SIXTEENTH ANNUAL WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT HONG KONG

MEMORANDUM FOR RESPONDENT

EBERHARD KARLS
UNIVERSITÄT
TÜBINGEN

ON BEHALF OF

Black Beauty

Equestrian

RESPONDENT

AGAINST

Phar Lap

Allevamento

CLAIMANT

JULE BAYER

THIMO HÄRTER

INGA HÖFEL

RAPHAEL REISS

SIMON THOMAS

Tübingen • Germany

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INDEX OF ABBREVIATIONS

$	US-Dollar
%	per cent
Answer to NoA	Answer to the Notice of Arbitration
Art.	Article
Arts.	Articles
Award	Partial Interim Award in another HKIAC proceeding
BGer	Bundesgericht
BGH	Bundesgerichtshof
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CISG AC	United Nations Convention on Contracts for the International Sale of Goods Advisory Council
Cl.	The Chinese University of Hong Kong - Memorandum for Claimant
CLAIMANT	Phar Lap Allevamento
Co.	Company
Contract	Frozen Semen Sales Agreement
Corp.	Corporation
DAL	Danubian Arbitration Law
DAP	Delivered at Place
DCL	Danubian Contract Law
DDP	Delivered Duty Paid
e.g.	for example
Ed.	Editor
Eds.	Editors
et al.	et alia: and others
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
Ex. C	CLAIMANT's Exhibit

Ex. R	RESPONDENT's Exhibit
f.	and the following page
ff.	and the following pages
HGer	Handelsgericht
HKIAC	Hong Kong International Arbitration Center
HKIAC-Rules	Hong Kong International Arbitration Center Administered Arbitration Rules 2018
i.a.	inter alia
IBA-Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
ICC	International Chamber of Commerce Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
INCOTERMS	ICC Rules for the Use of Domestic and International Trade Terms 2010
infra	later in this writing
Ltd.	Limited
MCL	Mediterranean Contract Law
ML	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
Mr.	Mister
Ms.	Miss
no.	number
NoA	Notice of Arbitration
NY	New York
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")
OLG	Oberlandesgericht
p.	page

para.	paragraph
PICC	UNIDROIT Principles of International Commercial Contracts 2016
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
pp.	pages
RESPONDENT	Black Beauty Equestrian
supra	earlier in this writing
U.S.	United States of America
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
v.	versus

INDEX OF AUTHORITIES

Beisteiner, Lisa	The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective In: Austrian Yearbook on International Arbitration (2014) pp. 77-122 Cited as: *Beisteiner, in: Austrian Yearbook on International Arbitration 2014, p.*	30
Bernardini, Piero	Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause In: ICCA Congress Series No. 9 (1998) pp. 197-203 Cited as: *Bernardini, in: ICCA Congress Series 1998, p.*	13
Bianca, Cesare Massimo/ Bonell, Michael Joachim (Eds.)	Commentary on the International Sales Law: The 1980 Vienna Sales Convention Giuffrè Milano (1987) Cited as: *Author, in: Bianca/Bonell, Art. para.*	113
Blackaby, Nigel/ Partasides, Constantine/ Hunter, Martin/ Redfern, Alan	Redfern and Hunter on international arbitration 6th Edition Oxford University Press Oxford (2015) Cited as: *Redfern/Hunter, p. para.*	3, 21, 25, 28, 32
Bloomberg BNA	Barton Center Case In: Labour Arbitration Report 2005 pp. 249ff. Cited as: *Barton Center Case, Lab. Arb. Rep. 2005, p.*	46

Born, Gary B.	International Commercial Arbitration Commentary and Materials Kluwer Law International The Hague (2001) Cited as: *Born, Commentary and Materials, p.*	18
Born, Gary B.	International Commercial Arbitration Volume 1-3 2nd Edition Kluwer Law International Alphen aan den Rijn (2014) Cited as: *Born, p.*	13, 19, 20, 21, 23, 24, 32, 56
Boyers, Rand G.	Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel In: Northwester University Law Review Volume 80 No. 5 (1985-1986) pp. 1244-1271 Available at: https://bit.ly/2RQv6NG (link shortened) Cited as: *Boyers, in: Northwester University Law Review 1985-1986, p.*	48
Brunner, Christoph	Force Majeure and Hardship under General Contract Principles. Exemption for Non-Performance in International Arbitration Wolters Kluwer Law & Business Austin i.a. (2009) Cited as: *Brunner, Force Majeure, p.*	66, 94, 102

Brunner, Christoph	UN-Kaufrecht-CISG. Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980 2nd Edition Stämpfli Verlag Bern (2014) Cited as: *Author, in: Brunner, Art. para.*	70, 73
Cremades, Bernardo M.	Good Faith in International Arbitration In: American University International Law Review Volume 27 Issue 4 (2012) pp. 761-788 Available at: https://bit.ly/2Bx7Qeo (link shortened) Cited as: *Cremades, in: Am. U. Int'l L. Rev. 2012, p*	56
Da Silveira, Mercedeh Azerdo	Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation Wolters Kluwer Law & Business Austin (2014) Cited as: *Da Silveira, International Sales, p. para.*	78
De Saint Marc, Valéry Denoix	Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations In: Journal of International Arbitration Volume 20 Issue 2 (2003) pp. 211 –216 Cited as: *De Saint Marc, in: Journal of International Arbitration 2003, p.*	43, 49

Demeyere, Luc	The Search for the "Truth": Rendering Evidence under Common Law and Civil Law In: Zeitschrift für Schiedsverfahren Volume 1 Issue 1 (2003) Cited as: *Demeyere, in: SchiedsVZ 2003, p.*	41
DiMatteo, Larry A./ Dhooge, Lucien/ Greene, Stephanie/ Maurer, Virginia	The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence In: Northwestern Journal of International Law & Business Volume 24 Issue 2 (2004) pp. 299- 440 Cited as: *DiMatteo/Dhooge/Greene/Maurer, in: NWJILB 2004, p.*	36
Duff, Clair V. (Chairman)	Problems of Proof in the Arbitration Process In: Report of the Pittsburgh Tripartite Committee 1966 pp. 245 – 262 Available at: https://bit.ly/2GPVHG2 (link shortened) Cited as: *Duff, in: Report of Pittsburgh 1966, p.*	46
Eberl, Walter (Ed.)	Beweis im Schiedsverfahren Nomos Verlagsgesellschaft Baden-Baden (2015) Cited as: *Author, in, Beweis, p. para.*	41
Ferrari, Franco et al.	Internationales Vertragsrecht. Kommentar 3rd Edition C.H. Beck Verlag Munich (2018) Cited as: *Author, in: Ferrari et al., Art. para.*	70

Flannery, Louis	The Law applicable to the arbitration agreement Paper for International Arbitration Conference Dublin (2016) Cited as: *Flannery, Applicable law, p.*	3
Flechtner, Harry M.	The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court In: Belgrade Law Review No. 3 (2011) pp. 84-101 Available at: https://bit.ly/2AsyJPH (link shortened) Cited as: *Flechtner, in: Belgrade Law Review 2011, p.*	96, 102
Fouchard, Philippe/ Gaillard, Emmanuel/ Goldman, Berthold	On International Commercial Arbitration Kluwer Law International The Hague (1999) Cited as: *Fouchard/Gaillard/Goldman, Arbitration, p. para.*	18, 19, 30, 43, 49, 56
Frick, Joachim G.	Arbitration and complex international contracts: with special emphasis on the determination of the applicable substantive law and on the adaptation of contracts to changed circumstances Schulthess Zurich (2001) Cited as: *Frick, Arbitration, p.*	32
Garner, Bryan A.	A Dictionary of Modern Legal Usage 1st Edition Oxford University Press New York (1987) Cited as: *Garner, Dictionary, p*	10

Garner, Bryan A. (Ed.)	Black's Law Dictionary 10th Edition Thomson Reuters St. Paul, Minnesota (2014) Cited as: *Black´s Law Dictionary, p.*	10
Garro, Alejandro M.	Exemption of Liability for Damages Under Article 79 of the CISG CISG Advisory Council Opinion No. 7 New York (2007) Available at: https://bit.ly/2xTKjmi (link shortened) Cited as: *CISG AC Opinion no. 7 para./Comment*	74, 94
Green, Michael Z.	No Strict Evidence Rules in Labor and Employment Arbitration In: Texas Wesleyan Law Review Volume 15 (2009) pp. 533-543 Available at: https://bit.ly/2ERtltv (link shortened) Cited as: *Green, in: Texas Wesleyan Law Review 2009, p.*	46
Grunewald, Barbara (Ed.)	München Kommentar zum Handelsgesetzbuch. Band 5 3rd Edition C.H. Beck Verlag Munich (2013) Cited as: *Author, in: MüKoHGB, Art. para.*	36, 75, 101

Gsell, Beate/ Krüger, Wolfgang/ Lorenz, Stephan/ Reymann, Christoph (Eds.)	beck-online: Großkommentar CISG C.H. Beck Verlag Munich (current status: 1 September 2018) Cited as: *Author, in: BeckOGK, Art. para*	93
Haynes, Timothy	Alleged Arbitral Misconduct: To Challenge or not to Challenge? In: Asian Dispute Review Volume 10 Issue 4 (2008) pp. 109-112 Available at: https://bit.ly/2Csnpog (link shortened) Cited as: *Haynes, in: Asian Dispute Review 2008, p.*	46
Holtzmann, Howard M./ Neuhaus, Joseph E.	A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary Kluwer Law and Taxation Publishers Deventer (1989) Cited as: *Holtzmann/Neuhaus, Model Law, Art. p.*	4
Honnold, John O/ Flechtner, Harry M. (Ed.)	Uniform Law for International Sales under the 1980 United Nation Convention 4th Edition Kluwer Law International Alphen aan den Rijn (2009) Cited as: *Honnold, Uniform Law, p. para*	94

Honsell, Heinrich (Ed.)/ Brunner, Christoph	Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG) 2nd Edition Springer Berlin i.a. (2010) Cited as: *Author, in: Honsell, Art. para.*	94
Huber, Peter/ Mullis, Alistair	The CISG: a new textbook for students and practitioners Sellier European Law Publishers Munich (2007) Cited as: *Author, in: The CISG, p.*	64, 101, 103
ICC	ICC Rules for the Use of Domestic and International Trade Terms: Incoterms 2010 by the International Chamber of Commerce (ICC) ICC Berlin (2011) Cited as: *ICC, INCOTERMS 2010, p.*	78
ICC	Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978 Available at: https://bit.ly/2CBC9Bk (link shortened) Cited as: *Secretariat Commentary, Art.*	113
ICC	ICC Force Majeure Clause 2003/ ICC Hardship Clause 2003 ICC Paris (2003) Cited as: *ICC, Clause, p.*	76

Janssen, André/ Meyer, Olaf (Eds.)	CISG Methodology Sellier European Law Publishers Munich (2009) Cited as: *Author, in: CISG Methodology, p.*	103
Kaufmann-Kohler, Gabrielle	Identifying and Applying the Law Governing the Arbitration Procedure – the Role of the Law of the Place of Arbitration In: ICCA Congress Series No. 9 (1998) pp. 336-365 Cited as: *Kaufmann-Kohler, in: ICCA Congress Series 1998, p.*	32
Kegel, Gerhard	Bürgerliches Recht: BGB § 242 In: JuristenZeitung Volume 7 (1952) pp. 145-148 Cited as: *Kegel, in: JZ 1952, p.*	31
Kröll, Stefan/ Mistelis, Loukas/ Perales Viscasillas, Maria del Pilar (Eds.)	UN Convention on Contracts for the International Sale of Goods (CISG). A Commentary. 2nd Edition C.H. Beck Verlag Munich (2018) Cited as: *Author, in: Kröll/Mistelis/Perales Viscasillas, Art. para.*	60, 64, 65, 70, 87, 90, 100
Laumen, Hans-Willi	Beweisaufnahme und Beweisführung im Schiedsverfahren In: Monatsschrift für Deutsches Recht Volume 22 (2015) pp. 176-1280 Cited as: *Laumen, in: MDR 2015, p.*	41

Leong, Hoi Seng Victor/ Tan, Jun Hong	The law governing arbitration agreements: BCY v. BCZ and beyond In: Singapore Academy of Law Journal Volume 30 (2018) pp. 70-96 Available at: https://bit.ly/2W7ovhb (link shortened) Cited as: *Leong/Tan, SAcLJ 2018, p.*	6
Lew, Julian D.M.	The Law Applicable to the Form and Substance of the Arbitration Clause, in: Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Conventions In: ICCA Congress Series No. 9 (1998) pp. 114-145 Cited as: *Lew, in: ICCA Congress Series 1998, p.*	18
Magnus, Ulrich	Die allgemeinen Grundsätze im UN-Kaufrecht In: Rabels Zeitschrift für ausländisches und internationales Privatrecht Volume 59 (1995) pp. 469-494 Cited as: *Magnus, in: RabelsZ 1995, p.*	100, 103
Marghitola, Reto	Document Production in International Arbitration Kluwer Law International Alphen aan den Rijn (2015) Cited as: *Marghitola, International Arbitration, p.*	41

Mazzacano, Peter	Exemptions for the Non-Performance of Contractual Obligations in CISG Article 79 Intersentia Publishing Ltd. Cambridge (20014) Cited as: *Mazzacano, Art. 79, p.*	75, 96
McIlwrath, Michael/ Savage, John	International Arbitration and Mediation: A Practical Guide Kluwer Law International Alphen aan den Rijn (2015) Cited as: *McIlwrath/Savage, Practical Guide, p. para*	41
Mistelis, Loukas/ Brekoulakis, Stavros L. (Eds.)	Arbitrability: International & Comparative Perspectives Wolters Kluwer Law & Business Austin i.a. (2009) Cited as: *Perales Viscasillas, in: Arbitrability, p. 275*	30
Moser, Michael/ Bao, Chiann	A guide to the HKIAC Arbitration Rules Oxford University Press Oxford (2017) Cited as: *Moser/Bao, HKIAC-Rules, (Art.) para.*	4, 28, 43, 46, 50, 53
Nazzini, Renato	The law applicable to the arbitration agreement: towards transnational principles In: International and Comparative Law Volume 65 Issue 3 (2016) pp. 681-703 Cited as: *Nazzini, in: International and Comparative Law 2016, p.*	13

