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

MEMORANDUM FOR RESPONDENT

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

Counsel for RESPONDENT

HUY NGUYEN • GRETA NIEHAUS • ANNE PHILIPPCZYK

OLIVER POLLAKOWSKY • OGUZHAN SAMANCI • SOPHIE STOEWE

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INDEX OF ABBREVIATIONS

Answer	Answer to the Notice of Arbitration
Art.	Article
BGH	Bundesgerichtshof; German Federal Supreme Court
cf.	confer
Cl. Memo.	Memorandum for CLAIMANT
e.g.	*exempli gratia*; for example
eds.	editors
et al.	*et alia*; and others
et seq.	*et sequens*; and the following one
et seqq.	*et sequentia*; and the following ones
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
i.e.	*id est*; that is
ibid.	*ibidem*; in the same place
No.	Number
Notice	Notice of Arbitration
OLG	Oberlandesgericht, German Higher Regional Court
p.	page
para.	paragraph
paras.	paragraphs
PO	Procedural Order
pp.	pages
v.	*versus;* against

INDEX OF LEGAL TEXTS

CISG	UN Convention on Contracts for the International Sale of Goods
Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
ICC Incoterms Rules 2010	International Chamber of Commerce (ICC) Incoterms Rules 2010
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018
2013 HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules 2013
PICC	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2010

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SUMMARY OF FACTS

The Parties to these arbitral proceedings are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**").

CLAIMANT is a company which runs Mediterraneo's oldest and most prominent stud farm covering all areas of the equestrian sport.

RESPONDENT operates a stud farm in Equatoriana which is mainly known for its pedigree mares. It has been expanding its business over the past years.

21 March 2017	RESPONDENT contacted CLAIMANT and expressed interest in purchasing 100 doses of frozen semen from the stallion Nijinsky III.
24 March 2017	CLAIMANT responded with an offer to sell the requested 100 doses of frozen semen in three instalments.
28 March 2017 – 11 April 2017	The Parties agreed that CLAIMANT should deliver the frozen semen to RESPONDENT in three instalments "delivery duty paid". RESPONDENT paid CLAIMANT a premium for the assumption of delivery risks.
25 April 2017	Mediterraneo elected a new president who had previously announced his protectionist approach to international trade, particularly with regard to agricultural goods.
6 May 2017	The Parties finalised and signed their contract (the "**Sales Agreement**") which contains an arbitration clause (the "**Arbitration Agreement**"). CLAIMANT subsequently delivered two out of three shipments.
November – December 2017	Mediterraneo's newly elected president levied 25 per cent tariffs on agricultural goods from Equatoriana. The government of Equatoriana imposed retaliatory tariffs amounting to 30 per cent.
15 January 2018	Equatoriana's tariffs affecting the frozen horse semen came into effect.
21 January	RESPONDENT paid the price it owed under the Sales Agreement. During a telephone call, the Parties discussed the final pending shipment. They neither modified the delivery date nor agreed to adjust the price.
23 January 2018	In accordance with the Sales Agreement, CLAIMANT delivered the final instalment of frozen semen and cleared the goods for import.
31 July 2018	CLAIMANT initiated this arbitration to claim for price adaptation.
September 2018	RESPONDENT's computer system was hacked.

SUMMARY OF ARGUMENT

1. CLAIMANT attempts to beat a dead horse. As the product of the Parties' common intention, the Sales Agreement settles their duties conclusively. CLAIMANT now seeks to depart from the Parties' agreement to mitigate its self-inflicted financial difficulties. The Tribunal must not allow CLAIMANT to utilise these arbitral proceedings to shift the risk it voluntarily assumed to RESPONDENT. An objective application of the law reveals that CLAIMANT's requests lack any ground.

2. Arbitration is based on consent. CLAIMANT ignores the consensually established framework in the Arbitration Agreement to confer powers upon the Tribunal as it sees fit. CLAIMANT's allegation that Mediterranean law governs the Arbitration Agreement aims at misleading the Tribunal by distorting the Parties' statements during the contractual negotiations. CLAIMANT deliberately interprets the Arbitration Agreement in a way that best serves its interests. However, any sensible interpretation of the Arbitration Agreement leads to the result that it does not empower the Tribunal to modify the Parties' Sales Agreement. The Tribunal therefore lacks the jurisdiction and power to adapt the price **[A]**.

3. As CLAIMANT has nothing more to lose, it does not shy away from attempting to submit illegally obtained evidence from another confidential arbitration which RESPONDENT was a party to. In the absence of grounds to substantiate its request, CLAIMANT employs unlawful means to introduce evidence from the other arbitration with the sole purpose of framing RESPONDENT. However, the documents are neither material nor relevant to the present case. Therefore, the Tribunal should reject them as evidence **[B]**.

4. CLAIMANT's case solely rests on its disregard for the risk allocation in the Sales Agreement. It requests the Tribunal to adapt the contractually agreed price on the basis that it would be unfair if it had to pay the tariffs. In fact, fairness requires that each party complies with its contractual obligations. CLAIMANT's poor financial situation cannot justify an adaptation of the price which goes beyond the Parties' agreement. In its desperate attempt to substantiate its claim, CLAIMANT relies on provisions which are neither applicable nor provide for the legal effect it seeks. At the same time, it accuses RESPONDENT of acting in bad faith merely because RESPONDENT insists on the contractually agreed risk allocation and refuses to depart from the Parties' initial agreement. Instead of allowing CLAIMANT to escape its liability, the Tribunal must honour the Parties' consensus reflected in the Sales Agreement **[C]**.

ARGUMENT

A. The Tribunal lacks the jurisdiction and power to adapt the Sales Agreement

5. The Tribunal lacks the jurisdiction and power to adapt the Sales Agreement. In determining whether the Tribunal has the jurisdiction and power to adapt the Sales Agreement, the Arbitration Agreement must be interpreted under its governing law. The governing law also determines whether or not pre-contractual negotiations can be taken into account to ascertain its scope. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 1], the Tribunal lacks the jurisdiction and power to adapt the Sales Agreement under the applicable Danubian rules of interpretation **[I]**. Even if, as CLAIMANT alleges [IBID.], Mediterranean law did govern the Arbitration Agreement, the Tribunal would lack the jurisdiction and power to adapt the Sales Agreement **[II]**. In any case, an express empowerment by the Parties is necessary for the Tribunal to adapt the Sales Agreement **[III]**. Lastly, if the Tribunal did adapt the Sales Agreement, the award could be set aside **[IV]**.

I. Under the applicable Danubian rules of interpretation, the Tribunal lacks the jurisdiction and power to adapt the Sales Agreement

6. Under the applicable Danubian rules of interpretation, the Tribunal lacks the jurisdiction and power to adapt the Sales Agreement. The law of Danubia governs the Arbitration Agreement **[1]**. Applying the restrictive Danubian rules of interpretation to the Arbitration Agreement, the Tribunal lacks the jurisdiction and power to adapt the Sales Agreement **[2]**.

1. The law of Danubia governs the Arbitration Agreement

7. The law of Danubia governs the Arbitration Agreement, with the consequence that it must be construed narrowly in accordance with the four corners rule [PO1, P. 52, PARA. II]. The Parties impliedly chose Danubian law to govern the Arbitration Agreement **[a]**. Even if there were no implied choice, Danubian law would govern the Arbitration Agreement as the law which is most closely connected to it **[b]**.

a) The Parties impliedly chose Danubian law to govern the Arbitration Agreement

8. There is no express choice of the law governing the Arbitration Agreement. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 19], the Parties impliedly chose Danubian law as the law governing the Arbitration Agreement. Parties impliedly agree on the law of the seat of arbitration by choosing a particular forum for the arbitral proceedings [BGH, JUDGMENT OF 7 JANUARY 1971; *PETRASOL BV V. STOLT SPUR INC.;* BORN, P. 511].

9. What is more, the absence of an express choice does not lead to the application of the law of the underlying contract to the Arbitration Agreement by default **[i]**. In fact, the doctrine of separability prevents the application of the law of the underlying contract to the Arbitration Agreement by default **[ii]**. The application of Danubian law best accommodates the Parties' need for neutrality **[iii]** and increases the efficiency of the arbitral proceedings **[iv]**.

(i) The absence of an express choice does not lead to the application of the law of the underlying contract by default

10. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 20], the law of the underlying Sales Agreement does not apply as a default rule due to the absence of an express choice of the law governing the Arbitration Agreement.

11. It is not, as CLAIMANT argues [CL. MEMO., PARA. 21], a general principle in international arbitration that in the absence of an express choice, the law of the underlying contract will govern an arbitration agreement. In fact, both Art. V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**") and Art. 34(2)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 Amendments (the "**Model Law**") provide for a different solution. Both provisions stipulate that in the absence of choice, the validity of the arbitration agreement should be assessed under the law where the award was made, that is the law of the seat of arbitration [ART. V(1)(A) NEW YORK CONVENTION; ART. 34(2)(A)(I) MODEL LAW; REDFERN/HUNTER, PARA. 3.14].

12. Accordingly, many arbitral tribunals apply the law of the seat to the arbitration agreement [ICC CASE NO. 5294; ICC CASE NO. 5505; ICC CASE NO. 6149; ICC CASE NO. 6162; ICC CASE NO. 14046]. For example, in ICC CASE NO. 14046 the arbitral tribunal stated that most decisions in contracting states of the New York Convention apply the law of the country where the award was made to the arbitration agreement. Thus, it is not a general principle in international arbitration to apply the law of the underlying contract to the arbitration agreement in the absence of an express choice.

13. Further, the HKIAC Model Clause does not, as CLAIMANT argues [CL. MEMO., PARAS. 10 ET SEQ.], indicate that the law of the underlying contract applies to the arbitration agreement in the absence of an express choice. CLAIMANT fails to provide any authority for this assumption [CL. MEMO., PARA. 6]. The Arbitration Agreement is based on the HKIAC Model Clause [EXH. R1, P. 33], which contains an optional reference to the law applicable to the arbitration agreement [MOSER/BAO, PARA. 4.24]. It is advisable to parties to include this reference precisely because the lack of such a clarification entails the risk of disputes and uncertainties

[MOSER/BAO, PARA. 4.21]. However, contrary to CLAIMANT's allegations [CL. MEMO., PARAS. 10 ET SEQ.], nothing in the HKIAC Model Clause indicates that the law of the underlying contract will govern the Arbitration Agreement in the absence of this express reference.

(ii) The doctrine of separability prevents the application of the law of the underlying contract by default

14. In fact, the doctrine of separability prevents a default rule which applies the law governing the Sales Agreement to the Arbitration Agreement in the absence of an express choice of law. The Danubian Arbitration Law, as the *lex arbitri*, is largely a verbatim adoption of the Model Law [PO1, P. 52, PARA. III.4]. In accordance with Art. 19(1) Danubian Arbitration Law, the Parties agreed to conduct the proceedings under the Hong Kong International Arbitration Centre Administered Arbitration Rules 2018 (the "**HKIAC Rules**") [EXH. C5, P. 14, PARA. 15; PO1, P. 51, PARA. II]. The doctrine of separability is evidenced in both Art. 19.2 HKIAC Rules and Art. 16(1) Danubian Arbitration Law. It provides that an arbitration agreement is separate from the underlying contract, with the consequence that it may be governed by a different law [ICC CASE NO. 4131; ICC CASE NO. 5505; BORN, PP. 475 ET SEQ.; LEW/MISTELIS/KRÖLL, PARA. 6-23; MOSER/BAO, PARA. 4.19; REDFERN/HUNTER, PARA. 3.13].

