SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL ARBITRATION MOOT

HONG KONG

CHRISTIAN ALBRECHT

UNIVERSITY OF KIEL

Memorandum for Claimant

On behalf of	Against
Phar Lap Allevamento, Meditarraneo	Black Beauty Equestrain, Equatoriana
(CLAIMANT)	(RESPONDENT)

Max Beucker•Jule Herbst•Jannis Knaack•Johann Potthast•Sina Neumann•

Lennard Wieduwild•

Kiel, Germany

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INDEX OF ABBREVIATIONS

AA	Appointing Authority
AR	Arbitration Rules
Art.	Article, articles
AT	Arbitral Tribunal
BezG	Bezirksgericht
BGH	Bundesgerichtshof (German Federal Court of Justice)
CE #	Claimant's Exhibit #
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	Advisory Council Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
Cl.	Clause
CL Memo	Claimant's Memorandum
CSR	Corporate Social Responsibilities
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
EC	European Convention on International Commercial Arbitration
e.g.	exempli gratia (for example)
et seq.	et sequens ≙ and the following
ECtHR	European Court of Human Rights

ed.	Edition
FSSA	Frozen Semen Sales Agreement
GA	General Assembly
HKIAC2013	Administered Arbitration Rules of the Hong Kong International Arbitration Center from 2013
HKIAC2018	Administered Arbitration Rules of the Hong Kong International Arbitration Center from 2018
IBA	International Bar Arbitration Rules on Taking of Evidence in International Arbitration from 29th of May 2010
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Inc	Incorporated
LP	Limited Partnership
Ltd	Limited
MCL	Mediterranean Contract Law
MCoT	Mauritius Convention on Transparency
Mr. / Mrs.	Mister / Mistress
No	Number
NoA	Notice of Arbitration
NYC	New York Convention
OLG	Oberlandesgericht
Op.	opinion

p.	page/ pages
para.	paragraph/ paragraphs
Parties	CLAIMANT and RESPONDENT
PICC	Principles of International Commercial Contracts
PO	Procedural Order
RE #	Respondent's Exhibit #
Resp. to Not. of Arb.	Response to Notice of Arbitration
supra	above
tribunal	Abitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL AR	UNCITRAL Arbitration Rules
UNCITRAL RoT	UNCITRAL Rules on Transparency
UNIDROIT	International Institute for the Unification of Private Law
US$	US Dollar
v.	versus

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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 is a company based in Mediterraneo. It is Mediterraneos oldest and most renown stud farm and provides frozen semen for artificial insemination.

RESPONDENT has a famous breeding stable, which decided to establish a racehorse stable three years ago. It is a company based in Equatoriana.

21 March 2017	RESPONDENT contacts CLAIMANT (hereafter: the Parties) inquiring about the availability of 100 doses of frozen semen by the famous stallion Nijinsky III.	*CE 1, p. 9*
24 March 2017 – 31 March 2017	The Parties negotiate the FSSA. CLAIMANT clarifies that the frozen semen shall not be re-sold without its express and written consent. CLAIMANT accepts the suggested DDP delivery while making clear that it is not willing to take over any further risks. CLAIMANT insists on the implementation of a hardship clause into the contract.	*CE 2, p. 10; CE 3, p. 11; CE 4, p. 12*
12 April 2017	The two main negotiators of the Parties are involved in a car accident and are to be replaced for finalizing the FSSA.	*CE 8, p. 17*
06 May 2017	The Parties, represented by the two new negotiators, conclude the FSSA in Mediterraneo which contains a hardship clause and an AC.	*CE 5, pp. 13 et seq.*
18 May 2017 - 3 October 2017	RESPONDENT pays the first instalment of US$ 5,000,000 and CLAIMANT ships the first two instalments of frozen semen.	*CE 5, p. 14*
15 January 2018	The tariffs of 30% on all agricultural products from Mediterraneo take effect.	*PO 2, para. 25, p. 58*
20 January 2018	CLAIMANT finds out that frozen semen are covered by the tariffs on animal products.	*PO 2, para. 26, p 58*
21 January 2018	CLAIMANT informs RESPONDENT about the necessary price adjustment due to the hardship caused	*CE 7, p. 16*

	by the tariffs. RESPONDENT creates the impression that an agreement on the price adaptation will be reached.	
21 January 2018	CLAIMANT ships the third instalment and RESPONDENT pays only US$ 5,000,000.	*CE 5, p. 14; CE 8, p. 18*
2 February 2018	CLAIMANT discovers that RESPONDENT has resold 15 doses for US$ 120,000 each to other breeders.	*PO 2, para. 40, p. 60*
12 February 2018	RESPONDENT stopped the negotiations with CLAIMANT regarding the price adjustment.	*CE 8, p. 18*
29 June 2018	The Partial Interim Award in the arbitration between RESPONDENT and the third party is rendered.	*PO 2, para. 39, p. 60*
31 July 2018	CLAIMANT initiates arbitral proceedings, submitting its NoA.	*NoA, pp. 4 et seq.*
September/ October 2018	CLAIMANT finds out that RESPONDENT successfully claimed a price adaption for increased tariffs in an arbitration between RESPONDENT and the third party.	*Letter by Langweiler, p. 49; PO 2, para. 39, p. 60*

INTRODUCTION

1 The Parties danced like great Nijinsky during the negotiations, RESPONDENT leading, whilst CLAIMANT giving way to several RESPONDENT's demands. Hoping for a long-term relationship, CLAIMANT remained true to his obligations in order to satisfy RESPONDENT, but still gaining modest profit for itself. At this point CLAIMANT could not have known that the dance would come to an abrupt end, when RESPONDENT decided to turn on the other most selfishly. The imposed tariffs blindsided the Parties. RESPONDENT loosened its grip letting CLAIMANT slip near bankruptcy. RESPONDENT is obliged to restore the equilibrium of the contract, and to reestablish the harmony between the Parties by restoring the old balance. *Failli.*

2 The only way out for CLAIMANT was to saddle up his horse and stride towards arbitration. The basis of this was the arbitration clause included in the FSSA. Revealing its true intentions to push CLAIMANT off the track, RESPONDENT disputed the Tribunal's jurisdiction over the adaption of the remuneration, although it previously argued for the jurisdiction itself when it was still in its own interest. (**ISSUE 1**)

3 CLAIMANT valiantly fought for a solution through arbitration, aiming to save strength, money and nerves, by laying out the case before the Tribunal the best it could. CLAIMANT submitted evidence which showed RESPONDENT's malicious intent, while RESPONDENT fights tooth and nail to exclude it. The evidence must be admissible in order to restore good faith. **(ISSUE 2)**

4 The import tariffs increase the costs for performance by US$ 1,500,000 and constitute severe hardship for CLAIMANT. They destroy the commercial basis of the deal and threaten CLAIMANT's economic existence. However, CLAIMANT ensured the swift delivery of the semen, as it wanted to contribute to a long-term and mutually beneficial relationship. CLAIMANT believed in RESPONDENT's trustworthiness when it assured that an agreement on price adaptation will be reached. But hold your horses! Contrary to its prior behavior, RESPONDENT suddenly objected to any adaptation of the price after CLAIMANT had delivered. Since RESPONDENT prevented an amicable solution, CLAIMANT must now enforce its right to price adaptation by the amount of US$ 1,250,000 in front of the Arbitral Tribunal. This claim is justified under Cl. 12 as it was included to relieve CLAIMANT from the economic risk of hardship resulting from subsequent changes in customs regulations (**ISSUE 3**). In any case, the claim is justified under the provisions of the CISG (**ISSUE 4**).

ARGUMENTS ON THE PROCEDURAL ISSUES

ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

5 The Tribunal is requested to find that it has the jurisdiction and the power to adapt the contract under the AC. The Parties agreed on the following AC: "*[a]ny dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration*" administered by the HKIAC under the HKIAC Rules 2018 [PO 1, para. II, first bullet point]. It is included into the FSSA.

6 Contrary to RESPONDENT's allegations, the Tribunal has the jurisdiction to adapt the contract on the basis of the AC, governed by law of Mediterraneo (**A**), interpretation of which leads to the conclusion that the terms "interpretation" and "performance" allow for the adaptation of the FSSA (**B**) [CE 5, para. 15, p. 14].

A. Not Danubian But Mediterrenean Law Governs The Interpretation of the Arbitration Clause

7 The Tribunal has the jurisdiction to rule on the adaptation of the contract on the basis of the AC.

8 In the following CLAIMANT will demonstrate (**I**) that the AC is not governed by law of Danubia but (**II**) by law of the Mediterraneo and that (**III**) even if the law of Danubia was applicable, the four corners rule is not.

I. The Arbitration Clause is not Governed by Danubian Law

9 The AC contains no explicit wording in regard of the law governing it.

1. Choice of the Seat Does not Predetermine the Choice of Law

10 It is a general principle that the Parties have the right to choose the law governing the AC [Art. V(1)(a) NYC, Art. VI(2)(a) EC]. In this case, there is no explicit choice of law by the Parties. Nevertheless, the Parties have chosen the law applicable to AC implicitly. Contrary to RESPONDENT's opinion [Resp. to NoA, p. 31, para. 13], that the seat is the only implicit choice made by the Parties, the law governing the AC is not the law of the seat of arbitration.

11 The choice of the seat of arbitration is usually made on the basis of different factors, mostly which place is the most suitable for the Parties, the Arbitrators and possible witnesses or experts.

12 The main contract supplies a logical solution to the question which law should be applicable, which is the application of the law governing the main contract, namely the FSSA.

