SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG

MEMORANDUM FOR CLAIMANT

WESTFÄLISCHE WILHELMS-UNIVERSITÄT MÜNSTER

MARKUS DIEKMANN | MAXIMILIAN EDINGER

DOMINIK MARCZOK | PEA SCHROVEN | JANA SCHUMACHER

On Behalf Of

CLAIMANT
PHAR LAP ALLEVAMENTO

Rue Frankel 1
Capital City
Mediterraneo

Against

RESPONDENT
BLACK BEAUTY EQUESTRIAN

2 Seabiscuit Drive
Oceanside
Equatoriana

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INDEX OF ABBREVIATIONS

Abbreviation	Full Text
2010 Incoterms	ICC rules for the use of domestic and international trade terms (Incoterms® 2010)
Answer	Answer to the Notice of Arbitration
Art./Artt.	Article/Articles
ASA	Swiss Arbitration Association
BGer	Schweizer Bundesgericht (Swiss Federal Court of Justice)
cf.	confer (compare)
CISG	UN Convention for International Sale of Goods 1980
CLOUT	Case Law on UNCITRAL-Texts
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid (Incoterms® 2010)
ed.	Edition
ed./eds.	Editor/Editors
et al	et alii/et aliae (and others)
et seq./ et seqq.	and following
Ex. C/Ex. R	Claimant's Exhibit/ Respondent's Exhibit
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts (approved on 19 March 2015)
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
i.e.	id est (this is to say)
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration

ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
MCL	Mediterranean Contract Law
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
No.	Number
Notice	Notice of Arbitration
p./pp.	Page/Pages
para./paras.	Paragraph/ Paragraph
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles on International Commercial Contracts 2016
PO	Procedural Order
supra	vide supra (see above)
UNCITRAL	United Nations Commission on International Trade Law
US$	United States Dollar
v	versus
vol.	Volume
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

STATEMENT OF FACTS

1 Phar Lap Allevamento [*hereinafter "**CLAIMANT**"*] and Black Beauty Equestrian [*hereinafter "**RESPONDENT**"*] are the parties to this arbitration.

2 CLAIMANT operates a well-established stud farm in Mediterraneo covering all areas of equestrian sports. It is known for its breeding successes regarding racehorses.

3 RESPONDENT is a newcomer in the racehorse breeding business and is trying to establish itself on the competitive equestrian market. Its racehorse stable is based in Equatoriana.

21 Mar 2017 CLAIMANT and RESPONDENT [*hereinafter "**the Parties**"*] initiate the negotiations on the Frozen Semen Sales Agreement [*hereinafter "**Sales Agreement**"*].

31 Mar 2017 CLAIMANT explicitly refuses to bear the risk of any customs regulation. It then proposes a mechanism addressing hardship.

12 Apr 2017 Ms Napravnik, on behalf of CLAIMANT, and Mr Antley, on behalf of RESPONDENT, discuss the inclusion of this mechanism into the Sales Agreement. They agree that an arbitral tribunal should perform contract adaptation in cases of hardship. After their meeting both negotiators are involved in a severe car accident postponing the conclusion of the Sales Agreement.

06 May 2017 The Parties conclude the Sales Agreement based on the previous negotiations. It provides that RESPONDENT purchases 100 doses of frozen racehorse semen.

15 Jan 2018 Equatoriania imposes tariffs of 30 per cent on agricultural products.

21 Jan 2018 Ms Napravnik and Mr Shoemaker, who is responsible for the Sales Agreement for RESPONDENT, discuss the problem. While offering prospects of a price adaptation, Mr Shoemaker urges Ms Napravnik to authorise the final instalment.

23 Jan 2018 CLAIMANT ships the last instalment to RESPONDENT and advances the tariffs amounting to US$ 1,500,000.

02 Feb 2018 CLAIMANT learns about RESPONDENT's unauthorised resale to third parties.

12 Feb 2018 The Parties meet to find an amicable solution for the advanced tariffs. However, RESPONDENT terminates the meeting on specious pretence.

31 Jul 2018 CLAIMANT initiates arbitral proceedings at the Hong Kong International Arbitration Centre. It requests an appropriate adaptation of the price.

02 Oct 2018 CLAIMANT informs the Arbitral Tribunal [*hereinafter "**the Tribunal**"*] about another arbitration involving RESPONDENT. In that proceeding, RESPONDENT is the party seeking an adaptation of the price due to tariffs. CLAIMANT intends to submit a Partial Interim Award evidencing this contradictory conduct.

SUMMARY OF ARGUMENTS

4 The promising business relationship between the Parties was suddenly shattered when free trade was superseded by protectionism in Equatoriana. The newly imposed tariffs led to a significant increase in the price of cross-border trade. RESPONDENT was dependent on the performance of delivery, despite these newly set hurdles. It assured CLAIMANT that an amicable solution for the increase in costs would be found in due course. CLAIMANT was determined not to let the relationship fall at the last hurdle. It advanced the costs of the tariffs and provided RESPONDENT with the goods it desperately needed.

5 Once in possession of the goods, RESPONDENT's demeanour changed. It suddenly denied any requests for compensation and let negotiations fail. All the while, RESPONDENT made a healthy profit by reselling the goods acquired – in breach of its contractual duties. This behaviour is all the more questionable in light of a second proceeding CLAIMANT has learned of. There, RESPONDENT passionately argues for the exact compensation that it vehemently denies CLAIMANT in the current proceedings.

6 In view of these facts, CLAIMANT makes the following three submissions:

a. The Tribunal has jurisdiction and power to adapt the Sales Agreement.

   The Parties applied Mediterranean law to the entirety of the Sales Agreement. An interpretation under this law results in the Tribunal's jurisdiction and power to adapt the Sales Agreement. Both the drafting history and the wording of the Arbitration Clause reflect this conclusion.

b. The Partial Interim Award should be found admissible as evidence in these proceedings.

   The Partial Interim Award is relevant and material to the outcome of this case. The origin of the information – be it a breach of confidentiality or a hack – bears no relevance on the admissibility under the IBA Rules.

c. The Tribunal should adapt the contract and grant CLAIMANT supplementary payment of the advanced tariffs in the amount of US$ 1,250,000.

   The equilibrium of the contract was fundamentally shaken by the imposition of tariffs in Equatoriana. Both the Sales Agreement and the CISG provide for an adaption of the contract in light of such hardship. Only a payment of US$ 1,250,000 by RESPONDENT can restore this equilibrium.

FIRST ISSUE: THE TRIBUNAL HAS JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE SALES AGREEMENT

7 CLAIMANT respectfully requests the Tribunal to find that it has jurisdiction and power to adapt the Sales Agreement. The Parties envisioned the Tribunal to perform adaptation throughout the course of their negotiations [*Ex. C8, p. 17*]. The purpose of this mechanism was to ensure an efficient solution where the Parties could not find common ground themselves. However, now that this mechanism comes into effect, RESPONDENT tries to evade responsibility by denying the Tribunal's jurisdiction and power. RESPONDENT justifies this evasion through reliance on a narrow interpretation of the Arbitration Clause under Danubian law [*Answer, p. 31 para. 13*].

8 However, Mediterranean law applies and subjects the Arbitration Clause to an interpretation under the CISG (**A**). This interpretation evidences that the Parties granted the Tribunal both jurisdiction and power to adapt the Sales Agreement (**B**).

A. Mediterranean Law Applies to the Arbitration Clause

9 The Parties submitted their Arbitration Clause to Mediterranean law. This law subjects the Arbitration Clause to an interpretation under the CISG. The clause reads as follows:

> "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Vindobona, Danubia. The number of arbitrators shall be three. The arbitration proceeding shall be conducted in English" [*Ex. C5, p. 14 para. 15*].

10 Remarkably, this clause does not reference its applicable law. Nonetheless, the Parties agreed on a law applicable to the Sales Agreement in its entirety by virtue of the Choice of Law Clause. It reads as follows:

> "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)" [*Ex. C5, p. 14 para. 14*].

11 Contrary to the Parties' choice of Mediterranean law, RESPONDENT alleges that Danubian law would apply to the Arbitration Clause [*Answer, p. 31 para. 13*]. The law of Danubia would lead

to an interpretation under the "*four corner rule*". As a consequence, the Tribunal's interpretation of the Arbitration Clause would be limited to its wording, disregarding other relevant circumstances [*PO1, p. 52 para. II; PO2 p. 61 para. 45*]. This narrow interpretation would in all likelihood result in an undue denial of the Tribunal's ability to adapt the Sales Agreement [*PO1, p. 52 para. II*].

12 As a matter of fact, the applicable law should be determined in accordance with a three-tier test [*Arsanovia v. Cruz City, para. 8; BCY v BCZ, para. 40; Owerri v Dielle, pp. 705-706; Petroleum v , para. 32; Sulamérica v Enesa, para. 9; Greenaway; Pearson, p. 117; Primrose, p. 139*]. This conclusive test was applied in the international commercial arbitration case of *BCY v. BCZ* [*hereinafter "**BCY**"*] [*BCY v BCZ, para. 40*]. Just as in the case at hand, the 2016 decision of *BCY* discussed the question of which law shall govern the arbitration clause. Whilst in *BCY* the parties chose the law of the state of New York to govern their contract, there was a dispute regarding the law governing the arbitration clause [*BCY v BCZ, paras. 14, 38*]. There, the tribunal finally held that the law governing the contract also applied to the arbitration clause [*BCY, paras. 65*]. The three-tier test applied in *BCY* sets forth the following parameters: First, the tribunal must determine whether there is an explicit choice of law by the parties. Second, in absence of such choice, the existence of an implied choice must be determined. Third, if the prior steps are inconclusive, the tribunal refers to the law with the "*closest and most real connection*" [*BCY v BCZ, para. 40; cf. Arsanovia, para. 8; Owerri, pp. 705-706; Petroleum, para. 32; Sulamérica v Enesa, para. 9; Dicey/Morris/Collins, para. 16*R-001*; Greenaway; Pearson, p. 117; Primrose, p. 139*].

13 The Parties in the case at hand explicitly chose Mediterranean law to govern the Arbitration Clause (**I**). Even if the Tribunal were to dismiss this explicit choice, it would have to find that the Parties implicitly chose Mediterranean law (**II**).

I. The Parties Explicitly Submitted the Arbitration Clause to Mediterranean Law

14 By virtue of the Choice of Law Clause, the Parties explicitly chose Mediterranean law to govern the entire Sales Agreement including the Arbitration Clause.

15 The plain wording of the Choice of Law Clause witnesses the Parties' explicit choice of Mediterranean law (**1**). Additionally, the drafting history supports this understanding (**2**).

1. The Parties' Explicit Choice Derives from the Plain Wording of the Choice of Law Clause

16 The Parties' explicit choice of Mediterranean law derives from the plain wording of the Choice of Law Clause. Contrary to RESPONDENT's submission [*Answer, p. 31, para. 14*], such a joint choice complies with the doctrine of separability.

17 A single choice of law within a contract may constitute an explicit agreement on the law governing all terms of it, including arbitration clauses [*Arsanovia v Cruz City, para. 22; cf. Petroleum, para. 32*].

