SIXTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG – 31ST MARCH TO 7TH APRIL 2019

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF ZURICH

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

PATRIZIA CASTELLAZZI • TESSA DOUMA • VANESSA HUBER
MEIKE PAULETZKI • YVES TJON-A-MEEUW • DELILAH VON STRENG

Table of Contents

Index of Abbreviations

%	per cent
a fortiori	with stronger reason
a contrario	on the contrary
Art.	Article
Artt.	Articles
ASA	Association Suisse de l'Arbitrage
AUS	Australia
AUT	Austria
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BE	Belgium
BV	Besloten Vennootschap met beperkte aansprakelijkheid (private company with limited liability)
cf.	confer (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods
DDP	Delivered Duty Paid
ed.	Edition
e.g.	*exempli gratia* (for example)
Ed(s).	Editor(s)
et seq.	et sequens (and the following one)
et seqq.	et sequentes (and the following ones)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
GER	Germany

GmbH	Gesellschaft mit beschränkter Haftung (private limited company)
HKIAC	Hong Kong International Arbitration Center
HKIAC Rules 2013	Hong Kong Arbitration Rules, 2013
HKIAC Rules	Hong Kong Arbitration Rules, 2018
IBA	International Bar Association
ibid.	ibidem (in the same source)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Court of Arbitration
ICCA	International Council for Commercial Arbitration
ICSID	International Center for Settlement of Investment Disputes
i.e.	*id est* (that is)
lex arbitri	law of the seat of arbitration
Inc.	Incorporated
Ltd	Limited company
Model Law	UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments
Mr	Mister
Ms	Miss
No.	Number
NoA	Notice of Arbitration
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
p./pp.	page/pages
para./paras	paragraph/paragraphs

PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
RNoA	Response to the Notice of Arbitration
S.A.	Sociedad Anonima (limited liability company)
SAS	Société par actions simplifiée (simplified corporation)
SG	Singapore
SUI	Switzerland
supra	above
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations Organisation
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts 2016
UA	Ukraine
US	United States
USA	United States of America
USD	United States Dollars
v.	versus
Vol.	Volume
WTO	World Trade Organization

Index of Authorities

Cited as	Reference
ASHFORD	ASHFORD PETER, The IBA Rules on the Taking of Evidence in International Arbitrations: A Guide, Cambridge 2013 *in paras 58, 59, 61*
ATAMER	ATAMER, YESIM M. in: KRÖLL STEFAN/MISTELIS LOUKAS A./ PERALES VISCASILLAS MARIA DEL PILAR, Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., München 2018, Art. 79 *in paras 110, 112, 121*
BERGER	BERGER KLAUS PETER, Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense, Arbitration International, Vol. 17(1), Oxford 2001, pp. 1-18 *in paras 30, 43, 44, 103*
BERGER/KELLERHALS	BERGER BERNHARD/KELLERHALS FRANZ, International and Domestic Arbitration in Switzerland, 3rd ed., Berne 2015 *in para. 59*
BINDER	BINDER PETER, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 3rd ed., London 2010 *in paras 49, 52*

BLAIR/GOJKOVIĆ	BLAIR CHÉRIE/VIDAK GOJKOVIĆ EMA, WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence, ICSID Review - Foreign Investment Law Journal, Vol. 33(1), pp. 235–259 *in para. 72*
BONELL	BONELL MICHAEL JOACHIM in: BIANCA CESARE MASSIMO/BONNELL MICHAEL JOACHIM, Commentary on the International Sales Law – The 1980 Vienna Sales Convention, Milan 1987, Art. 7 *in paras. 110, 111*
BONELL, Alternatives	BONELL MICHAEL JOACHIM, The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?, Uniform Law Review, Vol. 26, 1996, pp. 26-39 *in para. 110*
BORN	BORN GARY B., International Commercial Arbitration, Vol. I-III, 2nd ed., Alphen aan den Rijn 2014 *in paras 6, 16, 19, 21, 24, 29, 31, 49, 52, 59, 62, 69*
BRENNER/DÖRFLER	BRENNER HATTO/DÖRFLER WERNER, Hardship Exportpreise richtig kalkulieren und erfolgreich verhandeln: kalkulatorische Rahmenbedingung für die Festlegung von Auslandspreisen, Wiesbaden 2017 *in para. 85*

BRIDGE	BRIDGE MICHAEL G., The International Sale of Goods, 4th ed., Oxford 2017 *in para. 110*
BRUNNER	BRUNNER CHRISTOPH, Force Majeure and Hardship under General Contract Principles, Exemption for Non-Performance in International Arbitration, International Arbitration Law Library, Vol. 18, Alphen aan den Rijn 2009 *in paras 24, 30, 99, 103, 110, 112, 113, 114, 116, 126, 128, 129, 135, 137*
BRUNNER/SGIER	BRUNNER CHRISTOPH/SGIER ANGELINA, in: CHRISTOPH BRUNNER (Ed.), UN-Kaufrecht CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980, 2nd ed., Berne 2014, Art. 79 *in para. 112*
BUND	BUND JENNIFER M., Fore Majeure Clauses: Drafting Advice for the CISG-Practitioner, Journal of Law and Commerce, Vol. 17, 1998, pp. 381-413 *in paras 110, 116*
CHENG	CHENG BIN, General Principles of Law as Applied by International Courts and Tribunals, Cambridge 1987 *in para. 72*

DICEY/MORRIS/COLLINS	DICEY ALBERT VENN/MORRIS JOHN/COLLINS LAWRENCE, Dicey, Morris & Collins on the Conflict of Laws, 15th ed., Vol. 1, London 2017 *in paras 17, 21*
DIMATTEO	DIMATTEO LARRY, International Contracting, Law and Practice, 4th ed., Alphen aan den Rijn 2016 *in para. 103*
DIMATTEO, Excuse	DIMATTEO LARRY, Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines, Pace International Law Review, Vol. 27(1), 2015, pp. 258-305 *in para. 113*
DRYMER/GOBEIL	DRYMER STEPHEN L./GOBEIL VALÉRIE, Document Production in International Arbitration, Communicating Between Ships in the Night, Legitimacy, Myths, Realities, Challenges ICCA Congress Series, Vol. 18, 2015, pp. 205-220 *in para. 58*
EISELEN	EISELEN SIEG, Scope of the CISG, in: DIMATTEO LARRY A./JANSSEN ANDRÉ/MAGNUS ULRICH/SCHULZE REINER (Eds.), International Sales Law, München 2016 *in para. 83*

ELSING/TOWNSEND	ELSING SIEGFRIED H./TOWNSEND JOHN M., Bridging the Common Law Civil Law Divide in Arbitration, Arbitration International, Vol. 18(1), 2002, pp. 59-65 *in para. 58*
ERAUW	ERAUW JOHAN, in: KRÖLL STEFAN/MISTELIS LOUKAS A./ PERALES VISCASILLAS MARIA DEL PILAR, Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., München 2018, Art. 67 *in para. 122*
GAILLARD/GOLDMAN	GAILLARD EMMANUEL/SAVAGE JOHN (Eds.), Fouchard Gaillard Goldman On International Commercial Arbitration, The Hague 1999 *in paras 29, 49*
GARRO	GARRO ALEJANDRO M., CISG Advisory Council Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, 2007 *in para. 110, 113, 135*
GIRSBERGER/ZAPOLSKIS	GIRSBERGER DANIEL/ZAPOLSKIS PAULIUS, Fundamental Alteration of The Contractual Equilibrium under Hardship Exemption, Jurisprudence, Vol. 19(1), 2012, pp. 121-141 *in paras 126, 128, 129*

GRÜSKE	GRÜSKE WERNER, Incoterms 2010, A Practical Guide, Practical Know-How for the Users of the INCOTERMS 2010 Official Rules, Torgau 2012 *in para. 82, 85*
HACHEM	HACHEM PASCAL in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Intro to Artt. 66-70 *in para. 122*
HENDERSON	HENDERSON ALASTAIR, Lex arbitri, Procedural Law and the Seat of Arbitration, Singapore Academy of Law Journal, Vol. 26, 2014, pp. 886-910 *in paras 49, 50*
HOFMANN/ZUBERBÜHLER	HOFMANN DIETER/OETIKER CHRISTIAN/ROHNER THOMAS/ ZUBERBÜHLER TOBIAS, IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration, Zurich/Basel/Geneva 2012 *in para. 69*
HOLTZMANN/NEUHAUS	HOLTZMANN HOWARD M./NEUHAUS JOSEPH E., A Guide To The UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary, Deventer 1989 *in paras 36, 42, 44, 49*

HONNOLD	HONNOLD JOHN, Uniform Law for International Sales under the 1980 United Nations Convention, 4th ed., The Hague 2009 *in paras 110, 113, 121*
HUBER/MULLIS	HUBER PETER/MULLIS ALASTAIR, The CISG – A New Textbook for Students and Practitioners, Munich 2007 *in para. 113*
ICC Incoterms	International Chamber of Commerce (ICC), Incoterms 2010: ICC Rules for the Domestic and the International Trade Terms, English-German Version, 2010 *in para. 82, 83*
KAUR	KAUR NIMRAT, Impediment: A Concept Under CISG, UNIDROIT and Indian Contract Law – A Comparative Analysis, The Vindobona Journal of International Commercial Law and Arbitration, Vol. 15(1), 2011, pp. 91-104 *in paras 110, 113*
KREINDLER	KREINDLER RICHARD, The 2010 Revision of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, A Study in Both Consistency and Progress, International Arbitration Law Review, Vol. 13(5), 2010, pp. 157-159 *in para. 59*

KRÖLL	KRÖLL STEFAN, Anpassung und Ergänzung von Verträgen durch Schiedsgerichte, Internationales Wirtschaftsrecht, Vol. 16, Dissertation, University of Cologne, Cologne/Berlin/Bonn/Munich 1998 *in paras 30, 43, 103*
KRÖLL, Gap-Filling	KRÖLL STEFAN, Contractual Gap-Filling by Arbitration Tribunals, International Arbitration Law Review, Vol. 2(1), London 1999, pp. 9-16 *in paras 42, 44*
KÜHNER	KÜHNER DETLEV, The Revised IBA Rules on the Taking of Evidence in International Arbitration, Journal of International Arbitration Vol. 27(6), 2010, pp. 667-677 *in para. 59*
KURKELA/SNELLMAN	KURKELA MATTI S./SNELLMAN HANNES, Due Process in International Commercial Arbitration, New York 2005 *in para. 76*
LEW/MISTELIS/KRÖLL	LEW JULIAN D. M./MISTELIS LOUKAS A./KRÖLL STEFAN, Comparative International Commercial Arbitration, The Hague 2003 *in para. 6*

LLAMZON LLAMZON ALOYSIUS, Case Comment, Yukos Universal Limited (Isle of Man) v. The Russian Federation, The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as Both Omega and Alpha, ICSID Review, Vol. 30(2), 2015, pp. 315–325

in para. 72

MAGNUS MAGNUS ULRICH, Force Majeure and the CISG, in: SARCEVIC PETAR/VOLKEN PAUL (Eds.), The International Sale of Goods Revisited, The Hague/London/New York 2001

in para. 110

MAGNUS, BGB MAGNUS ULRICH, in: VON STAUDINGER JULIUS, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG), 13. ed., Berlin 2018, Artt. 6, 79

in paras.. 115, 117, 135

MARGHITOLA MARGHITOLA RETO, Document Production in International Arbitration, International Arbitration Law Library, Vol. 33, New York 2015

in para. 58

MCKENDRICK MCKENDRICK EWAN, in: VOGENAUER STEFAN (Ed.), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), 2nd ed., Oxford 2015, Art. 6.2.2

in paras. 111, 113, 137

MISTELIS	MISTELIS LOUKAS, in: KRÖLL STEFAN/MISTELIS LOUKAS A./ PERALES VISCASILLAS MARIA DEL PILAR, Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., München 2018, Art. 6 *in para. 115*
MOMBERG URIBE	MOMBERG URIBE RODRIGO, The Effect of a Change of Circumstances on the Binding Force of Contracts, Comparative Perspectives, Dissertation, University of Utrecht, Cambridge/Antwerp/Portland 2011 *in para. 135*
MOMBERG URIBE, Change of Circumstances	MOMBERG URIBE RODRIGO, Change of Circumstances in International Instruments of Contract Law, Vindobona Journal of International Commercial Law and Arbitration, Vol. 15(2), Vienna 2011, pp. 233-266 *in para. 110*
MOSER/BAO	MOSER MICHAEL J./BAO CHIANN, A Guide to the HKIAC Arbitration Rules, Oxford 2017 *in paras 6, 10, 52, 57, 59*
O'MALLEY	O'MALLEY NATHAN D., Rules of Evidence in International Arbitration: an Annotated Guide, London 2012 *in paras. 58, 59, 69, 72*

OMEROGLU	OMEROGLU EKIN, Taking Evidence in International Arbitration, Coventry Law Journal, Vol. 20(2), 2015, pp. 1-15 *in para. 61*
Oxford English Dictionary	Oxford English Dictionary, The Definitive Record of the English Language (2017) available at: http://www.oed.com/view/Entry/55213?rskey=gBMQOZ&result=1&isAdvanced=false#eid *in paras 31*
PERALES VISCASILLAS	PERALES VISCASILLAS MARIA DEL PILAR, in: KRÖLL STEFAN/MISTELIS LOUKAS A./PERALES VISCASILLAS MARIA DEL PILAR, Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), 2nd ed., München 2018, Art. 7 *in para. 110*
PIETROWSKI	PIETROWSKI ROBERT, Evidence in International Arbitration, Arbitration International, Vol. 22(3), Oxford 2006, pp. 373-410 *in para. 61*
PILTZ/BREDOW	PILTZ BURGHARD, in: PILTZ BURGHARD/BREDOW JENS (Eds.), Incoterms Kommentar, München 2016 *in para. 82, 83*

REDFERN/HUNTER	BLACKABY NIGEL/PARTASIDES CONSTANTINE/REDFERN ALAN/HUNTER MARTIN (Eds.), Redfern and Hunter on International Arbitration, 5th ed., New York 2009 *in para. 17, 59*
RIMKE	RIMKE JOEM, Force Majeure and Hardship: Application in International Trade Practice With Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts in: Pace University International Law Review (Ed.), Review of the Convention and Contracts for the International Sale of Goods (CISG) 1999-2000, The Hague 2001, pp. 197-243 *in paras 110, 111*
SALGER	SALGER HANNS-CHRISTIAN, in: WITZ WOLFGANG/SALGER HANNS-CHRISTIAN/LORENZ MANUEL (Eds.), International Einheitliches Kaufrecht, Praktiker-Kommentar und Vertragsgestaltung zum CISG, 2nd ed., Frankfurt am Main 2016 *in para. 116*
SCHLECHTRIEM	SCHLECHTRIEM PETER, Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods, Vienna 1986 *in para. 112*