Partington, Richard	IMF warns Trump trade war could cost global economy $430bn In: The Guardian 16 July 2018 Available at: https://bit.ly/2urqoca (link shortened) Cited as: *Partington, The Guardian 2018*	81
Peiris, Gamini L.	The admissibility of evidence obtained illegally: A comparative analysis In: Ottawa Law Review Volume 13 Issue 2 (1981) pp. 309-344 Cited as: *Peiris, in: Ottawa L. Rev. 1981, p.*	42
Perillo, Joseph M.	Corbin on Contracts. Impossibility. §§ 74.1-78.10 Volume 14 LexisNexis Group St. Paul, Minnesota (2001) Cited as: *Author, in: Corbin on Contracs, §, p.*	94, 102
Piltz, Burghard/ Bredow, Jens	Incoterms Kommentar C.H. Beck Munich (2016) Cited as: *Author, in: Incoterms, p. para.*	78
Raeschke-Kessler, Hilmar	Art. 3 IBA-Rules of Evidence - A Commentary on the Production of Documents in International Arbitration 12th IBA Arbitration Day, Dubai – February 16, 2009 Available at: https://bit.ly/2FEbq9W (link shortened) Cited as: *Raeschke-Kessler, IBA-Rules, p.*	46

Reymond, Claude (Ed.)	Recueil De Travaux Suisse Sur L'Arbitrage International Schulthess Zurich (1984) Cited as: *Author, in: Rec.Tr.Sui., p.*	32
Rimke, Joern	Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts Kluwer Law International Alphen aan den Rijn (1999-2000) pp. 197-243 Available at: https://bit.ly/2HgwXah (link shortened) Cited as: *Rimke, Force Majeure and Hardship, p.*	96, 102
Schlechtriem, Peter/ Schroeter, Ulrich G.	Internationales UN-Kaufrecht 6th Edition Mohr Siebeck Stuttgart (2016) Cited as: *Schlechtriem/Schroeter, UN-Kaufrecht, p. para.*	60, 64, 75, 93
Schlechtriem, Peter/ Schwenzer, Ingeborg H. (Ed.)	Schlechtriem & Schwenzer. Commentary on the UN Convention on the International Sale of Goods (CISG) 4th Edition Oxford University Press Oxford (2016) Cited as: *Author, in: Schlechtriem/Schwenzer, Art. para.*	36, 60, 70, 74, 75, 77, 97, 100, 101, 113
Schwenzer, Ingeborg	Force Majeure and Hardship in International Sales Contracts In: Victoria University of Wellington Law Review Volume 39 Issue 4 (2008) pp. 709-725 Available at: https://bit.ly/2Q91MRp (link shortened) Cited as: *Schwenzer, in: VUWLR 2008, p.*	73, 75

Schwenzer, Ingeborg/ Jaeger, Florence	Das CISG im Schiedsverfahren – Die Tücken des anwendbaren materiellen Rechts im Schiedsverfahren In: Zeitschrift für internationales Wirtschaftsrecht Volume 1 Issue 3 (2016) pp. 99-103 Cited as: *Schwenzer/Jäger, in: IWRZ 2016, p.*	4
Schwenzer, Ingeborg/ Hachem, Pascal/ Kee, Christopher	Global Sales and Contract Law Oxford University Press Oxford (2012) Cited as: *Schwenzer/Hachem/Kee, Global Sales and Contract Law, p. para*	75,
Slater, Scott D.	Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG In: Florida Journal of International Law 1998 Available at: https://bit.ly/2AWEVj9 (link shortened) Cited as: *Slater, in: FJIL 1998, p.*	102
Stacher, Marco	Die Rechtsnatur der Schiedsvereinbarung 1st Edition Dike Verlag Zurich/St. Gallen (2007) Cited as: *Stacher, Schiedsvereinbarung, p.*	21
Stoffel, Walter	Le droit applicable aux contracts de vente internationale de marchandises In: Publication du Centre du droit de l'entreprise de l'Université de Lausanne, CEDIDAC (1991) pp. 15-45 Cited as: *Stoffel, in: Publication CEDIDAC 1991, p.*	26

UNIDROIT	UNIDROIT Principles on International Commercial Contracts 2016 Commented Version Available at: https://bit.ly/2Uf4rIw (link shortened) Cited as: *PICC Official Comment, Art. para./Introduction p.*	60, 73
United Nations	United Nations Conference on Contracts for the International Sale of Goods Official Records Vienna (1991) Available at: https://bit.ly/2DWbhxB (link shortened) Cited as: *UN Conference on the CISG, OR, p.*	36
Vogenauer, Stefan (Ed.)	Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) 2nd Edition Oxford University Press Oxford (2015) Cited as: *Author, in: Vogenauer, Art. para.*	60, 73
von Segesser, Georg	The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010 In: ASA Bulletin Volume 28 (2010) pp. 736-752 Cited as: *von Segesser, in: ASA Bulletin 2010, p.*	41

von Staudinger, Julius	Staudinger BGB. Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen 4th Edition Sellier - De Gruyter Berlin (2018) Cited as: *Author, in: Staudinger, Art. para.*	90, 100, 113
Waincymer, Jeffrey	Procedure and Evidence in International Arbitration Kluwer Law International Alphen aan den Rijn (2012) Cited as: *Waincymer, Procedure, p.*	41, 51, 53
Welser, Irene/ De Berti, Giovanni	Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices pp. 79-101 Available at: https://bit.ly/2T8GSQT (link shortened) Cited as: *Welser/de Berti, Best Practices, p.*	41
Werner, Olaf	Verwertung rechtswidrig erlangter Beweismittel In: Neue Juristische Wochenschrift Volume 38 Issue 16 (1988) pp. 993-1002 Cited as: *Werner, in: NJW 1988, p.*	42
Zaccaria, Elena Christine	The Effects of changed Circumstances in International Commercial Trade International Trade and Business Review Volume 9 (2004) pp. 135-182 Cited as: *Zaccaria, in: IntTBLawRw 2004, p.*	102

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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento (hereinafter: "**CLAIMANT**") and Black Beauty Equestrian (hereinafter: "**RESPONDENT**").

CLAIMANT is the operator of a race horse breeding stud farm located in Mediterraneo. RESPONDENT is the operator of a race horse stable based in Equatoriana.

21 March 2017	The parties enter into contract negotiations for "Nijinsky III semen".
24 March – 12 April 2017	The contract negotiations are led by Ms. Napravnik (representative for CLAIMANT) and Mr. Antley (representative for RESPONDENT).
12 April 2017	Ms. Napravnik and Mr. Antley are severely injured in a car accident. They are not able to continue the negotiations.
6 May 2017	The Frozen Semen Sales Agreement (hereinafter: "**Contract**") is concluded in Mediterraneo by the two new negotiators, Mr. Ferguson and Mr. Krone.
15 November 2017	Mediterraneo imposes a 25% import tariff on agricultural products from Equatoriana including race horses.
15 January 2018	Equatoriana imposes a 30% retaliatory import tariff on all agricultural goods from Mediterraneo.
20 and 21 January 2018	CLAIMANT contacts RESPONDENT to bring up the issue that race horse semen is also subject to import tariffs.
23 January 2018	CLAIMANT delivers the last batch of semen.
12 February 2018	RESPONDENT and CLAIMANT meet to solve the issue of adaptation at the senior management level.
29 June 2018	A Partial Interim Award in another HKIAC proceeding (hereinafter: "**Award**") is rendered, where RESPONDENT claims a reimbursement of 25% from its contract partner in Mediterraneo which bought a mare.
31 July 2018	CLAIMANT submits its Notice of Arbitration (hereinafter: "**NoA**").
Shortly prior to 2 October 2018	At the annual breeder conference, a former employee of RESPONDENT informs CLAIMANT about RESPONDENT's other arbitral proceeding
2 October 2018	CLAIMANT notifies the arbitral tribunal that it wants to introduce the Award from the other arbitral proceeding as evidence.

SUMMARY OF ARGUMENT

On 6 May 2017, CLAIMANT and RESPONDENT concluded the Contract about the delivery of 100 doses of horse semen. Each dose cost $100,000. During the delivery of the last 50 doses of semen, CLAIMANT had to pay an additional $1,250,000 of import tariffs. In order to get compensated for these losses, CLAIMANT has submitted its claim of $1,250,000 from a contract adaptation under clause 12 of the Contract and the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: "**CISG**"). In doing so, CLAIMANT disregards the fact that both legal bases do not allow for contract adaptation by their express wording. CLAIMANT brings forward that it faces hardship due to the import tariffs. Had CLAIMANT, however, carefully followed the recent political developments in Mediterraneo and Equatoriana, it could have foreseen their imposition. Moreover, CLAIMANT would not have to bear the additional costs if it had not deliberately agreed to a Delivery Duty Paid (hereinafter: "**DDP**"). Due to the contractual agreement on DDP, however, CLAIMANT assumed the risks of the imposition of import tariffs. In fact, CLAIMANT cannot rely on hardship at all, since it would violate the very the nature of hardship to grant a contract adaptation where the disadvantaged party has already delivered **(Issue 3)**.

In any case, the arbitral tribunal can render no award on the merits of the dispute as it already lacks the jurisdiction to adapt the Contract. This can be derived from the fact that the Danubian Contract Law (hereinafter "**DCL**"), which stipulates a narrow interpretation of arbitration clauses, governs the arbitration clause. However, the arbitral tribunal also has no jurisdiction when applying the substantive laws of Mediterraneo or any other law to construe the arbitration agreement. Moreover, the procedural law of Danubia sets forth that an express conferral of powers is necessary for an arbitral tribunal to have the power to adapt contracts. The parties in the instant case have not expressly empowered the arbitral tribunal to adapt the Contract, thereby depriving it that power **(Issue 1)**.

Finally, the arbitral tribunal may not admit an Award from another arbitral proceeding also conducted under the Honk Kong International Arbitration Centre Administered Arbitration Rules 2018 (hereinafter: "**HKIAC-Rules**"). CLAIMANT intends to bring forward that Award although it was either obtained through a breach of a confidentiality obligation or an illegal hack of RESPONDENT's computer system. CLAIMANT thereby acts in bad faith. Moreover, the arbitral tribunal must not admit that Award as it is irrelevant to the case at hand. Finally, an admission of the Award would undermine the crucial principle of confidentiality in arbitration which is expressly set forth in Art. 45 HKIAC-Rules **(Issue 2)**.

ISSUE 1 – THE ARBITRAL TRIBUNAL NEITHER HAS JURISDICTION NOR THE POWER TO ADAPT THE CONTRACT

1 RESPONDENT respectfully submits that the arbitral tribunal neither has jurisdiction nor the power to adapt the Contract as the law of Danubia applies to the arbitration clause **(I.)**. Even if the arbitral tribunal found that Danubian law did not govern the arbitration clause, the arbitral tribunal would still lack jurisdiction and power to decide the case **(II.)**.

I. The arbitral tribunal has neither jurisdiction nor power to adapt the Contract as Danubian law applies to the arbitration clause

2 Since the law of Danubia governs the arbitration clause **(1.)**, the arbitral tribunal lacks both the jurisdiction **(2.)** and the power to adapt the Contract **(3.)**. This is due to the fact that the DCL stipulates a narrow interpretation of arbitration clauses and as the parties – according to Art. 28 (3) Danubian Arbitration Law (hereinafter: "**DAL**") – would have needed to expressly give the arbitral tribunal the power to adapt contracts.

1. Danubian law applies to the arbitration clause

3 The law of Danubia governs the arbitration clause as it has the closest and most real connection to it. CLAIMANT fails to recognize that by arguing that Mediterranean law applies [*Cl. paras. 34ff.*]. RESPONDENT kindly asks the arbitral tribunal to ascertain the applicable law in accordance with the three-stage inquiry. The arbitral tribunal can determine the applicable law due to its "Kompetenz-Kompetenz" to rule on its own jurisdiction pursuant to Art. 19 (1) HKIAC-Rules. According to the three-stage inquiry, which is an international standard (*EWCA, Sulamérica CIA de Seguros v. Enesa Engenharia SA; EWHC, Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings; EWHC, Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v. VSC Steel Company Ltd.; Flannery, Applicable law, p. 10; Illmer, in: Balthasar Arbitration, p. 308 para. 23*), one must first consider whether an express choice of law was made by the parties. If no express choice can be discerned, one must determine whether an implied choice has been made. Finally – in the absence of an express or implied choice of law by the parties – the proper law is the one with the closest and most real connection to the parties' arbitration clause (*EWCA, Sulamérica CIA de Seguros v. Enesa Engenharia SA; Redfern/Hunter, p. 158 para. 3.11*).

4 This approach is suitable since neither the DAL nor the HKIAC-Rules contain provisions on the law applicable to the interpretation of an arbitration clause. Especially Art. 28 DAL and Art. 36 HKIAC-Rules are inapplicable as they only determine the law governing the merits of the dispute (*Moser/Bao, in: HKIAC-Rules, Art. 35 para. 11.51; Holtzmann/Howard, Model Law, Art. 28 p. 764; Schwenzer/Jäger, in: IWRZ 2016, p. 103*).

5 The parties have neither rendered an express choice **(a.)** nor an implied choice **(b.)** in favour of the law of Mediterraneo. The law of Danubia is most closely connected to the arbitration clause and therefore must be applied **(c.)**.

a. The parties have not rendered an express choice in favour of Mediterranean law

6 Contrary to CLAIMANT's assertions [*Cl. para. 34*], the parties have not expressly chosen a law to govern the arbitration clause. An express choice of law requires that the parties designate their choice explicitly in writing or openly address it at the time the contract is made (*Leong/Tan, SAcLJ 2018, p. 90; McKendrick, in: Chitty on Contracts Vol. I, p. 1095 para. 14-001*).

7 First, the arbitration clause agreed upon by the parties omits the question of the governing law. It reads in its relevant part: "Any dispute arising out of this contract (…) shall be referred to and finally resolved by arbitration (…) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Vindobona, Danubia. The number of arbitrators..." [*Ex. C5, p. 14 no. 15*].

8 Secondly, the parties did not come to an oral agreement on the law applicable to the arbitration clause at the time the Contract was made. In the course of the contract negotiations, there was a back and forth with respect to the governing law: At one point, RESPONDENT suggested that Equatorianian law should apply to the arbitration clause [*Ex. R1, p. 33*]. CLAIMANT's ensuing counterproposal omitted the issue of the law governing the arbitration clause [*Ex. R2, p. 34*]. The last recorded parties' communication demonstrates that the issue of the governing law was still subject to negotiations [*Ex. R3, p. 35*]: The main negotiator for RESPONDENT noted only after the last round of negotiations that he intended to "clarify in arbitration clause (…) the applicable law" [*Ex. R3, p. 35*]. After that round, the parties' negotiators were involved in a car accident, forcing their colleagues to take up their positions [*Ex. R3, p. 35*]. The new negotiators did not address the topic as they considered it to be only of minor importance [*PO2, p. 55 no. 7*]. Therefore, an analysis of the negotiation history shows that the parties did not come to an express oral agreement.

