid in two instalments. The doses were to be delivered in three instalments. CLAIMANT despatched

the first 25 doses on **20 May 2017**. The second instalment of 25 doses was despatched on **3 October 2017**.

9. In **November 2017**, the President of Mediterraneo began to implement his protectionist campaign promises by imposing a 25% tariff on foreign agricultural goods. In retaliation, the Government of Equatoriana announced a 30% tariff on agricultural goods effective from **15 January 2018**.
10. On **20 January 2018**, Ms. Napravnik, on CLAIMANT's behalf, wrote an e-mail to Mr. Shoemaker, a veterinary at Black Beauty who is responsible for its racehorse breeding programme. She informed him that the 30% tariff also applied to frozen horse semen and, therefore, affected the final shipment. On **21 January 2018**, Mr. Shoemaker called Ms. Napravnik to discuss CLAIMANT's request for an increased payment due to the tariff. Mr. Shoemaker emphasised that he was not familiar with the details of the FSSA and could not consent to any additional payments. After this call, Ms. Napravnik authorized the last shipment, which was despatched on **23 January 2018**.
11. On **12 February 2018**, the Parties met to negotiate an adaptation of the purchase price. During these renegotiations, CLAIMANT insinuated that our client had breached the contract by reselling some of the doses. Due to these accusations, our client terminated the renegotiations. On **31 July 2018**, CLAIMANT issued its Notice of Arbitration. Black Beauty issued its Answer to the Notice of Arbitration on **24 August 2018**.
12. On **2 October 2018**, CLAIMANT offered to submit evidence in form of a Partial Interim Award stemming from another arbitration in which our client is involved. CLAIMANT has arranged to buy the documents for US$ 1000 from a company which provides inside information on the horseracing industry. This company had obtained the Award either from two of our client's former employees or from hackers who had infiltrated our client's computer system. Black Beauty objected to the submission of the evidence on **3 October 2018**.
13. During the telephone conference on **4 October 2018**, the Parties agreed to conduct the present proceedings in accordance with the HKIAC 2018 Rules.

ISSUES

I. The Arbitral Tribunal lacks jurisdiction to adapt the FSSA. [**FIRST ISSUE**]

II. CLAIMANT is not entitled to submit evidence from our client's other arbitration. [**SECOND ISSUE**]

III. CLAIMANT is not entitled to an adaptation of the contract, neither pursuant to Clause No. 12 FSSA, nor pursuant to Art. 79(1) CISG, nor pursuant to Art. 6.2.3 MCL. [**THIRD ISSUE**]

SUMMARY OF ARGUMENT

14. **I. The Arbitral Tribunal lacks jurisdiction to adapt the FSSA.** The arbitration agreement is governed by the law of Danubia. The choice of law provision in Clause No. 14 FSSA does not extend to the arbitration agreement. Rather, the Parties intended to apply the law of the seat of arbitration, *i.e.* the law of Danubia, to the arbitration agreement. Furthermore, the closest connection test also illustrates that the law of the seat of arbitration determines the law applicable to the arbitration agreement. Under Danubian law, a tribunal is only empowered to adapt a contract if expressly authorized by the parties. Since the Parties did not expressly authorize the Tribunal in the FSSA, it does not have the power to adapt the contract. Even if the Tribunal were to apply Mediterranean law to the arbitration agreement, the Tribunal would not be empowered to adapt the contract. This is due to the Parties' mutual intent not to empower the Tribunal, which is underlined by the wording of Clause No. 15 FSSA. [**FIRST ISSUE**]
15. **II. CLAIMANT is not entitled to submit evidence from RESPONDENT's other arbitration.** The Tribunal should exclude the evidence CLAIMANT intends to submit since it was obtained unlawfully. Its admission would thus infringe on the principle of procedural fairness. In addition, it would violate the confidential nature of arbitration. Finally, the evidence is neither material nor relevant to the present case since it originates from RESPONDENT's other arbitration, which differs factually and legally from the present case. Our client further emphasizes that a joinder would not be in the Parties' interest as it contradicts the purpose of an efficient proceeding. [**SECOND ISSUE**]
16. **III. CLAIMANT is not entitled to an additional payment in the amount of US$ 1,250,000 resulting from an adaptation of the FSSA.** The imposition of the tariff does not constitute hardship in the sense of Clause No. 12 FSSA. It is neither an unforeseen event comparable to additional health and safety requirements nor does it fundamentally alter the equilibrium of the FSSA. Furthermore, CLAIMANT assumed the risk of the imposition of the tariff by agreeing on DDP. Even if the Tribunal were to find that the imposition of the tariff constitutes hardship in the sense of Clause No. 12 FSSA, the clause does not provide for contract adaptation as the remedy.
17. Further, CLAIMANT is not entitled to contract adaptation pursuant to Art. 79(1) CISG, as the CISG does not govern hardship. Even if it did, the Parties implicitly derogated from its application in accordance with Art. 6 CISG. Assuming *arguendo* that there was no derogation, the imposition of the tariff does not constitute an impediment beyond CLAIMANT's control in the sense of Art. 79(1) CISG. Irrespectively, Art. 79(1) CISG does not provide the remedy of contract adaptation.
18. Furthermore, CLAIMANT is not entitled to contract adaptation pursuant to the Mediterranean Contract Law (*hereinafter MCL*), as the CISG takes precedence over domestic law. Even if the MCL were applicable, the prerequisites of Art. 6.2.2 MCL are not fulfilled. [**THIRD ISSUE**]

FIRST ISSUE: THE TRIBUNAL LACKS JURISDICTION TO ADAPT THE FSSA

19. Contrary to CLAIMANT's contention [*Memo. for Cl., para. 16*], the Tribunal lacks jurisdiction to adapt the FSSA under the arbitration agreement in Clause No. 15 FSSA. Therefore, our client respectfully requests the Tribunal to dismiss CLAIMANT's request for contract adaptation.

20. The Parties chose Danubia as the seat of arbitration [*Cl. Ex. No 5*]. Therefore, the Danubian Arbitration Law (*hereinafter DAL*), which is a verbatim adoption of the UNCITRAL Model Law with the 2006 amendments [*P.O. No. 1, para. 4*], is the *lex arbitri* applicable to the present proceedings [*cf. Redfern/Hunter, para. 3.37*]. Within the DAL, the principle of *Kompetenz-Kompetenz* is incorporated in Art. 16(1) DAL, which reads: "The arbitral tribunal may rule on its own jurisdiction". Thus, the Tribunal has the jurisdiction to rule on its own jurisdiction.

21. Contrary to CLAIMANT's assertion [*Memo. for Cl., paras. 17ff.*], the arbitration agreement is governed by Danubian law. Under Danubian law, arbitral tribunals may only adapt a contract if there is an express authorization to that effect in the contract. Since the FSSA does not contain such an authorization, the Tribunal lacks jurisdiction to adapt the contract (**A.**). Even if the Tribunal were to decide that the law of Mediterraneo is applicable to the arbitration agreement, the Tribunal would still not have the power to adapt the FSSA (**B.**).

A. Since Danubian law is applicable to the arbitration agreement, the Tribunal lacks jurisdiction to adapt the FSSA

22. Whereas it is undisputed between the Parties that the law of Mediterraneo governs the Sales Agreement in the FSSA, the Parties disagree on which law governs the arbitration agreement in Clause No. 15 FSSA.

23. CLAIMANT asserts that the choice of law clause in Clause No. 14 FSSA extends to the arbitration agreement and that the arbitration agreement is, therefore, also governed by the law of Mediterraneo [*Memo. for Cl., paras. 17ff.*]. Clause No. 14 FSSA reads:

> "This *Sales Agreement* shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)." [*emphasis added*]

24. CLAIMANT's assertion is without merit. RESPONDENT will demonstrate that the arbitration agreement is governed by the law of the seat of arbitration, *i.e.* the law of Danubia (**I.**). Under Danubian law, a tribunal may only adapt a contract if expressly authorized by the parties [*P.O. No. 2, para. 36*]. Since the FSSA does not contain such an express authorization, the Tribunal is not empowered to adapt the FSSA (**II.**).

I. The law of Danubia is applicable to the arbitration agreement

25. The arbitration agreement in Clause No. 15 FSSA is governed by Danubian law. By submitting the Sales Agreement to the law of Mediterraneo, the Parties did not implicitly agree to apply Mediterranean law to the arbitration clause.

26. Pursuant to the doctrine of separability, an arbitration clause is considered to be separate from the main contract [*Redfern/Hunter, para. 2.101; Storme/De Ly, p. 78; Feehily, p. 355; Raymond Gosset v Frère Carapelli; Bremer Vulkan Schiffbau v South India Shipping Corp. Ltd.*]. This doctrine is expressed in both the applicable arbitration law and the applicable arbitration rules. Pursuant to Art. 16(1) DAL as well as Art. 19(2) HKIAC Rules, "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". The arbitration agreement is thus completely autonomous from the main contract. Hence, the choice of law clause for the main contract does not automatically extend to the arbitration clause [*Born, p. 517; Fouchard/Gaillard/Goldman, para. 412; Várady et al., p. 122*].

27. In the present case, the choice of law provision in Clause No. 14 FSSA does not extend to the arbitration agreement in Clause No. 15 FSSA (**1.**). Instead, the contract negotiations reveal the Parties' intent to apply the law of the seat of arbitration to the arbitration agreement, *i.e.* the law of Danubia (**2.**). Even if the Tribunal were to find that the Parties' mutual intent cannot be determined unambiguously, it should apply Danubian law in accordance with the closest connection test (**3.**).

1. The choice of law provision does not extend to the arbitration agreement

28. Contrary to CLAIMANT's assertion [*Memo. for Cl., paras. 17, 27*], the choice of law provision in Clause No. 14 FSSA does not apply to the arbitration agreement. This is evidenced by the negotiations of the FSSA (**a.**) as well as by the wording and structure of Clauses No. 14 and 15 FSSA (**b.**).

a. The negotiations of the FSSA reveal that the Parties were conscious of the option to apply different laws to the Sales Agreement and the arbitration clause

29. The negotiations leading up to the conclusion of the FSSA evidence the Parties' intention to apply different laws to the Sales Agreement and the arbitration clause.

30. CLAIMANT's contention that the law governing the Sales Agreement extends to the arbitration agreement [*Memo. for Cl., paras. 17, 27*] is without merit since the Parties specifically discussed a distinct choice of law provision for the arbitration agreement.

