ALBERT LUDWIG
UNIVERSITY OF FREIBURG


# Memorandum for
# RESPONDENT

**On Behalf Of**

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana
– RESPONDENT –

**Against**

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo
– CLAIMANT –

MARC BOVERMANN • JULIEN FEURER • LUKAS GOTTSCHLING • JULIA SCHMIDT
HAUKE SCHNEIDER • DAVID WILLFORT • ANNA MARIA YANG-JACOBI

Freiburg, Germany

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## STATEMENT OF FACTS

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

CLAIMANT operates Mediterraneo's oldest stud farm which provides breeders with frozen semen for artificial insemination and stallions for natural coverage.

RESPONDENT is a fast-growing breeder from Equatoriana which has recently started to add a new racehorse breeding programme to its business.

**21 March 2017** RESPONDENT contacts CLAIMANT about the option to purchase 100 doses of frozen semen of CLAIMANT's star stallion Nijinsky III [*EXHIBIT C 1, p. 9*].

**24 March 2017** CLAIMANT offers to sell RESPONDENT 100 doses of frozen semen for the price of US$ 99,500 per dose [*EXHIBIT C 2, p. 10*].

**28 March 2017** RESPONDENT agrees with most of CLAIMANT's suggested terms; however, RESPONDENT requests delivery according to the incoterm DDP [*EXHIBIT C 3, p. 11*].

**31 March 2017** CLAIMANT agrees to a DDP delivery under the condition of a price increase, which is granted by RESPONDENT. CLAIMANT suggests arbitration as dispute resolution mechanism [*EXHIBIT C 4, p. 12*].

**10 April 2017** RESPONDENT submits a first draft for the arbitration agreement, which is based on the HKIAC Model clause, but significantly narrower in its scope. The draft provides for arbitration in Equatoriana and contains an express choice of law for the arbitration agreement in favour of Equatorianian law [*EXHIBIT R 1, p. 33*].

**11 April 2017** CLAIMANT requests to change the seat of arbitration to Danubia and proposes to include a hardship clause based on the ICC Hardship Clause in the sales agreement. RESPONDENT voices its concern that the scope of the ICC Hardship Clause is too broad. It is common ground that the hardship clause in the sales agreement should thus be interpreted more narrowly than the ICC Hardship Clause [*EXHIBIT R 2, p. 34; Procedural Order No 2, p. 56, para. 12*].

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| **6 May 2017** | CLAIMANT and RESPONDENT (hereafter "the Parties") sign the Frozen Semen Sales Agreement (hereafter "the Contract"). The Contract is expressly governed by Mediterranean Law. The arbitration agreement provides for Danubia to be the seat of arbitration [*EXHIBIT C 5, pp. 13 et seq.*]. |
| **15 November 2017** | After the first two shipments, the government of Mediterraneo imposes a 25 per cent tariff on agricultural products from Equatoriana [*Procedural Order No 2, p. 58, para. 23*]. |
| **19 December 2017** | The government of Equatoriana retaliates by imposing a 30 per cent tariff on agricultural goods from Mediterraneo [*Procedural Order No 2, p. 58, para. 25*]. |
| **20/21 January 2018** | CLAIMANT informs RESPONDENT that the last shipment is affected by the punitive tariffs. RESPONDENT communicates that to its understanding, CLAIMANT bears the risks of such tariffs according to the agreement on DDP delivery. CLAIMANT pays the tariffs and authorises the shipment [*EXHIBIT C 7, p. 16; EXHIBIT C 8, pp. 17 et seq.; EXHIBIT R 4, p. 36*]. |
| **31 July 2018** | CLAIMANT initiates arbitral proceedings against RESPONDENT demanding an adaptation of the Contract by the arbitral tribunal of these proceedings (hereafter "Arbitral Tribunal") [*Email of Mr. Langweiler, pp. 3 et seq.*]. |
| **September 2018** | RESPONDENT's computer system is hacked, resulting in the loss of a considerable amount of confidential data [*RESPONDENT's Email, p. 51*]. |
| **2 October 2018** | CLAIMANT informs the Arbitral Tribunal of the existence of a partial interim award of another arbitration (hereafter "Interim Award) involving RESPONDENT. CLAIMANT intends to buy a copy of the Interim Award from a source with a doubtful reputation in order to submit it into evidence [*CLAIMANT's Email, p. 50; Procedural Order No 2, pp. 60 et seq., para. 41*]. |

# INTRODUCTION

***- "It is legal because I wish it" …***

… spoke Louis XIV of France and proceeded to bend the law to his will. As an absolute ruler, he considered himself above the law and was thus free to dedicate his spare time to his expensive hobbies. It is said that over 700 horses populated the stables at his court in Versailles. Unfortunately, a fondness of horses is not the only thing CLAIMANT has in common with the infamous monarch: CLAIMANT also seems to share his attitude towards the law. The Parties agreed that CLAIMANT would be responsible for the delivery of three shipments of frozen semen. Nonetheless, CLAIMANT sought to renegotiate the purchase price as soon as it realised that agricultural tariffs would result in more costs than planned. Only upon RESPONDENT's reminder of the contractual obligations did CLAIMANT deliver. The contentment was short-lived however: a few weeks later, CLAIMANT decided it did not want to adhere to the Contract after all and initiated arbitral proceedings against RESPONDENT. Luckily, the era of absolutism is long gone, and the rule of law prevails.

True to the maxim 'It is legal because I wish it', CLAIMANT submits that the Arbitral Tribunal has the power to adapt the Contract and increase the purchase price upon its discretion. Since the Parties did not expressly authorise the Arbitral Tribunal to adapt the Contract as would be required in Danubia, an adaptation of the Contract is excluded by law. In any case, an interpretation of the arbitration agreement reveals that the Parties never intended the Arbitral Tribunal to be able to adapt their Contract [**First Issue**].

With creative ingenuity that would make Louis XIV proud, CLAIMANT has taken to construing legal remedies that allow for an adaptation of the Contract. However, the remedy of adaptation is neither provided by the contractual hardship clause nor by the CISG. Far from it, as not even the requirements for hardship are met [**Second Issue**].

Knowing it cannot rely on its legal arguments, CLAIMANT now attempts to distract the Arbitral Tribunal by submitting a confidential Interim Award from another arbitration that RESPONDENT is party to. The Interim Award, however, has been obtained by illegitimate means and should not be admitted as evidence. Once again: It is not legal simply because you wish it [**Third Issue**].

## FIRST ISSUE: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT

1 The Parties concluded a contract obliging CLAIMANT to deliver 100 doses of frozen semen in three instalments [*EXHIBIT C 5, pp. 13, 14*]. Shortly before the third shipment, CLAIMANT suddenly informed RESPONDENT that it would not deliver because of newly imposed tariffs that made the shipment more expensive [*EXHIBIT C 7, p. 16*]. RESPONDENT reminded CLAIMANT of its contractual obligations and encouraged it to deliver, as CLAIMANT was generally responsible for customs clearance for import [*EXHIBIT R 4, p. 36*]. CLAIMANT in turn authorised the delivery [*EXHIBIT C 8, p. 18*].

2 The goods were shipped, and the price was paid – a successful business transaction. Yet, CLAIMANT now demands a subsequent adaptation of the Contract to secure its profit. To this end, CLAIMANT has initiated arbitral proceedings against RESPONDENT (hereafter "the Arbitration"). The proceedings were started in accordance with the contractual arbitration agreement (hereafter "the Arbitration Agreement") [*EXHIBIT C 5, p. 14, Clause 15*]. In general, RESPONDENT has no objections to the jurisdiction of the Arbitral Tribunal. However, an adaptation of the Contract is excluded because it is a non-arbitrable matter in Danubia, where the Arbitration takes place [**A**]. In any case, the Arbitration Agreement is to be interpreted under Danubian Contract Law and reveals that the Parties did not intend to empower the Arbitral Tribunal to adapt the Contract [**B**].

### A. The Adaptation of the Contract Is Not Arbitrable in Danubia

3 The issue of contract adaptation is not arbitrable in the present case. CLAIMANT argues that Mediterranean Law governs the Arbitration Agreement [*MEMORANDUM CLAIMANT, p. 18, para. 78*]. The question of which law governs the Arbitration Agreement, however, is not decisive because the adaptation of the Contract is an issue not capable of settlement by arbitration ("non-arbitrable") in Danubia. The parties' freedom to submit any dispute they wish to the jurisdiction of an arbitral tribunal is limited by arbitrability [*Wolff – Quinke, p. 380, para. 418; Lew/Mistelis/Kröll, para. 9-4; Born, para. 6.02 (f)*]. All countries are free to determine which disputes are arbitrable and which are not [*Redfern/Hunter, para. 2.30; Wolff – Quinke, p. 384, para. 430; Lew/Mistelis/Kröll, para. 9-35; Born, para. 6.01*]. This principle is also enshrined in Art. 1 (5) UNCITRAL Model Law on International Commercial Arbitration (hereafter "Model Law"), which was implemented in many national jurisdictions and has also been adopted in Danubia as the Danubian Arbitration Law [*PO NO 1, p. 53, para. III, point 4*]. Contract adaptation is a question of arbitrability [**I**]. Danubian Law as the *lex arbitri* precludes an adaptation of the Contract in the present case [**II**].

## I. Contract Adaptation Is a Question of Arbitrability

4 Contract adaptation is a question of arbitrability. When asked to adapt a contract, an arbitral tribunal must first determine the arbitrability of the issue [*Kröll, p. 139; Frick, p. 197; Berger, RIW, 2000, pp. 8 et seq.; Peter, p. 279; Ferrario, p. 75; Sanders, p. 167 et seq.; Peter, in: Nicklisch, Long-Term Contract, p. 146; Bernardini, JWELB, 2008, p. 107; Briner, p. 370; Kapwadi, p. 53*]. Contract adaptation gives the arbitrator extensive powers to redefine the contractual obligations without the parties' agreement [*Berger, Arb Int'l, 2001, p. 2*]. Some countries do not recognise such power or want to reserve it for a state court. Under Belgian law, for example, the power to modify a contract cannot be conferred on an Arbitral Tribunal [*Matray, Yearbook Commercial Arbitration, 1980, para. 3 (b); Dal/Keutgen, National Report Belgium 2018, ICCA, para. II (3)*]. In Hong Kong, Mexico and India, an adaptation is only arbitrable with an express empowerment by the parties [*Kaplan/Morgan, National Report Hong Kong 2018, ICCA, para. II (3) (b); De Cossío, National Report Mexico 2018, ICCA, para. II (3) (b); Nariman, National Report India 2015, ICCA, para. II (3) (b)*]. Other countries explicitly state in their arbitration law that contract adaptation is arbitrable [*cf. Portuguese Voluntary Arbitration Law, Art. 1 (4); Dutch Arbitration Act, Art. 1020 (4) (c); Bulgarian Law on the International Commercial Arbitration, Art. 1 (2)*]. Whether an arbitral tribunal may adapt a contract is thus a question of arbitrability and varies from country to country.