9 Finally, CLAIMANT misstates the facts by arguing that the parties expressly chose the law of Mediterraneo to govern the arbitration clause [*Cl. para. 34*]. The choice of law clause reads: "This Sales Agreement shall be governed by the law of Mediterraneo (…)" [*Ex. C5, p. 14 no. 14*]. The term Sales Agreement equates to the rights and obligations which arise from and in connection with a sales contract. These substantive obligations are distinctly different from the procedural issues which are regulated in the arbitration clause. The arbitration clause sets forth, inter alia, the arbitral institution and the seat of arbitration [*Ex. C5, p. 14 no. 15*]. These stipulations have no direct effect on the substantive rights and obligations stated in the Sales Agreement. Consequently,

the term Sales Agreement does not encompass the arbitration clause. Hence, the parties did not expressly choose a law to govern the arbitration clause.

b. The parties have not impliedly chosen the law governing the arbitration clause

10 Contrary to CLAIMANT's assertions [*Cl. para. 37ff.*], the parties have not made an implied choice. When the parties have not chosen the applicable law expressly, the general circumstances of the contract must be considered to determine as to whether they have rendered an implied choice (*Black's law dictionary, p. 823; Garner, Dictionary, p. 280*). The negotiation history demonstrates that the parties have not rendered an implied choice. **(aa.)**. The choice of law provision in favour of Mediterranean law does not presumptively govern the arbitration clause as the parties' implied choice **(bb.)**. Even if the arbitral tribunal found that such a presumption existed, this alleged presumption has been rebutted in the case at hand **(cc.)**.

aa. There is no implied choice of law governing the arbitration clause

11 CLAIMANT errs in stating that the parties have impliedly chosen the law governing the arbitration clause [*Cl. paras. 37ff.*]. Its line of argument is that the negotiation history demonstrates that the parties did intend for Mediterranean law to govern the arbitration clause [*Cl. para. 40*]. It specifically states that "CLAIMANT rejected RESPONDENT's proposal on the law of this arbitration clause, and counter-proposed that Mediterranean Law remains applicable and Danubia should be the arbitral seat" [*Cl. para. 40*]. That, however, is a misstatement of the facts. The arbitration clause which CLAIMANT offered as counterproposal did not address its governing law [*Ex. R2, p. 34*]. Additionally, CLAIMANT insisted that Mediterranean Law remained applicable to the Sales Agreement [*Ex. R2, p. 34*]. As stated above [*supra, para. 9*], the Sales Agreement differs from the arbitration clause, thereby ruling out that CLAIMANT referred with this remark to the arbitration clause. Finally, the contract negotiations came to no result on the applicable law [*supra, para. 8*]. Hence, there is no implied choice of law for the arbitration clause.

bb. The choice of law provision is no presumption that demonstrates an implicit choice for the arbitration clause

12 Contrary to CLAIMANT's allegations [*Cl. paras. 38ff.*], Mediterranean Law does not presumptively govern the arbitration clause and its interpretation as the parties' implied choice of law. CLAIMANT's line of argument is ill-conceived as there is no such presumption.

13 A presumption is a rule of law which allows an arbitral tribunal to assume that a fact is true until there is an overbalance of evidence which disproves or rebuts the presumption (*cf. Black´s Law Dictionary, pp. 1304, 1305, 1306*). International practice shows that this alleged presumption is not accepted (*cf. Singapore High Court, FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd.; ICC, case no.*

5294; Hamburg Chamber of Commerce, 21 March 1996). The reason for this is that such a presumption would violate the separability doctrine. The separability doctrine is set forth both in Art. 19 (2) HKIAC-Rules and stipulates that arbitration clauses are to be treated as independent of other contractual terms. In consequence, arbitration clauses are deemed as a separate contract from the main agreement (*U.S. Supreme Court, Prima Paint Corp v. Flood & Conklin Mfg. Co.; Nazzini, in: International and Comparative Law 2016, p. 684*) and going even further, as having been "separately concluded" (*UKHL, Premium Nafta Products Ltd. and others v. Fili Shipping Company Ltd.*). In that spirit, it cannot be automatically assumed that an express choice of law for the substantive terms of the contract applies to the arbitration clause as well (*Born, p. 517; Bernardini, in: ICCA Congress Series 1998, p. 201; Nazzini, in: International and Comparative Law 2016, p. 685; Illmer, in: Balthasar Arbitration, p. 308 para. 23*). The parties expressly chose Mediterranean law to govern the Sales Agreement [*Ex. C5, p. 14 no. 14*]. In CLAIMANT's eyes, this justifies the application of Mediterranean law as the parties have included the arbitration clause into their Contract [*Cl. paras. 39*]. It thereby intends to apply the law of the main contract to the arbitration clause because they are both written down on the same legal document. Therefore, CLAIMANT automatically assumes that the express choice of Mediterranean law for the substantive terms of the contract applies to the arbitration clause as well. By putting forward the alleged presumption, CLAIMANT disregards the doctrine of separability. Consequently, there is no such presumption.

cc. In any case, a presumption that Mediterranean law governs the arbitration clause is rebutted

14 Even if the arbitral tribunal found that the parties are presumed to have chosen the law of the substantive contractual terms to govern their arbitration clause, that presumption is rebutted. CLAIMANT states that a presumption is rebutted when the parties intended to apply a law different from the law of the substantive contractual terms to their arbitration clause [*Cl. para. 39*]. It purports that the parties never intended to apply a law different from Mediterranean law [*Cl. para. 40*].

15 First, the structure of the Contract demonstrates the parties' intent to not apply Mediterranean law. The choice of law can be found in clause 14 and the arbitration agreement in clause 15 [*Ex. C5, p. 14*]. These are two separate clauses. While clause 14 is based on an industry template, clause 15 was added by the parties only in the course of the contract negotiations [*PO2, p. 55 no. 3*]. Had they intended to connect the two clauses, they could have included the arbitration agreement into the substantive choice of law clause. Consequently, the parties' intent to not apply Mediterranean law can be derived from the structure of the Contract.

16 Secondly, the contract negotiations demonstrate the parties' will to not apply Mediterranean law to the arbitration clause as stated above [*supra, para. 8*]. As the parties' intention shows that they wanted to apply a different law than the law of Mediterraneo, the alleged presumption is rebutted. In conclusion, the parties have not made an implied choice of law for their arbitration clause.

c. Danubian Law is applicable to the interpretation of the arbitration clause

17 In accordance with the last stage of the three-stage inquiry, the law of Danubia governs the arbitration clause as it has the closest and most real connection to the arbitration agreement. The closest and most real connection is indicated by so called connecting factors which associate a law with the parties' arbitration agreement. The law of Danubia governs the arbitration clause since the decisive connecting factor is the seat of arbitration **(aa.)**. The law of the underlying contract does not sufficiently indicate the law applicable to the arbitration clause **(bb.)**.

aa. Danubian law governs the arbitration clause as Danubia is the seat of arbitration

18 Danubian law governs the arbitration clause since the decisive connecting factor in the instant case is the seat of arbitration. It has the most significant relationship with the arbitration agreement (*EWCA, C v. D; Born, Commentary and Materials, p. 111; Fouchard/Gaillard/Goldman, Arbitration, p. 225 para. 429; Lew, in: ICCA Congress Series 1998, pp. 141f.*). The seat of arbitration is recognized as the "juridical centre of gravity" which gives life and effect to an arbitration agreement (*Singapore High Court, FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd.*).

19 Even though there is no specific rule to ascertain the law applicable to the interpretation of an arbitration agreement, in most jurisdictions, the law determining the validity of the arbitration agreement is the same as the law governing its interpretation (*EWCA, Int'l Tank and Pipe SAK v. Kuwait Aviation Fuelling Co.; BGer, A. v. B.; OLG Düsseldorf, 17 November 1995; Born, p. 635; Fouchard/Gaillard/Goldman, Arbitration, p. 255 para. 475*).

20 The UNCITRAL Model Law on International Commercial Arbitration (hereinafter: "**ML**") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: "**NYC**") establish that the law of the seat of arbitration is applicable to ascertain the validity of the arbitration agreement in the absence of an express or implied party choice. Therefore, Art. 36 (1)(a)(i) ML and Art. V (1)(a) NYC establish a default choice of law rule in favour of the law of the arbitral seat (*Born, p. 499; Fouchard/Gaillard/Goldman, Arbitration, p. 226 para. 431*). Thereby, the ML and the NYC underline the paramount importance of the seat of arbitration in international arbitration. In the present case, RESPONDENT and CLAIMANT have chosen Danubia as the seat of arbitration [*Ex. C5, p. 14 no. 15*]. Therefore, Danubian law applies to the interpretation of the arbitration clause.

21 Moreover, the procedural character of the arbitration clause also demonstrates that the law of the arbitral seat is to be applied. Arbitration clauses are of procedural character as they are drafted with regard to future disputes und regulate the proceeding in which these disputes are decided (*ICC, case no. 4504; Born, p. 359f.; Redfern/Hunter, p. 161 para. 3.24; Stacher, Schiedsvereinbarung, p. 7*). Since it is the nature of arbitration clauses to "provide for given procedures in a given place" (*High Court Tokyo, Japan Educational Corporation v. Kenneth J. Feld*), it must be assumed that – absent an express or implied party choice – it was the parties' intent to apply the law of the place of arbitration (*ICC, case no. 5294; Hamburg Chamber of Commerce, 21 March 1996; High Court Tokyo, Japan Educational Corporation v. Kenneth J. Feld; Korean Supreme Court, 10 April 1990*). As Danubia is the seat of arbitration, the procedural nature of arbitration clauses also weighs in favour of Danubian law. Hence, the decisive connecting factor, seat of arbitration, leads to the application of Danubian law.

bb. The underlying contract is no sufficient indication

22 The law of the underlying contract is no decisive connecting factor and does thus not sufficiently indicate the law applicable to the arbitration clause.

23 First, only the law of the seat complies with the parties' hypothetical intention to safeguard neutrality in arbitration. Even in cases where the real party intent is indiscernible, the arbitral seat weighs in heavily as a connecting factor when it is placed in a neutral country (*Born, p. 518*). While CLAIMANT and RESPONDENT come from Mediterraneo and Equatoriana [*NoA, p. 4f. no. 1ff.*], Danubia is a neutral country. The law of the underlying contract, the law of Mediterraneo [*Ex. C5, p. 14 no. 14*], is thus not neutral. Applying the domestic law of Mediterraneo or Equatoriana would give advantage to one of the parties. It must be assumed that the parties would most probably have opted for a neutral law to not give any advantage to either one of them, had they come to an agreement about the law governing the arbitration clause. Hence, it would contradict the parties' hypothetical intention to apply the law of the underlying contract instead of the law of the seat.

24 Secondly, it is rare for the law governing the arbitration agreement to differ from the law of the seat (*EWCA, C v. D; Singapore High Court, FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd*). That applies especially where parties have expressly chosen a law for the underlying agreement but opted for a different seat of arbitration (*Singapore High Court, FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd; Born, p. 518.*). The parties have decided to submit the sales agreement to Mediterranean law while placing their proceedings in Danubia [*Ex. C5, p. 14*]. All things considered, the law of the underlying contract is thus no sufficient indication. In conclusion, the law of Danubia has the closest and most real connection to the arbitration clause and therefore governs its interpretation.

2. The arbitral tribunal does not have jurisdiction to adapt the contract

25 The arbitral tribunal has no jurisdiction to adapt the contract under the narrow interpretation of the arbitration clause pursuant to the DCL. Arbitral tribunals have jurisdiction when they can decide a matter instead of state courts. Jurisdiction is granted by an agreement of the parties in the arbitration clause (*Redfern/Hunter, p. 339 para. 5.102*). The arbitral tribunal lacks jurisdiction to adapt the Contract since the parties did not agree to include contract adaptation in the arbitration clause. The reason for this is that the arbitration clause must be interpreted pursuant to Art. 4.1 DCL **(a.)** which points to a narrow interpretation in the instant case **(b.)**. Under this narrow interpretation, contract adaptation neither is a dispute, nor does it arise out of this contract **(c.)**.

a. Art. 4.1 DCL governs the interpretation of the arbitration clause

26 The arbitration clause must be interpreted pursuant to Art 4.1 DCL. Generally, the CISG would take precedence over national contract laws where both parties have their seat in contracting states (*BGer, CISG-online no. 770; Stoffel, in: Publication CEDIDAC 1991, p. 36*), as in the pending dispute [*PO1, p. 53 no. III 4*]. However, it is consistent jurisprudence in Danubia that the CISG does not govern arbitration agreements [*PO2, p. 60 no. 36*] since they are considered to be a procedural contract and not a sales agreement in light of the doctrine of separability. Therefore, Art. 4.1 DCL, the basic rule of contract interpretation, governs the interpretation of the arbitration clause.

27 When applying Art. 4.1 DCL, caution must be exercised regarding the peculiarities of the DCL. While mostly a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (hereinafter: "**PICC**"), the DCL deviates once from its legislative model: The interpretation of contracts is characterized by the four corners rule in Art. 4.3 DCL [*PO2, p. 61 no. 45*]. This rule sets forth that a contract in writing cannot be contradicted or supplemented by evidence of prior statements or agreements unless such statements or agreements are only used to interpret the writing [*PO2, p. 61 no. 45*].

b. The arbitration clause must be construed narrowly according to Art. 4.1 (1) DCL

28 Contrary to CLAIMANT's assertions [*Cl. paras. 51ff.*], the arbitration clause is to be interpreted narrowly pursuant to Art. 4.1 (1) DCL in accordance with the parties' common intention. CLAIMANT purports that the wording "shall be given expansive interpretation" in accordance with their intention [*Cl. para. 52*]. However, already the wording of the arbitration clause points towards a narrow interpretation. It only lists the term dispute and omits the terms controversy, difference and claim which are mentioned in the HKIAC Model clause (*Moser/Bao, HKIAC-Rules, para. 4.24*). The HKIAC Model clause has been drafted with the aim to provide for a broad scope which encompasses all legal disputes which may arise out of or in relation to a contract (*Moser/Bao,*

HKIAC-Rules, para. 4.06). To reach that aim, the terms controversy, difference and claim are of paramount importance as they are internationally acknowledged to be construed broadly (*EWHC, Woolf v. Collis Removal Service; EWCA, F & G Sykes (Wessex) Ltd. v. Fine Fare Ltd.; U.S. Supreme Court, Prima Paint Corp v. Flood & Conklin Mfg. Co.; Redfern/Hunter, p. 94 para. 2.68*). The parties omitted exactly these words in the final version of the arbitration clause [*Ex. C4 p. 14 no. 15*]. Hence, the wording of the arbitration clause shows the parties' common intent to construe it narrowly.