2. Separability of the Arbitration Clause has no Direct Influence on the Choice of Law

13 Contrary to what RESPONDENT might say, the doctrine of separability does not exclude the application of the law of the FSSA.

a) Art. 16 of the Danubian Arbitration Law does not Govern Choice of Law

14 Danubia adopted the ML [PO1, para. 4]. In Art. 16 (1) it provides that the AC is to be regarded as a separate agreement from the main contract, so that the Tribunal may rule on its own jurisdiction. But only "for that purpose" it is regarded as separate, the wording of Art. 16 (1) ML does not prohibit considering the express choice of law of the main contract as an implied choice of law for the AC. The purpose of the separability of the contract and the AC is to guarantee the survival of either one. The AC is to be regarded as a separate clause only in the sense that it will continue to be valid even if the main contract was null and void.

b) The Arbitral Practice Demonstrates no Direct Influence of Separability on the Choice of Law

15 A majority of states refer to the law governing the main contract if the Parties did not include a choice of law in the AC [MünchKomm BGB, para. 94; BGH, 28 Nov. 1963].

16 The AC is seen as a part of the main contract, therefore, it was interpreted under the law which governs the main contract as well by Belgian Courts [Practitioner's Handbook, para. 3.26] Dutch Courts [Van den Berg/Van Delden/Snijders 146-7; Practitioner's Handbook, para. 9.25; HR, 20 Feb 2004; HR, 05 March 2004; HR, 29 June 2007; Meijer, T&C Rv, Art 1020, note 1g and the literature and case law referred to therein]. When the law of the substantive contract is specified, English courts presumed that the law of the main contract is also applicable to the AC [Practitioner's Handbook, para. 5.33-34; Sonatrach v Ferrell; Channel Tunnel Group v. Balfour Beatty Construction; Sulamérica v. Enesa], by German Courts [BGH, 28 Nov 1963; BayOLG, 12 April 2000; OLG Frankfurt, 19 May 2006], and Italian Courts [Practitioner's Handbook, para. 8.26; Castelletti Spedizoni Internazionali v. Hugo Trumpy]. If no explicit choice of law is made by the Parties, the law of the merits shall govern the AC in Croatia [Art. 6 (7) Arbitration Act of 2001].

17 The predominant doctrinal view is that the law applicable to the contract covers also the AC as a default rule [Skvorcov, p. 352].

II. The Arbitration Clause is Governed by the Law of Mediterraneo

18 As shown, the law of the main contract is regarded as a proper law also governing the AC.

1. The CISG is Applied for the Interpretation of the Arbitration Clause

19 The CISG is applicable to the FSSA and therefore, to the AC: Firstly, in application of Art.1 of the CISG, it is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG [PO 1, p. 52, para. 4]. As the Parties both have their places of

business in the Contracting States, their contract is subject to the CISG. Secondly, the FSSA is governed by law of Mediterraneo [CE 5, p. 14, para. 14]. Moreover, the Parties intended to apply the law of Mediterraneo not only for the FSSA, but also for their AC as an express choice of law clause, which was then unintentionally left out due to an accident of the main negotiators [NoA, p. 5, para. 8].

20 Since the AC is only one clause out of many others in the contract, the Parties' choice of law in the FSSA shall be applied for the whole contract including the AC due to the following reasons: firstly, the Tribunal does not have to apply two laws to one contract and secondly, to have due regard to the implied intentions of the Parties, mentioning only Mediterranean law in their contract.

21 The CISG should, if applicable to the main contract, also be applicable to the AC [NAI Award, CISG-online No. 1621; Tribunal Supremo, CISG-online No. 1333; Chateau des Charmes v. Sabate]. There is consistent jurisprudence in Mediterraneo that the CISG applying to the sales agreement should also aid in interpreting the AC, inter alia with regards to the drafting history and the circumstances [PO 1, p. 52, para. 4].

22 Therefore, the rules of interpretation under the Art. 8 CISG apply and all relevant circumstances shall be taken into account, including the drafting history and the intent of the Parties. The Parties both separately proposed to choose Mediterranean Law as provision governing the AC [CE 3, p. 11; CE 4, p. 12].

23 On the 12th of April last year the two lead negotiators, Mrs. Julie Napravnik (for CLAIMANT) and Mr. Chris Antley (for RESPONENT) were involved in a car crash on their way to the meeting, planned for the finalization of the contract [NoA, p. 5, para. 8]. The car crash has made it impossible for them to continue drafting the contract. Therefore, the contract that has been finalized and obeyed so far is by no means the same as the Parties intended originally.

24 The negotiators, in the name of the Parties, made an oral agreement to include an adaptation clause in the AC to allow the arbitrators in case of an unsolved dispute to adapt the contract. But because of the car accident and the resulting change of the main negotiators, the adaptation clause was not included in the final hardship clause or AC. However, the oral agreement of Mr. Antley and Mrs. Napravnik is also a part of the AC, even if it is not explicitly included into it. The note left by Mr. Antley before the accident states that the negotiators wanted to „clarify in arbitration clause that neutral venue and applicable law" [RE 3, p. 35]. The express mention of „neutral" for the seat of arbitration highlights the contrast to just „applicable law". The witness statement by Mrs. Napravnik [CE 8, p. 17] makes the intent of the Parties even more clear: Mr. Antley suggested that Arbitrators should adapt the contract when any conflicts would arise from it, which law of Mediterraneo allows. RESPONDENT has also demonstrated

his will to accept the law of Mediterraneo in earlier correspondence [CE 3, p. 11], implying the only condition being that seat and law of arbitration should not be the same. RESPONDENT's change in suggestion for the applicable law indicates that for him the de facto choice of law was of no interest. The only condition being that the applicable law should not be of the same country as the seat.

25 Art. 5 of the Hague Principles, which are the general conflict of laws rule for contracts in Danubia, Mediterraneo and Equatoriana [PO 2, p. 56, para. 43], provide that the validity of an agreement is not subject to a specific form, thus the oral agreement is valid. Contrary to RESPONDENT's potential argument that the AC shall be evidenced in writing, the requirement of Art. II (1) of the NYC applies only to the agreement to arbitrate [Redfern, p. 91, para. 2.17, 2.19]. Since choice of law does not constitute an essential element of the AA, it can be concluded in any form, including an oral one.

26 Therefore, the Tribunal has to take the oral agreement into account to determine the intent of the Parties.

27 Contrary to RESPONDENT's possible argument, the four corners rule [PO 2, para. 45] is not pertinent, since CISG applies. To resolve an ambiguity and establish the terms of a contract, the CISG commands courts to consider extrinsic evidence that illuminates the parties' intent [Cedar Petrochemicals Inc. v. Dongbu Hannong]. This becomes apparent in the relevant diplomatic history of Art. 8 CISG [Documentary History, supra note 6, at 483, para. 51] and cases [MCC-Marble v. Nuova D'Agostina; Korea Trade v. Oved Apparel; Rienzi v. Puglisi].

28 Thus, interpretation of the AC under the CISG indicates that the choice of law made for the FSSA is valid also for the AC.

2. Alternatively, the Wording of the Arbitration Clause Shall be Interpreted under the Rules of the PICC

29 The general contract law of Mediterraneo is a verbatim adoption of the PICC [PO 1, p. 52, para. 4]. The Parties' intent was to make the PICC applicable, as they chose Mediterraneo law as governing the FSSA.

30 Even if the Parties did not intend to make Mediterranean Law govern the AC, the PICC are widely accepted as an aid in interpretation of the intention of the Parties, as shown in the Arbitral practice [Arbitral Award, 1994, ASA Bull 2/1996, 303, see also I.2.b.]. The Preamble of the PICC provides for their application when the parties are silent which law governs their contract.

31 As it is provided for in Art. 4.8 II (a)-(d) Mediterranean Contract Law, the Tribunal may supply an omitted term, namely the choice of law clause, to fill gaps in an agreement which were unintentionally left by the Parties. The omitted term of the AC in this case is the choice of law.

Thereby, regard has to be paid to all circumstances to the case [*Vogenauer*, p.615, para.13], namely words used by the parties, internal context of the contract, preliminary negotiations [Vogenauer, p. 615, para.13, see fn. 305], the intent of the Parties and good faith and fair dealing. According to the French arbitral practice the scope of the AC has to be interpreted in light of generally accepted principles of international law, one of them being the "principle of good faith interpretation" [Arbitral Award, ICC No. 5721; Khoms El Mergeb v Société Dalico].

3. The Hague Principles on Choice of Law Shall be Used as Guidelines for Determining Choice of Law

32 Contrary to the RESPONDENT's possible argument that the Hague Principles do not apply to the ACs, they should apply to the AC [Basedow, p. 313]. The outcome of a case will depend on the law applicable to the interpretation of the AC, therefore the exclusion of the Hague Principles would result in a complete absence of any applicable conflict of laws rule. Therefore, the Hague Principles should be used as guidelines to determine the applicable law. In application of Art. 9 (1) (a) of the Hague Principles, the law chosen by the parties shall govern the interpretation of the AC. The Parties chose the law of the main contract, therefore, it should be applicable to the AC as well.

33 The law of the FSSA is also the law of the closest connection to the AC, as the contract was also signed in Mediterraneo [PO 2, p. 56, para. 13; Born, p. 830, para. 41].

34 As shown above, the Tribunal is requested to find that the law of Mediterraneo is closer connected to the AC, as it was signed in Mediterraneo, the law governing the FSSA is also Mediterranean Law and the Hague Principles point to the same result.

III. Even if the Law of Danubia was Applicable the Four Corners Rule is not Pertinent

35 Even if the law of Danubia was applicable, the four corners rule is not pertinent.

The four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Art. 2.1.17 PICC [PO2, p. 61, para. 45], according to which "*[a] contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing*".