18 The Danubian Arbitration Law [*hereinafter "**DAL**"*] as the *lex arbitri* witnesses the doctrine of separability in Art. 16 (1) DAL. The DAL has adopted the UNCITRAL Model Law [*hereinafter "**Model Law**"*] [*PO1, p. 53 para. III 4*]. In contrast to RESPONDENT's assertion, Art. 16 (1) DAL is silent on the choice of law [*cf. Binder, para. 4-011; Roth in Weigand, para. 14.*259]. It even confirms the limited purpose of the doctrine of seperability [*cf. BCY v BCZ para. 60; Primrose, p. 144*]. According to Art. 16 (1) DAL, an arbitration clause shall be treated separately solely "*for [the] purpose*" of determining its "*existence or validity*". This evidences the doctrine's purpose to ensure the validity of the arbitration clause in case the underlying contract is claimed to be void [*BCY v BCZ, para. 60; cf. Briggs, para. 14.37; Joseph, para. 6.35; Viscasillas/Muñoz, p. 1368*]. Thus, an arbitration clause is only separable for this purpose, yet it is not entirely independent [*BCY v. BCZ, para. 60; Briggs, para. 14.37; Derains, p. 16; Joseph, para. 6.35; Nazzini, p. 684; cf. Petroleum, para. 31*]. Therefore, the doctrine of separability allows the law of the arbitration agreement to be determined with reference to the main contract [*Arsanovia v Cruz City, para. 22; Briggs, para. 14.37*].

19 The Sales Agreement only contains a single choice of law provision which provides that "*[t]his Sales Agreement shall be governed by the law of Mediterraneo*" [*Ex. C5, p. 14 para. 14*; *emphasis added*]. The Arbitration Clause forms part of this "*Frozen Semen Sales Agreement*".

20 Therefore, the plain wording of the Choice of Law Clause shows that the Parties submitted the entire Sales Agreement to Mediterranean law.

2. This Explicit Choice of Law Is Supported by the Drafting History of the Arbitration Clause

21 Under a careful analysis, the drafting history of the Arbitration Clause evidences the explicit choice in favour of Mediterranean law.

22 CLAIMANT originally suggested to submit the Sales Agreement to the law of Mediterraneo [*Ex. C2, p 10; Ex. C3, p. 11*]. RESPONDENT accepted Mediterranean law to govern the substantive part of the Sales Agreement [*Ex. R1, p. 33*]. At the same time, it proposed an arbitration clause governed by Equatorianian law [*Ex. R1, p. 33*]. CLAIMANT objected to this proposal [*Ex. R2, p. 34*]. In fact, it highlighted, that it would not accept a contract "*submitted to a foreign law*" [*Ex. R2, p. 34*]. At this point, the Parties had already agreed on Mediterranean law to govern the substantive part of the Sales Agreement. For this reason, CLAIMANT's objection can only refer to the law governing the Arbitration Clause. This evidences that CLAIMANT insisted that the arbitration clause should be subjected to Mediterranean law. CLAIMANT was only willing to make

one concession: a seat of arbitration in a neutral country [*Ex. R2, p. 34*]. Nonetheless, CLAIMANT insisted "*that the law applicable to the Sales Agreement remains the law of Mediterraneo*" [*Ex. R2, p. 34*]. This shows that CLAIMANT would only accept Mediterranean law to govern the Arbitration Clause.

23 When the Parties' second negotiators finalised the Sales Agreement, they merely adopted this existing draft [*Ex. R3, p. 35; PO2, p. 55 para. 6*]. Both negotiators could access the previous email chain [*PO2, p. 55 para. 5*]. The final Arbitration Clause contains the wording CLAIMANT proposed [*Ex. C5, p. 14; cf. Ex. R2, p. 34*]. This evidences that the Parties agreed on CLAIMANT's position with regard to the law governing the Arbitration Clause.

24 The plain wording of the Choice of Law Clause reflects this agreement. The clause assigns a single choice of law in favour of Mediterranean law to the entire Sales Agreement. This also includes the Arbitration Clause. Thus, the entire Sales Agreement including the Arbitration Clause was supposed to be governed by the law of Mediterraneo.

25 In light of this, the Parties made an explicit agreement to subject the Arbitration Clause to Mediterranean Law. Thus, the Choice of Law Clause explicitly demands the application of Mediterranean law to the Sales Agreement and to the Arbitration Clause contained therein.

II. In Any Case, the Parties Implicitly Submitted the Arbitration Clause to Mediterranean Law

26 Even if the Tribunal were to deny an explicit choice of law, the Parties implicitly subjected the Arbitration Clause to Mediterranean law.

27 In a second step, the tribunal has to assess whether the parties implicitly chose a law governing the arbitration clause. The holding in *BCY* confirmed that in absence of any contrary indication, the law governing the substantive contract also governs the arbitration clause [*BCY v BCZ, para. 49*]. Case law and scholars widely affirm this fundamental assumption [*Arsanovia v Cruz City, para. 21; ICC Case No. 2626, p. 316; Sulamérica v Enesa, para. 11; Bantekas, p. 2; Derains, p. 16; Dicey/Morris/Collins, para. 16-017; Graffi, pp. 61-62; Joseph, para. 6.31; Lew/Mistelis/Kröll, para. 6-24; Lew, p. 143; cf. Channel Tunnel case, p. 357; Jarivn, p. 142; Pearson, p. 118*]. Without this assumption, a coherent business relationship would face the risk of being subjected to different laws. In contrast, a reasonable person in international trade would in fact expect the same law to govern the whole relationship [*BCY v BCZ, para. 59; Sulamérica v Enesa, paras. 11, 15; Graffi, p. 30*]. If intended otherwise, parties would explicitly provide for a different law to govern their arbitration clause [*BCY v BCZ, para. 59*].

28 In particular, the mere choice of a seat of arbitration does not rebut this assumption. When choosing the seat, parties primarily seek a neutral forum [*BCY v BCZ, para. 63; cf. Sulamérica v*

Enesa, para. 15]. The law of the seat does not address substantive issues but determines the arbitration's procedure [*Schwenzer/Jaeger, p. 103; cf. BCY v BCZ, para. 63; Born, Arbitration Agreements, para. 44*].

29 Initially, the Parties envisioned a forum selection clause. This clause provided for Mediterranean law and jurisdiction of the Mediterranean courts [*Ex. C3, p. 11*]. When objecting, RESPONDENT sought a forum other than state court litigation in Mediterraneo [*ibid.*]. The Parties agreed on a solution acceptable for both sides: arbitration at the neutral seat of Danubia [*Ex. C5, p. 14, para. 15; Ex. R2 p. 34*]. However, this choice of the seat does not allow any interferences on the law governing the arbitration clause.

30 The Parties' choice of Danubia as seat does not suggest the submission of the Arbitration Clause to Danubian law. There is not a single indication pointing to Equatorianian law. As there is neither an indication for Danubian law nor for Equatorianian law, the assumption in favour of an implicit choice of Mediterranean law prevails.

31 The Arbitration Clause is thus governed by Mediterranean law. According to the consistent jurisprudence in Mediterraneo, the CISG applies to the interpretation of arbitration clauses if they are part of a sales contract governed by the CISG [*PO1, p. 53 para. III 4*]. Both Parties to the Sales Agreement are seated in Contracting States to the CISG [*PO1, p. 53 para III 4*]. The Sales Agreement is thus subject to the CISG.

32 As a consequence, the CISG governs the interpretation of the Arbitration Clause.

B. The Tribunal Has Jurisdiction and Power to Adapt the Sales Agreement

33 The Parties provided for the jurisdiction and power of the Tribunal to adapt the Sales Agreement.

34 *Jurisdiction* is the authority of a tribunal to hear and resolve all disputes conferred to it by the arbitration clause [*Fouchard/Gaillard/Goldman, para. 647; cf. Finizio/Speller, pp. 157-158; Jarvin, p. 143; Redfern/Hunter, para. 2.63, 5.91*]. *Power* is a tribunal's capability to carry out the tasks conferred upon it by the parties within the limits of the the *lex arbitri* [*Jarvin, pp. 140, 149-150; Redfern/Hunter, para. 5.06; cf. Brunner, Hardship, p. 493; Kröll, p. 20*].

35 The interpretation of the Arbitration Clause in line with Art. 8 CISG evidences the jurisdiction (**I**) and power (**II**) of the Tribunal to adapt the Sales Agreement.

I. The Tribunal Has Jurisdiction over Adaptation of the Sales Agreement

36 The Parties provided for the Tribunal's jurisdiction to decide on the adaptation of the Sales Agreement.

37 By virtue of an arbitration clause parties confer the mandate to resolve any dispute falling within the clause's scope to the tribunal [*Finizio/Speller, pp. 157-158; Redfern/Hunter, para. 2.63; cf. Fouchard/Gaillard/Goldman, para. 647; Jarvin, p. 143*]. This scope has to be interpreted in line with Art. 8 CISG.

38 Under Art. 8 (1) CISG, statements made by and other conduct of a party are to be interpreted according to the parties' common intent. If the parties' common intent cannot be deduced, Art. 8 (2) CISG applies. Under said provision, the interpretation has to be conducted according to the understanding of a reasonable third person in the other party's position. This understanding primarily derives from the wording of the disputed statement [*Witz in Witz et al., Art. 8 CISG, para. 11; cf. Chemical Products case*]. Finally, Art. 8 (3) CISG names circumstances that are to be considered for interpretation, including subsequent conduct. These rules also apply to the interpretation of contracts [*Ferrari, IHR, p. 12*; *Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8 CISG, para. 3; Zuppi in Kröll et al., Art. 8 CISG, para. 2*].

39 An interpretation of the Arbitration Clause under Art. 8 (1) CISG reveals that the Parties intended to provide jurisdiction for the Tribunal to decide on adaptation (**1**). In any case, an interpretation under Art. 8 (2) CISG would provide for the identical scope of jurisdiction (**2**).

1. The Subjective Interpretation Evidences the Tribunal's Jurisdiction

40 Interpreting the Arbitration Clause in line with Art. 8 (1) CISG shows the Tribunal's jurisdiction concerning the adaptation of the Sales Agreement.

41 Under Art. 8 (1) CISG, the subjective intent of the Parties has to be identified.

42 The Parties agreed to arbitrate under the HKIAC Rules [*Ex. R1, p. 33; Ex. R2, p. 34*]. Mr Antley, RESPONDENT's negotiator, implemented minor changes to the HKIAC model clause's wording [*Ex. R1, p. 33*]. He decided not to include the terms "*claims, differences and controversies*" and "*relating to*". Mr Antley did not give any particular reasons as to why he made these changes and what effect they were supposed to have on the scope of the Clause.

43 However, shortly after this proposal, Mr Antley told CLAIMANT that a tribunal shall be able to adapt the Sales Agreement in case the Parties could not agree on an amendment [*Ex. C8, p. 17*]. This subsequent conduct evidences that RESPONDENT in fact wanted the Tribunal to adjudicate the matter of adaptation.

44 Thus, interpreting the Arbitration Clause in line with Art. 8 (1) CISG reveals that the Parties provided the Tribunal with the jurisdiction to decide on adaptation.

2. In Any Case, the Tribunal Has Jurisdiction under an Objective Interpretation

45 Even if the Tribunal were to find the interpretation under Art. 8 (1) CISG inconclusive, the interpretation under Art. 8 (2) CISG would equally provide for the Tribunal's jurisdiction.

46 Reasonable persons in international trade do not arbitrarily differentiate between slightly different wordings [*Fiona Trust v Privalov, paras 17; Born, p. 1346; Redfern/Hunter, para. 2.66; cf. Briggs, para. 14.44*]. What they are instead interested in, is a fast and efficient settlement of their dispute in a single forum [*Fiona Trust v Privalov, para. 17; Born, p. 1346; Briggs, para. 14.44*]. An arbitration clause should thus be interpreted extensively [*Amortisation Arbitration case, 215 para. 16; Fiona Trust v Privalov, para. 18; Nafta Products v Fili, para. 13; Welser/Molitoris, p. 19; cf. BGHZ 53, 315 (322); Threlkeld v. Metallgesellschaft, para. 15*].