29 The drafting history confirms that assessment. RESPONDENT proposed an arbitration clause "based on the aforementioned model clause suggested by the HKIAC" [*Ex. R1 p. 33*]. It did, however, intentionally leave out the words *controversy, difference and claim* and only referred to disputes arising out of the Contract instead of both disputes arising out of *and* relating to said Contract [*Ex. R1 p. 33*]. RESPONDENT clearly pointed out that its intention behind these omissions was to "narrow down the wording of the arbitration clause" [*Ex. R1, p. 33*], thereby deleting any reference which could be interpreted as an authorization for contract adaptation [*Answer to NoA, p. 31 no. 13*]. CLAIMANT raised no objections to the narrow wording proposed by RESPONDENT and accepted this arbitration clause with an amendment only as to the place of arbitration [*Ex. R2, p. 34*]. CLAIMANT thereby agreed to RESPONDENT's intention and established it as common understanding. This understanding is in line with the DCL which stipulates a narrow interpretation of arbitration agreements [*PO1, p. 52 no. II*]. Therefore, the arbitration clause must be interpreted narrowly pursuant to Art. 4.1 (1) DCL according to the parties' common intention.

c. Contract adaptation is no dispute and does not arise out of this contract

30 CLAIMANT puts forward that price adaptation is covered by the arbitration clause as it concerns the interpretation of clause 12 of the Contract [*Cl. para. 53*]. Thereby, it disregards that term dispute does not comprise the creative task of adapting the Contract under the aforementioned narrow interpretation. It is in the nature of arbitration to understand the term dispute only as the adjudication of pre-existing rights (*Beisteiner, in: Austrian Yearbook on International Arbitration 2014, pp. 83ff.; Fouchard/Gaillard/Goldman, Arbitration, p. 25 para. 34; Perales Viscasillas, in: Arbitrability, p. 275*). When the arbitral tribunal adapts a contract, it does not render a decision on the existence and extent of rights set forth in the contract. Instead, it embarks on the creative task of shaping the future contractual relationship of the parties (*OGH, 27 February 1985; Beisteiner, in: Austrian Yearbook on International Arbitration 2014, pp. 85f.*). As the arbitral tribunal does thereby create new rights and obligations, this creative exercise is incompatible with the nature and essence of arbitration. Hence, the adaptation of contracts is not a dispute pursuant to the arbitration clause.

31 Moreover, the parties are not at odds about rights arising out of the contract but only rights relating to said contract. CLAIMANT asks for an additional reimbursement of $1,250,000 which is not stipulated in the Contract the parties agreed upon. If the arbitral tribunal were to adapt the contract, it would render a judgement affecting a legal relationship (*RGZ, 03 February 1922; Kegel, in: JZ 1952, p. 148*) and thus amend the existing contract. RESPONDENT's alleged obligation to pay CLAIMANT an additional $1,250,000 stems from this amended contract. Consequently, the additional reimbursement is not a dispute arising out of the Contract the parties agreed upon. Instead, the additional reimbursement is an issue relating to the Contract. This is also supported by the fact that the arbitral tribunal itself gave out the information that under Danubian law it would most likely not interpret the arbitration agreement as authorizing a contract adaptation [*PO1, p. 52 no. II*]. Therefore, contract adaptation neither is a dispute nor does it arise out of the Contract under the narrow interpretation of the arbitration clause pursuant to Art. 4.1 (1) DCL. Hence, the arbitral tribunal does not have jurisdiction to adapt the Contract.

3. The arbitral tribunal lacks the power to adapt the Contract

32 Even if the arbitral tribunal assumed jurisdiction, it does not have the power to adapt the Contract as the requirements of the DAL are not met. If an arbitral tribunal has the jurisdiction but not the power to adapt a contract, neither state courts nor arbitral tribunals can grant the remedy of contract adaptation. Contrary to CLAIMANT's allegations [*Cl. paras. 44, 54ff.*], the question of whether not arbitral tribunals may adapt contracts is a procedural question regulated in the applicable arbitration law (*Frick, Arbitration p. 194; Homburger, in: Rec.Tr.Sui, p. 101*). Both theory and practice show that the applicable arbitration law is the procedural law of the seat of arbitration (*EWHC, Dubai Islamic Bank PJSC v. Paymentech Merchant Servs. Inc.; Redfern/Hunter, p. 171 para. 353; Kaufmann-Kohler, ICCA Congress Series 1998, p. 338; Born, p. 1530*). The parties have chosen the arbitral proceedings to be seated in Danubia [*Ex. C5, p. 14*], thus rendering the DAL applicable. Pursuant to Art. 28 (3) DAL, parties may only authorize arbitral tribunals to adapt contracts by conferring upon them this power expressly [*PO2, p. 60 no. 36*]. The question of whether the parties have come to an express agreement is of substantive nature. Hence, the rules of interpretation of the DCL apply to ascertain an express conferral of powers, more specifically Art. 4.1 (1) DCL.

33 The parties' intent to not give the arbitral tribunal the power to adapt the Contract can be derived from its wording. The wording of the Contract entails no express provision granting the arbitral tribunal said power [*Ex. C5, pp. 13f.*]. In the spirit of the aforementioned four corners rule pursuant to Art. 4.3 DCL, this is further evidenced by the parties' communications prior to contract conclusion. CLAIMANT's negotiator, Ms. Napravnik, stressed that it was important for CLAIMANT

to provide the arbitrators with a mechanism for contract adaptation [*Ex. C8, p. 17*]. RESPONDENT's negotiator, Mr. Antley, hesitated and only announced to make a proposal of his own regarding the topic at the next meeting [*Ex. C8, p. 17; Ex. R3, p. 35*]. A final agreement was never reached between these negotiators since they were injured in a car accident before Mr. Antley could make his proposal [*Ex. C8, p. 17; Ex. R3, p. 35*]. The replacements for Ms. Napravnik and Mr. Antley who finalized the Contract did not discuss the issue of contract adaptation since they attributed little importance to it [*PO2, p. 55 no. 7*]. Hence, the parties never came to an oral agreement concerning the power of the arbitral tribunal to adapt the Contract. The negotiation history thus underlines the finding that there is no express authorization of the arbitral tribunal to adapt the Contract. The parties have thus not expressly agreed to give the arbitral tribunal the power to adapt the Contract in light of Art. 4.1 (1) DCL. As a result, the requirements of Art. 28 (3) DAL are not fulfilled and the arbitral tribunal lacks the power to adapt the Contract.

34 In conclusion, the arbitral tribunal lacks both the jurisdiction and the power to adapt the Contract when Danubian law governs the arbitration clause.

II. Irrespective of which other law applies to the arbitration clause, the arbitral tribunal lacks both the jurisdiction and the power to adapt the Contract

35 Even if the arbitral tribunal found the law of Mediterraneo or any other law applicable, it lacks jurisdiction and power to adapt the Contract under the arbitration clause interpreted pursuant to Art. 8 (1) CISG. First, Art. 8 CISG governs the interpretation of the arbitration clause when applying Mediterranean law or any other law **(1.)**. Secondly, the arbitral tribunal lacks both the jurisdiction and the power to adapt the Contract **(2.)**.

1. Art. 8 CISG governs the interpretation of the arbitration clause

36 Art. 8 CISG governs the interpretation of the arbitration clause when applying Mediterranean law or any other law. CLAIMANT correctly implies that the pending dispute falls within the scope of application of the CISG [*cf. Cl. para. 82*]. Contrary to CLAIMANT's assertions [*Cl. paras. 45f.*], however, under the law of Mediterraneo, the arbitration clause must be construed pursuant to Art. 8 (1) CISG and not pursuant to Art. 4.1 MCL. CLAIMANT argues that the CISG does not govern the interpretation of the arbitration clause under Danubian jurisprudence [*Cl. para. 33*]. In arguing that, CLAIMANT fails to recognize that the Danubian jurisprudence is inapplicable and thus irrelevant when interpreting the arbitration clause pursuant to the law of Mediterraneo. Hence, the arbitral tribunal must apply Art. 8 CISG to construe the arbitration clause when applying the law of Mediterraneo to stay in line with the consistent Mediterranean jurisprudence [*PO1, p. 53 no. III 4*]. However, Art. 8 CISG also governs the arbitration clause when applying any

other law. As a starting point, Art. 8 CISG applies not only to parties' statements but also to the interpretation of contracts (*HGer Aargau, CISG-online no. 1740; UN Conference on the CISG, OR, p. 18; Ferrari, in: MüKoHGB, Art. 8 para. 3*). Its scope of application is not limited to the substantive issues addressed in the CISG. This is evidenced by Art. 19 (3) CISG which inter alia governs agreements on the settlement of disputes such as arbitration clauses (*U.S. District Court Southern District of NY, CISG-online no. 45; DiMatteo/Dhooge/Greene/Maurer, in: NWJILB 2004, p. 355; Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8 para. 5*). Since it is a provision regarding the formation of contracts, statements pursuant to Art. 19 (3) CISG are subject to an interpretation pursuant to Art. 8 CISG. Hence, Art. 8 CISG also governs the arbitration clause under any other law.

2. The arbitral tribunal lacks both jurisdiction and the power to adapt the Contract

37 The arbitral tribunal lacks both jurisdiction and the power to adapt the Contract when applying Art. 8 CISG to the interpretation of the arbitration clause.

38 Pursuant to Art. 8 (1) CISG, contracts must be interpreted in line with the parties' intent. The arbitral tribunal has no jurisdiction as the phrase "dispute arising out of this contract" [*Ex. C5, p. 14 no. 15*] does not cover contract adaptation in accordance with the parties' common intention [*supra, paras. 25ff.*]. Moreover, the arbitral tribunal also lacks the power to adapt the Contract when applying the rules of interpretation of Mediterraneo or any other country. The question as to whether an arbitral tribunal has said power is regulated in the applicable arbitration law. As the parties have chosen Danubia as the seat of arbitration, DAL applies [*supra, para. 32*]. The parties have not expressly empowered the arbitral tribunal as required by Art. 28 (3) DAL [*supra, para. 33*].

39 In conclusion, the arbitral tribunal lacks both the power and the jurisdiction to adapt the Contract even if the law of Mediterraneo or any other law governed the arbitration clause.

CONCLUSION TO ISSUE 1

In light of the aforementioned arguments, CLAIMANT requests the honourable tribunal to find that it does not have the jurisdiction and the power to adapt the Contract under the arbitration clause. The reason for this is that Danubian law applies to construe the arbitration clause narrowly. However, the same applies under Mediterranean or any other law.

ISSUE 2 – THE AWARD IS INADMISSIBLE AS EVIDENCE

40 RESPONDENT kindly asks the arbitral tribunal to find the Award put forward by CLAIMANT to be inadmissible as evidence. CLAIMANT intends to rely on said Award to prove RESPONDENT's alleged contradictory behaviour, although its illicit procurement is undisputed [*Cl. paras. 71, 76*]. To

deemphasize the shady obtainment of the Award, CLAIMANT reiterates that the arbitral tribunal has a wide discretion to admit evidence pursuant to Art. 22 (2) HKIAC-Rules [*Cl. paras. 59ff.*].

41 In accordance with that wide discretion, the arbitral tribunal could use the IBA Rules on the Taking of Evidence in International Arbitration (hereinafter: "**IBA-Rules**") as guidance even if parties did not explicitly agree upon their applicability. The IBA-Rules constitute the international best practice with regard to taking of evidence (*ICSID, Glamis Gold Ltd. v. United States of America; Risse/Haller, in: Beweis, p. 123 para. 25; Marghitola, International Arbitration, p. 2; Demeyere, in: SchiedsVZ 2003, p. 249; McIlwrath/Savage, Practical Guide, p. 289 para. 173; Welser/de Berti, Best Practices, p. 80*). This can be derived from the fact that the IBA-Rules reconcile the different legal positions of the civil law and the common law and thereby mark a common ground between the parties (*Laumen, in: MDR 2015, p. 1276; von Segesser, in: ASA Bulletin 2010, p. 736; Waincymer, Procedure, p. 760*). RESPONDENT thus respectfully asks the arbitral tribunal to use the IBA-Rules as guidance in the instant case in light of their advantages and widespread acceptance.

42 The arbitral tribunal shall exercise its discretion by weighing the parties' interests to balance their expectations and prevent the omission of material interests (*High Court of Australia, Bunning v. Cross; Peiris, in: Ottawa L. Rev. 1981, p. 344; Werner, in: NJW 1988, p. 997*). First, RESPONDENT's interest of confidentiality weighs heavily due to Art. 45 HKIAC-Rules **(I.)**. Secondly, CLAIMANT cannot have a strong interest to admit the Award as it is irrelevant **(II.)**. Thirdly, CLAIMANT would have to take an illegal action in order to acquire the Award **(III.)**. Finally, CLAIMANT is less worthy of protection since the admission of the Award would violate good faith **(IV.)**.

I. RESPONDENT has a strong interest to safeguard confidentiality of the proceedings

43 The Award shall not be admitted as its admission would promote a breach of confidentiality contrary to RESPONDENT's interests. By arguing that the "arbitral tribunal should admit the Award to promote the transparency of the proceedings" [*Cl. para. 74*], CLAIMANT fails to recognize that the HKIAC-Rules take a particularly firm stance on confidentiality (*Moser/Bao, HKIAC-Rules, Art. 42 para. 12.29*). Its confidentiality requirements are so strict that no award from HKIAC administered proceedings has been published yet (*Moser/Bao, HKIAC-Rules, Art. 42 para. 12.37*). This is even more staggering as the HKIAC has existed for more than 30 years and managed over 9000 cases in the meantime (*Moser/Bao, HKIAC-Rules, para. 3.86*). While it is true that transparency in arbitration makes outcomes more predictable [*Cl. para. 74*], the parties are bound by an express duty of confidentiality pursuant to Art. 45 (1) HKIAC-Rules by opting for HKIAC administered proceedings (*Moser/Bao, HKIAC-Rules, Art. 42 para. 12.30*).

