SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 7 APRIL 2019 – HONG KONG

UNIVERSITEIT VAN AMSTERDAM

MEMORANDUM FOR CLAIMANT

ON BEHALF OF	**AGAINST**
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1	2 SEABISCUIT DRIVE
CAPITAL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
CLAIMANT	**RESPONDENT**

WESSEL BREUKELAAR – CAROLINE GROEFSEMA – FLORENCE HAVERHALS
FREEK VAN LEEUWEN – STIJN WILBERS

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TABLE OF ABBREVIATIONS

AppGer	Appellationsgericht (Appellate Court Switzerland)
BEL	Belgium
BGer	Bundesgericht (Supreme Court Switzerland)
BGH	Bundesgerichtshof (Supreme Court Germany)
CE	CLAIMANT's exhibit
CH	Switzerland
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Arbitration Law of Danubia
DCL	Contract Law of Danubia
DDP	Delivery Duty Paid
EWCA	Court of Appeals of England and Wales
EWHC	High Court of Justice of England and Wales
EXW	Ex Works
GER	Germany
HKIAC	HKIAC
HvC	Hof van Cassatie (Cassation Court Belgium)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LbF	Letter by Julia Clara Fasttrack from 3 October 2018
LbL	Letter by Joseph Langweiler from 2 October 2018
MCL	Contract Law of Mediterraneo

No.	Number
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OLG	Oberlandesgericht (Higher Regional Court Germany)
p./pp.	Page/pages
PCA	Permanent Court of Arbitration
PIA	Partial Interim Award
PO	Procedural Order
RE	RESPONDENT's exhibit
RNoA	Response to Notice of Arbitration
SGHC	High Court of The Republic of Singapore
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	International Institute for the Unification of Private Law Principles of International Commercial Contracts (2010)
USA	United States of America
v.	Versus
WTO	World Trade Organisation
YCA	Yearbook Commercial Arbitration

LIST OF DEFINITIONS

Arbitration clause	Clause 15 of the sales agreement on the sale of frozen horse semen between CLAIMANT and RESPONDENT
Black Beauty	Black Beauty Equestrian
CLAIMANT	Phar Lap Allevamento
Contract	The sales agreement on the sale of frozen horse semen between CLAIMANT and RESPONDENT
Evidence	Evidence CLAIMANT aims to introduce in the current proceedings from the other proceedings
Model Law	UNCITRAL Model Law
Parties	CLAIMANT and RESPONDENT
Phar Lap	Phar Lap Allevamento
RESPONDENT	Black Beauty Equestrian
Tariff	Retaliation tariff imposed by the Government of Equatoriana on 19 December 2017
Tribunal	The arbitral tribunal in the present proceedings

LEGAL SOURCES AND MATERIALS

2013 HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules (2013)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules (2018)
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
Incoterms	International Chamber of Commerce International Commercial Terms (2010)
New York Convention	United Nations Convention on contracts for the International Sale of Goods (1958)
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with amendments (2006)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules with new Article 1, paragraph 4 (2013)
UNCITRAL Rules on Transparency	United Nations Commission on International Trade Law Arbitration Rules on Transparency (2014)
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STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**") (collectively: the "**Parties**"). CLAIMANT operates Mediterraneo's oldest stud farm and is a highly respected player in the field of equestrian sports. RESPONDENT is an Equatorianian breeder. Parties concluded a sales agreement (the "**Contract**") on the frozen horse semen of Nijinski III, CLAIMANT's most sought-after horse.

On **21 March 2017**, Parties initiated negotiations on the sale of 100 doses of frozen semen of Nijinksi III**.** On **24 March 2017**, CLAIMANT offered to sell 100 doses, delivered Ex Works ("**EXW**"). Four days later, RESPONDENT requested the law of Mediterraneo as the applicable law to the future contract and Delivery Duty Paid ("**DDP**"). In its reply on **31 March 2017**, CLAIMANT offered that the price would be increased by USD 1,000 and offered DDP under the condition that all risks associated with customs regulations and import restrictions remained with RESPONDENT. Parties subsequently concluded the Contract on **6 May 2017**. On **19 December 2017**, the Equatorianian government announced a tariff of 30 percent ("**Tariff**") on selected agricultural products from Mediterraneo, including horse semen.

Just before sending the final shipment on **20 January 2018**, CLAIMANT realised that the Tariff applied to that shipment, which raised the costs by USD 1,500,000. CLAIMANT instantly approached RESPONDENT to settle the payment of the Tariff. Following this, on **23 January 2018**, CLAIMANT sent the final shipment assured by RESPONDENT's that it would bear the bulk of the costs.

On **2 February 2018**, CLAIMANT discovered that RESPONDENT had resold doses of semen without informing CLAIMANT as the Contract prescribed. CLAIMANT confronted RESPONDENT with this fact. In a meeting to settle the payment of the Tariff on **12 February 2018**, RESPONDENT reacted by ending the discussions to settle the Tariff. Therefore, on **31 July 2018**, CLAIMANT was forced to initiate arbitral proceedings by sending its Notice of Arbitration ("**NoA**") in which it requested an additional payment in remuneration for the Tariff. On **24 August 2018**, RESPONDENT submitted its Response to Notice of Arbitration ("**RNoA**"). On **2 October 2018**, CLAIMANT announced its intent to submit a Partial Interim Award ("**PIA**") from an earlier arbitral proceeding as evidence, which involved RESPONDENT and a third party. RESPONDENT objected to the submission of the PIA on **3 October 2018**.

SUMMARY OF ARGUMENTS

Parties laid the foundation for a fertile future relationship when they concluded the sales agreement on frozen horse semen. CLAIMANT would be able to return to a profit after a number of financially difficult years and RESPONDENT would be offered the unique opportunity to expand its nascent breeding programme with the offspring of CLAIMANT's most renowned racehorse, Nijinsky III. Parties would have galloped off into the equestrian sunset if RESPONDENT had honoured its end of the bargain after the imposition of the import Tariff by RESPONDENT's national government. While RESPONDENT had led CLAIMANT to believe it was interested in a long-term relationship, it turned its back to CLAIMANT once it had paid the Tariff in advance. RESPONDENT thus tries to leave CLAIMANT to bear the USD 1,500,000 Tariff, which would confront CLAIMANT with a USD 1,250,000 loss on the once so promising sale. This would ruin the financial prospects of CLAIMANT and the future of the once so fertile relationship between Parties.

By refusing to pay the Tariff, RESPONDENT fails to honour its contractual obligations. Parties had opted for DDP as the delivery terms but specifically allocated the risks associated with changes in customs regulations and import restrictions to RESPONDENT, at CLAIMANT's specific request. This was done through the inclusion of a hardship formula. This formula was drafted by RESPONDENT, which led CLAIMANT to believe it addressed its request to allocate the aforementioned risks with RESPONDENT. While CLAIMANT trusted its concerns had been addressed, RESPONDENT now argues the Contract does not require it to bear the Tariff.

Once the Tariff had been imposed, RESPONDENT assured CLAIMANT that it would bear the bulk of the Tariff. At RESPONDENT's request, CLAIMANT then paid the Tariff in advance, in reliance on RESPONDENT's assurance. However, RESPONDENT suddenly denied any responsibility for the Tariff once CLAIMANT had paid the Tariff. This stands in stark contrast to RESPONDENT's previously expressed interest in a long-term relationship and constitutes a blatant denial of the assurances it made to CLAIMANT and a disavowal of its contractual obligations.

CLAIMANT is entitled to the payment of an additional amount in compensation for the Tariff. RESPONDENT owes CLAIMANT USD 1,500,000 in accordance with its responsibility under the Contract. Alternatively, CLAIMANT is entitled to the payment of USD 1,250,000 pursuant to pursuant to the United Nations Convention on the

International Sale of Goods ("**CISG**") or the UNIDROIT Principles of International Commercial Contracts ("**UPICC**") (**Issue III**).

Unfortunately, CLAIMANT has now been forced to pursue its claim in the present proceedings as a result of RESPONDENT's failure to recognize its responsibility to bear the Tariff. RESPONDENT has continued to behave unreliably even in the present proceedings by alleging that the Tribunal neither has jurisdiction to decide on the claim nor power to adapt the contract. RESPONDENT thus disavows its earlier assurance to CLAIMANT that a tribunal would have the power to adapt the Contract in case of hardship. RESPONDENT's allegation is furthermore simply incorrect as the Tribunal does have jurisdiction to decide on the claim for the additional payment and adapt the Contract. (**Issue II**).

In a final show of its inconsistent behaviour, RESPONDENT has objected to the submission of evidence from other arbitral proceedings in which RESPONDENT was involved, which shows that RESPONDENT has taken position which is diametrically opposed to its position in the current proceedings. The evidence should be admitted to the present proceedings as there is no proof of any unlawful involvement of CLAIMANT in obtaining the evidence and as the evidence will support the Tribunal in its task to reach a decision on the claim brought forward by CLAIMANT (**Issue I**).

ISSUE I: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER HKIAC ARBITRATION PROCEEDINGS

1. CLAIMANT received information at the annual breeder conference about the PIA rendered in another arbitration procedure under the 2013 Hong Kong International Arbitration Centre Administered Arbitration Rules ("**2013 HKIAC Rules**") on 29 June 2018 [*LbL, p. 50*]. In contrast to the present proceedings, in which RESPONDENT denies any need to adapt the Contract due to the Tariff imposed by the government of Equatoriana, RESPONDENT itself asked for adaptation of the price in the other proceedings. The PIA confirms that the arbitral tribunal has the power to adapt the contract should a tariff result in hardship when parties have concluded a standard arbitration agreement [*PO2, p. 60, §39*]. RESPONDENT has taken conflicting positions in different arbitrations. This negatively affects the credibility of RESPONDENT's arguments in the present proceedings. Furthermore, the PIA is important to the present arbitral proceedings because it supports the finding that this Tribunal has the power to adapt the contract.

2. CLAIMANT wishes to submit the PIA as evidence in the present arbitral proceedings. According to RESPONDENT, the PIA could only be obtained through a confidentiality breach or a hack of RESPONDENT's computer system and that therefore CLAIMANT is barred from submitting it as evidence. RESPONDENT states in e-mail correspondence that "*the evidence has been obtained by illegal means and should not be admitted into the arbitration.*" [*LbF, p. 51*]. This statement is unfounded.