47 International arbitration recognises a general assumption in favour of a broad jurisdiction for tribunals [*Berger, Adaptation, pp. 1375, 1376, cf. Berger, Clauses, p. 9*]. This broad jurisdiction includes the adaptation of contracts [*Berger, Adaptation, pp. 1375, 1376; Fouchard/Gaillard/Goldman, p. 28*].

48 The term "*dispute*" must be interpreted extensively. A dispute is defined as a "*disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*" [*Greek Rep. v U.K., para. 19; Berger, Adaptation, p. 1376; Brunner, Hardship, p. 469*]. The opposing interests and legal views of the parties need to be duly considered when exercising the wide discretion granted in contract adaptation [*Berger, Adaptation, p. 1375 et seqq.*]. Therefore, questions of contract adaptation in view of hardship qualify as a dispute [*Berger, Adaptation, p. 1376; Brunner, Hardship p. 469*]. Furthermore, "*claims, controversies and differences*" also fall within the expansive scope of the word "*dispute*" [*Tjong v Antig, para. 50; Born, pp. 1348, 1349*].

49 Disputes "*arising out of*" a contract are to be distinguished from disputes simply "*relating to*" it. The term *disputes arising out of* encompasses all contractual disputes [*Born, Forum Selection, pp. 39-40; cf. Ethiopian Oilseeds v Pulses, p. 97; Fiona Trust v Privalov, para. 18, 21; Francis v Virgin; Mustill/Boyd, p. 120*]. In contrast, *disputes relating to* also cover non-contractual claims such as torts [*Born, Forum Selection, pp. 39-40; Redfern/Hunter, para. 2.64*].

50 The Parties decided to include the term "*any dispute*" into their Arbitration Clause. The question at hand is one of price adaptation. When facing this question, due consideration has to be given to the opposing interests and legal views of the Parties. Thus, the Parties are in *"dispute"*.

51 RESPONDENT might have excluded the Tribunal's jurisdiction on tort claims through the omission of the term *"relating to"*. However, in the present case the dispute deals with the issue of price adaptation, which arises out of the very core of the Sales Agreement – the price. Therefore, the dispute arises directly out of the Sales Agreement.

52 Considering all the above, a reasonable third person would conclude that the Arbitration Clause in fact provides for the jurisdiction of the Tribunal over adaptation. Consequently, the clause demands the Tribunal's jurisdiction over the issue of contract adaptation.

II. The Tribunal Has the Power to Adapt the Sales Agreement

53 The Parties conferred the power to adapt the Sales Agreement upon the Tribunal.

54 Within the limits of the Danubian Arbitration Law (**1**) the Parties conferred the power to adapt the Sales Agreement upon the Tribunal (**2**).

1. Danubian Arbitration Law Allows the Conferral of Power to Adapt the Sales Agreement

55 Under the *lex arbitri* of Danubia, the Parties are allowed to confer the power to adapt the Sales Agreement upon the Tribunal.

56 Parties may confer specific powers to tribunals within the limits of the *lex arbitri* [*Jarvin, pp. 140, 149-150; Redfern/Hunter, para. 5.06; cf. Brunner, Hardship, p. 493; Kröll, p. 20*]. According to consistent jurisprudence in Danubia, Art. 28 (3) DAL allows the conferral of exceptional powers such as adaptation by express agreement [*PO2, p. 60, para 36*]. Art. 28 (3) DAL enumerates certain types of decision-making by tribunals. The rationale for requiring an express conferral is to ensure that parties are aware of such a choice [*cf. Binder, para. 6-016; Holtzmann/Neuhaus, p. 790, para. 8; Roth in Weigand, para. 14*.].

57 However, this express conferral does not have to be in writing in order to fulfil its purpose. This is evidenced by the differentiation of the terms "express" and "in writing" within the Model Law [*cf. Art. 7 Option 1 Model Law*]. Authorities in different states which have adopted the Model Law support this finding. Austria, Canada (Ontario) and Germany have all enacted a verbatim adoption of Art. 28 (3) Model Law [*Austria by means of 1158 of the supplements, p. 22; Canada by means of the International Commercial Arbitration Act, 2017, Part II, para. 5; Parliamentary Printing Matter 13/5274, p. 53*]. The term "express" has been interpreted in those jurisdictions as to not require a written conferral of power [*Liberty v QBE, para. 15; Mayr in Rechberger, § 104 ZPO, para. 7; Münch in Rauscher/Krüger, § 1051 ZPO, para. 48; Saenger in Saenger, § 1051 ZPO, para. 6; Voit in Musielak/Voit, § 1051 ZPO, para. 4*].

58 Thus, the Danubian Arbitration Law allows the Parties to confer power to adapt the Sales Agreement upon the Tribunal. This express conferral, however, is not required to be in writing.

2. The Parties Expressly Conferred the Power of Adaptation upon the Tribunal

59 By virtue of their Arbitration Clause, the Parties expressly conferred the power to adapt the Sales Agreement to the Tribunal.

60 Parties confer powers to the tribunal through an arbitration clause [*Redfern/Hunter, para. 5.08; Russell, para. 4-111*]. Art. 28 (3) DAL requires an express, but not necessarily written agreement [*supra para. 58*]. In order to deduce the existence of such an express conferral, the arbitration clause has to be interpreted according to Art. 8 CISG [*Hascher, p. 1065*].

61 This interpretation demonstrates the Parties' express conferral of power upon the Tribunal. The negotiations (**a**) as well as RESPONDENT's behaviour in the other arbitration (**b**) lead to this conclusion.

a) The Negotiations of the Parties Evidence an Express Conferral of Power

62 Throughout their negotiations, the Parties expressly conferred the power upon the Tribunal to adapt the Sales Agreement.

63 The existence of an adaptation mechanism within a contract indicates the parties' common intent to confer the power of adaptation to a tribunal [*Beisteiner, p. 109; Berger, Power, p. 8; cf. Redfern/Hunter, paras. 9.68-9.69*]. This common intent is to be construed pursuant to the subjective standard of Art. 8 (1) CISG [*supra para. 38*]. As a general principle, knowledge is imputed to a legal entity from its own people [*Magnus, pp. 487,488; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 9; Saenger in Ferrari et. al., Art. 79 CISG, para. 8; cf. Huber in Säcker et al., Art. 79 CISG, para. 5; Mankowski in Schmidt, Art. 79 CISG para. 54*].

64 The Parties mutually decided to implement a mechanism to adapt the contract in cases of hardship [*Ex. C8, p. 17*]. Ms Napravnik, CLAIMANT's main negotiator, emphasised towards RESPONDENT's negotiator, Mr Antley, that such a mechanism was essential for CLAIMANT [*Ex. C8, p. 17*]. In turn, Mr Antley even highlighted that the arbitrators should "*adapt the contract if the Parties could not agree*" on an amendment themselves [*Ex. C8, p. 17*]. Thus, it was undisputed that a tribunal should have the power to adapt the contract. This adaptation mechanism was later included as Clause 12 of the Sales Agreement [*hereinafter "**Adaptation Clause**"*] [*Ex. C5, p. 14 para. 12*].

65 Mr Antley wrote a note right after the meeting which supports this understanding. It contains a "*list of issues for further negotiations*" [*Ex. R3, p. 35*]. Notably, the question of contract adaptation, did not appear on this list. This is due the fact that the Parties had already reached an express agreement on contract adaptation in cases of hardship.

66 Even though multiple negotiators were involved in drafting the Sales Agreement, Mr Antley's understanding is imputed to RESPONDENT because he acted on its behalf.

67 In view of the above, it was the Parties' common intent throughout the negotiations to include an adaptation mechanism in cases of hardship into the Sales Agreement. Therefore, by implementing the Adaptation Clause the Parties expressly conferred the power to adapt the Sales Agreement upon the Tribunal.

b) RESPONDENT's Behaviour in the Other Arbitration Evidences This Conferral of Power

68 RESPONDENT's inconsistencies regarding adaptation evidence its view, that the Tribunal has the power to adapt the Sales Agreement.

69 Under Art. 8 (3) CISG, subsequent conduct of a party must be considered in interpretation.

70 Now that the question of adaptation has arisen, RESPONDENT claims that it would have never agreed on an adaptation mechanism [*Answer, p. 32 para. 19*]. It justifies this by claiming that it would not want the "*financial dimension"* of a contract to "*be dependent on the discretion of the arbitrators*" [*ibid*]. Apparently, RESPONDENT views on this matter are not particularly consistent. In its other arbitration, in which RESPONDENT stands to benefit from an adaptation, it relies heavily on an adaptation mechanism to further its claim [*Letter Langweiler, p. 50; cf. PO2, p. 60 para. 39*]. In this case, RESPONDENT seems comfortable with handing over the decision to the discretion of the tribunal. Now, that the adaptation would work to RESPONDENT's detriment, it relies on the pretext of alleged concerns regarding adaptation. The Tribunal should take notice of RESPONDENT's conduct in its other arbitration when assessing the sincerity of its arguments.

71 Thus, RESPONDENT's behaviour both throughout the drafting history and after the conclusion of the contract evidences the Parties' mutual intent to allow for adaption. This intent expressly confers the power to adapt the Sales Agreement upon the Tribunal. Therefore, the Arbitration Clause provides for jurisdiction and power of the Tribunal to adapt the Sales Agreement.

CONCLUSION TO THE FIRST ISSUE

72 CLAIMANT respectfully requests the Tribunal to adhere to the Parties' explicit choice of Mediterranean law to govern the Arbitration Clause. This agreement subjects the interpretation of the Arbitration Clause to the CISG. RESPONDENT's transparent attempts to renounce such application are refuted not only by the unequivocal wording of the Parties' Choice of Law Clause but also by the established intent of the Parties. RESPONDENT's request to artificially divide the applicable laws into two is driven purely by the fear of contract adaptation and shall be dismissed. Under the CISG, the Tribunal has both the jurisdiction and the power to adapt the contract. CLAIMANT thus asks the Tribunal to honour the Parties' Agreement by assuming jurisdiction and power over all matters of contract adaptation.

SECOND ISSUE: CLAIMANT IS ENTITLED TO SUBMIT THE PARTIAL INTERIM AWARD AS EVIDENCE

73 CLAIMANT respectfully requests the Tribunal to admit the Partial Interim Award as evidence. This award was rendered in another arbitral proceeding, to which RESPONDENT is a party [*Letter Langweiler p. 50; PO2, pp. 60, 61, para. 41*]. The Partial Interim Award indicates RESPONDENT's expectations when drafting the Adaptation Clause. In this other proceeding, RESPONDENT itself acknowledges that a tribunal may rule on price adaptation in cases of hardship [*ibid.*]. Not only is RESPONDENT's behaviour highly contradictory. It also demonstrates RESPONDENT's expectations that unprecedented tariffs can indeed constitute unforeseen hardship. Hence, the evidence is highly important to this dispute.

74 RESPONDENT argues that the Partial Interim Award either stems from the breach of RESPONDENT's former employees' confidentiality agreements or a hack [*Letter Fasttrack, p. 51*]. RESPONDENT is misled in arguing that the evidence would have to be considered inadmissible in either case.

75 Under its broad discretion, the Tribunal should seek guidance with leading authorities when assessing the admissibility of evidence (**A**). Pursuant to these standards, the Partial Interim Award constitutes admissible evidence (**B**).