## II. Danubian Law as the *Lex Arbitri* Precludes an Adaptation of the Contract

5 The arbitrability of an adaptation of the Contract has to be determined according to Danubian Law. The question of whether certain powers can be conferred on the arbitral tribunal depends on the *lex arbitri* [*ICC No 4604, 1985; Kröll, pp. 19 et seq.; Redfern/Hunter, para. 3.44; Poudret/Besson, para. 332; Frick, pp. 193 et seq.; Lew/Mistelis/Kröll, para. 9-31; Berger, Int'l Arb. 2006, p. 333; Zweigert/Hoffmann, Luther lib. am., p. 211*]. In other words, if a matter is non-arbitrable under the *lex arbitri*, any power to address the issue under the applicable substantive law is without effect [*Brunner, Hardship, p. 493; Kröll, p. 19; Frick, p. 193; Peter, p. 257; Redfern/Hunter, paras. 5.12 et seq.*]. The *lex arbitri* is the entirety of the national law provisions that apply to the arbitration at the seat of the arbitration [*Redfern/Hunter, paras. 3.37 et seq.; Henderson, SAcLJ, 2014, p. 887*]. The seat of the Arbitration is Danubia [*EXHIBIT C 5, p. 14*]. The *lex arbitri* thus is Danubian Law. The arbitrability of contract adaptation therefore depends on Danubian Law.

6 Contrary to CLAIMANT's allegations, the substantive law by itself cannot determine the power of an arbitral tribunal. CLAIMANT alleges that the award is valid as long as the substantive law

allows for an adaptation and cites two cases in support [*MEMORANDUM CLAIMANT, p. 18, para. 77*]. However, both court decisions that CLAIMANT relies on prove the opposite. In both instances, the court looked at the relevant arbitrability provisions in the *lex arbitri* before reaching its decision. Only after determining that there was no contrary provision to be found, the court acknowledged the tribunal's power [*Desputeaux v Éditions Chouette, 21 Mar 2003, paras. 40, 60; Compagnie Maritime Belge v Distrigas, 19 Dec 2001, para. 2(c)(bb)(aaa)*]. Whether a decision is in accordance with the substantive law is thus only a subordinate question to be determined after the arbitrability of the issue has been affirmed.

7 In the present case, an adaptation of the Contract is not arbitrable. In Danubia, there is consistent jurisprudence that an arbitral tribunal may only adapt the contract with an express empowerment [*PO NO 2, p. 60, para. 36*]. Danubia is a common law country [*PO NO 2, p. 61, para. 44*], which makes this jurisprudence binding law. In the present case, the Parties have not expressly empowered the Arbitral Tribunal to adapt the Contract. 'Express' is defined as "*clearly and unmistakably communicated; directly stated*" [*Black's Law Dictionary*]. No mention of the term 'adaptation' can be found in the Arbitration Agreement or anywhere else in the Contract. There is thus no express empowerment. An adaptation of the Contract is therefore not arbitrable in the present case.

8 Furthermore, any award implementing an adaptation of the Contract in the present case would be set aside. CLAIMANT argues that the only reason for setting aside the award would be if the award were in conflict with the public policy of the state of the seat, as provided in Art. 34(2)(b)(ii) Danubian Arbitration Law [*MEMORANDUM CLAIMANT, p. 18, para. 77*]. CLAIMANT, however, does not discuss the alternative of Art. 34(2)(b)(i) Danubian Arbitration Law, which states that an award may also be set aside if the matter of the dispute is not capable of settlement by arbitration under the law of the seat. In the present case, an adaptation of the Contract is not arbitrable. Therefore, the award would be set aside. In conclusion, the power of the Arbitral Tribunal to adapt the Contract is already excluded for the reason that it is not arbitrable in Danubia. The question of whether the Parties intended to confer this power and which law governs the Arbitration Agreement is thus not material for resolving this issue.

**B. In Any Case, the Arbitration Agreement Does Not Allow for an Adaptation**

9 Even if the Arbitral Tribunal were to regard the adaptation of the Contract as arbitrable, the Arbitration Agreement, properly interpreted, shows that the Parties did not agree to confer the power to adapt the Contract on the Arbitral Tribunal. As CLAIMANT correctly states, the law

governing the arbitration agreement is the law under which questions of its existence, validity and scope of application are to be determined [*cf. MEMORANDUM CLAIMANT, p. 17, para. 76*]. However, contrary to CLAIMANT's view, the scope of an arbitration agreement includes which powers were assigned to the tribunal by the parties [*cf. Redfern/Hunter, para. 5.06*, *fn. 7*]. Whether the Parties intended for the Arbitral Tribunal to have the power to adapt the Contract is thus to be determined by interpreting the Arbitration Agreement under the law governing it. In the present case, Danubian Contract Law governs the Arbitration Agreement [**I**]. Applying the Danubian rules of interpretation, there is nothing in the Arbitration Agreement to show that the Parties intended to confer the power to adapt the Contract on the Arbitral Tribunal [**II**]. Even interpreted under Mediterranean Contract Law, the Arbitration Agreement does not empower the Arbitral Tribunal to adapt the Contract [**III**].

### I. The Arbitration Agreement Is Governed by Danubian Contract Law

10 Danubian Contract Law governs the Arbitration Agreement. The law governing the arbitration agreement is generally determined by the parties' choice [*International Tank & Pipe v Kuwait Aviation Fuelling, 9 Oct 1974, p. 3; BGH, 8 May 2014, para. 11; Blessing, ICCA Congress Series, 1996, pp. 395 et seq.*]. However, the Parties have not expressly chosen the law of the Arbitration Agreement [**1**]. Instead, the negotiations show that the Parties impliedly agreed on Danubian Contract Law to govern the Arbitration Agreement [**2**]. In any case, Danubian Contract Law as the law of the seat of Arbitration has the closest connection to the Arbitration Agreement and thus governs its interpretation [**3**].

#### 1. There Is No Express Choice of Law for the Arbitration Agreement

11 The Parties have not expressly chosen a law governing the Arbitration Agreement. There is no law specified in the Arbitration Agreement itself. The choice of law clause of the main contract does not determine the law of the Arbitration Agreement due to the doctrine of separability [**a**]. The separability is not contradicted by the fact that the Parties omitted a choice of law clause in the Arbitration Agreement [**b**].

##### a) The Arbitration Agreement Is Separate from the Rest of the Contract

12 Due to the doctrine of separability, there is no express choice of the law governing the Arbitration Agreement. The main contract contains a choice of law clause in favour of Mediterranean Law [*EXHIBIT C 5, p. 14, Clause 14*] (hereafter "Clause 14"). CLAIMANT argues that this also constitutes an express choice of law for the law governing the Arbitration Agreement [*MEMORANDUM CLAIMANT, p. 19, paras. 81 et seq.*]. However, the doctrine of

separability provides that an arbitration agreement is a separate and autonomous agreement, even if it is included in the underlying sales contract [*Fouchard/Gaillard/Goldman, para. 389; Dicey/Morris/Collins, para. 16-011; Born, Cases and Materials, p. 190; Redfern/Hunter, para. 2.103; Mustill/Boyd, p. 62; Jones, SAcLJ, 2014, p. 912, para. 6; Moses, p. 18; ICC No 9480, 1998*]. Consequently, the arbitration agreement can be, and often is, governed by a different law than the sales contract [*FirstLink Investments v GT Payment, 19 Jun 2014, para. 13; Black Clawson v Papierwerke, 3 Mar 1981, p. 453; Mustill/Boyd, p. 62; Poudret/Besson, para. 178; Fouchard/Gaillard/Goldman, paras. 412 et seq.; Born, Cases and Materials, p. 91; Jones, SAcLJ, 2014, p. 912, para. 6*]. The choice of law clause in the substantive contract can thus not constitute an express choice for the Arbitration Agreement by itself.

13 This is supported by the fact that the Parties recognised the separability of the Arbitration Agreement and the main contract. In particular, a choice of law of the main contract cannot automatically be held to govern the arbitration agreement if the parties knew of its separability from the main contract [*Czernich, SchiedsVZ, 2015, p. 184*]. The Parties used the HKIAC Model Arbitration Clause, which prompts the Parties to specify the law applicable to the arbitration agreement [*HKIAC Model Arbitration Clause; cf. D'Agostino/Hughes, Kluwer Arbitration Blog, 2014*]. Throughout the negotiations, the Parties made use of this suggestion and distinguished between the substantive law and the law governing the Arbitration Agreement by including an express choice of law in the Arbitration Agreement [*cf. EXHIBIT R 1, p. 33*]. Thus, the Parties demonstrated their intent to treat the two applicable laws independently from each other. Therefore, the choice of law in the main contract cannot be treated as an express choice of law for the Arbitration Agreement.

14 The placement of Clause 14 further emphasises the separability of the substantive contract and the Arbitration Agreement. CLAIMANT argues that the placement of the contractual choice of law clause and the Arbitration Agreement in the Contract is an indicator that Mediterranean Law was intended to govern the Arbitration Agreement [*MEMORANDUM CLAIMANT, p. 19, para. 81*]. CLAIMANT submits that the choice of law clause is a concluding clause placed at the end of the Contract and for this reason applies to the entire Contract. Yet, the Arbitration Agreement is placed after the choice of law clause, being Clause 15 of the Contract [*cf. EXHIBIT C 5, p. 14, Clause 14 and 15*]. Following CLAIMANT's logic, this in fact rather indicates that the Arbitration Agreement must be viewed seperately and is therefore not subject to Clause 14. There is thus no express choice of law for the law governing the Arbitration Agreement.

**b) The Separability Is Not Contradicted by the Omission of a Choice of Law in the Arbitration Agreement**

15 The separability of the Arbitration Agreement and the main contract is not contradicted by the fact that the Parties omitted a choice of law governing the Arbitration Agreement. CLAIMANT argues that by omitting the choice of law, the negotiators intentionally decided against a separate law governing the Arbitration Agreement [*MEMORANDUM CLAIMANT, p. 19, para. 80*]. However, the omission was no deliberate choice.

16 First, CLAIMANT's last draft of the Arbitration Agreement was never intended to be complete. CLAIMANT itself stated that in the last draft, the Arbitration Agreement was only written out in its "*relevant part",* the part that CLAIMANT had changed in the respective email [*EXHIBIT R 2, p. 34*]. Important information including language and the number of arbitrators was also not included. This, however, was certainly not intended to be a deliberate omission. There is thus no reason why it should constitute a deliberate omission in the case of the law applicable to the Arbitration Agreement.

17 Second, the fact that the final version of the Arbitration Agreement did not contain a reference to the applicable law can be explained by the negligence of the final negotiators. The two initial negotiators had been hospitalised after a car accident, and the Arbitration Agreement was finished by two other lawyers who had limited time to familiarise themselves with the past negotiations [*EXHIBIT R 3, p. 35*]. Without attributing much importance to the Arbitration Agreement, they simply adopted the incomplete wording of CLAIMANT's last draft [*PO NO 2, p. 55, para. 6*]. They cannot remember why they did not include a choice of law governing the Arbitration Agreement [*ibid.*]. One of the negotiators even states he would definitely have included a reference to the applicable law had he been aware of all the past negotiations [*EXHIBIT R 3, p. 35*]. In conclusion, the omission of a choice of law for the Arbitration Agreement was not deliberate, but merely an oversight.

18 Finally, Clause 14 could not have been intended to govern the Arbitration Agreement, as it was finished long before the Arbitration Agreement was finalised. Clause 14 had been part of CLAIMANT's standard contract template and had remained unchanged from the beginning [*EXHIBIT C 5, p. 14, Clause 14; PO NO 2, p. 55, para. 3*]. It was thus already agreed upon when the Parties discussed the law governing the Arbitration Agreement. The contractual choice of law clause could therefore not have been intended to also determine the law of the Arbitration Agreement. In conclusion, Clause 14 does not constitute an express choice of law for the Arbitration Agreement.