3. The 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules ("**HKIAC Rules**") and the Danubian Arbitration Law ("**DAL**") suffice as guidance to the Tribunal in order to establish that CLAIMANT can submit the PIA as evidence ("**Evidence**"). Moreover, pursuant to Article 36.1 HKIAC Rules, the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") may be used as guidance by the Tribunal in order to assess evidence.

4. CLAIMANT may submit the Evidence from the other arbitration proceedings. Firstly, in accordance with the HKIAC Rules and the DAL, the Evidence should be admitted (**2.1**). Furthermore, the principle of equality of arms requires that CLAIMANT is allowed to submit the Evidence (**2.2**). Lastly, CLAIMANT is entitled to submit the Evidence, notwithstanding the alleged hack and confidentiality of the other proceedings (**2.3**).

1.1 In accordance with the HKIAC Rules and the DAL, the Evidence should be admitted

5. Parties agreed on arbitration through the inclusion of an arbitration clause in the Contract [*CE5, p. 14, Clause 15*]. The arbitration clause provides that the *lex arbitri* is the DAL, which is an adoption of the UNCITRAL Model Law ("**Model Law**") [*PO1, p. 53, ∫4*]. Article 19 DAL gives parties the freedom to agree on the procedure to be followed by the tribunal in conducting the proceedings. Parties agreed on the HKIAC Rules as arbitration rules. CLAIMANT will show the Evidence is admissible pursuant to the HKIAC Rules and the DAL.

6. In the present case, the PIA is relevant to the case and material to the outcome of the case (**1.1.1**). Pursuant to the common law background of Danubia, the PIA should be admitted as evidence in the present proceedings (**1.1.2**).

1.1.1 CLAIMANT's Evidence is admissible as it is relevant to the case and material to the outcome of the case

7. In accordance with Article 22.3 HKIAC Rules, the PIA is admissible because it is relevant to the case and material and to the outcome of the case. In order for evidence to be admissible in accordance with Article 22.3 HKIAC Rules, it follows from the HKIAC Rules Commentary that it must be relevant and material to the outcome of the case [*Moser/Bao, ∫9.162*].

8. Firstly, the Evidence is relevant to the outcome of the case. Relevance suggests that the document is useful to establish the truth of the factual allegations on which the legal conclusion will be based [*Moser/Bao, ∫9.161*]. The Evidence objectively shows that under the Mediterranean Contract Law ("**MCL**") a standard arbitration agreement suffices to grant a tribunal the same powers a court has under Article 6.2.3 (4)(b) MCL [*PO2, p. 60, ∫39*]. It also evidences that RESPONDENT takes conflicting positions when it comes to the question whether the Tribunal can adapt the Contract in case of unforeseen circumstances.

9. Secondly, the Evidence is material. Material in the context of the HKIAC Rules means "*that the tribunal must deem it necessary that the document is needed as an element to allow complete consideration as to whether a factual allegation is true or not.*" [*Moser/Bao, ∫9.161*]. Moreover, the evidence "*would have a tendency to influence the tribunal's determination of issues in dispute*." [*Waincymer, p. 859, ∫11.7.1.2*]. The PIA optimally supports CLAIMANT's reasoning that the Tribunal has the power to adapt the Contract if the Tariff results in hardship for

CLAIMANT. The decision supports CLAIMANT's legal argumentation as supporting case law. If the proceedings in which the PIA was rendered will be consolidated with the present proceedings (**1.3.2.1**), RESPONDENT will have to align its current diametrically opposed positions on the common question of law whether a tribunal has the power to adapt the contract in case of unforeseen circumstances.

10. Thus, as the PIA is relevant and material to the outcome of the case, the Evidence is admissible pursuant to the HKIAC Rules.

1.1.2 Pursuant to the common law background of Danubia, the PIA should be admitted in the present proceedings

11. Parties are free to agree on the procedure to be followed by the Tribunal according to Article 19(1) DAL. Pursuant to Article 19(2) DAL the power conferred upon the Tribunal to assess the admissibility of evidence in instances wherein the parties have agreed to a set of arbitration rules is not limited. RESPONDENT states the Evidence should not be admitted to the present proceedings [*LbF, p. 51*]. However, it is in line with the DAL that Parties can determine that the Evidence is admissible by agreeing to the HKIAC Rules, which contain no limitations to the admissibility of evidence.

12. Furthermore, Danubia has a common law tradition [*PO2, p. 60, §44*]. National courts in common law jurisdictions uniformly affirm that arbitrators are not bound by the strict rules of evidence, given an arbitral tribunal's inherently broad discretion to make evidentiary decisions [*Born I, p. 2308, §15.09*]. For example, American courts routinely upheld awards based on evidentiary rulings that would not be accepted in judicial proceedings: "*the arbitrators appear to have accepted hearsay evidence (…) as they were entitled to do. If parties wish to rely on such technical objections, they should not include arbitration clauses in their contracts.*" [*2nd Cir. (USA) 20 November 1961*]. By agreeing to arbitration, Parties granted the Tribunal a broad discretion to make evidentiary decisions rather than to be bound by strict evidentiary rules of common law. Therefore, the Tribunal should admit the PIA.

1.2 The principle of equality of arms requires that CLAIMANT is allowed to submit the Evidence

13. Additionally, in accordance with the principles of international commercial arbitration, CLAIMANT should be allowed to submit the Evidence. The DAL provides for the procedural guarantee of equality of arms in this particular dispute. Moreover, Article V(2)(b) NYC Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") provides for procedural guarantees.

14. Equality of arms is a fundamental principle in international arbitration and includes the right to submit evidence [*Born I, p. 2373, §15.04,*]. Article 18 DAL provides for the definition of the procedural principle of equality of arms: "*The parties shall be treated with equality and each party shall be given full opportunity of presenting his case*.". Furthermore, when rendering an award, the provisions of the NYC need to be taken into account to ensure legal enforceability of the award. Even if Danubia, Mediteranneo and Equatoriana are non-Contracting States to the NYC, an award that is to be rendered in the current proceedings can be enforced in another Contracting State. In that case, the NYC determines whether the award can be enforced. Pursuant to Article V(1)(b) NYC, recognition and enforcement of the award may thus be refused in case "*a party against whom the award was invoked (…) was otherwise unable to present its case.*". Pursuant to the NYC, a breach of the principle of equality of arms may result in the setting aside of the award being or in refusal of its recognition and enforcement [*Metzler in: Klausegger/Klein et al. II, p. 244*].

15. If CLAIMANT cannot introduce the Evidence, it will not be given the **full** opportunity of presenting its case. By invoking the confidentiality of that award, RESPONDENT impairs CLAIMANT's ability to rely on the Evidence. RESPONDENT violates due process with its behaviour and CLAIMANT must therefore be able to rely on the Evidence. Additionally, CLAIMANT should be granted the right to submit the Evidence to prevent setting aside of the award.

16. Thus, if CLAIMANT is not allowed to submit the Evidence from the other proceedings, the fundamental procedural guarantee offered by the principle of equality of arms is breached. Considering the possibility that the award is set aside under the NYC if the principle of equality of arms is not honoured, CLAIMANT must be allowed to submit the Evidence from the other proceedings.

1.3 CLAIMANT is entitled to submit the Evidence, notwithstanding the alleged hack and confidentiality of the other proceedings

17. As there are no grounds to reject the PIA of the other arbitral proceedings, CLAIMANT is entitled to submit it as evidence. First of all, as CLAIMANT was not involved in any alleged hack nor in the acquisition of evidence through former employees, it can submit the Evidence (**1.3.1**). Secondly, despite the confidentiality of the other proceedings CLAIMANT can submit the PIA (**1.3.2**).

1.3.1 As CLAIMANT was not involved in any hack, it can submit the Evidence

18. RESPONDENT states that the PIA could have been retrieved by "*a hack of RESPONDENT's computer system*." [*LbF, p. 51*]. However, a company that provides intelligence on the horseracing industry is in the possession of the PIA [*PO2, p. 60, §41*]. CLAIMANT itself was not involved in any alleged hack.

19. When a party wishes to submit unlawfully obtained evidence, the evidence is admissible if that party was not involved in the unlawful activity that lead to the disclosure of the evidence. The 'clean hands doctrine' entails that if a party seeking to introduce the evidence participated in the unlawful activity that led to its disclosure, the evidence is inadmissible on the basis that a party should not be permitted to profit from its own misconduct [*Blair/Gojković, §IIIff; Boykin/Havalic, p. 35 ff*]. The clean hands doctrine has been affirmed in arbitral case law.

20. In the *Methanex v. United States of America*, the clean hands doctrine is confirmed. The *Methanex* tribunal adds that the evidence in dispute must be material to the issue in the arbitral proceedings. The *Methanex* tribunal applied the UNCITRAL Arbitration Rules (1976). Article 15 UNCITRAL Arbitration Rules is similar to Article 18 DAL in that both articles confirm that a party must be given full opportunity to present its case. Therefore, this award can be looked at for guidance. In a similar fashion, in *Yukos v. The Russian Federation*, the tribunal relied on evidence obtained through WikiLeaks to reach conclusions on the merits. As in *Methanex*, the tribunal also applied the UNCITRAL Rules (1976). The tribunal stressed the need to have access to information that is in the public domain and that is relevant and material to the dispute. In the related *Hulley Enterprises Limited v. The Russian Federation* dispute, the tribunal's conclusion implied that unlawfully obtained evidence is admissible and may be relied upon by the tribunal.

21. In these aforementioned arbitral proceedings, none of the parties seeking to submit the evidence were engaged in an unlawful activity that led to the disclosure of the evidence. None of the facts presented by RESPONDENT prove that CLAIMANT played any role in the act of hacking or prove that it played any role in contributing to the disclosure of the PIA by RESPONDENT's former employees. CLAIMANT was not in any way involved in the hack and has clean hands. Therefore, the Evidence is admissible.

1.3.2 In spite of the confidentiality of the other proceedings, CLAIMANT can submit the PIA

22. RESPONDENT was engaged in another arbitration proceeding which concerned a dispute between RESPONDENT and a third party. In the present proceedings, CLAIMANT may rely on the PIA as evidence in case of consolidation (**1.3.2.1**). Moreover, CLAIMANT can submit the Evidence because it is already part of the public domain (**1.3.2.2)**. In any case, CLAIMANT can submit the PIA rendered in the other proceedings, notwithstanding the confidentiality of the other proceedings (**1.3.2.3**). Moreover, in light of the UNCITRAL Rules on Transparency, CLAIMANT should be able to submit the Evidence (**1.3.2.4**).