A. The Tribunal Shall Exercises Its Broad Discretion in Line with Leading Authorities

76 The Tribunal may rely on widely accepted legal frameworks when assessing the admissibility of evidence. First, the Tribunal should exercise its broad discretion according to the IBA Rules on the Taking of Evidence [*hereinafter "**IBA Rules**"*] (**I**). Second, it should consider the overriding importance of CLAIMANT's right to present its case under the Danubian Arbitration Law [*hereinafter "**DAL**"*] (**II**).

I. The Tribunal Should Exercise Its Broad Discretion on the Taking of Evidence in Accordance with the IBA Rules

77 Regarding the taking of evidence, the Tribunal has broad discretion, which it should exercise in line with the IBA Rules.

78 Art. 22.2 HKIAC Rules recognises a tribunal's broad discretion regarding the admissibility, relevance and materiality of evidence [*Moser/Bao, 9.153*]. Thus, tribunals may determine to apply the IBA Rules even in the absence of an agreement of the parties [*Born, p. 2212; Leisinger, p. 218; Schütze, p. 5*]. As best practice in international commercial arbitration, the IBA Rules are regularly used by tribunals due to their predictability and fairness [*Born, p. 2212, 2348; Moser/Bao, para. 9.154; O'Malley, p. 9 para. 1.24*]. While not directly binding, the IBA Rules function as

guidelines for exercising discretion [*Konsortium v. Czech Republic, p. 10 para. 76; Stati v. Kazakhstan, p. 12; Travis v. Essar, p. 12 para. 23*]. Their role as a useful and predictable framework is explicitly recognised for arbitrations under the HKIAC Rules [*Moser/Bao, para. 9.155*].

79 The Parties made no agreement on the taking of evidence in this arbitration. Art. 22.2 HKIAC Rules thus grants the Tribunal full discretion. In light of their effectiveness and their role in promoting legal certainty, the IBA Rules are the most appropriate framework to guide this discretion.

80 Consequently, the Tribunal should apply the IBA Rules to assess the admissibility of the Partial Interim Award.

II. The Tribunal Has to Honour CLAIMANT's Right to Present Its Case by Allowing It to Submit All Relevant Evidence

81 As the right of a party to present its case is considered extraordinarily important under the DAL, the Tribunal is held to assess this right with particular care. Otherwise, a subsequent award could be rendered unenforceable.

82 Art. 18 DAL obliges tribunals to grant each party full opportunity to present its case. Similarly, Art. 13.1 HKIAC Rules safeguards the party's reasonable opportunity to do so. Thus, parties need to be granted the opportunity to disclose evidence in arbitration [*Born, p. 2320; Park, p. 266 para. 18-039*]. If a tribunal does not honour this right, this constitutes a ground for setting-aside any subsequent award under Art. 34 (2) (a) (ii) DAL [*Binder, p. 7-019; Born, p. 3222; Holtzmann/Neuhaus, p. 915; Park, para. 18-039; Roth in Weigand, Art. 18 para. 14.360*]. As arbitral tribunals serve the purpose of rendering a final and enforceable award [*Born, p. 77; Lew, p. 119; Kreindler in Horvath/Wilske, p. 104; cf. Art. 35.2 HKIAC Rules*], denying a party's right to be heard defeats the purpose of arbitration. To this extent, a tribunal also risks unenforceability of its award if a party is denied such opportunity [*Berger, Best Practice Standards, p. 518; Kreindler, pp. 132-134; cf. Salomon/Friedrich, p. 552; Kaufmann-Kohler/Bärtsch, p. 17*].

83 The DAL is the *lex arbitri* of the present proceeding. CLAIMANT's right to present its case is therefore protected extensively by this legal framework.

84 The Tribunal has to honour this right by allowing CLAIMANT to submit all relevant evidence in order to ensure the enforceability of a subsequent award. CLAIMANT therefore asks the Tribunal to respect both the IBA Rules and CLAIMANT's right to present its case when exercising its broad discretion.

B. The Partial Interim Award Is Admissible under the IBA Rules

85 The IBA Rules allow for the admission of the Partial Interim Award.

86 Art. 9.2 IBA Rules lists grounds on which evidence can be excluded. The IBA Rules, however, do not provide for requirements for the admissibility of evidence. Therefore, evidence is generally seen to be admissible unless an evidentiary exclusion applies [*Ashford, para. 9-2; Pietrowski, p. 378; Pilkov, p. 148; Zuberbühler, p. 168 para. 6; cf. O'Malley, p. 267 paras. 9.01-9.02*].

87 Despite RESPONDENT's submission [*Letter Fasttrack, p. 51*], no such exclusions apply to the Partial Interim Award CLAIMANT intends to submit. When obtaining the Partial Interim Award, CLAIMANT will act in good faith in line with Preamble III of the IBA Rules (**I**). The Partial Interim Award is further relevant and material to the outcome of the case under Art. 9.2 (a) IBA Rules (**II**). In addition, the confidentiality of the Partial Interim Award alone does not justify its exclusion as evidence under Art. 9.2 (b) and (e) IBA Rules (**III**). Finally, neither does the origin of the Partial Interim Award justify its exclusion under Art. 9.2 (g) IBA Rules (**IV**).

I. CLAIMANT Will Act in Good Faith When Obtaining the Partial Interim Award

88 CLAIMANT has the opportunity to acquire the Partial Interim Award from an intelligence company. Such a purchase does not contradict the standard of good faith in arbitration.

89 In the taking of evidence, good faith is a relevant factor for the admissibility of evidence [*Landmark v. Insightec, para. 9; Waincymer, p. 753; cf. Philip Morris v. Australia, para. 4.7; Methanex v USA, Part II Chapter I, p. 26 para. 54; Reisman/Freedman, p. 741*]. The preamble of the IBA Rules explicitly recognises this principle. It states that "*the taking of evidence shall be conducted on the principle that each party shall act in good faith*" [*Preamble III of the IBA Rules*].

90 Thus, the submitting party must act in good faith. In this regard, the relevant aspect is the degree of involvement of a party in obtaining evidence of uncertain origin [*Methanex, Part II Chapter I, p. 26 paras. 54, 55; cf. Shearson Lehmann Brothers v. Maclaine, p. 29; Boykin/Havolic, p. 33; Blair/Gojković, pp. 256, 259*]. Especially if the third party's misconduct is hardly connected to the submitting party, an exclusion of evidence appears unreasonable [*Blair/Gojković, p. 256; Boykin/Havalic, p. 34*].

91 CLAIMANT itself did not inquire into RESPONDENT's second arbitration. CLAIMANT itself did not hack RESPONDENT's ill-protected computer system. CLAIMANT itself also did not infringe any confidentiality obligations. Instead, it only followed a lead it received by chance at the annual breeder conference [*PO2, p. 60 para. 40*]. To substantiate this lead, it resorts to an intelligence company providing information on the equestrian market [*PO2, pp. 60, 61, para. 41*]. Obtaining information is a legitimate and economically motivated decision that in no way demonstrates CLAIMANT's intent to drive illegal activities.

92 The intelligence company was already in the possession of the Partial Interim Award [*PO2, pp. 60, 61 para. 41*]. CLAIMANT has no actual knowledge as to the origin of the Partial Interim

Award [*PO2, pp. 60, 61 para. 41*]. As the information was already obtained, CLAIMANT is not promoting any legally disfavoured interference with RESPONDENT's business by acquiring the Award.

93 As CLAIMANT's behaviour is not connected to the alleged violation of RESPONDENT's business, it acts in good faith when acquiring the Partial Interim Award.

II. The Partial Interim Award Is Relevant and Material to the Outcome of the Case

94 The Partial Interim Award cannot be excluded on grounds of lack of relevancy or materiality.

95 Art. 9.2 (a) IBA Rules only allows for the exclusion of evidence if there is no sufficient relevance to the case or materiality to its outcome. Evidence is *relevant* if it has a sufficient connection to one of the party's submissions [*Ashford, para. 3-37*]. Evidence is *material* if it has an impact on the tribunal's deliberations on the final award [*Marghitola, p. 53*; *O'Malley, 9.13*]. In order to assess any potential impact, tribunals must compare all available evidence. Materiality might only become fully clear in the later stages of the proceedings [*O'Malley, para 9.14*]. Therefore, in a proceeding's early stages, tribunals should not exclude evidence prematurely [*Marghitola, p. 55; Waincymer, para. 11.7.1.2; cf. Ashford, para. 3-38; O'Malley, para 9.14*].

96 RESPONDENT has asked for contract adaptation in the pertinent arbitration just as CLAIMANT is doing in this case [*PO2, p. 60, para. 39*]. The Partial Interim Award is thus relevant to this case. It illustrates RESPONDENT'S understanding of the burden of hardship in the pertinent proceeding. This, in turn, reveals RESPONDENT's undisclosed expectations regarding the threshold of hardship in this case. The evidence is necessary to eliminate any remaining doubts as to RESPONDENT's actual expectations. Thus, the Partial Interim Award is material to the outcome of this arbitration.

97 Due to its relevance and its materiality to the outcome of the case, the Partial Interim Award is admissible under Art. 9.2 (a) IBA Rules.

III. The Partial Interim Award's Confidentiality Is in Itself No Reason for Its Exclusion

98 The Partial Interim Award is not to be excluded on grounds of its confidentiality.

99 Under the IBA Rules, a tribunal may exclude evidence on grounds of confidentiality if it falls within an exclusionary provision. As a first exclusionary provision, Art. 9.2 (b) IBA Rules renders evidence inadmissible due to privilege. This provision protects professional relationships dependent on the undisclosed exchange of information [*Grégoire, pp. 10-11*]. Second, Art. 9.2 (e) IBA Rules excludes evidence if it contains commercial secrets, whose inherent economic worth would be lost if published [*Marghitola, p 93; cf. Sandifer, p. 376; O'Malley para 9.84 cf. Gotham*

Holdings v. Health Grades, p. 665]. Both provisions follow the same reasoning: safeguarding a substantial value, inherent to the information itself. Confidentiality as an end in itself, however, is not protected by these standards. Furthermore, once rendered, an award regularly passes through the hands of persons initially not involved in the arbitration [*Esso Australia v. Plowman, p. 245; Toulson/Phipps, para. 22.025*]. Thus, the confidentiality of an arbitral award is, from the outset, not regarded as absolute [*Esso Australia v. Plowman, 245; Born p. 2820; Toulson/Phipps, para. 22.025 cf. Hassneh Insce v. Mew, p. 249; United States v. Panhandle, p. 347*].

100 As a consequence, the mere desire for secrecy is not sufficient to warrant exclusion [*ICC Case No. 6497, p. 77; O'Malley para. 9.85*]. Instead, the party contesting the submission of evidence on grounds of confidentiality must give detailed reasons for its objection [*ICC Case No. 6497, p. 77; O'Malley para. 9.85*].

101 RESPONDENT's submission does not provide for any detailed reasons why the admission of the Partial Interim Award could entail negative consequences. Instead, RESPONDENT only relies on the general confidentiality of arbitral proceedings under Art. 42.1 HKIAC Rules 2013 [*Letter Fasttrack, p. 51*]. This reasoning represents a mere desire for secrecy, which lacks a substantial value in itself. This mere desire is, however, not worthy of protection under the IBA Rules. There is no substantial value inherent to the Partial Interim Award that elevates confidentiality to meet the requirements of protection under the IBA Rules.

102 The Tribunal may thus not exclude the Partial Interim Award because of its confidentiality.

IV. The Origin of the Partial Interim Award Does Not Justify Its Exclusion as Evidence

103 The Partial Interim Award is admissible despite its uncertain origin. No potential concerns connected to its origin lead to considerations of fairness justifying an exclusion as evidence.