15. The doctrine of separability is applicable in the present case. Even if parties may, as CLAIMANT alleges, negate the application of the doctrine [CL. MEMO., PARA. 57], the Parties in the present case affirmed its application by their agreement to conduct the proceedings under the HKIAC Rules [EXH. C5, P. 14, PARA. 15; PO1, P. 52, PARA. II], including Art. 19.2 thereof. Thus, the doctrine prevents the application of the law governing the underlying contract to the arbitration agreement by default.

16. As the Parties have reinforced the application of the doctrine of separability, CLAIMANT cannot rely on the presumption in the English case of *SULAMÉRICA V. ENESA*, whereby parties intend the same law to govern the contract and the arbitration clause contained therein [CL. MEMO., PARA. 22]. In the present case, such a presumption can be refuted. Contrary to CLAIMANT's allegation [CL. MEMO., PARA. 6], it did not clarify that it equally intended the law of Mediterraneo to apply to the Arbitration Agreement. Ms. Napravnik was CLAIMANT's prime negotiator of the Sales Agreement prior to the severe car accident of the main negotiators of both Parties [EXH. C8, P. 17]. She offered to refer disputes to arbitration in Danubia as a neutral country [EXH. R2, P. 34]. Ms. Napravnik specifically said that "[the] *offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo*" [IBID.]. She thereby clarified that it was only important to CLAIMANT that the law applicable to the Sales Agreement, which is separate from the Arbitration Agreement, remains the law of

Mediterraneo. Thus, the Parties have negotiated the law applicable to the Sales Agreement and the law applicable to the Arbitration Agreement separately since the beginning. This is reflected in the finalised Sales Agreement, as it specifically states that Mediterranean law should only apply to the Sales Agreement [EXH. C5, P. 14, PARA. 14].

(iii) The application of Danubian law best accommodates the Parties' need for neutrality

17. The application of Danubian law to the Arbitration Agreement best accommodates the Parties' need for neutrality. As CLAIMANT admits, neutrality was paramount to the Parties in the contractual negotiations [CL. MEMO., PARA. 8].

18. The Singaporean case of *FIRSTLINK INVESTMENTS V. GT PAYMENT* supports an implied choice of the law of the seat where parties wish to conduct the arbitration in a neutral country. The court stated that *"*[…] *having abandoned their initial positions relating to the primary obligations of the contract, parties would desire neutrality above all else and accordingly, primacy ought to be accorded to the neutral law selected by the parties to govern the dispute resolution*" [*FIRSTLINK INVESTMENTS V. GT PAYMENT*, PARA. 12]. The court did not follow an assumption that parties intend their entire relationship to be governed by the same law. Instead, it acknowledged that the parties' relationship in the phase of dispute resolution is fundamentally different from their prior relationship and that it only arises if that prior relationship has irretrievably broken down [IBID., PARA. 13]. Once parties enter the phase of dispute resolution, it is a natural inference that they desire neutrality [IBID.]. The law of the seat of arbitration can usually provide this desired neutrality [IBID.]. The court went on to say that the express stipulation of an applicable law to the underlying contract cannot displace the parties' intention to submit the arbitration agreement to the law of the seat of arbitration [IBID., PARA. 16]. The same applies in the present case. CLAIMANT itself admits that it was important for the Parties to have a neutral forum [EXH. R2, P. 34; CL. MEMO., PARAS. 7 ET SEQQ.]. The application of the law of Danubia to the Arbitration Agreement can best provide the neutrality that the Parties desire.

19. Furthermore, the case of *BCY V. BCZ*, on which CLAIMANT relies [CL. MEMO., PARA. 24], must be distinguished from the present case. In that case, the court also admitted that "[i]*t is correct that the seat of arbitration is chosen based on a desire for a neutral forum, and that the law of the seat will usually be different from the law governing the main agreement*" [*BCY V. BCZ*, PARA. 63]. Other than in that case, the application of the law governing the present Sales Agreement would entail the application of the law of CLAIMANT's seat, and not a neutral law. Thus, only the law of the seat as the governing law of the Arbitration Agreement, namely Danubian law, can provide neutrality. As a consequence, the principle CLAIMANT derives from *BCY V. BCZ* does not apply to the present case.

(iv) The application of Danubian law increases the efficiency of the arbitral proceedings

20. The application of Danubian law to the Arbitration Agreement further increases the efficiency of the arbitral proceedings. This is because the law of one country applies both to the procedural framework of the arbitration and the interpretation of the Arbitration Agreement.

21. Contrary to CLAIMANT's allegation [CL. MEMO., PARA. 7], the proposal that the Arbitration Agreement should be governed by the law of the respective seat was communicated to CLAIMANT's Ms. Napravnik [EXH. R1, P. 33]. RESPONDENT's Mr. Antley, when proposing Equatoriana as the seat of arbitration, also wanted to submit the Arbitration Agreement to the law of Equatoriana [IBID.]. This demonstrates the importance of the coincidence between the procedural framework of the arbitral proceedings and the law applicable to the Arbitration Agreement [IBID.]. This is also supported by the note Mr. Antley left after his last meeting with Ms. Napravnik before the car accident [EXH. R3, P. 35]. Mr. Antley had the habit of writing down the important issues in the negotiations [IBID.]. His note reads as follows: "*Clarify in arbitration clause that neutral venue and applicable law*" [IBID.]. Thus, it proves that consistency between the seat of arbitration and the law applicable to the Arbitration Agreement was always intended.

22. For these reasons, the Parties impliedly chose Danubian law as the law governing the Arbitration Agreement.

b) Even if there were no implied choice, Danubian law would govern the Arbitration Agreement as the law which is most closely connected to it

23. Even if there were no implied choice, Danubian law would govern the Arbitration Agreement as the law which is most closely connected to it. In the absence of choice, many jurisdictions apply the closest connection test to determine the law applicable to the arbitration agreement [*FIRSTLINK INVESTMENTS V. GT PAYMENT*; *SULAMÉRICA V. ENESA*; BORN, P. 506].

24. Contrary to CLAIMANT's allegation [CL. MEMO., PARA. 23], the law of the seat is not only significant in cases where parties have not chosen a substantive law to govern their underlying contract. In fact, in the case of *SULAMÉRICA V. ENESA* cited by CLAIMANT [CL. MEMO., PARA. 18], the parties chose Brazilian law to govern their underlying contract [*SULAMÉRICA V. ENESA*, PARA. 60]. Despite this choice, the court held that English law as the law of the seat of arbitration applies to the arbitration agreement as its proper law [IBID., PARA. 8].

25. CLAIMANT fails to substantiate its claim that the law of the underlying contract is more closely connected to the Arbitration Agreement than the law of the seat of arbitration [CL. MEMO.,

PARAS. 29 ET SEQQ.]. Contrary to CLAIMANT's allegations [CL. MEMO., PARA. 30], the law of Danubia is most closely connected to the Arbitration Agreement.

26. In fact, there has been a development in recent decades in both common and civil law jurisdictions to apply the law of the seat of arbitration to the arbitration agreement [*CITATION INFOWARES LTD V. EQUINOX CORP.*; *JAPAN EDUCATIONAL CORPORATION V. KENNETH J. FELD*; ICC CASE NO. 5294; BORN, P. 509]. For instance, the Tokyo High Court held that "[i]*f the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply*" [*JAPAN EDUCATIONAL CORPORATION V. KENNETH J. FELD,* P. 747]. In the case of *C V. D* the court said that an arbitration agreement will usually have a closer and more real connection with the deliberately chosen seat of arbitration, than with the law of the underlying contract [*C V. D*, PARA. 26]. Furthermore, both the New York Convention and the Model Law stipulate for the application of the law of the seat in the absence of choice [ART. 36(1)(A)(I) MODEL LAW; ART. V(1)(A) NEW YORK CONVENTION; LEW/MISTELIS/KRÖLL, PARAS. 6-54 ET SEQ.; REDFERN/HUNTER, PARA. 3.14]. Although these provisions concern the issue at the stage of recognition and enforcement, the law of the seat should also apply as a default rule at the pre-award stage [LEW/MISTELIS/KRÖLL, PARA. 6-55]. Otherwise, parties would have to face the danger of diverging decisions [IBID.].

27. What is more, in *FIRSTLINK INVESTMENTS V. GT PAYMENT*, the court described the arbitral seat as "*the juridical centre of gravity which gives life and effect to an arbitration agreement*" [*FIRSTLINK INVESTMENTS V. GT PAYMENT*, PARA. 13]. Particularly in cases like the present, where the substantive contract is governed by the local law of one of the parties, the arbitration agreement will be more closely connected to the law of the seat of arbitration [CF. BORN, P. 518]. As a consequence, even if there were no implied choice, Danubian law would govern the Arbitration Agreement as the law which is most closely connected to it.

2. Applying the Danubian rules of interpretation, the Tribunal lacks the jurisdiction and power to adapt the Sales Agreement

28. Applying the Danubian rules of interpretation to the Arbitration Agreement, the Tribunal lacks the jurisdiction and power to adapt the Sales Agreement. It is consistent jurisprudence in the common law jurisdiction of Danubia [PO2, P. 61, PARA. 44], that due to the doctrine of separability, the UN Convention on Contracts for the International Sale of Goods (the "**CISG**") does not apply to the interpretation of an arbitration agreement contained in a sales contract [PO2, P. 60, PARA. 36]. Thus, Danubian Contract Law, which is largely a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts (the "**PICC**"), governs the

interpretation of the Arbitration Agreement. Article 4.3 thereof provides for an interpretation of written contracts in accordance with the four corners rule [PO2, P. 61, PARA. 45].

29. Applying the four corners rule, the Tribunal should interpret the Arbitration Agreement restrictively **[a]**. Under this narrow construction, the claim for a price adaptation falls outside its scope **[b]**. In any case, the Parties did not authorise the Tribunal to adapt the Sales Agreement as required by Art. 6.2.3(4)(b) Danubian Contract Law **[c]**.

a) Applying the four corners rule, the Tribunal should interpret the Arbitration Agreement restrictively

30. Contrary to CLAIMANT's allegations [CL. MEMO., PARA. 39], the Arbitration Agreement must be interpreted restrictively under Danubian law. The four corners rule under Danubian law has largely the same effects as a merger clause under Art. 2.1.17 PICC [PO2, P. 61, PARA. 45], pursuant to which "[a] *contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements …*" [ART. 2.1.17 PICC]. Thus, the four corners rule under Danubian law stipulates that the provisions of the Arbitration Agreement cannot be contradicted or supplemented by evidence of prior statements or agreements [CF. ART. 2.1.17 PICC].