36 RESPONDENT stated that if the wording of the AC is clear, reliance on external evidence is prohibited [Resp. to NoA, para. 16]. Since the AC is lacking important information like a specific choice of law, it is not clearly worded and does not completely embody the agreed terms. The Parties have never declared that the AC constitutes their final agreement, in light of the end of the breeding season 2017 the parties had to rush the conclusion of the contract [PO

2, p. 56, para. 11]. Thus, drafting history and preceding communication of the Parties should be allowed as it is most crucial information for the understanding of the AC.

37 Furthermore, four corners rules which is similar to the parol evidence rule adopted in many common law countries. It is applicable to substantive provisions of the contracts, but not to the choice-of-law agreements, as it is in our case.

38 Moreover, RESPONDENT himself refers to the drafting history [cf. Resp. to NoA, para. 15] to determine the applicable law. RESPONDENT also states, that the choice of law from the first draft has been merely forgotten, therefore showing that the AC is not clear from his perspective as well.

39 Finally, the Art. 2.1.17 PICC as such does not prohibit to use the prior statements or agreements of the Parties for interpretation of the written AC.

40 As shown, having regard to the drafting history and all relevant circumstances is crucial to determine the intent of the Parties, therefore if the Tribunal finds that the AC is governed by DAL, it should disregard the four corners rule.

B. The Arbitral Tribunal has the Power to Adapt the Contract on the Basis of the Arbitration Clause Regarding Interpretation and Performance

41 An express empowerment for adaptation of the FSSA is not needed for the Tribunal to adapt the contract as it falls under "interpretation of the contract" in the meaning of the AC.

I. The Tribunal has the Power to Adapt the FSSA on the Basis of "Interpretation of the Contract" in the Arbitration Clause

42 The wording of the AC "any dispute arising out of this contract" vests the tribunal with wide powers. Contrary to RESPONDENT's opinion (Resp. to Not. of Arb. para. 13) the term "interpretation" in the AC authorizes tribunal to adapt the FSSA.

43 Contrary to RESPONDENT's position, the derivation from the Model Clause of the HKIAC Rules does not influence the scope of the AC.

II. Alternatively, the Arbitral Tribunal has the power to adapt the contract as it is a part of the "contract performance"

44 If the Tribunal finds that "interpretation of contract" does not cover the adaptation of contracts, CLAIMANT's motion shall be regarded as relating to contract performance.

45 Contrary to RESPONDENT's opinion [Resp. to Not. of Arb. para. 12] a change in remuneration of the contract which is included in the contract can be interpreted as a part of contract performance. The demand in monetary compensation given in exchange of the goods in the contract is not a set price but rather a fee which is subject to change when circumstances demand it.

46 As it is provided for in Art. 6.2.3 of the DCL, hardship is included into the Chapter 6 “Performance”. Therefore, the jurisdiction to adapt the contract alternatively also stems from “performance” in the AC.

47 Therefore, the relief sought falls under the jurisdiction of the Tribunal as it is provided for in Art. 6.2.3 DCL, as it is the law governing the FSSA.

48 CLAIMANT is in a clear disadvantage by the tariffs and therefore under Art. 6.2.3 (1) DCL it is entitled to request renegotiations. Furthermore, the Tribunal, which essentially perform functions of a court in the meaning of Art. 6.2.3. (4) (b) DCL, is entitled to adapt the FSSA.
In conclusion, no express empowerment to adapt the FSSA is needed, as the AT has jurisdiction on the basis of the AC.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

A. The Tribunal has the Power to Decide upon Admissibility of Evidence

49 Art. 22.2 of the applicable HKIAC Rules 2018 states that "[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence." This constitutes the basis of the AT's power to decide upon admissibility of the Partial Interim Award, rendered in the proceedings between RESPONDENT and the third party on 29 June 2018, in which the AT had confirmed its power to adapt the contract [PO 2, p. 60, para. 39].

50 CLAIMANT would like to request that the AT does not to apply strict rules of evidence since it would encumber the CLAIMANT's ability to make his case in these proceedings and will lead to an incorrect final award. It has been well established that an AT is not constrained by rules of court procedure at the seat of arbitration [P v. A, ICC Case No. 7626]

51 Furthermore, contrary to what RESPONDENT may argue, the IBA Rules on Taking of Evidence do not govern these proceedings since the Parties have not reached an agreement to apply them to their dispute. Even if the AT would deem them applicable, they "are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration" [Preamble of IBA Rules, para. 2] and therefore, should not hinder the admissibility of the Partial Interim Award presented by CLAIMANT.

B. The Partial Interim Award from the other Arbitral Proceedings is Admissible to the Proceedings

52 The evidence presented to the AT is admissible when it is relevant to the case and material to its outcome [Art. 22.2 HKIAC 2018 and Art. 3.7(i) IBA]. In conformity with these common standards CLAIMANT asserts that the Partial Award, rendered in RESPONDENT's other arbitral proceedings concerning price adaptation, is (**I**) relevant and (**II**) material and furthermore it (**III**) should be admitted according to the prevailing principles of transparency, hence it would otherwise (**IV**) violate CLAIMANT´s right to a fair trial and equal treatment in arbitration.

I. The Partial Award from the other Arbitral Proceedings is Relevant Evidence

53 The Partial Award from the other arbitral proceedings is relevant evidence since it supports CLAIMANT's argument in respect to RESPONDENT's conflicting claims before a different AT concerning the same issue. The other arbitration is very closely related in the matter of its subject-matter (products of the horse breeding sector), type of contract (international sales), places of business of the Parties (Mediterraneo and Equatoriana) and the applicable arbitration

rules (the HKIAC). Contrary to what RESPONDENT might argue, the fact that different versions of the Rules are applicable to the two proceedings, the essential provisions of the rules have not been amended. Furthermore, CLAIMANT would like to point out that the disputes both arose from the implementation of tariffs imposed by the home countries of the Parties, thus bringing forth the same issues in dispute with the agreed delivery DDP and hardship clauses in both cases.

54 In the interest of the parties involved and under the UNCITRAL RoT and the similarities of the disputes, CLAIMANT would like to reinforce its suggestion of a possible joinder of the two arbitrations under Art. HKIAC, as due to the similarities the Partial Award rendered in arbitration between RESPONDENT and the third party would be highly relevant to the present proceedings.

II. The partial award from the other Arbitral Proceedings is Material Evidence

55 The Partial Award from the other arbitral proceedings is material evidence, hence in case of the rendering of contradicting awards the same matter concerning the same Party would be resolved in two different ways. The AT shall admit the Partial Award since it leads to an issue estoppel in the present case, that would prevent RESPONDENT from relying on hardship defence.

56 Furthermore, admitting the Partial Award in this proceeding would promote procedural economy. According to the general principles of arbitration reflected in the Art. 9.2 (g) IBA, it lies within the AT's power to consider procedural economy when evaluating evidence. The issues already resolved in the Partial Award would not be arbitrated again in the present proceedings. The AT should regard the Award from the other arbitration in order to save time and costs of the Parties.

III. The Partial Award shall be Admitted According to the "Prevailing Principles of Transparency" or UNCITRAL Rules on Transparency

57 The Partial Award of the other arbitration shall be admitted to the proceedings according to the principles of transparency prevailing in international arbitration.

58 Arbitration in itself is establishing values and standards like national judicial systems, one of such values being transparency. Stemming from the international investment arbitration, the prevailing principles of transparency are gaining acceptance in international commercial arbitration as well. These principles are prevailing, because they are applicable not only when the UNCITRAL RoT apply. "The levels of transparency already permitted by the general UNCITRAL Arbitration Rules (2010 or 1976) are in no way intended to be reduced by any non-application of the Rules on Transparency" [*Johnson*].

59 Despite RESPONDENT's opinion that there is an implied duty of confidentiality, in recent years there is an evident trend in favour of more transparency in international commercial

arbitration. With the implementation of the UNCITRAL AR combined with UNCITRAL RoT and the most recent MCoT the arbitral institution like ICSID have proposed amendments to their provisions under the influence of UNCITRAL RoT [cf. Amendments Volume 3, p.860]. Under the new rules an award will be published unless a party objects within a short period of time [Background on for ICSID Amendments, p. 3].

60 Contrary to RESPONDENT's possible argument that confidentiality is an inherent feature of arbitration, case practise further emphasizes that confidentiality is guaranteed not without exceptions. In the UK confidentiality is disregarded when it would hinder the fair disposal of awards. Furthermore, there should be "different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality [EPC, 29 Jan 2003]. In the context of the case at hand the AT shall admit the Award since unlike any other procedure which would be sufficient to substantiate CLAIMANT's argument, awards are more likely to be published during enforcement in courts.

61 Contrary to RESPONDENT's position there is no implied duty of confidentiality; e.g. courts of appeal in the USA, Sweden and Australia have dismissed the argument that the parties had a general understanding all materials pertaining to the arbitration would remain confidential [United States v. Panhandle E. Corp., para. 346, 350; Contship Containerlines v. PPG Industries, 23 Apr 2003]. Hence, the AT should not be obligated by any implied agreement and has the power to reduce confidentiality in favor of transparency by admitting the Partial Award.

IV. Non-admission of the Partial Interim Award Could Result in an Unenforceable Award

62 Non-admission of the Partial Interim Award would violate CLAIMANT's right to a fair trial and amount to an unequal treatment of CLAIMANT thus resulting in an award that might be set aside.

1. Non-admission Would Constitute a Violation of CLAIMANT's Right to a Fair Trial

63 Non-admission would constitute a violation of CLAIMANT's right to a fair trial, which is a fundamental right, guaranteed also by Art. 13.5 HKIAC 2018. The restriction of evidence would forbid CLAIMANT to rely on crucial arguments which would influence the way his case is presented.