104 The IBA Rules reflect the need for a fair hearing in arbitration. Art. 9.2 (g) IBA Rules encompasses considerations of fairness that an arbitral tribunal determines to be compelling. Case law and scholars universally acknowledge this standard of fairness [*TCL v Castel, para. 111; Semiconductor case; cf. UCI v. A, pp. 166-167; Fouchard/Gaillard/Goldman, paras. 188, 1129; Born, p. 2124; Rubino-Sammartano, p. 716; Ryan/Dharmananda, pp. 36-37, 40, 56; cf Fusimalohi v FIFA, p. 45 para. 72; Enron Annulment, para. 177. LCIA Reference No. 3488, p. 418 para. 4.5; Maruman v. Maruman Global, para. 117;*].

105 This standard of fairness has been specified by a number of arbitral tribunals [*Methanex v USA, Part II Chapter I, p. 26 paras. 55, 56, 57; Libananco v. Turkey, pp. 37-40 paras. 79-89; EDF v. Romania, PO3, paras. 28, 29, 36, 38, 39; Quiborax v. Bolivia, para. 67*]. Parties have a right to present their case that is of special importance in the taking of evidence [*Abu Dhabi Investment v. Citigroup, p. 88; Central Trading v. Fioralba, para. 32; Rubino-Sammartano, p. 656; Born, p. 2311; cf. Caratube v.*

Kazakhstan, paras. 263; Enron v. Argentina, paras. 192-193, 197; Libananco v. Turkey, p. 36 para. 78; cf. Fusimalohi v FIFA, p. 57 para. 103; Methanex v USA, Part II Chapter I, p. 29 para. 59]. The right to present its case is also particularly emphasised by Art. 18 DAL [*supra paras. 82 et seq.*].

106 In light of this, evidence is not excluded just because it was originally obtained by an unlawful act [*Corfu Channel case, p. 35; Libananco v Turkey, p. 39 para. 80; EDF v Romania para. 38; Quiborax v Bolivia, para. 67; Waincymer, para. 10.16.6; Reisman/Freedman, pp. 740-741*]. Instead, any objections based on the origin of the evidence in question need to be balanced against the submitting party's right to present its case [*Blair/Gojković, pp. 242, 256-259; Boykin/Havalic, pp. 33; cf. Methanex v USA, Part II Chapter I, pp. 26-29 paras. 56; cf. Meyer-Hauser/Wirz in Horvath/Wilske, p. 145; cf. Sicard-Mirabal/Derains, p. 208*].

107 RESPONDENT alleges that the information stems from a breach of confidentiality agreement or alternatively a hack of its computer system [*Letter Fasttrack, p. 51*]. However, no considerations of fairness based on RESPONDENT's objection outweigh CLAIMANT's right to present its case. This is true in both the case of breach of confidentiality agreement (**1**) and in case of a hack (**2**).

1. The Alleged Breach of Confidentiality by Respondent's Former Employees Does Not Justify an Exclusion of the Partial Interim Award as Evidence

108 The possible leak of the Partial Interim Award by RESPONDENT'S former employees does not relate to CLAIMANT. Thus it constitutes no factor to considerations of fairness justifying an exclusion of evidence.

109 In the annulment decision in the case of *Enron*, the tribunal held that a statutory confidentiality obligation does not preclude a third-party from submitting evidence [*Enron Annulment, paras. 156, 176*]. This holding equally applies to merely contractual obligations. This is because the effects of contracts are limited to the contracting parties. Such a limitation arises out of the *privity of contracts* as a general principle of contract law [*Drive Yourself v. Strutt, p. 271; PICC Official Comments, p. 167 Art. 5.2.1*]. Thus, a confidentiality agreement can only bind the parties subject to it [*Esso Australia v Plowman, p. 15 para. 33; cf. Shearson Lehmann Brothers v. Maclaine, p. 29;; Born, p. 2789; Neill, p. 290; Ritz, pp. 157-158; Lionnet, p. 237; Salomon/Friedrich, p. 575; Smeureanu, p. 151*]. In this regard, an employee's obligation of confidentiality arises from a contract rather than from any mandatory law or public policy [*Leisinger, pp. 94-95; Ritz, pp. 144-145; Paulsson/Rawding, p. 320*]. Therefore, the nature of the contractual confidentiality obligations is a private one that does not affect third parties. For this reason, breaches of confidentiality agreements can only be raised in proceedings with the party in breach [*Enron Annulment, paras. 165, 175; Smeureanu, p. 152*].

110 RESPONDENT's former employees were under a contractual obligation of confidentiality

regarding their former employer [*PO2, pp. 60, 61 para. 41*]. Any such contractual obligation stems, however, from a private contract that only relates to RESPONDENT and its employees. Thus, this proceeding is not the right forum to address the breach of a contractual confidentiality agreement between RESPONDENT and its former employees. This precludes RESPONDENT's reliance on this breach as an element of considerations of fairness in the present proceeding.

111 Consequently, a breach of confidentiality agreement by RESPONDENT's former employees lacks relevant connection to CLAIMANT. Therefore, it does not justify the exclusion of the Partial Interim Award as evidence.

2. The Alleged Hack Does Not Justify an Exclusion of the Partial Interim Award as Evidence

112 Contrary to RESPONDENT's submission, a hack is no reason for exclusion of evidence.

113 Tribunals are keen on establishing a full understanding of all relevant facts before rendering final decisions on a case [*Blair/Gojković, p. 258; Pietrowski, p. 408*]. Evidence is the foundation for this understanding [*Waincymer, p. 743; cf. Persia International Bank v. Council, para. 95*]. Evidence thus may not be automatically excluded just because it was illegally obtained [*VIAC Case No. 5179, Blair/Gojković, p. 235; Sicard-Mirabal/Derains, p. 208; cf. Bible v. USA Funds, p. 8; Corfu Channel case, p. 35; Dalmine v. Commission, para. 72; FFU case, para. 3.2.2; Persia International Bank v. Council, para. 95; Kazazi, p. 208Meyer-Hauser/Wirz in Horvath/Wilske, p. 145; Reisman/Freedman, pp. 738, 740; Segesser, p. 3*]. Particularly in cases of hacking, evidence remains admissible if the submitting party was not involved in the hack [*Caratube et al. v Kazakhstan, paras. 150-156; cf. Bible v. USA Funds, p. 8; cf. Methanex v USA Part II Chapter 1, p. 26 para. 55*]. Consequently, the illegality of the acts of a third party *alone* is no sufficient reason for exclusion.

114 Most importantly, it was not CLAIMANT itself that hacked RESPONDENT's computer system [*cf. PO2, pp. 60, 61 para. 41*]. Besides, while now invoking the hack to justify exclusion, RESPONDENT itself used a remarkably ill-protected computer system [*PO2, p. 61 para. 42*]. It was RESPONDENT's negligence that allowed the hackers to obtain the Partial Interim Award [*cf. PO2, p. 61 para. 42*]. In light of considerations of fairness, it seems inappropriate to now shift the burden for RESPONDENT's negligence to CLAIMANT.

115 The alleged hack thus does not justify an exclusion of the Partial Interim Award for considerations of fairness. In view of all the above, the origin of the Partial Interim Award does not invoke considerations of fairness that would outweigh CLAIMANT's right to present its case. Its origin therefore does not justify an exclusion of the Partial Interim Award.

116 As a consequence, the Partial Interim Award is admissible evidence under the IBA Rules. For this reason, the Tribunal is held to admit the Partial Interim Award as evidence into this proceeding.

CONCLUSION TO THE SECOND ISSUE

117 RESPONDENT has mastered the art of self-contradiction by claiming the exact opposite with view to two essentially identical sets of facts. In this proceeding, RESPONDENT argues that contract adaption is not within the Tribunals power. In the other arbitration, it insists that it is. Before this Tribunal, RESPONDENT argues that tariffs of 30 per cent cannot possibly constitute hardship. Before the other tribunal, it insists that tariffs of 25 per cent are sufficient to do so. While, naturally, RESPONDENT is intent on shielding this proceeding from such contradictory behaviour, it fails to find any legal basis for such an exclusion of evidence. RESPONDENT is not even able to say with certainty whether or not the Award was illegally obtained. Be it through breach of confidentiality or through hacking – CLAIMANT has no part in any such presumed activities. That is why the IBA Rules demand the admission of this relevant and material information to these proceedings. CLAIMANT thus respectfully requests the Tribunal to honour its right to fair proceedings and admit the Award into evidence.

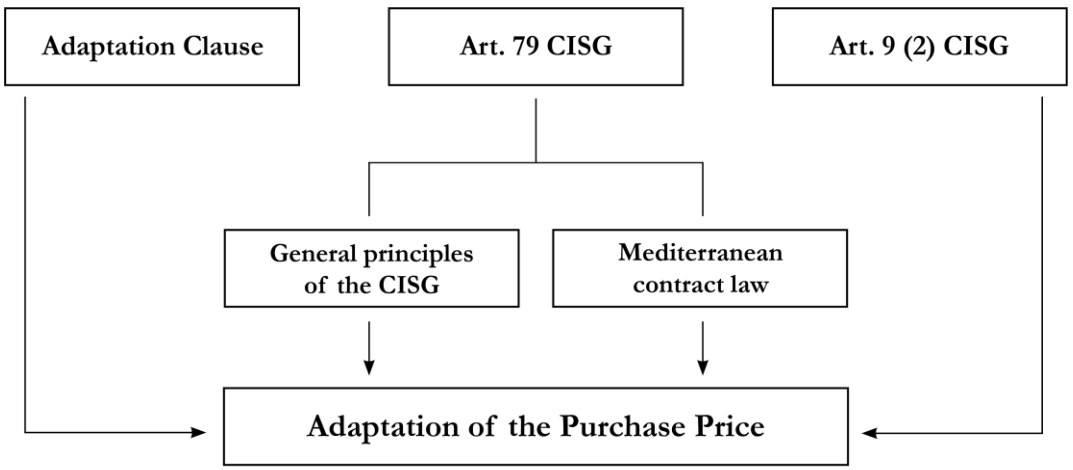
THIRD ISSUE: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE

118 The Tribunal is respectfully requested to adapt the price of the Sales Agreement. This should result in a payment of US$ 1,250,000.

119 CLAIMANT and RESPONDENT agreed that their Sales Agreement is governed by the law of Mediterraneo with an explicit reference to the CISG [*Ex. C5, para. 14*]. As Mediterraneo and Equatoriana are both contracting states of the CISG, it can be applied to the Sales Agreement.

120 According to the Sales Agreement, CLAIMANT was bound to deliver 100 doses of frozen semen and RESPONDENT was obliged to pay US$ 10,000,000 in exchange. CLAIMANT would then be left with a profit margin of five per cent [*NoA, p. 7, para. 18*]. Surprisingly, before the last shipment of frozen semen RESPONDENT's home country, Equatoriana, imposed unprecedented tariffs [*PO2, p. 58 para. 25, cf. Ex. C6, p. 15*]. These tariffs, amounting to 30 per cent, were imposed on agricultural goods imported from Mediterraneo [*Ex. C6, p. 15*]. Urged by RESPONDENT to deliver, CLAIMANT fulfilled its contractual duty and provided the last instalment of frozen semen [*Ex. C8, p. 18*]. Additionally, CLAIMANT also paid the 30 per cent of the purchase price for the tariffs upfront [*cf. NoA, p. 6 para. 13, Ex. C8, p. 17*]. Because of this payment, CLAIMANT incurred a loss of 25 per cent amounting to US$ 1,250,000, necessitating a price adaptation [*cf. PO2, p. 59 para. 29*]. CLAIMANT immediately tried to resolve this issue with RESPONDENT amicably [*Ex. C8, p. 18*]. Although RESPONDENT first promised to find a solution to this issue, it then unilaterally terminated the renegotiations [*Ex. C8, p. 18*].