Art. 45 (1)(2) HKIAC-Rules obligate arbitrators to keep awards made in the arbitration confidential. The HKIAC-Rules thereby adopt the general principle of confidentiality which is a cornerstone of international commercial arbitration (*De Saint Marc, in: Journal of International Arbitration 2003, p. 211; Fouchard/Gaillard/Goldman, Arbitration, p. 773 para. 1412*). The importance of confidentiality is also reflected by the IBA-Rules which stipulate in Art. 9 (2)(e) IBA-Rules an express grounds for exclusion of confidential documents.

44 With the admission of the Award, information that is explicitly protected by Art. 45 (1) HKIAC-Rules would be disclosed. Although it is brought forward by CLAIMANT, which is not a party in the other arbitration proceeding, the admission would promote the breach of confidentiality in the other proceeding. When making a decision, it cannot be in the arbitral tribunal's interest to enable a breach of confidentiality in another arbitration also conducted by the HKIAC. As both proceedings are HKIAC administered, the arbitrators must be aware of the significance of confidentiality under the HKIAC-Rules. Admitting the Award as evidence would thus subvert the principles which arbitration under HKIAC stands for. The arbitral tribunal must comply with Art. 45 (1)(2) HKIAC-Rules.

II. The Award is irrelevant and immaterial to the case at hand

45 Contrary to CLAIMANT's assertions [*Cl. para. 63ff.*], the Award is irrelevant and immaterial to the present case, thereby diminishing its interest to admit the Award.

46 The honourable tribunal shall not admit irrelevant or immaterial evidence as that would cause unnecessary costs and delays (*Barton Center Case, Lab. Arb. Rep. 2005, p. 253; Green, in: Texas Wesleyan Law Review 2009, p. 543; Duff, in: Problems of Proof, pp. 246f.*). Admitting irrelevant evidence would even threaten the arbitrators to be reasonably challenged due to misconduct (*Haynes, in: Asian Dispute Review 2008, p. 110*). Finally, the IBA-Rules confirm that legal stand point in Art. 9 (2)(a) IBA-Rules. Said provision sets forth that an arbitral tribunal shall exclude documents from evidence for "lack of sufficient relevance to the case or materiality to its outcome". Therefore, the arbitral tribunal shall not admit evidence which is irrelevant or immaterial. The Award is both irrelevant and immaterial to the instant case. According to CLAIMANT, evidence is relevant if it proves a fact from which legal conclusions are drawn [*Cl. para. 66*]. RESPONDENT agrees with that definition. Moreover, it is material if it assists an arbitral tribunal to determine if a factual allegation is true [*Cl. para. 66*] (*Moser/Bao, HKIAC-Rules, Art. 22.2 para. 9.161; Raeschke-Kessler, IBA-Rules, p. 22*). The legal conclusion from which CLAIMANT infers that the Award is relevant is the doctrine of judicial estoppel [*Cl. paras. 63*]. According to that doctrine, a party may not advance a contradictory position in subsequent proceedings [*Cl. para. 63*] (*U.S. Court of Appeals, Scarano v.*

Central R. Co. of New Jersey; U.S. Court of Appeals, Patriot Cinemas Inc. v. Gen. Cinema Corp; *Cour de Cassastion, Golshani v. Government of the Islamic Republic of Iran*). CLAIMANT argues that RESPONDENT shall be estopped from objecting to contract adaptation in the pending proceeding as it put forward the contrary position in a different proceeding [*Cl. para. 63*].

47 However, CLAIMANT cannot rely on judicial estoppel as its rationale contradicts the rationale of confidentiality under the HKIAC-Rules **(1.)**. Even if the arbitral tribunal found judicial estoppel applicable in arbitration, CLAIMANT cannot put forward estoppel since it is a stranger to the other proceeding **(2.)**. Moreover, the two proceedings are not similar as required by judicial estoppel **(3.)**.

1. The rationale of estoppel contradicts the rationale of confidentiality under the HKIAC-Rules

48 CLAIMANT puts forward that RESPONDENT should be estopped from asserting contradictory positions [*Cl. para. 63*]. However, CLAIMANT cannot invoke judicial estoppel as the doctrine's rationale contradicts the rationale of confidentiality under the HKIAC-Rules. There are two competing rationales for judicial estoppel: Some say that the rationale of estoppel is to prevent damage from the public confidence in the integrity of the judicial system (*Tennessee Supreme Court, H. Hamilton v. John M. Zimmermann; Boyers, in: Northwester University Law Review 1985-1986, p. 1252*). Others are of the opinion, that the integrity of the judicial process might be threatened where there is a risk of inconsistent results (*U.S. Court of Appeals, William Edwards v. Aetna Life Insurance Company; U.S. Court N.D. Texas, USLIFE Corp. v. United States Life Insurance Company; Boyers, in: Northwester University Law Review 1985-1986, p. 1252*).

49 Parties can design their arbitral proceedings to be as confidential as they decide (*De Saint Marc, in: Journal of International Arbitration 2003, p. 211; Fouchard/Gaillard/Goldman, Arbitration, p. 773 para. 1412*). The proceedings and the awards in arbitration are generally held confidential and do not make it into public awareness. This is even more so under the HKIAC-Rules which take a particularly firm stance on confidentiality in Art. 45 HKIAC-Rules [*supra, para. 43*].

50 Since the HKIAC has never once published an award (*Moser/Bao, HKIAC-Rules, Art. 42 para. 12.37*), there is no risk of diminishing public confidence since the goal of the HKIAC-Rules is to achieve complete confidentiality. By choosing HKIAC administered arbitration, parties also disregard the inconsistency aspect of estoppel since these parties attribute more weight to keep proceedings confidential than to contribute with their award to consistent decision-making. Therefore, CLAIMANT cannot invoke judicial estoppel in the present case.

2. CLAIMANT cannot invoke estoppel as it is not a party to the other proceeding

51 Even if the arbitral tribunal found judicial estoppel to be applicable under HKIAC administered proceedings, CLAIMANT cannot rely on said doctrine to admit the Award as it is a stranger to the first proceeding. This doctrine only applies, when the parties are the same in two subsequent proceedings (*Supreme Court of Arizona, Martin v. Wood et al.; Supreme Court of Arizona, Adams v. BEAR; Supreme Court of Arizona, State Farm Automobile Insurance Company, v. Civil Service Employees Insurance Company; Waincymer, Procedure, p. 790*). The rationale of judicial estoppel is to prevent a party from taking unfair advantage of the other party's reliance on their expressed intentions (*Cour de Cassastion, Golshani v. Government of the Islamic Republic of Iran*).

52 CLAIMANT cannot justifiably rely on RESPONDENT's plea in the other arbitration proceeding where RESPONDENT claimed a higher remuneration from a contract adaptation [*PO2, p. 60 no. 39*]. Since the receipt of the Answer to NoA [*HKIAC-Note, p. 37*], CLAIMANT had to be well aware that RESPONDENT would not accept contract adaptation in the pending arbitration proceeding. CLAIMANT only later learned about RESPONDENT's legal position in the other arbitration proceeding [*Langweiler E-mail, p. 50*]. Therefore, CLAIMANT cannot have trusted that RESPONDENT would also consent to contract adaptation in the pending proceeding. In conclusion, CLAIMANT cannot rely on the doctrine of judicial estoppel as it is a stranger to the first proceeding.

3. The two proceedings are not similar

53 Contrary to CLAIMANT's allegations [*Cl. para. 64*], the two proceedings are not similar as required by judicial estoppel. For judicial estoppel to apply, the proceedings must have a similar context and decide the same issues (*Waincymer, Procedure, p. 695*). The two proceedings are not similar since entirely different contracts underlie the two business relations. CLAIMANT argues that the proceedings are similar as both arbitration clauses are based on the HKIAC Model clause [*Cl. para. 64*]. However, it fails to recognize that there is one decisive difference between the two arbitration clauses. The parties in the other arbitration have agreed on the HKIAC Model clause with all additions and thus expressly chose a law to govern their arbitration clause (*cf. Moser/Bao, HKIAC-Rules, para. 4.24*). On the contrary, the law governing the arbitration clause is in dispute in the instant case [*supra, paras. 3ff.; Cl. paras. 34ff.*] since there was no such express choice [*supra, paras. 6ff.*]. Additionally, the parties agreed about the delivery of a mare to Mediterraneo in the other proceeding [*PO2, p. 60 no. 39*]. In the pending proceeding, however, the frozen semen was delivered to Equatoriana [*Ex. C5, p. 14 no. 8*]. Finally, the contract underlying the other arbitration proceeding stipulated the ICC hardship clause [*PO2, p. 60 no. 39*] whereas CLAIMANT and RESPONDENT have

opted for a specially-tailored solution in their Contract [*infra, para. 114*]. With all these paramount factors differing, the two proceedings are not similar as required by judicial estoppel.

Therefore, CLAIMANT cannot invoke judicial estoppel in the instant case. As a result, the Award is neither relevant nor material to prove the factual basis of judicial estoppel. In conclusion, CLAIMANT cannot base its interest to admit the Award on the relevance of the Award.

III. CLAIMANT would have to take an illegal action in order to acquire the Award

54 CLAIMANT is planning to commit an illegal action in order to admit the Award. It rightfully states that it "lawfully learnt about the other arbitration" [*Cl. para. 78*]. However, the arbitral tribunal should not give weight to CLAIMANT's alleged evidentiary difficulties [*Cl. para. 80*] since buying illegally obtained evidence in knowledge of that illegal obtainment is an illegal action itself. The reason for this is that the buyer aids to perpetuate the illegal condition. Perpetuating an illegal condition is a criminal offense in virtually all countries (*§ 662 U.S. Criminal Code; Section 22 (1) Theft Act 1968 of the United Kingdom; § 259 German Criminal Code; Section 24 Theft Ordinance of Hong Kong; § 354 Canadian Criminal Code; § 411 Indian Penal Code; Art. 321-1 French Criminal Code; Art. 312 Chinese Criminal Code; Art. 299 Spanish Criminal Code; Art. 180 Brazilian Criminal Code; Section 37 of General Law Amendment Act 62 of 1955 of South Africa*). Consequently, arbitrators in international arbitration should recognise the illegality of such actions, taking them into account as a factor adversely to the party which took part in the crime.

55 CLAIMANT intends to buy the Award [*PO2, p. 60 no.* 41] although it is aware of its illicit procurement history [*Cl. paras. 71, 76*]. Thereby, CLAIMANT would perpetuate the illegal condition when buying the Award. This planned illegal action shall bar CLAIMANT from admitting the Award.

IV. CLAIMANT is less worthy of protection as it acts in bad faith

56 CLAIMANT is less worthy of protection since the admission of illegally obtained evidence would contradict good faith. Good faith is a well-acknowledged principle in international arbitration (*BGer, 10 May 1982; Born, p. 1258; Fouchard/Gaillard/Goldman, Arbitration, p. 820 para. 1462; Cremades, in: Am. U. Int'l L. Rev. 2012, p. 785*). Therefore, the IBA-Rules expressly stipulate a duty of good faith in Art. 9 (7) IBA-Rules. CLAIMANT errs by stating that it acted in good faith in seeking to admit the evidence [*Cl. paras. 77ff.*]. It argues that it complied with good faith as it presented evidence "which throws a light on the claim's merits" and because the evidence is "accessible by any person" [*Cl. para. 77*]. However, CLAIMANT does not even once argue with the Award in his arguments on the merits [*Cl. paras. 82ff.*], thereby impliedly agreeing that the Award is irrelevant. Moreover, the Award is not accessible by anyone. The Award is purchasable from a company

which provides intelligence on the horseracing industry at a price of $1,000 [*PO2, pp. 60f. no. 41*]. Hence, the Award is behind a paywall and only accessible to people having paid the fee of $1,000.

57 Quite contrary to CLAIMANT's assertions, it acts in bad faith by putting forward the Award in light of the Award's procurement history. It was obtained through either a breach of a confidentiality agreement or through an illegal hack [*PO2, p. 61 no. 41*]. Therefore, either way, the Award was obtained illegally. RESPONDENT deliberately took precautions to prevent its internal information from becoming publicly available by setting up a firewall [*PO2, p. 61 no. 42*] and contractually obligating its employees to confidentiality [*PO2, p. 61 no. 41*]. By seeking to admit the Award as evidence, CLAIMANT is thus acting inconsiderately and fails to conduct itself in good faith. Hence, CLAIMANT is less worthy of protection. Therefore, RESPONDENT's interest of not admitting the Award for reasons of confidentiality outweighs CLAIMANT's interests.

In conclusion, the Award put forward by CLAIMANT is inadmissible as evidence.

CONCLUSION TO ISSUE 2

RESPONDENT respectfully asks the honourable tribunal to deny CLAIMANT's request for admission of the Award as evidence. The Award is irrelevant to decide the case at hand. Additionally, the admission of the Award would breach confidentiality and CLAIMANT would have to take an illegal action to acquire it. Finally, CLAIMANT acts in bad faith by admitting the Award.

ISSUE 3 - CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF $1,250,000

58 RESPONDENT requests the honourable tribunal to dismiss CLAIMANT's request for an additional payment of $1,250,000. First, CLAIMANT is not entitled to the payment of $1,250,000 since it cannot rely on hardship due to the fact that it already met its obligation to deliver **(I.)**. Secondly, there is no basis for CLAIMANT's payment claim of $1,250,000 from a contract adaptation **(II.)**. Even if the arbitral tribunal concluded that there was a legal basis for adaptation, RESPONDENT shall pay less than $1,250,000 **(III.)**.

I. CLAIMANT cannot rely on hardship as it already delivered

59 CLAIMANT cannot invoke hardship neither under clause 12 [*Cl. paras. 84ff.*] of the Contract nor under Art. 79 CISG [*Cl. paras. 109ff.*] since it already delivered the frozen semen and therefore performed its contractual obligations.

