SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL ARBITRATION MOOT

HONG KONG

CHRISTIAN ALBRECHT

UNIVERSITY OF KIEL

Memorandum for RESPONDENT

On behalf of	Against
Black Beauty Equestrian	*Phar Lap Allevamento*
(RESPONDENT)	(CLAIMANT)

Max Beucker	Jule Herbst	Jannis Knaack
Johann Potthast	Sina Neumann	Lennard Wieduwild

Kiel, Germany

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INDEX OF ABBREVIATIONS

AC	Arbitration Clause
Answ. to Not. o. Arb.	Answer to Notice of Arbitration
AR	Arbitration Rules
Art.	Article, articles
CE #	Claimant's Exhibit #
cf.	Compare with
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC Op.	The CISG Advisory Council
Cl.	Clause
CM	Claimant's Memorandum
DCL	Danubian Contract Law
e.g.	exempli gratia (for example)
ECICA	European Convention on International Commercial Arbitration
ed.	Edition
et al.	et alii/ aliae (and others)
et seq.	et sequens (and the following)
FSSA	Frozen Semen Sales Agreement
HKIAC 2013	2013 Administered Arbitration Rules of the Hong Kong International Arbitration Center
HKIAC 2018	2018 Administered Arbitration Rules of the Hong Kong International Arbitration Center
IBA RoE	2010 International Bar Association Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
int.	International

MA	Mediterranean Arbitration; the arbitration between RESPONDENT and a third party
MCL	Mediterranean Contract Law
Mr. / Mrs.	Mister / Mistress
No.	Number
NoA	Notice of Arbitration
NYC	New York Convention
p.	page/ pages
RE #	Respondent's Exhibit
para. / paras.	paragraph/ paragraphs
Parties	CLAIMANT and RESPONDENT
PIA	Partial Interim Award of the Mediterranean Arbitration
PICC	Principles of International Commercial Contracts
PO #	Procedural Order #
SAA	Swedish Arbitration Act of 1999
supra	above
UN	The United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US$	US Dollar
v.	versus
VOL.	Volume

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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 reknown stud farm and provides frozen semen of its 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	There are serious restrictions on transportation of living animals in Equatoriana. RESPONDENT contacts CLAIMANT 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	CLAIMANT and RESPONDENT (hereafter together: the Parties) negotiate the FSSA. CLAIMANT accepts the suggested DDP delivery. RESPONDENT makes clear that the ICC hardship clause proposed by CLAIMANT is too broad.	*CE 2, p. 10; CE 3, p. 11; CE 4, p. 12; RE 1, p. 33; RE 3, p. 35*
12 April 2017	The two main negotiators of the Parties are involved in a car accident. Therefore they are replaced to finalize the contract.	*CE 8, p. 17*
6 May 2017	The Parties, represented by the two new negotiators, conclude the FSSA with an AC.	*CE 5, pp. 13 et seq.*
18 May - 3 October 2017	RESPONDENT pays the first instalment of and CLAIMANT ships the first two instalments.	*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*

21 January 2018	RESPONDENT inquires with the relevant authorities to confirm that frozen semen are covered by the tariffs on animal products. RESPONDENT's representative Mr. Shoemaker calls CLAIMANT and makes clear that he has no authority to consent to any additional payments. CLAIMANT ships the third instalment and RESPONDENT pays the second instalment.	*RE 4, p. 36* *CE 7, p. 16;* *RE 4, p. 36* *CE 5, p. 14;* *CE 8, p. 18*
6 July 2018	The contracts with two former employees of RESPONDENT acting as witnesses in the MA are terminated for cause with immediate effect	*Letter by Fasttrack, p. 50, PO 2, para. 41, p. 61*
31 July 2018	CLAIMANT initiates arbitral proceedings, submitting its Notice of Arbitration.	*Notice of Arbitration, pp. 4 et seq.*
24 August 2018	RESPONDENT submits its Answer to the Notice of Arbitration.	*Answer to the Notice of Arbitration, p. 29 et seq.*
September 2018	RESPONDENT's computer system gets hacked and a considerable amount of data is retrieved.	*Letter by Fasttrack, p. 50*
2 October 2018	CLAIMANT informs RESPONDENT that it will receive a confidential PIA from an arbitration between RESPONDENT and a third party.	*Letter by Langweiler, p. 49; PO 2, para. 41*

INTRODUCTION

1 Turning a profit and securing its survival in the modern economy is the goal of every commercial entity. Despite this basic economic principle, the result of negotiations between two companies is at best a mutually beneficial trade deal. This is the foundation of trade. This equilibrium of a deal is swayed as soon as one party tries to undermine the other party's position to gain an advantage for itself. In order to gain this doubtful advantage CLAIMANT acts regardless of the balanced interests in the contract by claiming a legal position which it is not entitled to.