**2. The Parties Impliedly Chose Danubian Law to Govern the Arbitration Agreement**

19 Absent an express choice, the Parties made an implied choice of Danubian Contract Law as the law governing the Arbitration Agreement. It is generally acknowledged that where the parties have chosen the seat of arbitration, but not the governing law, it can be inferred that they intended to subject the arbitration agreement to the law of the seat [*FirstLink Investments v GT Payment, 19 Jun 2014, paras. 15, 16; Bulbank v AI Trade Finance, 27 Oct 2000, p. 4; C v D, 5 Dec 2007, paras. 16 et seq.; Shashoua v Sharma, 7 May 2009, para. 29; XL Insurance v Owens Corning, 28 Jul 2000, para. 42; cf. Petrasol v Stolt Spur, 28 Sep 1995, para. 9*]. In the decisions mentioned above this was assumed even where the parties had not discussed a separate choice of law governing the arbitration agreement at all. The law of the seat should thus apply all the more where this result is supported by the parties' negotiations.

20 In the present case, the drafting history shows that the Parties had always intended the law of the seat to govern the Arbitration Agreement. During the negotiations, the law governing the Arbitration Agreement was dependent upon the law of the seat. RESPONDENT's first draft of an arbitration agreement specified the seat of arbitration as Equatoriana and contained a choice of law in favour of Equatorianian Law [*EXHIBIT R 1, p. 33*]. CLAIMANT changed the seat of arbitration to Danubia without mentioning the applicable law [*ibid.*]. This suggests that the applicable law was also meant to be Danubian Law.

21 Additionally, the Parties' choice of a neutral seat of the Arbitration implies the choice of Danubian Contract Law. A neutral law of the arbitration agreement ensures the balance between the parties, which is especially important if the parties are from different countries [*FirstLink Investments v GT Payment, 19 Jun 2014, para. 13; Oldendorff v Libera (No 2), 16 Nov 1995, pp. 12, 13; cf. Peter, p. 284, para. 3.2.4*]. CLAIMANT proposed to choose a neutral country as the seat of arbitration and suggested Danubia [*EXHIBIT R 2, p. 34*], which RESPONDENT accepted in the final Contract [*EXHIBIT C 5, p. 14*]. The choice of Danubian Contract Law would put both Parties in the same position with regard to their knowledge of the legal system and would be in accordance with the neutral seat. This strongly suggests that the Parties impliedly chose Danubian Contract Law to govern the Arbitration Agreement.

22 Contrary to CLAIMANT's allegation, it never informed RESPONDENT that it intended the Arbitration Agreement to be governed by Mediterranean Law. CLAIMANT argues that it attached a condition to the final draft, which stated "*that the offer is naturally on the condition that the law applicable to the Frozen Semen Sales Agreement remains the law of Mediterraneo*" [*MEMORANDUM CLAIMANT, p. 19, para. 81, EXHIBIT R 2, p. 34; corrected in PO NO 2, p. 62, para. 50(c)*]. However, the wording indicates that this statement merely

referred to the substantive law of the main contract, not the law governing the Arbitration Agreement. CLAIMANT's choice of the word "*naturally*" suggests that it simply wanted to clarify that a change in the Arbitration Agreement would not affect the law of the sales part of the contract due to the doctrine of separability [*EXHIBIT R 2, p. 34*]. It is also to be noted that CLAIMANT wrote "*remains the law of Mediterraneo*", which indicates that "*the law*" that CLAIMANT referred to had also been Mediterranean Law before. Yet, the law governing the Arbitration Agreement in the prior draft had been Equatorianian Law [*EXHIBIT R 1, p. 33*]. CLAIMANT could thus only have referred to the law applicable to the main contract, which had always been Mediterranean Law. Hence, CLAIMANT never communicated its alleged intent to RESPONDENT.

23 Contrary to CLAIMANT's assumption [*MEMORANDUM CLAIMANT, p. 20, para. 85*], the standard set by the decisions of *BCY v BCZ, Sulamérica, Arsanovia* and *Habas Sinai* does not speak in favour of a choice of Mediterranean Law. These decisions merely state that the choice of a seat might not be enough to displace the presumption that the whole contract is governed by the same law if no evidence of past negotiations is available and no indicators to the contrary can be discerned [*BCY v BCZ, 9 Nov 2016, para. 65; Sulamérica v Enesa Engenharia, 16 May 2012, para. 26; Arsanovia v Cruz City, 20 Dec 2012, para. 21; Habas Sinai v VSC Steel, 19 Dec 2013, para. 101*]. However, in the present case, the Parties have discussed a separate law governing the Arbitration Agreement, and, in addition to stipulating the seat as Danubia, there are further indicators that they intended Danubian Contract Law to govern their Arbitration Agreement. Thus, the court decisions cited are not in conflict with Danubian Contract Law governing the Arbitration Agreement.

24 Finally, the Hague Principles on the Choice of Law in International Commercial Contracts (hereafter "Hague Principles") cannot be taken into account in the present case. CLAIMANT contends that according to the Hague Principles, the choice of the seat is not a sufficient indicator of the Parties' choice of law of the arbitration agreement [*MEMORANDUM CLAIMANT, p. 21, para. 86*]. As admitted by CLAIMANT, however, Art. 1 (3) (b) Hague Principles expressly stipulates that the Hague Principles do not apply to the law governing arbitration agreements. Thus, the applicability of the Danubian Contract Law to the Arbitration Agreement is not affected by the Hague Principles. In conclusion, the Arbitration Agreement is governed by Danubian Contract Law.

### 3. Danubian Contract Law Has the Closest Connection to the Arbitration Agreement

25 Even if an implied agreement cannot be deduced from the Parties' negotiations, Danubian Contract Law is applicable as it has the closest connection to the Arbitration Agreement. If no clear choice of the law governing the Arbitration Agreement can be determined, the law with the closest connection to the Arbitration Agreement is deemed to be the governing law, which is usually the law of the seat [*C v D, 5 Dec 2007, para. 26; Abuja International Hotels v Meridien, 20 Jan 2012, para. 21; Sulamérica v Enesa Engenharia, 16 May 2012, paras. 32, 56; Owerri Commercial v Dielle, 4 Aug 1993, para. 8; Dicey/Morris/Collins, para. 16-021; Harisankar, JIA, 2013, p. 630*]. The arbitration agreement has a fundamentally different role than the rest of the contract and is much more closely connected with the procedural law than with the law governing the parties' substantive obligations [*Poudret/Besson, para. 297; Nazzini, ICLQ, 2016, p. 702; van den Berg, p. 293*]. This is also acknowledged by Art. V(1)(a) NYC and Art. 34(2)(a)(i) Model Law, which state that the law of the seat governs the arbitration agreement as a default rule if no choice of law is made. The Parties agreed on Danubia as the seat of arbitration and therefore on Danubian Law to govern the procedural framework. Danubian Contract Law thus has the closest connection to the Arbitration Agreement. Therefore, Danubian Contract Law would govern the Arbitration Agreement even in the absence of a choice by the Parties.

## II. An Interpretation Under Danubian Contract Law Demonstrates that the Arbitration Agreement Does Not Allow for an Adaptation of the Contract

26 Applying the rules of interpretation of Danubian Contract Law to the Arbitration Agreement, it is clear that the Parties did not confer the power to adapt the Contract on the Arbitral Tribunal. In Danubia, Art. 28(3) Danubian Arbitration Law is taken as a general standard that applies to all the exceptional powers of an arbitrator [*PO NO 2, p. 60, para. 36*]. Thus, an express conferral of powers is required for contract adaptation [*ibid.*]. Additionally, under Danubian Contract Law arbitration agreements are to be interpreted narrowly [*PO NO 1, p. 52, para. II, point 3*]. The absence of an express empowerment shows that the Parties did not intend for the Arbitral Tribunal to be able to adapt the Contract. Accordingly, in the telephone conference on 4 October 2018, both Parties agreed that under Danubian Contract Law, there was a high likelihood that the Arbitration Agreement would not be interpreted as authorising a contract adaptation by the Arbitral Tribunal [*PO NO 1, p. 52, para. II, point 3*]. The interpretation under Danubian Law thus shows that no empowerment to adapt the Contract was intended.

27 This conclusion is not invalidated by CLAIMANT's allegations that there was a prior agreement between the Parties regarding the Arbitral Tribunal's power to adapt the Contract. Contrary to CLAIMANT's allegations [*MEMORANDUM CLAIMANT, p. 22, para. 93*], the conversation between the Parties' negotiators on 12 April 2017 [*EXHIBIT C 8, p. 17*] does not constitute an express empowerment to adapt the Contract.

28 First, the four corners rule of Art. 4.3 Danubian Contract Law states that a contract cannot be supplemented by evidence of prior statements [*PO NO 2, p. 61, para. 45*]. Second, even if CLAIMANT were correct in stating that prior statements may nonetheless be used to interpret the written word [*cf. MEMORANDUM CLAIMANT, p. 22, para. 90*], the negotiations show there was no final agreement on an empowerment of the Arbitral Tribunal. RESPONDENT's negotiator only stated that it was "*probably*" the arbitrator's task to adopt the contract and promised to come back with a proposal for a solution of the issue [*EXHIBIT C 8, p. 17*]. This suggests the issue was not yet fully resolved, and the final negotiators never made proposals regarding this issue. Contrary to CLAIMANT's assumption, the former negotiator's statement cannot be taken as RESPONDENT's intent. It is the common intention of the Parties at the time of the conclusion of the contract that is decisive [*Comment to Art. 4.1 (1) PICC (Danubian Contract Law)*]. The Arbitration Agreement was drafted by the final negotiators [*PO NO 2, p. 55, para. 4*] and it is their intent that is conclusive. RESPONDENT's final negotiator could not have been aware of an oral communication between the two former negotiators and if he had been, he would not have agreed [*EXHIBIT R 3, p. 35*]. Therefore, the Parties did not reach a final agreement to empower the Arbitral Tribunal to adapt the Contract. Thus, interpreted in accordance with Danubian Contract Law, the Arbitration Agreement does not allow for an adaptation of the Contract.

### III. Even Interpreted Under Mediterranean Contract Law, the Arbitration Agreement Does Not Allow for an Adaptation of the Contract

29 Even if Mediterranean Law were to govern the Arbitration Agreement, the Arbitral Tribunal would not have the power to adapt the Contract. Mediterranean Law provides for the interpretation of international arbitration agreements under the Convention on the International Sale of Goods (hereafter "CISG") [*PO NO 1, p. 53, para. 4*]. Pursuant to Art. 8 (2), (3) CISG statements of a party are to be interpreted according to the understanding of a reasonable person in the same situation with regard to all the relevant circumstances. A reasonable person in terms of Art. 8 (2), (3) CISG would conclude that the Parties intended to exclude the power to adapt the Contract by deviating from the HKIAC Model Arbitration Clause. The Arbitration Agreement in its final version refers "[*a*]*ny dispute arising out of this*

*contract* […]" [*EXHIBIT C 5, p. 14, emph. add.*] to arbitration. In contrast, the HKIAC Model Arbitration Clause, which was initially relied upon by the Parties, additionally covers "*any dispute, controversy, difference or claim arising out of or relating to this contract*" [*cf. HKIAC Model Arbitration Clause, emph. add.*]. The Parties considered the original wording too broad and excluded any "*controversy, difference or claim*" as well as any dispute "*relating to*" the Contract [*EXHIBIT R 1, p. 33*]. A reasonable person would have deduced from that exclusion that the Parties intended to limit the scope of their Arbitration Agreement.