31. The Parties used the HKIAC model clause as the template for their arbitration clause [*Resp. Ex. No. 2*]. This model clause explicitly includes the option to indicate the law applicable to the arbitration agreement, which may differ from the law applicable to the main contract

[*www.hkiac.org/arbitration/model-clauses*]. Our client made use of this option and suggested to apply the law of the seat of the arbitration to the arbitration agreement [*Resp. Ex. No. 1*].

32. Thus, the Parties were conscious of the option of applying different laws to the sales agreement and the arbitration agreement.

b. The wording and structure of the clauses illustrate that Mediterranean law applies only to the main contract

33. The wording and structure of the choice of law clause and the arbitration agreement further evidence that Mediterranean law applies only to the main contract but not to the arbitration agreement.

34. First, the choice of law clause for the Sales Agreement (Clause No. 14 FSSA) is systematically situated before the arbitration agreement (Clause No. 15 FSSA), which is the final clause of the FSSA. If the Parties had intended for the arbitration agreement to be governed by the choice of law clause, they would have situated the former before the latter. Therefore, the order of the clauses highlights that the choice of Mediterranean law does not extend to the arbitration agreement.

35. Second, the wording of the clauses demonstrates that Mediterranean law only applies to the Sales Agreement. This becomes apparent when comparing Clauses No. 14 and 15 FSSA. The choice of law provision in Clause No. 14 FSSA refers only to the "Sales Agreement", which does not encompass the separable arbitration agreement. In contrast, Clause No. 15 FSSA contains the broader term "contract" and thereby refers to the entire FSSA.

36. Therefore, Clause No. 14 FSSA is not applicable to the arbitration agreement as the arbitration agreement is not part of the "Sales Agreement". Hence, the arbitration agreement is not governed by the law of Mediterraneo.

2. The Parties intended to apply the law of Danubia to the arbitration agreement

37. The Parties intended to apply Danubian law to the arbitration agreement. It is widely accepted in international arbitration that, absent an express choice of law provision for the arbitration agreement, the law of the seat of arbitration governs the arbitration agreement (**a.**). In the present case, this is confirmed by the negotiations leading up to the conclusion of the FSSA (**b.**).

a. Absent an express provision, the law of the seat of arbitration governs the arbitration agreement

38. The Parties' choice for Danubia to be the seat of arbitration determines that the law of Danubia governs the arbitration agreement. Thus, contrary to CLAIMANT's assertion [*Memo. for Cl., para. 25*], the applicable law does not "remain a mystery" [*ibid.*].

39. In the absence of an express choice of law provision regarding the arbitration agreement, the choice of a seat of arbitration is widely accepted as an indirect choice of the law applicable to the arbitration agreement [*Fouchard/Gaillard/Goldmann, para. 430; Lew/Mistelis/Kröll, para. 6.61; Bernardini, p. 201; www.trans-lex.org/973000 (Commentary); ICC Case No. 5730*]. The presumption that the seat of arbitration determines the law applicable to the arbitration agreement is also manifested in Art. 36(1)(a) DAL as well as in Art. V(1)(a) NYC.

40. In its relevant parts, Art. 36(1) DAL reads:

> "Recognition or enforcement of an arbitral award […] may be refused […] if […] the said agreement is not valid under the law to which the parties have subjected it or*, failing any indication thereon, under the law of the country where the award was made*" [*emphasis added*].

41. Art. V(1) NYC reads:

> "Recognition and enforcement of the award may be refused […] if […] the said agreement is not valid under the law to which the parties have subjected it or, *failing any indication thereon, under the law of the country where the award was made* […]" [*emphasis added*].

42. The choice of law for the main contract in and of itself does not constitute an indication as to which law governs the arbitration agreement in accordance with Art. 36(1) DAL and Art. V(1) NYC. A choice of law clause for the main contract determines which law is applicable to the substantive part of the dispute. However, the nature and purpose of the arbitration agreement, which is a procedural clause aimed at dispute resolution, is different from the nature and purpose of the substantive sales contract [*van den Berg, p. 293; Berger, Applicable Law, p. 319*]. Due to the different character of the arbitration agreement, the choice of substantive law does not indicate which law governs the arbitration agreement. Therefore, according to Art. 36(1)(a) DAL and Art. V(1)(a) NYC, the law of the main contract is only applicable to the arbitration agreement if expressly stated [*cf. van den Berg, p. 293*].

43. In the absence of such an express statement, the arbitration agreement is governed by "the law of the country where the award was made". The award is deemed to have been made at the seat of arbitration [*Redfern/Hunter, para. 3.14; Solomon in Balthasar, para. 209*]. Hence, if a contract contains both a general choice of law clause and a choice of a seat of arbitration, the law of the seat prevails over the choice of law for the main contract [*van den Berg, p. 293; Schlosser in Stein/Jonas, p. 479; Zöller, Sec. 1029, para. 118*].

44. As the seat of arbitration is Danubia, the arbitration agreement is governed by the law of Danubia in accordance with Art. 36(1)(a) DAL as well as Art. V(1)(a) NYC.

b. The negotiations of the FSSA confirm that the law of the seat of arbitration was to govern the arbitration agreement

45. An interpretation of the FSSA pursuant to Art. 8 CISG confirms the Parties' intention to apply the law of the seat of arbitration to the arbitration agreement.

46. Pursuant to Clause No. 14 FSSA, the Parties chose Mediterranean law including the CISG to govern their contract. Therefore, the CISG is also to be applied in order to determine whether the Parties intended to apply this choice of law provision to their arbitration agreement.

47. Under the subjective approach of Art. 8(1) CISG, statements of a party "are to be interpreted according to [its] intent where the other party knew or could not have been unaware what that intent was." If an intent in the sense of Art. 8(1) CISG cannot be determined, the agreement has to be interpreted according to Art. 8(2) CISG [*Saenger in Ferrari/Kieninger/Mankowski, Art. 8, para. 3*]. According to the objective approach set out in this provision, statements of a party "are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Regardless of whether the subjective or objective approach is applied, according to Art. 8(3) CISG, "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices, which the parties have established between themselves, usages and any subsequent conduct of the parties."

48. When interpreting the FSSA in accordance with this provision, it becomes apparent that the Parties intended to apply Danubian law to the arbitration agreement:

49. First, Mr. Antley, our client's main negotiator, noted in his negotiation file after his last meeting with CLAIMANT's negotiator that the "neutral venue and applicable law" had to be clarified "in [the] arbitration clause" [*Resp. Ex. No. 3*]. "Neutral" refers to both the venue and the law applicable to the arbitration clause. Due to their mutual wish for neutrality, the Parties agreed on Danubia as the venue [*Resp. Ex. No. 2*]. Since CLAIMANT is located in Mediterraneo, Mediterranean law is not neutral in this case. Therefore, only the application of Danubian law would correspond with the parties' intention to provide for neutral arbitral proceedings.

50. Second, CLAIMANT alleges that there was never any indication during the negotiations that RESPONDENT intended to apply Danubian law to the arbitration agreement [*Memo. for Cl., para. 20*]. It is true that our client did not specifically suggest Danubian law to govern the arbitration agreement. However, it proposed to link the law applicable to the arbitration agreement to the seat of arbitration by suggesting Equatoriana as the seat of arbitration and Equatorianean law to govern the arbitration agreement [*Resp. Ex. No. 1*]. When responding to this proposal, CLAIMANT only changed the seat from Equatoriana to Danubia [*ibid.*]. It did not, however, object to RESPONDENT's proposal that the seat of arbitration should determine the law applicable to the arbitration

agreement [*ibid.*]. Therefore, CLAIMANT accepted our client's suggestion to link the seat of arbitration and the law applicable to the arbitration agreement. Thus, when the Parties finally agreed on Danubia as the seat of arbitration, they implicitly agreed on the law of Danubia to govern the arbitration agreement.

51. As the contract negotiations of the FSSA reveal, the Parties implicitly agreed on Danubian law to govern the arbitration agreement. Thus, an interpretation pursuant to Art. 8 CISG shows that the arbitration agreement is governed by the law of Danubia.

3. Even if the Parties' mutual intention could not unambiguously be determined, Danubian law is applicable pursuant to the closest connection test

52. Even if the Tribunal were to find that the Parties' intent regarding the law governing the arbitration agreement cannot be determined unambiguously, the Tribunal should apply Danubian law pursuant to the closest connection test.

53. The closest connection test is the most prominent conflict of laws rule in international arbitration and may be regarded as a transnational legal principle [*Berger, Private Dispute Resolution, para. 24-18; Jones in Kaplan/Moser, p. 308; www.trans-lex.org/971000 (Commentary)*]. Therefore, the Tribunal should apply it in order to determine which law is applicable to the arbitration agreement. According to this test, in the absence of any choice of law by the parties, the law that is most closely connected to the arbitration should be applied to the arbitration agreement. The arbitration agreement usually has the closest and most real connection to the law at the seat of arbitration [*Russel on Arbitration, para. 2-121; Berger, Applicable Law, p. 315; Bernardini, p. 201*]. The arbitration agreement is, therefore, more closely connected with the seat of arbitration than with the law that governs the underlying contract [*C v D; Born, p. 518*]. This was confirmed by the English High Court in *Abuja Int'l Hotels Ltd. v Meridien SAS*. In that case, the choice of law clause provided for the application of Nigerian law. However, as the seat of arbitration was London, the Court held that the arbitration agreement had the closest and most real connection to English law. Therefore, the Court applied English law to the arbitration agreement.

54. The arbitration agreement is especially more closely connected to the seat in cases where the domestic law of one of the parties' governs the main contract and the seat of arbitration provides for a neutral country [*Born, p. 518*]. This is because a neutral legal system gives both parties a fair chance to present their case and allows neither party to gain an advantage in the proceedings, which is what reasonable parties would aim for [*Born, p. 75*]. In the case at hand, Danubia is a neutral country for both Parties. Therefore, Danubian law is a neutral law and neither Party gains an advantage.

55. Thus, Danubia has the closest and most real connection to the arbitration agreement. Accordingly, the law of Danubia is applicable to the arbitration agreement.

II. The Tribunal does not have the power to adapt the FSSA since there is no express authorization in the FSSA

56. There is consistent jurisprudence in Danubia that Art. 28(3) DAL contains a general standard pursuant to which a tribunal may only adapt a contract if this specific power has been conferred on it expressly [*P.O. No. 2, para. 36*]. Such an express conferral of powers is not included in the FSSA.