60 It lies within the very nature of hardship that the remedy of contract adaptation may only be invoked relating to obligations which have not been performed yet (*PICC Official Comment, Art. 6.2.2 para. 4*). Therefore, Art. 79 (1) CISG sets forth a relief of responsibility in cases of hardship [*infra, para. 94*] only where the invoking party failed to perform. In other words, "a contracting

party cannot invoke hardship to claim greater payment for work that it had already done" (*McKendrick, in: Vogenauer, Art. 6.2.2 para. 4*). The reason for this lies within the rationale of hardship. Hardship can only be assumed if the performance is economically impossible for the disadvantaged party (*Schlechtriem/Schroeter, UN-Kaufrecht, p. 302 para. 678; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79 para. 31; Atamer, in: Kröll/Mistelis/Perales Viscasillas, Art. 79 para. 82*). It is a last resort to avert its financial collapse. In the pending case, CLAIMANT has undisputedly complied with its contractual obligations [*Answer to NoA, p. 31 no. 12*] by delivering all 100 batches of frozen semen and also bearing the import tariffs [*Ex. C5, p. 14 no. 6*]. As CLAIMANT's financial situation can thus not have been as critical as purported [*Cl. paras. 89, 122, 130*], it now acts contradictorily by invoking hardship although the performance was apparently economically possible. Therefore, CLAIMANT must adhere to the terms of the Contract. It can thus not invoke hardship for contract adaptation, neither under clause 12 nor under Art. 79 CISG.

II. There is no legal basis for CLAIMANT's claim of $1,250,000 from a contract adaptation

61 CLAIMANT has no legal basis for its claim of $1,250,000 from an adaptation of the Contract. Neither clause 12 of the Contract **(1.)** nor the CISG **(2.)** entitle CLAIMANT to such a payment.

1. CLAIMANT is not entitled to the payment of $1,250,000 from a contract adaptation under clause 12 of the Contract

62 CLAIMANT is not entitled to the payment of $1,250,000 from a contract adaptation under clause 12 since it does not allow for contract adaptation **(a.)**. Moreover, the prerequisites of clause 12 are not met **(b.)**. In any case, CLAIMANT cannot rely on clause 12 as it assumed the risk of the imposition of import tariffs **(c.)**.

a. Adaptation under clause 12 is not possible

63 Clause 12 does not allow for contract adaptation. This can be derived from an interpretation of said clause pursuant to Art. 8 (1) CISG according to the parties' intent. The parties' intent can be deduced both from the clear wording of clause 12 as well as from the negotiation history.

64 Contrary to CLAIMANT's assertions, Art. 8 (1) CISG is applicable to interpret clause 12 [*Cl. para. 85*]. CLAIMANT states that Art. 8 (2) CISG must be applied as the parties' intent is difficult to discern in practice [*Cl. para. 85*]. While that might be true for many practical cases, it is quite possible to ascertain the parties' intention in the pending dispute. When the parties' intention can be ascertained, Art. 8 (1) CISG takes precedence over Art. 8 (2) CISG, thereby rendering the objective parties' intention inapplicable to the interpretation (*ICC, case no. 8324; Schlechtriem/Schroeter, UN-Kaufrecht, p. 107 para. 215; Zuppi, in: Kröll/Mistelis/Perales Viscasillas, Art. 8 para. 23; Huber, in: The*

CISG, p. 12). For the purpose of determining the parties' intent pursuant to Art. 8 (1) CISG, all relevant circumstances of the case must be considered pursuant to Art. 8 (3) CISG. The parties' intent to not allow for contract adaptation under clause 12 is expressed in its wording **(aa.)**. The negotiation history confirms that assessment **(bb.)**.

aa. The wording of clause 12 shows the parties' will to not allow contract adaptation

65 The parties' intent to not allow contract adaptation pursuant to clause 12 is reflected in its wording. It reads that the "seller shall not be responsible for (…) acts of God *neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C5, p. 14*]. While adaptation is a frequent remedy in cases of hardship (*cf. Atamer, in: Kröll/Mistelis/Perales Viscasillas, Art. 79 para. 83*), the legal consequence stipulated in clause 12 is the seller's exemption from responsibility. The parties intended the exemption from liability to refer to both acts of God and to hardship since both prerequisites are connected by the term *neither*. As the parties' will can be deduced from the clause's clear wording, CLAIMANT errs by stating that the parties objectively wanted the arbitral tribunal to base its adaptation on clause 12 [*Cl. para. 103*]. Had the parties intended to allow for contract adaptation in cases of hardship, they would have expressly included that remedy. Instead, the wording of clause 12 reflects the parties' intent to not allow contract adaptation.

bb. The negotiation history confirms that assessment

66 This understanding complies with the parties' intention expressed in the contract negotiations. CLAIMANT's conditions brought forward in the negotiations can be complied with by understanding clause 12 literally. CLAIMANT set forth that it was not willing to bear any additional costs relating to additional health and safety requirements [*Ex. C4, p. 12*]. The relief of responsibility meets these requirements. When a party is relieved from responsibility in cases of hardship, it is not exposed to damage claims related to non-delivery as a result of hardship (*cf. Brunner, Force Majeure, p. 346*). Under the premise that the prerequisites of clause 12 are fulfilled, the relief of responsibility thus allows CLAIMANT to halt its delivery. If CLAIMANT can safely avoid delivery, it must not try to meet costly import requirements to fulfil its delivery obligation. Consequently, the literal understanding of clause 12 is in line with CLAIMANT's intent. The same can be said about RESPONDENT. It did not consent to include a contractual adaptation mechanism when the issue came up at an earlier stage of the contract negotiations [*supra, para. 33*]. Therefore, the contract negotiations confirm that the parties did not intend for contract adaptation to be possible under clause 12. In conclusion, an interpretation of clause 12 pursuant to Art. 8 (1) CISG demonstrates that said clause does not allow for contract adaptation.

b. The prerequisites of clause 12 are not met

67 Not only is adaptation not possible under clause 12, its prerequisites are also not fulfilled. First, the threshold for hardship is not met **(aa.)**. Secondly, the tariffs are not a comparable event to the additional health and safety requirements expressly mentioned in clause 12 **(bb.)**. Thirdly, the tariffs could have been foreseen by CLAIMANT **(cc.)**.

aa. The threshold for hardship is not met

68 Both the common practice in Mediterraneo as well as the circumstances of the case demonstrate that a cost increase of 30% is not enough to trigger the threshold for hardship **(i.)**. The parties did not intend to differ from that common practice and allow for a lower threshold for hardship under clause 12 **(ii.)**.

i. A cost increase of 30% is too little to trigger the threshold for hardship

69 CLAIMANT has been struck by import tariffs of 30% imposed by the Equatorianian government [*Ex. C7, p. 16*]. It is in accordance with Mediterranean common practice that this does not meet the threshold for hardship. The Mediterranean common practice is characterized by the CISG as Mediterraneo is a contracting state of the CISG [*PO1, p. 53 no. III 4*].

70 Generally, a party cannot seek relief if the fulfillment of its contractual duties becomes more onerous due to an increase in delivery costs (*Saenger, in: Ferrari et al., Art. 79 para. 7; Brunner/Sgier, in: Brunner, Art. 79 para. 26*). The reason for this is that an impediment to the obligor's performance duties falls into its sphere of risk (*Brunner/Sgier, in: Brunner, Art. 79 para. 26*). That applies especially, where the obligor has contractually assumed all risks related to the delivery as is the case in the pending dispute [*infra, para. 78*]. Only where the cost increase is extraordinarily excessive, an exception may be made with respect to the rigorous risk allocation to the obligor (*Schwenzer, in: Schlechtriem/Schwenzer, Art. 79 para. 31; Saenger, in: Ferrari et al., Art. 79 para. 7; Atamer, in: Kröll/Mistelis/Perales Viscasillas, Art. 79 CISG para. 81*).

71 Therefore, there is a broad consensus both in the case law on the CISG as well as in the scholarly discussion that the entry threshold for hardship is way above 30%.

72 The German Higher Regional Court of Hamburg decided that even a 300% cost increase does not constitute hardship (*OLG Hamburg, CISG-online no. 261*). Furthermore, the Belgian Supreme Court determined a 70% increase to not be high enough (*Hof van Cassatie van België, CISG-online no. 1963*). Finally, the District Court of Monza specifically held that a 30% cost increase was way insufficient for hardship (*Tribunale Civile di Monza, Nuova Fucinati S.p.A v. Fondmetall Int'l A.B.*).

73 Additionally, the PICC, which reflects the common scholarly opinion (*cf. PICC Official Comment, Introduction p. xxxii-xxxiii*), take an equally firm stance on the threshold for hardship. While the

official comment of the PICC included an explicit threshold for hardship of 50% in 1994, that amount was dropped in later editions. The reason for this was the fact that 50% were considered too low as a 50% cost increase does not fundamentally alter the equilibrium of the contract (*McKendrick, in: Vogenauer, Art. 6.2.2 para. 8*). Other scholars have found that the amount to excuse a party from performance must be between 100% and 200% (*Schwenzer, in: VUWLR 2008, p. 717; Brunner/Sgier, in: Brunner, Art. 79 para. 31*).

74 Even under the premise that the individual circumstances of the case should be given primary consideration [*Cl. para. 93*], a threshold as a low as 30% is not justified. CLAIMANT sets forth that it cannot bear the tariff costs as they would "financially endanger it and even expose it to the risk of insolvency" [*Cl. paras. 89, 93*]. While it is regrettable that CLAIMANT faces these monetary problems, one must keep in mind that the assumption of hardship is only justified where the cost increase exceeds the obligor's maximum ability to perform (*CISG AC Opinion no. 7, Comment 38; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79 para. 31*). CLAIMANT performed its contractual obligations by delivering the last batch of semen [*NoA, p. 6 para. 13*], aware that it thereby had to shoulder the import tariffs [*Ex. C7, p. 16*]. CLAIMANT knew that RESPONDENT was not inclined to bear its expenses related to the import tariffs [*Ex. R4, p. 36*]. As CLAIMANT made a conscious decision to deliver despite the financial risks, its financial situation cannot have been as dire as purported. In light of the above, not even the circumstances of the case justify a threshold as low as 30%. Hence, the cost increase of 30% does not suffice to trigger the threshold for hardship.

ii. The parties did not intend to define the threshold for hardship different than is common practice

75 The parties did not intend for the threshold for hardship under clause 12 to not deviate from the aforementioned common threshold. Generally, hardship can be assumed where the equilibrium of the contract is fundamentally altered and the contractual performance is rendered excessively onerous (*Schwenzer, in: VUWLR 2008, pp. 714, 715, Schwenzer/Hachem/Kee, Global Sales and Contract Law, p. 666 para. 45.76; Mazzacano, Art. 79 p. 99; Ferrari, in: MüKoHGB, Art. 79 para. 41*; *Schwenzer, in: Schlechtriem/Schwenzer, Art. 79 para. 31; Schlechtriem/Schroeter, UN-Kaufrecht, p. 70 para. 137*). The parties have instead defined hardship in clause 12 as "unforeseen events making the contract more onerous" [*Ex. C4, p. 14 no. 12*].

76 Nonetheless, the parties did thereby not agree to amend the threshold. Quite to the contrary, RESPONDENT firmly objected to the ICC hardship clause due to its broadness in the course of the contract negotiations [*Ex. R3, p. 35*]. The ICC hardship clause may only be triggered where the performance is rendered excessively onerous whereas a party is still bound to perform if its

performance gets more onerous (*cf. ICC, Clause, p. 15*). On the surface, the contractual hardship clause thus seems to have a broader scope of application than the ICC hardship clause as it allows the reliance on hardship where the performance is merely rendered more onerous. Such a literal interpretation would, however, contradict RESPONDENT's expressed intent. Since RESPONDENT dismissed the ICC hardship clause for its vast scope of application, it cannot be assumed that it intended to give clause 12 an even broader scope than the ICC hardship clause. The only reason for why this understanding is not reflected in the wording of clause 12 is that the new negotiators after the accident attributed only little importance also to this topic [*PO2, p. 55 no. 7*]. Hence, the contract history shows that the parties did not agree to amend the usual threshold for hardship under clause 12. In conclusion, the threshold for hardship is not met.

bb. The tariffs are not comparable to additional health and safety requirements

77 Contrary to CLAIMANT's allegations [*Cl. paras. 88f.*], the imposed tariffs of 30% are not comparable to additional health and safety requirements as required by clause 12. Under clause 12, not only additional health and safety requirements may lead to a relief of responsibility but also comparable events [*cf. Ex. C5, p. 14 no. 12*]. Said clause must be interpreted according to Art. 8 (2) CISG as the parties' intent is indiscernible. Pursuant to Art. 8 (2) CISG, a contract must be interpreted in line with a parties' objective intent according to a reasonable person's understanding (*Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8 para. 20*). First, the term comparable must be construed narrowly **(i.)**. Secondly, the tariffs are not comparable to additional health and safety requirements under such a narrow interpretation **(ii.)**.

i. The term comparable must be construed narrowly

78 A reasonable person of the same kind as the parties would have understood the term comparable in clause 12 narrowly. With the regard to CLAIMANT, this objective intent can be derived from the fact that it consented to DDP. The parties stipulated in clause 8 of the Contract the DDP delivery [*Ex. C5, p. 14 no. 8*], thereby referring to a DDP pursuant to the International Commercial Terms (hereinafter: "**INCOTERMS**") [*PO2, p. 56 no. 10*]. The decisive feature of an INCOTERMS DDP is that the seller must bear all costs related to delivery (*ICC, INCOTERMS 2010, p. 73; Da Silveira, International Sales, p. 228 para. 872*). When CLAIMANT "accepted for this contract a delivery DDP" [*Ex. C4, p. 12*], it thus consented to generally bearing all costs related to delivery. The only exceptions from this rule CLAIMANT insisted on were with respect to additional health and safety requirements as it had bad experiences with those in the past [*Ex. C4, p. 12*]. Therefore, additional health and safety requirements are listed as events which may exempt CLAIMANT from responsibility pursuant to clause 12 [*Ex. C5, p. 14 no. 12*]. Had CLAIMANT intended to be exempted

from responsibility in more cases, it should not have agreed on a DDP delivery but instead opted e.g. for a Delivered At Place (hereinafter: "**DAP**") delivery term. Under a DAP delivery, it is the buyer who must bear the costs related to the import (*Piltz, in: Incoterms, p. 506 para. D-137*). Keeping in mind, however, that CLAIMANT consciously opted for DDP, a reasonable person of its kind would have understood that the relief of responsibility is reserved for a very narrow range of events. In order to give effect to that objective intent, the term comparable must be construed narrowly.

79 RESPONDENT objectively intended for the term comparable to be interpreted in a narrow way as well. As a result of the DDP delivery, it must pay an additional $200 for every dose of semen, amounting to $20,000 in total [*Ex. C5, p. 14 no. 8; PO2, p. 56 no. 8*]. Consequently, RESPONDENT must have intended for the effect of DDP to not be diminished by a relief of responsibility for many events. A wide interpretation of the term comparable would lead to a relief of responsibility in many instances. Therefore, RESPONDENT objectively intended for the term comparable to be interpreted narrowly. Consequently, it was the parties' objective intent to understand the term comparable in a narrow way according to a reasonable person's understanding.

ii. Under a narrow interpretation, the tariffs do not constitute a comparable unforeseen event

80 Considering that the term comparable is construed narrowly according to the parties' objective intention, the import tariffs are not comparable to additional health and safety requirements.