30 A reasonable person would further conclude that the adaptation of the Contract was not within the intended scope of the Arbitration Agreement. While it is true that the wording 'dispute' on its own is generally interpreted broadly in the context of arbitration [*Fiona Trust v Privalov, 17 Oct 2007, para. 13*], in the present case, the Parties have deliberately chosen to limit 'dispute' to its strict sense by excluding all further terms. A 'dispute' is generally considered narrower than a 'difference' [*Poudret/Besson, para. 157; Kheng, p. 12, para. 7.4; F and G Sykes v Fine Fare, 1967, p. 60*]. A traditional legal 'dispute' is a question that can be reduced to a yes or no decision [*Berger, Arb Int'l, 2001, p. 2*]. When adapting a contract, the arbitral tribunal has to decide on its own discretion, even beyond the provisions of the contract. In the strict sense of the word, adaptation is thus not a 'dispute' [*Fouchard/Gaillard/Goldman, para. 34, Mandri-Perott/Stiggers, p. 170; Berger, Vand. J. Transnat'L., 2003, pp. 1372 et seq.*]. This is why traditionally, adaptation was not considered arbitration at all but a wholly separate form of conflict resolution [*OGH, 27 Feb 1985; Oppetit, Clunet, 1974, pp. 808 et seq.; Rubino-Sammartano, para. 1.19; Bernardini, ICSID Rev, 1998, pp. 421 et seq.*]. A reasonable person would thus conclude that the Parties did not intend the Arbitration Agreement to include contract adaptation. In conclusion, even if Mediterranean Law governed the Arbitration Agreement, it would not allow for an adaptation of the Contract.

31 **Conclusion to the First Issue**: The Arbitral Tribunal does not have the power to adapt the Contract since, in the present case, adaptation is not arbitrable under the *lex arbitri*, which is Danubian Law. Even if an adaptation of the Contract were arbitrable, the Arbitration Agreement, properly interpreted, would not allow for an adaptation in the present case. The Parties agreed on Danubian Contract Law to govern the Arbitration Agreement, which provides for a narrow interpretation and does not allow for an adaptation without express authorisation to adapt the Contract. However, even if Mediterranean Contract Law applied, the Arbitration Agreement would not allow for an adaptation of the Contract by the Arbitral Tribunal.

## SECOND ISSUE: CLAIMANT IS NOT ENTITLED TO AN ADDITIONAL PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT

32 CLAIMANT is not entitled to the payment of an additional US$ 1,250,000 or any other amount. Even if the Arbitral Tribunal had the power to adapt the Contract, using that power would not be called for in the present case. After CLAIMANT had delivered the first two shipments of frozen semen, Equatoriana imposed punitive tariffs on agricultural goods from Mediterraneo [*EXHIBIT C 6, p. 15*]. The Parties discovered that the tariffs applied to frozen horse semen and thus affected the third shipment. CLAIMANT authorised the delivery of the third shipment and paid for the tariffs, as it was responsible for the delivery [*cf. EXHIBIT C 8, p. 18*]. Facing financial problems, CLAIMANT now demands RESPONDENT to pay for the additional costs caused by the tariffs. However, CLAIMANT stretches the provisions of both the Contract and the CISG beyond their limits to justify its demand. Consequently, CLAIMANT is not entitled to an adaptation of the price under Clause 12 [**A**] or under the CISG [**B**].

### A. CLAIMANT Is Not Entitled to an Additional Payment Under Clause 12

33 CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount under Clause 12. The agreement on the incoterm DDP ("*delivery duty paid*") allocates all delivery risks to CLAIMANT [**I**]. As the tariffs do not meet the requirements of Clause 12 [**II**], CLAIMANT is not exempted by that provision. In any case, Clause 12 does not provide for contract adaptation as a legal remedy [**III**].

#### I. The Agreement on DDP Allocates Delivery Risks to CLAIMANT

34 Generally, all risks associated with the delivery of the frozen semen are allocated to CLAIMANT by the agreement on DDP. Clause 8 of the Contract requires the shipments to be sent DDP [*EXHIBIT C 5, p. 14*]. DDP refers to the ICC incoterm, meaning that the seller is obliged to deliver the goods at the agreed upon destination and bears all costs and risks of delivery [*ICC Guide Incoterms 2010, p. 149*]. This also includes the obligation to clear the goods for import and pay for tariffs [*ibid; MEMORANDUM CLAIMANT, p. 4, para. 26*]. CLAIMANT argues that "*the parties did not actually intend for DDP to apply*", because the parties allegedly removed some of the risks associated with DDP in the Clauses 10 and 13 (insurance) of the Contract [*MEMORANDUM CLAIMANT, p. 5, para 27*]. However, the inclusion of specific exceptions from DDP into the Contract would only demonstrate that the parties fundamentally accepted the risk distribution associated with DDP. Consequently, the agreement on DDP assigns all delivery risks to CLAIMANT.

## II. The Requirements of Clause 12 Are Not Met

35 Clause 12 does not exclude tariffs from falling into CLAIMANT's sphere of responsibility, as the tariffs do not meet the requirements of the provision. The tariffs do not qualify as comparable events to additional health and safety requirements [**1**] and do not constitute hardship [**2**].

### 1. The Tariffs Do Not Qualify as Comparable Events in the Sense of Clause 12

36 The tariffs are not an event comparable to health and safety requirements. To begin with, the scope of Clause 12 is to be interpreted narrowly. The interpretation of a contract shall ensure that the contract implements the parties' will [*Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 8, para. 51; Baldus, p. 131; cf. Calnan, p. 35, para. 3.02*]. CLAIMANT argues that the wording of Clause 12, which requires "*comparable unforeseen events*", is a catch-all provision [*MEMORANDUM CLAIMANT, p. 2, para. 16*]. In fact, the Parties agreed on a narrow hardship clause. The ICC Hardship Clause 2003, which was originally suggested by CLAIMANT [*EXHIBIT R 2, p. 34*], recognises hardship whenever "*an event*" occurs that meets the requirements listed in the clause. The parties narrowed down the provision by requiring the event to be "*caused by additional health and safety requirements or comparable unforeseen events*", thereby limiting the number of events that may constitute causes of hardship [*cf. EXHIBIT R 3, p. 35*; *EXHIBIT C 5, p. 13, Clause 12*]. Thus, the scope of the term "*comparable events*" is to be interpreted narrowly to reflect the Parties' intention when drafting the Clause.

37 Second, tariffs are objectively not comparable to health and safety requirements. CLAIMANT argues that tariffs fall into the same category as health and safety requirements [*MEMORANDUM CLAIMANT, p. 2, para. 18*]. However, Clause 12 was included in the Contract to address CLAIMANT's concerns resulting from experiences with events that made highly expensive tests necessary [*cf. EXHIBIT C 4, p. 12*]. Possible causes for such measures other than health and safety requirements might be additional product-related quality requirements. The tariffs are an act of Mediterranean foreign policy and thus not related to either health and safety requirements or comparable product related quality standards.

38 Third, the agreement on DDP indicates that tariffs are not covered by Clause 12. DDP is the one incoterm that obligates the seller to bear all costs and risks associated with import clearance [*Piltz/Bredow – Piltz, paras. D-500, D-504; ICC Guide Incoterms 2010, p. 149*]. This generally includes the risk of unexpected difficulties regarding import clearance [*cf. ICC Guide Incoterms 2010, p. 32*]. Had the Parties intended for the costs and risks of

tariffs to be borne by RESPONDENT, they would have chosen a different incoterm, such as DAP, which differs from DDP mainly in the regard that it assigns risks and costs of import clearance to the buyer. The official ICC Incoterm Guide advises contracting parties to either choose a different incoterm [*cf. Incoterm 2010 Guide, p. 57*], or modify the term by using a phrase such as "*DDP tariffs unpaid*" [*ICC Guide Incoterms 2010, p. 150*] if the seller is not supposed to pay for import tariffs. As the Parties agreed to apply the specific incoterm DDP, they could not have meant Clause 12 to negate that incoterm's defining criteria. Therefore, the tariffs are not comparable events as set forth by Clause 12.

**2. The Tariffs Do Not Constitute Hardship**

39 Contrary to CLAIMANT's submission [*MEMORANDUM CLAIMANT, p. 3. para. 21*], the tariffs do not cause hardship in the sense of Clause 12. CLAIMANT argues that any increase in difficulty or expensiveness constitutes hardship [*MEMORANDUM CLAIMANT, p. 3. para. 22*]. However, a person concluding a contract takes the risk that performance becomes more difficult or expensive than expected [*Southerington, para. 5.2.3*; *MEMORANDUM CLAIMANT, p. 3. para. 22*]. Only in exceptionally detrimental situations the disadvantaged party may be relieved due to hardship. The Parties chose to include the term "*hardship*" into the wording of Clause 12, which indicates that the characteristic requirements of hardship do apply to Clause 12. If any measure of increase in cost were to trigger Clause 12, the requirement of "*hardship*" would be redundant. Thus, the tariffs need to meet the threshold of onerousness that is customarily associated with hardship.

40 The tariffs do not make the Contract sufficiently more onerous to meet the threshold of hardship. Generally, the threshold for hardship requires the contract to be 100 or even 200 per cent more onerous, with only a few commentators suggesting a threshold of 50 per cent [*OLG Hamburg, 28 Feb 1997; Rechtbank van Koophandel Hasselt, 2 May 1995; Cour d'Appel de Colmar, 12 Jun 2001; Cour de Cassation, 20 Jun 2004; CIETAC, 10 May 1996; ICC No 2508, 1976; ICSID, CMS Gas v Argentine, 2005, para. 355; BCCI, 12 Feb 1998; Schwenzer/Hachem/Kee, p. 671, para. 45.106; Vogenauer – McKendrick, Art. 6.2.2, para. 8; Schwenzer, VWULR, 2008, p. 717; Maskow, Am. J. Comp. L., p. 661*]. CLAIMANT's increased cost of performance only amounts to 15 per cent, not to "*at least 30 per cent*" as claimed by the opposing party [*MEMORANDUM CLAIMANT, p. 3, para 22*]. The tariffs amounted to a cost increase of 30 per cent on the third shipment, which constitutes half of the delivery [*NOTICE OF ARBITRATION, p. 6, paras. 9, 13*]. However, hardship must alter the equilibrium of the entire contract, not just a single shipment [*Schwenzer, VWULR, 2008, p. 714; Maskow, Am. J. Comp. L., 1992, p. 662; Brunner, Hardship, pp. 397 et seq.; Schwenzer/Hachem/Kee, p. 666,*

*para. 45.67*]. This rule is confirmed by the wording of Clause 12, which postulates that hardship must make "*the contract more onerous*" [*EXHIBIT C 5, p. 14, Clause 12, emph. add.*]. The increased cost of full performance of the Contract thus amounts to 15 per cent. An increase in cost of performance by merely 15 per cent however, does not constitute hardship.

**III. In Any Case, Clause 12 Does Not Provide for the Remedy of Contract Adaptation**

41 Even if the requirements of Clause 12 were met, an adaptation of the Contract would not be a possible remedy of Clause 12. The wording of Clause 12 merely provides that the "*Seller is not responsible for* […] *hardship*". This wording suggests that the clause precludes certain claims of the buyer against the seller. Those claims would be claims for damages and the claim for performance. Clause 12 does not imply that it allows for any additional claims, such as price adaptation, to be raised by the seller against the buyer. Hence, the wording of Clause 12 does not provide for an adaptation.