57. CLAIMANT, however, tries to circumvent the lack of an express authorization in the FSSA by, first, insinuating that the Parties implicitly agreed during the contract negotiations to confer powers on the Tribunal. Second, CLAIMANT argues that, according to the *contra proferentem*-principle, the arbitration clause would have to be interpreted against our client. Finally, CLAIMANT tries to circumvent the lack of authorization by labelling the restrictive interpretation of arbitration agreement under Danubian law "archaic" [*Memo. for Cl., para. 36*].

58. First, in its attempt to establish the authorization of the Tribunal under Danubian law, CLAIMANT refers to the contract negotiations [*Memo. for Cl., paras. 32ff.*]. However, under Danubian law, arbitration agreements must be interpreted in accordance with the "four corners rule" [*ANA, para. 16*]. Pursuant to this rule, any evidence outside the wording of the contract cannot be used to interpret the contract if the wording is clear [*ibid.*]. In the case at hand, the arbitration clause does not contain an express authorization which would empower the Tribunal to adapt the contract. Thus, the wording of the arbitration clause is clear and no extraneous evidence may be relied on to interpret the clause. CLAIMANT, however, disregards the "four corners rule" by asserting that the Parties implicitly agreed that the Tribunal should be empowered to adapt the contract if necessary [*Memo. for Cl., para. 38*]. While the Parties discussed this point, they did not make the final decision that the Tribunal should have the power to adapt the FSSA and did not include an express authorization in the FSSA. CLAIMANT furthermore alleges that the Parties provided such a conferral of powers in the hardship clause [*Memo. for Cl., para. 41*]. Yet, Clause No. 12 FSSA neither provides for contract adaptation as a remedy [*infra paras. 150ff.*] nor designates the jurisdiction regarding such matters to the Tribunal. Thus, the Parties did not implicitly agree to empower the Tribunal to adapt the contract.

59. Second, CLAIMANT argues that, pursuant to the *contra proferentem*-principle, any ambiguity regarding the scope of the arbitration agreement must be interpreted to the detriment of our client [*Memo. for Cl., para. 39*]. It is true that this principle prescribes that any ambiguity in a clause must be resolved against the party that provided it [*Klingler/Parkhomenko/Salonidis, p. 241; Persimmon Homes v Ove Arup*

and Partners]. However, in commercial contracts negotiated between parties of equal bargaining power, the *contra proferentem*-rule has a very limited role [*Persimmon Homes v Ove Arup and Partners; K/S Victoria Street v House of Fraser*]. Therefore, the rule remains only as a last resort where the interpretation of the meaning of the words and the commercial context have not led to any result [*ibid.*]. The FSSA is a commercial contract and the Parties were negotiating partners with equal bargaining powers. Thus, the *contra proferentem*-rule may only be applied as a method of last resort. Even if the *contra proferentem*-rule were to be applied, it would have to be applied to the detriment of CLAIMANT, since it was CLAIMANT who provided the arbitration clause that was ultimately included into the contract [*Resp. Ex. No. 2*].

60. Finally, CLAIMANT asserts that the restrictive interpretation of arbitration agreements under Danubian law "is archaic and does not apply in contemporary decisions" [*Memo. for Cl., para. 36*]. However, this general assertion is immaterial to the present dispute as it ignores consistent and long-standing jurisprudence on the DAL [*P.O. No. 2, para. 36*]. It is beside the point whether a broad interpretation is applied in decisions in other countries or by other tribunals and whether "many jurisdictions hold […] that arbitration agreements should be interpreted expansively" [*Memo. for Cl., para. 36*]. The only jurisdiction that is of relevance to the interpretation of the present arbitration agreement is Danubia. In Danubia, it is well established that an express authorization is necessary to grant an arbitral tribunal the power to adapt a contract [*P.O. No. 2, para. 36*].

61. In conclusion, the arbitration agreement is governed by the law of Danubia. Under Danubian law, tribunals may only adapt a contract if they are expressly authorized to do so. Since the FSSA does not contain such an express authorization, the Tribunal should find that it does not have jurisdiction to adapt the FSSA.

B. Even if the law of Mediterraneo governed the arbitration agreement, the Tribunal would not be empowered to adapt the FSSA

62. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 31*], even under the broad interpretation of arbitration agreements pursuant to Mediterranean law, the Tribunal would not have jurisdiction to adapt the FSSA. It cannot be derived from the contract negotiations that the Parties intended to empower the Tribunal to adapt the FSSA (**I.**). To the contrary, the narrow wording of Clause No. 15 FSSA evidences the Parties' intent not to empower the Tribunal (**II.**).

I. The Parties did not intend to empower the Tribunal to adapt the FSSA

63. CLAIMANT alleges that it can be derived from the negotiations of the FSSA that the Parties intended to empower the Tribunal to adapt the contract [*Memo. for Cl., paras. 32f.*]. Such a conclusion, however, cannot be drawn from the contract negotiations.

64. According to Ms. Napravnik's witness statement, the Parties discussed whether the Tribunal should have the power to adapt the FSSA [*Cl. Ex. No. 8*]. While it is true that the Parties discussed the issue, they did not reach a final decision. This is evidenced by the note Mr. Antley prepared after a meeting with CLAIMANT, which lists the possible "[c]onnection of hardship clause with arbitration clause" as the subject of "further negotiations" [*Resp. Ex. No. 3*]. Therefore, the Parties' mutual intent regarding the Tribunal's power to adapt the FSSA can neither be derived unambiguously from Ms. Napravnik's witness statement nor from the note Mr. Antley left. The fact that the Parties did not reach a final decision is also reflected in Mr. Krone's witness statement. Mr. Krone, who was responsible for the final negotiations of the FSSA as Mr. Antley's successor, stated that if he had known the meaning of the note, he "would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion" [*ibid.*].

65. Thus, contrary to CLAIMANT's assertion [*Memo. for Cl., paras. 32f.*], it cannot be derived from the contract negotiations that the Parties intended to empower the Tribunal to adapt the FSSA.

II. The wording of Clause No. 15 FSSA does not empower the Tribunal to adapt the contract

66. Under Mediterranean law, a standard arbitration agreement suffices to grant an arbitral tribunal the power to adapt contracts. However, contrary to CLAIMANT's assertion [*Memo. for Cl., para. 34*], the arbitration agreement in Clause No. 15 FSSA is narrower than a standard arbitration agreement. Thus, the Tribunal does not have jurisdiction to adapt the FSSA.

67. During the negotiations of the FSSA, the Parties used the HKIAC model clause as a template [*Resp. Ex. No. 2*]. The HKIAC model clause states in its relevant parts:

> "Any dispute, controversy, difference or claim *arising out of or relating to this contract*, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration […]." [*emphasis added*]

68. However, the Parties significantly reduced the wording and the scope of the model clause. In contrast to the model clause, Clause No. 15 FSSA reads:

> "Any *dispute arising out of this contract*, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration […]." [*emphasis added*]

69. Thus, Clause No. 15 FSSA only refers to "disputes arising out of" the FSSA and does not cover disputes "relating to" the contract. The term "relating to this agreement" is characterized as a "broad arbitration clause" [*Prima Paint v Flood & Conklin*], whereas the wording "arising out of" must be interpreted narrowly [*Tracer Research Corp. v Nat'l Environmental Service; Texaco v American*

Trading Company]. If the arbitration agreement only refers to "disputes arising out of the contract", the jurisdiction of the tribunal is limited "to the interpretation of the contract and matters of performance" [*In re Kinoshita*]. However, contract adaptation goes beyond the mere interpretation or matters of performance of the original contract. Instead, the tribunal would be required to rewrite the existing contract [*Berger, Power of Arbitrators, p. 2*; *Rubin/Nelson, pp. 29, 36f.*]. Thus, due to the narrow wording of Clause No. 15 FSSA, the Tribunal does not have jurisdiction to adapt the FSSA.

70. Therefore, the Tribunal would not be empowered to adapt the FSSA even if the law of Mediterraneo were applicable.

***

71. In conclusion, the Tribunal should deny its jurisdiction to adapt the FSSA. The law of Danubia is applicable to the arbitration agreement. Under Danubian law, a tribunal is only empowered to adapt a contract if expressly authorized. Since the FSSA lacks such an express authorization, the Tribunal does not have jurisdiction to adapt the contract. Even if the Tribunal were to find that the arbitration agreement is governed by Mediterranean law, it would not be empowered to adapt the FSSA.

SECOND ISSUE: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION

72. RESPONDENT, in the interest of ensuring a fair and equal arbitration, respectfully requests the Tribunal not to admit the unlawfully obtained evidence CLAIMANT intends to submit.
73. First, the Partial Interim Award from our client's other arbitration, which CLAIMANT plans to submit, is not admissible as evidence (**A.**). Second, RESPONDENT emphasizes that a joinder as a procedural ploy to introduce the evidence would not be in either of the Parties' interest (**B.**).

A. The evidence CLAIMANT intends to submit is not admissible

74. The Tribunal should find that the evidence CLAIMANT intends to submit is not admissible in the present case. The Tribunal is given the discretionary power to rule on the admissibility of evidence pursuant to Art. 22.2 HKIAC 2018 Rules. This provision states:

> "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence."

75. This power equally follows from Art. 19(2) DAL, which provides in its relevant parts:

> "The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight on any evidence."

76. In applying its discretionary power, the Tribunal should seek guidance from international arbitral practice. In international arbitral practice, tribunals frequently refer to the IBA Rules on the Taking of Evidence (*hereinafter IBA Rules*), as they provide for an efficient, economical and fair arbitration [*Kubalczyk, p. 98; IBA Rules, Preamble; Report IBA*]. Hence, the Tribunal should follow the universal standard and apply the IBA Rules.
77. Our client requests the Tribunal to make use of its discretionary power and exclude the evidence concerned for the following reasons: first, admitting the evidence in question would infringe on the principle of procedural fairness (**I.**). Second, admitting the evidence would violate the confidential nature of arbitration (**II.**). Finally, the evidence is neither material nor relevant to the present case (**III.**).