121 There are several grounds for adaptation of the contract, stemming both from the Parties' express agreements and the applicable law:



122 In light of this, CLAIMANT respectfully requests the Tribunal to find that both the Sales Agreement (**A**) and the CISG (**B**) provide for an adaptation. This adaptation should result in the payment of US$ 1,250,000 (**C**).

A. The Adaptation Clause Provides for an Adaptation of the Price

123 The Adaptation Clause contractually entitles Claimant to a price adaptation due to the tariffs imposed by Equatoriana.

124 The Tribunal has both jurisdiction and power to adapt the Sales Agreement [*supra paras. 52, 71*]. Moreover, the Parties agreed that an adaptation should be the legal consequence of hardship by virtue of the Adaptation Clause [*supra paras. 64 et seqq.*].

125 Under an interpretation of this clause, the tariffs at hand fulfil the requirements set forth in the Sales Agreement. As a prerequisite, the Adaptation Clause requires "*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C5, p. 14 para. 12; emphasis added*].

126 The tariffs constitute a comparable event and therefore fall within the scope of the Adaptation Clause (**I**). They made the Sales Agreement more onerous to perform (**II**) and were unforeseeable (**III**). Furthermore, the Parties' Adaptation Clause does not lead to a derogation from the CISG (**IV**).

I. The Tariffs Are Comparable to the Events Referred to in the Adaptation Clause

127 The tariffs are comparable to the "*additional health and safety requirements*" mentioned in the Adaptation Clause.

128 In order to determine expectations the Parties had in regard to the requirement of "*comparable events*", the Adaptation Clause must be interpreted. Art. 8 (1) CISG stipulates the subjective standard of contract interpretation. It can be applied alongside the relevant circumstances mentioned in Art. 8 (3) CISG.

129 The wording of the Adaptation Clause does not explicitly refer to tariffs. Nonetheless, the clause makes reference to "*additional health and safety requirements*". This is due to CLAIMANT's previous experiences with such restrictions [*Ex. C4, p. 12; PO2, p. 58, para. 21*]. The Parties additionally chose to include the term "*comparable events*" which illustrates that the aforementioned examples were not meant to be exhaustive.

130 The Parties included delivery according to the 2010 Incoterm "*Delivered Duty Paid*" [*hereinafter "**DDP delivery**"*] into their Sales Agreement [*Ex. C5, p. 14, para. 8*]. The only reasons for this choice were the urgency of delivery and CLAIMANT's experience in the shipment of frozen semen [*Ex. C3, p. 11*]. However, in an email to RESPONDENT, CLAIMANT highlighted that it was "*not*

willing to take over any further risks associated with such a change in delivery terms" [*Ex. C4, p. 1*2]. It further emphasised that bearing the risks "*associated with changes in customs regulation or import restrictions*" was not acceptable [*ibid.*]. Tariffs constitute one element of customs regulation [*Eibner, para. 8.10*]. CLAIMANT explicitly rejected to bear any further risks associated with DDP delivery.

131 When finally drafting the Adaptation Clause, RESPONDENT's negotiator, Mr. Krone, did so with reference to CLAIMANT's email [*PO2, p. 56, para. 12*]. This proposal thus reflects the Parties' understanding that CLAIMANT would not bear the risks associated with customs regulation.

132 All of the abovementioned indicates that tariffs were one of the "*comparable events*" included in the Adaptation Clause. Consequently, the tariffs fall within scope of the Adaptation Clause.

II. The Tariffs Constitute Hardship

133 The tariffs result in hardship, making the contract more onerous to perform.

134 The Adaptation Clause is to be interpreted pursuant to Art. 8 CISG. The determination of whether an event constitutes hardship, thus making the contract more onerous to perform, is to be conducted by considering all circumstances of the individual case [*Schwenzer, Hardship, p. 716; cf. Atamer in Kröll et al., Art. 79 CISG, para. 82; Rimke, p. 225; Tallon in Bianca/Bonell, p. 582*].

135 To assess whether a party is exposed to hardship, the following aspects must be taken into account: the financial situation of both parties as well as the cost increase [*Da Silveira, p. 347, para. 525; Schwenzer, Hardship, p. 716*]. The threshold for allowing hardship may be lowered when a party's economic survival is at stake [*Schwenzer, Hardship, p. 716*].

136 For CLAIMANT, the cost increase eradicates its five per cent profit margin and even entails a substantial loss of US$ 1,250,000 [*cf. Ex. C8, p. 17, Ex. C5, p. 14, para. 6*]. CLAIMANT is experiencing financial difficulties and has been battling bankruptcy. This makes the prospect of a loss even more onerous [*Ex. C8, p. 17*]. Only through cuts in the work force and thorough restructuring measures in the past CLAIMANT was able to stay in business at all [*ibid.*]. It is imperative for CLAIMANT to make a profit of at least US$ 300,000 in 2018 in order to prolong its main credit lines [*PO2, p. 59 para. 29*]. This calculation of the profit is almost entirely dependent on the revenue from this contractual relationship [*ibid.*]. The prolongation of the main credit lines would be seriously endangered if CLAIMANT had to bear the additional costs caused by the tariffs in the amount of US$ 1,250,000 [*ibid.*].

137 Obtaining a new credit would bring great difficulties for CLAIMANT. As a precondition for a new credit, CLAIMANT's bank would probably require the sale of CLAIMANT's dressage part, a cornerstone of its business [*ibid.*]. On the other side, RESPONDENT would not be threatened economically at all if it had to bear a part of the additional costs [*PO2, p. 59 para. 30*].

138 Furthermore, RESPONDENT's conduct in the other arbitration indicates its expectations

regarding the threshold for hardship. In that arbitration, RESPONDENT argues that 25 per cent tariffs imposed by Mediterraneo are sufficient for creating hardship. Thus, in RESPONDENT's view, tariffs of 25 per cent suffice to render a contract "*excessively onerous*" to perform [*cf. PO2, p. 60 para. 39*]. As a consequence, RESPONDENT must acknowledge that 30 per cent tariffs make a contract at least "*more onerous*" to perform.

139 Consequently, the tariffs constitute hardship making the performance of the Sales Agreement more onerous for CLAIMANT.

III. The Tariffs Were Unforeseeable

140 The Parties were unable to foresee the implementation of the tariffs.

141 The CISG allows for recourse to statutory remedies in order to interpret individual contract terms [*cf. Schmidt-Kessel in Schlechtriem/Schwenzer, Art. 8 CISG para. 40*]. For the interpretation of individually drafted adaptation clauses the practice of Art. 79 CISG may be taken into account [*Brunner/Sgier in Brunner, Art. 79 CISG, para. 52*]. Under Art. 79 CISG, an event is unforeseeable if a reasonable person could not be expected to foresee its occurrence [*Achilles in Ensthaler, Art. 79 CISG, para. 7; Huber in Säcker et al., Art. 79 CISG, para. 8; Lindström, p. 8; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 13; cf. Herber/Czerwenka, Art. 79 CISG, para. 10*].

142 To the baffling of international observers, Equatoriana unexpectedly imposed 30 per cent tariffs upon agricultural products imported from Mediterraneo [*PO2, p. 58 para. 25, cf. Ex. C6, p. 15*]. There were no prior indications to this unprecedented change of policy as Equatoriana has always been an ardent supporter of free trade [*Ex. C6, p. 15; PO2, p. 58, para. 25*].

143 Even if tariffs in general were considered foreseeable nobody would have expected frozen racehorse semen to be included in tariffs on agricultural products. This is because racehorse breeding normally falls within a different category of breeding than livestock [*NoA, p. 6, para. 11*]. Neither Party expected such a categorisation [*Ex. C8, p. 17; PO2, p. 58, para. 26*]. They only found out that the tariffs encompass racehorse semen after confirming with customs authorities [*Ex. C8, p. 17; PO2, p. 58, para. 26*].

144 When considering all of the above, a reasonable person could not have foreseen an imposition of tariffs that includes frozen racehorse semen. Thus, the tariffs were unforeseeable.

IV. The Adaptation Clause Does Not Constitute a Derogation from the CISG

145 Contrary to RESPONDENT's allegation [*ANoA, p. 32, para. 20*], the Parties did not derogate from the CISG by including the Adaptation Clause into the Sales Agreement.

146 Pursuant to Art. 6 CISG, the parties' intent is decisive in order to derogate from a provision [*Ferrari in Schlechtriem/Schwenzer, Art. 6 CISG, para. 12; Mistelis in Kröll et al. Art. 6 CISG, paras. 7-*

10]. Such intent cannot be hypothetical [*CLOUT case No. 904; CISG AC Opinion No. 16, Comments 3.1.; Ferrari, Specific Topics, para. 614; Honnold, p. 108, para. 77*]. Instead it must be expressed clearly [*Mistelis in Kröll et al., Art. 6 CISG, paras. 16-21*]. The interpretation of this intent is conducted pursuant to Art. 8 CISG [*Magnus in Staudinger, Art. 6 CISG, para. 20*].

147 CLAIMANT's suggestion to include a hardship clause into the contract [*Ex. C4, p. 12*] was not a manifestation of its intent to derogate from any provision of the CISG. Moreover, RESPONDENT also made no indication regarding such an intent. Consequently, the Parties did not agree to derogate from any provision of the CISG, especially not from Art. 79 CISG as alleged by RESPONDENT. Any considerations regarding derogation therefore remain hypothetical.

148 Thus, the Parties did not derogate from the CISG by virtue of their Adaptation Clause and the CISG remains applicable.

149 The tariffs fall within the scope of the Adaptation Clause. The Parties did not derogate from the CISG. In view of all the above, an adaptation of the price is necessary.

B. Art. 79 CISG Provides for an Adaptation of the Price

150 The Tribunal should adapt the price in this case of hardship pursuant to Art. 79 CISG.

151 Contrary to RESPONDENT's allegations [*ANoA, p. 32 para. 21*], the scope of application of Art. 79 CISG encompasses cases of hardship.

152 The wording of Art. 79 CISG evidences that the provision governs cases of non-performance, that is objective impossibility. The term "*impediment*" in Art. 79 CISG however extends to cases beyond non-performance. It is widely accepted, that the provision governs cases of economic impossibility, also referred to as hardship [*Atamer in Kröll et al., Art. 79 CISG, para. 78; Brunner, Art. 79 CISG, para. 26; CISG AC Opinion No. 7, opinion 3.1-3.2; Da Silveira, p. 333, para. 504; Enderlein/Maskow, Art. 79 CISG, para. 6.3; Honnold, Art. 79 CISG, para. 432.2; Lindström, p. 11; Mankowski in Säcker, Art. 79 CISG para. 64; Pirozzi, pp. 101; Rimke, p. 225; Rummerl in Hoyer/Posch, p. 188; Ruescher, p. 941; Schlechtriem/Schroeter, para. 678; Schwenzer in Schlechteriem/Schwenzer, Art. 79 CISG, para. 30; Schwenzer in Schlechtriem/Schwenzer Commentary, Art. 79 CISG, para. 31*]. Arbitral tribunals and courts support this understanding and recognise hardship to be included in Art. 79 CISG [*Chinese goods case, para. 8; CLOUT Case No. 277, para. D; Romay v. Behr; Scafom v. Loraine; Vital Berry v. Dira-Frost; cf. Construction material case*].