42 CLAIMANT argues that the Parties agreed on the remedy of adaptation during the negotiations [*cf. MEMORANDUM CLAIMANT, p. 13, paras. 40 et seq.*]. Yet, CLAIMANT does not take into account that the final version of Clause 12 was agreed upon at a much later time. After the original negotiators were involved in a car accident, the negotiations had to be relaunched and Clause 12 was finalised by two unbriefed representatives [*EXHIBIT R 3, p. 35*]. Considering these circumstances, an interpretation of Clause 12 under Art. 8 (1) CISG shows that the Parties did not intend Clause 12 to provide for the remedy of adaptation:

43 During the drafting of the Clause, CLAIMANT proposed to rely on the ICC Hardship Clause 2003 [*EXHIBIT R 2, p. 34*], which does not allow for the remedy of contract adaptation [*ICC Hardship Clause 2003*]. Whilst the older version of the ICC Hardship Clause included the remedy of price adaptation, that part was excluded from the 2003 version [*Schwenzer, VWULR, 2008, p. 723*]. CLAIMANT itself recognised that the ICC Hardship Clause 2003 does not provide for the remedy of price adaptation [*MEMORANDUM CLAIMANT, p. 6, para. 34*]. The fact that CLAIMANT suggested this hardship clause shows that CLAIMANT did not intend contract adaptation to be a possible remedy. Instead of adding remedies to the ICC Hardship Clause 2003, the negotiators who finalised the Contract agreed on an even narrower wording in Clause 12 [*EXHIBIT R 3, p. 35; PO NO 2, p. 56, para. 12*]. Hence, the drafting history demonstrates that contract adaptation was not intended as a remedy of Clause 12.

44 Contrary to CLAIMANT's submission, the original negotiators' oral conversation does not lead to a different conclusion. The parties' common intent at the conclusion of the contract which is decisive for interpretation purposes [*Enderlein/Maskow, Art. 8, para. 3.1*]. In this case, the

original negotiators exchanged their thoughts on an adaptation of the Contract in an oral discussion. This conversation was not meant to be binding as the Parties agreed to further discuss the issue [*EXHIBIT C 8, p. 17*]. The final negotiators, however, could not have been aware of their predecessors' thoughts on the remedy. They merely drafted Clause 12 on the basis of the Parties' email chain [*PO NO 2, p. 55, para. 5*] and a note from RESPONDENT's previous negotiator [*EXHIBIT R 3, p. 35*]. Both sources do not record the original negotiators' conversation. Therefore, the oral statements of their predecessors were not part of the final negotiators' common intention when drafting Clause 12. Hence, the conversation cannot be consulted to interpret Clause 12 in terms of Art. 8 (3) CISG.

45 CLAIMANT argues that it is in the nature of hardship clauses to allow for an adaptation of the price [*MEMORANDUM CLAIMANT, p. 5, para. 28*]. However, CLAIMANT's sources also stress that hardship clauses allow for a renegotiation of the contract only under the condition that the clause expressly allows for it [*Ullman, CWILJ, 1988, p. 82; Schmitthoff, pp. 418 et seq.; Flambouras, PILR, 2001, p. 283; Rimke, Pace Rev. CISG, 1999-2000, p. 228*]. As even the remedy of renegotiation by the parties needs to be expressly provided for, so does the more invasive remedy of contract adaptation. Yet, in the present case, the Contract does not expressly allow for adaptation. Further, CLAIMANT recognises that the lack of an adaptation mechanism in the hardship clause does not render the Clause incomplete [*MEMORANDUM CLAIMANT, p. 5, para. 29*]. Hardship clauses do not necessarily provide for adaptation [*Ferrario, p. 138; Schmitthoff, pp. 418 et seq.; Rimke, Pace Rev CISG, 1999/2000, p. 229; Ullman, CWILJ, 1988, pp. 81 et seq*]. They have to be distinguished from adaptation clauses [*Schwenzer/Hachem/Kee, p. 667, para. 45.85*]. Therefore, Clause 12 does not allow for the adaptation of the price.

### B. CLAIMANT Is Not Entitled to an Adaptation of the Price Under the CISG

46 CLAIMANT is not entitled to an adaptation of the Contract under the CISG, as Clause 12 supersedes the application of Art. 79 CISG [**I**]. In any case, the requirements of Art. 79 CISG are not met [**II**] and the CISG does not provide for the remedy of contract adaptation [**III**].

#### I. Clause 12 Supersedes the Application of Art. 79 CISG

47 Art. 79 CISG cannot be applied in addition to Clause 12 of the Contract. Pursuant to Art. 6 CISG, parties can derogate from individual provisions of the CISG, including Art. 79 CISG [*Schlechtriem/Schwenzer – Schwenzer/Hachem, Art. 6, para. 8*]. Both Clause 12 and Art. 79 CISG deal with unexpected events that impede performance and provide exemption for the disadvantaged party if these events meet certain criteria. In

Clause 12, the Parties adjusted the conditions for exemption to meet their specific needs. Hence, Clause 12 is *lex specialis* to Art. 79 CISG and thus supersedes that provision. Furthermore, Clause 12 was drafted as a force majeure clause with an added hardship wording [*ANSWER TO NOTICE OF ARBITRATION, p. 30, para. 4*]. A derogation from Art. 79 CISG through a force majeure clause is quite common in international trade [*Schlechtriem/Schwenzer – Schwenzer, Art. 79, para. 58*]. The nature of Clause 12 therefore speaks for a derogation of Art. 79 CISG. It may thus not be applied next to Clause 12.

**1. The Tariffs Do Not Meet the Requirements of Art. 79 CISG**

48 In any case, the tariffs do not meet the requirements set forth in Art. 79 CISG. Under Art. 79 CISG, a party is exempted if its "*failure to perform*" 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*". The tariffs do not meet these conditions. There is no failure to perform [**a**] and the tariffs are not an impediment in the sense of Art. 79 CISG [**b**]. Further, CLAIMANT could have taken the tariffs into account [**c**].

**a) There Is No Failure to Perform**

49 Art. 79 CISG is not applicable to the present case as there is no failure to perform. Art. 79 CISG grants a party exemption from liability for a "*failure to perform any of its obligations*" due to certain impediments. The provision is thus meant to grant relief in cases where unexpected events impede performance, thereby causing a failure to perform. In the present case, CLAIMANT did not fail to perform any of its obligations as it delivered the frozen semen on time [*NOTICE OF ARBITRATION, p. 6, para. 13; EXHIBIT C 5, p. 14, Clause 8*]. Therefore, Art. 79 CISG is not applicable to the present case.

**b) The Tariffs Are No Impediment in the Sense of Art. 79 CISG**

50 Contrary to CLAIMANT's submission, the tariffs do not constitute an impediment as required by Art. 79 CISG [*MEMORANDUM CLAIMANT, p. 9, paras. 44 et seq.*]. The fundamental principle of *pacta sunt servanda* binds each party to the performance of the contract [*Brunner, Hardship, pp. 392 et seq.; Schwenzer/Hachem/Kee, p. 668, para. 45.87; Rimke, Pace Rev CISG, 1999/2000, p. 242*]. This principle also applies under the CISG [*Kröll/Mistelis/Perales Viscasillas – Perales Viscasillas, Art. 7, para. 64*]. Art. 79 CISG only provides for an exception in cases when an unexpected impediment gravely affects one party's ability to perform. It is disputed whether economic hardship may constitute such an

impediment [*Kröll/Mistelis/Perales Viscasillas – Atamer, Art. 79, para. 79; Flambouras, Pace Int'l Law Rev, 2001, pp. 291 et seq*.]. If, however, economic hardship is to be included in the scope of Art. 79 CISG, its effects on performance must be equal to those of physical impediments. The threshold is thus to be set high enough to amount to unaffordability [*Schlechtriem/Schroeter, p. 293, para. 678*].

51 The tariffs do not meet the threshold of Art. 79 CISG. It is generally accepted that the threshold for hardship is established above a 70 per cent cost increase [*Brunner, Hardship, p. 427; Schwenzer, VWULR, 2008, p. 717; Schwenzer/Hachem/Kee, p. 671, para. 46.106*]. An Italian court ruled that a 30 per cent cost increase is not enough to constitute a hardship impediment as required by Art. 79 CISG [*Nuova Fucinati v Fondmetall International, 14 Jan 1993*]. The tariffs caused CLAIMANT's overall cost to increase by 15 per cent [*supra, para. 43*]. Thus, the tariffs do not constitute hardship.

52 CLAIMANT argues that the tariffs qualify as a hardship impediment because performance would result in CLAIMANT's financial ruin and possible bankruptcy [*MEMORANDUM CLAIMANT, p. 9, para. 45*]. However, the deterioration of a party's financial situation falls within its own sphere of control and may therefore not authorise this party to invoke the hardship exemption [*Girsberger/Zapolskis, Jurisprudence, 2012, p. 131*]. A deviation from this rule is possible only if the financial ruin is not due to a lack of managerial skill or resources [*ibid; Brunner, Hardship, p. 437*]. Because of CLAIMANT's business history, CLAIMANT is in debt and needs to make substantial profits to prolong its main credit lines [*PO NO 2, p. 59, para. 29*]. However, the additional costs cannot be assigned to RESPONDENT so that CLAIMANT's company may make the profits it desires. The Contract did not guarantee either CLAIMANT or RESPONDENT that their respective companies would be profitable due to the transaction. In any case, CLAIMANT would not be financially ruined if it had to pay for the tariffs, as it would be able to prolong its credit lines by selling its dressage part [*PO NO 2, p. 59, para. 29*]. Therefore, CLAIMANT's financial situation does not make the tariffs qualify as hardship. The tariffs are thus not an impediment in the sense of Art. 79 CISG.

**c) CLAIMANT Could Have Taken the Tariffs into Account**

53 CLAIMANT could have taken the tariffs into account. According to CLAIMANT's definition, the tariffs would qualify as unforeseeable if they constituted an "*ahistorical jump*" [*MEMORANDUM CLAIMANT, p. 9, para. 47; DiMatteo, p. 296*]. However, it is not the first time that Equatoriana imposed retaliatory tariffs [*EXHIBIT C 6, p. 15; cf. MEMORANDUM CLAIMANT, p. 10, para. 48*]. Additionally, since 2016, the prospect of multiple trade wars loomed over the

stage of international trade. The ongoing tensions eventually culminated in tariffs and counter tariffs being imposed by some of the greatest trade nations, including the United States, China and the EU. Already in January 2017, the President of Mediterraneo announced a "*preference for a more protectionist approach to international trade, in particular in relation to agricultural products*" in his election programme [*EXHIBIT C 6, p. 15*]. Moreover, he appointed the most ardent critic of free trade as superminister for agriculture, trade and economics on 5 May 2017, a day before the Contract was concluded [*PO NO 2, p. 58, para. 23*]. The possibility of tariffs being imposed by Mediterraneo was thus very present when the Contract was concluded on 6 May 2017. Therefore, the initial tariffs imposed by the Mediterranean government were not unforeseeable.