The import tariffs have no objective justification as they were only imposed as a retaliatory measure [*Ex. C6, p. 15*]. The same applies for the Mediterranean tariffs which initiated the retaliation in the first place [*Ex. C6, p. 15*]. The so-called reasons for these tariffs, the alleged threat of national security, has been identified as a "mockery of the system" [*Ex. C6, p. 15*]. The additional health and safety requirements on the other hand were strictly necessary, as they helped to prevent the spread of the deadly foot and mouth disease [*PO2, p. 58 no. 21*]. Therefore, the import tariffs differ from the additional health and safety requirements as to their sense of purpose.

81 Moreover, the import tariffs harm Mediterranean farmers. Import tariffs in general do more harm than good, as they hinder the circulation of goods and therefore disrupt the economy (*cf. Partington, The Guardian 2018*). The reciprocal tariffs of both the Mediterranean and the Equatorianian government increase the price of imports and impede the free flow of trade. The additional health and safety requirements on the other hand benefit the farmers as they protect their animals. CLAIMANT is of the opinion that the tariffs are comparable since they are trade restrictions like the past additional health and safety requirements [*Cl. para. 88*]. CLAIMANT thereby adopts a one-size-fits-all approach and disregards the differences between import tariffs and health and safety

requirements as to their sense of purpose and usefulness. Instead, comparable events CLAIMANT could rely on under clause 12 would be increased quality standards which render the performance more onerous. Quality standards have the objective justification to prevent influx of subpar quality goods and protect customers from quality-related risks. Import tariffs are, however, distinctly different from quality standards since they do not have such an objective justification.

In conclusion, the imposed tariffs are not comparable to additional health and safety requirements.

cc. The tariffs could have been foreseen

82 Additionally, the imposition of import tariffs by Equatoriana could have been foreseen by CLAIMANT contrary its allegations [*Cl. paras. 90ff.*]. First, only events that CLAIMANT could not have reasonably foreseen fall under clause 12 according to the parties' objective intent pursuant to Art. 8 (2) CISG **(i.)**. Secondly, CLAIMANT could have reasonably foreseen that import tariffs would be imposed as a retaliatory measure **(ii.)**.

i. Only reasonably unforeseeable events fall under clause 12

83 Clause 12 lays down the requirement that an event causing hardship must be unforeseen by the seller [*Ex. C5, p. 14 no. 12*]. However, the term unforeseen may not be construed literally, but with regard to a reasonable person's understanding pursuant to Art. 8 (2) CISG. If the term unforeseen was construed literally, any event which the seller did not expect would fall under clause 12, irrespective of whether the seller could have anticipated the event with just a little bit of caution. The seller could thus turn a blind eye to such an event and purposely pretend to not have known it – and invoke clause 12 nonetheless. According to a reasonable person's understanding, such an interpretation cannot have been the parties' intention. Consequently, when interpreted pursuant to Art. 8 (2) CISG, only events that the seller could not have reasonably foreseen meet the requirements of clause 12. This is in accordance with the legal situation in both parties' home countries [*NoA, p. 4 no. 1; Answer to NoA, p. 29*] which require an event to not be reasonably foreseeable in Art. 6.2.2 (b) Mediterranean and Equatorianian Contract Law and Art. 79 (1) CISG.

ii. The imposition of import tariffs was reasonably foreseeable for CLAIMANT

84 CLAIMANT purports that the tariffs were unforeseeable since the retaliation of the Equatorianian government "shocked informed circles" [*Cl. para. 91*]. However, it could have reasonably foreseen that the Equatorianian tariffs would be imposed in retaliation for the Mediterranean tariffs.

85 First, there were indications that the government of Mediterraneo might turn into a protectionist direction. The president of Mediterraneo announced in his election program that he would prefer a more protectionist approach towards international trade, especially in relation to agricultural products [*Ex. C6, p.15*]. The parties had access to that manifesto [*Ex. C6, p.15*]. Moreover, the

president's nominee for minister for agriculture had been an outspoken protectionist for years [*PO2, p. 58 no. 23*]. The minister for agriculture was appointed prior to the date of contract conclusion [*NoA, p. 5 no. 8; PO2, p. 58 no. 23*]. CLAIMANT must pay attention to these developments, as it is a company conducting business on an international level [*Ex. C4, p. 12; PO2, p. 58 no. 21*]. CLAIMANT stated that it faces a severe financial situation [*PO2, p. 58 no. 21; Cl. paras. 89, 122, 130*] which is even more a reason for CLAIMANT to be aware of possible changes in international trade. Contrary to CLAIMANT's assertions [*Cl. para. 90*], this applies even though the World Trade organisation, to which both Mediterraneo and Equatoriana are members [*PO2, p. 61 no. 47*], prohibits discriminatory tariffs. Despite that prohibition, there is a continuous threat of the imposition of protectionist tariffs in our globalized world [*PO2, p. 58 no, 23*], especially in recent years (*e.g. US, Aluminum, 2017; EU-Sanctions against Russia, 2014ff.*).

86 Secondly, CLAIMANT could have also foreseen the retaliatory tariffs by the Equatorianian government. The Mediterranean tariffs were particularly harsh in several regards, especially in view of their amount and the speed with which they were imposed [*PO2, p. 58 no. 23*]. Harsh reactions typically trigger equally harsh and imprudent counteractions. In this volatile situation, it could have been expected from CLAIMANT to not only read the news [*PO2, p. 58 no. 26*] but also to draw the necessary conclusions therefrom by taking into account all options and scenarios. Hence, it could have reasonably foreseen the imposition of import tariffs by the Equatorianian government.

c. CLAIMANT cannot rely on clause 12 as it assumed the risk of the imposition of import tariffs

87 In any case, CLAIMANT may not rely on clause 12 as it assumed the risk of the imposition of the import tariffs by the Equatorianian government in contrast to its allegations [*Cl. paras. 95ff.*]. CLAIMANT argues that it has not assumed that risk as "RESPONDENT was in a better position than CLAIMANT to estimate the imposition of the tariffs and their magnitude" [*Cl. para. 100*]. Thereby, it fails to recognize that a party cannot later claim a limitation of liability for the consequences of risks it agreed to bear (*Atamer, in: Kröll/Mistelis/Perales Viscasillas, Art. 79 para. 89*). CLAIMANT agreed on a DDP delivery, thereby incurring all risks related to the delivery of the frozen semen [*supra, para. 78*]. Since clause 12 does not cover the imposition of import tariffs [*supra, paras. 61ff.*], those risks are not shifted back to RESPONDENT. Considering that CLAIMANT thus assumed the risk of the imposition of import tariffs, it cannot ask to be relieved from the financial consequences these risks entailed. Therefore, CLAIMANT may not rely on clause 12 for its risk assumption. In conclusion, clause 12 of the Contract does not entitle CLAIMANT to an additional payment of $1,250,000.

2. CLAIMANT is not entitled to the payment of $1,250,000 from a contract adaptation under the CISG

88 The CISG does also not entitle CLAIMANT to the payment of $1,250,000 since Art. 79 CISG does not allow for contract adaptation **(a.).** Moreover, its prerequisites are not fulfilled **(b.)**. In any case, CLAIMANT cannot rely on Art. 79 CISG as the parties have derogated said provision by including clause 12 into the Contract **(c.)**.

a. Adaptation under Art. 79 CISG is not possible

89 Adaptation under Art. 79 CISG does not allow for contract adaptation since its wording does not provide for contract adaptation **(aa.)** and adaptation through gap-filling under Art. 7 (2) CISG is not possible **(bb.)**.

aa. The wording of Art. 79 CISG does not provide for adaptation

90 The term contract adaptation does not appear in the wording of Art. 79 CISG. The wording of a provision must always be the starting point of interpretation and may not be overstepped prematurely (*OGH, CISG-online no. 1041; Magnus, in: Staudinger, Art. 7 para. 32; Perales Viscasillas, in: Kröll/Mistelis/Perales Viscasillas, Art. 7 para. 37*). The legal consequence of Art. 79 is set forth in Art. 79 (1) CISG which reads in its relevant part: "A party is not liable for a failure to perform any of his obligations...". Therefore, Art. 79 CISG stipulates a relief of responsibility of the seller. This remedy is distinctly different from a contract adaptation [*supra, para. 66*]. Hence, CLAIMANT concedes that the wording of Art. 79 CISG precludes contract adaptation [*Cl. para. 123*]. Art. 79 CISG does thus not allow for contract adaptation according to its clear wording.

bb. Adaptation in the course of a gap-filling is not possible

91 Art. 79 CISG cannot be supplemented with the remedy of contract adaptation through a gap-filling pursuant to Art. 7 (2) CISG. Art. 7 (2) CISG sets forth that questions concerning matters governed by the CISG which are not expressly settled in it must be settled with the general principles on which the CISG is based, or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

92 First, the CISG has no gap pursuant to Art. 7 (2) CISG as it governs the matter of contract adaptation and conclusively settles it **(i.)**. Even if the arbitral tribunal assumed a gap, the general principle of favor contractus does not justify a contract adaptation under Art. 79 CISG **(ii.)**. Moreover, the PICC are no general principle on which the CISG is based, thus making them unsuitable for a gap-filling as well **(iii.)**. Finally, a gap-filling with the Mediterranean Contract Law (hereinafter: "**MCL**") does also not lead to the possibility of contract adaptation in the case at hand **(iv.)**.

i. The CISG has no gap with respect to contract adaptation in cases of hardship

93 Contrary to CLAIMANT's allegations [*Cl. paras. 123ff.*], there is no gap in the CISG regarding adaptation in cases of hardship as this topic constitutes a matter governed by the CISG which is expressly settled in it. CLAIMANT acknowledges that the issue of contract adaptation in cases of hardship is governed by the CISG [*Cl. para. 123*]. However, it then concludes that the CISG does not expressly settle this issue, thus leaving room for a gap-filling pursuant to Art. 7 (2) CISG. Its reasoning is that "Art. 79 CISG does not expressly provide for adaptation as relief, thus leaving a gap of adaptation as a relief for performance imposing hardship" [*Cl. para. 123*]. In arguing that, CLAIMANT fails to recognize that a matter can also be expressly settled by deliberately not including it into the CISG (*Bodenheimer, in: BeckOGK Art. 7 para. 19; Schlechtriem/Schroeter, UN-Kaufrecht, p. 70 para. 137*). The remedy of contract adaptation has been consciously omitted from the CISG.

94 This can be deduced from the fact the CISG knows the concept of hardship and has opted to remedy its effects by a relief of responsibility and not by adaptation. The relief of responsibility pursuant to Art. 79 CISG takes effect if there is an impediment according to Art. 79 (1) CISG. The term impediment is widely acknowledged to be construed broadly and to thus also comprise economic impossibility, or, in other words, hardship (*Bulgarian Chamber of Commerce and Industry, CISG-online no. 436; CISG AC Opinion no. 7 para. 3.1; Nehf, in: Corbin on Contracts, § 74.12, p. 78; Brunner, Force Majeure, p. 397; Magnus, in: Honsell, Art. 79 para. 14; Honnold, Uniform Law, pp. 627f. para. 432.2*). CLAIMANT acknowledges that as well [*Cl. paras. 112ff.*]. Consequently, the CISG allows a party suffering hardship to only invoke a relief of responsibility.

95 The conscious omission of the remedy of contract adaptation is further evidenced by the drafting history and the purpose of gap-filling.

96 When the CISG was drafted, the question as to whether adaptation should be possible in cases of hardship had been lingering in the legal debate for centuries (*cf. Mazzacano, Art. 79, pp. 60ff.*). Therefore, there have been several proposals during the drafting process to include into the CISG an express provision allowing for adaptation in cases of hardship. Those proposals were all rejected (*Flechtner, in: Belgrade Law Review 2011, p. 88; Rimke, in: Force Majeure and Hardship, p. 239*).

97 Moreover, it would defeat the purpose of gap-filling in the CISG to assume that there is an adaptation-related gap. Gap-filling is an instrument to develop the CISG and to adapt it to new needs (*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7 para. 30*). As stated above, adaptation is no new need but has rather been discussed for centuries. Instead, new needs that must be complied with through a gap-filling are e.g. challenges imposed by the rapid technological advancement. More specifically, there is a new need to find a solution to the issues related to electronic

communication and how it effects the receipt of notifications. In light of the above, the issue of contract adaptation in cases of hardship is not a new need. It would thus violate the purpose of gap-filling in the CISG to assume that there is a gap regarding adaptation in cases of hardship.

98 All things considered, the remedy of contract adaptation has been omitted deliberately from the CISG. As a consequence, the matter of contract adaptation in cases of hardship is expressly settled in it. In conclusion, there is no gap in the CISG regarding adaptation in cases of hardship.

ii. A purported gap cannot be filled by favor contractus to establish the possibility of contract adaptation

99 Even if the arbitral tribunal assumed that the CISG had a gap concerning contract adaptation in cases of hardship, it cannot rely on the general principle of favor contractus to fill said gap.

100 Favor contractus is a general principle on which the CISG is based on (*Schwenzer/Hachem, in Schlechtriem/Schwenzer, Art. 7 para. 35*; *Perales Viscasillas, in: Kröll/Mistelis/Perales Viscasillas, Art. 7 para. 65; Magnus, in: RabelsZ 1995, p. 483*) as CLAIMANT rightly emphasises [*Cl. para. 124*]. However, a gap-filling with favor contractus leads to the very opposite of what CLAIMANT purports: CLAIMANT alleges that the arbitral tribunal should adapt the contract under favor contractus to avert its "premature termination" [*Cl. para. 124*]. Instead, favor contractus means that there is a strong favor that the contract stands in its original as it was drafted by the parties (*Keller, in: International Commercial Law, p. 249; Magnus, in: Staudinger, Art. 7 para. 49*). While it is true that favor contractus also stipulates that contract termination is a last resort (*BGer, 18 May 2009*; *OGH, 12 November 2011; BGH, 24 September 2014*), favor contractus can only be abided by if the Contract is performed exactly as the parties agreed upon. A contract adaptation would modify the original contract as drafted by the parties. Consequently, CLAIMANT cannot rely on favor contractus to fill an adaptation-related gap in the CISG.

iii. Gaps in the CISG cannot be filled with the PICC

101 Contrary to CLAIMANT's allegations [*Cl. para. 127*], the PICC cannot be used to fill gaps in the CISG. CLAIMANT intends to apply the PICC as general principles since they stipulate the abstract possibility of contract adaptation in Arts. 6.2.2-6.2.3 PICC [*Cl. para. 127*]. The mere fact that the PICC allow contract adaptation in exceptional circumstances does, however, not justify their application as they are not a general principle the CISG is based on pursuant to Art. 7 (2) CISG (*Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 79 para. 36; Ferrari, in: MüKoHGB, Art. 79 para. 60; Huber, in: The CISG, p. 35*).