64 Likewise, the IBA govern that "the taking of evidence shall be conducted on the principles that each Party shall act in good faith" [Preamble of IBA, para. 3], if not adhered to these principles, the Parties shall be held accountable. By agreeing to arbitration the Parties agreed to cooperate in good faith [ADF v USA, 6 Jan 2003, PO 3, para 4]. RESPONDENT is acting in bad faith by not cooperating and restricting the AT's access to relevant evidence [Letter by Fasttrack, p.50].

65 The DAL in Art. 18 furthermore states that the Parties should be given a full opportunity of making their case. This premise is undermined when a Party is withholding crucial evidence from the AT, since the AT relies on the sum of the arguments and evidence admitted. Therefore, RESPONDENT shall not oppose admitting the Partial Award from the other arbitration.

66 RESPONDENT is bound by the good faith and fairness principles [see para. 58]. Appeals to fairness can be evidenced in similar institutions like Art. 9(2)(g) of the IBA Rules ("considerations of procedural economy, proportionality, fairness or equality of the Parties"), and Art. 1.7 of the PICC, its applicability as shown above ("good faith and fair dealing in international arbitration"). Though not directly applicable, the PICC as shown previously are of guiding nature in these proceedings.

67 A right to a fair trial is guaranteed by the procedural due process. CLAIMANT in the case at hand would be seriously restricted in his rights to a fair trial and to present his case if AT does not admit partial award from the other arbitration.

2. An Award in these Proceedings Might be Set Aside

68 An award in these proceedings might be set aside in line with the DAL Art. 34(2)(a)(i) and Art. 18 if CLAIMANT "was otherwise unable to present his case" and was not "treated with equality and [was not] given a full opportunity of presenting his case". A Party could argue that due to the disregard of the evidence supporting a particularly material argument it could not rely on it and therefore it would be unable to present his case. This would inevitably lead to an unfair trial and under the stated article to an award that will be set aside by the courts at the seat of arbitration.

C. Respondent has not Proven that the Partial Interim Award had been Obtained Either through a Breach of a Confidentiality Agreement or through an Illegal Hack of RESPONDENT's Computer System

69 RESPONDENT has accused CLAIMANT of obtaining the Partial Interim Award through a breach of confidentiality or an illegal hack [Letter by Fasttrack, p. 50]. But whether in this letter nor later RESPONDENT has brought up any evidence to prove this, although RESPONDENT has to do so if they accuse CLAIMANT of it. But in fact, they failed to do so until now.

I. The Burden of Proof is upon RESPONDENT

70 RESPONDENT has the duty to prove the facts on which it relies, including allegations that the Partial Interim Award has been obtained illegally. Art. 22.1 HKIAC Rules states that each party shall have the burden of proving the facts relied on to support its claim. RESPONDENT has the burden of proof and has to present evidence to prove his unfounded assumptions.

II. RESPONDENT has Failed to Establish that the Partial Award was Obtained Illegally

71 RESPONDENT failed to bring up any proof that CLAIMANT obtained evidence through an alleged breach of confidentiality or an illegal hack. It is clear that RESPONDENT has failed and has not been able to prove it. Consequently, it is shown that the claim is an unfounded assumption.

72 Even if the AT comes to the conclusion that this evidence was obtained illegally, this does not mean the evidence is automatically inadmissible. This is shown in the Corfu Channel case which laid the groundwork for the treatment of illegally obtained evidence for the ICJ [Corfu Channel Case]. In the case the United Kingdom relied on such evidence on a claim against Albania that the latter did not fulfill his duties to remove all mines in its territory. Although condemning the UK for its wrongful actions, the Court did not exclude any evidence that has been obtained unlawfully.

73 Furthermore, the CJEU allowed the admission of the illegally obtained WikiLeaks cables into evidence in the case Persia International Bank v Council [Persia International Bank v Council, para. 95] and in other numerous judgments [cf. El Masri v Former Yugoslav Republic of Macedonia, para. 160 and Al-Nashiri v Poland, para. 440] of the ECtHR. The ECtHR relied in its decisions on the same illegally obtained WikiLeaks cables as the CJEU to find a breach of the Convention on Human Rights, not indicating that such illegal evidence should be considered automatically inadmissible.

D. The Partial Interim Award from the other Arbitral Proceedings is not under the Compelling Reasons of Confidentiality

74 CLAIMANT is entitled to rely on the Partial Interim Award from the other arbitration because any existing confidentiality agreements are not binding upon CLAIMANT (**I**). In any case, the Partial Award it is not under the compelling reasons of either contractual (**II**) or statutory (**III**) confidentiality and in any case RESPONDENT has waived its right to invoke confidentiality defense (**IV**).

I. Any Confidentiality Obligations are not Binding upon Claimant

75 RESPONDENT may argue on the basis of Art. 45.1 HKIAC 2013, under which no party or party representative may publish, disclose, or communicate any information relating to an award made in the arbitration. But CLAIMANT is not a party to the arbitration where the Award was rendered. Therefore, CLAIMANT can bring up the Partial Interim Award as evidence without any breach of confidentiality under the Art. 45.1 HKIAC 2018 since CLAIMANT is not bound to any confidentiality obligations.

76 This also shown in arbitral practice [Hassneh Insurance Co of Israel v. Stuart J Mew.] where the tribunal held that the disclosure of the award to a non-party to the arbitration has to be reasonably necessary, i.e. where it is necessary to enforce or protect a right in question. This means that the Tribunal is entitled to admit the award as evidence necessary to enforce the right of CLAIMANT and therefore CLAIMANT is not bound to any confidentiality obligations related to the Partial Interim Award.

77 CLAIMANT is contemplating to join for the arbitration between RESPONDENT and the third party under Art. 45.3 (d) HKIAC 2018. This article governs the publication of information relating to an arbitration or an award made in an arbitration to specific persons, where the disclosure of such information is not a breach of confidentiality. Therefore, if the motion for joinder is successful, CLAIMANT is entitled to disclose the award from the arbitration between RESPONDENT and the third party.

II. There are no Contractual Confidentiality Obligations upon Claimant

78 An agreement requiring confidentiality can be unenforceable due to the public policy reasons [Born, §10.02C]. The good faith principle which is the mandatory rule in the Mediterranean Law [Art. 1.7 PICC] which governs the respective AC [PO2, para 39] prevents enforcement of the confidentiality agreement between RESPONDENT and the third party.

79 CLAIMANT heard about the arbitration between RESPONDENT and the third party from Mr. Velazquez. Mr. Velazquez is the new CEO of one of CLAIMANT's customers but until the 30th of May 2018 he worked for RESPONDENT but he was not involved in the arbitration between RESPONDENT and the third party [PO2, para 40]. Contrary to RESPONDENT's argument [Letter by Fasttrack, p. 50], Mr. Velazquez is no longer a representative of the RESPONDENT of the arbitration. Therefore, the confidentiality obligation due to Art. 45.1 HKIAC 2018 does not apply to Mr. Velazquez and he is allowed to disclose information relating to the arbitration or the award made in the arbitration between RESPONDENT and the third party.

80 Also the two former employees of RESPONDENT have not breached contractual confidentiality obligations. Both employees were fired on 6 July 2018 and *had been* under a contractual obligation to keep all information about the other arbitral proceedings confidential [PO 2, para. 41]. Moreover, it is not clear whether the Partial Interim Award was obtained by the hack of RESPONDENT's computer system or through the two former employees [PO 2, p. 61, para. 41].

81 Therefore, it is not possible to accuse the former employees of a breach of confidentiality, if there is not any proof of it.

III. There are no Statutory Confidentiality Obligations upon Claimant

82 Contrary to RESPONDENT's argument, CLAIMANT has not breached statutory confidentiality obligations, since he has not committed an alleged hack itself. This means that CLAIMANT has not violated any law by obtaining the Partial Interim Award.

83 Since partial award deals only with issues of procedure, and not substance, the threshold of confidentiality shall be lower than for final awards. The systematic interpretation of Art. 42.1 HKIAC 2013 in conjunction with Art 3.9 HKIAC 2013, which are applied to the arbitration between RESPONDENT and the third party and also between CLAIMANT and RESPONDENT, the confidentiality obligation applies only to the final awards made in arbitration.

84 Further RESPONDENT's counsel, which is the same in the arbitration between RESPONDENT and the third party [PO 2, p. 60, para. 38], is entitled to disclose information relating to the arbitration, including the Partial Interim Award, since his confidentiality obligation vis-à-vis arbitration with the third party is governed by the HKIAC 2013. According to Art. 42.1 HKIAC 2013 the counsels of one of the parties are not under the confidentiality obligation. Therefore, RESPONDENT's counsel is not bound to any confidentiality obligation and can disclose information relating to the arbitration, which he has knowledge about trough the other arbitration between RESPONDENT and the third party.

IV. In any case, Respondent has Waived its Right to Invoke Confidentiality Defense

85 If there were any reasons of confidentiality, the Partial Interim Award was already in the public domain [PO2, para. 41]. The Award is accessible for everyone through the company that sells it. Relating to Art. 9 (3) (d) IBA Rules the Tribunal can take the fact into account that the Partial Award was already in the public domain and disclosed by the company that sells the Award. The circumstance that CLAIMANT is paying for getting access to this information makes no difference, because the Award is already available to the public through paying a fee to the company to get access to the award. This means that the information relating to the award are not confidential anymore.

86 RESPONDENT has breached its duty to act in good faith by arguing the opposite position on almost the same facts in the other arbitration.