### II. In Any Case, the CISG Does Not Provide for an Adaptation of the Contract

54 In any case, the CISG does not provide for an adaptation of the Contract. Art. 79 CISG does not authorise the court or tribunal to adapt contracts as a response to an "*impediment*": Art. 79 (1) CISG specifies that the disadvantaged party is "*not liable*," and Art. 79 (5) CISG clarifies that this means the party is not liable in damages for failing to perform its duties [*Flechtner, Magnus lib.am., p. 201*]. Even gap-filling under Art. 7 (2) CISG does not allow for contract adaptation as an additional remedy of Art. 79 CISG [**1**]. Furthermore, the PICC may not be applied to provide for the remedy of contract adaptation by including the PICC in the Contract via Art. 9 (2) PICC [**2**]. Finally, the general principle of good faith does not allow for an adaptation of the price [**3**].

#### 1. The Remedy of Contract Adaptation May Not Be Established Under Art. 7 (2) CISG

55 The remedy of contract adaptation cannot be read into the CISG by means of gap-filling according to Art. 7 (2) CISG. There is no internal gap in Art. 79 CISG [**a**]. In any case, the PICC may not be used for gap-filling purposes under Art. 7 (2) CISG [**b**] and the principles underlying the CISG would provide for an adequate remedy for cases of hardship [**c**].

##### a) There Is No Internal Gap in Art. 79 CISG Concerning Its Remedies

56 There is no internal gap in Art. 79 CISG as to its legal remedies. CLAIMANT argues that Art. 6.2.3 PICC may be used to fill a gap in Art. 79 CISG, thereby providing for the remedy of price adaption [*MEMORANDUM CLAIMANT, p. 11 paras. 52, 53*]. However, CLAIMANT does not provide reasons for the allegation that there is a gap in Art. 79 CISG allowing for the supplementary use of the PICC. An internal gap only exists if a question concerning the

particular provision cannot be answered after liberally interpreting the provision [*Schlechtriem/Schwenzer – Schwenzer/Hachem, Art. 7, para. 29*].

57 The drafting history of the CISG confirms that there is no gap in Art. 79 CISG that requires the additional remedy of contract adaptation. According to Art. 7 (1) CISG, the CISG is to be interpreted by considering its history [*Schlechtriem/Schwenzer – Schwenzer/Hachem, Art. 7, para. 22; MüKo HGB – Ferrari, Art. 7 CISG, para. 34*]. During the drafting of Art. 79 CISG, the remedy of price adaptation for cases of hardship was proposed but deliberately excluded from the CISG [*da Silveira, pp. 329 et seq.; Gillete/Walt, p. 304; Flechtner, BLR, 2011, p. 89; Honnold/Flechtner, p. 629; Lindström, NJCL, 2006, p. 15*]. Therefore, the lack of the remedy of contract adaptation cannot be considered a gap of Art. 79 CISG.

58 Additionally, considering the rationale of the provision, Art. 79 CISG itself already provides an adequate legal remedy for cases of economic hardship. The rationale is the protection of the disadvantaged party against the possible ramifications of its failure to perform. The relief from damage claims specifically provided in Art. 79 CISG is sufficient to provide for effective relief in hardship situations when combined with a suspension of the obligation to deliver for the duration of the hardship event [*Schlechtriem/Schroeter*, *p. 295, para. 682; Flechtner, BLR, 2011, p. 97*]. Art. 79 CISG thus provides for an exhaustive remedy in cases of economic hardship. Consequently, there is no internal gap which needs to be filled.

**b) The PICC May Not Be Used for Gap-Filling Under Art. 7 (2) CISG**

59 Even if a gap existed, the provisions of the PICC could not be used for gap-filling purposes. According to Art. 7 (2) CISG, internal gaps in the CISG "*are to be settled in conformity with the principles on which it is based*". CLAIMANT argues that the PICC constitute such principles [*MEMORANDUM CLAIMANT, p. 11, para. 52*]. However, the PICC do not constitute general principles underlying the CISG and may thus not be used for gap-filling in the CISG. The wording of Art. 7 (2) CISG does not support the use of the PICC as general principles. The provision states that gaps in the CISG are to be "*settled in conformity with the principles on which it is based*". This indicates that these principles must be drawn from within the CISG itself, not from external model law provisions.

60 Further, the legal nature of the PICC contradicts its use as general principles underlying the CISG. Not only do the PICC derive their provisions from sources unconnected to the CISG, but they also partly contradict the CISG and were issued by bodies without any law-making authority [*Ferrari/Gillette/Torsello/Walt, IHR, 2017, p. 101; Flechtner, Magnus lib. am., p. 199*]. The CISG is a carefully crafted compromise between the contracting states, which

ratified its automatic application in cross-border disputes. Using the PICC as principles underlying the CISG despite the fact that they are of a fundamentally different legal nature than the CISG would endanger the sensitive political compromise that is the CISG.

61 Finally, the rationale of Art. 7 (2) CISG contradicts the assumption that the PICC reflect general principles underlying the CISG. Art. 7 (2) CISG provides a two-step-solution for matters not expressly settled by the Convention. Primarily, gaps are to be filled with principles underlying the CISG as these principles can be assumed to reflect the hypothetical consensus of the states that drafted the Convention. In the absence of such principles, gaps are filled by recourse to domestic law. This second step is indispensable because the drafting states did not reach a consensus on all matters, which is why they were not expressly settled in the Convention. Those matters cannot be settled in accordance with general principles of the CISG, as there never was a consensus of the drafting states that these principles could be based on. Due to the great extent of the PICC, almost all internal gaps in the CISG could be filled by the corresponding PICC provision [*Flechtner, Magnus lib. am, p. 199*]. The second step of Art. 7 (2) CISG to refer to domestic law in absence of general principles would thus be rendered redundant. One would need to assume that the PICC reflect an all-encompassing consensus of the drafting states, even though such a consensus never existed. The rationale of Art. 7 (2) CISG thus contradicts the use of the PICC as principles underlying the CISG.

**c) The General Principles of the CISG Provide for an Adequate Remedy for Hardship**

62 The general principles underlying the CISG provide for an adequate remedy for hardship. A recourse to domestic law via the second step of Art. 7 (2) CISG is thus not necessary. The principle of internationality anchored in Art. 7 (1) CISG indicates that the remedy for hardship would not be contract adaptation, as the remedy of contract adaptation is not internationally accepted [*Flechtner, The Exemption Provision of the CISG, p. 13*]. It is not consistent or necessary to create a different legal remedy for economic impossibility that differs from the remedy that already exists for actual impossibility [*cf. MüKo HGB – Mankowski, Art. 79, para. 10; Schwenzer, VWULR, 2008, p. 724; cf. Schlechtriem/Schroeter, p. 295, para. 682*]. Art. 79 CISG expressly exempts the disadvantaged party from damage claims. The party affected by physical impossibility is naturally protected against the claim of performance, as *impossibilium nulla est obligatio*. Correspondingly, the duty to perform would be suspended in cases of economical hindrance for the duration of the impediment. Thereby, parties affected by both physical and economic impediments are adequately and equally protected. It can safely be assumed that the states that signed the Convention would have consented to this solution regarding hardship, as it mirrors the solution they already approved of for physical

impediments. Thus, there is no necessity to produce additional legal remedies for Art. 79 CISG via recourse to domestic law, as the general principles of the CISG provide for an adequate remedy for hardship.

**2. The PICC Are Not Applicable by Virtue of Art. 9 (2) CISG**

63 The PICC cannot be applied by virtue of Art. 9 (2) CISG. According to Art. 9 (2) CISG, usages which are known to the parties and widely known in international trade may be applicable to the contract. CLAIMANT argues that Art. 6.2.3 PICC, which provides for an adaptation of the price in cases of hardship, constitutes such a usage [*MEMORANDUM CLAIMANT, p. 11, para. 55*]. The PICC are opt-in provisions which parties may or may not choose to apply to their contract [*Vogenauer – Vogenauer, Introduction, para. 12*]. Applying the PICC provisions by default as trade usages in terms of Art. 9 CISG contradicts their legal nature, because the application of the PICC would no longer depend on the parties' choice [*Bridge, ULR, 2014, p. 628*]. Finally, an automatic application of PICC provisions to CISG-governed contracts is subject to many of the same concerns as the inclusion of the PICC via Art. 7 (2) CISG. Including the PICC into the CISG as trade usages under Art. 9 (2) CISG would go far beyond the limited compromise that was reached by the states that signed the CISG. Art. 9 (2) CISG may thus not be applied to allow for contract adaptation.

**3. The General Principle of Good Faith Does Not Allow for an Adaptation**

64 The general principle of good faith does not provide the legal remedy of price adaptation. CLAIMANT argues that an interpretation of Art. 79 (5) CISG in light of Art. 7 (1) CISG allows for an adaptation of the price [*MEMORANDUM CLAIMANT, p. 12, paras. 56 et seq*.]. However, the general principle of good faith does not create additional legal remedies [**a**]. Furthermore, RESPONDENT did not act in breach of good faith [**b**].

**a) Art. 7 (1) CISG May Not Be Used to Procure Additional Legal Remedies**

65 Art. 7 (1) CISG may not procure legal remedies that were not intended by the Convention. CLAIMANT cites Art. 7 (1) CISG to establish a duty to renegotiate in good faith [*MEMORANDUM CLAIMANT, p. 12, para. 56*]. However, the wording of Art. 7 (1) CISG clarifies that Art. 7 (1) CISG is a standard for the interpretation of the CISG. It may not be used to create rights for the parties [*Schlechtriem/Schwenzer – Schwenzer/Hachem, Art. 7, para. 19*]. Furthermore, Art. 7 (1) CISG postulates the CIGS's international character as one of its main principles next to good faith. The doctrine of contract adaptation is not accepted in most common law jurisdiction and is thus not in conformity with the international character of the

CISG [*Flechtner, The Exemption Provision of the CISG, p. 13*]. The principle of good faith may not be used in a way that disregards the CISG's international character. Hence, an adaptation of the price may not be derived from Art. 7 (1) CISG.

**b) RESPONDENT Did Not Act in Bad Faith**

66 Furthermore, RESPONDENT did not, at any point, act in breach of good faith. Contrary to CLAIMANT's allegations [*cf. MEMORANDUM CLAIMANT, p. 12, para. 59*], RESPONDENT never assured that it would pay for the tariffs. RESPONDENT's representative told CLAIMANT that according to his understanding of the Contract, CLAIMANT would have to pay for the tariffs and merely added that "*if the Contract provides for an increased price*", an agreement would be reached [*EXHIBIT R 4, p. 56; emph. add.*]. RESPONDENT thus never assured that it would pay for the tariffs. Hence, RESPONDENT did not act in breach of good faith and the general principle of good faith does therefore not provide for the legal remedy of price adaptation. Hence, CLAIMANT may not demand an adaptation of the Contract under the CISG.

67 **Conclusion to the Second Issue:** The tariffs do not meet the requirements of either Clause 12 of the Contract or Art. 79 CISG. Moreover, neither Clause 12 or Art. 79 CISG provide for an adaptation of the price. CLAIMANT is thus not entitled to an additional payment of US$ 1,250,000 or any other amount.

## THIRD ISSUE: THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE PARTIAL INTERIM AWARD FROM THE OTHER PROCEEDINGS INTO EVIDENCE

68 CLAIMANT is trying to derail the present proceedings by attempting to submit evidence which is questionable in various ways. RESPONDENT is currently involved in a different, unrelated arbitration concerning the sale of a mare to a Mediterranean buyer [*PO NO 2, p. 60, para. 39; CLAIMANT's Email, p. 50*]. Confidential information regarding the existence of an Interim Award rendered in the other proceedings was leaked to CLAIMANT [*PO NO 2, p. 60, para. 41*]. Now, CLAIMANT is willing to pay US$ 1,000 to acquire and submit the confidential and illegitimately obtained Interim Award [*PO NO 2, p. 60, para. 41*]. An admission would therefore unnecessarily taint the proceedings, especially as the Interim Award fails to serve any factual or legal support for the current Arbitration.