153 The provisions of the CISG are supposed to have a meaningful effect. To exclude cases of hardship would improperly narrow the scope of Art. 79 CISG [*Schwenzer, Successes and Pitfalls, p. 475*]. This is because in a globalised world, objective impossibility can be overcome in most instances by finding replacement [*ibid.*].

154 Thus, Art. 79 CISG regulates cases of hardship.

155 Presently, the requirements of Art. 79 CISG are met (**I**) and adaptation is its legal consequence (**II**).

I. The Requirements of Art. 79 CISG Are Satisfied

156 All requirements of Art. 79 CISG are fulfilled.

157 The imposed tariffs constitute an impediment (**1**) that was beyond CLAIMANT's control (**2**). The tariffs resulting in hardship were unforeseeable and thus could not have been taken into account by CLAIMANT (**3**)**.** It could not have avoided or overcome this impediment (**4**).

1. The Tariffs Resulting in Hardship Constitute an Impediment for CLAIMANT

158 The tariffs resulting in hardship qualify as an impediment to CLAIMANT's detriment.

159 Hardship constitutes an impediment pursuant to Art. 79 CISG if the equilibrium of the contract is fundamentally altered [*Atamer in Kröll et al., Art. 79, para. 81; Da Silveira, pp. 321, para. 486; Girsberger/*Zapolskis p.*123; Schwenzer, Hardship, p. 716*]. Therefore, the performance of a contract must become excessively onerous [*Da Silveira, p. 323, para. 488; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 30*]. Assessing hardship requires a case-by-case analysis [*Rimke, p. 225; Schwenzer, Hardship, p. 716; Tallon in Bianca/Bonell, p. 582; cf. Atamer in Kröll et al., Art. 79 CISG, para. 82*].

160 Presently, various factors rendered the performance excessively onerous. CLAIMANT was not supposed to bear the tariffs (**a**). The tariffs further eradicated CLAIMANT's profit margin (**b**) whilst it cannot carry the additional costs (**c**).

a) CLAIMANT Was Not Supposed to Bear the Risks of the Tariffs

161 The allocation of risks between the Parties shows that the tariffs constitute an impediment.

162 The parties' intended risk allocation determines whether an event renders performance excessively onerous [*Liu, p. 693; Schwenzer, Hardship, p. 716*].

163 Contrary to RESPONDENT's submission [*cf. Ex. R4, p. 36*], the Parties indeed agreed that CLAIMANT should not bear the risk of tariffs despite a DDP delivery [*supra paras. 130 et seq.*].

164 It is true that RESPONDENT was willing to pay an increased purchase price for DDP delivery [*Ex. C4, p. 12; Ex. C5, p. 13*]. However, "*the direct additional costs associated with transportation and DDP delivery per dose are 200 USD*" [*PO2, p. 56 para. 8*]. In view of the purchase price per dose, the additional costs for DDP delivery equate only to 0.2 per cent of the price. In return for this minor sum, CLAIMANT both had to ensure DDP delivery *and* organise the transport. A reasonable businessperson would hardly presume an assumption of the risks of unexpected tariffs in exchange for such a minor sum.

165 Moreover, in the other arbitration RESPONDENT itself was under an obligation for DDP delivery [*PO2, p. 60 para. 39*]. It is telling that RESPONDENT refuses to bear tariffs regardless of its DDP delivery obligation in that arbitration [*PO2, p. 60 para. 39*]. RESPONDENT thus presently relies on the exact opposite.

166 Consequently, under the contractual terms, CLAIMANT was not supposed to bear the risks of tariff regulations.

b) The Tariffs Eradicate CLAIMANT's Profit Margin

167 If CLAIMANT had to bear the tariffs, its profit margin would be erased.

168 To determine whether a performance is rendered excessively onerous the profit margins have to be assessed [*Schwenzer, Hardship, p. 716*].

169 There is no information available on average profit margins in the market for racehorse semen in Equatoriana or Mediterraneo. Nonetheless, RESPONDENT's unauthorised resale of the doses allows for inferences on profit margins. Of what is known, RESPONDENT benefited from profit margins around 17 per cent when reselling the doses [*cf. PO2 p. 57 para. 20*]. In contrast, due to the tariffs, CLAIMANT did not only lose its entire profits from this transaction. It is even confronted with a loss amounting to US$ 1,250,000 [*PO2, p. 59 para. 29*]. Beyond this single transaction, this loss supposedly also leaves CLAIMANT's entire business unprofitable [*cf. PO2, p. 59 para. 29*].

170 This loss of any profits renders the performance excessively onerous.

c) CLAIMANT Is Unable to Carry the Additional Costs

171 Finally, CLAIMANT experiences financial difficulties that make it impossible for CLAIMANT to bear the additional costs.

172 An impending financial ruin of the disadvantaged party lowers the threshold for an excessively onerous performance [*Brunner, Hardship, pp. 438-439; Schwenzer, Hardship, p. 716*].

173 CLAIMANT would either lose one of its vital business sections or face bankruptcy if it had to bear the costs resulting from the tariffs [*supra paras. 136 et seq.*]. This acute situation does not allow CLAIMANT to carry the additional costs, rendering the performance excessively onerous.

174 Considering all the above, the equilibrium of the contract is fundamentally altered. The tariffs thus result in hardship for CLAIMANT, constituting an impediment under Art. 79 CISG.

2. The Tariffs Resulting in Hardship Were beyond CLAIMANT's Control

175 The impediment was beyond CLAIMANT's control.

176 According to Art. 79 CISG the impediment must be beyond the disadvantaged party's

control. This requirement is satisfied when there is no connection between this party and the event resulting in hardship [*Saenger in Ferrari et. al., Art. 79 CISG, para. 4; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 11; cf. Reinhart, Art. 79 CISG, para. 4*]. Especially, acts of states fulfil this requirement [*Atamer in Kröll et al., Art. 79 CISG, para. 46; Brunner/Sgier in Brunner, Art. 79 CISG, para. 22; Magnus in Staudinger, Art. 79 CISG, para. 28; Saenger in Ferrari et. al., Art. 79 CISG, para. 4; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG para. 17; cf. Russia 22 January 1997 Arbitration proceeding 155/1996; Reinhart Art. 79 CISG, para. 4*].

177 The tariffs were imposed by Equatoriana's government. They, therefore, constitute an act of state. CLAIMANT had no influence on the imposition, it was an external act.

178 Thus, the tariffs resulting in hardship were beyond CLAIMANT's control.

3. The Parties Could Not Have Reasonably Taken the Tariffs into Account

179 The tariffs were unforeseeable [*supra para. 144*]. Therefore the Parties could not have reasonably taken them into account.

4. CLAIMANT Could Not Have Reasonably Been Expected to Avoid the Impediment or Overcome Its Consequences

180 CLAIMANT could neither have reasonably been expected to avoid the impediment nor to overcome its consequences.

181 An event is unavoidable if a party could not have successfully averted the event before it took place [*Atamer in Kröll et al., Art. 79 CISG, para. 54; Enderlein/Maskow, Art. 79 CISG, para. 6.1; Rimke, p. 215; Tallon in Bianca/Bonell, Art. 79 CISG, para. 2.6.4*]. An impediment is impossible to overcome when all required steps to preclude its consequences failed [*Flambouras, p. 271; Rimke, p. 215; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 14; Tallon in Bianca/Bonell, Art. 79 CISG, para. 2.6.4; cf. Enderlein/Maskow, Art. 79 CISG, para. 6.2*]. However, a party only has a duty to undertake measures that can reasonably be expected from it [*Enderlein/Maskow, Art. 79 CISG, para. 6.2; Plate, p. 49; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 14*]. In all other cases, the impediment can neither be avoided nor overcome [*cf. Enderlein/Maskow, Art. 79 CISG, para. 6.2*]. A party can only be expected to perform up to the limit of hardship [*Brunner, Hardship, p. 322; Brunner/Sgier in Brunner, Art. 79 CISG, para. 40; cf. Lindström p. 10*].

182 The Parties only learned about the tariffs on racehorse semen after they had taken effect [*Ex. C7, p. 16; PO2, p. 58, para. 26*]. They could thus not have avoided them. The equilibrium of the Sales Agreement is fundamentally altered which constitutes hardship [*supra para. 174*] Moreover, it was impossible for CLAIMANT to be exempted from or obtain a reduction in tariffs [*PO2, p. 58 para. 27*]. Thus, CLAIMANT could not have overcome the impediment.

183 As a consequence, CLAIMANT was unable to reasonably avoid the impediment or overcome its consequences. In conclusion, the requirements of Art. 79 CISG are fulfilled.

II. In Cases of Hardship, Art. 79 CISG Calls for an Adaptation of the Price

184 Under Art. 79 CISG, the legal consequence for cases of hardship is a price adaptation.

185 In such cases, the exemption from liability envisioned by the wording of Art. 79 CISG is no adequate legal consequence. This results in a gap within the CISG (**1**). The gap has to be filled in accordance with the general principles of the CISG resulting in a price adaptation (**2**). Additionally, recourse to the UNIDROIT Principles of International Commercial Contracts [*hereinafter "**PICC**"*] also demands an adaptation (**3**).

1. The Legal Consequence of Art. 79 CISG Is Inadequate for Cases of Hardship, Resulting in a Gap within the CISG

186 As the codified legal consequence of Art. 79 CISG is not suitable for cases of hardship, there is a gap within the CISG.

187 The wording of Art. 79 CISG refers to cases of objective impossibility. However, in cases of hardship, performance is not objectively impossible but excessively onerous [*Fischer, p. 199; Flambouras p. 277; Garro p. 1184*]. Art. 79 CISG solely exempts the obligor from liability. Other claims such as performance remain valid [*Glass bottles case, para. 31; Fischer, p. 199; Keller, p. 261; Lindström, p. 17; Nicholas, p. 18; Reinhart, Art. 79 CISG, para. 2; Saenger in Ferrari et al., Art. 79 CISG, para. 11; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 52-54; cf. Da Silveira, p. 346 para. 523*].

188 In cases of objective impossibility, the exemption from liability is an appropriate legal consequence as the other party cannot request delivery. In cases of subjective impossibility, however, the exemption is moot as the other party can still make such a request [*Lindström p. 17; Liu, p. 709; Nicholas, p. 18; Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, paras. 52-54*]. In these cases, restoring the impaired contractual equilibrium requires a different legal consequence [*Brunner, Art. 79 CISG, para. 33; Flambouras, p. 279; Flechtner, Exemption, p. 93*]. This results in a gap [*ibid.*].

189 Thus, because of this absence of adequate legal consequences in cases of hardship, there is a gap within the CISG.

2. The General Principles within the CISG Fill the Gap Resulting in a Price Adaptation

190 Filling the gap with the general principles of the CISG allows the Tribunal to adapt the price.

191 Art. 7 (2) CISG addresses internal gaps arising if an issue is governed by the CISG but not

expressly settled within it. Pursuant to the first alternative of Art. 7 (2) CISG, general principles of the CISG fill its internal gaps.

192 The need to adapt a contract derives from the general principles of *favor contractus*, good faith and the duty of the parties to mitigate each other's losses [*Da Silveira, pp. 314-315, paras. 516 et. seq.*].

193 In a case of hardship, one of the parties faces a situation of economic impossibility. Nonetheless, both parties are still interested in performance. This holds especially true in regard to the buyer. This is based on the principle of *favor contractus*. This general principle of the CISG provides that parties must uphold their contract and can only rely on termination as a last resort [*Da Silveira, p. 342, para. 516; Ferrari, Gap-Filling, p. 229; Ferrari, Uniform Interpretation, p. 225; Uribe, p. 262; cf. Berger, Adaptation, p. 1356; Reinicke/Tiedtke, para, 1155; Zaccaria, p. 137*].