SCHLECHTRIEM/ SCHROETER	SCHLECHTRIEM PETER/SCHROETER ULRICH G., Internationales UN-Kaufrecht, 6th ed., Tübingen 2016 *in para. 110*
SCHLECHTRIEM/ SCHWENZER	SCHLECHTRIEM PETER/SCHWENZER INGEBORG, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Art. 7 *in para. 110*
SCHMIDT-KESSEL	SCHMIDT-KESSEL MARTIN in: SCHLECHTERIEM PETER/ SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Art. 8 *in para. 4*
SCHMITTHOFF	SCHMITTHOFF CLIVE, Hardship and Intervener Clauses, Journal of Business Law, 1980, pp. 82-98 *in para. 30*
SCHWENZER, Force Majeure	SCHWENZER INGEBORG, Force Majeure and Hardship in International Sales Contracts, Victoria University of Wellington Law Review, Vol. 39, pp. 709-725. *In paras 110, 128*

SCHWENZER, Commentary	SCHWENZER INGEBORG, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Art. 79 *in paras 110, 135*
SCHWENZER/FOUNTOULAKIS/DIMSEY	SCHWENZER INGEBORG/FOUNTOULAKIS CHRISTIANA/DIMSEY MARIEL, International Sales Law, 2nd ed., Oxford/Portland 2012 *in paras 21, 110*
SCHWENZER/HACHEM	SCHWENZER INGEBORG/HACHEM PASCAL, in: SCHLECHTRIEM PETER/SCHWENZER INGEBORG (Eds.), Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed., Oxford 2016, Art. 6 *in paras 115, 122*
SCHWENZER/HACHEM/KEE	SCHWENZER/HACHEM/KEE, Global Sales and Contract Law, Oxford 2012 *in paras 99, 116*
Seventh Secretariat Note	SECRETARY-GENERAL OF THE UNITED NATIONS, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, 18th Session, Vienna 3 – 21 June 1985 No. A/CN.9/264 *in para. 49*

SHEPPARD SHEPPARD STEPHEN MICHAEL, Bouvier Law Dictionary, Compact Edition, New York 2011

in paras 98, 123

Sixth Secretariat Note SECRETARY-GENERAL OF THE UNITED NATIONS, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, 18th Session, Vienna
3 – 21 June 1985
No. A/CN.9/263

in para. 36

SMEUREANU SMEUREANU ILEANA M., Confidentiality in International Arbitration, Alphen aan den Rijn 2011

in para. 69

STACHER STACHER MARCO, The Authority of Para-Regulatory Texts, in: FAVALLI DANIELE (Ed.), The Sense and Non-sense of Guidelines, Rules, and other Para-regulatory Texts in International Arbitration, ASA Special Series No. 37, New York 2015, pp. 107-126

in para. 59

TALLON TALLON DENIS, in: BIANCA CESARE MASSIMO/BONNELL MICHAEL JOACHIM (Eds.), Commentary on the International Sales Law – The 1980 Vienna Sales Convention, Milan 1987, Art. 79

in para. 110

TAO	JINGZHOU TAO, Document Production in Chinese International Arbitration Proceedings, ICCA Congress Series, Vol. 13, 2006, pp. 597-621 *in para. 58*
UNCITRAL Model Law Digest	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, UNCITRAL, New York, 2012 *in para. 49*
UPICC Commentary	International Institute for the Unification of Private Law (UNIDROIT), Official Comments on Articles of the 2016 UNIDROIT Principles, Rome 2016 Rome 2016 *in paras 113, 121, 126, 135*
VALIOTI	VALIOTI ZOI, Passing of Risk in International Sale Contracts: A Comparative Examination of the Rules on Risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and Incoterms 2000, available at: http://www.cisg.law.pace.edu/cisg/biblio/valioti1.html#243 *in para. 122*

VAN VECHTEN VAN VECHTEN VEEDER, Are the IBA Rules "Perfectible"?, in: GIOVANNINI TERESA/MOURRE ALEXIS (Eds.), Written Evidence and Discovery in International Arbitration, New Issues and Tendencies, ICC Services, Paris 2009, pp. 321-337

in para. 59

VENEZIANO VENEZIANO ANNA, UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court, Uniform Law Review, Vol. 15(1), 2010, pp. 137–149

in para. 110

VOSER VOSER NATHALIE, Best Practices: What Has Been Achieved and What Remains to be Done?, in: WIRTH MARKUS (Ed.), Best Practices in International Arbitration, ASA Special Series No. 26, Zurich/Basel 2006, pp. 1-17

in para. 59

WAINCYMER WAINCYMER JEFFREY, Procedure and Evidence in International Arbitration, Alphen aan den Rijn 2012

in paras 59, 62, 69

Working Group	UNCITRAL, Revised Draft Articles A to G on Adaptation and Supplementation of Contracts, Commencement of Arbitral Proceedings, Minimum Contents of Statements of Claim and Defense, Language in Arbitral Proceedings, Court Assistance in Taking Evidence, Termination of Arbitral Proceedings and Period for Enforcement of Arbitral Award, 6th Session, Vienna 29 August – 9 September 1983 No. A/CN.9/WG.II/WP.44 *in paras 42, 43, 44*

Index of Court Decisions

CISG-Online 1414 Moist Towelettes Production Machine Case
[GER 2006] Higher Regional Court of Stuttgart
15 May 2006
CISG-Online No. 1414

in para. 4

Singapore

Tjong Very Sumito Case Tjong Very Sumito and others v. Anting Investments Pte Ltd
[SG, 2006] Court of Appeal of Singapore
Case No. 348/2008
26 August 2009

in para. 24

Daimler Case Daimler South East Asia Pte Ltd v. Front Row Investment Hold-
[SG 2012] ings Pte Ltd
High Court of Singapore
Case No. 157/2012
31 July 2012

in para. 50

Rals Case Rals International Pte Ltd v. Cassa di Risparmio di Parma e Piacenza
[SG, 2016] SpA
Court of Appeal of Singapore
Case No. 75
2016

in para. 16

BCY Case	BCY v. BCZ
[SG, 2016]	High Court of Singapore
	Decision No. 249
	06 November 2016
	in paras 16, 17

Switzerland

CISG-Online 1012	TETA Case
[SUI, 2005]	Federal Supreme Court of Switzerland
	5 April 2005
	CISG-Online No. 1012
	in para. 4
CISG-Online 1740	Fruit and Vegetables Case
[SUI, 2008]	Commercial Court of the Canton of Aargau
	5 February 2008
	CISG-Online No. 1740
	in para. 4

Ukraine

Corn Case	Corn Case
[UA, 2012]	International Commercial Arbitration Court at the Ukraine Chamber of Commerce and Trade
	23 January 2012
	CLOUT Case No. 1405
	in paras 115, 117

United Kingdom

Naviera Case	Naviera Amazonica Peruana v Compania Internacional De Seguros
[UK, 1988]	Del Peru
	Court of Appeal of England and Wales
	1 Lloyd's Rep 116
	1988
	in para. 50
Paul Smith Case	Paul Smith Ltd. V. H&S International Holding Co. Inc.
[UK, 1991]	The High Court of Justice Queen's Bench Division
	1 Lloyd's Rep 127
	18 February 1991
	in para. 17
Sumimoto Heavy Industries Case	Sumimoto Heavy Industries Ltd. V. Oil and Natural Gas Commis-
[UK, 1994]	sion
	The High Court of Justice Queen's Bench Division
	1 Lloyd's Rep 45
	in para. 17
Sonatrach Case	Sonatrach Petroleum Corporation (BVI) v. Ferrell International Ltd
[UK, 2001]	The High Court of Justice Queen's Bench Division
	Case No. EWHC 481
	4 October 2001
	in para. 17

Leibinger Case	Leibinger v. Stryker Trauma GmbH
[UK, 2006]	Court of Appeal of England and Wales
	Case No. APP.L.R. 03/31
	31 March 2006
	in para. 21
C Case	C v. D
[UK, 2007]	Court of Appeal of England and Wales
	Case No. EWCA Civ 1282
	2007
	in para. 16
Sulamérica Case	Sulamérica Cia Nacional De Seguros S.A. and Ors v. Enesa Engenharia S.A.
[UK, 2012]	The High Court of Justice Queen's Bench Division
	Case No. EWCA Civ 638
	2012
	in para. 16, 19
Arsanovia Case	Arsanovia Ltd, Burley Holdings Ltd and Unitech Ltd v. Cruz City 1 Mauritius Holdings
[UK, 2012]	The High Court of Justice Queen's Bench Division
	Case No. EWHC 3702
	20 December 2012
	in paras 17, 21

USA

JJ Ryan & Sons Case	JJ Ryan & Sons, I.c v. Rhone Poulenc Textile, SA, 863,
[USA, 1988]	U.S. Court of Appeals, Fourth Circuit
	Case No. 863 F.2d 315
	13 December 1988
	in para. 31
Iran Aircraft Case	Iran Aircraft Indus. V. Avco. Corp.
[USA, 1992]	U.S. Court of Appeals, Second Circuit
	Case No. 980 F. 2d 141
	24 November 1992
	in para. 76
CISG-Online 342	MCC-Marble Ceramic Center Inc. V. Ceramica Nuova D'Agostino
[USA, 1998]	S.p.A.
	U.S. Court of Appeals, Eleventh Circuit
	29 June 1998
	CISG-Online No. 342
	in para. 4, 36
CISG-online 767	Château des Charmes Wines Ltd. V. Sabate USA Inc., Sabate S.A.
[USA, 2003]	U.S. Court of Appeals, Ninth Circuit
	5 May 2003
	CISG-online No. 767
	in para. 4

Index of Arbitral Awards

Reference

Ad-hoc Arbitration

Aminoil Case	The State of Kuwait v. The American Independent Ol Company,
[1982]	21 I.L.M. 976
	24 March 1982
	in para. 43
1976 Case	Methanex Coproation v. United States, Final Award on Jurisdiction
[2005]	and Merits 44 ILM 1345, Inside US Trade, 19 August 2005, 12, IIC 167
	3 August 2005
	in para. 72

ICC Arbitration

ICC Case No. 2291	ICC Case No. 2291, 1975
[1976]	in : Clunet, Journal du Droit International, 1976,
	pp. 989 et seqq.
	In para. 106
ICC Case No. 6379	Principal v. Distributor
[1990]	Final Award
	ICC Case No. 6379, 1990
	in: VAN DEN BERG ALBERT JAN (Ed.), Yearbook Commercial Arbitration 1992, Vol. 17, pp. 212-220
	in para. 6

ICC Case No. 6850	Manufacturer Y SA v. Distributor X GmbH
[1992]	Final Award
	ICC Case No. 6850
	1992
	in: VAN DEN BERG ALBERT JAN (Ed.), Yearbook Commercial Arbitration 1998, Vol. 23, pp. 37
	in para. 6
ICC Case No. 16655	ICC Award No. 16655
[2011]	2011
	in: International Journal of Arab Arbitration, 2012, Vol. 4(2), pp. 125-215
	in para. 59

ICSID

Noble Ventures Case [2005]	Noble Ventures Inc. v. Romania
	12 October 2005
	ICSID Case No. ARB/01/11
	in para. 59
EDF Services Case [2009]	EDF (Services) Limited v. Romania
	8 October 2009
	ICSID Case No. ARB/05/13
	in para. 72

Index of Legal Acts and Rules

Cited as	Reference
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
HKIAC Rules 2013	Hong Kong Arbitration Rules, 2013
HKIAC Rules	Hong Kong Arbitration Rules, 2018
Model Law	UNCITRAL Model Law on International Commercial Arbitration (Vienna, 21 June 1985, with the 2006 amendments)
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
UPICC	UNIDROIT Principles of International Commercial Contracts, 2016

Statement of Facts

The "**Parties**" to this arbitration ("**Arbitration**") are Phar Lap Allevamento ("**CLAIMANT**"), seller of frozen racehorse semen for artificial insemination based in Mediterraneo, and Black Beauty Equestrian ("**RESPONDENT**"), owner of a racehorse stable in Equatoriana.

On 21 March 2017, RESPONDENT contacted CLAIMANT inquiring about frozen racehorse semen. **During negotiations,** the Parties agreed on a choice-of-law clause in favour of Mediterranean Law and on an arbitration clause ("**Arbitration Agreement**") which provides for Danubia as the seat of arbitration. Regarding delivery RESPONDENT insisted on DDP in order to benefit from CLAIMANT's experience in transportation. In order not to burden CLAIMANT with all DDP-related risks the Parties also agreed on a hardship clause ("**Hardship Clause**").

On 6 May 2017, the Parties signed the contract ("**Contract**") which obligated CLAIMANT to ship three instalments of racehorse Nijinski III's frozen semen, for a total of 100 doses.

On 19 December 2017, Equatoriana imposed a 30 % tariff on "*agricultural goods*" from Mediterraneo.

On 20 January 2018, the Parties, to their great surprise, learned that frozen racehorse semen also fell under the category of "*agricultural goods*". CLAIMANT immediately notified RESPONDENT and informed it that the delivery of the third instalment of 50 doses would result in immense additional costs.

On 21 January 2018, RESPONDENT promised CLAIMANT that an agreement on the price would certainly be found and urged it to deliver. Relying on RESPONDENT's promise, CLAIMANT delivered the last instalment on 23 January 2018.

On 12 February 2018, RESPONDENT changed horses in midstream and abruptly ended renegotiations on the new price, leaving CLAIMANT, already financially endangered, with a massive loss of USD 1,250,000.

On 31 July 2018, CLAIMANT initiated arbitration proceedings against RESPONDENT under the HKIAC Rules asking the tribunal to adapt the price.

Subsequently, at an annual breeder conference, CLAIMANT learned that RESPONDENT, in similar arbitration proceedings, had requested an adaptation of the price due to a tariff imposition. Yet, in the present proceedings, RESPONDENT vigorously denies both the tribunal's jurisdiction to adapt the price and the actual need to do so. CLAIMANT thus seeks to introduce the Partial Interim Award from the other arbitration proceedings as evidence of RESPONDENT's contradictory behaviour.