69 Pursuant to Art. 22 (2) HKIAC Rules 2018, the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence. Art. 22 (3) HKIAC Rules 2018 enables arbitral tribunals to exclude evidence. The Arbitral Tribunal should use its power to exclude the Interim Award, as it is confidential and has illegitimate origins [**A**]. In any case, the information contained in the Interim Award is irrelevant to the case and immaterial to its outcome [**B**]. Finally, the joinder or consolidation requested by CLAIMANT is not possible under the HKIAC Rules 2018 [**C**].

### A. The Interim Award Should Be Excluded Due to Its Illegitimate Origins

70 The Interim Award was obtained in an illegitimate manner and should therefore be excluded by the Arbitral Tribunal. CLAIMANT is attempting to buy the Interim Award from a company that specialises in selling "*intelligence*" on businesses operating in the horseracing industry [*PO NO 2, pp. 60 et seq., para. 41*]. The company is known for its dubious ways of acquiring such information [*ibid.*]. An investigation has shown that the Interim Award was either stolen through a hack of RESPONDENT's computer system or leaked by former employees of RESPONDENT which were under the contractual obligation to keep the Interim Award confidential [*ibid.; RESPONDENT's Email, p. 51*]. The Interim Award was thus illegitimately obtained in either case. Therefore, the Interim Award should be excluded to preserve the integrity of the proceedings, as its submission would violate the principle of fair conduct [**I**]. Further, confidentiality obligations bar the admission of the Interim Award [**II**]. Finally, admitting the Interim Award into the proceedings could violate public policy and endanger the enforceability of the award [**III**].

### I. Admitting the Interim Award Violates the Principle of Fair Conduct

71 The submission of the illegitimately obtained Interim Award would infringe the principle of fair conduct. Pursuant to Art. 13 (5) HKIAC Rules 2018, "*the arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration*". This obligation is further specified within the International Bar Association Rules on the Taking of Evidence in International Arbitration (hereafter "IBA Rules"). According to Art. 9 (2) (g) IBA Rules, arbitral tribunals shall exclude documents from evidence because of "*considerations of procedural economy, proportionality, fairness or equality of the Parties*". The IBA Rules are commonly adopted in arbitrations under HKIAC Rules [*Moser/Bao, HKIAC Commentary, para. 9.155; cf. Hayward, p. 178, para. 4.86; Karrer, Bergsten lib. am., p. 292*]. As CLAIMANT submitted, the IBA Rules should operate as guidance in the present case since they reflect the international best practice on the admission of evidence [*MEMORANDUM CLAIMANT, p. 25, para. 101*]. Following these rules, the Interim Award should be excluded due to CLAIMANT's misconduct according to Art. 9 (2) (g) IBA Rules.

72 CLAIMANT argues that it did not perform any illegal activities and that the Interim Award is therefore admissible [*MEMORANDUM CLAIMANT, p. 29, para. 116*]. Yet, in various cases obtaining evidence in breach of fair conduct has led to the exclusion of the respective evidence [*Methanex v USA, 2005, Part II, Ch. I, paras. 53 et seq.*; *EDF v Romania, PO No 3, 2008, p. 21, para. 38, p. 26, para. 48; Libananco v Turkey, Preliminary Award, 2008, p. 36, para. 78; p. 42, paras. 1.1.6 et seq.; cf. Boykin/Havalic, TDM, 2014, p. 32; Blair/Gojkovic, ICSID Review, 2018, p. 250; Cremades, Am. U. Int'l L. Rev., 2012, p. 787; Berger/Kellerhals, p. 461, para. 1320*]. In contrast to CLAIMANT's allegation [*MEMORANDUM CLAIMANT, p. 29, para. 116*], whether the party submitting the evidence itself behaved illegally is not decisive. Even in the cases cited by CLAIMANT [*MEMORANDUM CLAIMANT, p. 29, para. 116*], legal but unfair conduct was grounds for exclusion [*EDF v Romania, PO No 3, 2008, p. 26, para. 48; Libananco v Turkey, Preliminary Award, 2008, p. 36, para. 78; p. 42, paras. 1.1.6 et seq.*]. CLAIMANT intends to buy the Interim Award despite its knowledge of the illegitimate origins [*PO NO 2, pp. 60 et seq., para. 41*]. This constitutes dishonest and unfair behaviour.

73 Further, the planned purchase of the Interim Award would violate the principle of fair conduct because CLAIMANT did not attempt to include the Interim Award into the proceedings using the established procedural means. Pursuant to Art. 3 (2) IBA Rules, a party is entitled to request documents from the other party to be admitted in the proceedings. CLAIMANT, after learning of the existence of the Interim Award, could have requested RESPONDENT to produce the Interim Award. However, CLAIMANT is attempting to circumvent the legitimate procedure

and confidentiality obligations by acquiring an illegitimate copy of the Interim Award. The admission of this copy would only perpetuate the unfaithful behaviour behind the obtainment of the Interim Award. Thereby, CLAIMANT would infringe the duty to arbitrate in a fair manner.

74 Finally, the Interim Award should be excluded to preserve the integrity of the present proceedings. Requests based on wrongdoing committed by the party raising the claim should not be entertained, as allowing them will compromise the integrity of proceedings and thereby violate core principles of justice [*Herstein, Legal Theory, 2011, p. 177; cf. Precision v Automotive, 23 Apr 1945, p. 324, para. 815; Bein v Heath, 1848, p. 47, para. 247*]. The company CLAIMANT is attempting to buy the Interim Award from is specialised in selling information from questionable origins [*PO NO 2, pp. 60 et seq., para. 41*]. The admission of the Interim Award into evidence would hence lead to the support of illegitimate, possibly even criminal activities. Any decision based on such tainted material would compromise the integrity of the proceedings. Thus, the Arbitral Tribunal should not admit the Interim Award.

**II. Admitting the Interim Award Violates Confidentiality Obligations**

75 The Interim Award should not be admitted into the proceedings due to its confidentiality. The confidentiality of arbitral proceedings has traditionally been considered to be one of the most important advantages of international commercial arbitration, and an implied obligation of confidentiality arises out of the nature of arbitration itself [*Dolling-Baker v Merrett, 21 Mar 1990, p. 7; Redfern/Hunter, para. 2.145; Thomson/Finn, Dis. Res. J, 2007, p. 1; Moser/Bao, HKIAC Commentary, para. 12.27; Trakman, Arb. Int., 2002, pp. 1 et seq.*]. CLAIMANT does not contest that the Interim Award and any related information is confidential under Art. 42 HKIAC Rules 2013 [*cf. RESPONDENT's Email, p. 51*]. Instead, CLAIMANT argues that the admission of confidential documents is not prohibited [*MEMORANDUM CLAIMANT, p. 26, para. 107*]. However, this does not hold true in the present case. Pursuant to the HKIAC Rules 2018, the confidentiality obligation extends to CLAIMANT and bars the admission of the Interim Award, in accordance with the IBA Rules [**1**]. RESPONDENT has also not waived the confidentiality of the Interim Award [**2**].

**1. Confidentiality Provisions Bar the Admission of the Interim Award**

76 The HKIAC Rules suggest the inadmissibility of the Interim Award for confidentiality reasons. Fair conduct requires a respect for confidentiality [*Libananco v Turkey, Preliminary Award, 2008, p. 36, para. 78*]. The unauthorised use of confidential information violates this principle and has led to the exclusion of the respective evidence in several instances

[*cf. Libananco v Turkey, Preliminary Award, 2008, p. 42, paras. 1.1.6 et seq.; Danube Commission, 8 Dec 1927, para. 79; Reisman/Freedman, Am. J. Int. L., 1982, p. 743*]. Further, it is a general principle that a duty of confidentiality extends to third parties when the party obtaining the information is aware of its confidentiality [*Attorney General v Guardian Newspapers, 13 Oct 1988; Toulson/Phipps, p. 20, para. 2-006*]. CLAIMANT is not a party of the other proceedings and was thus not explicitly bound by its confidentiality provision. Yet, CLAIMANT is conducting the present Arbitration under HKIAC Rules and RESPONDENT informed CLAIMANT of the Interim Award's confidential nature [*RESPONDENT's Email, p. 51*]. Hence, CLAIMANT had to be aware that the Interim Award rendered under HKIAC Rules is generally confidential. Therefore, the duty of confidentiality extends to CLAIMANT and bars the admission of the Interim Award.

77 The Interim Award should also be excluded pursuant to the IBA Rules. According to Art. 9(2)(b) IBA Rules, documents shall be excluded due to a "*legal impediment or privilege under the legal or ethical rules applicable*". The term 'legal impediment' includes every legal rule that prohibits the disclosure of evidence [*Marghitola, p. 29, para. 5.10; cf. Zuberbühler/Hofmann/Oetiker/Rohner, p. 178, para. 37*]. The rule prohibiting the disclosure of evidence in the current case is the confidentiality obligation of Art. 42 HKIAC Rules 2013. Even though Art. 42 HKIAC Rules 2013 does not bind the Arbitral Tribunal and CLAIMANT explicitly, the need to honour such confidentiality provisions is recognised in Art. 9(4) IBA Rules, pursuant to which confidential information requires general protection. Therefore, Art. 42 HKIAC Rules 2013 constitutes a legal impediment in terms of Art. 9(2)(b) IBA Rules, leading to an exclusion of the Interim Award.

**2. RESPONDENT Has Not Waived the Confidentiality of the Interim Award**

78 Contrary to CLAIMANT's submission [*MEMORANDUM CLAIMANT, p. 26, para. 108*], RESPONDENT has not waived its right to object to the admission of the Interim Award on the grounds of confidentiality. According to Art. 9(3)(d) IBA Rules, parties may waive confidentiality by virtue of consent, earlier disclosure, or affirmative use of the document or its contents. A waiver therefore requires voluntary, legally significant conduct showing a party's intent to not rely on its rights [*AAY v AAZ, 15 Jun 2009, para. 130; Baptista, ICC Dossiers, p. 130*]. The mere mentioning of a privileged document does not suffice to waive the confidentiality of said document [*Buttes Gas and Oil Co v Hammer No 3, 20 Jun 1980, pp. 233 et seq.*]. CLAIMANT argues that RESPONDENT's objection to the announced submission of the confidential Interim Award constitutes a waiver by affirmative use [*MEMORANDUM CLAIMANT, p. 27, paras. 109 et seq.*]. However, RESPONDENT did not

affirmatively use the Interim Award, as it did not refer to the document [*cf. RESPONDENT's Email, p. 51*]. RESPONDENT only stated that any materials obtained by CLAIMANT are confidential and that CLAIMANT's allegations are taken out of context [*RESPONDENT's Email, p. 51*]. RESPONDENT also did not consent, but objected to the announced submission [*RESPONDENT's Email, p. 51*]. This objection cannot constitute a waiver in respect to the confidentiality of the Interim Award. Otherwise, the confidentiality of any document would be waived by any objection to its use. Art. 9 (2) (b) IBA Rules, which allows parties to object to production based on privilege, would thus be redundant. Hence, the Interim Award's confidentiality has not been waived and is thus still protected by Art. 42 HKIAC Rules 2013.