2 CLAIMANT seeks to submit evidence from another arbitral proceeding acting in dubious ways while trying to obtain it. Irrespective of that, the evidence is irrelevant for the case and immaterial to its outcome and therefore inadmissible. Such behavior should not be tolerated by the Tribunal. The Tribunal is asked to remind CLAIMANT of its obligation to act in good faith and dismiss the evidence obtained by illegal means (**ISSUE 1**).

3 In addition, CLAIMANT wants to change retroactively the applicable law. The Parties have impliedly chosen Danubian law to govern their arbitration clause. Absent an express authorization by the Parties, the Tribunal lacks jurisdiction and powers to adapt the contract (**ISSUE 2**).

4 Beyond that, CLAIMANT fails to interpret the contract correctly. It brings forward a claim for price adaptation which has no basis under the contract between the Parties. The alleged prerequisites are not met: while the Parties included a hardship clause into their contract, they did not intend to make it applicable in case of an imposition of tariffs. Moreover, the hardship clause does not provide for the remedy of price adaptation (**ISSUE 3**).

5 CLAIMANT's request for additional remuneration is neither justified under the CISG. Its interpretation of the CISG and the application of it lacks prudence. The Parties are barred from referring to the CISG on the matter of hardship since they included a deviating provision into their contract. However, even if the CISG were applicable, it would not justify CLAIMANT's request (**ISSUE 4**).

6 The Parties equilibrated their interests in the contract after detailed negotiations in which they also considered the possible occurrence of hardship. However, nothing in the contract indicates that they intended to make price adaptation available in any situation. There is no basis and no power for an external party to interfere in the contract equilibrium.

ARGUMENTS ON THE PROCEDURAL ISSUES

ISSUE 1: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

7 Starting with the application of admission by CLAIMANT of the PIA from the MA; those documents are neither relevant to the case nor material to its outcome. They are therefore inadmissible **(A.)**. Furthermore, the Tribunal, as it is within its power to rule on such matters due to Art. 22.2 HKIAC 2018, should exercise its discretion to refuse admission of the concerned documents **(B.)**.

RESPONDENT asks to apply strict rules of evidence under Art. 22.2 HKIAC 2018.

A. The Documents from the Mediterraneo Arbitration are Irrelevant and Immaterial to Outcome of this Proceedings

8 As CLAIMANT has already stated; according to Art. 22.3 HKIAC 2018, the Tribunal does have the power to decide upon the relevance and materiality of evidence. CLAIMANT uses the IBA RoE to circumscribe "relevance and materiality" [*CM, para.4*], but contrary to CLAIMANT's suggestion [*CM, para. 3*], the Tribunal is not required to rely upon the IBA RoE in any way and even if it relies, the IBA RoE themselves exclude the *prima facie* standard. Under Art. 9(2) of the IBA RoE evidence must be of *"**sufficient** relevance… and materiality [emphasis added]"*, and not *prima facie*.

9 CLAIMANT believes that he has sufficiently established the relevance and materiality [*CM, paras. 4, 5*], but to the contrary, *"the more startling the proposition a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that preposition to be fully established"* [*Redfern/Hunter Stud., para. 6.35*]. CLAIMANT in this instance would like to prove the relevance and materiality of the evidence. Following this premise, the Tribunal should conclude that the *prima facie* standard cannot be sufficient, as shown by the Parker case [*Parker case*]. There the tribunal has come to the conclusion that "after claimant has established a *prima facie* case and respondent Government has offered no evidence in rebuttal, latter may not insist that evidence be produced to establish allegations beyond a reasonable doubt [*Parker case, p. 36*]. Contrary to this, RESPONDENT has already pointed out reasons to doubt [*see above and cf. Letter by Fasttrack, 3 Oct. 2018, p. 50*] that CLAIMANT has established a *prima facie* case which has the effect that the standard of proof has risen, which should lead the Tribunal to believe that CLAIMANT's reasoning does not suffice to establish the relevance and materiality of evidence and therefore needs further foundation to uphold the claim.

I. The Documents Stemming from the Mediterranean Arbitration are Irrelevant

10 As CLAIMANT rightly established that "evidence is relevant where it can be used to support an allegation made by the party seeking to adduce the evidence" [*CM, para. 4*]. In contrast materiality is "connected with the sufficiency of evidence" [*cf. Pilkov, Evidence in Int. Arb. p. 149*].

11 RESPONDENT would like to point out that the present arbitration and the Mediterranean one are quite incomparable due to the significant factual differences, most predominantly: the difference of governing law: this proceeding is governed by the law of Danubia, which does include the "four corners" rule and under which arbitration agreements are interpreted narrowly, while the other arbitration is held under the law of Mediterraneo. Furthermore, the disputes differ in the subject of sale and place of delivery. Moreover, the arbitrations have different seats and are even held under different versions of the HKIAC Rules. The latest version applicable to this arbitration now includes within its provision concerning confidentiality (Art.45.1 HKIAC 2018) an express prohibition of document publication for party representatives. Hence, the PIA of the other arbitration is irrelevant to these proceeding.