1.3.2.1 CLAIMANT may rely on the PIA as evidence in case of consolidation

23. The other proceedings and the current proceedings can be consolidated. As a consequence of such consolidation, the other party will be able to bring the PIA into the arbitral proceedings in accordance with Article 45.3.d HKIAC Rules despite the confidentiality of the other proceedings. As the disputes involve similar dispute matters, consolidation will prevent an inconsistent or conflicting decision in the two arbitration proceedings.

24. Whereas the DAL does not contain a specific provision on consolidation, Article 28 HKIAC Rules does. In accordance with Article 28.1(c) HKIAC Rules, consolidation of two or more arbitrations is possible when "*the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of (…) a series of related transactions and the arbitration agreements are compatible*". The first condition for consolidation is that a common question of law must arise in both arbitrations. Both disputes deal with the question whether a tribunal has the power to adapt the contract in case of unforeseen circumstances. Secondly, consolidation is allowed when there is a series of transactions. This is highly dependent on the relevant factual matrix [*Moser/Bao, §10.109*]. Both contracts are concluded for the same purpose and are substantially similar, as they both concern the sale of agricultural products. Thirdly, the agreements are compatible because the present proceedings as well as the other proceedings are based on Model HKIAC-Arbitration Clauses [*RE1, p. 33; PO2, p. 60, §39*). Lastly, the claims must be made under more than one arbitration agreement. The arbitral tribunal even has the power to consolidate two or more arbitral proceedings when the parties are not identical and the possible consolidation includes multiple parties to multiple contracts [*Smith, p. 186, §5.7*]. The third party is signatory to

another arbitration agreement, which binds the third party and RESPONDENT. CLAIMANT is not involved in those proceedings. Based on the foregoing, consolidation is possible on the basis of Article 28.3(c) HKAIC Rules.

25. Through consolidation, the third party becomes a 'party' under Article 45.3 HKIAC Rules. Articles 45.1 and 45.3.d HKIAC Rules provide that communication or disclosure of evidence by a party to an additional party is possible in case of consolidation. Therefore, the third party can communicate or disclose the Evidence to CLAIMANT. Consequently, submission of the PIA in the present proceedings by RESPONDENT's opposing party will in any event be possible after consolidation.

1.3.2.2 CLAIMANT can submit the Evidence because it is part of the public domain

26. Moreover, CLAIMANT could obtain the PIA despite the confidentiality of the other proceedings because it is part of the public domain.

27. Article 36.1 HKIAC Rules grants a tribunal the power to use any rules of law it deems appropriate if parties have not agreed otherwise. Parties have not explicitly agreed on using the IBA Rules. In this respect, the IBA Rules are commonly adopted or referred to in HKIAC administered arbitrations as persuasive guidance and provide a useful framework for the Tribunal to assess evidence [*Moser/Bao, §9.155*]. Pursuant to Article 3(1) IBA Rules, evidence that is in the public domain can be introduced in the arbitral proceedings.

28. Information is considered to be part of the public domain if the information is commonly known and accessible by virtually any person, at any time before the start or during the course of the proceedings [*Smeureanu, p. 77, §2.1.2*]. Information that is already in the public domain should be excluded from the confidentiality obligation arising from Article 45.1 HKIAC Rules.

29. The PIA that CLAIMANT wants to submit to the arbitral proceedings is already part of the public domain. Mr Kieron Velazquez, who knew about the main issues in dispute because he was working for the third party in the other proceedings, told CLAIMANT about the PIA [*PO2, p. 60, §41*]. CLAIMANT will acquire the PIA through an intermediary company against payment. Any party present at the annual breeder conference would be able to access and receive the information without actively breaching any contractual and statutory confidentiality obligations. Thus, as the PIA is part of the public domain, CLAIMANT can submit this Evidence.

1.3.2.3 CLAIMANT can submit the Evidence notwithstanding the confidentiality of the other arbitration agreement

30. In any case, CLAIMANT is not bound by the confidentiality agreement of the other proceedings. The other proceedings are conducted under the 2013 HKIAC Rules [*LbF, p. 51*]. Parties are obliged to keep information relating to the proceedings confidential, pursuant to Article 42 of the 2013 HKIAC Rules. According to Article 42.2 of the 2013 HKIAC Rules, this confidentiality obligation also applies to the arbitral tribunal, any Emergency Arbitrator, expert, witness, secretary of the arbitral tribunal and HKIAC. CLAIMANT acts in none of these capacities in the other proceedings. Thus, CLAIMANT is not bound by the confidentiality of that arbitration and can therefore submit the PIA.

1.3.2.4 In light of the UNCITRAL Rules on Transparency, CLAIMANT should be able to submit the Evidence

31. Moreover, RESPONDENT's assertion that the award is protected by confidentiality is rebutted by the principles derived from the UNCITRAL Rules on Transparency. Although the UNCITRAL Rules on Transparency do not apply in the present proceedings, the relevant submission of the PIA would be in line with the prevailing principles of transparency evidenced in the UNCITRAL Rules on Transparency.

32. The Preamble of the UNCITRAL Rules on Transparency states that the need for transparency provisions should be recognised, taking into account the public interest involved in treaty-based investor-state disputes. Moreover, the disputing parties' interest in a fair and efficient resolution of their dispute is stressed in the UNCITRAL Rules on Transparency.

33. International commercial arbitrations can also affect the public interest [*Poorooye/Feehily, p. 312*]. The unexpected Tariff in the present dispute is a matter of public policy which affects the public interest. In order to avoid unnecessary disputes, it is essential for future commercial disputes arising from such a change in public policy to have clear guidance on whether contracts can be adapted in such circumstances

34. Application of the underlying rationale of the UNCITRAL Rules on Transparency should lead to the conclusion that CLAIMANT can introduce the PIA.

1.4 Conclusion

35. The PIA from the other HKIAC proceedings in which RESPONDENT was involved is admissible under the HKIAC Rules, DAL and general principles of arbitration. CLAIMANT requests the Tribunal to admit the Evidence.

ISSUE II: THE TRIBUNAL HAS JURISDICTION TO DECIDE ON THE CLAIM AND ADAPT THE CONTRACT

36. Due to the Tariff imposed by the Equatorianian government, CLAIMANT is burdened with the Tariff, whereas RESPONDENT is responsible for these costs. Therefore, CLAIMANT asks for an additional payment from RESPONDENT [*NoA, p. 8*].

37. RESPONDENT alleges that the Tribunal does not have jurisdiction to decide on the claim [*RNoA, p. 32, §22*]. RESPONDENT states that the claim raised asks for adaptation of the Contract rather than to require the arbitrators to interpret it [*RNoA, p. 31, §12*]. According to RESPONDENT, Danubian Contract Law ("**DCL**") is applicable to the arbitration clause, which therefore does not grant the Tribunal jurisdiction to adapt the Contract [*RNoA, p. 3, §13*]. However, CLAIMANT will hereinafter establish that the Tribunal does have jurisdiction to decide on the claim.

38. Firstly, as the claim concerns interpretation rather than adaptation of the Contract, the Tribunal has jurisdiction to decide on the claim (**2.1**). If the Tribunal finds that adaptation is required, it also has jurisdiction as Parties have authorised the Tribunal to adapt the Contract (**2.2**). Moreover, interpretation of the arbitration clause pursuant to the Mediterranean Contract Law ("**MCL**") leads to the conclusion that the Tribunal has jurisdiction (**2.3**). In any case, the Tribunal has jurisdiction to adapt the Contract based on the DAL (**2.4**), as well as based on its general decision making powers (**2.5**).

2.1 The claim concerns interpretation rather than adaptation of the Contract

39. CLAIMANT requests an additional payment in accordance with the Contract [*NoA, p. 8*]. RESPONDENT argues that an additional payment qualifies as an adaptation of the Contract [*RnoA, p. 31, §12*]. However, CLAIMANT only requests that RESPONDENT meets its obligations under the Contract.

40. To allocate the risks associated with delivery, Parties have added a hardship formula to Clause 12 (**3.1**). The Tariff constitutes hardship (**3.2.1.2**). According to Clause 12, costs arising from an event of hardship should be borne by RESPONDENT [*CE5, p. 14,*

Clause 12]. However, CLAIMANT now bears the costs of the Tariff as it advanced these costs in reliance on RESPONDENT's promise that a solution would be found [*CE8, p. 18*].

41. Parties disagree whether the Contract obliges RESPONDENT to bear the Tariff. The determination of existing obligations is a matter of contract interpretation [*Brunner, p. 154; Peter, p. 42*]. Tribunals are empowered to interpret contracts [*Kröll I, p. 10; Al Furaque, p. 153*]. The arbitration clause reads: "*Any dispute arising out of this contract, including the existence, validity,* ***interpretation****, performance, breach or termination thereof shall be referred to and finally resolved by arbitration (…).*" (emphasis added) [*CE5, p. 14, Clause 15*]. Thus, the scope of the arbitration clause encompasses interpretation of the Contract. Consequently, the Tribunal has jurisdiction to decide on the claim for the additional payment.

2.2 Parties have authorised the Tribunal to adapt the Contract

42. The moment Parties initiated renegotiations following the imposition of the Tariff, Parties impliedly granted jurisdiction to the Tribunal to settle any disputes arising from the failure of these renegotiations. Consequently, the Tribunal should find it has impliedly been authorised to adapt the Contract.

43. A tribunal should ensure the equilibrium of a contract is maintained [*Brunner, p. 514*]. In the event parties fail to agree on new terms as provided for by a renegotiation clause, it is presumed that parties intended to authorise the tribunal to adapt the terms of the contract [*Brunner, p. 514; Peter, p. 40*]. In spite of the absence of explicit empowerment by the parties, a tribunal can be authorised to adapt following failed renegotiations [*Nessi in: Gonzalez-Bueno, p. 392; BGer (CH), 19 December 2001, §2c.bb.aaa; EWCA (UK), 21 March 2001, §38*].