### III. Admitting the Interim Award Endangers the Enforceability of the Award

79 Admitting the Interim Award could render the award of the present proceedings unenforceable. According to Art. V (2) (b) NYC, an award is not enforceable if it is against public policy. Public policy protects basic notions of morality and justice, which includes the principle of good faith [*Wolff – Wolff, p. 429, para. 560; cf. Fouchard/Gaillard/Goldman, p. 996, para. 1711; van den Berg, p. 360*]. The principle of fair conduct is an expression of good faith, which will be infringed by CLAIMANT's plans to obtain the Interim Award. Additionally, the admission of illegally obtained evidence by itself can violate public policy [*Böckstiegel/Kröll/Nacimiento - Kröll, p. 561, para. 129; Wolff – Wolff, p. 427, para. 554; Schlosser, p. 483, para. 647*]. Therefore, any decision based on the illegitimately obtained Interim Award would violate public policy. Thus, the Arbitral Tribunal should take into consideration that the admission of the Interim Award into the proceedings could lead to the award being set aside by national courts.

## B. In Any Case, the Interim Award Is Not Relevant and Material

80 In any case, the Interim Award is not relevant to the case and not material to its outcome. CLAIMANT argues that the illegitimacy of the Interim Award may still be outweighed by its relevance and materiality to the case [*MEMORANDUM CLAIMANT, p. 28, para. 114*]. Evidence is relevant when it is useful to prove a fact from which a legal conclusion can be drawn [*Raeschke-Kessler, Arb. Int., 2002, p. 427; Born, p. 2362; Pilkov, Arbitration, 2014, p. 148*]. Evidence is material if it is needed for a complete consideration of the legal issues [*Raeschke-Kessler, Arb. Int., 2002, p. 427; Born, p. 2362; Pilkov, Arbitration, 2014, p. 148; Kekenadze, p. 35; Sattar, Int. Arb. L. Rev., 2011, pp. 215 et seq.*]. However, CLAIMANT fails to show that the Interim Award satisfies this standard. The facts of the other case are not comparable to the present ones and thus do not allow for any legal conclusions [**I**]. Therefore, the Interim Award

has no impact on the result of the arbitration and hence is not material to the outcome of the present case [**II**].

**I. The Two Proceedings Are Not Comparable**

81 The other proceedings differ on several important facts, which make them incomparable to the present case. CLAIMANT argues that the fact that the other arbitral tribunal confirmed its power to adapt the contract under the other arbitration agreement shows that the present arbitration agreement also allows for an adaptation [*MEMORANDUM CLAIMANT, p. 26, para. 106*]. However, the facts shared by the Arbitral Tribunal regarding the other arbitration [*PO NO 2, p. 60, para. 39*] demonstrate that the facts of the other case and the present case differ in content as well as context. Whilst the arbitration agreement in the other arbitration is a verbatim adoption of the HKIAC Model Clause with all its additions [*PO NO 2, p. 60, para. 39*], the Arbitration Agreement in the present case is considerably streamlined and "*narrowed down*" [*EXHIBIT R 1, p. 33*]. The present Arbitration Agreement is also governed by a different law, which bars adaptation without an express empowerment [*supra, paras. 8 et.seq.; cf. PO NO 2, p. 60, para. 39*]. Therefore, the arbitration agreements are not comparable.

**II. The Interim Award Has No Impact on the Outcome of the Present Arbitration**

82 The Interim Award has no impact on the result of the current Arbitration and is therefore immaterial. CLAIMANT argues that RESPONDENT acts contradictory, demanding a contract adaptation from a third party whilst not granting a contract adaptation to CLAIMANT [*MEMORANDUM CLAIMANT, p. 25, para. 105*]. However, this does not allow for any legal conclusions. A party will only be bound by its prior conduct if the other party could reasonably rely thereon in good faith [*Kotuby/Sobota, p. 121; Friede, ZaöRV, 1935, p. 517*]. CLAIMANT was not aware of RESPONDENT's conduct concerning the other proceedings at the time the present contract was signed. Therefore, it could not reasonably rely on it. Thus, any conduct regarding the other dispute between RESPONDENT and the Mediterranean buyer cannot bind RESPONDENT in the present proceedings.

83 Further, contrary to CLAIMANT's allegation [*MEMORANDUM CLAIMANT, p. 25, para. 104*], RESPONDENT's submissions regarding the contract underlying the other proceedings cannot be used to determine RESPONDENT's intent in the present proceedings. Such a farfetched interpretation of a party's intent is neither covered by Art. 4 Danubian Contract Law nor Art. 8 CISG. Legal opinions are inevitably linked to the facts of the respective situation and therefore vary depending on the facts of the individual case. It is entirely possible that

RESPONDENT signed one contract with the intent to allow for adaptation and then another with the intent to exclude such a remedy. Therefore, RESPONDENT's intent in the present case must be determined independently from the other proceedings.

84 Finally, CLAIMANT argues that the Interim Award holds persuasive authority regarding the present case in favour of CLAIMANT's contentions, as the other arbitral tribunal confirmed its power to adapt the contract [*MEMORANDUM CLAIMANT, p. 26, para. 106*]. However, there is no doctrine of precedent in arbitration [*Waincymer, p. 798; Kaufmann-Kohler, Arb. Int., 2007, p. 357; Guillaume, JIDS, p. 5; cf. Hay, 40 under 40 Int. Arb., 2018, pp. 223 et seq.*]. Arbitral tribunals must make a finding of fact independent from other proceedings and cannot rely on any conclusions drawn by other arbitral tribunals [*Waincymer, p. 789*]. Therefore, the Interim Award is not relevant or material in any way.

### C. The Joinder or Consolidation Requested by CLAIMANT Is Not Possible Under the HKIAC Rules 2018

85 The present circumstances do not allow for either the joinder of the third party or a consolidation with the other proceedings. CLAIMANT argues that a joinder or a consolidation can be ordered, which would then allow for the disclosure of the Interim Award without a breach of confidentiality [*MEMORANDUM CLAIMANT, pp. 30 et seq., paras. 120 et seq.*]. However, neither a joinder nor a consolidation is possible.

86 First, the requirements of a joinder of the third party are not met. A joinder pursuant to Art. 27(1) HKIAC Rules 2018 requires the joining party to be "*bound by an arbitration agreement under these Rules giving rise to the arbitration*". This requires the additional party to be bound by the same arbitration agreement [*Moser/Bao, HKIAC Commentary, para. 10.18, emph. add*]. The third party is not a signatory to the Arbitration Agreement of the present Arbitration. Moreover, the arbitration agreement of the other proceedings is fundamentally different and has no relation to the present proceedings. Hence, the possibility of a joinder is ruled out.

87 Second, a consolidation of the two proceedings is equally impossible. CLAIMANT argues that the Arbitral Tribunal should consolidate the different proceedings pursuant to Art. 28(1)(c) HKIAC Rules 2018 [*MEMORANDUM CLAIMANT, p. 30, para. 122*]. However, a consolidation may only be ordered by the HKIAC, not an arbitral tribunal [*Art. 28(1) HKIAC Rules 2018; Moser/Bao, HKIAC Commentary, para. 10.97*]. Additionally, Art. 28(1)(c) HKIAC Rules 2018 requires that the respective proceedings concern a series of related transactions and that the arbitration agreements are compatible. Contrary to CLAIMANT's

assumptions [*MEMORANDUM CLAIMANT, p. 31, paras. 125 et seq*.], neither is the case. The sale of the mare concerning the other proceedings and the sale of frozen horse semen in the present case are not related. The arbitration agreements have different scopes, are governed by different arbitration laws and provide for different seats [*PO NO 2, p. 60, para. 39*]. The consolidation requested by CLAIMANT is therefore not possible.

88 **Conclusion to the Third Issue**: The Interim Award should not be admitted into the proceedings as it was obtained illegitimately and therefore endangers the integrity of the proceedings. The Interim Award is irrelevant to the case and immaterial to its outcome. Finally, the Interim Award cannot be introduced to the proceedings through a joinder or consolidation of the third party as the requirements are not met.

## REQUEST FOR RELIEF

In response to the Arbitral Tribunal's Procedural Orders and the Memorandum for CLAIMANT, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

- An adaptation of the Contract is not arbitrable in these proceedings. In any case, Danubian Law governs the Arbitration Agreement. Interpreted thereunder, the Arbitration Agreement does not provide the Arbitral Tribunal with the power to adapt the Contract. An interpretation under Mediterranean Law would not lead to a different outcome **[First Issue]**.
- Even if the Arbitral Tribunal had the power to adapt the Contract, neither Clause 12 of the Contract nor the CISG would provide for an adaptation of the purchase price **[Second Issue]**.
- CLAIMANT should not be entitled to submit the Interim Award from the other arbitration proceedings as evidence **[Third Issue]**.

On these grounds, the Arbitral Tribunal is respectfully requested to dismiss all of CLAIMANT's claims and order CLAIMANT to bear the costs incurred in this Arbitration.

Freiburg im Breisgau, 24 January 2019

Marc Bovermann • Julien Feurer

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David Willfort • Anna Maria Yang-Jacobi

## INDEX OF ABBREVIATIONS

| | |
|---|---|
| Art. | article |
| BCCI | Bulgarian Chamber of Commerce and Industry |
| BeckOK | Beck'sche Online-Kommentare |
| BGer | Bundesgericht (Federal Supreme Court of Switzerland) |
| BGH | Bundesgerichtshof (German Federal Court of Justice) |
| cf. | confer (compare) |
| Ch. | chapter |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CISG | United Nations Conventions on Contracts for the International Sale of Goods |
| Co | Company |
| DAP | delivered at place |
| DDP | delivered duty paid |
| ed. | edition |
| emph. add. | emphasis added |
| et seq. | et sequens (and the following) |
| EU | European Union |
| fn. | footnote |
| HKIAC | Hong Kong International Arbitration Centre |
| HGB | Handelsgesetzbuch (German Commercial Code) |
| IBA | International Bar Association |
| ibid. | ibidem (in the same place) |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICSID | International Centre for Settlement of Investment Disputes |
| Inc | Incorporation |

| | |
|---|---|
| lib. am. | liber amicorum (commemorative publication) |
| Ltd | Limited |
| Mr. | Mister |
| MüKo | Münchener Kommentar |
| No | number |
| NYC | New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| OGH | Oberster Gerichtshof (Austrian Supreme Court) |
| OLG | Oberlandesgericht (appellate court) |
| p./pp. | page/pages |
| para./paras. | paragraph/paragraphs |
| PICC | Principle of International Commercial Contracts |
| PO | Procedural Order |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Model Law | United Nations Commision on International Trade Law Model Law on International Commercial Arbitration |
| UNIDROIT | International Institute for the Unification of Private Law |
| US | United States |
| USA | United States of America |
| US$ | United States Dollar |
| v | versus |
| Vol. | volume |
| WTO | World Trade Organization |

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## CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Marc Bovermann

Julien Feurer

Lukas Gottschling

Julia Schmidt

Hauke Schneider

David Willfort

Anna Maria Yang-Jacobi

**Certificate and Choice of Forum**

To be attached to each Memorandum

I Nicole Grohmann, on behalf of the Team for the Albert-Ludwigs-Universität Freiburg hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☒ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☒ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for the Albert-Ludwigs-Universität Freiburg

Name Nicole Grohmann

Signature _____