12 CLAIMANT asserts that the arbitration agreements in both proceedings are governed by Mediterranean law [*CM, para. 21*]. But since this arbitration is held in Danubia and is governed by the law of Danubia, the other arbitral proceeding should seem quite incomparable with this one. The choice of law for the AC has great effect on the outcome of the proceedings because as the Tribunal already stated that under application of "*Danubian Contract Law [..] there is a high likelihood that the arbitration agreement would not be interpreted as authorising a contract adaptation by the Arbitral Tribunal"* [*PO 1, p. 51, para. II*].

13 In addition, CLAIMANT does not have a complete picture of the circumstances involved in the MA, which influences how *"materially similar clauses*" [*CM, para. 5*] play out in the final award.

14 RESPONDENT would like to clarify that even if the MA and these proceedings are similar to a certain degree, it is within this Party's rights to exercise its autonomy and take opposing stances in different arbitral proceedings. Party autonomy is *"a key element in all arbitration agreements"* [*Fagbemi, p. 246, para. 8*], since without it there could not be an autonomous agreement that gives jurisdiction and power to a tribunal constituted by private individuals instead of a state court to decide upon high profile cases.

15 In anticipation of what CLAIMANT may argue, the previously rendered PIA of the other tribunal would have no effect on this proceeding. It is widely accepted in literature, that *"decisions of an arbitral tribunal on a question of law have no precedential value"* [*Sheppard,*

Res Judicata and Estoppel, p. 219, 222; Redfern/Hunter Stud., para. 1.113; Kaufmann-Kohler, Arbitral Precedent, p. 362ff].

II. The Documents Stemming from the Mediterranean Arbitration are Immaterial

16 Furthermore, CLAIMANT asserts that the evidence is "material to the outcome where the factual allegation which it supports is necessary for complete consideration of the case" [*CM, para. 4*]. Contrary to the conclusion that CLAIMANT draws from his plausible assertion, the materiality cannot be established because the PIA cannot change this Tribunal's view on the case at hand, since the facts have not been established in the other arbitration yet. In addition, the PIA is rendered in the ongoing proceedings and the Final award will not be handed down until August of 2019 [*PO 2, p. 60, para. 39*]. Furthermore, the reasoning of the arbitrators in the PIA is influenced by consistent jurisprudence in Mediterraneo that the CISG also applies to procedural matters [*PO 1, p. 52, para. III.4*] and by the application of Mediterranean law in general.

17 Moreover, CLAIMANT is arguing that Art. 8 (3) CISG "allows the subsequent conduct of the parties to be taken into account in interpreting the intentions underlying their previous statements and conduct" [*CM, para. 5*]. As RESPONDENT will show later, the CISG does not apply to the AC. The CISG is only applicable to sales contracts and does not govern procedural matters [*Kröll, Selected Problems, (III) (2) (b)*], therefore Art. 8 (3) CISG bears no weight in this argumentation.

18 RESPONDENT has already stated with authorisation of the other party to the MA *"that the allegations [that RESPONDENT is acting contradictory] by CLAIMANT do not reflect reality and are taken out of context"* [*Letter by Fasttrack, 3 Oct. 2018*]. This should by itself be enough to clarify any dispute over the information. It furthermore expresses the Parties' interest to keep any information about the MA confidential.

19 Besides that, CLAIMANT states *"[e]vidence is material to the outcome where the factual allegation which it supports is necessary for complete consideration of the case"* [*CM, para. 4*] The information that CLAIMANT would like to make up from any documents from the other arbitration is not necessary for a complete consideration of the case, since it is from a different arbitration, only connected to the one at hand by the legal representatives of RESPONDENT. Contrary to what CLAIMANT states [*CM, para. 4*], "necessary" should only entail the factual consideration of the arguments in this arbitration. Otherwise the conduct of the proceedings oriented to serve the needs of individual parties to arbitration would be endangered. The proceedings should be confidential and not dependent on each other and should be ruled on a case by case basis [*cf. HOGAȘ, Juridical Tribune, p.130 VOL. 4, Issue 2*].

III. The IBA Rules on the Taking of Evidence are not Applicable to these Proceedings

20 The IBA RoE are applicable under *"whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence"* [*Art. 1 IBA RoE*].

1. There has been no Agreement to Apply the IBA Rules on the Taking of Evidence in these Proceedings

21 The Parties have not agreed to apply the IBA RoE in their AC. Since there has not been any agreement, the Tribunal should therefore come to the conclusion that they are not applicable.