31. CLAIMANT misinterpreted the four corners rule under Danubian law when it assumed that it requires a merger clause in order to be applicable [CL. MEMO., PARAS. 68 ET SEQQ.]. However, the four corners rule applies regardless of the inclusion of a merger clause, as it merely has "*the same effects*" [PO2, P. 61, PARA. 45]. Therefore, contrary to CLAIMANT's understanding, the prerequisites of Art. 2.1.17 PICC do not need to be fulfilled for the rule to apply. Instead of applying the relevant rules of interpretation under the law governing the Arbitration Agreement, namely Danubian law, CLAIMANT refers to the broad interpretation of arbitration clauses in other jurisdictions [CL. MEMO., PARAS. 39 ET SEQ.]. As the four corners rule applies to the Arbitration Agreement, the Tribunal should construe the it restrictively, and disregard external evidence such as prior negotiations.

b) The claim for a price adaptation falls outside the scope of the Arbitration Agreement

32. Under this restrictive interpretation of the Arbitration Agreement, the claim for a price adaptation falls outside its scope. The Parties had anticipated the high likelihood of this legal outcome under Danubian law during the telephone conference of 4 October 2018 [PO1, P. 52, PARA. II]. Behaving inconsistently, CLAIMANT now argues that the Arbitration Agreement would comprise claims for a price adaptation even under Danubian law [CL. MEMO., PARA. 35]

and that it is allegedly "*international practice […] to adapt the contract*" [CL. MEMO., PARA. 45]

33. CLAIMANT fails to prove that the present issue is a "*dispute arising out of this contract*" [EXH. C5, P. 14, PARA. 15] within the meaning of the Arbitration Agreement [CL. MEMO., PARAS. 37 ET SEQ.] The Sales Agreement does not provide for a price adaptation, neither due to the imposition of tariffs nor due to hardship. As a consequence, the present dispute does not arise out of the Sales Agreement and does not concern a contractual claim. In fact, RESPONDENT fulfilled its contractual obligation when it paid the price of the frozen semen. The claim raised does not merely require the Tribunal to order a payment on the basis of an interpretation of the Sales Agreement but asks for its adaptation. CLAIMANT is thus seeking payment of an amount that exceeds the contractually agreed price. Thus, the claim for a price adaptation falls outside the scope of the Arbitration Agreement.

c) In any case, the Parties did not authorise the Tribunal to adapt the Sales Agreement

34. In any case, the Parties did not authorise the Tribunal to adapt the Sales Agreement. A conferral of powers is only possible within the limits of the applicable law [REDFERN/HUNTER, PARA. 5.08]. Article 6.2.3(4)(b) Danubian Contract Law reads as follows: "*If the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium if authorized*" [CF. ART. 6.2.3(4)(B) PICC; PO2, P. 61, PARA. 45]. Although CLAIMANT is aware of this prerequisite of the applicable Danubian Contract Law [CL. MEMO., PARA. 67], it fails to prove that an authorisation took place. The Arbitration Agreement does not contain a clause to that effect. Therefore, the Parties did not authorise the Tribunal to adapt the Sales Agreement.

II. Even if Mediterranean law governed the interpretation of the Arbitration Agreement, the Tribunal would lack the jurisdiction and power to adapt the Sales Agreement

35. Even if, as CLAIMANT argues [CL. MEMO., PARA. 2], Mediterranean law governed the interpretation of the Arbitration Agreement, the Tribunal would lack the jurisdiction and power to adapt the Sales Agreement. CLAIMANT fails to present the applicable rules of interpretation and construe the Arbitration Agreement accordingly [CL. MEMO., PARAS. 35 ET SEQQ.]. There is consistent jurisprudence in Mediterraneo that in contracts governed by the CISG, the CISG also applies to the interpretation of an arbitration agreement contained in such contracts [PO1, P. 52, PARA. III.4]. As the CISG governs the Sales Agreement, it is also applicable to the interpretation of the Arbitration Agreement under Mediterranean law.

36. The Tribunal should apply Art. 8(2) CISG to interpret the Arbitration Agreement. Article 8(1) CISG provides that statements made by a person shall be interpreted according to

his or her intent [ZUPPI IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 8 CISG PARA. 2]. However, where the other party did not know or could not have been aware of that intent, the statement must be interpreted pursuant to Art. 8(2) CISG, that is according to the understanding of a reasonable person [IBID., PARA. 23]. Additionally, the circumstances of the case including the negotiations between parties shall be considered pursuant to Art. 8(3) CISG [IBID., PARA. 29]. The provisions of Art. 8 CISG do not only apply to the interpretation of unilateral statements but also to the interpretation of agreements [IBID., PARA. 2].

37. Mr. Krone, who finalised the negotiations on RESPONDENT's side after the accident, was not aware of CLAIMANT's alleged intention to empower the Tribunal to adapt the contractual price [EXH. R3, P. 35]. Neither could he have reasonably been aware of inconclusive oral discussions of the former negotiators concerning possible amendments [EXH. C8, P. 17]. Therefore, the Tribunal should apply the reasonable person standard in Art. 8(2) CISG.

38. A reasonable person would not interpret the Arbitration Agreement as empowering the Tribunal to adapt the Sales Agreement. CLAIMANT was aware that RESPONDENT's Mr. Antley had narrowed down the wording of the HKIAC Model Clause to limit the disputes that would be referred to arbitration [EXH. R1, P. 33]. While the first negotiators of the Sales Agreement, Mr. Antley and Ms. Napravnik, had talked about situations in which an amendment of the Sales Agreement might be necessary, the power to adapt the Sales Agreement was not incorporated into the Arbitration Agreement [EXH. C8, P. 17]. The Parties never reached an agreement on the issue. In fact, the prior negotiators of the Sales Agreement themselves considered the issue not finalised, for which reason Mr. Antley included it in his note after his last meeting with Ms. Napravnik [EXH. R3, P. 35]. The Parties never discussed the possibility of a price adaptation by an arbitral tribunal specifically. In any case, RESPONDENT's subsequent negotiator Mr. Krone would have objected to the transfer of the power to adapt the Sales Agreement to the Tribunal [EXH. R3, P. 35]. Consequently, a reasonable person would not interpret the Arbitration Agreement as empowering the Tribunal to adapt the Sales Agreement.

III. In any case, an express empowerment is necessary for the Tribunal to adapt the Sales Agreement

39. In any case, an express empowerment is a procedural requirement that is necessary for the Tribunal to adapt the Sales Agreement. CLAIMANT fails to mention that Danubian courts have interpreted Art. 28(3) of the applicable Danubian Arbitration Law as requiring an express empowerment for an arbitral tribunal to adapt contracts [PO2, P. 60, PARA. 36]. The provision, which is a verbatim adoption of the corresponding Model Law provision [IBID.], has been interpreted to contain a general standard to be applied to the conferral of exceptional powers to

an arbitral tribunal [IBID.]. Firstly, the Parties must adhere to the provisions of the *lex arbitri* **[1]**. Secondly, in the absence of an express empowerment in the Arbitration Agreement, the Tribunal lacks the power to adapt the Sales Agreement **[2]**.

1. The Parties must adhere to the provisions of the *lex arbitri*

40. As the Parties chose Danubia as the seat of arbitration, they agreed to adhere to the provisions of the Danubian Arbitration Law. CLAIMANT alleges that "*Danubia was to act only as a neutral venue and not the juridical seat*" [CL. MEMO., PARA. 8]. However, the Sales Agreement proves the contrary, as it provides that "[t]*he seat of arbitration shall be Vindobona, Danubia*" [EXH. C5, P. 14, PARA. 15]. As CLAIMANT admits [CL. MEMO., PARA. 7], the seat was chosen precisely because of its neutrality, one of the reasons being that CLAIMANT's Ms. Napravnik was aware that Danubia adopted the Model Law [PO2, P. 57, PARA. 14]. It is a well-established concept that the procedural rules of the seat govern the conduct of the arbitral proceedings [BORN, P. 1531; REDFERN/HUNTER, PARA. 3.53]. If parties determine the seat of arbitration, this is not merely a geographical choice but also the choice of a procedural framework for the arbitral proceedings [REDFERN/HUNTER, PARA. 3.56]. The seat of arbitration is the "*legal centre of gravity*" [IBID.], which is why the Parties must adhere to the provisions of the Danubian Arbitration Law. Particularly in the common law jurisdiction of Danubia with its doctrine of binding precedent [CF. PO2, P. 61, PARA. 44], the interpretation of its provisions by the Danubian courts must be followed.

2. In the absence of an express empowerment in the Arbitration Agreement, the Tribunal lacks the power to adapt the Sales Agreement

41. In the absence of an express empowerment in the Arbitration Agreement, as required by the Danubian Arbitration Law, the Tribunal lacks the power to adapt the Sales Agreement. The power to adapt a contract is an exceptional power [PO2, P. 60, PARA. 36]. Therefore, it would require an express empowerment by the Parties, as Art. 28(3) Danubian Arbitration Law contains a general standard to be applied to the conferral of exceptional powers to an arbitral tribunal [IBID.]. The Parties have not included such an express empowerment in the Arbitration Agreement. Thus, the Tribunal lacks the power to adapt the Sales Agreement.

IV. The Tribunal should refrain from adapting the Sales Agreement to render an enforceable award

42. Lastly, the Tribunal should refrain from adapting the Sales Agreement to render an enforceable award. According to Art. 34(2)(iii) Danubian Arbitration Law, which is a verbatim adoption of the corresponding Model Law provision [PO2, P. 57, PARA. 14], a court can set aside the award if it deals with a dispute which is outside the scope of the arbitration agreement. Thus, the award

will be set aside "*in situations in which an arbitral tribunal, which has jurisdiction to hear the disputes between the parties, exceeded* […] *the authority that was granted to it. That involves cases where the tribunal exceeds its power by deciding matters not referred to it*" [CISG DIGEST, P. 151].

43. In the present case, the Arbitration Agreement does not confer the jurisdiction and power to adapt the Sales Agreement upon the Tribunal. If the Tribunal were to adapt the Sales Agreement nonetheless, it would exceed its powers. If the award is set aside or suspended by a court in Danubia, it may further be refused recognition and enforcement by other signatory states of the New York Convention, according to Art. V(1)(e) thereof. In order to render an enforceable award, the Tribunal should therefore refrain from adapting the Sales Agreement.

V. Conclusion

44. The Tribunal lacks the jurisdiction and power to adapt the Sales Agreement under the applicable Danubian rules of interpretation. Even if Mediterranean law governed the Arbitration Agreement, the Tribunal would nonetheless lack the jurisdiction and power to adapt the Sales Agreement**.** In any case, the Parties have not expressly empowered the Tribunal to adapt it.

B. CLAIMANT is not entitled to submit evidence from the other arbitration

45. CLAIMANT seeks to submit the partial interim award and submissions from the other arbitration RESPONDENT was a party to (the "**documents**") as evidence. They allegedly demonstrate RESPONDENT's contradictory behaviour, as RESPONDENT claimed price adaptation in the other arbitration but now denies CLAIMANT's request to adapt the Sales Agreement [LETTER LANGWEILER, P. 49]. However, the only similarity lies in the claim for price adaptation. As the underlying facts of the other arbitration were entirely different, RESPONDENT's rejection of CLAIMANT's request in the present case does not constitute contradictory behaviour.