44. The Tariff has altered the equilibrium of the Contract **(3.3.2)**. After the imposition of the Tariff, Parties have renegotiated the price, but failed to reach new terms [*CE8, p. 18; RE4, p. 36*]. Following the imposition of the Tariff, Ms Napravnik attempted to reach an agreement with RESPONDENT on an additional payment [*RE4, p. 36*]. The matter was discussed with Mr Shoemaker, who gave the impression that a solution regarding the price would be found [*CE8, pp. 16, 18; RE4, p. 36*]. Subsequently, Parties organised a meeting to solve the issue regarding the Tariff [*PO2, p. 60 §*35]. The renegotiations failed when RESPONDENT's CEO stopped the renegotiations and walked away [*CE8, p. 18*]. Consequently, Parties' implied consent to authorise the Tribunal has been triggered as Parties did not reach an agreement on the adapted price.

45. Parties excluded court proceedings by impliedly authorising the Tribunal. This is evidenced by the PIA, which CLAIMANT seeks to submit as evidence in the current proceedings (**Issue 1**). The tribunal in the other proceedings was exclusively authorised to adapt the contract following failed renegotiations [*PO2, p. 60, §39*]. Furthermore, Parties agreed to exclusively resort to arbitration in case of a dispute arising out of the Contract [*CE5, p. 14, Clause 15*].

46. To conclude, Parties impliedly authorised the Tribunal to adapt the Contract following failed renegotiations. Consequently, the Tribunal has jurisdiction to adapt the Contract.

2.3 Interpretation of the arbitration clause pursuant to the MCL leads to the conclusion that the Tribunal has jurisdiction to adapt the Contract

47. Should the Tribunal find that the claim raised does not merely require interpretation but adaptation of the Contract, it should determine whether the arbitration clause provides for adaptation. This clause does not constitute an express conferral of the power to adapt to the Tribunal [*CE5, p. 14, §15*]. Consequently, the Tribunal has to interpret it in order to determine the power to adapt has been conferred to the Tribunal.

48. The Tribunal should base its interpretation of the arbitration clause on the law applicable to it. As the arbitration clause does not include an express choice of law [*CE5, p. 14, Clause 15*], the Tribunal should decide which law is applicable. The Tribunal should find that the MCL is the applicable law (**2.3.1**). Interpretation of the arbitration clause in accordance with the MCL leads to the conclusion that the Tribunal has jurisdiction to adapt the Contract (**2.3.2**).

2.3.1 The MCL is the law applicable to the arbitration clause

49. In its e-mail of 31 March 2017 CLAIMANT intitiated the negotiations on the arbitration clause by suggesting arbitration in Mediterraneo [*CE4, p. 12*]. In response, RESPONDENT suggested a draft arbitration clause which included Equatoriana as the seat of arbitration and the Contract Law of Equatoriana ("**ECL**") as the law applicable to it [*RE1, p. 33*]. CLAIMANT sent a revised draft to RESPONDENT through e-mail of 11 April 2017 [*RE2, p. 34*]. CLAIMANT removed the express choice-of-law provision, changed the seat to Danubia and emphasised that the MCL should remain the law applicable to the Contract [*RE2, p. 34*]. RESPONDENT did not contest these changes nor the choice for the MCL. The final Contract includes the arbitration clause as drafted in CLAIMANT's latest e-mail [*CE5, p. 14, Clause 15*]. The final Contract thus includes the

choice of law for the MCL and an arbitration clause which does not contain an express choice of law. Consequently, the MCL is the law applicable to the arbitration clause.

50. A tribunal is not bound to any conflict of law rules when deciding on the law applicable to the arbitration clause [*Blackaby et al., p. 222; Lew in: Berg, p. 136; Bernardini in: Berg, p. 200*]. However, a tribunal should apply the method as developed in the *Sulamérica* case to determine the applicable law [*EWCA (UK), 16 May 2011 §§25-26*]. This method is applied by national courts and arbitral tribunals in cases similar to the current proceedings [*Born II, pp. 828-830; St. John Sutton et al., p. 90*; *ICC Case No. 11869 (2011); EWHC (UK), 20 December 2012*; *SGHC (SG), 9 November 2016*]. According to the *Sulamérica* method the starting point for the law applicable to the arbitration clause is the substantive law of the main contract, if the arbitration clause itself does not contain an express choice for the applicable law. Only if there are actual indications that a different law applies, a deviation from that starting point is justified. Application of the *Sulamérica* method in the current proceedings leads to the conclusion that the MCL is the law applicable to the arbitration clause.

51. In the case at hand, Parties signed the Contract including a choice for the application of the MCL to the Contract [*CE5, p. 14, Clauses 14*]. Pursuant to the *Sulamérica* method, the choice of the law governing the Contract is "***a strong indication*** *of the parties' intention in relation to the agreement to arbitrate*." (emphasis added) [*EWCA (UK), 16 May 2011, §26*]. Thus, the starting point is that the MCL as the substantive law applies to the arbitration clause.

52. By appealing to the separability doctrine RESPONDENT denies that the applicability of the MCL to the Contract leads to its applicability to the arbitration clause [*RNoA, p. 31, §14*]. The separability doctrine does not entail that the law of the Contract must be different from the law applicable to the arbitration clause. The concept of separability only reflects that the clause remains effective even if the main contract is challenged or found to be invalid [*EWCA (UK), 16 May 2011, §26; SGHC (SG), 9 November 2016, §§60-61*].

53. The separability doctrine is expressed in Article 16(1) DAL, which parallels Article 16 Model Law. Article 16(1) DAL adopts the doctrine of separability and limits this doctrine to disputes regarding the existence or validity of the arbitration clause. Moreover, it follows from the Model Law commentary that the separability doctrine is intended to only have the effect that an arbitrator does not lose his jurisdiction in cases

where the main contract is invalid [*Broches, p.* 75]. Consequently, the doctrine of separability solely treats the arbitration clause as a distinct agreement in the context of a challenge to its validity and not in the context of the choice of law [*Glick/Venkatesan in: Kaplan/Moser, p. 137; SGHC (SG), 9 November 2016, §60*]. Therefore, the applicability of the MCL to the arbitration clause is not impeded by the separability doctrine.

54. In addition, there are no indications that lead to the conclusion that the MCL does not apply. It follows from case law that the choice for the seat of the arbitration is in itself not a sufficient contrary indication [*EWHC (UK), 20 December 2012, §21; SGHC (SG), 9 November 2016, §§56, 72; EWHC (UK), 19 December 2013, §101*]. In the current proceedings, the choice for Danubia as the seat of arbitration must be understood as a choice for a neutral forum and not as a choice for the DCL to apply to the arbitration clause. Furthermore, it follows that RESPONDENT did not intend to deviate from the starting point that the MCL applies to the arbitration clause.

55. Firstly, CLAIMANT proposed Danubia as the seat of arbitration, because it was a neutral forum [*RE2, p. 34; PO2, p. 57, §14*]. CLAIMANT emphasised that the change of the seat does not imply that the law of the seat was chosen as the applicable law by stating that: "*(this) offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo.*" [*RE2, p. 34*]. RESPONDENT understood that Danubia was chosen only because it is a neutral forum. This follows from both the notes of Mr Antley and the witness statement of Mr Krone, who negotiated the Contract on RESPONDENT's behalf [*RE3, p. 35*]. Mr Antley's note states: "*Clarify in arbitration clause that neutral venue*" and subsequently Mr Krone stated that the draft of the Contract had already provision in favour of "*Danubia as a neutral country*" [*RE3, p. 35*].

56. Secondly, RESPONDENT did not express its wish for the application of the DCL. The express choice-of-law provision that RESPONDENT included in its draft arbitration clause is insufficient to conclude that RESPONDENT expressed a wish for application of the DCL. The draft included a choice for the ECL as the applicable law and Equatoriana as the seat of arbitration [*RE1, p. 33*]. The final arbitration clause provides for a different seat which has a contract law that deviates substantially from the ECL [*PO2, p. 60, §39, p. 61, §45*]. Consequently, RESPONDENT's preference in its draft arbitration clause for application of the law of the seat does not imply a choice for the application of the DCL in the final arbitration clause.

57. Lastly, RESPONDENT did not intend to deviate from the starting point that the MCL applies. This is evidenced by the witness statement of Mr Krone, who finalised the negotiations between Parties and signed the Contract on RESPONDENT's behalf [*RE3, p. 35*]. During the finalisation of the negotiations on the Contract, Mr Krone was guided by notes that his predecessor wrote. One of the matters addressed in these notes is the choice of law: "*Clarify in arbitration clause (…) applicable law*" [*RE3, p. 35*]. Even though he had seen this note and the previous draft which included the express choice-of-law provision, Mr Krone signed the Contract **without** clarifying the applicable law in the arbitration clause [*PO2, p. 55, §§5-6; RE1, p. 33*]. Mr Krone stated that he did not clarify the applicable law, since the Contract already included "*a choice of law clause in favour of the Law of Mediterraneo.*" [*RE3, p. 35*]. Thus, Mr Krone did not intend to deviate from the starting point that the choice for the MCL as the substantive law also governs the arbitration clause.

58. In view of the above, Parties' choice for the MCL as the law applicable to the Contract applies to the arbitration clause. Thus, the MCL is the law applicable to the arbitration clause.

2.3.2 Interpretation of the arbitration clause in accordance with the MCL leads to the conclusion that the Tribunal has jurisdiction

59. An arbitration clause is to be interpreted in conjunction with the CISG if the contract containing the arbitration clause is governed by the CISG [*PO1, p. 53, §4*]. In accordance with Article 8 CISG, the scope of the arbitration clause can be construed according to Parties' common intent to adapt the Contract. Alternatively, in accordance with Article 8(2) CISG a reasonable third person would understand the same. As a result, the Tribunal should find it has jurisdiction to adapt the Contract.

60. Article 8(1) CISG requires that a contract is interpreted in accordance with the common intent of parties [*CISG Advisory Op. No. 3, §2.2*]. If the intent of parties cannot be determined, Article 8(2) CISG requires that a contract is interpreted in accordance with the reasonable understanding a third party would have had [*CISG Advisory Op. No. 3, §2.2.*]. It follows from Article 8(3) CISG that all relevant circumstances should be considered for the application of Article 8(1) and Article 8(2) CISG [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 153, §21; Magnus in: Staudinger, p. 168, §*24; *OLG Dresden (GER), 27 December 1999*].

61. The Contract does not contain an express adaptation clause. The Tribunal should nevertheless find that Parties' common intent was to authorise the Tribunal to adapt the Contract. Common intent of the parties prevails in the absence of an objective manifestation of that intent at the time of the conclusion of the contract, since the meaning of the contract is not determined by its writing [*11th Cir. (USA) 28 June 1998; Flechtner, p. 264*]. Consequently, Parties' common intent prevails in spite of the absence of an adaptation clause as an objective manifestation of Parties' intent at the time of conclusion of the Contract.