2. The Tribunal Should not Determine the IBA Rules on the Taking of Evidence to be Applicable *ex officio*

22 The Tribunal can determine the IBA RoE applicable under Art. 1 IBA RoE. The Tribunal should not do so, since the IBA RoE are not decisive in their application and could not be relevant to the case in order to satisfy the *"basic desire to maintain procedural flexibility"* [*O'Malley, p. 9, para. 1.23*]. In the literature used by CLAIMANT the IBA RoE *"are often considered "non-binding" in many instances"* [*O'Malley, p. 10, para. 1.24*], furthermore stating that they are of a supplementary nature and are intended to fill gaps left by arbitration rules [*O'Malley, p. 10, para. 1.27*] and even if provisions would be breached it would not constitute an annullable offence [*cf. X v. A in ASA Bulletin, No. 3, p. 517*]. Thus they would have no effect on the validity and accuracy of the award and the ongoing proceedings. In other words, the application would have no effect on the proceedings, Art. 22.3 HKIAC 2018 sufficiently defines the relevance and materiality standard, a further application would only lead to more costly and complicated proceedings.

IV. Even if the Tribunal Determines the IBA RoE were Applicable, the Evidence Should be Restricted under Art. 9.2 (a) IBA RoE

23 Even if the Tribunal determines the IBA RoE to be applicable, the evidence should be restricted under Art. 9.2 (a) IBA RoE.

While it is customary that during the early stages of the proceedings arbitrators are more likely to take a more liberal approach to admitting evidence, the Tribunal is nevertheless empowered to restrict use of certain documents when they are deemed to be irrelevant and immaterial to the case [*cf. Art. 9.2 (a) IBA RoE*]. Hence, RESPONDENT would like to request that said action will be taken in light of the lacking relevance of any documents from the other arbitration.

CLAIMANT only could have gained the alleged information by bribing hackers or witnesses from the other arbitration which had signed a confidentiality agreement.

B. There is a Valid Basis for this Tribunal to Exercise its Discretion to Refuse Admission of the Documents

24 CLAIMANT has stated that the Tribunal has the discretion to decide whether evidence is admissible or not under Art. 22.3 HKIAC 2018 [*CM, para. 6*]. Contrary to CLAIMANT's suggestions, the Tribunal is not bound to the IBA RoE since the Parties have not agreed to their application. Therefore, there is no *prima facie* standard CLAIMANT is referring to [*CM, para. 6*] and the Tribunal should exclude the evidence submitted by CLAIMANT.

25 Further CLAIMANT is under a statutory confidentiality obligation and therefore not allowed to submit the documents as evidence (**I**). Also there are serious indications that CLAIMANT has been involved into the illegal actions to get access to the PIA from the MA (**II**).

I. CLAIMANT is under a Statutory Confidentiality Obligation

26 Contrary to CLAIMANT's statement [*CM, para. 8*], CLAIMANT is under a statutory confidentiality obligation. Therefore, CLAIMANT is not allowed to disclose the award from the MA in the present arbitration. Confidentiality is one of the core values in arbitration [*Redfern/Hunter, 2.165; ICSID Arbitration Rules, r. 48(4)*; *Paulsson*].

27 Contrary to CLAIMANT's suggestions, the Mediterranean law is not applicable [*CM, para. 9*]. DCL is applicable, which is a largely verbatim adoption of the PICC [*PO 2, para. 45*]. Art. 2.1.16 PICC states that there can be a duty of confidentiality even if there is no express confidentiality obligation. This is the case where it would be a violation of the principle of good faith and fair dealing to disclose such information. CLAIMANT wants to obtain the PIA against consideration in order to use it in the proceedings through payment of a high amount of money to a company with a doubtful reputation [*PO 2, para. 41*]. The PIA is indeed a document that should be kept confidential and the way CLAIMANT acts is a strong violation of the principle of good faith and fair dealing. Therefore, CLAIMANT should not be allowed to disclose the PIA in the present arbitration.

28 Even if Mediterranean Arbitration Law, which is a verbatim adoption of the ML [*PO 2, para. 14*], were applicable, the drafters of the ML envisaged that the standard of confidentiality should be governed by the arbitration rules and not by the ML itself [*Born, Int. Comm. Arb., p. 2785*; *Report of the Secretary-General*], which are in this case the HKIAC 2018 Rules. Art. 45.1 HKIAC 2018 indeed contains a confidentiality provision. Contrary to CLAIMANT's position that this provision does not apply to it, CLAIMANT is prevented from using "fruit of

the poisonous tree" or the illegally obtained PIA on the basis of the principle of good faith. This is also shown in *Libananco v. Turkey* [*Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8*] where the Tribunal stressed in its decision that the parties have an obligation to arbitrate fairly and in good faith. Therefore, the Tribunal excluded an audiotape which was submitted as evidence by Libananco because this party obtained it through a violation of the principle of good faith and fairness.

29 Art. 45.2 HKIAC 2018 states that this provision also applies to the Tribunal itself and the HKIAC in general. This means that the Tribunal, which has the discretion to decide whether evidence is admissible or not under Art 22.3 HKIAC 2018 as stated before, has to decide about the award as evidence. If the Tribunal would come to the conclusion that the evidence is admissible and disclose the PIA in the proceedings, the Tribunal and even the HKIAC itself would breach the confidentiality provision of Art. 45.1 HKIAC 2018. Therefore, the Tribunal and the HKIAC are under the confidentiality obligation and should not admit the confidential documents as evidence. The CLAIMANT's argument regarding the Mediterranean Law is irrelevant here.