46. In its attempt to justify the admission of the documents as evidence, CLAIMANT does not even try to deny the illegal origin of the documents. It is common ground between the Parties that the documents were either obtained through a breach of a confidentiality obligation or through an illegal hack of RESPONDENT's computer system [PO1, P. 52, PARA. III.1.B].

47. In any case, the Tribunal should exclude the documents as they are immaterial and irrelevant to the present case **[I]**. Further, the Tribunal should exclude the documents due to their illegal origin **[II]** and because they contain confidential information **[III]**. Lastly, contrary to CLAIMANT's argument [CL. MEMO., PARA. 122], it has sufficient opportunity to present its case **[IV]**.

I. The documents are immaterial and irrelevant to the present case

48. Contrary to CLAIMANT's allegations [IBID.], the documents are immaterial and irrelevant to the present case, so that the Tribunal should reject their admission as evidence.

49. CLAIMANT fails to demonstrate that the requirements of materiality and relevance are fulfilled [CL. MEMO., PARA. 135]. The HKIAC Rules and the common law tradition envisage that arbitrators possess wide discretion regarding procedural matters and can freely decide over any submissions made by parties [BORN, PP. 2307 ET SEQ.; GIRSBERGER/VOSER, PARA. 981; MOSER/BAO, PARA. 9.150]. According to the broad wording of Art. 22 HKIAC Rules, as the only provision on evidence, arbitral tribunals "*shall determine the admissibility, relevance, materiality and weight of the evidence*". However, they are guided by general evidentiary rules that are applied in international arbitration [MOSER/BAO, PARA. 9.153]. An arbitral tribunal should exclude the admission of evidence at the outset when it is irrelevant or redundant [BORN, P. 2311].

50. The factual circumstances of the present case are entirely different. The opponent in the other arbitral proceedings even authorised RESPONDENT to state that CLAIMANT's allegations of contradictory behaviour do not reflect reality and are taken out of context [LETTER FASTTRACK,

P. 51]. Firstly, the notion of hardship RESPONDENT relied on in the other arbitration is less restrictive than the meaning of hardship in the Sales Agreement [CF. PO2, P. 60, PARA. 39; P. 56, PARA. 12]. The contract in that case contained the ICC Hardship Clause 2003 [IBID., P. 60, PARA. 39]. In the present case however, the Parties specifically decided against incorporating the ICC Hardship Clause into the Sales Agreement as its notion of hardship was considered to be too broad [IBID., P. 56, PARA. 12]. Further, RESPONDENT based its claim in the other arbitration on Art. 6.2.3 Mediterranean Contract Law, which is a verbatim adoption of the corresponding PICC provision [IBID., P. 60, PARA. 39]. The present Sales Agreement, however, is governed by the CISG [EXH. C5, P. 14, PARA. 14] and not by the provisions of the Mediterranean Contract Law as the contract in the other arbitral proceedings [PO2, P. 60, PARA. 39]. Furthermore, the seat of arbitration in the other case was Mediterraneo [IBID.]. Therefore, Danubian Arbitration Law with its requirement of an express authorisation to empower tribunals to adapt contracts was not applicable in the other arbitration. Further, the event which triggered RESPONDENT's claim in the other arbitration cannot be compared to the event on which CLAIMANT attempts to rely. In contrast to the protectionist tariffs imposed by Mediterraneo, the present imposition of tariffs by Equatoriana was a retaliatory measure [EXH. C6, P. 15]. As Equatoriana had taken retaliatory measures against trade restrictions before [NOTICE, P. 7, PARA. 19, EXH. C6, P. 15], the imposition of tariffs was foreseeable. Thus, the cases are incomparable due to the different nature of the tariffs.

51. Lastly, an award on the merits has not even been rendered yet in the other arbitration [PO2, P. 60, PARA. 39]. Evidence has the purpose of assisting arbitral tribunals in determining disputed issues of fact [GIRSVERGER/VOSER, PARA. 977; REDFERN/HUNTER, PARA. 6.75]. Therefore, the Tribunal should use its broad discretion under Art. 22 HKIAC Rules only to admit evidence which is sufficiently connected to a relevant claim [CF. ASHFORD, PARAS. 3 ET SEQQ.]. The arbitral tribunal in the other case is yet to decide on whether the imposition of tariffs by Mediterraneo constitutes hardship [PO2, P. 60, PARA. 39]. Thus, the documents would not assist the Tribunal in determining whether the tariffs imposed by Equatoriana can be regarded as hardship. As the Tribunal cannot draw any conclusions from them for the present case, the documents are immaterial and irrelevant. Therefore, the Tribunal should use its broad discretion under Art. 22 HKIAC Rules to exclude the documents due to lack of relevance.

II. The Tribunal should exclude the documents due to their illegal origin

52. Further, the Tribunal should exclude the documents due to their illegal origin. The source of the evidence is not, as CLAIMANT argues [CL. MEMO., PARA. 120], irrelevant when deciding on its admission **[1]**. The evidence should be excluded all the more as CLAIMANT does not have clean

hands in obtaining the documents **[2]**. If the Tribunal nonetheless admitted the documents as evidence, it would risk the enforceability of the award **[3]**.

1. The source of evidence is relevant when deciding on its admission

53. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 120], the source of evidence must be taken into account when deciding on its admission. Arbitral tribunals regularly reject the admission of evidence due to its illegal origin [*LIBANANCO*; *METHANEX*]. The approach in these cases is consistent with the exclusionary rule of evidence known as the fruit of the poisonous tree doctrine, according to which documents that have been illegally obtained must be rejected as evidence [CF. BOYKIN/HAVALIC, P. 35; COOPER, PP. 2 ET SEQQ.]. In the present case, it is undisputed that the documents were obtained illegally, either by a hack of RESPONDENT's computer system or by an unlawful disclosure by some of RESPONDENT's employees who were heard as witnesses in the other arbitration [PO1, P. 53, PARA. III.1.B; PO2, P. 61, PARA. 41]. In light of their illegality, the Tribunal must reject the admission of the documents as evidence.

54. Further, contrary to CLAIMANT's argument [CL. MEMO., PARAS. 137 ET SEQQ.], the few cases in which illegally obtained evidence was admitted cannot establish an international principle which disregards the illegality of evidence when it is publicly available. Even if there were such a principle, the cases CLAIMANT mentions must be distinguished. In contrast to the cases *CARATUBE INTERNATIONAL, CONOCOPHILIPPS V. VENEZUELA* or *YUKOS*, where the documents had been obtained illegally and subsequently published on the Internet, the present documents are not publicly available. In fact, the documents CLAIMANT seeks to submit from the other arbitration are in possession of a dubious company which specialises in providing intelligence on the horseracing industry [PO2, P. 61, PARA. 41]. CLAIMANT is not yet in possession of the documents but would have to pay USD 1,000 to acquire and access them [IBID.]. This situation cannot be compared to a world-wide availability of documents on the Internet where everyone can access the content free of charge and at any time. Thus, CLAIMANT cannot rely on either *CARATUBE INTERNATIONAL, CONOCOPHILIPPS* or *YUKOS* to support its request to admit the documents as evidence.

2. CLAIMANT does not have clean hands in obtaining the documents

55. Contrary to CLAIMANT's allegations [CL. MEMO., PARAS. 129 ET SEQQ.], it does not have clean hands in obtaining the documents. The doctrine of clean hands provides that the party seeking to introduce illegally obtained evidence must not be involved in its obtainment [*YUKOS*; DUMBERRY, PARA. 230].

56. This prerequisite is not fulfilled in the present case. Hence, the Tribunal should reject the admission of the documents. CLAIMANT's attempt to obtain the documents from the new CEO

of one of its regular customers, Mr. Velazquez, who had told CLAIMANT about the other arbitration at the annual breeder conference, failed [PO2, PP. 60 ET SEQ., PARAS. 40 ET SEQ.]. Therefore, CLAIMANT had to take the initiative and look for alternative means of obtaining the documents [IBID., PP. 60 ET SEQ., PARA. 41]. Now, CLAIMANT intends to purchase the illegally obtained documents from a dubious company [PO2, PP. 60 ET SEQ., PARA. 41]. Thus, CLAIMANT's hands have never been clean, and will be even more tainted when it purchases the documents from the company, knowing that its reputation is doubtful.

57. Further, CLAIMANT alleges that even in cases where a party has not approached the evidence with clean hands, the end would justify the means [CL. MEMO., PARA. 132]. The only case CLAIMANT mentions to support this allegation is *ALEJANDRO BELMONTE V. CONI* [IBID.], which must be distinguished from the present case. In this sports arbitration case, the anti-doping agency obtained a positive doping test sample from an athlete without asking him for permission. First, the arbitral tribunal ruled that the authorities did not need permission for taking the doping test. Therefore, the obtainment of the evidence was in fact legal. Consequently, when admitting the doping test as evidence, the arbitral tribunal did not admit illegally obtained evidence. Second, it noted that even if the doping test were obtained illegally, the admission would be justified as the evidence proved the doping and was therefore highly material to the outcome of the case. In the present case, however, the documents are both immaterial and irrelevant [SEE PARAS. 48 ET SEQQ.]. Therefore, no end justifies illegal means.

3. If the Tribunal nonetheless admitted the documents as evidence, it would put the enforceability of the award at risk

58. If the Tribunal nonetheless decided to admit the illegally obtained documents as evidence, it would put the enforceability of the award at risk. Pursuant to Article V(2)(b) of the New York Convention, recognition and enforcement of an award may be refused on grounds of public policy. The concept includes the fundamental values and principles of a legal system [IBA REPORT, PP. 6 ET SEQQ.]. To refuse an award on grounds of public policy, "*it has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good*" [*DEUTSCHE SCHACHTBAU- UND TIEFBOHRGESELLSCHAFT GMBH V. RAS AL KHAIMAH NATIONAL OIL CO.*; IBA REPORT, PP. 8 ET SEQ.].

59. In light of recent human rights advances, particularly the reinforcement of the personal right to privacy, there has been a tendency to exclude illegal evidence altogether [COOPER, PP. 2 ET SEQQ.]. If the Tribunal decided to admit the documents, it would support illegal conduct and encourage the breach of law, which runs counter to the reasons for which parties take recourse to dispute resolution mechanisms in the first place. The admission of documents irrespective of

their source undermines the values the legal system seeks to protect. The Tribunal would therefore put the enforceability of the award at risk on grounds of public policy.

III. The Tribunal should exclude the documents as they contain confidential information

60. The Tribunal should further exclude the documents as they contain confidential information. Firstly, the confidential nature of the documents must be taken into account when deciding on their admission **[1]**. Secondly, the admission of the documents would lead to full disclosure of all confidential information **[2]**. Lastly, an alleged need for transparency cannot lead to the disclosure of confidential information **[3]**.

1. The confidential nature of the documents must be taken into account when deciding on their admission

61. Contrary to CLAIMANT's allegations [CL. MEMO., PARA. 89], the confidential nature of the documents must be taken into account when deciding on their admission.