Summary of Argument

Issue A: The Tribunal has jurisdiction to adapt the Contract. The Tribunal is authorized under the Arbitration Agreement to adapt the Contract, exactly as the Parties had intended: "[*RESPONDENT's*] *Mr. Antley replied that in his view it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" *(Exh. C 8, p. 17 para. 4)*. This authorization is revealed by an interpretation of the Arbitration Agreement under Mediterranean Law, by which it is governed. However, even if, as RESPONDENT alleges, Danubian Law governed the Arbitration Agreement, the Tribunal would be authorized to adapt the Contract. The *lex arbitri*, Danubian Arbitration Law, does not interfere with this authorization in any way. The express authorization requirement in Danubian Arbitration Law does not apply to the case at hand. In the alternative, the Parties validly derogated from it. Thus, the Tribunal has jurisdiction to adapt the Contract

Issue B: CLAIMANT is entitled to submit the evidence from the other arbitration proceedings. The Tribunal has full discretion in deciding on the admissibility of evidence, which it should exercise in accordance with international practice. The presumptive admissibility of evidence cannot be rebutted in the case at hand, as there are no grounds to exclude the Partial Interim Award from RESPONDENT's other arbitration proceedings. In particular, the evidence in question is relevant and material to the outcome of the present case, as it demonstrates RESPONDENT's contradictory behaviour. Furthermore, no confidentiality interests preclude its admission and CLAIMANT had no involvement whatsoever in originally obtaining it. Finally, CLAIMANT's right to be heard would be violated if the evidence in question were excluded. Thus, CLAIMANT is entitled to submit the evidence from the other arbitration proceedings.

Issue C: CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price. The 30 % tariff imposed by Equatoriana came very unexpectedly for the Parties and caught even informed circles off guard. It caused CLAIMANT a massive loss of USD 1,250,000, bringing it to the verge of insolvency. The tariff thus amounts to hardship under the Parties' contractual Hardship Clause. In the alternative, it amounts to hardship under Art. 79 CISG. When CLAIMANT initiated renegotiations on the price, RESPONDENT promised that an agreement would certainly be found and urged CLAIMANT to deliver. However, RESPONDENT did not keep its end of the bargain. It abruptly broke off renegotiations and refused to pay any additional amount. Given this failure of renegotiations, CLAIMANT is entitled to resort to the Tribunal for an adaptation of the price. Thus, CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price

A. THE TRIBUNAL HAS JURISDICTION TO ADAPT THE CONTRACT

1 The Tribunal has jurisdiction to adapt the Contract. In the case at hand, jurisdiction is only disputed as it relates to the Tribunal's power to adapt the Contract (*PO 2, p. 61 para. 48*). Thus, the term jurisdiction will hereafter be used to refer to this power. The framework for the present Arbitration is established by the Parties' Arbitration Agreement and the *lex arbitri*, i.e. the law governing the Arbitration. In the case at hand, the Tribunal is authorized to adapt the Contract under the Arbitration Agreement [**I**]. The *lex arbitri* does not require that this authorization be express [**II**]. The Tribunal therefore has jurisdiction to adapt the Contract.

I. The Tribunal is authorized to adapt the Contract under the Arbitration Agreement

2 The Tribunal is authorized to adapt the Contract under the Arbitration Agreement. This is revealed by an interpretation of the Arbitration Agreement, conducted pursuant to the law by which it is governed. The Parties agreed on Mediterranean Law to govern the Arbitration Agreement [**1**]. In the alternative, Mediterranean Law governs the Arbitration Agreement as the law with the closest connection [**2**]. An interpretation of the Arbitration Agreement according to Mediterranean Law shows that the Tribunal is authorized to adapt the Contract [**3**]. However, even if Danubian Law governed the Arbitration Agreement, the Tribunal would be authorized to adapt the Contract [**4**].

1. The Parties agreed on Mediterranean Law to govern the Arbitration Agreement

3 In clause 14 of their Contract, the Parties included a choice-of-law clause which reads as follows: "*this Sales Agreement shall be governed by the Law of Mediterraneo including the CISG*" (*Exh. C 5, p. 14 para. 14*). An interpretation of this choice-of-law shows that it applies to the Arbitration Agreement. Thus, the Parties agreed on Mediterranean Law to govern the Arbitration Agreement.

4 The choice-of-law clause is part of a sales contract governed by the CISG. Since the CISG also applies to the interpretation of choice-of-law clauses, the clause must be interpreted pursuant to Art. 8 CISG (*CISG-Online 767 [USA 2003]; CISG-Online 1414 [GER 2006]; SCHMIDT-KESSEL, Art. 8 para. 5*). According to Art. 8(1) CISG, the parties' common intent is primarily relevant for the interpretation of an agreement (*CISG-Online 1012 [SUI, 2005]; SCHMIDT-KESSEL, Art. 8 para. 22; SCHWENZER/ FOUNTOULAKIS/DIMSEY, p. 60*). If the parties' common intent cannot be established, pursuant to Art. 8(2) CISG, an agreement has to be interpreted according to the understanding of a reasonable third person of the same kind, placed in the same external circumstances (*CISG-Online 1740 [SUI, 2008]; SCHMIDT-KESSEL, Art. 8 para. 25*). For an interpretation, all surrounding circumstances must be considered as set forth in Art. 8(3) CISG (*CISG-Online 342 [USA, 1998]; SCHMIDT-KESSEL, Art. 8 para. 32*). The wording [**a**] and

the negotiations [**b**] show that the choice-of-law clause in favour of Mediterranean Law applies to the Arbitration Agreement.

a) The wording shows that the choice-of-law clause applies to the Arbitration Agreement

5 The wording of the choice-of-law clause "***this Sales Agreement*** *shall be governed by the Law of Mediterraneo including the CISG*" (*Exh. C 5, p. 14 para. 14, emphasis added*) shows that it applies to the Arbitration Agreement. "*Sales Agreement*" is the title of the Contract as a whole (*Exh. C 5, p. 13*) and hence refers to all of its provisions, including the Arbitration Agreement. There is no indication of any distinction between the law applicable to the substance of the Contract and the law governing the Arbitration Agreement. Consequently, when making a choice-of-law for the "*Sales Agreement*" the Parties intended for it to apply to the Arbitration Agreement contained therein.

6 Contrary to RESPONDENT's allegation (*RnoA, p. 31 para. 14*), the doctrine of separability does not hinder this interpretation. The doctrine of separability merely states that an arbitration agreement ***may*** be governed by a law different from the one governing the main contract (*BORN, p. 475; MOSER/BAO, para. 4.19*). It does not entail that this necessarily must be the case (*LEW/MISTELIS/KRÖLL, para. 6.9*). Indeed, it is common that parties make a choice-of-law in their contract and mean to apply it to the arbitration agreement contained therein (*ICC Case No. 6379 [1990]; ICC Case No. 6850 [1992]*). The wording of the choice-of-law clause reflects that this was the Parties' intent in the case at hand.

7 Therefore, the wording of the choice-of-law clause in favour of Mediterranean Law shows that it applies to the Contract in its entirety, including the Arbitration Agreement.

b) The negotiations show that the choice-of-law clause applies to the Arbitration Agreement

8 The finding that the term "*Sales Agreement*" in the choice-of-law clause also refers to the Arbitration Agreement is further corroborated by the negotiation history. Throughout their negotiations, it was the Parties' common understanding that one uniform law should govern the Contract in its entirety, including the Arbitration Agreement. The law they chose was Mediterranean Law. Thus, it was the Parties' common intent to apply the choice-of-law clause in favour of Mediterranean Law to the Arbitration Agreement.

9 The very first e-mail CLAIMANT's Ms Napravnik sent to RESPONDENT's Mr Antley included CLAIMANT's Standard Frozen Semen Sales Agreement, which contained a uniform choice-of-law clause in favour of Mediterranean Law and proposed the jurisdiction of Mediterraneo (*Exh. C 3, p. 11; PO 2, p. 55 para. 4*). In its reply, RESPONDENT objected to the jurisdiction of Mediterraneo but acknowledged Mediterranean Law as the uniform law governing the Contract (*ibid.*).

10 To address RESPONDENT's objection to the jurisdiction of Mediterraneo, CLAIMANT then introduced arbitration without making any alteration regarding the applicable law (*Exh. C 4, p. 12 para. 5*). In response, RESPONDENT agreed to arbitration and proposed to adopt the HKIAC Model Clause. This Model Clause includes a choice-of-law clause (*MOSER/BAO, paras. 4.24 et seqq.*). RESPONDENT, in completing the Model Clause, designated Equatorianan Law. This was the only time RESPONDENT proposed an alternative to Mediterranean Law as the law governing the Arbitration Agreement. RESPONDENT then asked whether CLAIMANT had any objection to this proposal (*Exh. R 1, p. 33*).

11 CLAIMANT did indeed have an objection, as it promptly made clear in its reply to said proposal (*Exh. R 2, p. 34*). CLAIMANT informed RESPONDENT that it was not and would not be in a position to accept any other law than Mediterranean Law to govern the Contract: CLAIMANT has an internal policy prohibiting the submission of any contract to a foreign law without prior approval of CLAIMANT's creditors' committee (*ibid.*). Thus, CLAIMANT explained, any further discussion about applying a foreign law would be futile (*ibid.*). For this reason, CLAIMANT, in its reply, made a counterproposal for the Arbitration Agreement which specifically dropped the choice-of-law clause designating Equatorianan Law (*Exh. R 2, p. 34*). Furthermore, CLAIMANT again reiterated that the law applicable to the Sales Agreement could only remain Mediterranean Law (*ibid.*). In line with all previous communications, CLAIMANT was referring to the Contract in its entirety, including the Arbitration Agreement. Having just been informed about the impossibility of submitting any contract to a foreign law, RESPONDENT knew or could not have been unaware that CLAIMANT did not mean to submit the Arbitration Agreement, i.e. a contract, to a foreign law. As RESPONDENT continued the negotiations without any further comment on this point, CLAIMANT could only have understood RESPONDENT to have accepted that Mediterranean Law should govern the Contract in its entirety, including the Arbitration Agreement.

12 The Parties continued their negotiations under this common understanding regarding the applicable law during and after their meeting on 12 April 2017. In his post-meeting notes, RESPONDENT's Mr Antley recorded: "*Clarify in arbitration clause that neutral venue and applicable law*" (*Exh. R 3, p. 35*). Contrary to RESPONDENT's allegation (*RnoA, p. 30 para. 5*), this note does not suggest any intent to deviate from the Parties' common understanding established up to that point. In particular, it cannot be construed as indicating a preference on Mr Antley's part that Danubian Law should govern the Arbitration Agreement. In fact, neither side mentioned Danubian Law as an option even once throughout the Parties' extensive negotiations. Instead, Mr Antely must have meant to *"clarify"* that Mediterranean Law also governed the Arbitration Agreement by introducing an express reference to that effect into the Arbitration Agreement. At this point in the time, the question of the applicable law was no longer subject to negotiations, as is demonstrated by two facts: First, CLAIMANT's Ms Napravnik recalls that during this meeting, the Parties'

representatives "*shortly exchanged views on what still had to be **finalized***" (*Exh. C 8, p. 17*). The term "*finalized*" indicates that the Parties did not consider any major issues – such as the applicable law – as remaining open. Second, Mr Antley's note also stated to "*clarify in arbitration clause that neutral venue […]*" (*Exh. R 3, p. 35*), when in fact the Parties had already agreed on Danubia as the seat of arbitration (*Exh. C 5, p. 14 para. 15*). Thus, in Mr Antley's note, "*to clarify*" only meant to spell out what the Parties had already agreed on. Therefore, Mr Antley could have only meant to include an express reference into the Arbitration Agreement to record the Parties' understanding that Mediterranean Law should also govern the Arbitration Agreement.

13 The only reason this express reference was not included in the final Contract was Mr. Antley's and Ms Napravnik's accident, which led to their replacement (*Exh. C 8, p. 17*). However, their successors in the negotiation did not deviate from the common understanding established by their predecessors. In fact, they did not even discuss the issue of the applicable law at all or make any modifications to that effect, despite having access to the content of the prior negotiations, including the e-mail chain and the negotiators' notes (*Exh. R 3, p. 35; PO 2, p. 55 para. 5*). Hence, no deviation from the common understanding that Mediterranean Law should govern the Contract in its entirety, including the Arbitration Agreement, could have occurred.

14 Thus, the Parties conducted their negotiations under the common understanding that Mediterranean Law should govern the Contract in its entirety, including the Arbitration Agreement. Therefore, the negotiation history shows that the choice-of-law clause in favour of Mediterranean Law applies to the Arbitration Agreement.

15 Consequently, the wording of the choice-of-law clause as well as the negotiations show that it applies to the Arbitration Agreement. In contrast, there is nothing to suggest an agreement on Danubian Law. As a result, the Parties agreed on Mediterranean Law to govern the Arbitration Agreement.

2. In the alternative, Mediterranean Law governs the Arbitration Agreement as the law with the closest connection

16 Even if the Tribunal were to find no choice-of-law in favour of Mediterranean Law, the latter would govern the Arbitration Agreement as the law with the closest connection. In the absence of a choice-of-law regarding an arbitration agreement, it is governed by the law to which it has the closest connection (*C Case [UK, 2007]; Sulamérica Case [UK, 2012]; BCY Case [SG, 2016]; Rals Case [SG, 2016]; BORN, pp. 517 et seqq.*).

17 Under the closest connection approach, an express choice-of-law in the underlying contract strongly indicates the law applicable to the arbitration agreement. This may be illustrated by looking at a case of the

Commercial Court of England and Wales, a common law jurisdiction like Danubia (*PO 2, p. 61 para. 44*): In the *Sonatrach Case* [*UK, 2001*], the court was faced with a fact pattern closely analogous to the one at hand. A contract between a Japanese and an English company contained an arbitration clause. When a dispute arose, the question of which law governed the arbitration agreement came to the forefront. The arbitration agreement in question contained no express choice-of-law. However, the underlying contract set forth a choice-of-law clause in favour of English law. The court held that this clearly established a closest connection with English Law and summarized its view as follows: "*Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.*" (*ibid., para. 32*). This holding reflects a broad consensus in jurisprudence and scholarly writing (*Paul Smith Case [UK, 1991]; Sumimoto Heavy Industries Case [UK, 1994]; Arsanovia Case [UK, 2012]; BCY Case [SG, 2016]; DICEY/MORRIS/COLLINS, para. 16-017; REDFERN/HUNTER, para. 3.1*).

18 In the present case, the Parties included an express choice-of-law in favour of Mediterranean Law to govern the underlying Contract (*Exh. C. 5, p. 14, para. 14*). Therefore, the choice-of-law in the Parties' Contract is a strong indicator for a close connection to Mediterranean Law.

19 The presumption that the law of the underlying contract is the law with the closest connection allows for an exception, where there is such a close connection to a different law that it overrides the express choice-of-law in the underlying contract (*Sulamérica Case [UK, 2012]; BORN, pp. 517 et seqq.*). However, in the present case there is no such connection to any other law, in particular not to Danubian Law.

20 First, neither the Parties nor their performances have any connection to Danubian Law. Neither of the Parties have their domicile or business operation in Danubia (*NoA, p. 4 paras 2 and 4*). Additionally, the Contract was concluded in Mediterraneo, performance took place in Mediterraneo and Equatoriana and the goods did not spend a second in Danubian territory (*Exh. C 5, p. 14 para. 8; PO 2, p. 56 para. 13*). Thus, neither the Parties nor their performances have any connection to Danubian Law.