30 Contrary to CLAIMANT's suggestions [*CM, para. 11*], CLAIMANT is not allowed to disclose any information relating to the arbitration between RESPONDENT and the third party. Under HKIAC which are the applicable arbitration rules in the present and another proceeding, no party may disclose information relating to an award. Such a provision is included in Art. 45.1 HKIAC 2018 and also in the previous version of the HKIAC Rules [*Art. 42.1 HKIAC 2013*] which were applicable to the MA. Therefore, the award in the arbitration between RESPONDENT and the third party should be kept confidential [*Born, Int. Comm. Arb., p. 2785*]. Parties agree on an arbitration agreement especially because they want to keep their disputes away from the public eye. They want to avoid a public discussion, which is an injury even for the successful party [*Born, Int. Comm. Arb., p. 2792*; *Russel v. Russel*]. This is even more important under the aspect that CLAIMANT is going to obtain the award through doubtful methods. CLAIMANT intends to pay a company with a questionable reputation US$ 1,000 for obtaining the PIA [*PO 2, p. 60, para. 41*] although there is a strong suspicion that the arbitral award was obtained through an illegal hack or a breach of the confidentiality agreement of the two former employees. Therefore, CLAIMANT should not be allowed to disclose such a sensible document.

31 In addition to that it is not the purpose of arbitration to decide a case by relying on previous awards but more to make an individual decision on each case that the parties are able to profit from the non-binding character of earlier awards and the confidentiality of those awards [*Noussia, p. 112*]. The MA and the arbitration between CLAIMANT and RESPONDENT are

not comparable. In the MA the law of Mediterraneo was applicable as they agreed on it in the arbitration agreement. In the present arbitration the parties failed to make such a choice. But because the seat of the arbitration is Danubia, the law of Danubia is applicable and therefore the arbitrations are not comparable. Moreover, the doctrine of estoppel is not relevant in this case. Therefore, CLAIMANT cannot rely on the award of the arbitration between RESPONDENT and the third party because this award shall not have an impact on the decision in the present arbitration.

32 Art. 45.3 (a)(i) HKIAC 2018 and Art. 42.3 (a)(i) HKIAC 2013 only apply to the parties of the arbitration. Since CLAIMANT is not a party to the arbitration between RESPONDENT and the third party Art. 45.3 (a)(i) HKIAC 2018 does not apply to CLAIMANT. Therefore, CLAIMANT shall not disclose information relating to an arbitration under Art. 45.3 (a)(i) HKIAC 2018. Therefore, whether CLAIMANT pursues any legal right bears no meaning in this case.

33 Contrary to CLAIMANT's suggestion [*CM, para. 14*], there is indeed a disclosure of confidential information to persons who had previously no access to this information [*PO 2, p.61, para. 41*]. Especially CLAIMANT itself had no access to this confidential information what actually still should be the case because an award should be treated as confidential due to Art. 45.1 HKIAC 2018. CLAIMANT is going to gain access through the payment of US$ 1,000 to the company that sells these illegally obtained information [*PO 2, para. 41*]. This means that this award should still remain confidential and CLAIMANT should not be allowed to rely on it, even in front of this Tribunal since they are two completely different arbitrators sitting in this arbitration and in the MA. Therefore, the Tribunal would be a third party to the other arbitration, which means that the Tribunal should not admit PIA as the evidence in this arbitration.

II. The Tribunal Should Refuse Admission of the Partial Interim Award as it is Highly Probable that CLAIMANT is Going to Obtain the Award Illegally

34 The Tribunal should take into account that there are strong indications that CLAIMANT is involved into the illegal actions that led to the disclosure of the award. The payment of US$ 1,000 to the shady company that refused to disclose its sources in the case at hand [*PO 2, p. 60, para. 41*], and the illegal hack of RESPONDENT's computer system after this proceedings have commenced [*Letter by Fasttrack, p. 50*] make it highly probable that CLAIMANT violated the principle of good faith or even breached the law in order to obtain the PIA and submit it to the Tribunal. These are indications the Tribunal should take into account and decide that this evidence is indeed inadmissible.

35 As CLAIMANT stated correctly, in the proceedings of the landmark case *Methanex* [*Methanex Corporation v. United States of America, UNCITRAL*] the claimant tried to rely on documents that were unlawfully obtained. The tribunal refused to accept the evidence and stated a general duty of good faith and basic principles of fairness and justice in its decision. In the present case it is clear that the PIA has been obtained through illegal ways. In addition to that, CLAIMANT violated its duty of good faith and fairness by arranging the opportunity to pay US$ 1,000 to a company with a very doubtful reputation [*PO 2, p. 61, para. 41*] which offers the PIA of MA. The payment of US$ 1,000 is a much too high price for a document dealing only with jurisdiction of some tribunal. This indicates that the payment is not only for the providing the copy of PIA but rather includes the fee for some illegal services which the company rendered for CLAIMANT. It is highly probable that CLAIMANT is involved in some doubtful actions in relation to the disclosure and the receipt of the PIA.