ARGUMENTS ON THE SUBSTANTIVE ISSUES

ISSUE 3: CLAIMANT IS ENTITLED TO PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT

87 When concluding the FSSA the Parties were aware, that changes in customs regulations and import restrictions could destroy the commercial basis of their deal. To address that concern, they included a hardship clause into Cl. 12 of the contract. Thereby, the Tribunal is entitled to adapt the purchase price, if events which are covered under Cl. 12 increase the costs of performance. The tariffs which were imposed by the President of Equatoriana fulfil the conditions of Cl. 12 (**A**). Therefore, the Tribunal is entitled to adapt the purchase price by US$ 1,250,000 (**B**). CLAIMANT is entitled to the outstanding payment under Art. 53 CISG.

A. The Imposed Tariffs Fulfil the Conditions of Hardship under Clause 12 of the Frozen Semen Sales Agreement

88 The tariffs are covered as hardship under Cl. 12 of the FSSA. Cl. 12 states that "*CLAIMANT shall not be responsible […] for hardship caused by additional health and safety requirements or other unforeseen events making the contract more onerous*." Thereby, hardship is defined as a reason for exemption under the conditions set up by Cl. 12. The imposed import tariffs fulfill those conditions. They make the contract more onerous (**I**) and their imposition was an unforeseeable for CLAIMANT (**II**). As required in Cl. 12, they are also comparable to hardship caused by additional health and safety requirements (**III**). Finally, CLAIMANT did not assume the risk of changes is customs regulations.

I. The Tariffs Make the Contract more Onerous in the Sense of Clause 12

89 The imposed tariffs increase the costs for performance by 30% and thereby make the contract more onerous in the sense of Cl. 12.

90 First, this is indicated by the wording of Cl. 12. It states as a condition for hardship that events must be "*making the contract more onerous*". In comparison to common formulations in other hardship provisions, the interpretation of this term indicates a broad understanding of the term "*more onerous*". The Mediterranean law, which was chosen to govern the contract [CE 5, p. 14, para. 14] requires a fundamental alteration of the contract equilibrium in Art. 6.2.2 MCL. Also, the ICC hardship clause, which was used as basis for the negotiation of Cl. 12 [RE 2, p. 34, para. 4] requires that performance has become excessively onerous [ICC hardship cl. 2003, 2a]. While these provisions underline their restriction to exceptional cases by the expressions fundamental or exceptional, Cl. 12 does not set up such a threshold and must therefore also

cover cases, in which performance becomes only slightly costlier. However, the imposed tariffs lead to a severe increase of costs for performance by US$ 1,500,000. They destroy the commercial basis of the FSSA. It was calculated with a very low profit margin of 5% to accommodate RESPONDENT - in the prospect of entering into a long-term and mutually beneficial relationship [CE 8, p. 17]. Furthermore, the excessive burden imposed on CLAIMANT by the additional costs threatens CLAIMANT's economic existence [PO2, p. 59, para. 29]. Thereby, the tariffs make performance excessively more onerous for CLAIMANT and exceed the threshold for hardship even under the strict ICC hardship clause. *A fortiori*, they make the contract more onerous in the more liberal understanding under Cl. 12.

91 This is confirmed by the intentions of the Parties. The contract must be interpreted in accordance with the CISG, as the CISG is the law governing the contract [see supra, Issue I] Under the CISG, the negotiations must be used to determine the intention of the Parties according to Art. 8 (3) CISG [Arbitral Award, ICC (11849/2003); *Kröll/Zuppi* CISG Art. 8 para. 29]. The reason why the Parties included the hardship Clause into the FSSA was the concern that the commercial basis of the contract could be destroyed by an unforeseen event. That follows expressly from an e-mail sent to RESPONDENT [CE 4, p.12, para. 4]. The e-mail chain was also accessible for the final negotiators [PO2, p. 55, para. 5], so that they must have been aware of this intention in the sense of Art. 8 (1) CISG. The Parties intended to make Cl. 12 applicable when the commercial basis of the FSSA gets destroyed. The term "more onerous" must be interpreted in the light of this intention. Consequently, the tariffs, which destroy the commercial basis of the FSSA, make the FSSA more onerous in the sense of Cl. 12.

II. The Imposition of the Tariffs was Unforeseeable for CLAIMANT

92 The imposition of tariffs was beyond CLAIMANT's control and unforeseeable. The question of foreseeability must be examined from the view of a reasonable third person in the same situation [*Schlechtriem/Schwenzer* CISG Art. 79 para. 13]. Government interventions are likely to be categorized as extraordinary events [*DiMatteo*, Contractual Excuse, p. 293].

93 The tariffs have been imposed in December 2017, which is more than seven months after conclusion of the FSSA, by an executive order from the President of Equatoriana. Even though the imposition of tariffs came as a response to the same measure by the Mediterranean government, it came as a complete surprise, even to informed circles [CE 6, p. 15]. The Equatorianian government has always been an ardent supporter of free trade and used to resolve trade disputes amicably [CE 6, p. 15; NoA, p. 6, para. 10]. Both, the Mediterranean and Equatorianian Government are Members of the WTO [PO2, p. 61, para. 47] which prohibits the imposition of tariffs in Art. 2 (1) GATT. The President of Equatoriana acted in contradiction to the rules of the WTO. Such behavior could not have been foreseen by CLAIMANT.

94 Furthermore, the way of the imposition of the tariffs was extraordinary. They were only announced days before becoming effective [PO2, p. 58, para. 23] and covered an unusual breadth of good, including frozen horse semen which were usually categorized differently [RE 4, p. 36; NoA, p. 6, para. 11].

95 Consequently, a reasonable person in CLAIMANT's position could not have foreseen the imposition of tariffs.

III. The Tariffs are Comparable to Additional Health and Safety Requirements In the Sense of Clause 12

96 The increase of costs caused by the imposition of import tariffs is also comparable to hardship caused by additional health and safety requirements. This results from their comparable effect and origin.

Both, additional health and safety requirements and import tariffs have the same effect as they constitute an economic burden for the aggrieved party.

97 They are also comparable in their origin. This results from the drafting history of Cl. 12. While there are many possible causes for hardship, both, hardship caused by health and safety requirements and caused by imposed tariffs are the result of unexpected governmental interventions. As is apparent from CLAIMANT's e-mail, the motivation behind including the hardship Clause into the contract was to address subsequent changes associated with customs regulations and import restrictions [CE 4 p. 12, para. 4]. Both, additional health and safety requirements and the imposed tariffs can be subsumed under these terms and are thereby comparable in the sense of Cl. 12.

98 Contrary to RESPONDENT's argument the application of Cl. 12 on the imposed tariffs is not excluded by its narrow wording compared to the originally suggested ICC hardship clause [Answer to NoA, p. 30, para. 4, p. 32, para. 19]. It was specifically the case of changes in customs regulations which Cl. 12 was created for [PO 2, p. 56, para. 12].

IV. CLAIMANT did not Assume the Full Risk of Changed Circumstances by Agreeing on DDP

99 Hardship cannot occur if one party has assumed the risk of changed circumstances. Contrary to the opinion of Mr. Shoemaker [RE 4, p. 36], CLAIMANT has not assumed the risk of changed circumstances by agreeing on the Incoterm DDP. While it is true that the Incoterm DDP obliges the seller to bear all costs associated with delivery, it does not settle the risk of changed circumstances [ICC Guide to Incoterms 2010, p. 17 sq.; *Magnus/Piltz*, International Sales Law, p. 270, para. 6].

100 Furthermore, the negotiations between the Parties show that CLAIMANT did not take over the risk of changes in customs regulations. The Parties chose DDP to benefit from CLAIMANT's

experience in the shipment of frozen semen [CE 3, p. 11, para. 2]. Their intention was not to shift all risks associated with delivery to CLAIMANT, which is documented by including Cl. 12 into the FSSA [NoA, p. 7, para. 19].

101 Consequently, CLAIMANT did not assume the full risk of changes in customs regulations so that the constitution of hardship is not precluded.

B. The Legal Consequence of Clause 12 in Case of Hardship is the Claimed Price Adaptation

102 The legal consequence of hardship under Cl. 12 is the claimed price adaptation. The costs resulting from changed circumstances covered under Cl. 12 are assigned to RESPONDENT (**I**) and the Tribunal is entitled to adapt the purchase price under Cl. 12 (**II**). In any case, supplementary interpretation of the FSSA leads to an adaptation of the price (**III**). This follows also from the principle of good faith (**IV**). Consequently, the purchase price must be increased by US$ 1,250,000 (**V**).

I. All Costs Resulting From Changed Circumstances Covered by Clause 12 are shifted to RESPONDENT

103 All costs resulting from changed circumstances covered by Cl. 12 are shifted to RESPONDENT because CLAIMANT is relieved from bearing them (**1**). The Parties intended to maintain the FSSA and shifted the costs to RESPONDENT (**2**), which leads to the conclusion that RESPONDENT must bear those costs.

1. CLAIMANT Must be Relieved from all Costs

104 First, the wording of Cl. 12 indicates CLAIMANT's relief. The term "is responsible" is used throughout the FSSA to allocate costs or obligations to CLAIMANT or RESPONDENT [CE 5, p. 14, para. 9, 10]. In Cl. 12 the Parties agreed that "*CLAIMANT shall not be responsible for* […] *hardship* […]" [CE 5, p. 14, para. 12]. Considering the previous use of the term "*not responsible*", a reasonable person can only understand this as relieving CLAIMANT of any costs that are associated with hardship.

105 Secondly, the negotiations between the Parties, which are to be considered for interpretation according to Art. 8 (3) CISG, lead to the same conclusion. The Parties included Cl. 12 into the FSSA to eliminate the financial risks for CLAIMANT. He expressly objected to bearing the risk of increased custom duties and therefore insisted on including a hardship clause – at minimum [CE 4, p. 12, para. 4]. Consequently, as also RESPONDENT admits [Answer to NoA, p. 40, para. 1], Cl. 12 was included as a hardship clause to relieve CLAIMANT of certain financial risks of DDP delivery, in particular the risk of increased costs through changes in customs regulations. As a result, Cl. 12 of the contract can only be understood as relieving

CLAIMANT from all costs resulting from changed circumstances. Since the imposed import tariffs fulfill the conditions of Cl. 12 CLAIMANT does not have to bear them.