21 Second, the choice of Danubia as the seat of arbitration does not indicate a close connection to Danubian Law. Generally, where the underlying contract contains an express choice-of-law by the parties, the importance of the choice of the seat decreases (*Arsanovia Case [UK, 2012]*). In fact, there is even support for the view that, where the underlying contract contains an express choice-of-law, the seat should have no bearing on the applicable law whatsoever (*Leibinger Case [UK, 2006]*; *DICEY/MORRIS/COLLINS, para. 16-017*). In addition, parties choose a certain seat with a view to arbitral procedure and not for its substantive law (*BORN, p. 517*). In the present case, interpreting the Arbitration Agreement under Danubian Law does not reflect what the Parties wanted. Danubia was only chosen as a compromise because it represented a

neutral third country and not because there was any inherent connection between Danubian Law and the Parties or their business dealings (*Exh. R 2, p. 34*). Thus, the choice of Danubia as the seat of arbitration is of minor importance and cannot override the express choice-of-law clause in the underlying Contract.

22 Consequently, Mediterranean Law has the closest connection to the Arbitration Agreement. As a result, Mediterranean Law governs the Arbitration Agreement.

3. The Tribunal is authorized to adapt the Contract under the Arbitration Agreement interpreted according to Mediterranean Law

23 The Arbitration Agreement the Parties included in their Contract reads as follows: "***any dispute*** *arising out of this contract, including its 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 […]*" (*Exh. C 5, p. 14 para. 15, emphasis added*).

24 The term "*any dispute*" generally encompasses all types of differences, controversies or claims that may be asserted in arbitral proceedings (*Tjong Very Sumito Case [SG, 2006]; BORN, pp. 1347 et seqq.; BRUNNER, p. 496*). The present dispute, i.e. the adaptation of the Contract, is covered by the term "*any dispute*" and thus falls within the scope of the Arbitration Agreement. This is demonstrated by an interpretation of the Arbitration Agreement under Mediterranean Law.

25 According to consistent jurisprudence in Mediterraneo, the CISG applies to the interpretation of arbitration agreements in sales contracts governed by the CISG (*PO 1, p. 53 para. 4*). Moreover, arbitration agreements are interpreted broadly under Mediterranean Law (*NoA, p. 7 para. 16*). An agreement has to be interpreted pursuant to Art. 8(3) CISG (*supra para. 4*). The negotiations [**a**], the Arbitration Agreement's purpose [**b**], its contractual context [**c**] as well as its wording [**d**] demonstrate that adaptation of the Contract falls within its scope.

a) The negotiations show that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement

26 In their meeting on 12 April 2017, the Parties discussed the Arbitration Agreement and the Hardship Clause. CLAIMANT's Ms Napravnik emphasized that the Tribunal should be authorized to adapt the Contract in case the Parties could not agree on an amendment (*Exh. C 8, p. 17*). This was not merely a wish CLAIMANT brought to the negotiating table. It was the Parties' common understanding, as CLAIMANT's Ms Napravnik recalls: "*[RESPONDENT's] Mr Antley stated that in his view it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree […] that had also been my [Ms Napravnik's] preference and understanding of the existing provisions*" (*ibid.*). These statements illustrate the Parties' common understanding

that the Arbitration Agreement already authorized the Tribunal to adapt the Contract, even without containing an express authorization.

27 For the avoidance of doubt, the Parties intended to include an express reference into the Contract, even though they did not consider it necessary from a legal point of view (*Exh. C 8, p. 17 para. 4; Exh. R 3, p. 35, Mr Antley's note*). However, the Parties' common intention to include an express reference into the hardship clause could not be realized due to Mr Antley's and Ms Napravnik's accident (*ibid.*). The Arbitration Agreement was subsequently introduced into the Contract by Ms Napravnik's and Mr Antley's successors. It was only supplemented by adding the number of arbitrators and the language of arbitration (*PO 2, p. 55 para. 6*). Thus, the Arbitration Agreement was included in the Contract with wording that – according to the Parties' common understanding during the negotiations – already allowed for adaptation of the Contract.

28 Therefore, the negotiation history shows that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement.

b) The purpose of the Arbitration Agreement shows that the adaptation of the Contract by the Tribunal falls within its scope

29 The primary goal of arbitration agreements is to create one unified forum for the efficient resolution of disputes (*BORN, pp. 1345 et seqq.; GAILLARD/GOLDMAN, para. 478*). If the Parties had not authorized the Arbitral Tribunal to adapt the Contract, a potential contract adaptation would fall into the jurisdiction of a national court. Consequently, there would be two separate and different ways of dispute settlement depending on the precise type of the dispute. At no time did the Parties intend such a splitting of their access to legal action. On the contrary, they aimed for a single forum for dispute resolution. In addition, a splitting would mean that a contract adaptation would likely end up before a national court in either Mediterraneo or Equatoriana, where the Parties are domiciled. This was exactly what the Parties were trying to avoid by opting for arbitration in a neutral country (*Exh. C 4, p. 12*). Subsequently, the single forum for any dispute arising out of the Contract was meant to be the Arbitral Tribunal. Therefore, the purpose of the Arbitration Agreement shows that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement.

c) The contractual context shows that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement

30 The Arbitration Agreement is contained in a Contract that provides for a hardship clause (*Exh. C 5 p. 14 para. 12*). It is a natural feature of a hardship clause that it may give rise to issues of contract adaptation (*BERGER p. 6; BRUNNER, p. 22; KRÖLL, p. 138*). In fact, the terms "*hardship clause*" and "*adaptation clause*"

are sometimes even used as synonyms (*SCHMITTHOFF, p. 84*). As the Parties put into place a mechanism that enables an adaptation of the Contract, they naturally also intended to give the Tribunal the necessary procedural power to do so. No reasonable party would opt for a divergence between what the Tribunal *ought to do* and what it *can do*. Therefore, the contractual context shows that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement.

d) The wording shows that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement

31 Contrary to RESPONDENT's allegation (*RnoA, p. 31 para. 13*), the modification of the wording of the HKIAC Model Clause by the Parties does not limit the scope of the Arbitration Agreement. The adjustment of the Model Clause from "*any dispute, controversy, difference or claim*" to "*any dispute*" had the sole purpose of simplifying and streamlining the wording of the Arbitration Agreement (*Exh. R 1, p. 33*). The different standard formulae used in arbitration agreements do not materially reduce or extend their scope but are mostly semantic (*JJ Ryan & Sons Case [USA, 1988]; BORN, p. 1346; cf. Oxford English Dictionary and Black's Law Dictionary, which even list "controversy" and "dispute" as synonyms*). If such changes to the wording altered the scope of arbitration agreements, considerable uncertainty would result as to the jurisdiction of tribunals in any given case. This would neither be in the interest of the Parties nor in line with the Arbitration Agreement's purpose of avoiding a splitting of the access to dispute settlement (*supra para. 29*). Therefore, the wording of the Arbitration Agreement shows that the adaptation of the Contract by the Tribunal falls within the scope of the Arbitration Agreement.

32 Consequently, an interpretation of the Arbitration Agreement shows that contract adaptation falls within its scope. As a result, the Arbitration Agreement authorizes the Tribunal to adapt the Contract.

4. In any event, the Tribunal would be authorized to adapt the Contract even if Danubian Law governed the Arbitration Agreement

33 As demonstrated, the Tribunal's authorization to adapt the Contract results from comprehensive interpretation of the Arbitration Agreement (*paras 2 et seqq.*). However, the four corners rule contained in Danubian Contract Law restricts interpretation to the wording of contracts and excludes extraneous evidence from being considered (*PO 2, p. 61 para. 45*). Despite this rule, the Tribunal should consider all relevant evidence in its interpretation of the Arbitration Agreement, even if it were to find that Danubian Law governed the Arbitration Agreement.

34 Since the four corners rule governs interpretation, it is considered a rule of substantive law (*PO 2, p. 61 para. 45*). However, it contains a procedural aspect, as it prevents tribunals from considering certain categories of evidence.

35 This prohibition conflicts with the applicable procedural law. According to Art. 19(1) Danubian Arbitration Law, parties may freely agree on the procedure applicable to their arbitration, including questions of evidence. In the present case, the Parties agreed on the HKIAC Rules (*Exh. C 5, p. 14 para. 15*), which state that the tribunal may freely decide on the admissibility, relevance and weight of evidence (Art. 22.2 HKIAC Rules).

36 This conflict between quasi-procedural rules of interpretation, like the four corners rule, and the discretion awarded to parties and tribunals in Art. 19 Model Law, identical to Art. 19 Danubian Arbitration Law, was raised during the preparatory works of the Model Law (*HOLTZMANN/NEUHAUS, p. 567; Sixth Secretariat Note, Art. 19 para. 4*). The clear consensus was that the discretion rule in Art. 19 Model Law should prevail in such situations of conflict. This holds true because Art. 19 Model Law more specifically addresses the question of admissibility, relevance and weight of evidence than does the applicable substantive law (*HOLTZMANN/NEUHAUS, p. 567*). Furthermore, it was agreed that, whenever possible, arbitration should not be burdened by technical rules of evidence. Remarkably, it was the delegate of the United States, whose domestic law also contains the four corners rule (*CISG-Online 342 [USA, 1998*]), who stated that parties choose arbitration precisely "*to be free of the technical rules of evidence, be they procedural or substantive*" (*HOLTZMANN/NEUHAUS, p. 567*).

37 The Tribunal should take into account the drafters' position and resolve the conflict in favour of the permissive procedural law and the Parties' agreement on the HKIAC Rules.

38 Consequently, the Tribunal should consider all relevant evidence in interpreting the Arbitration Agreement. As a result, such a comprehensive interpretation establishes that the Parties did in fact authorize the Tribunal to adapt the Contract (*supra paras 2 et seqq.*).

II. The *lex arbitri* does not require express authorization for the Tribunal to adapt the Contract

39 As demonstrated (*supra paras 2 et seqq.*) the Tribunal is authorized to adapt the Contract under the Arbitration Agreement. This authorization is sufficient, because the *lex arbitri* does not require express authorization for the Tribunal to adapt the Contract. Danubian Arbitration Law is the *lex arbitri* in the present case (*Exh. C 5, p. 14 para. 15; PO 1, p. 53 para. 4*). Art. 28(3) Danubian Arbitration Law contains an express authorization requirement for the conferral of exceptional powers to arbitral tribunals. According to jurisprudence in Danubia, this provision extends beyond its wording to cover contract adaptation (*PO 2, p. 60 para. 36*). However, Art. 28(3) Danubian Arbitration Law is not applicable to the present case [**1**]. In the alternative, the Parties validly derogated from Art. 28(3) Danubian Arbitration Law [**2**].

1. The express authorization requirement in Danubian Arbitration Law is not applicable

40 The express authorization requirement in Art. 28(3) Danubian Arbitration Law for the conferral of exceptional powers is not applicable to the present case. Simply put, no exceptional powers need be conferred on the Tribunal to allow adaptation of the Contract. Danubian Arbitration Law is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") (*PO 1, p. 53 para. 4; PO 2, p. 57 para. 14*). Therefore, an analysis of Danubian Arbitration Law must take into account the preparatory works of the Model Law. This analysis shows that the express authorization requirement in Art. 28(3) Danubian Arbitration Law does not apply to the present case.

41 The drafters of the Model Law stressed the importance of distinguishing two types of contract adaptation:

42 The first type of contract adaptation is at issue where contract adaptation forms the independent objective of the proceedings. With this type of adaptation, the approach is forward-looking: A tribunal changes existing contractual terms with effect for the future (*HOLTZMANN/NEUHAUS, p. 1116; KRÖLL, Gap-Filling, p. 12*). The drafters of the Model Law wrote that in such cases, "*the goal is to rewrite one or more terms of the contract,* ***which would then have to be carried out by the parties***" (*Working Group, para. 8, emphasis added*). Consider, by way of example, a long-term supply contract between two parties with numerous instalments and corresponding payments. If contract adaptation were the independent objective of the proceedings regarding this contract, the tribunal would render a final award ordering the modification of the price for future instalments.

43 In contrast, the second type of contract adaptation occurs where the adaptation of a contractual provision constitutes a preliminary decision. Characteristic for this type of contract adaptation is that the final award itself does not order contract adaptation (*BERGER, p. 6; KRÖLL, p. 7; UN Working Group, para. 9*). An example illustrating this second type of contract adaptation would be a tribunal ordering in its final award an additional payment by one of the parties because of hardship. In order to render this final award, the tribunal would have to adjust the contractual price as a necessary preliminary decision (*Aminoil Case [1982]; CISG-Online 1963 [BEL, 2009]*).

44 Contract adaptation as a preliminary decision is unproblematic with regards to tribunals' authorization. Far from being an exceptional power of the tribunal, such adaptation is considered "*an inherent part of deciding the legal dispute*" (*HOLTZMANN/NEUHAUS, p. 1116*). It is thus covered by the general authority granted to arbitral tribunals (*BERGER, p. 6; KRÖLL, Gap-Filling, p. 12*). The drafters of the Model Law summed this up as follows: *"Such adaptation of the contract would form an interim step in the process of making the final decision.* ***For this type of adaptation no special authorization by the parties is needed*** *and no provision need be included in the model law"* (*Working Group, para. 9, emphasis added*).

45 In the present case, by seeking additional payment, CLAIMANT asks the Tribunal to adapt the Contract as a preliminary decision. The Tribunal is only asked to interpret the substantive law, in particular the Hardship Clause and the CISG (*NoA, pp. 7 et seqq. Paras 18 et seqq.*) The Tribunal's final award would not have to order an adaptation of any contractual provision but only additional payment. This is demonstrated by the wording of CLAIMANT's prayer for relief: *"[RESPONDENT] is ordered to pay to [CLAIMANT] an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen"* (*NoA, p. 8*). Nowhere does CLAIMANT move for an adaptation of the price with effect for the future. In fact, the delivery concerned was the final instalment under the Contract and has already occurred (*cf. Exh. C 5, p. 14 paras 6 and 8*). An adaptation relating to future obligations of the Parties is thus not possible, meaning the case at hand deals with adaptation as a preliminary decision.

46 Consequently, the adaptation of the Contract by the Tribunal would not constitute the exercise of an exceptional power. As a result, the express authorization requirement of Art. 28(3) Danubian Arbitration Law is not applicable.

2. In the alternative, the Parties validly derogated from the express authorization requirement

47 As demonstrated, the express authorization requirement in Art. 28(3) Danubian Arbitration Law is not applicable because the case at hand deals with adaptation as a preliminary decision (*supra paras 40 et seqq.*). However, even if the Tribunal were to conclude that the express authorization requirement in Art. 28(3) Danubian Arbitration Law applied, the Parties would still have been free to derogate from this requirement [**a**] and in fact validly did so [**b**].

a) The Parties were free to derogate from the express authorization requirement

48 Art. 28(3) Danubian Arbitration Law is a non-mandatory provision, meaning the Parties were free to derogate from the express authorization requirement contained therein.