ISSUE 2: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWERS TO DECIDE UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

36 The AC is, contrary to CLAIMANT's allegations [*CM, para. 20*], governed by Danubian law and therefore does not confer the Tribunal the jurisdiction to adapt the contract (**A.**). Even if the Tribunal should find that the AC is governed by Mediterranean law, it still does not provide for an interpretation which confers the Tribunal with the powers to adapt the contract (**B.**).

A. The Arbitration Agreement as Interpreted under Danubian Law does not Confer the Tribunal the Jurisdiction to Adapt the Contract Price

37 Under Danubian law, the Tribunal only has the jurisdiction for a contract adaptation by express authorisation by the Parties [*Answ. to Not. o. Arb., p. 31, para. 13*]. The AC in the present case is governed by Danubian law (**I**), but in the matter at hand there is no express authorisation, therefore the Tribunal does not have the jurisdiction to adapt the contract (**II**).

I. Danubian Law Governs the Arbitration Agreement

38 CLAIMANT correctly states that the Parties' choice of law with regard to arbitration agreement should always prevail in arbitration [*CM, para. 22*]. In the AC [*NoA., p. 6*], the Parties have not made an express choice of law. CLAIMANT argues that the law governing FSSA is to be regarded as an implicit choice applicable to the AC, although there is in fact a more suitable solution closer to the AC, the seat and the law of arbitration, following from it.

39 The Parties designated Vindobona, Danubia as their seat of arbitration [*CE 5, p. 14, para. 15*], therefore showing their intent to choose Danubian law as also applicable to the AC (**1**). CLAIMANT also applies the "closest connection" test but fails to see that Danubian law is the law with the closest connection to the AC (**2**).

1. The Parties have Implicitly Chosen Danubian Law to Govern their Arbitration Agreement

40 In the AC there is no **express** reference as to the law governing it. Therefore, the **implicit** choice of the parties should prevail in the question which law is applicable to the AC.

41 Contrary to CLAIMANT's allegations [*CM, para. 22*], this implicit choice is not the law of Mediterraneo, but the law of Danubia, as it is indicated by the choice of seat of the arbitration.

42 In fact, the seat of the arbitration is the only explicit reference to a jurisdiction the Parties made, therefore highly relevant to the evaluation of an implicit choice of law.

43 CLAIMANT fails to see that the law of the merits cannot be considered as an implicit choice, as it is part of a separate contract. In the contract the Parties state that Mediterranean law should be applicable to the FSSA ["This Sales Agreement shall be governed by the law of Mediterraneo", *CE 5, p. 14, para. 12*]. In Danubian Arbitration law, which is the same as the UNCITRAL Model Law with 2006 amendments, Art. 16 (1) provides for the separability of arbitration agreement and main contract, as it is also evidenced in the doctrine of separability, no matter if an arbitration agreement is freestanding or a clause in a contract [*Weigand, para. 1.239*]. It is seen as a procedural contract, separate from the FSSA [PO2, para. 36]. Therefore, Mediterranean Law does not govern the AC.

44 This doctrine of separability leads to the possibility and, in practice likelihood, that in absence of an express choice of law, the law of the seat of the arbitration is subsidiarily applied as an implicit choice of law by NYC Art. V (1) (a) and ECICA Art. VI (2) (b). This is also evidenced in many jurisdictions and arbitral practice, such as the Swedish Arbitration Act of 1999 [*Swedish Arbitration Act of 1999, Art. 48, para.1; Weigand, para. 11.19*] or the Chinese Arbitration Act of 2005, where the lex arbitri is applied if there is no clear choice of law [*Official Interpretation (2006) of the Arbitration Act of 2005; Weigand, para. 4.71; C v D (2007) EWHC 1541*]. Furthermore, this is also done by Singapore Courts [*Weigand, para. 10.30*] and by arbitral tribunals [*Final Award ICC No. 1507*]. Lacking an explicit choice of law, English Courts decided that most likely the law of the seat of arbitration will govern the AC [*C v D (2007) EWCA Civ 1282; XL Insurance v Owens Corning*]. This presumption is also supported by doctrine [*Dicey/Morris/Collins, para. 16-020*].

45 Contrary to CLAIMANT's opinion [*CM, para. 25*] this is not changed by the commercial character of the contract. As shown, the doctrine of separability prevents the law of the merits from being applicable to the AC [*Born, Int. Comm. Arb., p. 583*].

46 As shown above, Danubian law is applicable, therefore its "four corners" rule is pertinent as well, with the consequence that the AC in writing cannot be interpreted according to any extraneous evidence, but only in consideration of the agreement in writing [*PO1, p.52, para. II, third bulletpoint*]. It is applicable when the wording of the agreement is not clear. The AC fulfills all necessary criteria of a valid arbitration agreement set by the NYC, Art. II (1) and V (1) (a) *inter alia* that the agreement is in writing [*Redfern/Hunter, para. 2.11, 2.12*] and hence it can be seen as clear. There is no requirement that an AC shall include a choice of law. Therefore, all arguments made by CLAIMANT concerning the drafting history shall be disregarded.