62. It is not, as CLAIMANT alleges [CL. MEMO., PARAS. 124 ET SEQQ.], international practice to admit confidential information as evidence. The only decision CLAIMANT mentions in its attempt to support this allegation is the Australian case of *ESSO AUSTRALIA V. PLOWMAN* [CL. MEMO., PARAS. 124], which must be distinguished from the present case. *ESSO AUSTRALIA V. PLOWMAN* solely concerned the question of whether a duty of confidentiality is presumed in arbitration, as the parties had not included a confidentiality obligation into their arbitration agreement. However, the other arbitration between RESPONDENT and a third party was conducted under the express confidentiality obligation contained in Art. 42.1 Hong Kong International Arbitration Centre Administered Arbitration Rules 2013 (the "**2013 HKIAC Rules**") [LETTER FASTTRACK, P. 51]. This demonstrates that the parties intended the entire arbitral proceedings to be confidential, including the documents CLAIMANT seeks to submit.

63. As the HKIAC Rules do not contain sufficient guidance on evidentiary matters [MOSER/BAO, PARA. 9.155], the Tribunal should further take recourse to the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"). The IBA Rules reflect international best practice [ICC CASE NO. 16655; BORN, P. 2347 ET SEQQ.; REDFERN/HUNTER, PARA. 6.95]. They aim to supplement institutional rules such as the HKIAC Rules [PREAMBLE IBA RULES; LEW/MISTELIS/KRÖLL, PARAS. 22.5, 22.24; REDFERN/HUNTER, PARA. 6.85] and are "*one of the generally accepted mainstays of international commercial arbitration*" [BORN, P. 2349; GIRSBERGER/VOSER, PARA. 986; KREINDLER, P. 157; MOSES, P. 173 ET SEQQ.; MOSK/GINSBURG, P. 375; TEVENDALE/CARTWRIGHT-FINCH, P. 837].

64. CLAIMANT agrees with RESPONDENT that the Tribunal should take recourse to the IBA Rules for further guidance on evidentiary matters [CL. MEMO., PARA. 109]. However, the IBA Rules themselves, in Art. 9.2(e), consider commercial or technical confidentiality concerns sufficient to warrant the exclusion of documents. Therefore, CLAIMANT cannot argue that matters of confidentiality are irrelevant [CL. MEMO., PARA. 89] while at the same time referring to the IBA Rules that consider confidentiality as an important factor when deciding on the admission of evidence. In line with the IBA Rules, the confidential nature of the documents must be taken into account.

2. The admission of the documents would lead to full disclosure of all confidential information

65. Further, the admission of the documents would lead to full disclosure of all confidential information. The Tribunal must determine that the present considerations of confidentiality are sufficient to warrant the exclusion of the documents as evidence in line with Art. 9.2(e) IBA Rules. The Tribunal must regard the concerns as "*compelling*" for the evidence to be excluded.

66. The documents CLAIMANT seeks to submit consist of the partial interim award as well as RESPONDENT's submissions [PO2, P. 61, PARA. 41]. Both contain comprehensive sensitive information connected to the arbitration, which is protected by the confidentiality obligation in Art. 42.1 2013 HKIAC Rules. The admission would therefore not only disclose the information CLAIMANT seeks to submit, but also other commercially sensitive information related not only to RESPONDENT's but also to RESPONDENT's opponent's business. In fact, confidentiality is one of the most important reasons why parties refer their disputes to arbitration in the first place [2010 INTERNATIONAL ARBITRATION SURVEY]. Due to the expected magnitude of the revelations, RESPONDENT's confidentiality concerns must be considered "*compelling*" and therefore fulfil the prerequisites of an exclusion. This must apply all the more since the documents are neither relevant nor material to the present case [SEE PARAS. 48 ET SEQQ.].

3. An alleged need for transparency cannot lead to disclosure of confidential information

67. Further, an alleged need for transparency cannot lead to disclosure of confidential information. CLAIMANT attempts to rely on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "**UNCITRAL Rules on Transparency**") [CL. MEMO., PARA. 142 ET SEQQ.]. However, the UNCITRAL Rules on Transparency apply exclusively to Treaty-based Investor-State Arbitration [ART. 1.1 UNCITRAL RULES ON TRANSPARENCY; HAY, PARA. 217]. CLAIMANT fails to provide any reason for why they should apply in this commercial dispute.

68. Even if the UNCITRAL Rules on Transparency applied to commercial arbitration by analogy, this would only be possible where public interest is at stake [HAY, P. 218; ROGERS, P. 1326]. Public interest is the main reason for the need for transparency in investment arbitration [ROGERS, P. 1308]. Commercial disputes, however, merely concern the interests of private parties [GARCIA P. 324; ROGERS, P. 1305]. In commercial arbitration, public interest will only be at stake in rare cases, for instance in the context of a bribery or corruption the public should be aware of [FERNANDEZ-ARMESTO, P. 722; HAY, P. 218; ROGERS, P. 1332]. The other arbitration merely dealt with the question of the risk allocation between the parties to that dispute [PO 2, P. 60, PARA. 39]. Therefore, the dispute does not concern any public interest, so that the UNCITRAL Rules on Transparency cannot be applied by analogy.

IV. CLAIMANT has sufficient opportunity to present its case

69. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 122], it has sufficient opportunity to present its case. Therefore, CLAIMANT cannot argue that the Tribunal must admit the documents.

70. Firstly, CLAIMANT misunderstood Art. 13.5 HKIAC Rules. The article stipulates that both arbitral tribunals and parties "*shall do everything necessary to ensure the fair and efficient conduct of the arbitration*". The provision aims at preventing parties from adopting tactics which delay or obstruct the arbitral proceedings [MOSER/BAO, PARA 9.49]. As there are substantial reasons for the exclusion of the documents, RESPONDENT's request that the evidence be rejected is not an unfair tactic within the meaning of the provision. The sole purpose of this request is to ensure that illegally obtained documents which contain confidential information, and which are irrelevant to the case, must not be submitted.

71. Secondly, CLAIMANT cannot rely on Art. 45.3 HKIAC Rules [CL. MEMO., PARA. 96]. The provision stipulates that a party to an arbitration may not rely on confidentiality if disclosure is necessary to protect a legal right of that party. However, this exception from the confidentiality obligation only applies in cases where the party to the relevant arbitral proceedings, that is RESPONDENT's opponent in the other arbitration, intends to enforce its legal right. The provision does not grant CLAIMANT as a third party the right to request the disclosure of confidential content. Therefore, CLAIMANT cannot rely on Art. 45.3 HKIAC Rules.

72. Lastly, CLAIMANT cannot argue that the award would be unenforceable under the New York Convention [CF. CL. MEMO., PARA. 99]. Article V (1)(b) thereof provides that recognition and enforcement of an award may be refused if a party was unable to present its case. The right to present the case covers cases in which the arbitration "*radically strayed from standards of due process*" [NEW YORK CONVENTION GUIDE, ART. V (1)(B), PARA. 33]. It does not require that all evidence CLAIMANT intends to submit must be accepted. The right to be heard is limited by

considerations of reasonableness and fairness [BORN, P. 2175, MOSER/BAO, PARA. 9.17]. In the present case, the admission of the documents is not required to ensure CLAIMANT's right to present its case. The documents are immaterial and irrelevant to these arbitral proceedings and do not assist in finding issues of fact [SEE PARAS. 48 ET SEQQ.]. CLAIMANT can still make use of all available means to substantiate its claim. Therefore, CLAIMANT already has sufficient opportunity to fully present its case.

V. Conclusion

73. CLAIMANT is not entitled to submit the documents from the other arbitration. They are neither material nor relevant to the present case. Further, their illegal origin as well as the confidential information therein prevent their admission as evidence. Lastly, the admission of the documents is not necessary to ensure CLAIMANT's right to present its case.

C. CLAIMANT is not entitled to price adaptation

74. CLAIMANT is not entitled to price adaptation. In their Sales Agreement, the Parties have agreed on a price of USD 10,000,000 for 100 doses of Nijinsky III's frozen semen, which were to be delivered in three shipments and to be paid in two instalments [EXH. C5, P. 13; P. 14, PARA. 8]. RESPONDENT fulfilled its contractual obligations and paid both instalments on time [EXH. C8, P. 18]. Two months before the last shipment, the government of Mediterraneo, CLAIMANT's home country, levied 25 per cent tariffs on agricultural products [EXH. C6, P. 15]. As it had done in the past, Equatoriana imposed retaliatory tariffs amounting to 30 per cent [IBID.]. CLAIMANT has to bear these costs due to the Parties' agreement on "delivery duty paid" ("**DDP**") [EXH. C5, P. 14, PARA. 8]. Nonetheless, and knowing that timely delivery was paramount to RESPONDENT, CLAIMANT threatened to stop delivery and thereby breach the Sales Agreement [EXH. R4, P. 36]. CLAIMANT now attempts to rely on the hardship provision in clause 12 of the Sales Agreement (the "**Hardship Clause**"). It mistakenly asserts that the tariffs imposed by Equatoriana constitute hardship [CL. MEMO., PARA. 178] and alleges that RESPONDENT had agreed to pay the additional costs resulting from the tariffs [CL. MEMO., PARA. 156]. However, CLAIMANT itself is liable to pay the tariffs under the Sales Agreement **[I]**. Further, CLAIMANT is not entitled to price adaptation under the CISG **[II]**.

I. CLAIMANT is liable to pay the tariffs under the Sales Agreement

75. Clause 8 of the Sales Agreement, which contains the Parties' agreement on DDP, obliges CLAIMANT to bear the costs of the tariffs **[1]**. In any case, the Hardship Clause does not exempt CLAIMANT from this liability **[2]**.

1. CLAIMANT must bear the costs of the tariffs according to clause 8 of the Sales Agreement

76. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 191], it must bear the costs of the tariffs according to clause 8 of the Sales Agreement. The clause provides that CLAIMANT "*will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen*" [EXH. C5, P. 14, PARA. 8]. DDP stands for "delivery duty paid" and is one of the International Commercial Terms (the "**Incoterms**"), designed to provide a set of international rules for the interpretation of the most commonly used trade terms [DDP INCOTERMS 2010]. DDP stipulates that "*the seller bears all costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods* […] *for import*" [IBID.]. The risks and costs include "*duties, taxes and other charges of delivering the goods*" [IBID.]. If sellers intend to avoid the obligation to clear goods for import, they must voice this by adding a reference to that effect or by using a different term [ICC CASE NO. 7903; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ANNEX, PARA. 7].

77. In the present case, it is undisputed that DDP has the Incoterm meaning and that the Parties incorporated this meaning into their Sales Agreement [PO2, P. 56, PARA. 10; P. 60, PARA. 39; EXH. C5, P. 14, PARA. 8]. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 191], the Parties did not limit CLAIMANT's liability as they did not include a reference to that effect into the Sales Agreement. In fact, RESPONDENT paid CLAIMANT a premium of USD 30,000 to assume the risks associated with the DDP, including potential tariffs. Due to the agreement on DDP, the contractual price increased by USD 50,000 [EXH. C2, P. 10; EXH. C5, P. 13], while the actual costs of delivery were only USD 20,000 [PO2, P. 56, PARA. 8]. The table below illustrates the calculation of the premium CLAIMANT received for assuming the risks associated with DDP.