I. Admitting the evidence would infringe on the principle of procedural fairness

78. The Tribunal should exclude the evidence CLAIMANT intends to submit as admitting such unlawfully obtained evidence would infringe on the indispensable principle of due process and procedural fairness.
79. In international arbitration, it "is common ground that any international commercial arbitration regime must encompass integrity and fairness, […] and respect essential elements of due process" [*Cohen/Morill, p. 982*]. Given the significance of due process, the parties must be granted a proceeding "untainted by illegal conduct" [*ibid.*].
80. Accordingly, in *EDF v Romania* it was found that

> "the Tribunal should refuse to admit evidence into the proceedings if […] there are good reasons to believe that those principles of good faith and procedural fairness have not been respected." [*EDF v Romania; cf. Methanex v U.S.A.; Libananco Holdings v Turkey*]

81. This is also expressed in Art. 9.2(g) IBA Rules, according to which an arbitral tribunal should exclude evidence for "considerations of […] fairness or equality of the Parties".
82. It is thus within this Tribunal's discretionary power to decide "whether a taint of illegality attached to evidence is of such a nature as to render it inadmissible" [*cf. O'Malley, para. 9.119*].
83. In the present case, the award was stolen either by two of our client's former employees or through infiltration of our client's computer system by hackers, and thus obtained illicitly (**1.**). Furthermore, CLAIMANT's connection to the illicitly obtained evidence is not as remote as it makes it out to be (**2.**). Thus, the evidence is tainted with illicit and illegal conduct and should be excluded.

1. The evidence was obtained illicitly

84. The evidence CLAIMANT plans to submit was obtained illicitly. A first investigation by our client revealed that the documents concerned have been illegally obtained either from two of its former employees (**a.**) or due to a hack of our client's computer system (**b.**) [*Resp. e-mail of 3 Oct. 2018*]. In

either scenario, the way in which the documents came to light is tainted by illicit conduct and the documents should, therefore, be excluded from evidence.

a. Scenario 1 – Two former employees breached their confidentiality obligations

85. The investigation revealed that two former employees of RESPONDENT's may have disclosed the crucial information in breach of their confidentiality obligations *vis-à-vis* our client and the party from RESPONDENT's other arbitration.

86. Both employees had been witnesses in our client's other arbitration before their contracts were terminated in July 2018 [*P.O. No. 2, para. 41*]. They both were under the contractual obligation to keep all information about that arbitration confidential [*ibid.*]. If these two former employees disclosed the documents concerned, they only could have done so in breach of their contractual confidentiality obligation.

b. Scenario 2 – The information was stolen as a result of a cyber intrusion

87. The alternative scenario is that hackers managed to intrude into our client's computer system. Thereby, the hackers were able to retrieve a considerable amount of sensitive data [*Resp. e-mail of 3 Oct. 2018*]. Attacks on computer systems and data thefts constitute "a direct threat to the fair, neutral, and orderly process that underlies all arbitrations and to public trust in the arbitral process" [*Cohen/Morril, p. 994*].

88. Our client stored all the files on its server, which was protected by a firewall [*P.O. No. 2, para. 42*]. Yet, CLAIMANT asserts that our client is to blame for the intrusion into its computer system and the data theft because the firewall was outdated [*Memo. for Cl., para. 46*]. In an act of utter cynicism, CLAIMANT tries to shift the blame for the cyberattack to the victim, our client, and away from the perpetrator. Contrary to CLAIMANT's assertion [*ibid.*], the fact that the firewall was outdated has no impact on the gravity of the cyberattack. It does not neutralise the illegality of the cyberattack itself and does not cleanse the evidence of its stain of illegality. To put it in other words: it is not the owner's use of a door lock which is easy to pick that constitutes the crime of burglary, but the burglar's intentional active deed of intrusion.

89. CLAIMANT, therefore, intentionally confuses the relevant actions when alleging that the evidence was obtained "through [our client's] cybersecurity negligence" [*ibid.*]. CLAIMANT cannot blame our client for having its confidential data stolen. *A fortiori,* CLAIMANT cannot try to use the theft to profit from the information in question; the evidence was obtained by unlawful means and should be excluded.

2. CLAIMANT's connection to the evidence is not as remote as it makes it out to be

90. In its attempt to justify the admission of the evidence, CLAIMANT asserts that the "connection between the CLAIMANT and the Evidence is outstandingly indirect and distant", and that CLAIMANT was not "in any way seeking for the evidence itself" [*Memo. for Cl., para. 49*]. However, RESPONDENT will show that CLAIMANT's connection to the evidence is not as remote as CLAIMANT makes it out to be.

91. First, CLAIMANT is not forthcoming of the fact that it tried to acquire the documents from Mr. Velazquez, a former employee of the other party from our client's other arbitration. Mr. Velazquez had been working for that party until May 2018 [*P.O. No. 2, para. 40*]. CLAIMANT and Mr. Velasquez plotted that he should retrieve the evidence from his former employer [*P.O. No. 2, para. 41*]. When this plan failed, Mr. Velasquez provided CLAIMANT with the address of a company which then promised to sell a copy of the award to CLAIMANT [*ibid.*].

92. Second, CLAIMANT deliberately took advantage of the unlawful conduct that was necessary to steal the documents when it bought the stolen evidence from the company that Mr. Velasquez had recommended. The company has a doubtful reputation, as it is not certain where it gets its information from and it was not willing to disclose its source in the case at hand [*ibid.*]. Despite the company's doubtful reputation, CLAIMANT decided to buy the stolen documents [*ibid.*], thereby endorsing the illicit behaviour by the persons who originally obtained the information.

93. Hence, CLAIMANT's connection to the evidence is not as "indirect and distant" [*Memo. for Cl., para. 49*] as it asserts. On the contrary, CLAIMANT sought the documents concerned from the moment it learned of their existence, even going so far as to promise to pay a company with a "doubtful reputation" to acquire the award [*P.O. No. 2, para. 41*].

94. In conclusion, the evidence is tainted by illicit conduct. Its admission would thus infringe on the principle of procedural fairness. Accordingly, the Tribunal should make use of its discretionary power and find that the "taint of illegality is of such nature as to render [the evidence] inadmissible" [*cf. O'Malley, para. 9.119*]

II. Admitting the evidence would contradict the confidential nature of arbitration

95. Since the award from the other arbitration is confidential, its admission as evidence in these proceedings would contradict the confidential nature of arbitration. As highlighted in *Ali Shipping v Shipyard Trogir*, "confidentiality […] arises as an essential corollary of the privacy of arbitration proceedings".

96. Confidentiality is a paramount characteristic of arbitration and one of the main reasons for parties to choose arbitration over the jurisdiction of domestic courts [*Smeureanu, p. XVI; Redfern/Hunter, para. 1.105; Berger, Private Dispute Resolution, para. 16-76; Esso v Plowman; Dolling-Baker v Merrett*]. The

fundamental need to protect confidentiality in arbitration is furthermore expressed in Art. 9.2(e) IBA Rules. According to Art. 9.2(e) IBA Rules, the arbitral tribunal should exclude any document from evidence on "grounds of commercial or technical confidentiality that [it] determines to be compelling." Therefore, the Tribunal should honour the Parties' legitimate expectation of confidentiality and refrain from admitting the award from our client's other arbitration.

97. Our client's other arbitration is being conducted in accordance with the HKIAC 2013 Rules [*Resp. e-mail of 3 Oct. 2018*]. Art. 42 HKIAC 2013 Rules states in its relevant parts:

> "42.1 Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) *an award made in the arbitration.*
>
> 42.2 The provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, *witness,* secretary of the arbitral tribunal and HKIAC." [*emphasis added*]

98. If, according to the first scenario, two former employees leaked the information, they breached their confidentiality obligations under Art. 42.2 HKIAC 2013 Rules as they were witnesses in the other arbitration [*P.O. No. 2, para. 41*]. Additionally, the award as such is protected pursuant to Art. 42.1 HKIAC 2013 Rules.

99. If, according to the second scenario, the award was stolen during the cyberattack on our client's computer system, the award is protected under Art. 42.1 HKIAC 2013 Rules. Even CLAIMANT admits that the evidence was obtained through an "active or passive breach of confidentiality" [*Memo. for Cl., para. 46*].

100. Thus, the award is confidential pursuant to the HKIAC 2013 Rules. Therefore, the Tribunal should exclude the evidence pursuant to Art. 9.2(e) IBA Rules.

III. The evidence is neither relevant nor material to the present case

101. The evidence is furthermore neither relevant nor material to the present case and should, therefore, be excluded.

102. According to Art. 9.2(a) IBA Rules, evidence should be excluded if it lacks "sufficient relevance to the case or materiality to its outcome". Whereas relevance concerns the general relationship between the evidence and the case, materiality refers to its impact on the outcome of the case [*Born, p. 2362; Pilkov, p. 149; Ashford, para. 3-38*].

103. CLAIMANT asserts that the evidence concerned reveals our client's "actual position on the issue of contract adaptation" [*Memo. for Cl., para. 50*]. However, the two proceedings differ fundamentally in both factual and legal aspects. Therefore, the award from the other arbitration cannot reveal our

client's position on contract adaptation in the present case and is thus neither relevant nor material. The two proceedings are different in the following three aspects:

104. First, in the other arbitration, the effect on the equilibrium of the contract is much more severe than in the present arbitration. In the present arbitration, the tariff only applied to the last shipment and, therefore, only to half the doses delivered under the contract [*NoA, para. 9; Cl. Ex. No. 7*]. Hence, the 30% tariff imposed by the Government of Equatoriana only rendered the overall performance of the FSSA 15% more expensive. In the other arbitration, however, the contract only provided for the delivery of a single mare [*P.O. No. 2, para. 39*]. Therefore, the 25% tariff imposed by the Government of Mediterraneo affected the entire contract, rendering the overall performance 25% more expensive.

105. Second, our client's claim in the other arbitration is based on the ICC Hardship Clause 2003. This clause was explicitly rejected in the negotiation of the FSSA [*ANA, para. 4*]. Instead, the Parties agreed on a much narrower hardship clause [*infra paras. 120ff.*].

106. Finally, the underlying contract in the other arbitration contains the HKIAC model arbitration clause with all additions [*P.O. No. 2, para. 39*] and, therefore, provides the tribunal with a much broader jurisdiction [*supra paras. 66ff.*].

107. For all these reasons, the two arbitration proceedings are not comparable. Consequently, the award from the other arbitration cannot prove our client's "actual position on the issue of contract adaptation" [*Memo. for Cl., para. 50*] in the present case. Hence, the award is neither material nor relevant and should, therefore, not be admitted as evidence.

108. In summary, the evidence CLAIMANT intends to submit was obtained unlawfully and, hence, infringes on the principle of procedural fairness. Furthermore, the evidence is protected by the confidential nature of arbitration and is neither relevant nor material to the present arbitration. Therefore, the Tribunal should exclude the award from evidence.