47 Even if the Tribunal comes to the conclusion that the "four corners" rule is not pertinent in the present case, the drafting history still suggests that Danubian law is governing the AC.

CLAIMANT states that its first negotiator Ms. Napravnik intended to apply Mediterranean law to the AC as she was familiar with it [*CM, para. 26*].

48 First, contrary to this allegation, it does not matter whether CLAIMANT's negotiator was familiar with one law, as she is legally trained, she could study laws different from her home country's. Furthermore, she knew that it was a largely verbatim adoption of the UNCITRAL Model law like the arbitration laws of Mediterraneo and Equatoriana [*PO 2, p. 56, para. 14*] with only a few amendments. It does not matter that Ms. Napravnik would not want to deviate from the jurisprudence that the CISG is applicable to the AC [*CM, p. 12, para. 26*], as the CISG does not regulate arbitration agreements [*Kröll, Selected Problems, (III) (2) (b); CISG-online No. 627; CLOUT Case No. 196; Ferrari, UNCITRAL Digest, at art. 4, 13*]. There is also constant jurisprudence in Danubia that the CISG is not applicable as the AC is a procedural contract and not a sales contract [*PO 2, p. 60, para. 36*].

49 CLAIMANT also alleges that applying the law of the seat would result in creating additional costs and complexities [*CM, para. 26*]. But, if the law applicable to the AC and the law applicable to the arbitral proceedings itself are the same, the arbitration process is more smoothly conducted. Furthermore, CLAIMANT refers to its financial difficulties which would have led to reluctance to incur costs by applying a foreign law. But RESPONDENT only heard rumors about these difficulties, not if they were true [*PO 2, p.58, para. 22*]. RESPONDENT therefore could not rely on them. Additionally, CLAIMANT's financial difficulties do not change an agreement between the Parties.

50 Furthermore, if CLAIMANT states that one negotiator would not want to deviate from its national law, the same would apply to both Ms. Napravnik and Mr. Antley as well. For the Parties to reach a contract in the end, a consensus needs to be reached, therefore it would be logical that this consensus is a neutral law, as Danubian law is.

51 The neutrality of an arbitration is an important standard in light of its international character. The Parties' intent shows, that this neutrality was very important to them, as it establishes equality. Their choice of the seat of arbitration as a neutral framework provides that they opted for the same law governing the AC.

52 This is also supported by the note found of Mr. Antley. He states that the AC should entail *"a neutral venue **and** applicable law [emphasis added]"* [*RE 3, p. 35*], this shows that he intended to discuss both the venue and applicable law with Ms. Napravnik, which resulted to Danubia being the seat of arbitration. It therefore follows that the Parties merely forgot to mention also Danubian law in an express reference in the AC.

53 CLAIMANT states that it would have needed to seek the approval of its creditors if it would subject a contract to a foreign law [*CM, para. 30*]. This is not true, as it would only need

approval in case that the contract was subjected to a non-neutral law [*PO 2, p. 56, para. 14*]. To the contrary, Danubia was regarded as such a neutral country and law with a functioning judicial system.

54 Even if the Tribunal should find that the Parties did not make an implicit choice of law, Danubian law should be **subsidiarily** applied as a default choice of law. This is provided for by NYC Art. V (1) (a), the law of the arbitration agreement should be the same as the law of the country where the award was made [*Born, Law governing AA, p. 825, para. 29*], for an arbitration agreement to be valid. In this case Danubian Law would be applicable to the AC, as the seat of arbitration is Danubia and therefore the award will also be made there. The law of the country which will render the award also has to be applied in all stages of the arbitration proceedings, as applying different laws in different stages of the arbitration will lead to varying results [*Born, Int. Comm. Arb., p. 497, second para*] and validity of an arbitration agreement might be treated differently by courts depending on the stage of the proceedings [*Lew/Mistelis/Kröll, para. 6-32*]. This would contradict the important objective of predictability of the choice-of-law analysis and international arbitration proceedings [*Audit, Droit international privé pp. 91 et seq; Dicey/Morris/Collins, para. 4-034*], as different tribunals will at different stages of the arbitration see the arbitration agreement as valid or invalid. Therefore, many courts [*Swiss Federal Tribunal, Judgement of 21 March 1995, XXII Y.B. Comm. Arb. 800, 804-05; Bevrachting & Overslagbedrijf BV v. Fallimento Cap. Giovanni Coppola Srl*] and authorities [*Lew/Mistelis/Kröll, paras. 6-32, 6-55; McMahon 735, 757; van den Berg, 126-28, 291-95*] have found the choice-of-law criteria in Art. V (1)(a) are applicable to Art. II (1) of NYC, as NYC is supposed to reach as much uniformity as possible [*van den Berg, 286*].