49 Art. 19(1) Danubian Arbitration Law guarantees the parties' right to agree freely on the procedure applicable to their arbitration (*HOLTZMANN/NEUHAUS, p. 564; Seventh Secretariat Note, Art. 19 para. 1*). This reflects the overriding principle of party autonomy, central to the system of commercial arbitration (*BINDER, pp. 280 et seqq.; BORN, pp. 84 and 2130; GAILLARD/GOLDMAN, para. 304; UNCITRAL Model Law Digest, pp. 100 et seqq.*). Thus, parties may deviate by agreement from any non-mandatory provision of the *lex arbitri* (*BINDER, p. 280; HOLTZMANN/NEUHAUS, p. 565; Seventh Secretariat Note, Art. 19 para. 1; UNCITRAL Model Law Digest, pp. 100 et seqq.*). In analysing whether Art. 28(3) Danubian Arbitration Law is a mandatory provision, the Tribunal should take into account what provisions are considered mandatory under the Model Law. While the Model Law does not list its mandatory provisions, only those provisions which are of fundamental importance are deemed to be mandatory (*HOLTZMANN/NEUHAUS,*

p. 564; Seventh Secretariat Note, Art. 19 para. 1; UNCITRAL Model Law Digest, p. 100 et seq.). Among those are the principle of equal treatment and similar matters (*BINDER, p. 280; HENDERSON, p. 899; HOLTZMANN/NEUHAUS, p. 564; Seventh Secretariat Note, Art. 19 para. 3*). The express authorization requirement in Art. 28(3) Model Law, however, is not considered a mandatory provision according to the drafters' intention (*ibid.*). There is no indication that Danubian jurisprudence takes the opposite view. Therefore, the express authorization requirement in Art. 28(3) Danubian Arbitration Law is a non-mandatory provision, meaning the Parties were free to derogate from it.

b) The Parties derogated from the express authorization requirement

50 The Parties were not only free to derogate from the express authorization requirement in Art. 28(3) Danubian Arbitration Law but they, in fact, did so by agreeing on the Hong Kong International Arbitration Centre Administered Arbitration Rules 2018 ("**HKIAC Rules**"). The derogation from non-mandatory provisions of a *lex arbitri* via a choice of arbitration rules is considered unproblematic, as the arbitration rules are an integral part of the agreement between the parties (*Naviera Case [UK, 1988]; Daimler Case [SG 2012]; HENDERSON, pp. 896 et seqq.*). Thus, a derogation from the non-mandatory Art. 28(3) Danubian Arbitration Law via the HKIAC Rules is possible.

51 In the present case, the Parties chose to have their Arbitration governed by the HKIAC Rules (*Exh. C 5, p. 14 para. 15*). Under the HKIAC Rules, express authorization requirements are the exception rather than the rule. The HKIAC Rules only require express authorization by the Parties for unusually high arbitrators' fees (Art. 9.5), the joinder of additional parties (Art. 27.1(b)) and for decisions by tribunals as *amiable compositeur* or *ex aequo et bono* (Art. 36.2). This is an exhaustive listing of the matters for which the HKIAC Rules require express authorization. Thus, a conclusion *a contrario* shows that, unless express authorization is explicitly required, implied authorization by the parties is sufficient under the HKIAC Rules.

52 The HKIAC Rules do not contain any provision requiring express authorization by the Parties for the Tribunal to adapt the Contract. The first two matters listed above – arbitrators' fees and the joinder of additional parties – are undisputedly not at issue here. Decisions as *amiable compositeur* or *ex aequo et bono* require special authorization because they free tribunals from deciding based on the law but instead allow them to base their decision solely on their own conceptions of fairness or equity (*BINDER, pp. 337 et seqq.; BORN, pp. 2770 et seqq.; MOSER/BAO, paras 11.59 et seqq.*). In the case at hand, CLAIMANT does not ask the Tribunal to do anything of the sort but instead asks it to decide based on the Contract and the applicable substantive law (*NoA, p. 7 paras 18 et seqq.*). Thus, none of the provisions in the HKIAC Rules requiring express authorization apply to the case at hand, meaning the Tribunal does not require express authorization to adapt the Contract.

53 In the case at hand, the Parties deliberately agreed on the HKIAC Rules, including the permissive regime concerning the Tribunal's authorization to adapt the Contract (*supra paras 51 et seqq.*). Both sides explicitly referred to these rules in their correspondence on the introduction of the Arbitration Agreement (*Exh. R 1, p. 33; Exh. R 2, p. 34*). Thus, the HKIAC Rules are a direct manifestation of the Parties' common intent to allow for adaptation of the Contract without express authorization.

54 In contrast, the express authorization requirement in Art. 28(3) Danubian Arbitration Law was nowhere near the Parties' minds when negotiating the Arbitration Agreement. In fact, CLAIMANT's Ms Napravnik was not even aware of its existence. It was her opinion that the Arbitration Agreement as it stood on 11 April 2017 – without an express authorization – already allowed for contract adaptation by the Tribunal. This explains why she considered an explicit agreement unnecessary from a legal point of view (*Exh. C 8, p. 17*). This is not surprising as Ms Napravnik was only familiar with the Model Law as it is ordinarily interpreted and not with the unusual Danubian jurisprudence, which requires express authorization for contract adaptation (*PO 2, p. 57 para. 14*). Similarly, there is no indication that RESPONDENT's Mr Antley was aware of Danubia's exceptional practice regarding Art. 28(3) Model Law or that he ever communicated any knowledge to that effect to CLAIMANT. Lastly, neither Mr Antley's nor Ms Napravnik's successors in the negotiations ever made any reference to the express authorization requirement in Art. 28(3) Danubian Arbitration Law. To give best effect to the Parties' common intent, the Tribunal should give preference to the permissive regime of the HKIAC Rules explicitly chosen by the Parties over an unusual non-mandatory provision in Danubian Arbitration Law, of which they were not even aware.

55 Consequently, the express authorization requirement in Art. 28(3) Danubian Arbitration Law is not applicable and was in any event derogated from by the Parties. As a result, the *lex abritri* does not require express authorization for the Tribunal to adapt the Contract.

Conclusion Issue A:

The Tribunal has jurisdiction to adapt the Contract because it is authorized to do so under the Arbitration Agreement. This authorization results from an interpretation according to Mediterranean Law, which governs the Arbitration Agreement. However, the same conclusion results from an interpretation of the Arbitration Agreement under Danubian Law. The *lex arbitri* does not require that this authorization be express, because the express authorization requirement in Danubian Arbitration Law is not applicable. In the alternative, the Parties validly derogated from it. Therefore, the Tribunal has jurisdiction to adapt the Contract.

B. CLAIMANT is entitled to submit evidence from the other arbitration proceedings

56 At a breeder conference, it was brought to CLAIMANT's attention that RESPONDENT is involved in another arbitration. There, RESPONDENT asked the arbitral tribunal to adapt its contract with a third party due to hardship arising out of a tariff imposition. To date, a Partial Interim Award has been issued (*PO 2, para. 39, p. 60*). CLAIMANT seeks to introduce this Partial Interim Award as evidence in the present proceedings. The Tribunal has discretion to decide on the admissibility of this evidence and should exercise it in accordance with international practice [**I**]. In line with said practice, the Tribunal should admit the evidence in question, as there are no grounds to exclude it [**II**]. Otherwise, CLAIMANT's right to be heard would be violated [**III**].

I. The Tribunal should exercise its discretion on the admissibility of evidence in accordance with international practice

57 Pursuant to the applicable arbitration rules and the *lex arbitri*, the Tribunal has discretion to decide on the admissibility of evidence. Art. 22.2 HKIAC Rules as well as Art. 19(2)(sentence 2) Danubian Arbitration Law submit the admissibility of evidence to the Tribunal's discretion (*MOSER/BAO, para. 9.153*). Moreover, the Arbitration Agreement does not restrict the Tribunal's discretion regarding evidence in any way (*cf. Exh. C 5, p. 14 para. 15*). Consequently, the Tribunal has full discretion to determine the admissibility of the evidence from the other arbitration.

58 In the case at hand, CLAIMANT and RESPONDENT have different legal backgrounds and thus differing expectations regarding the taking of evidence. In order to accommodate these differing expectations, the Tribunal, in exercising its discretion, should consider a compromise between various methods of the taking of evidence (*DRYMER/GOBEIL, p. 212; MARGHITOLA, p. 16 et seq.; O'MALLEY, para. 9.74; TAO, p. 603*).The IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") represent such a compromise (*ASHFORD, p. 2; ELSING/TOWNSEND, p. 61*).

59 Further, the IBA Rules reflect international practice on the taking of evidence (*ASHFORD, p. 146; BERGER/KELLERHALS, para. 1313; KREINDLER, p. 158; KÜHNER, P. 667; O'MALLEY, para. 9.03 REDFERN/HUNTER, para. 6.95; STACHER, p. 119; VOSER, pp. 5 and 8; WAINCYMER, p. 757*). They are frequently used in commercial arbitration (*BORN, p. 2348; VAN VECHTEN, pp. 321 et seqq.*). This is specifically true for HKIAC arbitration (*MOSER/BAO, para. 9.155*). As the IBA Rules represent international practice, arbitral tribunals consult them as a reference point for the taking of evidence even without an explicit party agreement or reference to these rules (*ICC Case No. 16655 [2011]; Noble Ventures Case [2005]*).

60 In light of the above, the Tribunal should exercise its discretion on the admissibility of evidence in accordance with international practice, in particular with the IBA Rules.

II. The Tribunal should admit the evidence in question because there are no grounds for its exclusion

61 In conformity with the IBA Rules and international practice, the Tribunal should admit the Partial Interim Award as evidence. In the context of the IBA Rules, evidence is presumed admissible unless there exist grounds for its exclusion (*ASHFORD, p. 146*). This reflects a general tendency in arbitration to admit evidence in principle (*OMEROGLU, p. 3; PIETROWSKI, pp. 378 and 408;*). Art. 9(2) IBA Rules lists possible grounds for the exclusion of evidence. In the case at hand, none of these grounds are given. The evidence in question is relevant to the case and material to its outcome [**1**]. Furthermore, no confidentiality interests preclude the introduction of the evidence [**2**]. Lastly, CLAIMANT was not involved in the original obtaining of the evidence [**3**].

1. The evidence is relevant to the case and material to its outcome

62 The Partial Interim Award, the evidence in question, is relevant to the present case and material to its outcome. Art. 9(2)(a) IBA Rules sets forth that evidence can be excluded if it lacks sufficient relevance to the case or materiality to its outcome. The Partial Interim Award from the other proceedings is relevant and material because it illustrates RESPONDENT'S contradictory behaviour. Such contradictory behaviour should be taken into account by arbitral tribunals, as it is suitable to raise doubts about a party's credibility and sincerity (*BORN, p. 1325; WAINCYMER, p. 789*).

63 By introducing the Partial Interim Award from the other proceedings, CLAIMANT intends to show that RESPONDENT's conduct in the two proceedings is contradictory. The proceedings are comparable because they are both governed by HKIAC Rules and concern effectively the same situation (*PO 2, p. 60 para. 39*). In the other proceedings, RESPONDENT requested an adaptation of the price due to the unforeseen imposition of a tariff of 25 % on its sale of a mare to Mediterraneo (*ibid.*). Thereby, RESPONDENT not only admitted that the tribunal had the powers to adapt the contract, which was affirmed by the tribunal in that case (*ibid.*). RESPONDENT even acknowledged the need to adapt the price as a consequence of the unforeseen tariff imposition. However, in the present proceedings, RESPONDENT disputes the need to adapt the Contract as well as the Tribunal's jurisdiction to do so. This is particularly egregious, since the unforeseen tariff imposition of 30 % in the case at hand is even higher than in the other case. In brief, RESPONDENT is trying to have it both ways: It is adjusting its position based on what is more opportune in any given situation and hoping the Tribunal will not take note. The Partial Interim Award can prove

this and is thus suitable to call into question RESPONDENT's sincerity regarding the arguments it has advanced in the present case. Thus, it is relevant to the case and material to its outcome and should therefore not be excluded.

64 Consequently, the evidence in question reveals RESPONDENT's contradictory behaviour and gives rise to doubts as to RESPONDENT's credibility and sincerity. As a result, it is relevant to the case and material to its outcome.

2. No confidentiality interests preclude the introduction of the evidence

65 Contrary to RESPONDENTS allegation (*e-mail by Ms Fasttrack, p. 51*), the Partial Interim Award should not be excluded as evidence on the grounds of confidentiality.

66 Under the IBA Rules, two forms of confidentiality must be distinguished. Art. 9(2)(b) IBA Rules allows the exclusion of evidence infringing on qualified confidentiality, such as confidentiality arising from legal impediment or privilege. In contrast, Art. 9(2)(e) IBA Rules addresses commercial confidentiality, which should only be grounds for excluding evidence if the tribunal finds it to be compelling. There is no indication that the evidence in question infringes upon privilege or that its admission is otherwise barred by any legal impediment. Thus, the present case deals with commercial confidentiality at most. The Tribunal should admit the evidence in question because this commercial confidentiality is not compelling.

67 First, the purpose of confidentiality in arbitration proceedings is adequately met by the confidentiality of the current proceedings. Art. 45 HKIAC Rules requires confidentiality with regard to the current proceedings. If information from RESPONDENT's prior proceedings is submitted as evidence in the case at hand, it will be sufficiently protected by the confidentiality of the current proceedings. Since, at the time of submission, RESPONDENT and CLAIMANT would already be aware of the content of the Partial Interim Award, the three arbitrators of the current proceedings would be the only additional persons to whom it would be revealed. However, the arbitrators (as well as the Parties) are themselves bound by confidentiality according to Art. 45 HKIAC Rules.

68 Second, the evidence in question is available for purchase from a company providing intelligence on the horseracing industry for a mere USD 1,000 (*PO 2, p. 60 et seq. para. 41*). Thus, any interested person could acquire a copy of the Partial Interim Award from said company, rendering the information quasi-public. It is therefore questionable whether any legitimate confidentiality interest can even be said to exist at this point in time.

69 Third, there exist adequate measures for safeguarding sensitive information. The Tribunal could issue a protective order to that effect, blacking out names and places to protect identities (*BORN, p. 2388; HOFMANN/ZUBERBÜHLER, p. 182; O'MALLEY, para.9.88; SMEUREANU, pp. 171 et seqq.; WAINCYMER,*

p. 800). What little confidentiality interest remains can be protected without excluding the evidence. Therefore, RESPONDENT's further concerns for confidentiality (*e-mail by Ms Fasttrack, p. 51*) are unwarranted. Indeed, one could even be inclined to think that RESPONDENT merely invokes confidentiality as a pretext in order to conceal its contradictory and opportunistic behaviour (*supra paras 62 et seqq.*).