		Price in total (in USD)
Price increase due to DDP		50,000
Actual delivery costs		- 20,000
Price for assuming risks of DDP		**<u>30,000</u>**

78. Further, contrary to CLAIMANT's argument [CL. MEMO., PARAS. 153, 155, 169 ET SEQ.], RESPONDENT does not contravene the principle of *pacta sunt servanda*, which is one of the most fundamental principles of law [CF. MAGNUS, P. 480]. In fact, it is not RESPONDENT but CLAIMANT which violates this principle of law by attempting to impose costs on RESPONDENT which it is contractually obliged to bear. As the agreement on DDP allocates the risk of tariffs to CLAIMANT, the principle of *pacta sunt servanda* requires that CLAIMANT bears the costs.

2. The Hardship Clause does not exempt CLAIMANT from its liability for the tariffs

79. The Hardship Clause does not exempt CLAIMANT from its liability for the tariffs. Firstly, the Hardship Clause does not provide for the remedy of price adaptation **[a]**. Secondly, the imposition of tariffs by Equatoriana does not fall within its scope **[b]**. Lastly, an alleged breach of Art. 7(1) CISG does not lead to a different conclusion **[c]**.

a) The Hardship Clause does not provide for the remedy of price adaptation

80. Contrary to CLAIMANT's argument [CL. MEMO., PARAS. 147 ET SEQQ.], nothing in the Hardship Clause indicates that the Parties provided for the remedy of price adaptation. Its wording merely provides for an exemption from liability.

81. The Tribunal should interpret the Hardship Clause in line with Art. 8(2) CISG, that is according to the understanding of a reasonable person. In doing so, Art. 8(3) CISG provides that the

circumstances of the case must be taken into account [ZUPPI IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 8 PARA. 29]. The Tribunal should not apply Art. 8(1) CISG which provides that agreements shall be interpreted according to parties' intent. Due to the practical difficulties of proving the identity between the intentions of parties, Art. 8(1) CISG is mostly irrelevant in practice [*MCC-MARBLE CERAMIC CENTER, INC. V. CERAMICA NUOVA D'AGOSTINO S.P.A.*; CISG DIGEST, P. 54; HONNOLD, P. 118, PARA. 107]. What is more, an interpretation in accordance with Art. 8(1) CISG only leads to a different result when the receiving party has additional background knowledge [ICC CASE NO. 8324]. As the Parties have never met before entering into the contractual negotiations [PO2, P. 55, PARA. 1], they had no background knowledge. Therefore, the Tribunal should interpret the Hardship Clause in accordance with Art. 8(2) CISG.

82. A reasonable person would not understand the Hardship Clause as providing for the remedy of price adaptation. Contrary to CLAIMANT's allegations, RESPONDENT's Mr. Shoemaker never "*assured that* [the Parties] *will reach an agreement on price*" [CL. MEMO., PARA. 156]. After the imposition of tariffs by Equatoriana, CLAIMANT's Ms. Napravnik contacted Mr. Shoemaker and asked to renegotiate the price [EXH. C7, P. 16]. Mr. Shoemaker merely stated that "*if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price*" [EXH. R4, P. 36]. However, CLAIMANT attempts to mislead the Tribunal, by bringing only half the truth to the Tribunal's attention. Mr. Shoemaker did not make any commitment as he clarified that an adaptation would in any case be conditional upon its foundation in the Sales Agreement. Thus, a reasonable person in the position of Ms. Napravnik would not understand his statement as a binding promise.

83. Similarly, a reasonable person would not interpret the discussions between the predecessors of the final negotiators as an agreement to provide for the remedy of price adaptation. CLAIMANT's Ms. Napravnik and RESPONDENT's Mr. Antley, who negotiated the Sales Agreement until the car accident leading to a change in the persons responsible for the negotiations, had talked about the topic of possible amendments to the Sales Agreement [EXH. C8, P. 17]. Ms. Napravnik said that there should be a mechanism in place for situations in which the Parties cannot agree on an amendment to the Sales Agreement [IBID.]. This statement does not constitute an offer within the meaning of Art. 14 CISG. A proposal can only constitute an offer if the proposing party indicates its willingness to be bound in case of acceptance without its further involvement [OLG SAARBRÜCKEN, JUDGMENT OF 13 JANUARY 1993; *SCAFORN INTERNATIONAL V. EXMA*; FERRARI IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 14 CISG PARA. 11]. Ms. Napravnik's statement is not precise enough and does neither indicate the situations in which an amendment to the Sales Agreement might be necessary, nor does it specify any procedure for it. As her

statement is too vague to be accepted without any further involvement of the proposing party, it does not constitute an offer. Even if it were true that Mr. Antley replied to Ms. Napravnik that "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" [EXH. C8, P. 17], this statement would neither constitute an offer for the same reasons. Further, the use of the word "*probably*" indicates an unwillingness to be bound. In any case, RESPONDENT's subsequent negotiator Mr. Krone could not have been aware of these discussions. Even if he had been aware of these negotiations, he would never have agreed to transferring the power to adapt the price to the Tribunal [EXH. R. 3, P. 35].

84. Consequently, contrary to CLAIMANT's allegations [CL. MEMO., PARA. 157], a reasonable person would not understand the Hardship Clause as containing the remedy of price adaptation.

b) The imposition of tariffs does not fall within the scope of the Hardship Clause

85. Moreover, the imposition of tariffs by Equatoriana does not fall within the scope of the Hardship Clause. CLAIMANT only states that the tariffs would cause hardship without elaborating on why they fulfil the prerequisites of the Hardship Clause [CL. MEMO., PARA. 150]. A reasonable person, taking the circumstances of the case into account, would not interpret the Hardship Clause as covering the imposition of tariffs. It is not a comparable unforeseen event in relation to "*additional health and safety requirements"* **[i]** and does not make the contract *"more onerous*" **[ii]**.

(i) The imposition of tariffs is not a comparable unforeseen event

86. The Hardship Clause provides relief in cases where hardship is caused by "*additional health and safety requirements*" or "*comparable unforeseen events*" [EXH. C5, P. 14, PARA. 12]. The imposition of tariffs by Equatoriana, however, is not such a comparable unforeseen event.

87. Firstly, the imposition of tariffs and its consequences cannot be compared to "*additional health and safety requirements*". The Parties specifically narrowed down the wording of the ICC Hardship Clause as they considered it too broad [EXH. R3, P. 35]. They thereby limited the events which may trigger hardship. Past experiences with additional health and safety requirements were the reasons why the Hardship Clause was included in the first place. In 2014, CLAIMANT had sold three mares DDP to farms in Danubia when a "*rare aggressive type of foot and mouth disease was discovered*" [PO2, P. 58, PARA. 21]. As a consequence, Danubia imposed health and safety requirements, which led to "*highly expensive tests*" and involved long quarantine times [EXH. C4, P. 12]. Performance of the contract was not possible without fulfilling these requirements. The tariffs imposed by Equatoriana in the present case, however, did not make performance of the contract impossible, as they merely needed to be paid. Further, a governmental action cannot be compared to the occurrence of a rare disease in terms of

predictability. Governmental measures like the imposition of tariffs are often imposed to influence markets, which is why they must be taken into account by companies participating in international trade. Therefore, the imposition of tariffs and its effects cannot be compared to additional health and safety requirements.

88. Secondly, CLAIMANT fails to mention any reason for the alleged unforeseeability of the tariffs. The Parties had been aware of the possibility of further import restrictions. In fact, CLAIMANT had initially inquired whether the Parties could allocate the risk of further import restrictions to RESPONDENT [EXH. C4, P. 12]. Nonetheless, the Parties agreed on DDP and CLAIMANT received a premium for the assumption of risks associated with delivery [SEE PARA. 77]. As the Parties had thus anticipated further import restrictions, the imposition of tariffs was foreseen. In fact, in January 2017, that is before the conclusion of the Sales Agreement on 6 May 2017, Mediterraneo's president indicated his preference for a protectionist approach with regard to agricultural products [EXH. C6, P. 15]. The retaliatory tariffs by Equatoriana were all the more foreseen, since restrictions imposed by other countries had resulted in direct retaliatory measures in the past [IBID.]. Therefore, the imposition of tariffs by Equatoriana is not a comparable unforeseen event in relation to "*additional health and safety requirements*".

(ii) The imposed tariffs do not make the Sales Agreement more onerous

89. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 150], the imposed tariffs do not make the Sales Agreement more onerous.

90. First of all, the ICC Hardship Clause 2003 (the "**ICC Hardship Clause**") is irrelevant when assessing whether this prerequisite is fulfilled. It stipulates that there will be hardship if a party proves that performance "*has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have* […] *taken into account*".

91. CLAIMANT contradicts itself when it admits that the Parties chose not to incorporate the ICC Hardship Clause while at the same time arguing that it shall be used to interpret the present Hardship Clause [CL. MEMO., PARAS. 158 ET SEQQ.]. In any case, the ICC Hardship Clause cannot assist in interpreting the Hardship Clause. A contractual reference is necessary to establish a link to the ICC Hardship Clause [NOTES ON THE ICC HARDSHIP CLAUSE, P. 15]. The wordings of the clauses differ greatly, and the Parties have made no reference to the ICC Hardship Clause whatsoever in the Sales Agreement. Thus, the ICC Hardship Clause cannot be used to interpret the Hardship Clause.

92. The Parties agreed on a restrictive conception of hardship [EXH. R4, P. 35], which does not cover the imposed tariffs as they do not make the Sales Agreement more onerous. Even hardship conceptions which are less restrictive than the present notion of hardship require a high

threshold to be met and are only reserved for extreme situations in which the balance of the contract changes fundamentally [ICC CASE NO. 15051; BLOCK, P. 55]. The imposed tariffs do not suffice to fundamentally change the balance of the Sales Agreement. In fact, CLAIMANT uses misleading figures to support its claim. The figures presented by CLAIMANT, namely a 30 per cent increase in the cost of performance, are only true in relation to the last shipment [NOTICE, P. 6, PARAS. 9 ET SEQ.]. To properly evaluate whether the increase in the cost of performance altered the contractual equilibrium, the entire contractual obligation must be considered. In relation to the value of the entire obligation under the Sales Agreement, which amounts to USD 10,000,000 [EXH. C5, PP. 13 ET SEQ.], the price increase is only 15 per cent. The relevant figures are presented in the following table:

	Figures CLAIMANT alleges to be relevant	**Relevant figures**
Value of shipment	USD 5,000,000	**USD 10,000,000**
Price increase due to tariffs $(= \frac{\text{additional tariffs paid}}{\text{value of shipment}})$	$\frac{\text{USD } 1{,}500{,}000}{\text{USD } 5{,}000{,}000} = 30\ \%$	$\frac{\text{USD } 1{,}500{,}000}{\textbf{USD } \mathbf{10{,}000{,}000}} = \mathbf{15\ \%}$

93. An increase in the cost of performance amounting to 15 per cent does not fundamentally change the contractual balance. Rather, this increase must be considered as part of the ordinary commercial risk that is inherent in business and international trade. Therefore, the imposed tariffs do not make the Sales Agreement more onerous. All the more, contrary to CLAIMANT's argument [CL. MEMO., PARA. 158 ET SEQQ.], they therefore cannot make it "*excessively onerous*" as it would be required under the ICC Hardship Clause.