62. Pursuant to Article 8(1) CISG, CLAIMANT unequivocally intended to confer the power to adapt the Contract on the Tribunal. CLAIMANT proposed the possibility of adaptation of the Contract during the negotiations with RESPONDENT. CLAIMANT suggested to reach an agreement on possibly adapting the Contract [*CE8, p. 17*]. RESPONDENT immediately replied it should indeed be the task of the Tribunal to adapt the Contract [*CE8, p. 17*]. CLAIMANT also preferred this and suggested to include an express reference to that extent [*CE8, p. 17*]. RESPONDENT stated it would provide a proposal to include an express reference for adaptation in the arbitration clause [*CE8, p. 17*]. Thus, the common intent of parties was that the Tribunal should be empowered to adapt the Contract.

63. Alternatively, in accordance with Article 8(2) CISG a reasonable third party would have understood that Parties indeed agreed on authorisation of the Tribunal to adapt the Contract. The negotiations are relevant circumstances in the light of Article 8(2) CISG [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 158, §31*]. A reasonable third party would conclude that RESPONDENT's proposal to include an express provision for adaptation in response to CLAIMANT's suggestion to do so demonstrates agreement between the Parties.

64. Furthermore, Parties only failed to expressly provide for adaptation due to the accident that involved the initial negotiators [*CE8, p. 17*]. The replacing negotiators acknowledged they were either inexperienced or ill-informed [*CE8, p. 17; RE3, p. 35*]. In any case, neither had knowledge of the consensus between the previous negotiators on adaptation of the Contract [*PO2, p. 55, §7*]. A reasonable third party would understand that the wording of the arbitration clause does not expressly reflect the earlier reached consensus due to this lack of knowledge.

65. The explicit and consensual choice for the applicability of the MCL to the Contract is a relevant circumstance for the application of Articles 8(1) and 8(2) CISG. A substantive choice-of-law clause is a relevant circumstance for authorisation of the tribunal to adapt contracts [*Beisteiner in: Klausegger/Klein I, p. 110; Born I, p. 1065*]. The choice for the MCL demonstrates Parties' preference for an adaptation-friendly jurisdiction [*CE5, p. 14, Clause 14*].

66. Another relevant circumstance pursuant to Article 8(3) CISG is Parties' inclusion of a standard arbitration clause in the Contract. Authorisation of a tribunal to adapt the contract can be derived from such a clause [*Beisteiner in: Klausegger/Klein I, p.110*]. Additionally, the PIA demonstrates that under the MCL a standard arbitration agreement suffices to enable the tribunal to adapt a contract when tariffs result in hardship [*PO2, p. 60, §39*]. The arbitration clause in the Contract qualifies as a standard arbitration clause because it is "*largely based on the model clause suggested by the HKIAC.*" [*RE1, p. 33*]. This was expressly stated by RESPONDENT who proposed the clause [*RE1, p. 33*]. Furthermore, the arbitration clause does not deviate substantively from the HKIAC Model Clause. The alterations made to the clause form insignificant alterations from the HKIAC Model Clause, because they only concern non-contractual obligations.

67. Consequently, interpretation of the arbitration clause in accordance with the MCL in conjunction with Article 8 CISG leads to the conclusion that the Tribunal has jurisdiction to adapt the Contract.

2.4 The DAL permits the Tribunal jurisdiction to adapt the Contract

68. The *lex arbitri* governs the arbitration procedure and a tribunal's competences [*Blackaby et al., p. 166*]. The DAL substantiates that the Tribunal has jurisdiction to adapt the Contract. Although the DAL is silent on adaptation of contracts, it allows for adaptation of the Contract based on the principle of synchronised competences of judges and arbitrators. As a result, the Tribunal has the power to adapt the Contract.

69. The principle of synchronised competences of judges and arbitrators entails that whenever the *lex arbitri* does not provide relevant procedural rules, the rules on the competence of domestic courts are applied to the tribunal [*Kröll I, p. 11; Frick, p. 194*]. As a result, the tribunal has the same powers under the *lex arbitri* as courts have under the substantive law of the seat [*Ferrario, p. 75, Brunner, p. 497, Berger I, p. 5*]. This link between procedural and substantive law constituted by the principle of synchronised competences of judges and arbitrators is an accepted practical solution [*Brunner, p. 494; Ferrario, p.143*].

70. The substantive law of the seat is the DCL, which enables courts to adapt contracts in case of hardship. Article 6.2.3 (4)b DCL provides for adaptation in cases of hardship. It suffices that a concept of hardship or change in circumstances exists as a *general principle of law* to effectuate the principle of synchronised competences of judges and arbitrators [*Brunner, p. 497*]. The addition "*if authorized*" to Article 6.2.3 (4)b DCL [*PO2, p. 61, §45*] does not affect the existence of a concept of hardship under the DCL. Thus, adaptation of the Contract is provided for under the DCL.

71. The principle of synchronised competences of judges and arbitrators is accepted practice. This is for example illustrated by a Swiss case in which the parties could not agree on the inclusion of a provision dealing with the right to extend the contract [*BGer (CH), 19 December 2001, §2b*]. The Claimant in that case requested the provision to be included in the contract [*Kröll II, p. 19*]. The Swiss *lex arbitri* was silent on the tribunals' power to adapt contracts [*BGer (CH), 19 December 2001, §2c.bb*]. This is similar to the DAL in the current proceedings. Another similarity was formed by the absence of an express authorisation of the tribunal by the parties. Regardless of this absence, the Swiss tribunal could adapt the contract because Swiss substantive law acknowledged that a change of circumstances provided a ground for adaptation by courts [*BGer (CH), 19 December 2001, §2c.bb.aaa*]. This is equal to the DCL in the current proceedings. Accordingly, the Swiss Supreme Court ruled that arbitral tribunals seated in Switzerland enjoy at least the same powers as Swiss courts [*BGer (CH), 19 December 2001, §2c.bb.aaa*]. The principle of synchronised competences of judges and arbitrators was used to adapt the contract. The outcome of the Swiss case has been confirmed [*BGer (CH), 21 September 2007, §6.2*]. The solution offered in this case should therefore be adopted by the Tribunal in the current proceedings.

72. Furthermore, the PIA demonstrates that the tribunal in the other proceedings applied the principle of synchronised competences of judges and arbitrators. As courts have the power to adapt contracts in cases of hardship under Article 6.2.3 MCL, the substantive law of the seat consequently allowed for adaptation of the contract by the tribunal [*PO2, p. 60, §39*]. The existence of this possibility in the substantive law of the seat empowered the tribunal to adapt the contract [*PO2, p. 60, §39*]. Thus, the principle of synchronised competences of judges and arbitrators was applied.

73. Based on the foregoing, the principle of synchronised competences of judges and arbitrators applies to the current proceedings. The Tribunal therefore has jurisdiction to adapt the Contract under the DAL.

2.5 The Tribunal has jurisdiction to adapt the Contract based on its general decision making powers

74. The Tribunal is furthermore authorised to adapt the Contract based on the general decision making powers it is endowed with. RESPONDENT fails to acknowledge the fact that the Tribunal has these powers as no restrictions apply [*RNoA, p. 31, §31*].

75. If there is no rule in the *lex arbitri* prohibiting adaptation, tribunals are authorised to adapt the contract as part of their general decision making powers [*Frick, p. 197; Brunner, p. 514*]. As long as the dispute is arbitrable and the general decision making powers of the tribunal are not limited, tribunals enjoy a broad discretion in executing these powers [*Berger II, p.1376; Frick, p. 197*].

76. No provision of the DAL prohibits adaptation of contracts as the DAL is silent on the matter. The arbitration clause contains no express restrictions of the Tribunal's power to adapt the Contract. Lastly, the dispute is arbitrable as it meets the requirements of Article 7 DAL. Contract adaption is considered to be an arbitrable dispute [*Brunner, p. 494; Fouchard/Gaillard, p. 28; Stalev, p.208*].

77. Moreover, Parties repeatedly expressed their interest in a long-term relationship [*CE3, p. 11; CE4, p. 12*]. In order to protect that relationship, tribunals may adapt the contract exercising the broad powers they enjoy in arbitration proceedings [*Frick, p. 272; Al Faruque, p. 154*; *Blackaby et al., p. 524*; *EWCA (UK), 22 March 2001; EWCA (UK), 18 January 2002; ICC Case No. 7365 (1997)*].

78. As no restrictions to the general decision making powers exist, the Tribunal has the power to adapt the Contract.

2.6 Conclusion

79. Based on the foregoing, the Tribunal has jurisdiction to decide on the claim for an additional payment and has jurisdiction to adapt the Contract.

ISSUE III: CLAIMANT IS ENTITLED TO AN ADDITIONAL PAYMENT

80. The unforeseen Equatorianian import Tariff confronts CLAIMANT with an additional cost of USD 1,500,000. Parties disagree whether CLAIMANT or RESPONDENT should bear the Tariff. CLAIMANT requests that RESPONDENT is ordered to pay an additional amount in remuneration for the Tariff [*NoA, p. 8*].

81. RESPONDENT should be ordered to pay USD 1,500,000 as CLAIMANT is entitled to the remuneration of the Tariff under the Contract (**3.1**). Alternatively, the CISG entitles CLAIMANT to the payment of USD 1,250,000 (**3.2**). In any case, the UPICC entitle CLAIMANT to the payment of USD 1,250,000 (**3.3**).

3.1 CLAIMANT is entitled to the payment of USD 1,500,000 under the Contract

82. Parties are in dispute about whom the risk of the Tariff is allocated to by the Contract. The CISG is applicable to the Contract [*CE5, p. 14, Clause 14*]. Article 8 CISG applies to the interpretation of contracts [*Schlechtriem/Schwenzer, p. 145, §3; UNCITRAL, p. 54, §§1-3; Lookofsky, p. 43*]. Interpretation pursuant to Article 8 CISG is required if there is such misunderstanding between parties [*Zeller, p. 631*].

83. Interpretation of the Contract in accordance with Article 8(1) CISG is based on the common intent of parties as shown by their conduct and statements [*Kröll III, p. 45*]. Article 8(1) CISG requires clarification of the common intent insofar as it has not been objectively expressed [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 150, §13*]. Beyond this, Article 8(2) CISG requires an objective test prescribing that a tribunal interprets the Contract according to the reasonable understanding a third party would have had [*CISG Advisory Op. No. 3, §2.2; Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 154, §20; Vorobey, p. 144*].