B. A joinder as a procedural ploy to introduce the evidence would not be in the interest of the Parties'

109. In its e-mail from 2 October 2018, CLAIMANT proposed a joinder [*Cl. e-mail of 2 Oct. 2018*] as a procedural ploy to introduce the evidence. Although CLAIMANT did not propose the joinder again in its memorandum, RESPONDENT emphasizes that it does not agree to the joinder of the other party to the present proceedings pursuant to Art. 27.1 HKIAC 2018 Rules. Thus, as Art. 27.1(b) HKIAC 2018 Rules requires the consent of all parties, the Tribunal may not join the party from the other arbitration.

110. Joint procedures are "intended to permit proceedings to occur more efficiently and to avoid the possibility of inconsistent results" [*Born, p. 2566*]. However, these objectives would not be fulfilled by joining the other party in the present case for two reasons:

111. First, as the two proceedings are factually and legally different from one another [*supra paras. 104ff.*], there is no risk of inconsistent results.

112. Second, the arbitrations are in two different phases of the arbitral procedure. While in RESPONDENT's other arbitration the tribunal has already rendered a Partial Interim Award [*P.O. No. 2, para. 39*], the present arbitration is only in the first written submissions stage. Therefore, the joinder would not be efficient since the present Tribunal would have to acquaint itself with the factual and legal background of the other arbitration. Hence, a joinder would lead to a prolongation of the arbitral proceedings for all parties involved.

113. Thus, joining the other party to the present proceedings would contradict the purpose of the concept of a joinder. Therefore, RESPONDENT clarifies that it does not agree to the joinder pursuant to Art. 27.1(b) HKIAC 2018 Rules.

***

114. In conclusion, RESPONDENT respectfully requests the Tribunal not to admit the Partial Interim Award CLAIMANT intends to submit as evidence. The award is tainted by illicit conduct; thus, its admission would infringe on the principle of due process and procedural fairness. Furthermore, the evidence is protected by the essential confidential nature of arbitrations and neither relevant nor material to the present case. Therefore, the evidence is inadmissible. Additionally, our client emphasizes that a joinder as a procedural ploy to introduce the evidence would not be in the Parties' interest.

THIRD ISSUE: CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT IN THE AMOUNT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE FSSA

115. RESPONDENT respectfully requests the Tribunal to reject CLAIMANT's claim for contract adaptation in the amount of US$ 1,250,000. RESPONDENT will demonstrate that CLAIMANT is not entitled to the additional payment: neither under Clause No. 12 FSSA (**A.**), nor under Art. 79(1) CISG (**B.**), nor under Art. 6.2.3 MCL (**C.**).

A. CLAIMANT is not entitled to contract adaptation pursuant to Clause No. 12 FSSA

116. Clause No. 12 FSSA does not entitle CLAIMANT to an additional payment in the amount of US$ 1,250,000. Contrary to CLAIMANT's assertion [*Memo. for Cl., paras. 62, 64.*], the imposition of the tariff does not constitute hardship in the sense of Clause No. 12 FSSA (**I.**). Even if the Tribunal

were to find that the tariff constitutes hardship in the sense of Clause No. 12 FSSA, Clause No. 12 FSSA does not provide for contract adaptation as the remedy (**II.**).

I. The imposition of the tariff does not constitute hardship in the sense of Clause No. 12 FSSA

117. The imposition of the 30% tariff on agricultural goods does not fall within the scope of Clause No. 12 FSSA. Clause No. 12 FSSA states:

> "Seller shall not be responsible for lost semen shipments or delays in the delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God, *neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*."

118. The imposition of the tariff, however, does not meet the requirements of Clause No. 12 FSSA. First, the imposition of the tariff is not comparable to additional health and safety requirements (**1.**). Second, the imposition of the tariff was not unforeseen (**2.**). Third, the performance of the contract has not become sufficiently more onerous for CLAIMANT (**3.**). Finally, CLAIMANT has assumed the risk of the tariff because the Parties agreed on DDP delivery (**4.**).

119. In determining whether the imposition of the tariff constitutes hardship, the Tribunal should bear in mind that our client only has to convince the Tribunal that one of the requirements is not fulfilled. In contrast, CLAIMANT must prove that every single requirement is met, since it bears the burden of proof according to Art. 22.1 HKIAC 2018 Rules.

1. The imposition of the tariff is not comparable to additional health and safety requirements in the sense of Clause No. 12 FSSA

120. CLAIMANT misrepresents the scope of the hardship clause when alleging that it "cover[s] a vast range of circumstances" [*Memo. for Cl., para. 69*]. On the contrary, the Parties explicitly reduced the scope of Clause No. 12 FSSA to events that are "*comparable*" to "*additional health and safety requirements*" specifically listed in the provision. Thus, contrary to CLAIMANT's assertion, Clause No. 12 FSSA does not "remain an open clause" [*ibid.*] and does not cover all potential hardship scenarios.

121. The imposition of the tariff does not fall within the scope of the hardship clause as it pursues a very different public objective than additional health and safety requirements. Thus, it is not comparable in the sense of Clause No. 12 FSSA (**a.**). Furthermore, the contract negotiations reveal that the Parties did not intend for the hardship clause to be applicable to cases such as the imposition of this tariff (**b.**).

a. The tariff and additional health and safety requirements pursue different public objectives

122. The tariff in question and additional health and safety requirements pursue different public objectives and are thus not comparable in the sense of Clause No. 12 FSSA.

123. Health and safety requirements regarding cross-border transportation of animals are imposed to prevent the transmission of diseases. In order to protect the public from contamination, certain safety precautions must be taken. These include *e.g.* veterinary checks and health certificates. In the event of a sudden outbreak of an infectious disease, additional requirements such as quarantine periods and special tests may also be necessary [*cf. P.O. No. 2, para. 21*].

124. The tariff in question, however, serves a purpose very different from protecting the public from potentially harmful diseases. Rather, it is a demonstration of power by the Government of Equatoriana. The 30% tariff on agricultural goods was imposed in retaliation for the 25% tariff on agricultural goods imposed by the Government of Mediterraneo [*Cl. Ex. No. 6*]. The newly elected President of Mediterraneo, Ian Bouckaert, justified the 25% tariff with an alleged threat to national security. Yet, Mr. Bouckaert had already announced his preference for a protectionist approach to international trade in his election manifesto [*ibid.*]. Thus, his justification for the tariff was widely experienced as a "mockery of the system [rather] than a good faith effort to justify the […] tariffs within the boundaries of the existing system" [*ibid.*]. The Government of Equatoriana reacted promptly by imposing an even more severe tariff of 30% [*ibid.*] instead of solving the dispute amicably. The 30% tariff is thus a weapon in a trade war and used for intimidation. Additional health and safety requirements, in contrast, are intended to prevent the transmission of diseases. Accordingly, as the tariff and additional health and safety requirements pursue very different public objectives, they are not comparable in the sense of Clause No. 12 FSSA.

125. CLAIMANT attempts to demonstrate that the imposition of the tariff falls within the scope of the hardship clause by referencing ICC Case No. 9994 [*Memo. for Cl., para. 68*]. In ICC Case No. 9994, the tribunal held that the governmental regulatory changes in question amounted to *force majeure* even though the clause concerned did not expressly enumerate such events. However, the decision in ICC Case No. 9994 must be distinguished from the present case. The clause in that arbitration was not drafted conclusively, but rather encompassed *force majeure* caused by

> "civil disorders, wars, acts of enemies, acts of God, fire, storm, flood, riot or strikes *or by any other cause* not within the reasonable control of the party". [*emphasis added*]

126. Thus, since Clause No. 12 FSSA is drafted restrictively and only applies to events comparable to health and safety requirements, the decision in ICC Case No. 9994 must be distinguished from the case at hand.

127. Hence, the measures are not comparable in their objective and purpose. Consequently, the tariff does not fall within the scope of Clause No. 12 FSSA.

b. The contract negotiations reveal that the Parties did not intend for the hardship clause to be applicable to cases such as the imposition of this tariff

128. The contract negotiations illustrate that the Parties did not want the hardship clause to apply to cases such as the imposition of this tariff.

129. The Parties agreed on the specific hardship provision in Clause No. 12 FSSA in order to address a past negative business experience CLAIMANT had had. In 2014, CLAIMANT had delivered three mares to a farm in Danubia. Due to a sudden outbreak of foot and mouth disease in Danubia, the Danubian Government imposed additional health and safety requirements to prevent the further spread of the disease. This made expensive additional tests and quarantine for the mares necessary, resulting in high costs for CLAIMANT [*P.O. No. 2, para. 21*]. The Parties, therefore, agreed to include a specific hardship clause into the FSSA in order to protect CLAIMANT from a reoccurrence of its misfortune [*ibid.*]. Since the Parties had these specific risks in mind when they included the hardship clause, not every sovereign act regardless of its objective falls within the scope of Clause No. 12 FSSA under the disguise of a "*comparable event*".

130. The imposition of the tariff is, thus, not comparable to additional health and safety requirements. Consequently, the imposition of the tariff does not constitute hardship in accordance with Clause No. 12 FSSA.

2. The imposition of the tariff is not an unforeseen event in the sense of Clause No. 12 FSSA

131. CLAIMANT asserts that the imposition of the tariff was unforeseen [*Memo. for Cl., para. 69*] without further substantiating this assertion. The imposition of the tariff, however, does not constitute an unforeseen event in the sense of Clause No. 12 FSSA.

132. An event is unforeseen if it was not anticipated or predicted [*www.oxforddictionaries.com/definition/unforeseen*]. When it comes to hardship, the decisive event must have been unforeseen at the time of the conclusion of the contract [*Pereira de Souza Fleury, p. 7*]. The threshold as to what is considered unforeseen is particularly high for parties to international commercial contracts. For such parties, "it is generally much less likely […] that [they] have been unaware of the risk of a remote contingency […], given their presumed professional sophistication" [*www.trans-lex.org/909000 (Commentary); cf. Berger in FS Horn, pp. 4f.; ICC Case No. 1990*].