94. Consequently, the imposition of tariffs by Equatoriana does not fall within the scope of the Hardship Clause, as it is not a "*comparable unforeseen event*" in relation to "*additional health and safety requirements*" which makes the Sales Agreement "*more onerous*".

c) An alleged breach of Art. 7(1) CISG does not entitle CLAIMANT to price adaptation

95. Contrary to CLAIMANT's argument [CL. MEMO., PARAS. 166 ET SEQQ.], an alleged breach of Art. 7(1) CISG does not entitle CLAIMANT to price adaptation.

96. First of all, Art. 7(1) CISG does not, as CLAIMANT alleges [CL. MEMO., PARA. 167], set a standard of behaviour for parties. Article 7(1) CISG only provides that "[i]*n the interpretation of this Convention, regard is to be had to its international character and* […] *the observance of good faith in international trade*". A duty of good faith cannot be extracted from the general

principles on which the CISG is based [BRIDGE, P. 27; CF. FERRARI, PP. 74 ET SEQQ.; HONNOLD, P. 99; SCHWENZER IN: SCHWENZER, ART. 7 CISG PARA. 17]. The drafting history of Art. 7(1) CISG underlines this conclusion [SCHWENZER IN: SCHWENZER, ART. 7 CISG, PARA. 17]. The Commission which was responsible for finalising the wording of the CISG decided that a duty of good faith should not be imposed upon parties [HONNOLD, P. 99]. Rather, it "*should be restricted to a principle for interpreting the provisions of the Convention*" [IBID.]. This observation has been confirmed in the ICC CASE NO. 8611. In that case, the arbitral tribunal held that the principle of good faith mentioned in Art. 7(1) CISG applies only to the interpretation of the CISG and does not impose any duties upon parties regarding the performance of the contract [ICC CASE NO. 8611].

97. CLAIMANT attempts to mislead the Tribunal by stating that the court in *SCAFOM INTERNATIONAL V. LORRAINE TUBES* adapted the contract due to an alleged duty of the parties to act in good faith [CL. MEMO., PARA. 168]. However, in that case, the court applied the principle of good faith in Art. 7(1) CISG merely to interpret Art. 79 CISG. Thus, it did not state that good faith imposes any duty on parties. Further, CLAIMANT cites a decision of the Singapore Court of Appeal in its attempt to substantiate its claim that Art. 7(1) CISG contains a duty to act in good faith [CL. MEMO., PARA. 174]. However, the facts of the present case are entirely different. In that case, the parties' contract contained a clause stipulating that they should act in good faith [*HSBC INSTITUTIONAL TRUST SERVICES V. TOSHIN DEVELOPMENT*]. The present Sales Agreement, however, does not set a duty to act in good faith as it does not contain such a clause, for which reason CLAIMANT cannot rely on this case to infer a duty to act in good faith from Art. 7(1) CISG.

98. Even if Art. 7(1) CISG set a standard of behaviour, the provision would not entitle CLAIMANT to price adaptation. CLAIMANT's attempt to support this argument is limited to aspects of "*inequity and unfairness*" in case the price was not adapted [CL. MEMO., PARAS. 178 ET SEQ.]. It argues that it should be entitled to price adaptation because it expected to make a profit from the sale and because its business would be threatened [CL. MEMO., PARA. 179]. However, a party is responsible for the influence of a contract on its financial situation and its ability to assume risks [HAMBURG TRIBUNAL, AWARD OF 21 MARCH 1996; OLG MÜNCHEN, JUDGMENT OF 5 MARCH 2008; *SIZING MACHINE CASE*; VISCHER, P. 178]. The principle of good faith manifested in Art. 7(1) CISG must in any case not be used to bypass the explicit legal effects of the remaining provisions of the CISG [TALLON IN: BIANCA-BONELL, ART. 7 CISG PARA. 3.1.2.]. Therefore, even if it set a standard of behaviour, the provision would not entitle CLAIMANT to price adaptation.

II. CLAIMANT is not entitled to price adaptation under the CISG

99. CLAIMANT is further not entitled to price adaptation under the CISG. Article 79 CISG is not applicable **[1]**. Even if Art. 79 CISG were applicable, the provision would not provide for price adaptation by the Tribunal **[2]**. Lastly, CLAIMANT cannot base its claim on the PICC **[3]**.

1. Article 79 CISG is not applicable

100. First of all, the Parties derogated from Art. 79 CISG in line with Art. 6 CISG **[a]**. In any case, Art. 79 CISG does not cover hardship **[b]**.

a) The Parties derogated from Art. 79 CISG in line with Art. 6 CISG

101. Contrary to CLAIMANT's argument [CL. MEMO., PARAS. 182 ET SEQQ.], clause 12 of the Sales Agreement is not complementary to Art. 79 CISG but constitutes a derogation from the provision in line with Art. 6 CISG. Article 6(1) CISG allows parties to entirely or partially exclude the application of the CISG or to derogate from its provisions [CISG-AC OPINION NO. 16, PARA. 1.1; FERRARI IN: SCHLECHTRIEM/SCHWENZER, ART. 6 CISG PARA. 33]. Parties may not only expressly but also impliedly derogate from provisions of the CISG [MISTELIS IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 6 CISG PARA. 15]. The inclusion of *force majeure* and hardship clauses into a contract often constitutes an implied derogation from Art. 79 CISG [SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 57].

102. The Parties derogated from Art. 79 CISG by including clause 12 into the Sales Agreement, which covers both *force majeure* and hardship [EXH. C5, P. 14, PARA. 12]. Such a contractual risk allocation precludes the application of Art. 79 CISG [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 92]. In the *CORN CASE*, the arbitral tribunal found that recourse to Art. 79 CISG was impossible. As the contract contained specific provisions on *force majeure*, it held that the contractual provisions should prevail over Art. 79 CISG [IBID.]. The same applies to the present case. After long discussions, the Parties agreed on clause 12 of the Sales Agreement, which covers both *force majeure* and a narrow conception of hardship [CF. EXH. R3, P. 35]. As the Parties incorporated risk allocation concepts different to those in Art. 79(1) CISG into their Sales Agreement, they derogated from the provision in the sense of Art. 6 CISG. Therefore, Art. 79 CISG is not applicable.

b) In any case, Art. 79 CISG does not cover hardship

103. In any case, contrary to CLAIMANT's allegations [CL. MEMO., PARA. 181], Art. 79 CISG does not cover hardship. The CISG is silent on the allocation of the risk of a severe change of circumstances which leads to a fundamental alteration of the contractual equilibrium [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 78; SCHWENZER IN:

SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 4]. In fact, the drafting history of the provision demonstrates that the drafters opted not to include the doctrine of hardship in the CISG [CF. CISG-AC OPINION NO. 7, PARA. 29; BUND, P. 391; FLAMBOURAS, PARA. 3; FLECHTNER, P. 88]. The reason for its exclusion from Art. 79 CISG is that the concept of "*impediment*" should be interpreted independent of national concepts such as hardship, which is only acknowledged in some jurisdictions [CISG-AC OPINION NO. 7, PARA. 28; TALLON IN: BIANCA-BONELL, ART. 79 CISG PARA. 1.2]. This is consistent with a prevailing practice of courts to burden the debtor with the risk of a change of circumstances [COURT OF CASSATION, JUDGMENT OF 30 JUNE 2004; DISTRICT COURT MONZA, JUDGMENT OF 14 JANUARY 1993; *VITAL BERRY MARKETING V. DIRA-FROST*; ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 78]. It is also a commercially sensible solution as in international trade, it is reasonable to expect that both parties are responsible to allocate risks contractually or else bear the consequences [CF. ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 78].

104. The purpose of Art. 79 CISG also supports the exclusion of hardship from its scope. Article 79 CISG constitutes the necessary limitation to the CISG's general principle of strict liability [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 2; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 PARA. 1]. Exemption from liability for damages will be granted if an event beyond the obligor's control prevents him or her from performing the contract [SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 PARA. 10]. The reason for the exemption is the severe, unforeseeable as well as unavoidable character of the impediment [CF. ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 43]. Further, parties must invoke the provision after non-performance [BUND, P. 389]. This is an important difference to the doctrine of hardship, which must be invoked in advance of non-performance [IBID.]. The concept of hardship does not deal with an exemption from liability for damages due to non-performance, but rather aims at renegotiating, adapting or terminating a contract [CF. ART. 6.2.3 PICC]. In light of the above, the purpose of Art. 79 CISG is to exempt the obligor in cases which are so severe as to hinder performance. Including hardship within the scope of this provision would be inconsistent with its purpose. Therefore, Art. 79 CISG does not apply in cases of hardship.

2. Even if Art. 79 CISG were applicable, it would not provide for price adaptation by the Tribunal

105. Even if Art. 79 CISG were applicable, it would not provide for price adaptation by the Tribunal. The provision does not contain the remedy of price adaptation **[a]**. Even if the Tribunal found

that Art. 79 CISG covers hardship in general, the imposition of tariffs by Equatoriana would not fall within its scope **[b]**.

a) The provision does not contain the remedy of price adaptation

106. First of all, Art. 79 CISG does not contain the remedy of price adaptation [FLECHTNER, P. 92]. Therefore, the Tribunal cannot resort to Art. 79 CISG to adapt the Sales Agreement. The wording of the provision does not indicate any authorisation to adapt contracts. Article 79(5) CISG clarifies that the effect of the provision is merely to exclude the obligor's liability for damages [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 80]. Therefore, Art. 79 CISG does not provide a legal basis for price adaptation. Rather, it has the character of a defence against claims for damages [CF. IBID.]. Overall, there is not a single legal basis in the CISG allowing price adjustment due to changed circumstances [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 86; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 4].

107. Further, contrary to CLAIMANT's argument [CL. MEMO., PARA. 168], the Tribunal should not rely on *SCAFOM INTERNATIONAL V. LORRAINE TUBES*. In that case, the Belgian Cassation Court mistakenly infers the remedy of price adaptation from Art. 79 CISG [FLECHTNER, PP. 96 ET SEQ.]. However, in the course of the drafting process of the CISG, the drafters rejected a proposal which would have enabled tribunals to adapt a contract to restore the contractual equilibrium [IBID., PP. 88, 92]. Therefore, the court assumes the existence of an additional remedy that has no basis in the wording of the provision and "*that is vehemently rejected in the Common Law tradition*" [IBID., PP. 96 ET SEQ.]. As this assumption runs counter to the wording, purpose and drafting history of the provision, the Tribunal should not infer the remedy of price adaptation from Art. 79 CISG.

b) Even if the Tribunal found that Art. 79 CISG covers hardship, the imposition of tariffs by Equatoriana would not fall within its scope

108. Even if the Tribunal found that Art. 79 CISG covers hardship, the imposition of tariffs would not fall within its scope. Although the burden of proof is upon CLAIMANT [CF. ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 99], it fails to substantiate that the requirements of Art. 79 CISG are fulfilled [CL. MEMO., PARAS. 187 ET SEQQ.].