84. With reference to the risk of changes in customs regulations and import restrictions mentioned by CLAIMANT, RESPONDENT added a hardship formula to Clause 12 [*PO2, p. 56, §12; CE4, p. 12*]. The hardship formula added to Clause 12 to allocate those risks ensures that CLAIMANT shall not be responsible for: "*(…) hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" [*CE5, p. 14, Clause 12*].

85. Clause 12 should be interpreted as to place the responsibility for hardship caused by customs regulations and import restrictions on RESPONDENT. This is so because the intent of Parties was that RESPONDENT bears the risk of changes in customs regulations and import restrictions (**3.1.1**). Alternatively, if the Tribunal is not be able to establish Parties' intent, it must find that a reasonable third party would understand that RESPONDENT bears the risk of changes in regulations and import restrictions (**3.1.2**). As a result of the allocation of the risk of the Tariff to RESPONDENT, RESPONDENT is obliged to make an additional payment of USD 1,500,000 to CLAIMANT.

3.1.1 Parties intended that RESPONDENT bears the risk of changes in customs tariffs

86. Article 8(1) CISG requires that a tribunal interprets a contract in accordance with the common intent of parties [*CISG-AC Op. No. 3, §2.2; Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 154, §22*]. Pursuant to Article 8(3) CISG, one of the relevant circumstances that is to be taken into account for this interpretation are the negotiations. According to Article 19 CISG, a contract is formed through offer and acceptance, whereby an acceptance that contains material limitations qualifies as a counter-offer [*Schroeter in: Schlechtriem/Schwenzer, p. 351, §1*].

87. CLAIMANT's original offer included EXW as the terms of delivery [*CE2, p. 10; PO2, p. 56, §9*]. EXW requires the buyer to collect the goods at the premises of the seller and to assume all risks associated with the transport from that point onwards [*International Chamber of Commerce II, p. 15*]. Subsequently, RESPONDENT's request for DDP constituted a counter-offer [*CE3, p. 11*]. The usual meaning of DDP would be that all risks associated with the transport are borne by seller [*International Chamber of Commerce II, p. 69*]. CLAIMANT accepted the inclusion of DDP with the express limitation that the risks associated with a change from EXW to DDP remain with RESPONDENT [*CE4, p. 12*]. Thus, CLAIMANT made the final counter-offer which required RESPONDENT to bear the risks associated with delivery.

88. CLAIMANT's offer constitutes a deviation from the usual meaning of DDP. DDP is one of the Incoterms. Parties may deviate from an Incoterm by demonstrating a "*cognizable and concurrent intention*" [*BGH (GER), 11 December 1996, §2.2.1*]. It follows that Parties could place the risks normally associated with DDP with RESPONDENT.

89. CLAIMANT explicitly stated that it was "*not willing to take over any further risks associated with such a change in the delivery terms, **in particular** not those associated with changes in customs regulation or import restrictions.*" (emphasis added) [*CE4, p. 12*]. In order to ensure that RESPONDENT bears the risk of changes in customs regulations and import restrictions, CLAIMANT specifically requested the inclusion of a hardship clause [*CE4, p. 12*]. Through its counter-offer CLAIMANT unequivocally intended that RESPONDENT bears the risk of changes in customs regulations and import restrictions and that this would be effectuated through the inclusion of a hardship clause.

90. Moreover, RESPONDENT accepted CLAIMANT's offer. Whilst Article 18 CISG stipulates that silence in itself cannot constitute an acceptance, silence can indicate an intention to accept in conjunction with other circumstances

[*OLG Köln (GER), 22 February 1994; Magnus in: Staudinger, p. 218, §12*]. RESPONDENT stated that the reasons to request DDP were CLAIMANT's much greater experience in the shipment of frozen semen and the urgency of the delivery [*CE3, p. 11*]. Notably, RESPONDENT did not state its explicit intent that CLAIMANT would bear the risks associated with customs regulations and import restrictions. Furthermore, RESPONDENT failed to object against CLAIMANT's unequivocal request that a hardship clause would be added to place the risk of changes in customs regulations and import restrictions on RESPONDENT. By putting forward the hardship formula that was added to Clause 12, it even acted on CLAIMANT's request [*PO2, p. 56, §12*]. What is more, RESPONDENT directly referred to the risks mentioned by CLAIMANT when it introduced the final wording of Clause 12 [*PO2, p. 56, §12*]. RESPONDENT thus indicated that it intended to address those risks with the clause. Therefore, the common intent was that RESPONDENT bears the risk of changes in customs regulations and import restrictions such as the Tariff and that Clause 12 effectuates that intent.

91. Even if the Tribunal finds itself unable to determine the common intent of Parties, the unequivocal intent of CLAIMANT suffices. The unequivocal intent of one party is equivalent to the common intent insofar as the other party was aware or could not reasonably have been unaware of that intent [*BGer (CH), 5 April 2005, §3.3; Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 155, §24*]. CLAIMANT specifically stated that it was not willing to take over any risks associated with customs regulations and import restrictions and that a hardship clause should be included for that purpose [*CE4, p. 12*]. As CLAIMANT's intent was expressed in e-mails addressed to RESPONDENT, RESPONDENT was aware or could not reasonably have been unaware of CLAIMANT's intent.

92. It follows from the above that Clause 12 must be interpreted as to place the responsibility for the Tariff with RESPONDENT. In accordance with that responsibility, RESPONDENT is obliged to pay USD 1,500,000 to CLAIMANT.

3.1.2 Alternatively, a reasonable third party would understand that RESPONDENT bears the risk of customs tariffs

93. If a tribunal is not be able to establish the intent of parties, it ought to interpret a contract in accordance with the understanding a reasonable third party would have had [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 153, §20*]. Pursuant to Article 8(3) CISG a

tribunal must consider all relevant circumstances, including the negotiations between Parties.

94. A reasonable third party would understand that RESPONDENT bears the risk of the Tariff from the negotiations of the Contract (**3.1.2.1**), and from the fact that the Tariff meets the conditions of the hardship formula (**3.1.2.2**). In any case, Clause 12 should be interpreted against RESPONDENT (**3.1.2.3**).

3.1.2.1 A reasonable third party would understand from the negotiations that RESPONDENT bears the risk of customs tariffs

95. Firstly, the way Parties added the hardship formula to Clause 12 demonstrates that its purpose is to ensure that risks related to customs regulations and import restrictions remain with RESPONDENT. CLAIMANT's representative, Ms Napravnik, expressly mentioned in her e-mail of 31 March 2017 that CLAIMANT was "*not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions*." [*CE4, p. 12*]. In order to ensure that RESPONDENT in any case bears the risk of changes in customs regulations and import restrictions, CLAIMANT specifically requested the inclusion of a hardship clause [*CE4, p. 12*]. RESPONDENT then put forward the hardship formula "*with reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017*" [*PO2, p. 56, §12*]. Therefore, it can reasonably be understood that Parties placed risks related to customs regulations and import restrictions with RESPONDENT with the hardship formula.

96. Secondly, the commercial logic of the negotiations supports the finding that Parties have agreed that RESPONDENT bears the risk of changes in regulations and import restrictions. A clause is to be understood in the context of the contract as a whole [*BGH (GER), 3 April 1996*]. The interests of parties form part of that context [*OLG Dresden (GER), 27 December 1999*]. CLAIMANT's offer was to include an the amended version of DDP and a USD 1000 price increase per dose [*CE4, p. 12*]. This price increase functioned merely to cover CLAIMANT's delivery costs [*CE4*, *p. 12*]. Therefore, the price increase did not form a remuneration for any transfer of risks to CLAIMANT. CLAIMANT would have requested a more substantial price increase if it had taken over any risks. RESPONDENT stated that it was "*not willing to pay a much higher price for receiving basically nothing.*" [*RNoA, p. 30, §4*]. RESPONDENT thus acknowledged it received nothing but CLAIMANT's delivery services and expertise – and in any case no transfer of risks to CLAIMANT. Subsequently, the price increase was lowered to USD 200 per

dose to accommodate RESPONDENT's concern [*PO2, p. 56, §8*]. However, it can reasonably be understood that CLAIMANT would not agree to both a decrease of the additional price as well as an increase of the risks it assumes.

97. Thirdly, it can be understood that RESPONDENT wanted to exclude the right to terminate and limit the hardship formula to the risks mentioned by CLAIMANT. RESPONDENT rejected CLAIMANT's request to include the ICC Hardship Clause because it found the clause too broad [*RE3, p. 35; RNoA, p. 30, §4*]. The ICC Hardship Clause includes a right to terminate and enables a party to renegotiate in case of **any** unexpected event beyond its control that makes performance more onerous [*International Chamber of Commerce I, p. 15, §§2-3*]. The ICC hardship clause was indeed too broad as it includes a right to terminate. Furthermore, RESPONDENT rightfully portrayed the ICC Hardship Clause as too broad because it would indeed go beyond Parties' intent to ensure that **only** risks related to delivery remain with RESPONDENT. Therefore, the hardship formula was narrowed by excluding the right to terminate and by limiting the formula to the risks mentioned by CLAIMANT – as affirmed by RESPONDENT's reference to these risks when RESPONDENT put forward the hardship formula [*PO2, p. 56, §12*].

3.1.2.2 The Tariff meets the conditions of Clause 12

98. The Tariff meets the conditions of Clause 12. The clause requires "[…] *hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" [*CE5, p. 14, Clause 12*]. A reasonable third party would understand that Clause 12 must be read as applying to both specific as well as general circumstances of hardship, namely:

i) hardship caused by additional health and safety requirements; and
ii) hardship caused by comparable unforeseen events making the contract more onerous.

The Tariff falls within the wording of (ii). Firstly, it causes hardship. Secondly, it is a comparable event. Thirdly, it is unforeseen. Fourthly, it makes the contract more onerous.

99. Firstly, the Tariff subjects CLAIMANT to hardship. The term hardship constitutes "*suffering or adversity*" [*Black Law's Dictionary, "hardship"*]. CLAIMANT planned to make a modest profit in 2018 after a financially difficult period [*PO2, p. 59, §29*]. The USD 1,500,000 burden of the Tariff would not only destroy that profit as well as the

modest profit it made in 2017, but even jeopardises CLAIMANT's overall financial stability [*PO2, p. 59, §29*]. As a result, CLAIMANT will likely be forced to sell part of its business [*PO2, p. 59, §29*]. The Tariff therefore qualifies as hardship.