70 Consequently, there are no compelling grounds of confidentiality to justify an exclusion of the Partial Interim Award. As a result, it should be admitted by the Tribunal.

3. CLAIMANT was not involved in the original obtaining of the evidence

71 Pursuant to Art. 9(2)(g) IBA Rules, tribunals may exclude evidence based on general considerations of fairness. In the present case, the Tribunal might be hesitant to admit the Partial Interim Award, seeing as it was originally obtained by potentially illegitimate means. However, even if this were the case, it should not lead the Tribunal to exclude the Partial Interim Award as evidence, because CLAIMANT was not involved in the original obtaining.

72 When considering whether to exclude illegitimately or illegally obtained evidence, the tribunal shall take into consideration whether the party seeking to submit evidence acted illegally in obtaining it. This approach is also called the clean-hands doctrine (*Methanex Case [2005]; EDF Services Case [2009]; CHENG, p. 156 et seq.; LLAMZON, p. 325*). It precludes a party which obtained evidence illegally from introducing said evidence. In contrast, illegally obtained evidence should be considered admissible if the party introducing it was not involved in the illegal obtaining and thus has clean hands (*BLAIR/VIDAK GOJKOVIC, pp. 256 et seqq.; cf. O'MALLEY, para. 9119*).

73 CLAIMANT did not contribute to the breach of confidentiality in any way. The evidence is in the possession of an intelligence firm that received it either from RESPONDENT's former employees or from a hacker (*PO 2, p. 61 et seq. para. 41*). Thus, CLAIMANT did not take part in the original obtaining of the Partial Interim Award. In fact, CLAIMANT only coincidentally received information about its existence at a breeder conference from Mr Velazquez, who had been working for the other party in the other arbitration (*PO 2, p. 60 para. 40*). Since Mr Velazquez could not organize the promised evidence, he referred CLAIMANT to the aforementioned intelligence firm (*PO 2, p. 61 et seq. para. 41*). However, this company was not involved in directly obtaining the Partial Interim Award either (*ibid.*). Therefore, CLAIMANT is not one, but two steps removed from any potentially illegitimate activity.

74 Consequently, CLAIMANT was not involved in any way in the original obtaining of the Partial Interim Award. As a result, no fairness considerations should lead the Tribunal to exclude it from evidence.

75 In light of the above, the presumption that evidence is generally admissible cannot be rebutted in the present case. Thus, the evidence should not be excluded.

III. If the evidence were excluded, CLAIMANT's right to be heard would be violated

76 If the Partial Interim Award were excluded as evidence from the present proceedings, CLAIMANT's right to be heard would be violated. The fundamental principle that parties have a right to be heard is enshrined in Art. V(1)(b) New York Convention ("**NY Convention**"), to which all states involved in the case at hand are signatories (*Moot Rules, para. 24*.). This principle is reflected in Art. 18 Danubian Arbitration Law and Art. 13(1) HKIAC Rules, which require that parties be given a full opportunity to present their case. The right to present one's case entails the right to submit relevant documentary evidence in support of one's claims (*Iran Aircraft Case [USA, 1992]; KURKELA/SNELLMAN, p. 184*).

77 If the Partial Interim Award were excluded, Claimant would have no way of demonstrating RESPONDENT's contradictory behaviour (*supra paras 62 et seqq.*). Hence, the evidence is relevant and material to CLAIMANT's case (*ibid.*). Consequently, CLAIMANT would be deprived of relevant documentary evidence in support of its claim if the Partial Interim Award were excluded, meaning it could not properly present its case.

78 Furthermore, an exclusion of the Partial Interim Award as evidence would be potential grounds for setting aside the Tribunal's award. Pursuant to Art. V(1)(b) NY Convention as well as Art. 34(2)(a)(ii) Danubian Arbitration Law, an award may be set aside if a party can show that it was unable to present its case.

79 In light of the above, CLAIMANT's right to be heard would be violated if the Partial Interim Award were excluded, potentially constituting grounds for setting aside the award.

Conclusion Issue B:

CLAIMANT is entitled to submit as evidence the Partial Interim Award from RESPONDENT's other arbitral proceedings. In exercising its discretion, the Tribunal should consider the IBA Rules as a reflection of international practice. These give rise to a presumption of admissibility, which can only be rebutted if there are grounds for excluding the evidence in question. None of the potential grounds for exclusion apply. In particular, the Partial Interim Award is relevant and material to the case at hand. Furthermore, its admission is not precluded by any compelling confidentiality interests and CLAIMANT was not involved in its original obtaining. Lastly, if the Tribunal were to exclude the evidence in question, CLAIMANT'S right to be heard would be violated. Thus, CLAIMANT is entitled to submit the Partial Interim Award as evidence.

C. CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price

80 CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price under the Hardship Clause [**I**]. In the alternative, CLAIMANT is entitled to said payment under Art. 79 CISG **[II**].

I. CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price under the Hardship Clause

81 The 30 % tariff imposed by Equatoriana amounts to hardship under the Hardship Clause, which states that the "*seller shall not be responsible […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (*Exh. C 5, p. 14 para. 12*). The Hardship Clause prevails over the Parties' agreement on DDP [**1**]. The requirements for hardship under the Hardship Clause are met [**2**] and the Tribunal should adapt the price under said clause [**3**]. CLAIMANT is thus entitled to payment of USD 1,250,000 resulting from an adaptation of the price under the Hardship Clause.

1. The Hardship Clause prevails over DDP

82 In their Contract, the Parties included the Incoterm Delivered Duty Paid (DDP) and a Hardship Clause (*Exh. C 5, p. 14 para. 8 and 12; PO 2, p. 56 para. 10*). DDP and the Hardship Clause both address risk allocation for tariffs within their respective scope of application. Ordinarily, DDP imposes all risks and costs of delivery, including import-related taxes, on the seller (*ICC Incoterms 2010, p. 205; GRÜSKE, p. 88; PILTZ, para. D-506*). Thus, under DDP, CLAIMANT would generally have to bear the costs associated with customs tariffs. However, the Hardship Clause exempts CLAIMANT from customs tariffs if they amount to "*[…] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* (*Exh. C 5, p. 14 para. 12*).

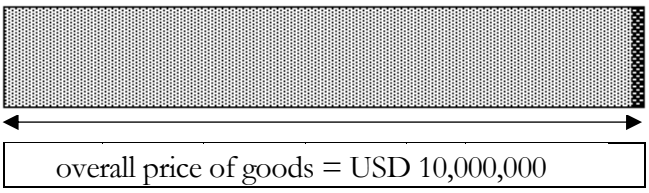
83 Contrary to RESPONDENT's allegation (*RNoA, p. 32 para. 19*), the Hardship Clause applies despite DDP because it prevails over the latter. Parties can derogate from an Incoterm by agreeing on conflicting contractual provisions, which then prevail over the Incoterm for the situations they specifically provide for (*ICC Incoterms 2010, p. 205; EISELEN, p. 110; PILTZ/BREDOW, A-309*). In the case at hand, the Parties implemented the Hardship Clause with the common intent that it should prevail over DDP in situations of hardship arising from changes in customs regulation. This common intent pursuant to Art. 8(1) CISG is demonstrated by the negotiation history (*supra para. 4*).

84 The negotiation history shows the Parties' common intent that the Hardship Clause should prevail over DDP in cases of hardship arising from changes in customs regulation. RESPONDENT insisted on DDP primarily to ensure a smooth, low-risk and low-cost delivery given "*the urgency of the situation and your [CLAIMANT's] much greater experience in the shipment of frozen semen*" (*Exh. C 3, p. 11; Exh. C 8, p. 17 et seq.; NoA, p. 7*

para. 18). CLAIMANT, however, rejected shouldering all DDP-related risks and demanded the inclusion of a hardship clause as it was *"not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with* ***changes in customs regulation*** *or import restrictions. […]"* (*Exh. C 4, p. 12, emphasis added*). Subsequently, the Parties introduced the Hardship Clause into their Contract. Thereby, they exempted CLAIMANT from responsibility for certain DDP-related risks, specifically for changes in customs regulation, if they amount to hardship (*NoA, p. 7 para. 18; Exh. C 8, p. 17; cf. Exh. C 5, p. 14 para. 12*). This clearly demonstrates the Parties' intent to have the Hardship Clause prevail over DDP for said risks. Since Equatoriana's 30 % tariff constitutes a change in customs regulation, it falls within the scope of application of the Hardship Clause if it meets the respective requirements.

85 Moreover, in their negotiations, the Parties increased the price per dose by USD 200 in exchange for CLAIMANT agreeing to DDP (*PO 2, p. 56 para. 8*). This minuscule price increase corroborates that CLAIMANT did not assume all DDP-related risks and was in fact exempted from responsibility in situations of hardship under the Hardship Clause. Generally, DDP-related risks justify a considerably higher price for goods to be exported (*BRENNER/DÖRFLER, pp. 87 et seqq.; GRÜSKE, pp. 102 et seqq.*). Since the whole Contract was for 100 doses, the price increase represents USD 20,000 of the Contract's total value of USD 10,000,000 as illustrated by the graph below.

86



87 One cannot reasonably conclude that CLAIMANT was burdened with all DDP-related risks in exchange for this marginal price increase of 0,2 %. On the contrary, the Parties exempted CLAIMANT from certain risks of DDP, i.e. those falling within the scope of the Hardship Clause. This miniscule price increase thus reveals that CLAIMANT did not assume the risk for the 30 % tariff imposed by Equatoriana if said tariff imposition meets the requirements of the Hardship Clause.

88 Therefore, the Hardship Clause prevails over DDP.

2. Equatoriana's tariff amounts to hardship under the Hardship Clause

89 According to the Hardship Clause, a situation amounts to hardship if it is an "*unforeseen comparable event making the contract more onerous*" (*Exh. C 5, p. 14 para. 12*). These requirements have to be interpreted pursuant to Art. 8 CISG. Accordingly, the Parties' common intent and, in the alternative, a reasonable third person's understanding is decisive (*supra para. 4*). Equatoriana's 30 % tariff represents a comparable event [**a**] that was unforeseen [**b**] and made the Contract more onerous [**c**]. It thus amounts to hardship under the Hardship Clause.

a) Equatoriana's tariff represents a "comparable event"

90 The Hardship Clause requires an event comparable to "*additional health and safety requirements*" in order to give rise to hardship (*Exh. C 5, p. 14 para. 12*). The 30 % tariff imposition by Equatoriana is an event that falls under the notion "*comparable event*".

91 The negotiation history shows that the Parties intended for the notion of "*comparable events*" to encompass changes in customs regulation. CLAIMANT emphasized in its e-mail dated 31 March 2017 that it did not want to take over risks associated with *"changes in customs regulation"*, "*import restrictions"* or "*unforeseeable additional health and safety requirements*" (*Exh. C 4, p. 12*). It thereby identified multiple possible scenarios of hardship that caused it concern. RESPONDENT used CLAIMANT's e-mail as a basis to draft the Hardship Clause (*PO 2, p. 56, para. 12*). Hence, RESPONDENT knew or could not have been unaware of CLAIMANT's intent to cover "*changes in customs regulation*" and mirrored this intent by incorporating the term "*comparable event*" in the proposed Hardship Clause (*Exh. C 5, p. 14 para. 12*). Consequently, it was the Parties' common intent to encompass "*changes in customs regulation*" by the term "*comparable event*". As tariffs are considered customs regulations, the 30 % tariff imposed by Equatoriana constitutes precisely such a "*change in customs regulation*". Thus, the 30 % tariff imposed by Equatoriana constitutes a "*comparable event*".

92 In fact, the reason why CLAIMANT insisted on the Hardship Clause in the first place was its previous experience with "*additional health and safety requirements*" (*Exh. C 5, p. 14 para. 12*). These measures had been imposed by the government of Danubia and required highly expensive tests, nearly resulting in CLAIMANT's insolvency (*Exh. C 4, p. 12; PO 2, p. 58 para. 21*). CLAIMANT communicated this to RESPONDENT to make sure that such situation would not unfold again in the present business relationship. In its email dated 31 March 2017, CLAIMANT elaborated that "*additional health and safety requirements*" were to be understood as sharing the following features: they were imposed by a government and had a negative financial impact on the disadvantaged party (*Exh. C 4, p. 12; PO 2, p. 58. para. 21*). "*Changes in customs regulation*" and "*import restrictions*", i.e. the further scenarios of hardship that CLAIMANT mentioned in its e-mail, both contain exactly these features. Since RESPONDENT used said e-mail to draft the Hardship Clause (*ibid.*), it knew or could not have been unaware of CLAIMANT's understanding to cover events with these very

same features by the term "*comparable events*". As Equatoriana's 30 % tariff is a is a state intervention and burdened CLAIMANT with considerable additional costs, it shares these very same features. Therefore, it represents a *"comparable event"* under the Hardship Clause.

b) Equatoriana's tariff was "unforeseen"

93 The Hardship Clause requires an event to be "*unforeseen"* in order to give rise to hardship (*Exh. C 5, p. 14 para. 12*). Equatoriana's 30 % tariff was *"unforeseen"* by the Parties at the time of conclusion of the Contract for the following reasons:

94 First, Equatoriana had always been one of the biggest supporters of the existing system of free trade. Except for one single instance, it had never imposed retaliatory measures against other countries (*Exh. C 6, p. 15*). Instead, it had always tried to solve disputes amicably or via the WTO dispute resolution mechanism (*ibid.*). Since Mediterraneo is also a member of the WTO (*PO 2, p. 61 para. 47*), the Parties reasonably expected that Equatoriana would maintain its course and, if necessary, opt for WTO dispute resolution, rather than imposing a 30 % retaliatory tariff.

95 Second, the imposition of the tariff by Mediterraneo, which led Equatoriana to take retaliatory measures, was itself also unforeseen by the Parties. Although Mediterraneo's President had announced a certain preference for a more protectionist approach to international trade in his election program, the actual imposition of the tariff came as a great surprise even for analysts (*Exh. C 6, p. 15*). It would be unreasonable to assume that ordinary participants in commerce ought to have known that Mediterraneo would disregard its long-standing practice of free trade in an extreme way that not even experts had anticipated.

96 Third, the Parties did not foresee that frozen racehorse semen would be reclassified as an "*agricultural good*" and would thus be affected by the tariff. In Equatoriana and Mediterraneo racehorse semen is usually classified differently from ordinary agricultural products (*NoA, p. 6 para. 11*). However, with the imposition of the tariffs, racehorse semen was reclassified as an "*agricultural good*". Both Parties were caught by surprise and only learned about it when CLAIMANT's Ms Napravnik asked the relevant ministry and customs authority (*Exh. R 4, p. 36; PO 2, p. 58 para. 26*).