109. In any case, contrary to CLAIMANT's argument [CL. MEMO., PARA. 189], the imposition of tariffs does not qualify as an impediment within the meaning of Art. 79 CISG. To exempt the obligor under Art. 79 CISG, an unforeseeable event beyond his or her control must fundamentally disrupt the contractual equilibrium [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 81]. In cases of state interventions, Art. 79 CISG applies

only if the measures are substantial, such as import, export or trade prohibitions [CF. SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 17]. The instances where arbitral tribunals held that there was an exclusion from liability under Art. 79 CISG involved serious interventions such as the UN embargo against Yugoslavia [*CAVIAR CASE*; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 17]. Arbitral tribunals have been particularly restrictive when it comes to allowing an exemption due to import or export prohibitions or if licences were not granted [*EQUIPMENT CASE*; *LINDANE CASE; SANGUINARINE CASE*; *SHIRT CASE*; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 17]. If arbitral tribunals did not find an exemption from liability to pay damages in case of such severe state interventions, the present imposition of tariffs is not sufficient to constitute an impediment all the more. If at all, only rare cases of economic impossibility, where performance would be excessively onerous, can lead to an exemption under Art. 79 CISG [CF. SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 30].

110. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 191], the imposition of tariffs leading to an overall increase in the cost of performance of 15 per cent for CLAIMANT [EXH. C8, P. 17; SEE PARAS. 92 ET SEQ.] does not allow for relief under Art. 79 CISG. The only case CLAIMANT relies on is *SCAFOM INTERNATIONAL V. LORRAINE TUBES* [CL. MEMO., PARA. 89]. However, that case must be distinguished from the present case. The court held that an increase in the price of steel by 70 per cent would constitute hardship and therefore an impediment under Art. 79 CISG [*SCAFOM INTERNATIONAL V. LORRAINE TUBES*; CF. BUND, P. 392]. In contrast, an increase in the overall cost of performance of 15 per cent in the present case is not comparable to the impediment in *SCAFOM INTERNATIONAL V. LORRAINE TUBES*. In fact, in other decisions, price increases of more than 100 per cent were not sufficient to exempt a party under Art. 79 CISG [*FEMO ALLOY CASE*; *STEEL ROPES CASE*; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 30]. The German Higher District Court Hamburg even considered a market price increase of 200 per cent as not exempting a party under Art. 79 CISG [OLG HAMBURG, JUDGMENT OF 28 FEBRUARY 1997; CF. HUBER IN: MÜKO, ART. 79 CISG PARA. 21; SCHWENZER, P. 715]. As parties in international trade can be expected to incorporate terms concerning possible contract adjustments into their agreement, the margin should be 150 - 200 per cent [SCHWENZER, P. 717]. Thus, the tariffs imposed by Equatoriana do not suffice to constitute an impediment within the meaning of Art. 79 CISG.

111. Furthermore, contrary to CLAIMANT's allegations [CL. MEMO., PARA. 203], the effects of an unforeseen event on the financial situation of the obligor cannot be considered. Under Art. 79 CISG, only an objective impediment exempts the obligor [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 47]. Parties are responsible for

their own financial liquidity [IBID.; SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 79 CISG PARA. 25]. Therefore, CLAIMANT's remarks on the effect of the tariffs on its financial situation [CL. MEMO., PARA. 203] are irrelevant in determining whether there was an impediment within the meaning of Art. 79 CISG.

3. CLAIMANT cannot otherwise base its claim on the PICC

112. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 207], it cannot base a claim for price adaptation on the PICC. Firstly, there is no gap in the CISG **[a]**. Secondly, even if there were a gap, Art. 7(2) CISG would not allow recourse to the PICC **[b]**. In any case, the imposition of tariffs by Equatoriana is not a case of hardship within the meaning of Art. 6.2.2 PICC **[c]**.

a) Article 79 CISG is conclusive

113. Contrary to CLAIMANT's allegations [CL. MEMO., PARA. 222], the provision of Art. 79 CISG is conclusive [CF. FLAMBOURAS, PARA. 3; FLECHTNER, P. 92; SCHWENZER, P. 713]. "*The ambiguity in CISG as per the hardship clause*" [CL. MEMO., PARA. 222] is not sufficient to constitute a gap in the CISG within the meaning of Art. 7(2) CISG. In fact, the drafting history of Art. 79 CISG suggests that hardship was deliberately excluded from its scope [CISG-AC OPINION NO. 7, PARA. 29; BUND, P. 391; FLAMBOURAS, PARA. 3; FLECHTNER, P. 88]. The decision in *SCAFOM INTERNATIONAL V. LORRAINE TUBES*, on which CLAIMANT relies [CL. MEMO., PARA. 211], has been criticised for not sufficiently substantiating the reason why it found a gap in the CISG regarding hardship [FLECHTNER, P. 96]. The court merely seemed to suggest that the gap was its inability to adapt the contract [IBID.]. Thus, the court used Art. 7(2) CISG to fill an alleged gap with a civil law remedy which was rejected in the drafting process of Art. 79 CISG [IBID., P. 97]. It has therefore been suggested to ignore the decision in *SCAFOM INTERNATIONAL V. LORRAINE TUBES* altogether [IBID., P. 98]. What is more, Art. 79(5) CISG clarifies that the provision only concerns an exemption from the liability for damages [ATAMER IN: KRÖLL/MISTELIS/PERALES VISCASILLAS, ART. 79 CISG PARA. 13; FLECHTNER, P. 84]. The exemption provisions of the CISG fully address the legal effects of events rendering performance more onerous [FLECHTNER, P. 92]. Only because the CISG does not allow for contract adaptation does not mean that there is a gap [IBID.; SCHWENZER, P. 724]. It rather reflects a deliberate decision to reject contract adaptation [FLECHTNER, P. 92]. Therefore, the provisions of Art. 79 CISG are conclusive, so that there is no gap as required by Art. 7(2) CISG.

b) Article 7(2) CISG does not allow recourse to the PICC

114. Contrary to CLAIMANT's argument [CL. MEMO., PARA. 208], Art. 7(2) CISG does not allow recourse to the PICC [FERRARI IN: SCHLECHTRIEM/SCHWENZER, ART. 7 CISG PARA. 62]. Even if the Tribunal found that there was a gap in the CISG, Art. 7(2) CISG only allows to resolve

gaps "*in conformity with the general principles on which* [the CISG] *is based*". This wording refers to the general principles of the CISG itself [FERRARI IN: SCHLECHTRIEM/SCHWENZER, ART. 7 CISG PARA. 62; FLECHTNER, P. 94]. Recourse to external principles such as the PICC is excluded from the method of interpretation under Art. 7(2) CISG [FERRARI IN: SCHLECHTRIEM/SCHWENZER, ART 7 CISG PARA. 62]. The PICC should only be used to fill gaps if parties agree that they should apply [IBID., PARA. 59; PREAMBLE TO THE PICC]. In fact, CLAIMANT contradicts itself in admitting that the PICC may only be considered if Parties "*agree to submit their relationship to lex mercatoria or general principles of international trade law*" [CL. MEMO., PARA. 218]. Further, CLAIMANT attempts to rely on ICC CASE NO. 7365, but admits itself that in that case, "*the parties had agreed to 'complementary and supplementary action' of general principles of international trade law and usages*" [CL. MEMO., PARA. 229]. In the present case, however, there was no such agreement by the Parties. As the PICC are no general principles of the CISG, Art. 7(2) CISG does not allow recourse to them [FERRARI IN: SCHLECHTRIEM/SCHWENZER, ART. 7 CISG PARA. 62].

c) In any case, Art. 6.2.2 PICC does not cover the imposition of tariffs by Equatoriana

115. In any case, hardship within the meaning of Art. 6.2.2 PICC does not cover the imposition of tariffs by Equatoriana. CLAIMANT fails to provide a single case that would substantiate its claim that the imposition of tariffs qualifies as hardship [CL. MEMO., PARAS. 223 ET SEQQ.]. Article 6.2.2 PICC states that "[t]*here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract* […]". The Official Comment to the 1994 version of the PICC suggested that a price increase of 50 per cent would lead to a fundamental alteration [BUND, P. 390; MCKENDRICK IN: VOGENAUER/KLEINHEISTERKAMP, ART. 6.2.2 PICC PARA. 8; PERILLO, P. 11]. Such a suggestion has been omitted in the Official Comment to the 2004 edition, as the figure of 50 per cent had been criticised as arbitrary and too low a threshold to constitute a fundamental alteration of the contractual equilibrium [MCKENDRICK IN: VOGENAUER/KLEINHEISTERKAMP, ART. 6.2.2 PICC PARA. 8]. Therefore, "[i]*n all likelihood the threshold will be set at a higher level*" [IBID.]. For example, an 80 per cent devaluation of the currency is likely to constitute hardship within the meaning of the PICC [CISG-AC OPINION NO. 7, PARA. 33].

116. Since the figure of 30 per cent that CLAIMANT relies on does not suffice to constitute hardship according to these thresholds, the actual overall increase in the cost of performance amounting to 15 per cent [SEE PARAS. 92 ET SEQ.] does not fundamentally alter the contractual equilibrium all the more. Rather, this increase must be considered as part of the ordinary commercial risk that is inherent in business and international trade. Not even the situation in *SCAFOM INTERNATIONAL V. LORRAINE TUBES*, on which CLAIMANT relies [CL. MEMO., PARA. 211], is

comparable, as that case involved an increase in the price of steel of about 70 per cent. Therefore, in any case, the imposition of tariffs by Equatoriana is not a case of hardship within the meaning of Art. 6.2.2 PICC.

III. Conclusion

117. CLAIMANT must bear the costs of the tariffs which Equatoriana imposed. The Parties contractually provided for this risk allocation. The Hardship Clause does not exempt CLAIMANT from this liability and does in any case not provide for a price adaptation by the Tribunal. Similarly, CLAIMANT is not entitled to price adaptation under the CISG. Article 79 thereof does not provide for price adaptation by the Tribunal, and CLAIMANT can in any case not base its claim on the PICC.

REQUEST FOR RELIEF

118. For the above reasons, Counsel for RESPONDENT respectfully requests the Tribunal to:

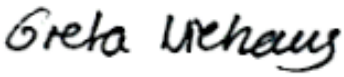
1. find that it lacks the jurisdiction and the power under the Arbitration Agreement to adapt the Sales Agreement;

In the event that the Tribunal assumes the jurisdiction and power to decide over the claim for adaptation, the Tribunal is respectfully requested to:

2. reject CLAIMANT's request to submit evidence form the other arbitration; and

3. dismiss CLAIMANT's claim in its entirety, as CLAIMANT is not entitled to price adaptation.

HUY NGUYEN

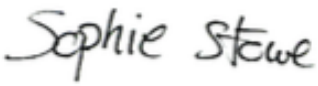


GRETA NIEHAUS

ANNE PHILIPPCZYK

OLIVER POLLAKOWSKY

OGUZHAN SAMANCI



SOPHIE STÖWE

BERLIN, 24 JANUARY 2019