2. The costs resulting from the imposed tariffs are shifted to RESPONDENT

106 The costs resulting from the imposed tariffs are shifted to RESPONDENT. Since the FSSA continues to be in force, one party must bear the additional costs. As pictured above CLAIMANT is relieved from bearing any costs resulting out of hardship. The duty of RESPONDENT to bear those costs is the logical consequence.

The intention of the Parties to shift costs associated with delivery to RESPONDENT is also confirmed by the negotiation regarding the purchase price. The price is an aggregation of the Parties chase good itself and costs associated with delivery [PO2, p. 56, para. 8]. This shows the general intention of the Parties to shift costs associated with delivery to RESPONDENT.

107 Though, RESPONDENT might argue, that in a case of hardship Cl. 12 does not oblige him to bear the additional costs and only provides for termination of the contract. However, such interpretation of Cl. 12 would contradict to the intention of the Parties.

108 When determining the intent of a party according to Art. 8 (3) CISG due consideration is to be given to any subsequent conduct of the Parties. Subsequent conduct can indicate the Parties' intentions at the point of the conclusion of the contract [BezG St. Gallen, 3.7.1997, CISG-online No. 336]. The continuation of contract execution can indicate that a party does not want the contract to be avoided [OLG Koblenz, 31.1.1997, CISG-online No. 256]. In January 2018 RESPONDENT learned that the newly imposed import tariffs also cover horse semen [RE 4, p. 36, para. 2]. Consequently, he knew or must have known that a hardship situation according to Cl. 12 occurred. In a phone call on 21 January, RESPONDENT, however, requested the prompt delivery to ensure receiving the 50 doses which "*were urgently needed due to the start of the breeding season.*" [RE 4, p. 36, para. 3]. This behavior shows the intention of the parties to maintain the contract if a situation of hardship in the sense of Cl. 12 occurred.

109 This is also confirmed by the Parties' agreement on a "*non-refundable*" fee of US$ 100,000 per dose [CE 5, p. 13 para. 2]. The use of the term "*non-refundable*" shows that termination and a related refund of the fee was not intended by the Parties. Consequently, Cl. 12 cannot be interpreted in a way that it only provides for contract termination. Instead, Cl. 12 must be interpreted as shifting the costs resulting out of the tariffs to RESPONDENT.

II. The Arbitral Tribunal is Entitled to Adapt the Purchase Price in Accordance with the Contractual Allocation of Costs

110 The Tribunal has the right to adapt the price to realize the contractual allocation of costs. This results from an interpretation of Cl. 12 (**1**). But even if other interpretations are possible RESPONDENT must bear the risk of ambiguity under the contra proferentem rule (**2**).

1. Interpretation of Clause 12 Leads to Contract Adaptation by the Arbitral Tribunal

111 Cl. 12 entitles the Tribunal to adapt the purchase price. This follows from an interpretation of Cl. 12 of the FSSA under Art. 8 CISG. Contract interpretation under the CISG is not limited to the plain meaning of the words but must also consider negotiations and other conduct of the Parties according to Art. 8 (3) CISG.

112 The main negotiators of the contract Mr. Antley and Mrs. Napravnik shared the view that in case of hardship, it should be the task of the Arbitrators to adapt the price [CE 8, p. 17]. This intention is also documented in a note from Mr. Antley in which he held that the task of price adaptation should be assigned to the Tribunal [RE 3, p. 35]. Because of the tragic car accident this agreement was not included into the main contract, which was finalized by Mr. Krone and Mr. Ferguson. However, the intentions of the original negotiators remain relevant for the contract interpretation. This is already shown in the FSSA, where Mr. Antley and Mrs. Napravnik are still named as official representatives of their companies [CE 5, p. 13, para. 1]. When finalizing the contract Mr. Krone, who succeeded Mr. Antley on RESPONDENT's side, tried to implement the intentions of Mr. Antley into the contract and therefore drafted the final version of Cl. 12 [RE 3, p. 35].

113 It was the Parties' common intention to find a practicable solution for hardship in accordance with the plans of the original negotiators. Considering this negotiation history of Cl. 12 under Art. 8 (1) and (3) CISG it must be interpreted as giving the Tribunal the right to adapt the purchase price.

114 This does also comply with the understanding of a reasonable person in the situation of RESPONDENT, which is relevant under Art. 8 (2) CISG. The parties chose the Mediterranean contract law to govern the FSSA, which provides the legal consequence of price adaptation in Art. 6.2.3 MCL. Additionally, RESPONDENT successfully claimed a price adaptation in another arbitration in a similar case [p. 50, para. 2]. Therefore, a reasonable person in RESPONDENT's position would have been aware of the common legal consequence of price adaptation and therefore must have understood Cl. 12 accordingly.

115 Taking this into account, a reasonable person in the position of RESPONDENT must have understood Cl. 12 as providing for price adaptation by the Tribunal. Even if the legal consequence of hardship would require renegotiations in the first place, the abortion of the renegotiations by the CEO of RESPONDENT leads to the consequence of price adaptation by the Tribunal [CE 8, p. 18].

2. RESPONDENT Bears the Risk of Ambiguity under the Contra Proferentem Rule

116 Even if one should find that Cl. 12 can be interpreted differently, RESPONDENT cannot rely on the deviating interpretation. That follows from the *contra proferentem rule* under which the

party suggesting a provision for an agreement must bear the risk of its ambiguity and must accept the provisions being interpreted against it [NJW-RR 2014, 1202; Arbitral Award, ICC No. 7645; *Schmidt-Kessel*, in*: Schlechtriem/Schwenzer* CISG Art. 8 para 49; *Vogenauer*, in: *Vogenauer* Art 4.6, para. 2,9; Skys, V.J. 2004, p. 66]. The *contra preferentum rule* can be applied on an ambiguous term if one party introduced the Clause into the contract [*Vogenauer*, Art. 4.6, para 6]. Ms. Napravnik suggested to rely on the ICC-Hardship Clause [RE 2, p. 34, para. 6]. It was RESPONDENT who found it too broad [RE 3, p. 35, para. 3] and who suggested the wording of the final version of the hardship Clause in the FSSA [PO2, p. 56, para. 12]. Thus, an interpretation contra proferentem leads to the prevailing interpretation that Cl. 12 provides for contract adaptation by the Tribunal.

III. In any Case, Supplementary Interpretation of the FSSA Leads to Implied Price Adaptation or Adaptation of the Price by the Arbitral Tribunal

117 Even if the legal consequence of price adaptation cannot be derived directly from Cl. 12, it can be deduced by supplementary interpretation of Cl. 12, taking into consideration the intention of the Parties. Such interpretation can become necessary to ensure the efficacy of the contract [*Kröll/Zuppi*, Art. 8, para. 33; *Schlechtriem/Schwenzer* CISG Art. 8, para. 27]. The efficacy of the FSSA would be hindered if it defined conditions for hardship but no legal consequence. While the theory of "*business efficacy*" was developed in the common law tradition it is also applicable under the CISG [*Kröll/Zuppi*, Art. 8, para. 33]. Thereby, a term can be implied if it is necessary to give efficacy to the contract. That is if one can confidently say that the Parties would have included that term when concluding the contract if they had thought about it [Reigate v Union Manufacturing].

118 The Parties shifted all costs resulting from the changed circumstances under Cl. 12 to RESPONDENT. If they had thought about the legal consequence of Cl. 12 more thoroughly, they would have included a provision which either directly increases the purchase price or entitles the Tribunal to adapt the price.

119 This is confirmed by the fact that the main negotiators intended to include an express provision on price adaptation, which was only not included because they were incapacitated by the car accident [CE 8, p. 17].

120 The necessity of a supplementary interpretation becomes even more clear with regard to the drafting history of Cl. 12. The part of it dealing with hardship was inserted into a standard *force majeure* clause. The legal consequence of Cl. 12 is contained in the part of the original *force majeure* clause and thereby suited to a situation of *force majeure*. However, the legal consequences of *force majeure* are not suitable for a situation of hardship because for hardship the adjustment of contractual terms is one of the key issues [*Kröll*, CISG Art. 79, para. 80]. If

the new negotiators would have thought about this, they would have added a provision which settles the price adjustment in conformity with the contractual allocation of costs.

121 Consequently, supplementary interpretation of Cl. 12 is necessary and leads to the conclusion that the price is either directly adapted in the contract or that the Tribunal has a right to adapt the price.

IV. The Right of the Arbitral Tribunal to Adapt the Price also Follows from the Principle of Good Faith

122 The right to price adaptation also follows from the principle of good faith because RESPONDENT created the impression to consent to the price adaptation. The principle of good faith, which is laid down in Art. 7 (1) CISG does also govern the relationship between the contractual parties [Compromex (Mexico), 30.11.1998, CISG-online No. 504; TdJ Rio Grande do Sul (Brazil), 2009, CISG-Online No. 2368; *Kröll/Perales Viscasillas* CISG Art. 7, para. 25; *Schlechtriem/Schwenzer/Ferrari* CISG Art. 7, para. 26; Gillette, p. 132]. One manifestation is the estoppel principle "*venire contra factum proprium*" which impedes acting contrary to the prior behavior [Arbitral Award (Wien), 1994, CISG-Online 120 and 121; OLG Karlsruhe, 1997, CISG-Online No. 263].