97 In any event, even if the Parties foresaw the imposition of the tariff itself, they could not have foreseen its extent and rapid implementation. The Parties engaged in a system of free trade without any tariffs whatsoever (*PO 2, p. 58 para. 25*). At 30 %, the magnitude of the tariff imposed by Equatoriana came as a great surprise even for informed circles (*Exh. C 6, p. 15*). Moreover, the speed of Equatoriana's tariff imposition was extraordinary, as it was announced on 19 December 2017 shortly after Mediterraneo's tariff a month prior (*PO 2, p. 58 para. 23*). Consequently, the Parties did not foresee either the imposition

of the tariff by Equatoriana as such or its extent and rapid implementation at the time of conclusion of the Contract. Therefore, Equatoriana's 30 % tariff was "*unforeseen*".

c) Equatoriana's tariff made the Contract "more onerous"

98 The Hardship Clause requires an event to make the Contract "*more onerous"* in order to give rise to hardship (*Exh. C 5, p. 14 para. 12*). The term "*onerous*" is synonymous with "*burdensome*" and relates to an expensive duty which outweighs the possible benefits (*Oxford Dictionary for "onerous"; SHEPPARD in Bouvier's Law Dictionary, p. 760*). Equatoriana's 30 % tariff made the Contract "*more onerous*" for the following reasons:

99 First, the Parties set a low threshold for hardship. Generally, it is upon the parties to determine the threshold for hardship under their hardship clause (*SCHWENZER/HACHEM/KEE, p. 45.99*). If parties use less stringent wording than a model hardship clause, e.g. *"more onerous"* instead of *"excessively more onerous"*, this indicates a lower threshold for hardship (*BRUNNER, p. 515*). In the case at hand, CLAIMANT first suggested including the ICC-Hardship Clause 2003 in the Contract, which requires an event to be "*excessively more onerous*" in order to give rise to hardship (*cf. Exh. R 2, p. 34*). However, RESPONDENT refused to agree to the wording of the ICC Hardship Clause 2003 and instead suggested the wording "*more onerous*" (*Exh. R 3, p. 35; PO 2, p. 56 para. 12*). By incorporating the wording "*more onerous*" into their Hardship Clause, the Parties in fact lowered the threshold for hardship.

100 Second, the threshold for hardship is met in the case at hand. The imposition of the 30 % tariff by Equatoriana resulted in additional costs of USD 1,500,000 on the last instalment (*price of last instalment x tariff: USD 5,000,000 x 0,3 = USD 1,500,000*) and completely changed the situation. Had the tariff in question not been imposed, CLAIMANT would have gained a profit of 5 %, i.e. USD 250,000 (*USD 5,000 profit per dose x 50 doses = USD 250,000*) on the last instalment (*Exh. C 8, p. 17; PO 2, p. 59 para. 31*). Instead, the imposition of the tariff made the Contract considerably more expensive for CLAIMANT, leaving it with a massive loss of 25 %, i.e. USD 1,250,000 (*30 % tariff – 5 % profit margin: USD 1,500,000 – USD 250,000 = USD 1,250,000*) (*NoA, p. 7 para. 18; Exh. C 8, p. 17*). Under any conceivable interpretation, this loss certainly outweighed the potential benefits of the Contract and thus made it more onerous for CLAIMANT.

101 In any event, a reasonable third person would find that the tariff imposed by Equatoriana made the Contract more onerous within the meaning of the Hardship Clause. No rational business participant would deliberately engage in an unprofitable transaction. Rather, a reasonable third person would assume that a contract would become "more onerous" if an anticipated profit were to be consumed entirely by changed circumstances. The tariff-related cost increase of USD 1,500,000 not only eroded CLAIMANT's envisaged profit of USD 250,000 but also burdened CLAIMANT with a massive loss of USD 1,250,000. Thus, a

reasonable third person would also find that the imposition of the tariff made the contract *"more onerous"* under the Hardship Clause for CLAIMANT.

102 Consequently, Equatoriana's 30 % tariff is a "*comparable unforeseen event making the Contract more onerous*". As a result, it gives rise to hardship under the Hardship Clause.

3. The Tribunal should adapt the price under the Hardship Clause

103 The Hardship Clause is silent on concrete remedies available to the Parties (*Exh. C 5, p. 14 para. 12*). However, it is generally recognized in practice that parties intend to provide for the possibility of adaptation of the price by a tribunal if renegotiations fail (*BERGER p. 6; BRUNNER, p. 517; DIMATTEO, pp. 111 et seqq.; KRÖLL, p. 138;*). In the case at hand, this is also precisely what the Parties intended to provide for under the Hardship Clause. Since the renegotiations between the Parties failed, the Tribunal should adapt the price.

104 The negotiation history shows that the Parties intended for the Tribunal to adapt the price of the Contract in case renegotiations of the price failed. The Hardship Clause was introduced by RESPONDENT and agreed upon by the Parties to protect CLAIMANT from the additional costs and risks of changed circumstances (*supra paras 81 et seqq.*). CLAIMANT meant to provide for price adaptation in case of significant cost increases due to changed circumstances (*Exh. C 4, p. 12; Exh. C 8, p. 17*). Similarly, RESPONDENT emphasized that it wanted to have a mechanism in place for the event that the "*Parties could not agree*" (*Exh. C 8, p. 17*). In such a case, as per RESPONDENT's view, "*it should probably be the task of the arbitrators to adapt the contract*" (*ibid.*). Contrary to RESPONDENT's allegation (*RNoA, p. 32 para. 19*), the Parties accordingly intended to allow for price adaptation by the Tribunal if renegotiations between the Parties failed.

105 Indeed, renegotiations between the Parties did fail. CLAIMANT's Ms Napravnik had initiated renegotiations on 20 January 2018 when she informed RESPONDENT's Mr Shoemaker of the 30 % cost increase (*Exh. C 7, p. 16*). Emphasizing their promising business relationship and that "*we [the Parties] will certainly find an agreement on the price*", RESPONDENT insisted on a timely delivery of the goods (*Exh. R 4, p. 36; cf. Exh. C 8, p. 18*). Shortly after the shipment, on 12 February 2018, RESPONDENT abruptly broke off renegotiations and refused to pay any additional amount (*Exh. C 8, p. 18*). Therefore, due to RESPONDENT's failure to renegotiate, CLAIMANT is entitled to resort to the Tribunal for an adaptation of the price under the Hardship Clause.

106 The Tribunal should adapt the price under the Hardship Clause and award USD 1,250,000 to CLAIMANT. The 30 % tariff caused CLAIMANT additional costs of USD 1,500,000. According to the Hardship Clause, CLAIMANT is exempted from any tariffs making the Contract "*more onerous*". CLAIMANT lost its entire anticipated profit of USD 250,000 on the last instalment due to the tariff imposed by Equatoriana. As if

seeing its anticipated profit vanish were not enough, CLAIMANT also suffered a loss of USD 1,250,000 (*supra paras 2.c) et seqq.*). Hence, CLAIMANT should at least be compensated for its loss. This would be in line with the objective of any commercial contract, namely a balance of performances between the parties (*ICC case No. 2291*). Therefore, CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the contractual price.

107 In the light of the above, the Hardship Clause prevails over DDP. Equatoriana's 30 % tariff amounts to hardship since the requirements under the Hardship Clause are met. In application of the Hardship Clause and in line with the Parties' common intent, the Tribunal should adapt the price of the Contract. As a result, CLAIMANT is entitled to payment of USD 1,250,000 under the Hardship Clause.

II. In the alternative, CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price under the CISG

108 Even if the Tribunal were to decide that an adaptation of the price under the Hardship Clause is not possible, CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price under the CISG. Art. 79 CISG applies to the case at hand [**1**]. Its requirements for hardship are met [**2**] and the Tribunal should adapt the price under said provision [**3**].

1. Art. 79 CISG is applicable to the case at hand

109 Art. 79(1) CISG states that "*a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*." Art. 79 CISG applies to the case at hand as it covers situations of hardship [**a**] and is applicable although CLAIMANT has already performed [**b**]. Moreover, the Parties neither excluded nor derogated from said provision [**c**]. Thus, Art. 79 CISG is applicable to the case at hand.

a) Art. 79 CISG covers hardship

110 The CISG does not expressly provide for a hardship provision. Nevertheless, hardship is regarded as an issue of performance (*BRUNNER, p. 400*) and is thus generally governed by the CISG (*Art. 4 CISG; GARRO, para. 37; HONNOLD, Art. 79 para. 432.2; RIMKE, pp. 197; SCHWENZER, Commentary, para. 12; TALLON, para. 3.3*). In fact, hardship can give rise to an impediment in the context of Art. 79 CISG (*ATAMER, Art. 79 para. 78 et seq.; MOMBERG URIBE, Change of Circumstances, p. 245; SCHWENZER, Force Majeure, p. 712*). Where the CISG governs an issue, but does not expressly settle it, the general principles underlying the CISG have to be applied by virtue of Art. 7(2) CISG (*BONELL, p. 75; BRIDGE, para. 10.28; PERALES VISCASILLAS, Art. 7 para. 12; SCHLECHTRIEM/SCHROETER, para. 140; SCHWENZER/FOUNTOULAKIS/DIMSEY, p. 52*). Namely, the UPICC need to be considered as they reflect these very principles

(*BONELL, Alternatives, p. 35; BUND, p. 391 et seq.; KAUR, p. 102*; *MAGNUS, p. 31; SCHLECHTRIEM/SCHWENZER, para. 36; VENEZIANO, p. 146*).

111 Art. 6.2.2 UPICC specifically addresses hardship and sets forth the respective requirements. Thereby the UPICC supplement Art. 79 CISG for hardship (*MCKENDRICK, p. 809; RIMKE, p. 239; cf. BONELL, pp. 35 et seqq.*). Thus, by virtue of Art. 7(2) CISG, Art. 6.2.2 UPICC applies analogously to specify the requirements for hardship under the CISG.

112 As a result, although not explicitly addressed by Art. 79 CISG, this provision, in conjunction with Art. 7(2) CISG and Art. 6.2.2 UPICC, covers hardship (*CISG-Online 1963 [BEL, 2009]; ATAMER, Art. 79 para. 79; BRUNNER, p. 418; BRUNNER/SGIER, Art. 79 CISG para. 27; SCHLECHTRIEM, p. 101;*).

b) Art. 79 CISG is applicable although CLAIMANT has already performed

113 Unlike force majeure as provided for in Art. 79 CISG, hardship does not necessarily render the disadvantaged party's performance impossible (*DIMATTEO Excuse, p. 259; GARRO, para. 38*; *HONNOLD, Art. 79 para. 432.2; HUBER/MULLIS, p. 194; KAUR, p. 99; MCKENDRICK, p. 810*). On the contrary, performance is still expected in situations of hardship. This is also manifested in Art. 6.2.3(2) UPICC, which does not entitle the aggrieved party to withhold performance (*BRUNNER, p. 487; UPICC Commentary, p. 225 para. 4*). In the case at hand, CLAIMANT, as the disadvantaged party, was expected to deliver the last instalment and indeed did so (*NoA, p. 6 para. 13*). Since it thereby fulfilled its obligation, it should not be precluded from relying on Art. 79 CISG. Thus, Art. 79 CISG is applicable although CLAIMANT has already performed.

114 Additionally, an aggrieved party may only be estopped from invoking hardship if it performed without informing the other party about the changed circumstances (*BRUNNER, p. 400*). In the case at hand, CLAIMANT raised the issue vis-à-vis RESPONDENT with its e-mail dated 20 January 2018 (*Exh. C 7, p. 16*). It did not mean to ship before an agreement on the new price could be reached (*ibid.*). However, it was urged to do so by RESPONDENT (*Exh. C 8, p. 18*). CLAIMANT's performance in good faith cannot be held against it. Therefore, Art. 79 CISG is applicable although CLAIMANT has already performed.

c) Art. 79 CISG was neither excluded nor derogated by the Hardship Clause

115 Contrary to RESPONDENT's allegation (*RNoA, p. 32, para. 20*), Art. 79 CISG was neither excluded nor derogated by incorporating the Hardship Clause in the Contract. Pursuant to Art. 6 CISG, parties may exclude or derogate from a provision by either express or clear implied agreement (*CISG-Online 261 [GER, 1997]; CISG-Online 614 [AUT, 2001]; CISG Online 759 [BEL, 2002]; cf. Corn Case [UA, 2012]; MAGNUS, BGB, Art. 6 para. 20; MISTELIS, Art. 6 para. 15 et seq.; SCHWENZER/HACHEM, para. 27*). An interpretation according to Art. 8 CISG (*supra para. 4*) shows that the Parties neither excluded nor derogated from Art. 79 CISG by including the Hardship Clause for the following reasons:

116 First, the wording of the Contract shows that the Parties neither excluded nor derogated from Art. 79 CISG by including the Hardship Clause. The Hardship Clause is silent on its relation to Art. 79 CISG *(cf. Exh. C 5, p. 13 para. 12*), which covers hardship (*supra. paras a) et seqq.*). Since Art. 79 CISG is primarily concerned with force majeure (*SALGER, p. 647; SCHWENZER/HACHEM/KEE, para. 45.16*), the relation between force majeure clauses and Art. 79 CISG has to be considered. In general, contractual force majeure clauses are assumed not to exclude or derogate from CISG provisions (*BRUNNER, p. 386; BUND, p. 404*). In the *Iron Molybdenum Case* (*CISG-Online 261 [GER, 1997]*) a German seller had failed to deliver iron-molybdenum to an English buyer. The latter made a substitute purchase at a higher price and sued the seller for the price difference. The court found that the force majeure clause, although silent on its relation to Art. 79 CISG, did not exclude the application of the latter. It thus assessed the situation under both the force majeure clause and Art. 79 CISG (*ibid.*). By analogy, the Hardship Clause being silent on its relation to Art. 79 CISG indicates that the Parties neither excluded nor derogated from this provision.

117 Second, the negotiation history shows that the Parties neither excluded nor derogated from Art. 79 CISG by including the Hardship Clause. They intended to have the Hardship Clause solely for selected situations of hardship and to rely on Art. 79 CISG as a fallback provision. A party agreement supersedes the CISG only to the extent that it regulates the matter more specifically (*CISG-Online 614 [AUT, 2001]; Corn Case [UA, 2012]; MAGNUS, BGB, Art. 6 para. 41*). CLAIMANT laid out the specific matters to which the Hardship Clause should apply in its e-mail dated 31 March 2017 as *"health and safety requirements, changes in customs regulation or import restrictions"* (*Exh. C 4, p. 12*). It stressed that "*at minimum, a hardship clause should be included into the contract to address such subsequent changes*" (*ibid.*). RESPONDENT knew or could not have been unaware of CLAIMANT's intent to apply the Hardship Clause to such matters only, as it used CLAIMANT's e-mail to draft the Hardship Clause (*PO 2, p.56 para. 12*). Accordingly, the Parties incorporated the term "*comparable events*" (*Exh. C 5, p. 14 para. 12*) in their Hardship Clause to address only *"such subsequent changes"* (*Exh. C 4, p. 12.*). The scope of the Hardship Clause is thus narrower than that of Art. 79 CISG, according to which

any *"impediment"* – irrespective of its nature – can amount to hardship if the relevant requirements are met. Thus, only insofar as *"comparable events"* are concerned does the Hardship Clause regulate the scope of hardship more specifically and prevails over Art. 79 CISG.