133. In consideration of the Parties' professional sophistication and the political tensions at the time of the conclusion of the FSSA, the imposition of the tariff cannot be regarded as unforeseen. The

events that ultimately led to the imposition of the tariff began to unfold a few months before the Parties concluded the FSSA: In January 2017, Ian Bouckaert, presidential candidate in Mediterraneo, announced his protectionist electoral platform [*Cl. Ex. No. 6*]. Shortly after he was elected as president, he assigned Ms. Cecil Frankel, a fierce critic of free trade and outspoken protectionist, as his "superminister" for agriculture, trade and economics on 5 May 2018 [*P.O. No. 2, para. 23*]. Thus, when the Parties concluded the FSSA on 6 May 2018, the fear of "a complete unraveling of the international trading system" [*Cl. Ex. No. 6*] already affected the free market and international politics. The possibility of tariffs being imposed and countries acting in retaliation could no longer be ruled out at that time.

134. Accordingly, with regard to the Parties' professional sophistication, the imposition of the tariff cannot be regarded as unforeseen in the sense of Clause No. 12 FSSA.

3. The imposition of the tariff did not make the performance of the contract sufficiently more onerous in the sense of Clause No. 12 FSSA

135. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 69*], the imposition of the 30% tariff did not make CLAIMANT's performance of the contract sufficiently more onerous in the sense of Clause No. 12 FSSA. In light of the fundamental principle of *pacta sunt servanda*, the loss incurred by CLAIMANT in the present case does not suffice to justify hardship.

136. The principle of *pacta sunt servanda* is the foundation of contract law [*Cheng, p. 113; Kull, p. 44; Sapphire Award*]. It prescribes that a valid contract is binding on the parties thereto and requires that in principle "agreements must be kept though the heavens fall" [*Perillo, p. 111*]. Thus, parties must perform their duties under the contract regardless of changes in the contractual circumstances [*Brunner, p. 391; Plate, p. 19; www.trans-lex.org/919000*].

137. Admittedly, the principle of *pacta sunt servanda* is not without exception. One of these exceptions is the principle of hardship [*www.trans-lex.org/919000*]. However, as the principle of *pacta sunt servanda* is of pivotal importance in international contract law, "the hardship defence is available only in exceptional cases" [*www.trans-lex.org/919000 (Commentary); cf. ICC Case No. 1512; Nassar, p. 201*]. Therefore, contrary to CLAIMANT's assertion, not every case in which performance of the contract has become "economically impractical" constitutes a case of hardship [*cf. Memo. for Cl., para. 60*]. Due to the ordinary risk of doing business [*Brunner, p. 409; Treitel, p. 881*], a party to a contract is not allowed to "escape a bad bargain merely because it is burdensome" [*Neal-Copper Grain Company v Texas Gulf Sulphur Company*]. Accordingly, the simple fact that a transaction that was expected to be profitable has turned out to be a losing one is not sufficient [*Brunner, pp. 474f.*]. Rather, the increase in costs must fundamentally alter the equilibrium of the contract and render performance excessively more onerous [*www.trans-lex.org/951000; Brunner, p. 421; Pereira de Souza Fleury, p. 6*].

138. Even CLAIMANT defines hardship as a situation "*when an event* […] *fundamentally alters the equilibrium*" [*Memo. for Cl., para. 68*], requiring that performance must become "overly burdensome" [*Memo. for Cl., para. 60*]. Thereby, CLAIMANT acknowledges that not any and all increases in price lead to hardship and that the threshold for hardship must be set high. While it is not possible to set an absolute threshold for every potential case, an increase in the costs of performance of about 100%-125% may be seen as a general reference point [*Brunner, p. 432; OLG Hamburg, 28.02.1997*].

139. Furthermore, the contract negotiations underscore that the Parties did not intend for any and all alterations of the equilibrium of the FSSA to qualify as hardship. During the negotiations, CLAIMANT informed our client of a negative business experience it had had in the past. In 2014, CLAIMANT incurred additional costs as a result of the outbreak of foot and mouth disease [*P.O. No. 2, para. 21*]. These additional costs rendered performance of the contract 40% more expensive [*ibid.*]. Therefore, as Clause No. 12 FSSA was specifically included to address this experience, one must conclude that only cost increases of approximately 40% or more were intended to constitute hardship in the sense of Clause No. 12 FSSA.

140. CLAIMANT asserts that it has incurred a loss of 25% as a result of the imposition of the tariff, amounting to US$ 1,250,000 [*Memo. for Cl., para. 69*]. These figures, however, are misleading and must be put into perspective: the tariff took effect after the first two shipments were already delivered and thus only affected the last shipment [*Cl. Ex. No. 7*]. The price paid for the last shipment was US$ 5,000,000 [*Cl. Ex. No. 5*]. The loss of 25% incurred on this shipment thus amounted to US$ 1,250,000. However, if one considers the overall purchase price of US$ 10,000,000, the loss dwindles to a mere 12.5%. A loss of 12.5% or even 25% does not amount to hardship. Rather, the loss is an alteration within the normal business risk and well below the hardship threshold. This is in line with CLAIMANT's premise that the standard for hardship is to be set high [*cf. Memo. for Cl., para. 68*], as well as with the Parties' mutual understanding as to what they define as hardship.

141. Thus, even though CLAIMANT's performance of the contract has become more burdensome, the alteration of the FSSA does not allow any deviation from the principle of *pacta sunt servanda*. Consequently, the imposition of the tariff does not amount to hardship in the sense of Clause No. 12 FSSA.

4. CLAIMANT cannot rely on hardship as it assumed the risk of the tariff due to the Parties' agreement on DDP delivery

142. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 92*], CLAIMANT assumed the risk of the imposition of the tariff by agreeing to DDP delivery in Clause No. 8 FSSA. Accordingly, CLAIMANT cannot rely on the hardship defense.

143. The question as to which party bears the risk of an unforeseen event is determined by the contractual risk allocation: if a party has assumed the risk concerned, it cannot rely on hardship to evade its contractual obligations [*Brunner, p. 424; Plate, p. 19; Pereira de Souza Fleury, p. 7*].

144. In the present case, the Parties agreed on DDP delivery in Clause No. 8 FSSA. DDP stands for "Delivered Duty Paid" and entails that the seller, in this case CLAIMANT, bears all costs and risks connected with bringing the goods to the buyer [*cf. Graf von Bernstorff, p. 356; O'Conner, p. 69*]. The seller is thus obliged to pay all customs duties, taxes and other duties to be paid on both the export and the import of the goods [*ibid.*].

145. CLAIMANT asserts that even though the Parties expressly agreed on DDP delivery in Clause No. 8 FSSA, this "was not to burden the Claimant with any risks" [*Memo. for Cl., para. 92*]. It maintains that the Parties "tailored the general rules conveyed in the Incoterms to their own needs" [*Memo. for Cl., para. 77*] and derogated from the standard DDP risk allocation [*ibid.*]. CLAIMANT relies on the assertion that the Parties only agreed on DDP delivery so that our client could benefit from CLAIMANT's "*much greater experience in the shipment of frozen semen*" [*Memo. for Cl., paras. 77, 92*]. Yet, this assertion is without merit for two reasons:

146. First, the Parties did not agree on DDP delivery solely for our client to benefit from CLAIMANT's experience regarding the shipment of frozen semen. CLAIMANT regularly offers its customers to organize the delivery of frozen semen through its associate Phar Lap Transportation LLP, even in cases where the contract provides for EXW delivery [*P.O No. 2, para. 9*]. Thus, it would have been possible for our client to benefit from CLAIMANT's expertise without having to agree on DDP delivery.

147. Second, our client compensated CLAIMANT for assuming the risks associated with DDP delivery. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 92*], the purchase price that was ultimately agreed on does in fact reflect an assumption of risks by CLAIMANT. It originally requested US$ 99,500 per dose of semen provided *via* EXW delivery [*Cl. Ex. No. 2*]. Due to our client's request for DDP delivery, CLAIMANT demanded an increase in the price [*Cl. Ex. No. 4*]. The Parties finally agreed on an overall price of US$ 100,000 per dose [*Cl. Ex. No. 5*]. Thus, the change of delivery terms led to an increase of the purchase price in the amount of US$ 500 per dose. However, the additional costs directly associated with the delivery of the goods only amounted to US$ 200 per dose [*P.O. No. 2, para. 8*], leaving a premium of US$ 300 per dose unaccounted for. As these US$ 300 per dose were not needed to carry out the delivery, it must be inferred that this premium was intended to compensate CLAIMANT for assuming the risks associated with DDP delivery.

148. Thus, the Parties did not "tailor" the general rules of DDP delivery to their own needs but rather agreed on an ordinary DDP delivery in Clause No. 8 FSSA. As DDP delivery entails that the seller pays all import duties [*Graf von Bernstorff, p. 356; O'Conner, p. 69*], CLAIMANT assumed the risk of the imposition of the tariff. Hence, it cannot rely on the hardship defence.

149. In summary, the imposition of the tariff does not constitute hardship in the sense of Clause No. 12 FSSA. Accordingly, the Tribunal should dismiss CLAIMANT's request for contract adaptation.

II. Even if the requirements of Clause No. 12 FSSA were met, Clause No. 12 FSSA does not provide for contract adaptation as a remedy

150. Assuming *arguendo* that the requirements of Clause No. 12 FSSA were fulfilled, it would still not provide for contract adaptation as the remedy. In light of the fundamental principle of *pacta sunt servanda*, the remedy of contract adaptation has to be expressly stipulated by the Parties [*cf. Berger, Power of Arbitrators, p. 5*].

151. CLAIMANT asserts that the wording of the hardship clause is "self-explanatory and should not raise any doubts" [*Memo. for Cl., para. 71*], thus insinuating that it provides for contract adaptation. Clause No. 12 FSSA, however, only states that "Seller shall not be responsible" for cases of hardship without providing for contract adaptation as a remedy.

152. Moreover, the Parties did not agree on an adaptation of the FSSA as a result of their telephone conversation on 21 January 2018 [*Resp. Ex. No. 4*]. Mr. Shoemaker on our client's behalf emphasised that he was not familiar with the detailed negotiations of the FSSA and that he had to confirm with his superiors whether the FSSA provided for contract adaptation. He furthermore indicated that, according to his understanding of the FSSA, CLAIMANT had to bear all risks associated with the delivery [*ibid.*]. Therefore, he did not commit to contract adaptation and underlined that only "*if* the contract provides for an increased price […]" the Parties would find a solution [*ibid., emphasis added*]. Thus, it cannot be inferred from the telephone conversation that the Parties agreed on contract adaptation as the remedy for Clause No. 12 FSSA. Consequently, even if the requirements of Clause No. 12 FSSA were met, CLAIMANT would not be entitled to an adaptation of the contract.