100. Secondly, application of Clause 12 requires that the Tariff is comparable to health and safety requirements. The comparability to health and safety requirements originates from an e-mail by CLAIMANT [*CE4, p. 12*]. The measure of comparability must therefore be construed in light of that statement. CLAIMANT voiced its unwillingness to take over risks associated with changes in customs regulations and import restrictions in the e-mail. CLAIMANT used unforeseeable additional health and safety requirements to illustrate why it was not willing to take over such risks. The crux of the example was that it demonstrated that changes in customs regulations and import restrictions can cause a significant cost increase and destruction of the commercial basis of the deal. Consequently, if an event leads to a cost increase and a destruction of the commercial basis of a deal, it is comparable to health and safety requirements in the context of Clause 12. CLAIMANT illustrated this by mentioning unforeseen health and safety requirements as those formed part of its previous experience [*PO2, p. 58, §21*]. The Tariff is a comparable event since it leads to a significant cost increase and destroys the commercial basis of the deal for CLAIMANT.

101. Thirdly, the Tariff qualifies as unforeseen. An event qualifies as unforeseen if it is "*not expected*" [*Black Law's Dictionary, "unforeseen"*]. The sudden measure came as a complete surprise according to CLAIMANT [*NoA, p. 6, §9*]. This is supported by the political context. The Mediterranean government had not taken comparable protectionist measures for its agricultural sector before, which made the Mediterranean tariff that preceded the Tariff unexpected [*PO2, p. 58, §23*]. The ensuing retaliatory Tariff was even more unforeseen as it was a response to the unforeseen Mediterranean tariff. Moreover, the Equatorianian government has almost always adhered to its WTO obligations and is a strong supporter of free trade [*CE6, p. 15*]. This context made the retaliatory Tariff unforeseen, as confirmed by reports that the retaliation came as "*a big surprise even to informed circles*" [*CE6, p. 15*].

102. Fourthly, the Tariff makes the Contract significantly more onerous. Performance is onerous if it involves "*obligations that outweigh the advantages*" [*Black Law's Dictionary, "onerous"*]. Due to the USD 1,500,000 Tariff, CLAIMANT's projected profit of USD 250,000 is converted to a USD 1,250,000 loss [*NoA, p. 7, §18; CE5, pp. 13-14; CE8, p. 17*]. The burden of the Tariff outweighs any commercial advantage for

CLAIMANT and destroys the entire basis of the Contract. Thus, the Tariff makes the Contract more onerous for CLAIMANT.

103. It follows that a reasonable third party would understand from the course of the negotiations and the fact that the Tariff meets the conditions of Clause 12 that RESPONDENT is responsible for the hardship caused by the Tariff. Thus, RESPONDENT is obliged to pay USD 1,500,000.

3.1.2.3 Clause 12 should be interpreted against RESPONDENT

104. If despite interpretation any ambiguity remains, Clause 12 is to be interpreted against RESPONDENT and thus places the risk of the Tariff on RESPONDENT. In accordance with the *contra proferentem* rule, an ambiguous clause ought to be interpreted against the party that drafted it [*Schmidt-Kessel in: Schlechtriem/Schwenzer, p. 157, §29; Magnus in: Staudinger, p. 167, §18; OLG Stuttgart (GER), 31 March 2008*]. The rule is all the more applicable if the drafting party fails to provide clarity despite inquiry from the other party [*Schmidt Kessel in: Schlechtriem/Schwenzer, p. 169, §50; OLG Frankfurt (GER), 31 March 1995*]. RESPONDENT drafted the hardship formula and deliberately remained ambiguous about its view on the effect of the formula when CLAIMANT sought to rely on Clause 12 [*RE4, p. 36*]. Therefore, Clause 12 should be interpreted against RESPONDENT, thus as placing the responsibility for the Tariff on RESPONDENT.

3.2 CLAIMANT is entitled to the payment of USD 1,250,000 under the CISG

105. If the Tribunal would rule that CLAIMANT is not entitled to payment of USD 1,500,000 under Clause 12 of the Contract, CLAIMANT would still be entitled to the payment of USD 1,250,000 under the CISG. The imposed Tariff puts CLAIMANT in a dire financial situation. CLAIMANT paid the Tariff in advance as it relied on RESPONDENT's assurance that a solution would be found. Due to the USD 1,500,000 cost increase caused by the Tariff, CLAIMANT's original USD 250,000 profit would become a USD 1,250,000 loss.

106. To remedy the hardship caused by the loss, CLAIMANT is entitled to USD 1,250,000 pursuant to the CISG. The Tariff subjects CLAIMANT to considerable hardship. Article 79 CISG applies to CLAIMANT's hardship and provides for the possibility of further relief (**3.2.1**). The Tribunal should adapt the price in accordance with the principle of good faith that underlies the CISG (**3.2.2**). As a result, CLAIMANT is entitled to the payment of USD 1,250,000. In any case, Parties did not derogate from the CISG (**3.2.3**).

3.2.1 The CISG provides for the remedy of price adaptation as there is hardship

107. In the present proceedings, the Tariff subjects CLAIMANT to considerable hardship. CLAIMANT is entitled to a price adaptation based on the CISG and its general principles. CLAIMANT's hardship is regulated by Article 79 CISG (**3.2.1.1**). The Tariff qualifies as hardship in the sense of Article 79 CISG (**3.2.1.2**). Article 79 CISG provides for the remedy of price adaptation in case of hardship (**3.2.1.3**).

3.2.1.1 Hardship is regulated by Article 79 CISG

108. Article 79 CISG regulates hardship. Article 79 CISG exempts a party from liability for non-performance when an impediment exists. Hardship may qualify as an impediment under Article 79 CISG if it requires a party to exceed "*a limit of sacrifice beyond which the obligor cannot be reasonably expected to perform.*" [*CISG-AC Op. No. 7, 3.1, §38*]. This rule is generally accepted [*Schwenzer in: Schlechtriem/Schwenzer, p. 1142, §31; Schwenzer, p. 713; Schlechtriem/Butler, p. 203; Kroll/Atamer in: Kröll/Mistelis/Viscasillas, p. 1071, §79*]. Case law confirms that hardship "*can* […] *form an impediment in the sense of this Convention.*" [*HvC (BEL), 19 June 2009, §IV.1*]. Thus, hardship can qualify as an impediment and therefore Article 79 CISG can also be applied to hardship.

3.2.1.2 The Tariff qualifies as hardship

109. When an unforeseen change of circumstances fundamentally alters the equilibrium of the contract, hardship exists [*Brunner, p. 391*]. The change of circumstances should not be assumed and unavoidably render the contract more onerous for one of the parties [*Brunner, p. 391; Lindström, §II*]. No general definition of hardship exist under Article 79 CISG, besides the requirement that it should entail a situation of economic impossibility [*CISG-AC Op. No. 7, 3.1, §38*].

110. Firstly, the Tariff fundamentally altered the equilibrium of the Contract. The Contract would have benefitted both RESPONDENT and CLAIMANT under the original circumstances. Nijinsky III is one of the most sought-after stallions in the industry and CLAIMANT usually does not sell the frozen semen – certainly not an amount as high as 100 doses [*NoA, p. 5, §3; CE2, p. 10*]. While natural coverage in Equatoriana was impossible due to national health restrictions, a ban on artificial insemination of racehorses had temporarily been lifted until December 2018 [*NoA, p. 5, §5*]. Due to CLAIMANT's unique storage techniques, the semen is long-living [*NoA, p. 5, §2*] and RESPONDENT therefore obtained the benefit of holding a large stock of high-quality

frozen semen in a market with restricted access. CLAIMANT's benefit would constitute a USD 250,000 profit on the final shipment. However, as a result of the USD 1,500,000 Tariff, CLAIMANT now suffers a USD 1,250,000 loss. This loss would even jeopardise CLAIMANT's ability to continue its business in its current form [*PO2, p. 59, §29*]. Thus, CLAIMANT would now be placed in a dire financial situation as a result of its performance whereas RESPONDENT would retain all its benefits under the Contract. Therefore, the Tariff fundamentally alters the equilibrium of the Contract.

111. Secondly, the Tariff is onerous, unforeseen and could not reasonably have been taken into account. As previously established, the Tariff makes the contract more onerous for CLAIMANT (par. **102)**. As previously established, the Tariff is unforeseen (par. **101**). Given this situation, CLAIMANT could not reasonably take the Tariff into account.

112. Lastly, the Tariff was unavoidable. Acts of governments are generally beyond the control of parties [*McKendrick in: Vogenauer/Kleinheisterkamp, p. 721, §14*]. The Tariff was imposed by the government of Equatoriana. CLAIMANT could not have obtained a reduction of the Tariff or been exempted from it [*P02, p. 58, §27*].

113. Thus, the Tariff constitutes an unavoidable unforeseen change of circumstances that fundamentally alters the equilibrium of the Contract and makes it more onerous. Therefore, the Tariff qualifies as hardship.

3.2.1.3 Article 79 CISG provides for the remedy of contract adaptation in case of hardship

114. RESPONDENT alleges that Article 79 CISG does not provide for the remedy of contract adaptation [*RNoA, p. 32, §21*]. However, a remedy does in fact exist.

115. The CISG should logically also contain a remedy for hardship as hardship is governed by Article 79 CISG [*CISG-AC Op. No. 7, §§35-40; Schwenzer: in Slechtriem/Schwenzer, p. 1151, §79; Schwenzer, p. 724; Azeredo, p. 331*]. The CISG contains an implicit remedy to restore the balance of performances in case of hardship [*CISG-AC Op. No. 7, §§35-40; Schwenzer, p. 724*]. Moreover, in case of hardship under Article 79 CISG beyond exemption from liability for non-performance, *"the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based."* [*CISG-AC Op. No. 7, Comment 3.2*].

116. In the present proceedings, the Tribunal should provide further relief for CLAIMANT consistent with the general principle of good faith. Good faith is a general principle, underlying the CISG [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 135, §32; UNCITRAL Digest, Article 7*]. Good faith imposes a duty on the parties to cooperate

[*Bridge, p. 510; Brunner, p. 391*]. A claim for contract adaptation in case of changed circumstances can be based on good faith [*Magnus in: Staudinger, p. 694, §*24; *OLG Brandenburg (GER), 18 November 2008*].