123 After RESPONDENT's responsible employee Mr. Shoemaker learned that the semen where covered under the imposed tariffs, he purposely created the impression to comply with CLAIMANT's demand for price adaptation to ensure the delivery by repeating the phrase "we will certainly find an agreement on the price" [RE 4, p. 36]. Also, he expressed RESPONDENT's interest in buying more semen from CLAIMANT's stallion Empire State [CE 8, p. 18, para. 2]. Mr. Shoemaker was introduced to Mrs. Napravnik as the person responsible for the racehorse breeding program including all questions concerning the FSSA [PO2, p. 59, para. 32]. He had a position with high credibility which made Mrs. Napravnik trust in his authority. Since he created the impression that RESPONDENT agrees to bear the additional costs caused by the tariffs, RESPONDENT can now not act in contradiction to that by denying CLAIMANT's right of price adaptation.

V. The Purchase Price must be Increased by US$ 1,250,000

124 The Tribunal must adapt the purchase price by increasing it by US$ 1,250,000. Since Cl. 12 covers all alterations which destroy the commercial basis of the contract, all costs going beyond CLAIMANT's 5% profit margin must be borne by RESPONDENT.

125 CLAIMANT is entitled to the payment of US$ 1,250,000 under Art. 53 CISG.

ISSUE 4: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG

126 CLAIMANT is entitled to payment of US$ 1,250,000 or any other amount under Art. 53 CISG. This results from an adaptation of the price under the CISG. If the claim is not already justified under Cl. 12 of the contract it is under the CISG. The Parties did not exclude the application of the CISG on hardship (**A**) and hardship is governed by the CISG (**B**). The imposed tariffs constitute hardship in the sense of the CISG (**C**) which leads to the legal consequence of price adaptation (**D**).

A. The Parties did not Exclude the Application of the CISG on Hardship

127 Contrary to RESPONDENT's opinion [Answer to NoA, p. 32, para. 20] the Parties did not exclude the application of the CISG beyond the scope of Cl. 12. If the Tribunal found that Cl. 12 does not cover the imposed tariffs as hardship or does not provide for requested price adjustment, the provisions of the CISG remain applicable.

128 scope of modifications, however, the provisions of the CISG remain applicable [MünchKomm/*Huber*, Art. 6 para. 25; *Staudinger/Magnus*, Art. 6 para. 41]. Content and scope of modifications are to be determined by contract interpretation under Art. 8 CISG.

129 In Cl. 12 of the Parties settled enumerated situations of changed circumstances in which RESPONDENT must bear all costs. To that extent, the Parties derogated from the general CISG provisions so that their application is not possible.

130 However, Cl. 12 does not contain an exhaustive rule whereby other situations of changed circumstances or other legal consequences would be excluded. If the Tribunal should find that the price adaptation is not justified under Cl. 12, recourse can be had to the general CISG provisions. The intention of the Parties when drafting Cl. 12 was to improve CLAIMANT's legal position in exchange for the assumed risks by agreeing on DDP delivery [CE 4, p. 12 para. 4]. Taking this into account, a reasonable person cannot conclude that the Parties wanted to restrict CLAIMANT's legal position by excluding application of the CISG on issues beyond the scope of Cl. 12.

131 Consequently, the general provisions of the CISG remain applicable beyond the scope of modifications in Cl. 12 of the contract.

B. The CISG does Govern Hardship

132 Hardship is governed by Art. 79 CISG. [Hof van Cassatie (Belgium), 2009, CISG-Online No. 1963; CISG-AC, para. 3.1; *Jones/Schlechtriem*, para. 217; *Brunner*, Hardship, p. 213]. This is

not excluded by virtue of Art. 4 (a) CISG (**I**). In the light of the general principles for the interpretation of the CISG (**II**) the term "*impediment*" in Art. 79 CISG must be interpreted as including hardship (**III**).

I. Application of the CISG on Hardship Issues is not Excluded by Art. 4 (a) CISG

133 While Art. 4 (a) CISG points out that the CISG does not regulate the validity of contracts it does not exclude application of the CISG on issues of hardship. RESPONDENT may argue hardship is a validity-related issue as it is the case in some legal traditions. However, the international character of the CISG requires an autonomous interpretation of validity which must be detached from the national perceptions [*Kröll/Djordjević* CISG Art. 4 para. 14]. Art. 79 (5) CISG shows that default is no matter of validity of contracts under the CISG, since performance is not excluded in those situations. The validity issues addressed by Art. 4 (a) CISG are mandatory rules which debar any agreement between the Parties [CISG-AC Opinion No. 7 para. 36; *Honnold* Uniform Law, p. 485]. Hardship is no such issue since the Parties are free to agree on individual hardship provisions under Art. 6 CISG. Consequently, Art. 4 (a) CISG does not exclude the application of the CISG on hardship issues.

II. An Interpretation under which CISG does Govern Hardship is Preferable with Regard to its Purpose to Unify the International Sales Law

134 When interpreting provisions of the CISG, its international character and the need to promote uniformity in its application are to be considered according to Art. 7 (1) CISG. The purpose of establishing uniformity in sales law can only be accomplished on issues which are governed by the CISG. Therefore, Art. 7 (2) CISG allows recourse to domestic law only as "last resort" when no possibility to settle the issue inside the CISG can be found [*DiMatteo*, Global Challenge, p. 56]. According to Art. 7 (2) CISG an issue can be governed by the CISG even if it is not expressly settled. Such "internal gaps" can then be filled with recourse to the general principles on which the CISG is based.

135 Consequently, the mere fact that the CISG does not expressly settle hardship does not exclude that it is governed by it. Especially in hardship situations application of domestic law would lead to a great diversity of potentially applicable legal doctrines which would contradict the purpose of the CISG to unify sales law [CISG-AC Opinion No. 7 para. 35]. To solve the issue of hardship "within the four corners of the CISG" all technically available means are to be exhausted [CISG-AC Opinion No. 7 para. 35]. Therefore, if various interpretation of Art. 79 CISG are possible, an interpretation under which hardship is governed should be preferred.

III. Hardship may be Qualified as an "Impediment" under Art. 79 CISG

136 Hardship may be qualified as an impediment under Art. 79 CISG. Neither the general understanding of the term "*impediment*", nor the legislative history contradict to that interpretation (**1**). It is instead indicated by the purpose and structure of Art. 79 CISG (**2**).

1. The Wording and Legislative History of Art. 79 CISG allow to Understand Hardship as an Impediment

137 Interpretation of a provision must start with the interpretation of its wording [Brunner CISG, Art. 7 para. 5]. The term "*impediment*" itself is neutral and does not indicate whether there must be physical hindrance to performance or not. [*Kröll/Atamer* CISG, Art. 79, para. 80]. Thereby, it allows to classify situations as impediment in which performance has not become physically impossible but just too onerous [*Schwenzer*, Hardship, Vict. U. L. Rev. 39 Issue 4, p. 715, CISG-AC Opinion No. 7, para. 3.1].

138 Contrary to what RESPONDENT might argue, the legislative history of Art. 79 does not indicate otherwise. While it is commonly accepted that the legislative history of a provision can be used for interpretation, it cannot be relied on, where the legislative history itself is unclear [*Kröll*, CISG Art. 7, para. 40]. The legislative history of Art. 79 CISG on the question whether it governs hardship is unclear and ambiguous *[Kröll*, Art. 79, para. 78; CISG-AC, para. 28]. Therefore, it cannot be used for interpretation of Art. 79 CISG.

2. The Purpose and the Structure of Art. 79 CISG Indicate that it Governs Hardship under the term Impediment

139 The term "*impediment*" must be interpreted as implying hardship in order to avoid structural and contentual contradictions in Art. 79 CISG.

140 First, an excuse under Art. 79 (1) CISG requires that an impediment cannot reasonably be expected to overcome. That requirement would be pointless if an "*impediment*" could only be factual impossibility because that could never be overcome. Consequently, Art. 79 CISG must also govern cases where performance became too onerous [*Bonell*, Dir.com.int. 1990, p. 543, 570f.].

141 Secondly, the transition between factual impossibility and situations where performance becomes too onerous is fluent. Given today's technical possibilities, a factual hindrance of performance can be overcome in most cases - but sometimes only with exorbitant costs [*Brunner* CISG, Art. 79 para. 25]. Art. 79 (1) CISG excuses the debtor in such situations if he cannot be expected to overcome the impediment.

142 Compared to that situation, there is no apparent reason why the debtor should not be excused when performance becomes too onerous because of changed circumstances which constitute hardship. The situations should not be treated differently, since the burden for the debtor is the

same in both cases – an unreasonable economical effort [*Brunner* CISG, Art. 79 para. 25]. Therefore, the purpose of Art. 79 CISG which is an exemption for the debtor in extreme situations makes it necessary to include hardship.

143 The coverage of hardship under Art. 79 CISG is further indicated by the prerequisites of Art. 79 (1) CISG. Thereafter an impediment must be unforeseeable, beyond the Parties' control and not be expected to overcome. These are also the typical prerequisites for hardship [*Schwenzer*, Hardship, Vict. U. L. Rev. 39 Issue 4, p. 715].

144 After all, it can be held that hardship is governed by Art. 79 CISG. This interpretation of Art. 79 (1) CISG is confirmed by the purpose and the international character of the CISG because it provides a uniform regulation of hardship cases.

C. The Prerequisites of Hardship under the CISG are met

145 The tariffs constitute hardship in the sense of the CISG. While the prerequisites can be deduced from Art. 79 CISG itself [*Brunner* Hardship, p. 420 sq.; *Kröll/Atamer* CISG, Art. 79, para. 81], it is also possible for the Parties to define the prerequisites of hardship individually [*Brunner* Hardship, p. 422, para. 2]. In Cl. 12 the Parties set up individual conditions for hardship and thereby derogated from the general conditions under the CISG. Since the conditions of Cl. 12 are fulfilled the tariffs constitute hardship.