118 However, at no point did the Parties intend to exclude the applicability of Art. 79 CISG for other situations of hardship. This is further corroborated by CLAIMANT's phrasing "*at minimum, a hardship clause should be included […]*" (*Exh. C 4, p. 12*). It underlines CLAIMANT's sincere wish to provide for specific situations of hardship with the Hardship Clause on the one hand and to rely on Art. 79 CISG as a fallback provision for all remaining situations of hardship on the other hand. Since RESPONDENT used said e-mail as the basis for drafting the Hardship Clause (*PO 2, p. 56 para. 12*), it knew or could not have been unaware of CLAIMANT's intent. Thus, it was the Parties common intent to incorporate the Hardship Clause solely for selected situations of hardship and to rely on Art. 79 CISG as a fallback provision.

119 Therefore, Art. 79 CISG was neither excluded nor derogated from by implementing the Hardship Clause.

120 Consequently, Art. 79 CISG covers hardship and is applicable although CLAIMANT has already performed. Furthermore, Art- 79 CISG is neither excluded nor derogated from by implementing the Hardship Clause. As a result, Art. 79 CISG is applicable to the case at hand.

2. Equatoriana's tariff gives rise to hardship under Art. 79 CISG

121 The requirements for hardship under Art. 79(1) CISG in conjunction with Art. 7(2) CISG and Art. 6.2.2 UPICC are met. Said provisions set out that the event giving rise to hardship must have been beyond the control of the disadvantaged party and that said party must not have assumed the respective risk. Furthermore, the hardship event must have been objectively unforeseeable and must have fundamentally altered the equilibrium of the contract (*CISG-Online 1963 [BE, 2009]; ATAMER, Art. 79 para. 81; HONNOLD, Art. 79 para. 432.2; SCHWENZER, pp. 728 et seqq.; UPICC Commentary, pp. 218 et seqq.*).

122 In the case at hand, the 30 % tariff imposed by Equatoriana was a state intervention and thus beyond CLAIMANT's control. Additionally, the relationship between the Hardship Clause and DDP implies that CLAIMANT had not assumed any DDP-related risks, i.e. customs tariffs that amount to hardship (*supra paras 82 et seqq.*). The Parties' agreement on DDP resulted in neither an exclusion of nor a derogation from Art. 79 CISG (*Exh. C 5, p. 14 para. 8; PO 2, p. 56 para. 10*). Incoterms are assumed to only displace Art. 66-70 CISG and not to govern situations of hardship (*ERAUW, Art. 67 para. 33; HACHEM, para. 24; SCHWENZER/HACHEM, para. 27; VALIOTI, para. III. A. 1*). Hence, Art. 79 CISG is applicabe despite the Parties' agreement on DDP and in fact prevails over the latter. The event in question was further unavoidable since CLAIMANT could have received neither an exemption nor a reduction on the tariff imposed

(*PO 2, p. 58 para. 27*). Moreover, the imposition of the tariff was objectively unforeseeable [**a**] and fundamentally altered the equilibrium of the Contract [**b**].

a) Equatoriana's tariff was objectively unforeseeable

123 An event is objectively unforeseeable if a reasonable third person in the same situation would not have anticipated it (*SHEPPARD in Bouvier's Law Dictionary, pp. 440 et seqq,*). Equatoriana's 30 % tariff was not only unforeseen by the Parties at the time of conclusion of the Contract (*supra paras I.2.b) et seqq.*) but it was also objectively unforeseeable for the following reasons:

124 First, the retaliatory 30 % tariff imposed by Equatoriana broke with years of practice of amicable dispute resolution, catching even informed circles off guard. Similarly, the tariff imposed by Mediterraneo had come as a great surprise even for analysts (*Exh. C 6, p. 15*). *A fortiori*, it was even less foreseeable for regular commercial parties without any insights into policy making processes at the state level. In particular, the extent and the speed of the tariff impositions were extraordinary, even more so since the global system of free trade had been growing for years (*ibid.; PO 2, p. 58 para. 23*).

125 Second, the reclassification of frozen racehorse semen as an "*agricultural good*", to which the newly imposed tariff would apply, was itself unforeseeable as it broke with years of practice in Equatoriana and Mediterraneo (*Exh. C 6, p. 15; PO 2, p. 58 para. 23*). Even officials of the respective ministry, when asked, were uncertain, whether the tariff would apply to frozen racehorse semen (*Exh. R 4, p. 36*). Therefore, Equatoriana's 30 % tariff was objectively unforeseeable.

b) Equatoriana's tariff fundamentally altered the equilibrium of the Contract

126 A tribunal has to consider all relevant circumstances to determine whether an event fundamentally altered the contractual equilibrium (*BRUNNER, p. 426; GIRSBERGER/ZAPOLSKIS, p. 129; UPICC Commentary, p. 219 para. 2*). An alteration is expressed in either an increase in cost for the seller or decrease in value for the buyer (*BRUNNER, p. 426*).

127 In the case at hand, CLAIMANT faced a cost increase of USD 1,500,000 on the last instalment because of the 30 % tariff (*supra para. 100*). Due to CLAIMANT's dire financial situation and moderate profit margin, a low threshold for a *"fundamental alteration"* is warranted and met.

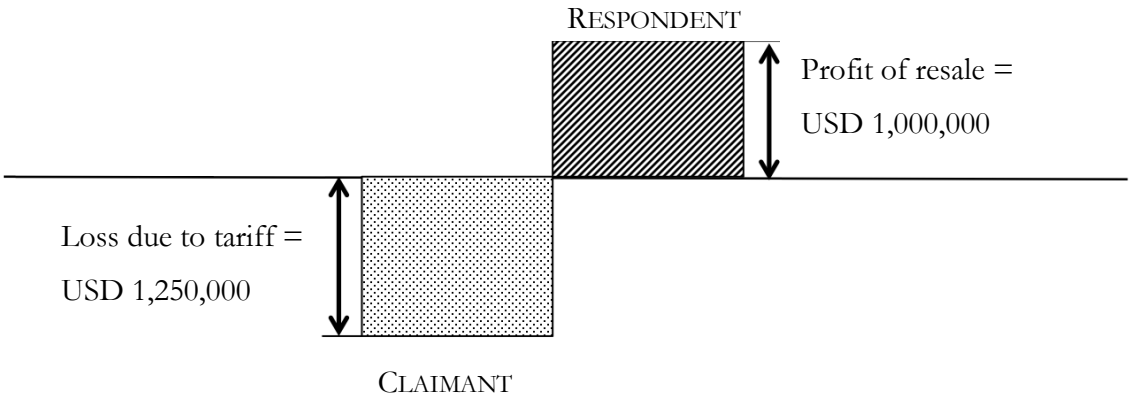
128 First, a low threshold for alteration is assumed in case of impending financial ruin of the disadvantaged party (*BRUNNER, p. 435; GIRSBERGER/ZAPOLSKIS, p. 129*; *JONES/SCHLECHTRIEM, p. 138 para. 220; SCHWENZER, Force Majeure, p. 716*). In the case at hand, CLAIMANT is facing financial ruin. If it is not remunerated, its loss of USD 1,250,000 will prevent a prolongation of credits and lead to insolvency (*Exh. C 8, p. 17; PO 2, p. 59 para. 29*). Thus, a low threshold for alteration applies. CLAIMANT's loss of USD 1,250,000 is five times higher than its expected profit of USD 250,000 (*supra paras 100 et seqq.*). The

30 % tariff by Equatoriana did not merely reduce profit but rendered the transaction ruinous for CLAIMANT. Thus, it fundamentally altered the equilibrium of the Contract.

129 Second, a low threshold is required if the disadvantaged party has assumed limited risk as implied by its moderate profit margin (*BRUNNER, p. 434; GIRSBERGER/ZAPOLSKI, p. 129*). In the case at hand, CLAIMANT's profit margin of merely 5 % shows that it assumed only very limited risk. Thus, a low threshold is to be applied.

130 Lastly, CLAIMANT would not be unduly favoured by the application of a low threshold for a fundamental alteration. In the case at hand, CLAIMANT was brought to the verge of insolvency by its loss of USD 1,250,000 (*PO 2, p. 59 para. 29*), whereas RESPONDENT did not suffer any loss in value of the frozen racehorse semen. On the contrary, RESPONDENT illegitimately resold at least 15 doses to other breeders and planned from the beginning to resell at least 50 doses of the goods at a significantly higher price of USD 120,000 per dose. This would result in a profit of at minimum USD 1,000,000 (*PO 2, p. 56 para. 11 and 20; cf. Exh. C 8, p. 18*). In doing so, RESPONDENT would violate its contractual obligation towards CLAIMANT (*Exh. C 5, p. 13*). The large discrepancy between RESPONDENT's anticipated profit and CLAIMANT's actual loss is illustrated by the graph below.

131



132 Aware of CLAIMANT's dire financial situation and with the intention to resell the racehorse semen, RESPONDENT had both forced down the initial price and later insisted on CLAIMANT's performance (*PO 2, p. 59 para. 20 and 28; Exh. C 3, p. 11; Exh. C 8, p. 18*). Thus, CLAIMANT would not be unduly favoured if a low threshold for a fundamental alteration of the contractual equilibrium were to be applied. As demonstrated, this threshold is met in the present case (*supra paras 128 et seqq.*).

133 Consequently, Equatoriana's 30 % tariff was objectively unforeseeable and fundamentally altered the equilibrium of the Contract. As a result, it gave rise to hardship under Art. 79 CISG in conjunction with Art. 7(2) CISG and Art. 6.2.2 UPICC.

3. The Tribunal should adapt the price of the Contract pursuant to Art. 79 CISG

134 CLAIMANT is entitled to an adaptation of the price by the Tribunal pursuant to Art. 79 CISG in conjunction with Art. 7(2) CISG and Art. 6.2.3 UPICC.

135 Contrary to RESPONDENT's allegation (*RNoA, p. 32 para. 19*), an adaptation of the price by the tribunal is a possible remedy under Art. 79 CISG. Since Art. 79 CISG does not expressly regulate the remedies for hardship, Art. 6.2.3 UPICC has to be applied (*cf. supra para. 1.a)*). Accordingly, the aggrieved party may request renegotiations and – upon failure thereof – resort to the tribunal for a termination or an adaptation of the contract (*BRUNNER, p. 488 et seq.; GARRO, para. 40; MAGNUS, BGB, Art. 79 para. 24b; MOMBERG URIBE, pp. 209 et seqq.; SCHWENZER, Commentary, para. 55; UPICC Commentary, p. 225, para. 6;*).

136 In the case at hand, CLAIMANT initiated renegotiations on the price. Prior to the last delivery, RESPONDENT promised CLAIMANT that an agreement on the price would certainly be found (*Exh. C 8, p. 18*; *Exh. R 4, p. 36*). However, despite its promise RESPONDENT broke off renegotiations after receiving the last delivery (*Exh. C 8, p. 18*). This behaviour constitutes a blatant example of *venire contra factum proprium*. Moreover, RESPONDENT pressured CLAIMANT to deliver despite CLAIMANT's financial difficulties (*Exh. C 8, pp. 17 et seqq.; PO 2, p. 59, para. 28 and 29*), while it intended to resell the frozen racehorse semen from the very beginning (*PO 2, p. 56 para. 11*). Since renegotiations failed, CLAIMANT is entitled to resort to the Tribunal for an adaptation of the price.

137 An adaptation of the price by the Tribunal is the only adequate remedy as it prevails over a termination of the Contract. In situations of hardship an adaptation of the price is to be preferred over a termination of the contract, especially if the aggrieved party has a prevailing interest in full performance (*BRUNNER, p. 510; MCKENDRICK, p. 820 et seq.*). In the case at hand, a termination of the Contract would be inadequate: CLAIMANT has delivered and RESPONDENT has accepted and even resold the goods already (*PO 2, p. 57 para. 20*). If the Parties reversed the transaction, the tariff would not be reimbursed and an additional 25 % tariff to reimport the goods to Mediterraneo would be due. Furthermore, CLAIMANT has a prevailing interest in full performance because it would risk insolvency if it had to bear a loss of USD 1,250,000 (*PO 2, p. 59 para. 29*). Thus, an adaptation of the Contract is the only adequate remedy.

138 To restore the equilibrium of the Contract (*supra paras 2.b) et seqq.*), CLAIMANT is entitled to a remuneration of USD 1,250,000 from RESPONDENT. This is not unduly detrimental to RESPONDENT as it did not suffer any loss of value but made profit by illegitimately reselling the racehorse semen (*PO 2, p. 57 para. 20; cf. supra para. 130*) and would generally not be financially endangered if it bore the additional cost (*PO 2, p. 59 para. 30*).

139 In light of the above, CLAIMANT is entitled to payment of USD 1,250,000 under Art. 79 CISG.

Conclusion Issue C:

CLAIMANT is entitled to payment of USD 1,250,000. The Hardship Clause prevails over DDP and its requirements are fulfilled. Furthermore, price adaptation by the Tribunal is the remedy envisaged in case renegotiations between the Parties fail. Therefore, CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price under the Hardship Clause. In the alternative, Art. 79 CISG is applicable to the case at hand and its requirements for hardship are met. Given the failed renegotiations between the Parties, an adaptation of the price by the Tribunal is the only adequate remedy. Therefore, CLAIMANT is entitled to payment of USD 1,250,000 resulting from an adaptation of the price under Art. 79 CISG.

PROCEDURAL REQUEST

Counsel, on behalf of CLAIMANT, respectfully requests the Tribunal to admit the Partial Interim Award as evidence to the proceedings.

PRAYERS FOR RELIEF

Counsel, on behalf of CLAIMANT, respectfully requests the Tribunal:

1. To order RESPONDENT to pay CLAIMANT an additional amount of USD 1,250,000;
2. To order RESPONDENT to bear all the cost arising from this Arbitration.

Respectfully submitted on 6 December 2018 by

PATRIZIA CASTELLAZZI

TESSA DOUMA

VANESSA HUBER

MEIKE PAULETZKI

YVES TJON-A-MEEUW

DELILAH VON STRENG

We hereby confirm that only the persons, whose names are listed above, have written this memorandum.