102 This can be deduced from the fact that the PICC are unsuitable for a gap-filling of the CISG as they favour the civil law and are thus inadequate from the view of common lawyers. The PICC

generally take a stance in favour of the legal solutions from civil law countries (*Flechtner, in: Belgrade Law Review 2011, p. 96; Slater, in: FJIL 1998, p. 241*). This is evidenced in the case at hand as the issue of contract adaptation is commonly accepted in civil law jurisdictions (*e.g. § 313 German Civil Code; Art. 1195 French Civil Code; Art. 388 Greek Civil Code*) while the common law takes the view that courts do not rewrite contracts (*Brunner, Force Majeure, p. 491; Zaccaria, in: IntTBLawRw 2004, p. 138*). Consequently, the CISG, which emphasises its international character in Art. 7 (1) CISG, envisions a less forgiving standard than the one established by the PICC (*Nehf, in: Corbin on Contracts, § 74.12, p. 78*). This is no surprise considering that the drafters of the PICC did not have a mandate by the signatory states of the CISG and that the possibility of contract adaptation was deliberately rejected when the CISG was drafted (*Flechtner, in: Belgrade Law Review 2011; Rimke, in: Force Majeure and Hardship, p. 239*). Therefore, the PICC are unsuitable for a gap-filling of the CISG as they favour the civil law.

103 Moreover, the PICC are no general principle the CISG is based on as they were published 14 years after the CISG (*Huber, in: The CISG, p. 36; Perales Viscasillas, in: CISG Methodology, p. 296*). The original version of the PICC was published in 1994 (*Magnus, in: RabelsZ 1995, p. 491*) while the CISG was published in 1980 (*Andersen, Uniformity, p. 1*). It is illogical to assume that the CISG can be based on a set of rules which did not exist at the time the CISG was drafted. In conclusion, the PICC are no general principle according to Art. 7 (2) CISG.

iv. Mediterranean Contract Law cannot fill a gap in the CISG regarding adaptation

104 Finally, a gap-filling with the applicable MCL also does not lead to the possibility of contract adaptation in the case at hand. CLAIMANT rightfully finds the MCL applicable by virtue of the rules of private international law [*Cl. para. 128*] but draws the wrong conclusion that Arts. 6.2.2 6.2.3 MCL can fill the adaptation-related gap in the CISG in the pending case [*Cl. para. 128*]. It is true that Art. 6.2.3 (4)(b) MCL generally allows for contract adaptation [*Cl. paras. 125, 135*]. However, the legal consequence of contract adaptation only comes into effect when there is a case of hardship pursuant to Art. 6.2.2 MCL. There is no case of hardship when the disadvantaged party has assumed the risk of the events fundamentally affecting the contract according to Art. 6.2.2 (d) MCL. CLAIMANT has, however, assumed the risk of the imposition of import tariffs by agreeing on a DDP delivery. This risk assumption is not reversed by clause 12 [*supra, para. 87*]. Since the requirements of Art. 6.2.2 (d) MCL are not met, the legal consequence of contract adaptation pursuant to Art. 6.2.3 (4)(b) MCL cannot take effect in the instant case. Consequently, there is no provision in the MCL which can evoke a contract adaptation in the case at hand. Therefore, the MCL can also not be adduced to justify a possibility of contract adaptation

through a gap-filling with the law applicable by virtue of the rules of private international law. In conclusion, Art. 79 CISG does not allow for contract adaptation.

b. The prerequisites of Art. 79 CISG are not met

105 Not only does Art. 79 CISG not allow for adaptation, its prerequisites are also not fulfilled. First, the tariffs do not meet the threshold for hardship **(aa.)**. Secondly, CLAIMANT could have taken the tariffs into account **(bb.)**. Finally, CLAIMANT could have avoided the cost increase which was the consequence of the imposition of import tariffs **(cc.)**.

aa. The threshold for hardship is not met

106 The import tariffs of 30% do not meet the threshold for hardship [*supra, paras. 69ff.*].

bb. The tariffs could have been taken into account by CLAIMANT

107 CLAIMANT could have taken the import tariffs into account at the time of contract conclusion since it was reasonably foreseeable that the Equatorianian government would impose import tariffs as a retaliatory measure to the Mediterranean tariffs [*supra, paras. 80ff.*].

cc. CLAIMANT could have reasonably avoided and overcome the costs

108 CLAIMANT could have reasonably avoided and overcome the consequences of the impediment by not agreeing on the DDP delivery term. Pursuant to Art. 79 (1) CISG, the legal consequence of said provision only takes effect if the disadvantaged party could not reasonably be expected to have avoided or overcome the impediment or its consequences.

109 CLAIMANT rightfully argues that it could not have reasonably avoided the import tariffs [*Cl. para. 122*]. However, CLAIMANT fails to put forward any argument regarding its capability to avoid the additional costs incurred from the imposition of import tariffs [*Cl. para. 122*]. This is the case because it could reasonably be expected to have avoided these costs.

110 CLAIMANT would not have been burdened by the costs if it had not agreed on the DDP delivery term, as the DDP shifts the risk of the imposition of import tariffs onto CLAIMANT [*supra, para. 87*]. The sole reason for why the parties agreed on DDP was to profit from CLAIMANT's experience in the shipment of frozen semen [*Ex. C3, p. 11*]. To do so, CLAIMANT could have also insisted on a DAP delivery which would allocate the risk of import restrictions to RESPONDENT [*supra, para. 78*]. It was unreasonable by CLAIMANT to agree to this risk shifting caused by the DDP delivery term since that risk assumption regarding import tariffs now puts it in danger of insolvency [*Cl. paras. 89, 22, 130*]. Therefore, CLAIMANT could reasonably be expected to have avoided the costs incurred from the imposition of import tariffs by not agreeing to a DDP delivery.

111 Moreover, CLAIMANT errs by stating that it "could not have reasonably overcome the consequences of the tariff cost" [*Cl. para. 122*]. CLAIMANT's reasoning is that its sheer existence

would be threatened if it had to bear the import tariffs [*Cl. para. 122*]. That reasoning is ill-conceived as CLAIMANT would not be "at the border of financial ruin and at risk of insolvency" [*Cl. paras. 89, 122*] if it had claimed a reasonable price increase in exchange for its agreement on a DDP delivery. RESPONDENT must only pay $200 per dose for cost increases associated with the DDP [*PO2, p. 56 no. 8*]. Considering that one dose of frozen semen comes at the price of $100,000, CLAIMANT only gets reimbursed for import tariffs up to 0.2%. As a result, CLAIMANT was hit hard by import tariffs of 30% which amount to $30,000 of cost increase per dose of semen. Due to CLAIMANT's fundamental miscalculation regarding a reasonable price for its agreement on a DDP delivery, it is now left to sit on the vast majority of the costs. In view of CLAIMANT's past experiences with additional health and safety requirements [*Ex. C4, p. 12*], it could reasonably have been expected to calculate a more appropriate price for the risks assumed through the DDP delivery. Therefore, CLAIMANT could also reasonably be expected to have overcome the cost increase caused by the import tariffs. In conclusion, CLAIMANT could have both reasonably avoided and overcome the costs incurred from the imposition of import tariffs.

c. In any case, the CISG is inapplicable in the instant case

112 In any event, CLAIMANT cannot rely on Art. 79 CISG as the parties derogated said provision according to Art. 6 CISG by including clause 12 into the Contract.

113 CLAIMANT correctly states that clause 12 and Art. 79 CISG govern the same matter of hardship [*Cl. para. 110*], but comes to the wrong conclusion, that clause 12 merely takes precedence over Art. 79 CISG. The parties derogated Art. 79 CISG pursuant to Art. 6 CISG. Art. 6 CISG states that "the parties may exclude the application of this Convention or, subject to Art. 12 CISG, derogate from or vary the effect of any of its provisions". Thus, it is possible to exclude a single provision of the CISG (*Magnus, in: Staudinger, Art. 6 para. 49; Bonell, in: Bianca/Bonell, Art. 6 para. 3.2.2; Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 6 para. 27*). The parties derogated Art. 79 CISG, which is not excluded from derogation by Art. 12 CISG. The parties can implicitly derogate from CISG articles (*OGH, CISG-online no. 614; ICC, CISG-online no. 1202; Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 6 para. 3*) by adopting solutions different from those in the CISG into their contract (*Secretariat Commentary, Art. 6*). An implied agreement on derogation pursuant to Art. 6 CISG requires that both parties intended to derogate from the CISG as its exclusion is governed by its contract formation provisions (*U.S. District Court for the Southern District of NY, Hanwha Corporation v. Cedar Petrochemicals, Inc; OLG Frankfurt, CISG-online no. 2165; Schroeter, in: Schlechtriem/Schwenzer, Intro to Arts. 14-24 para. 30*). The parties' consent to waive individual provisions shall be interpreted pursuant to Art. 8 (1) CISG (*OLG Linz, CISG-online no. 1377*).

114 First, the parties' intent to waive Art. 79 CISG is reflected by the wording of clause 12 which sets forth a solution different from the one provided by the CISG:

> Art. 79 CISG on the one hand, provides for relief of liability for non-performance due to an impediment caused by an unforeseen event beyond that parties' control.
>
> Clause 12 on the other hand, provides for a relief of responsibility in cases of hardship caused by "additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C5, p. 14 no. 12*].

Clause 12 thereby specifies the requirements of Art. 79 CISG. The condition that the event must be "comparable to additional health and safety requirements" is a characteristic difference between Art. 79 CISG and clause 12. Hence, clause 12 has a narrower scope of application, thereby providing for a solution different to the one in the CISG. Consequently, the wording of clause 12 leads to the conclusion that the parties intended to waive Art. 79 CISG.

115 Secondly, the parties' intent to waive Art. 79 CISG is further evidenced by the drafting history. The parties did not include the ICC hardship clause into the Contract, as RESPONDENT found its scope of application to be too broad [*supra, para. 76*]. The ICC hardship clause and Art. 79 CISG are very similar as to their requirements, as any event or impediment may be covered. Clause 12 on the other hand, specifies the unforeseen events which may be covered and is thus narrower. As the parties did not opt for the ICC hardship clause and instead for clause 12 with its comparability threshold, the drafting history confirms the parties' intent to derogate from Art. 79 CISG. Since the parties adopted a different and more specific solution than Art. 79 CISG in the Contract, they derogated said provision and CLAIMANT may not rely on it to claim adaptation.

III. Even if the arbitral tribunal concluded that there is a legal basis for adaptation, RESPONDENT shall pay less than $1,250,000

116 Even if the arbitral tribunal came to the conclusion that there is a legal basis for an adaptation of the Contract, the price must not be adapted in a way that RESPONDENT must bear the full $1,250,000. Under the premise that the Contract can be adapted, RESPONDENT is ready to pay $300,000, or, in the alternative, a maximum of $625,000.

117 Contrary to CLAIMANT's allegations [*Cl. paras. 133f.*], the alleged breach of the resale prohibition does not allocate to RESPONDENT the full amount of $1,250,000, but a maximum of $300,000. A breach of contract is not relevant to the possibility of contract adaptation and therefore does not allocate anything to RESPONDENT. At most, a breach of the Contract can be pending in a different and separate proceeding. A breach of contract under the CISG is mainly relevant for damage claims pursuant to Art. 74 CISG. Those are, however, not the subject matter of this proceeding

[*PO1, p. 53 no. III 1 c*] and have not been raised by Claimant before [*NoA, p. 7f., no. 18ff.*]. Even if the arbitral tribunal considered the alleged breach, it shall not order RESPONDENT to pay more than $300,000. The reason for this that CLAIMANT's request of $1,250,000 is not consistent with the amount RESPONDENT made by reselling some doses of semen. RESPONDENT merely resold 15 portions of the frozen semen for a price that is 20% above the price RESPONDENT originally paid [*PO2, p. 57 no. 20*]. Thus, RESPONDENT's profit margin amounts to $300,000. Therefore, RESPONDENT suggests to pay a maximum of $300,000 if the arbitral tribunal came to the conclusion that a possible breach carried weight in the pending dispute. It is very noble of CLAIMANT to waive its profit margin in the first place. RESPONDENT thus offers to also waive its profits amounting to $300,000 under the premise that the arbitral tribunal decided to adapt the Contract.

118 Even if the arbitral tribunal did not agree to $300,000 and allocated a higher amount towards CLAIMANT, there is no reason to order RESPONDENT to pay the full $1,250,000. None of the parties is responsible for the imposition of the tariffs. Therefore, it would be logical to equally split the additional costs between the parties. Hence, RESPONDENT must not be ordered to pay more than $625,000. In conclusion, even if the arbitral tribunal adapted the Contract, it should only order RESPONDENT to a payment of $300,000, or, in the alternative, a maximum of $625,000.

CONCLUSION TO ISSUE 3

RESPONDENT kindly asks the arbitral tribunal to dismiss CLAIMANT's request of a payment of $1,250,000 resulting from an adaptation of the Contract. CLAIMANT cannot request adaptation as it has already delivered all batches of frozen semen which were contractually due. Furthermore, neither clause 12 nor the CISG come into question as legal basis for an adaptation of the Contract.

REQUEST FOR RELIEF

According to the arbitral tribunal's Procedural Order and in light of the submissions above, RESPONDENT respectfully requests the honourable tribunal to assess RESPONDENT's submissions as follows:

- The arbitral tribunal neither has the jurisdiction nor the power to adapt the Contract under the arbitration clause (**ISSUE 1**).
- The Award from the other arbitral proceedings is inadmissible as evidence (**ISSUE 2**).
- CLAIMANT is not entitled to the payment of $1,250,000 from a contract adaptation neither under clause 12 of the Contract nor under the CISG **(ISSUE 2).**

CERTIFICATE

Tübingen, 24 January 2019

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Jule Bayer

Thimo Härter

Inga Höfel

Raphael Reiss

Simon Thomas