153. In conclusion, the imposition of the 30% tariff does not constitute hardship in the sense of Clause No. 12 FSSA. Even if the Tribunal were to find otherwise, Clause No. 12 FSSA does not provide for contract adaptation as the remedy. Thus, CLAIMANT is not entitled to contract adaptation under Clause No. 12 FSSA.

B. CLAIMANT is not entitled to contract adaptation pursuant to Art. 79(1) CISG

154. Contrary to CLAIMANT's assertion [*Memo. for Cl., paras. 72ff.*], it is not entitled to the additional payment under Art. 79(1) CISG.

155. First, hardship does not fall within the scope of application of Art. 79(1) CISG (**I.**). Second, even if the Tribunal were to decide that Art. 79(1) CISG governs hardship, the Parties excluded the application of Art. 79(1) CISG pursuant to Art. 6 CISG (**II.**). Third, irrespective of whether Art. 79(1) CISG is applicable, its requirements are not fulfilled (**III.**). Finally, Art. 79(1) CISG does not provide for contract adaptation as a remedy of hardship and Art. 6.2.3 UPICC cannot be used to supplement Art. 79(1) CISG (**IV.**).

I. Art. 79(1) CISG does not govern hardship

156. CLAIMANT is not entitled to contract adaptation pursuant to Art. 79(1) CISG since this provision does not apply to cases of hardship. Art. 79(1) CISG provides:

> "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences."

157. The plain wording of Art. 79(1) CISG already indicates that it is not applicable to the present case. The provision provides an excuse for failure to perform an obligation of the contract. However, in the present case, our client paid the agreed purchase price and CLAIMANT supplied the agreed amount of frozen semen. Thus, there is no non-performance that could be excused. Furthermore, the exemption of Art. 79(1) CISG is linked to situations of *force majeure*, *i.e.* cases of impossibility [*Audit, para. 180*].

158. CLAIMANT, however, seeks contract adaptation based on hardship, which is not governed by Art. 79(1) CISG for the following reasons: first, the drafting history of Art. 79(1) CISG reveals that it does not apply to situations of hardship (**1.**). Second, the concept of hardship is incompatible with the normative structure of the CISG (**2.**). Finally, contrary to CLAIMANT's assertion [*Memo. for Cl., para. 73*], neither the principle of good faith nor Art. 50 CISG may be used to introduce a concept alien to the CISG (**3.**).

1. The drafting history of Art. 79 CISG reveals that it does not govern cases of hardship

159. The drafting history of Art. 79 CISG illustrates that it is not applicable to situations of hardship.

160. During the drafting of the CISG, the Norwegian delegation proposed an amendment to the draft of Art. 79 CISG that would have regulated hardship [*Plate, pp. 57f.; Brunner, p. 216*]. However, the other contracting states objected to this amendment, fearing that it would lead to legal uncertainty and provide relief to non-performing parties too easily [*Kofod, para. 3.2.6; Rimke, p. 219*]. Thus, an express provision in the CISG dealing with hardship was actively considered and ultimately rejected [*Kofod, para. 3.2.6; Berger, Private Dispute Resolution, paras. 24-62f.; Plate, pp. 56f.*].

161. The drafting history, therefore, precludes the application of Art. 79(1) CISG to cases of hardship.

2. The hardship concept is incompatible with the system of remedies of the CISG

162. The concept of hardship is incompatible with the normative system of the CISG.

163. According to Art. 79(1) CISG, a party may be exempted from its obligation to pay damages in case of a breach of contract. However, pursuant to Art. 79(5) CISG, this excuse is limited to the obligation to pay damages and does not preclude any other remedy such as the right to compel performance, substitute delivery or to avoid the contract [*Atamer in Kröll/Mistelis/P.Viscasillas, Art. 79, para. 16; Saenger in BeckOK BGB, Art. 79, para. 11*]. As pointed out by *Nicholas*:

> "[I]nsofar as the impediment makes performance actually impossible, there can be no specific enforcement; but if performance is physically possible, but impracticable […], we have the curious result that the seller is not liable in damages for not performing and yet can be compelled to perform." [*Nicholas, p. 5-19*]

164. Therefore, applying Art. 79(1) CISG to cases of hardship would lead to paradoxical and unintended results [*Heuzé, para. 456; Audit, para. 182*].

165. Thus, the concept of hardship is not compatible with the CISG and its system of remedies.

3. Neither the principle of good faith nor Art. 50 CISG can be misused to introduce hardship into the CISG

166. CLAIMANT tries to justify the application of Art. 79(1) CISG to cases of hardship by enumerating provisions of the CISG and general principles of law without explaining or substantiating its assertions [*Memo. for Cl., para. 73*].

167. First, contrary to CLAIMANT's assertion [*Memo. for Cl., paras. 73, 75*], the principle of good faith does not lead to the application of Art. 79(1) CISG in cases of hardship. Pursuant to Art. 7(1) CISG, when interpreting the CISG, its international character and the need to promote uniformity must be taken into account. However, the principle of good faith in and of itself is too vague to serve as a basis for hardship and thus of no practical assistance to the judge or arbitrator [*Rimke, pp. 223f.*; *DiMatteo/Janssen, p. 54*]. Therefore, this would lead to the danger of the judge or arbitrator resorting to domestic concepts of hardship such as *imprévision*, *Wegfall der Geschäftsgrundlage* or frustration in order to apply the concept of good faith as a basis for hardship [*Rimke, pp. 223f.*]. However, if domestic legal concepts found their gateway into the CISG through the principle of good faith, "there would be a danger that the CISG's system of liability would 'burst' because domestic legal systems differ greatly from each other […]" [*Stoll and Gruber in Schlechtriem/Schwenzer (2nd edn.), Art. 79, para. 31*]. Consequently, the principle of good faith as a basis to introduce hardship into the CISG "appears to be at least one step too far" [*Kofod, para. 3.2.2; cf. Audit, para. 182*].

168. Second, it appears that CLAIMANT tries to justify the application of hardship by applying Art. 50 CISG analogously [*Memo. for Cl., para. 73*]. Contrary to CLAIMANT's assertion, however, Art. 50

CISG concerns an entirely different situation, namely that of price reduction in the event of breach of contract by the seller. In the present case, our client is neither the seller nor has it breached the contract. Therefore, Art. 50 CISG cannot be applied by analogy.

169. Consequently, the additional legal bases CLAIMANT puts forward [*Memo. for Cl., para. 73*] do not lead to the introduction of hardship into the CISG.

170. In conclusion, Art. 79(1) CISG is not applicable to cases of hardship. Moreover, the concept of hardship may not be introduced into the CISG through either the general principle of good faith or Art. 50 CISG. Therefore, the Tribunal should find that CLAIMANT is not entitled to contract adaptation under the CISG.

II. Even if hardship were governed by Art. 79(1) CISG, the Parties excluded its application pursuant to Art. 6 CISG

171. Even if the Tribunal were to find that Art. 79(1) CISG governs hardship, the Parties implicitly excluded the application of Art. 79(1) CISG in accordance with Art. 6 CISG. Pursuant to Art. 6 CISG, parties may expressly or impliedly derogate from or vary the effect of any of the provisions of the CISG [*Mistelis in Kröll/Mistelis/P.Viscasillas, Art. 6, paras. 15ff.; DiMatteo in DiMatteo et al., Chapter 22, para. 115*].

172. First, the Parties implicitly excluded the application of Art. 79(1) CISG by providing for an alternative provision in Clause No. 12 FSSA. If parties provide for a hardship clause that is narrower than the requirements of Art. 79(1) CISG, it must be inferred that they intended to derogate from Art. 79(1) CISG pursuant to Art. 6 CISG [*DiMatteo in DiMatteo et al., Chapter 22, para. 115*]. In the present case, the Parties stipulated in which specific situations hardship may apply. *A contrario*, they did not want to include a general concept of hardship, which would encompass a broad range of risks. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 76*], the specifications in Clause No. 12 FSSA, "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*", do not constitute mere examples. This becomes evident when examining the wording of Clause No. 12 FSSA since it does not contain formulations like "for example" or "*e.g.*". Clause No. 12 FSSA is, therefore, to be regarded as exhaustive. Thus, by inserting a restrictive hardship clause with specific requirements, the Parties implicitly derogated from Art. 79(1) CISG.

173. Second, contrary to CLAIMANT's assertion [*Memo. for Cl., para. 77*], the Parties modified the provisions of the CISG by agreeing on DDP delivery. If the CISG governs the legal relationships between parties, the INCOTERMS may replace, modify or supplement the provisions of the CISG [*Herdegen, Chapter 13, para. 4; Schmidt in MüKo HGB, Sec. 346, para. 115; Cour suprême du canton de Berne, 19.05.2008*]. In the case at hand, the Parties agreed on DDP delivery. Thus, the seller, *i.e.*

CLAIMANT, has to bear all costs and expenses connected with bringing the goods to the buyer [*cf. Graf von Bernstorff, pp. 354ff.; O'Conner, p. 69*]. Thus, the Parties provided for a specific regime of risk assumption and thereby derogated from Art. 79(1) CISG.

174. Hence, the Parties derogated from Art. 79(1) CISG pursuant to Art. 6 CISG by including the contractual hardship clause and providing for DDP delivery.

III. Even if the Tribunal were to find that the Parties did not derogate from the application of Art. 79(1) CISG, its requirements are not met

175. The party which seeks to rely on Art. 79(1) CISG bears the burden of proof that the requirements are met [*Atamer in Kröll/Mistelis/P.Viscasillas, Art. 79, para. 99; ICAC Case No. 155/1994*]. CLAIMANT, however, conveniently fails to substantiate its claim by omitting to prove even a single requirement of Art. 79(1) CISG. In order to assist the Tribunal in rendering its decision, RESPONDENT will nevertheless demonstrate that the requirements of Art. 79(1) CISG are not fulfilled in this case.

176. First, the tariff does not constitute an impediment beyond CLAIMANT's control in the sense of Art. 79(1) CISG (**1.**). Second, the imposition of the tariff was not unforeseeable (**2.**). Therefore, CLAIMANT is not entitled to contract adaptation pursuant to Art. 79(1) CISG.

1. The imposition of the tariff does not constitute an impediment beyond CLAIMANT'S control

177. Art. 79(1) CISG requires an impediment beyond the disadvantaged party's control. However, the fact that the tariff makes CLAIMANT's performance somewhat more burdensome does not constitute an impediment beyond CLAIMANT's control in the sense of Art. 79(1) CISG.