117. Thus, in conjunction with the principle of good faith, Article 79 CISG provides for the remedy of an adaptation of the price for CLAIMANT.

3.2.2 In accordance with the principle of good faith, the Tribunal should adapt the price

118. The Tribunal should adapt the price to remedy the hardship on the basis of good faith. The principle that no one may behave in disavowal of his past acts, known as *nemo potest venire contra factum proprium,* is implied by principle of good faith in the CISG [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 135, §32; UNCITRAL Digest Article 7 (2); OLG München (GER) 15 September 2004*]. Whereas RESPONDENT led CLAIMANT to believe it would bear the bulk of the Tariff, it subsequently failed to honour these commitments in any way. RESPONDENT thus acted in disavowal of its previous conduct.

119. When CLAIMANT learned that the Tariff applied, it reached out to RESPONDENT and tried to renegotiate the terms of the Contract [*CE8, p. 18*]. RESPONDENT reassured CLAIMANT that it understood the problem and that it *"was certain that a solution would be found*." [*CE8, p. 18*]. Furthermore, RESPONDENT emphasised its interest in a future relationship with CLAIMANT [*CE8, p. 18*]. Thus, RESPONDENT led CLAIMANT to believe it understood the need for a price adaptation. Moreover, RESPONDENT pressed CLAIMANT to deliver as planned before any agreement on the price adaptation had been reached [*CE8, p. 18*]. In reliance on RESPONDENT's assurances, CLAIMANT delivered the final shipment and paid the Tariff. After CLAIMANT delivered, it initiated a meeting with RESPONDENT to settle the price adaptation.

120. In stark contrast with its earlier behaviour, RESPONDENT then suddenly broke off renegotiations [*CE8, p. 18*]. Mr Shoemaker has admitted that he only gave CLAIMANT assurances because he knew CLAIMANT *"would not deliver if I* [Mr. Shoemaker] *were to reject their request outright*." [*RE4, p. 36*]. This demonstrates that RESPONDENT knowingly led CLAIMANT to believe it understood the need for a price adaptation for the sole purpose of inducing CLAIMANT to deliver.

121. Furthermore, RESPONDENT knew CLAIMANT was in financial difficulties [*PO2, p. 58, §22*]. During the renegotiations RESPONDENT was informed that it was impossible for CLAIMANT to shoulder the Tariff [*PO2, p. 59, §28*].

122. RESPONDENT's conduct led CLAIMANT to believe RESPONDENT would bear the bulk of the Tariff. The Tariff subjects CLAIMANT to hardship. Therefore, the Tribunal should remedy this hardship in line with the general principle of good faith, by entitling CLAIMANT to the payment of USD 1,250,000.

3.2.3 Parties did not derogate from the CISG

123. In any case, unlike RESPONDENT argues [*RnoA, p. 32, §20*], Parties did not derogate from Article 79 CISG. The Tariff fundamentally changed the circumstances on which parties relied when they concluded the Contract. RESPONDENT states that Parties included Clause 12 as a special regulation for changed circumstances. This would mean parties have impliedly derogated from Article 79 CISG [*RNoA, p. 32, §20*]. Parties can derogate from Article 79 CISG by including a hardship clause as a general clause "*on adaptation, renegotiation, profitability, and revision of the contract*" [*Schwenzer in: Schlechtriem/Schwenzer, p. 1153, §58*]. If the Tribunal finds that Clause 12 does not provide a remedy for the changed circumstances, it can neither find that Parties have settled the matter of changed circumstances. In that case, it follows that Parties have not impliedly derogated from Article 79 CISG.

3.3 Alternatively, the Tribunal should adapt the Contract under Article 6.2.3 UPICC

124. If the Tribunal would rule that the remedy of adaptation is not available under the CISG, or that Parties did derogate from Article 79 CISG, the Tribunal should resort to Section 6.2 of the UPICC to settle the hardship (**3.3.1**). The requirements of Article 6.2.2 UPICC are met (**3.3.2**). The Tribunal should adapt the Contract pursuant to Article 6.2.3 UPICC (**3.3.3**).

3.3.1 The Tribunal should resort to Section 6.2 UPICC

125. If the Tribunal finds that hardship is governed but not settled by the CISG, the Tribunal should resort to Section 6.2 UPICC. According to Article 7(2) CISG questions concerning matters which are governed but not expressly settled by the CISG are to be settled in accordance with the general principles underlying the CISG. It is often argued that a tribunal should use the UPICC in case of hardship under the CISG as the UPICC codify these general principles and contains a clear hardship provision in

Section 6.2 UPICC. [*Kröll/Atamer in: Kröll/Mistelis/Viscasillas), p. 1074, §86; Schlechtriem/Butler p. 204, §291; Pirozzi, p. 216; Veneziano, p. 1340; Schwenzer in: Schlechtriem/Schwenzer, p. 1151, §55/; HvC (BEL), 19 June 2009*].

126. Article 7(2) stipulates that if the Tribunal would find that hardship is governed by the CISG but that it cannot resort to general principles of Article 7(2) CISG, it should settle the matter in accordance with the law applicable by virtue of the rules of private international law. Recourse to domestic law is "*particularly necessary where the parties have excluded one or more provisions of the Convention (Article 6), without filling the resulting gap through contractual agreement*" [*Schwenzer/Hachem in: Schlechtriem/Schwenzer, p. 141,* §42]. Therefore, the Tribunal should resort to domestic law if it would find that Parties did derogate from Article 79 CISG by including Clause 12, but Clause 12 does not provide for the possibility of an adaptation of the price.

127. The Tribunal should determine the applicable law to the Contract in accordance with Article 36(1) HKIAC rules and Article 28(1) DAL. Parties chose the MCL as the law applicable to the Contract [*CE5, p. 14, Clause 14*]. The MCL is a verbatim adoption of UPICC [*PO1, p. 53*]. Thus, the Tribunal should resort to the UPICC, which addresses hardship in Section 6.2. Moreover, it follows from the PIA rendered in the other HKIAC proceedings, that a tribunal can adapt a contract under Article 6.2.3 MCL in case of hardship [*PO2, p. 60, §39*].

3.3.2 The requirements under Article 6.2.2 UPICC have been met

128. All requirements of Article 6.2.2 UPICC are met. Firstly, the Tariff should cause a fundamental alteration of the equilibrium of the Contract either because it diminishes the value of the performance CLAIMANT receives or because it increases the cost of the performance CLAIMANT renders. Secondly, the Tariff should have become known to CLAIMANT after the conclusion of the Contract. Thirdly, at the time of the conclusion of the contract, CLAIMANT should not reasonably have been able to take the Tariff into account. Fourthly, the Tariff should be beyond the control of CLAIMANT. Lastly, CLAIMANT should not have assumed the risk of the Tariff.

129. As previously established in (par. **110**), the Tariff forms a fundamental alteration of the equilibrium of the Contract. Whereas originally both Parties benefitted from the Contract, CLAIMANT now makes a USD 1,250,000 loss as a result of the USD 1,500,000 cost increase caused by the Tariff. Secondly, as the Contract was concluded on 7 May 2017 and the Tariff was announced on 19 December 2017, the Tariff was only imposed after

the conclusion of the Contract [*CE5, p. 14; CE6, p. 15*]. Thirdly, the Tariff was an unforeseen event due to the political context and the fact that it was a response to the unforeseen Mediterranean tariff (par. **101**). CLAIMANT could not reasonably have taken the Tariff into account at the time of the conclusion of the Contract. Fourthly, as an act of government the Tariff formed an event beyond CLAIMANT's control (par. **117**). Fifthly, CLAIMANT did not assume the risk of the imposition of the Tariff. Thus, the Tariff meets all requirements of Article 6.2.2. UPICC.

3.3.3 The Tribunal should apply the remedy of adaption pursuant to Article 6.2.3 UPICC

130. The Tribunal has the right to adapt the Contract pursuant to Article 6.2.3 UPICC. Article 6.2.3 UPICC states that a tribunal may "*adapt the contract with a view to restoring its equilibrium*" after parties have tried and failed to renegotiate. Parties attempted to renegotiate, but failed after RESPONDENT suddenly broke off the renegotiations [*CE8, p. 18*].

131. In order to merely break even and thus contribute to the restoration of the equilibrium between Parties, CLAIMANT requests an additional payment of USD 1,250,000 [par. **105**] Whereas CLAIMANT will experience significant financial difficulties if it has to bear the Tariff, RESPONDENT will not be financially endangered if it would bear the Tariff [*PO2, p. 59, §30*]. Moreover, RESPONDENT made a large profit by breaking its promise not to resell the semen without express notice to CLAIMANT. The information requirement was added because the value of frozen semen of a stud is influenced by the success of its offspring. Stud owners therefore have an interest in the choice of the mares for which the semen is used [*PO2, p. 57, §16*]. RESPONDENT further jeopardised CLAIMANT's financial interests by failing to honour its contractual obligation to notify CLAIMANT in advance.

132. In view of the above, CLAIMANT is entitled to USD 1,250,000 according to Article 6.2.3 UPICC.

3.4 Conclusion

133. Interpretation of Clause 12 leads to the conclusion that RESPONDENT bears the responsibility for the Tariff. In accordance with this responsibility, RESPONDENT is obliged to pay USD 1,500,000 to CLAIMANT in remuneration for the Tariff. Alternatively, CLAIMANT is entitled to the payment of USD 1,250,000 as a result of an adaptation of the price in accordance with either the CISG or Article 6.2.3 UPICC.

REQUEST FOR RELIEF

In light of the foregoing submissions, CLAIMANT respectfully requests the Tribunal to find that:

(I) The Tribunal has jurisdiction to decide on the claim and adapt the Contract;

(II) The evidence from the other arbitral proceedings should be admitted to the current proceedings;

(III) CLAIMANT is entitled to payment of USD 1,500,000 under Clause 12 of the Contract or to payment of USD 1,250,000 under the CISG or the UPICC; and

(IV) To order RESPONDENT to bear all the costs arising from this arbitration.

Respectfully submitted,

Amsterdam, 6 December 2018,

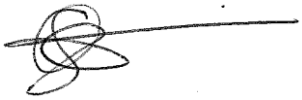
Wessel Breukelaar – Caroline Groefsema – Florence Haverhals –
Freek van Leeuwen – Stijn Wilbers

CERTIFICATE

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

Amsterdam, 6 December 2018

WESSEL BREUKELAAR



CAROLINE GROEFSEMA

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