194 To comply with this interest in performance, the disadvantaged party is entitled to request renegotiations conducted in good faith [*Schwenzer, Hardship, pp. 723; cf. Da Silveira, pp. 342, 343, para. 517; cf. Schwenzer in Schlechtriem/Schwenzer, Art. 79 CISG, para. 54*]. During the renegotiations, the parties are required to mitigate each other's undue losses.

195 The duty to mitigate each other's losses [*Da Silveira, p. 342, para. 516; cf. Schwenzer, Hardship, p. 725*] and good faith [*Ferrari, Gap Filling, pp. 76-77; Ferrari in Schlechtriem/Schwenzer, Art. 7 CISG, para. 49; Magnus in Staudinger, Art. 7 CISG, para. 43; Perales Viscasillas in Kröll et al, Art. 7 CISG, para. 64*] constitute general principles of the CISG.

196 However, if renegotiations fail, the disadvantaged party would be entitled to resort to a tribunal. This is because the parties' interests in performance remain untouched. To satisfy these general principles a tribunal would then have to adapt the contract accordingly [*Brunner, Art. 79 CISG, para. 33; Da Silveira, pp. 344, para. 520; Schwenzer, Hardship, pp. 724 et. seq.*].

197 CLAIMANT immediately initiated renegotiations after learning of the tariffs [*Ex. C8, p. 18*]. RESPONDENT initially suggested to CLAIMANT that a common solution could be found [*Ex. C8, p. 18; cf. Ex. R4, p. 36*]. Nonetheless, it terminated the renegotiations shortly after [*Ex. C8, p. 18*]. Thus, since the Parties' renegotiations failed, the Tribunal is now called on to adapt the price.

198 As shown above, the general principles of the CISG demand a price adaptation.

3. Equally, General Mediterranean Contract Law Can Be Used to Fill the Gap Resulting in a Price Adaptation

199 The gap within the CISG can additionally be filled with General Mediterranean Contract Law, a verbatim adoption of the PICC [*PO1, p. 53 para. III 4*].

200 The CISG provides for recourse to the General Mediterranean Contract Law (**a**) which in turn leads to price adaptation as a legal consequence (**b**).

a) The CISG Leads to the Application of General Mediterranean Contract Law

201 Art. 7 (2) CISG and Art. 9 (2) CISG lead to the application of General Mediterranean Contract Law, a verbatim adoption of the PICC, and the PICC itself in order to adapt the price.

202 First, if the general principles of the CISG do not suffice for gap-filling, the second alternative of Art. 7 (2) CISG demands recourse to domestic law. It does so by virtue of conflict of laws rules. The applicable general rules on conflict of laws are a verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts [*hereinafter "**Hague Principles**"*] [*PO2, p. 61 para. 43*].

203 The requirements of Art. 1 Hague Principles are met, since the Parties acted in their professional capacity and are based in different states [*NoA, p. 4, para. 1, p. 5, para. 4*]. Thus, the Hague Principles apply. Art. 2 (1) Hague Principles grants the parties the possibility to choose the applicable rules of law.

204 The Parties agreed on Mediterranean law to govern their Sales Agreement [*Ex. C5, p. 14, para. 14*]. The law of Mediterraneo provides for the CISG and General Mediterranean Contract Law. Recourse is to be taken to the latter in order to fill the gap within the CISG.

205 Thus, General Mediterranean Contract Law is applicable according to the conflict of laws rules and fills the gap within the CISG.

206 Second, Art. 9 (2) CISG leads to the PICC as trade usage [*Int. Ct. Russian CCI, 5.6.1997 CISG-online 1247; Atamer in Kröll et al., Art. 79 CISG, para. 86; Pamboukis p. 129*]. Thus, the PICC are impliedly included in the Sales Agreement.

207 The CISG allows recourse to the General Mediterranean Contract Law, a verbatim adoption of the PICC, and the PICC itself in order to adapt the price. Since the PICC and the General Mediterranean Contract Law are identical, their application leads to the same results.

b) General Mediterranean Contract Law Provides for Price Adaptation

208 In case of hardship, the General Mediterranean Contract Law [*hereinafter "**MCL**"*] leads to an adaptation of the price.

209 Chapter 6 Section 2 MCL regulates hardship and its legal effects. Art. 6.2.2 MCL stipulates the prerequisites for hardship and Art. 6.2.3 MCL prescribes its legal consequences. In principle, the prerequisites of Art. 6.2.2 MCL match those of Art. 79 CISG [*cf. Brunner/Sgier in Brunner, Art. 79 CISG, para. 33*]. Art. 6.2.2 MCL establishes two additional prerequisites however: First, the event resulting in hardship must have occurred after the conclusion of the contract. Second, the risk of the event must not have been assumed by the disadvantaged party. Art. 6.2.3 MCL requires that the disadvantaged party requests renegotiations without undue delay. After the

failure of renegotiations, the parties may then resort to tribunals. The tribunal is then entitled to adapt the contract.

210 The tariffs resulting in hardship occurred months after the conclusion of the Sales Agreement [*PO2, p. 58, para. 25; Ex. C5, p. 13*]. CLAIMANT did not assume the risk of the tariffs [*supra paras. 129 et seqq.*]. Moreover, CLAIMANT requested renegotiations immedieatly [*Ex. C8, p. 18*]. RESPONDENT terminated them soon after [*ibid.*]. Thus, the renegotiations failed. CLAIMANT was thereupon forced to ask the Tribunal for an adaptation of the price.

211 Consequently, the prerequisites of the MCL are met and the Tribunal should adapt the price.

C. An Adaptation of the Price Leads to a Payment of US$ 1,250,000

212 The Tribunal is respectfully requested to increase the price of the third shipment by means of adaptation resulting in an additional payment of US$ 1,250,000.

213 Regardless of how the remedy of adaptation is attained, it serves one common purpose: restoring the initial equilibrium of a contract [*Brunner, Hardship, p. 498; Fucci p. 38; Horn, p. 139*].

214 Restoring the initial equilibrium of the contract necessitates due consideration to multiple aspects. The starting point for any consideration is the distribution of risks between the parties [*Brunner, Hardship, p. 499; cf. Fucci p. 35, Da Silveira, p. 345, para. 520*]. Additionally, it is necessary to limit the adaptation to what is bearable [*ICC Case No. 2508, p. 294; cf. Brunner, Hardship, p. 500; Fucci, p. 35*]. In light of this, a distribution of costs does not necessarily have to be equal to be fair [*McKendrick in Vogenauer/Kleinheisterkamp, Art. 6.2.3 PICC, para. 7*]. Finally, any adaptation must honour the general standard of fairness [*Brunner, Hardship, pp. 498, 499; Horn, pp. 138, 139; cf. Fucci, p. 38*].

215 CLAIMANT stressed its unwillingness to bear the risk of tariffs throughout the negotiations of the Sales Agreement [*Ex. C4, p. 12*]. This is reflected in the Adaptation Clause which exempts CLAIMANT from such a risk [*supra paras. 129 et seqq.*]. The tariffs caused additional costs of US$ 1,500,000. In light of the risk assumption, the Tribunal should consider these costs in their entirety to perform an appropriate price adaptation.

216 Moreover, bearing the entire costs caused by the tariffs would put CLAIMANT's business at stake [*PO2, p. 59 para. 29*]. CLAIMANT heavily depends on being profitable in 2018 in order to prolong its credit lines [*ibid*]. This profitability almost entirely builds upon the revenue generated by the last shipment to RESPONDENT [*ibid.*]. CLAIMANT is even willing to forfeit its entire expected profits amounting to US$ 250,000 as a sign of good will. However, only an amount of US$ 1,250,000 would allow CLAIMANT to continue its business successfully. On the other side, RESPONDENT more than able to bear the additional costs without being financially endangered [*PO2, p. 59, para. 30*].

217 Additionally, CLAIMANT imposed a resale prohibition on its doses of frozen semen [*Ex. C2, p. 10; Ex. C5, p. 13*]. On multiple occasions, RESPONDENT breached this resale prohibition selling on the doses of semen for a much higher price of US$ 120,000 [*PO2, p. 57 para. 20*]. To make matters worse, it is now known to CLAIMANT that RESPONDENT had planned this contractual violation from the outset [*PO2, p 56 para. 11*].

218 In order to perform this contractual breach, Mr Shoemaker lured CLAIMANT into delivering the doses despite the imposition of the tariffs [*Ex C8, p. 18; Ex R4, p. 36*]. Mr Shoemaker was introduced to CLAIMANT as the person responsible for all questions concerning the Sales Agreement [*PO2, p. 59 para. 32*]. On behalf of RESPONDENT he promised to find an appropriate solution for the newly imposed tariffs [*Ex. C8, p. 18*]. He highlighted RESPONDENT's desire for a long-term-relationship [*ibid.*]. Mr Shoemaker even mentioned plans to buy further doses from CLAIMANT in the future [*ibid.*]. This final act of unethical conduct put CLAIMANT's business at stake, as it trusted in RESPONDENT's integrity when it delivered the goods. This shows that RESPONDENT has consistently violated general considerations of fairness.

219 Taking all of this into account, the price adaptation proposed by CLAIMANT reflects values of fairness all the more. Thus, the price adaptation should result in an additional payment of US$ 1,250,000.

CONCLUSION TO THE THIRD ISSUE

220 No matter which authority is consulted, they all demand adaptation of the contract in view of CLAIMANT's hardship. CLAIMANT had repeatedly insisted that it would not bear the risks connected to cross-border delivery in addition to its anyhow low profit margin. On these grounds, the Parties included the Adaptation Clause into the Sales Agreement. When this agreement was put to the test by an unforeseen imposition of sanctions, it seemed as though RESPONDENT was willing to live up to its promises. However, as soon as the desperately required goods were delivered, RESPONDENT discontinued all negotiations and left CLAIMANT with a substantial loss, threatening its economic survival. Instead, Claimant had to learn that RESPONDENT had resold the promptly delivered goods in breach of its contractual obligations. The Parties' failure to reach a solution and RESPONDENT's defaulting behaviour call for action by the Tribunal. The Parties' Adaptation Clause and the CISG demand contract adaptation in light of the circumstances at hand. While CLAIMANT is willing to relinquish its aspired profits, it cannot be reasonably asked to accept an existence-threatening loss while RESPONDENT enhances its profits through breach of contract. CLAIMANT therefore respectfully asks the Tribunal to order payment of the advanced tariffs in the amount of US$ 1,250,000.

STATEMENT OF RELIEF SOUGHT

For the reasons stated in this Memorandum, CLAIMANT respectfully requests the honourable Arbitral Tribunal to find that:

- The Tribunal has the jurisdiction and the power to adapt the Sales Agreement under the applicable Mediterranean law (**First Issue**).

- The Partial Interim Award is admissible as evidence to this arbitration proceeding (**Second Issue**).

- Both the Sales Agreement and Art. 79 CISG entitle CLAIMANT to an adaptation of the purchase price, resulting in a payment of US$ 1,250,000 to CLAIMANT (**Third Issue**).

Respectfully submitted on behalf of CLAIMANT, *Phar Lap Allevamento,* on 6th December 2018

MARKUS DIEKMANN | MAXIMILIAN EDINGER | DOMINIK MARCZOK

PIA SCHROVEN | JANA SCHUMACHER