178. Even if one were to accept in principle that a change in the equilibrium of the contract could amount to an impediment in the sense of Art. 79(1) CISG, the threshold is to be set extremely high and must come close to cases of physical impossibility [*CISG-AC No. 7, Comment No. 38; Huber in MüKo BGB, Art. 79, para. 21*]. In light of the fundamental importance of *pacta sunt servanda,* alterations in the equilibrium of the contract may only be qualified as an impediment if the cost of performance was increased by at least 100%, thereby going beyond the last limit of economic sacrifice [*Schwenzer in Schlechtriem/Schwenzer, Art. 79, para. 30; Magnus in Staudinger, Art. 79, para. 24a; Vital Berry Marketing NV v Dira-Frost NV; Société Romay AG v SARL Behr France*].

179. In the present case, the imposition of the tariff rendered CLAIMANT's performance of the contract 15% more expensive [*supra para. 104*]. This in no way comes close to the required 100% threshold. Thus, the imposition of the tariff does not constitute an impediment in the sense of Art. 79(1) CISG.

2. The imposition of the tariff was not unforeseeable

180. The imposition of the tariff was not unforeseeable. An impediment in the sense of Art. 79(1) CISG does not exempt the performing party if it had to reasonably expect the impediment at the time of the conclusion of the contract. It is decisive whether a reasonable person engaged in the type of business in question would have taken the event into account [*Atamer in Kröll/Mistelis/P. Viscasillas, Art. 79, paras. 50ff.; Audit, para. 180; Heuzé, para. 455*].

181. Unforeseeability thus requires an "extraordinary type of occurrence and a large magnitude of the occurrence" [*DiMatteo in DiMatteo et al., Chapter 22, para. 41*].

182. Given the Parties' professional sophistication and the political tensions at the time of the conclusion of the FSSA, the imposition of the tariff was reasonably foreseeable [*cf. supra paras. 131ff.*]. A reasonable person in the Parties' situation would have taken it into account. Thus, the tariff was not unforeseeable in the sense of Art. 79(1) CISG.

183. Consequently, the requirements of Art. 79(1) CISG are not met.

IV. Art. 6.2.3 UPICC does not justify contract adaptation in cases of Art. 79(1) CISG

184. As Art. 79(1) CISG does not provide the remedy CLAIMANT seeks, it is attempting to bypass this reality by applying Art. 6.2.3 UPICC. However, contrary to CLAIMANT's assertion [*Memo. for Cl., para. 83*], a potential internal gap could not be filled by application of Art. 6.2.3 UPICC in accordance with Art. 7(2) CISG.

185. Art. 7(2) CISG provides:

> "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the *general principles on which the CISG is based* […]". [*emphasis added*]

186. Art. 6.2.3 UPICC, however, cannot serve as a basis for gap-filling. First, the remedy of contract adaptation within the UPICC is deeply rooted in civil law and alien to common law jurisdictions [*Slater, pp. 241f.; Berger, Private Dispute Resolution, para. 24-62; Momberg Uribe, p. 191; Flechtner, p. 92*]. In common law jurisdictions, courts view it as their task to enforce the contract as concluded by the parties and are reluctant to interfere in the contractual equilibrium [*Flechtner, p. 92; DiMatteo in DiMatteo et al., Chapter 22, para. 34*]. Hence, the UPICC are not equally recognized in civil law and common law countries and, therefore, do not constitute general principles in the sense of Art. 7(2) CISG.

187. Second, "a later set of rules should be disregarded as a valid source of interpretation to an earlier one" [*Kofod, para. 3.2.3*]. The UPICC were drafted 14 years after the CISG [*ibid.*]. Thus, they cannot be considered as general principles on which the CISG is based.

188. Consequently, Art.7(2) CISG cannot be misused as a "wide open door allowing [the] CISG to be undermined" [*Kofod, para. 3.2.6*]. After all, "the 'missing' remedy under Article 79 simply reflects its rejection of a specific remedy in situations of hardship" [*ibid.*]. Thus, the Tribunal should find that Art. 6.2.3 UPICC is not applicable in accordance with Art. 7(2) CISG and, therefore, does not justify contract adaptation as a remedy.

189. In conclusion, CLAIMANT is not entitled to contract adaption pursuant to Art. 79(1) CISG.

C. CLAIMANT is not entitled to contract adaptation pursuant to Art. 6.2.3 MCL

190. CLAIMANT is not entitled to an adaptation of the FSSA pursuant to Art. 6.2.3 MCL. First, the hardship provisions in the MCL are not applicable as the CISG takes precedence over domestic law (**I.**). Even if the hardship provisions in the MCL were applicable, the prerequisites of Art. 6.2.2 MCL are not fulfilled (**II.**).

I. The hardship provisions of the MCL are not applicable

191. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 81*], the hardship provisions of the MCL are not applicable to the present dispute. As the CISG takes precedence over domestic law, the drafters' intention not to provide for an exemption in cases of hardship cannot be circumvented by applying domestic law.

192. According to Art. 7(2) CISG, gaps may be filled by having recourse to the law that is applicable by virtue of the rules of private international law. However, recourse to domestic law is only permitted as a last resort [*Schwenzer/Hachem in Schlechtriem/Schwenzer, Art. 7, para. 42*].

193. Pursuant to Art. 2 of the Hague Principles on Choice of Law in International Commercial Contracts, which contains the general conflict of law rules for contracts in Mediterraneo [*P.O. No. 2, para. 43*], a contract is governed by the law chosen by the parties. According to Clause No. 14 FSSA, the Sales Agreement is governed by the law of Mediterraneo, including the CISG.

194. Pursuant to Art. 1.4 MCL, which is a verbatim adoption of Art. 1.4 UPICC, nothing should restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law. Mandatory rules of international or supranational origin are those derived from international conventions or general public international law [*Official Commentary, Art. 1.4*]. The CISG is such an international convention adopted by Equatoriana, Mediterraneo and Danubia [*P.O. No. 1, para. 4*]. Art. 1 CISG is a unilateral conflict of laws rule determining the sphere of application of the Convention and at the same time precluding recourse to any other conflict of laws rules to the greatest extent possible [*Mistelis in Kröll/Mistelis/P.Viscasillas, Art. 1, para. 1*]. The objective of uniform application pursuant to Art. 7(1) CISG also establishes the precedence of uniform law over competing national laws

[*Schmid, p. 31*]. Thus, the CISG prevails over national contract law, and, therefore, over the MCL. Consequently, in all matters that are determined by the CISG, the MCL is not applicable.

195. Since the drafters of the CISG explicitly rejected the proposal that would have regulated hardship [*supra para. 160*], they determined that Art. 79(1) CISG may not serve as an excuse for non-performance in cases of hardship. That determination must not be undermined by applying domestic laws in order to excuse non-performance in cases of hardship.

196. Thus, Art. 6.2.3 MCL is not applicable since the CISG takes precedence.

II. The requirements of Art. 6.2.2 MCL are not met

197. Irrespective of whether the hardship provisions of the MCL are applicable or not, their requirements are not met. Art. 6.2.3 MCL requires a case of hardship in the sense of Art. 6.2.2 MCL. The imposition of the tariff does not fulfil the requirements of Art. 6.2.2 MCL. Therefore, CLAIMANT is not entitled to contract adaptation under the MCL.

198. Art. 6.2.2 MCL reads:

> "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
>
> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
>
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
>
> (c) the events are beyond the control of the disadvantaged party; and
>
> (d) the risk of the events was not assumed by the disadvantaged party."

199. Contrary to CLAIMANT's assertion [*Memo. for Cl., para. 85*], the imposition of the tariff has not fundamentally altered the equilibrium of the FSSA. CLAIMANT tries to justify its assertion by referring to the 2004 edition of the official UNIDROIT Commentary. It claims that "the sentence referring to an alteration amounting to 50% or more was deleted" [*Memo. for Cl., para. 85*]. However, this does not justify CLAIMANT's conclusion that the 15% increase in the cost of performance, which CLAIMANT incurred due to the tariff, amounts to hardship in the sense of Art. 6.2.2 MCL. While it is true that the reference in the UNIDROIT Commentary was deleted, this was for the exact opposite reason than CLAIMANT alleges. Rather, "the figure of 50% had been criticised on the grounds that it was *too low*" [*Vogenauer, Art. 6.2.2, para. 8, emphasis added*].

200. CLAIMANT furthermore puts forward that its "restructuring plan would be severely endangered if the CLAIMANT had to bear additional and yet unjust costs" [*Memo. for Cl., para. 85*]. However, our client cannot be scapegoated for CLAIMANT's economically imprudent behaviour. The

restructuring plan is in no way related to the FSSA, let alone to our client. CLAIMANT's need for this plan arose as a result of an investment it made in 2014, which ended up being unprofitable [*P.O. No. 2, paras. 21, 29*]. The risk of incurring losses in international business contracts is the very essence of the ordinary risk of doing business [*Brunner, pp. 474f.*]. Therefore, the burden should not fall on our client to salvage CLAIMANT's finances for something that occurred before the Parties ever came into contact.

201. Hence, the cost increase of 15% does not amount to a fundamental alteration of the FSSA in the sense of Art. 6.2.2 MCL.

202. Furthermore, CLAIMANT assumed the risk of the tariff by agreeing on DDP delivery [*supra paras. 142ff.*] and the Parties could have taken the imposition of the tariff into account [*cf. supra paras. 131ff.*].

203. Therefore, the imposition of the tariff does not constitute hardship in the sense of Art. 6.2.2 MCL.

***

204. In conclusion, the imposition of the tariff does not constitute hardship in the sense of Clause No. 12 FSSA. Even if the Tribunal were to find otherwise, Clause No. 12 FSSA does not provide for contract adaptation as a remedy. Furthermore, CLAIMANT is not entitled to an adaptation of the contract – neither under Art. 79(1) CISG, nor under Art. 6.2.3 MCL. Thus, the Tribunal should reject CLAIMANT's request for an additional payment in the amount of US$ 1,250,000.

REQUEST FOR RELIEF

In light of the above submissions, counsel for RESPONDENT respectfully requests the Arbitral Tribunal to find that

(1) it lacks jurisdiction to adapt the FSSA;

(2) CLAIMANT is not entitled to submit evidence from our client's other arbitration;

(3) CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price: neither under Clause No. 12 FSSA, nor under Art. 79(1) CISG, nor under Art. 6.2.3 MCL;

(4) CLAIMANT has to bear the costs of the arbitration.

Cologne, 24 January 2019

Paula Billen

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Celina Lay

Johanna Ueberberg