146 But even if the AT decides differently, the prerequisites for hardship under the CISG are fulfilled. Thereafter an impediment which cannot reasonably be expected to overcome must occur (**I**), which is unforeseeable and beyond the control of the aggrieved party (**II**).

I. The Tariffs are an Impediment which cannot be Expected to Overcome

147 The 30% raise of costs through the imposed import tariffs constitute an impediment which cannot reasonably be expected to overcome.

148 The relevant threshold for an exemption under Art. 79 (1) CISG must be examined with a view on the individual case [*Schwenzer*, Hardship, Vict. U. L. Rev. 39 Issue 4, p. 716]. Thereby, due consideration is to be given to the character of the contract, the financial situation of the aggrieved party (**1**) and the relationship between the Parties (**2**).

1. The Character of the Contract and the Financial Situation of the Aggrieved Party must be Taken into Consideration

149 Courts often tend to be very restrictive with assuming hardship based on the premises that in speculative contracts the Parties know about the risk of price deviations and therefore cannot be exempted if the risk materializes [OLG Hamburg, 1997, CISG-online No. 261].

150 Contrary to that, in non-speculative contracts with low profit margins, the threshold for hardship must be lower [*Schwenzer*, Hardship, Vict. U. L. Rev. 39 Issue 4, p. 716]. The FSSA was not

of speculative nature. CLAIMANT neither had to procure the semen from a third party, nor was he dependent from any other market fluctuations. Thereby, both parties expected the economic basis of the deal to remain unchanged [CE 4, p. 12]. Only then it was possible for CLAIMANT to offer RESPONDENT such a competitive price with a low profit margin of only 5% [CE 4 p. 12 para. 1; CE 8 p. 17 para. 3]. With a view on the character of the contract also smaller alterations of its equilibrium reach the threshold for hardship.

151 Furthermore, when examining the threshold for hardship the economic situation of the Parties must be taken into consideration. If the economical existence of one party is seriously threatened, a lower burden is enough to constitute a relevant impediment [*Brunner* CISG, Art. 79 para. 25; *Schwenzer*, Hardship, Vict. U. L. Rev. 39/4, p. 716]. CLAIMANT has suffered from financial difficulties during the past years. The additional costs caused by the imposed tariffs would seriously endanger CLAIMANT's restructuring plan and thereby also his ability to continue the economic activity [PO2, p. 59, para. 29].

2. The Relationship Between the Parties Indicates a Lower Threshold for Hardship

152 Finally, it must also be considered, that the contractual relationship of the Parties was extraordinarily based on trust and good faith. They planned a long-term and mutually beneficial relationship [CE 8 p. 18 para. 2]. Only with this prospect CLAIMANT was willing to enter into the contract [CE 2 p. 10 para. 3]. However, RESPONDENT violated those agreed on principles when he sold the delivered semen to third parties, breaching the contractual re-sell prohibition [CE 2 p. 10 para. 3; CE 3 p. 11 para. 1]. Since considerate behavior was a basis of contract conclusion it is appropriate to lower the threshold of hardship in this case.

153 With regard to the special circumstances of the case, the additional costs of 30% arising out of the imposed tariffs constitute an impediment which cannot reasonably be expected to overcome by CLAIMANT.

II. The Imposed Tariffs are an Unforeseeable Event beyond CLAIMANT'S Control

154 The imposed tariffs are an unforeseeable event [see para. 90] and beyond CLAIMANTS control. They were imposed by an executive order from the President Equatoriana [PO2, p. 58, para. 23]. CLAIMANT as a private person from Mediterraneo could not have taken any influence.

D. The Legal Consequence of Hardship under the CISG is the Claimed Price Adaptation by the Arbitral Tribunal

155 As consequence of hardship the CISG does provide for the claimed price adaptation. The legal consequence of hardship under CISG is price adaptation (**I**) by the amount requested by CLAIMANT (**II**).

I. The CISG does Provide for Price Adaptation

156 While the legal consequence of hardship is not expressly settled in Art. 79 CISG, there are several approaches which all lead to this result. The internal gap in Art. 79 CISG can be filled via Art. 7 (2) CISG in connection with the general principle of good faith **(1)** or by recourse to Art. 6.2.3 PICC as general principle on which the CISG is based **(2)**. Besides, the application of Art. 6.2.3 PICC is also justified as international trade usage under Art. 9 (2) CISG **(3)**.

1. The Right of Price Adaptation stems from the Principle of Good Faith

157 The right to price adaptation follows from the principle of good faith which is laid down in Art. 7 (1) CISG. The principle of good faith is also a substantive provision [see para. 120]. Therefore, a duty to renegotiate the contract terms and the right of price adaptation by the AT in a situation of hardship can be deduced [*Staudinger/Magnu*s CISG, Art. 79 para 24b; *Brunner* CISG, Art. 79 para. 27]. This applies *a fortiori* in this case, since the FSSA was extraordinarily based on trust and good faith [see para. 150]. Since the imposed tariffs constitute hardship and renegotiation between the Parties failed [CE 8, p. 18], observance of the good faith principle requires adaptation of the price by the Tribunal. Consequently, the Tribunal is entitled to adapt the price under Art. 7 (1) CISG.

2. Art. 6.2.3 PICC is Applicable for Gap-filling and Provides for Price Adaptation

158 If the Tribunal should find that contract adaptation by the Tribunal as legal consequence of hardship cannot be deduced from Art. 7 (1) CISG, the internal gap of the CISG must be filled by application of Art. 6.2.3 PICC via Art. 7 (2) CISG. According to Art. 7 (2) CISG, matters which are governed by the CISG but not expressly settled in it are to be settled in conformity with the general principles on which the CISG is based. Such general provisions can be found in the PICC [ICC Court of Arbitration (Basel), Unilex 207; ICC International Court of Arbitration, Unilex 1434; Hideo Yoshimoto v. Canterbury Golf International, Unilex 828; Brunner CISG, Art. 7 para. 9].

159 The PICC are based on comparative law and document a broad international consent [*Staudinger/Magnus* CISG, Art. 7 para. 14; *Brunner* CISG, Art. 7 para. 9]. The UNCITRAL has endorsed them and stated that they complement the CISG [Report of the UNCITRAL A/62/17 (Part I), paras 210 et seq.]. With regard to the international character of the CISG, Art. 7 (2) CISG must be interpreted in a way, which allows to fill internal gaps with recourse to the PICC [*Brunner* CISG, Art. 7 para. 9].

160 Consequently, Art. 6.2.3 PICC can be used to fill the internal gap regarding the legal consequence of hardship [*Brunner* CISG, Art. 79 para. 27; *Garro*, The Gap Filling Role, 69 Tulane L. Rev. (1995) 1149, 1184].

161 Under to Art. 6.2.3 (4) (b) PICC a court may adapt a contract in a situation of hardship with a view to restoring its equilibrium if renegotiations between the Parties fail. According to Art. 1.11 PICC the reference to a court includes a Tribunal. Renegotiation failed when RESPONDENT aborted them so that the contract equilibrium must be restored though price adaptation by the Tribunal.

3. The Use of the PICC to Fill Internal Gaps of the CISG is also Justified under Art. 9 (2) CISG

162 The use of the PICC to fill internal gaps of the CISG is also justified under Art. 9 (2) CISG. Under Art. 9 (2) CISG the Parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the Parties knew or ought to have known and which in international trade is widely known. The PICC are a reflection of international trade usages [Arbitral Award, 1997, CISG-Online No. 1247; *Huber/Mullis*, The CISG, p. 20 sq.; *Pamboukis*, 25 J. of Law and Commerce, p. 129 sq.]. They "*set forth general rules for international commercial contracts*" and embody the *lex mercatoria* [Preamble of the PICC]. This is confirmed by its comparative law background and the endorsement by the UNCITRAL. Consequently, the PICC constitute a trade usage in the sense of Art 9 (2). Thereby, the use of Art. 6.2.3 PICC to fill an internal gap of the CISG can also be justified under Art. 9 (2) CISG [*Kröll/Atamer* CISG Art. 79 para. 86; *Schlechtriem/Butler*, International Sales, para. 291]. The Parties did not agree otherwise, quite the reverse, they agreed that their contract shall also be governed by the law of Mediterraneo [CE 5, p. 14 para. 14], which is a verbatim adoption of the PICC. Although the CISG is the primary applicable law, this shows that the Parties were aware of the provisions of the PICC but did not object to it. As a result, Art. 6.2.3 PICC can be used for gap filling. It provides the legal consequence of contract adaptation by the Tribunal [see para. 159].

II. The Arbitral Tribunal Shall Adapt the Price by the Claimed Amount

163 As a result, the Tribunal must adapt the contract with a view to restoring its equilibrium. Under Cl. 12 of the FSSA RESPONDENT must bear US$ 1,250,000 as costs resulting from changed circumstances [see para. 101]. Observing that allocation of costs, the AT shall restore the equilibrium of the contract by increasing the purchase price by US$ 1,250,000.

164 However, if the Tribunal should find that conditions of Cl. 12 are not fulfilled, the contract equilibrium must be restored by increasing the purchase price by any other reasonable amount.

165 CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount under Art. 53 CISG.

REQUEST FOR RELIEF

In response to the AT's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the AT to declare that:

(1) It has the jurisdiction and the powers under the arbitration agreement to adapt the contract;

(2) CLAIMANT is entitled to submit evidence from the other arbitration proceedings;

(3) CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the contract;

(4) CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under the CISG.

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons 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.

Kiel, 06 December 2018