55 The ECICA [*Art. VI (2) (a)*] and the NYC [*Art. V (1) (a)*] select the law of the arbitral seat as a default rule in case the parties did not choose a law to govern their AC, which is applied by courts and commentaries *[Born, Int. Comm. Arb., p. 499; Judgement of 2 October 1931, DFT 57 I 295; Judgement of 24 November 1994, XX Y.B. Comm. Arb. 635, 638; Judgement of 30 May 1994, XX Y.B. Comm. Arb. 745, 747; Citation Infowares Ltd v. Equinox Corp.; Nat'l Thermal Power Corp v. Singer Co.; Craig/ Park/ Paulsson, para. 5.05; van den Berg, 124*]. In the present case this default choice would be the Danubian law.

56 CLAIMANT alleges that the seat of the arbitration was only chosen because of its geographical convenience and for being a suitably neutral venue, plus for the high reputation of the arbitration services there [*CM, para. 30*]. In fact, the Parties did not need to choose the seat of the arbitration in light of its geographical location, as the proceedings do not actually need to take place at the seat of arbitration, but the Parties are free in their decision on where they want to plead. The reputation of Danubian Arbitration is also not important as the Parties chose the

HKIAC for their arbitration services, which is Hong Kong-based. Instead, the seat is chosen because of its forum rules.

57 Contrary to CLAIMANT's position that RESPONDENT indicated its preference for Equatorianian law which is similar to Mediterranean law [*CM, para. 32*], it is to be clarified that RESPONDENT only found Mediterranean law acceptable if Equatorianian courts had jurisdiction [*CE 3, p. 11, bottom para*]. In the final AC the courts of Equatoriana do not have jurisdiction, therefore showing that RESPONDENT would never have agreed to law of Mediterraneo as governing the AC.

58 Contrary to CLAIMANT's opinion [*CM, para. 31*] the substantive law cannot be applied to the AC merely because of the silence concerning the law of the arbitration agreement. In *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* a choice of the law of the seat should be applied as a second option after the express choice of the parties. The High Court considered that in case of an arbitration, the parties' substantive contract is already the matter of a conflict, so there is no natural indication that the parties would want the law of the merits to govern the contract. Instead the parties would prefer a neutral law, the seat of their arbitration, to govern the arbitration agreement [*FirstLink Investments Corp Ltd v GT Payment Pte Ltd (2014)*].

2. Danubian Law is also the law with the Closest Connection to the Arbitration Agreement

59 The choice-of-law rules selecting the law of the state with the closest connection to the arbitration agreement, also called the "closest connection test", in CLAIMANT's opinion [*CM, para. 34*] leads to the law of Mediterraneo being applicable to the AC. But this test provides for great uncertainties and should therefore not be applied because different courts and tribunals might differently weigh various connecting factors regarding the agreement [*Born, Int. Comm. Arb., p. 521; Fouchard/Gaillard/Goldman, pp. 426, 434*]. Moreover, a tribunal has no *lex fori*, providing for the necessary conflict rules [*Lew/Mistelis/Kröll, para. 6-33*] such as the closest connection test.

60 Even if the Tribunal decides to apply the closest connection test, contrary to CLAIMANT's allegations [*CM, para. 34*], Mediterranean Law is still not the law with the closest connection to the AC.

61 The seat of arbitration is the Parties' only express reference in the AC, therefore it is more relevant than mere circumstances of the FSSA *inter alia* the place where Parties have their places of business.

62 The seat of arbitration was also found the closest connection to the AC in case practise [*C v. D (2007) EWCA Civ 1282, pp. 22, 26, 28; Abuja International Hotels Ltd. v Meridien SAS*].

63 CLAIMANT could also not deny the importance of the Parties' explicit choice *"Danubia […] **was chosen** as the seat of the arbitration [emphasis added]"* [*CM, para. 35*]. As CLAIMANT states [*CM, para. 34*] the closest connection test is based on the assumption that the Parties would want the AC governed by the law with the most significant relationship [*Born, Int. Comm. Arb., p. 517*]. Arbitration is always about the Parties' choice; therefore, the explicit choice of the seat delivers the most significant relationship, thus showing Danubian law as the law with the closest connection to the arbitration agreement.

II. Danubian Law does not Confer the Jurisdiction to the Arbitral Tribunal to Adapt the Contract

64 As shown, Danubian law governs the AC, therefore the Arbitral Tribunal needs an express authorisation by the Parties to adapt the contract. The matter at hand is, contrary to CLAIMANT's opinion [*CM, para. 46*], a matter of jurisdiction. *"An arbitral tribunal may only validly resolve those disputes that the parties have agreed that it should resolve"* [*Redfern/Hunter Stud., para. 5.85*]. The Tribunal is only allowed, in the light of party autonomy, to resolve the disputes that are in its jurisdiction, conferred by the Parties.

65 In the present case an express authorisation is lacking, therefore the Tribunal does not have the jurisdiction for a contract adaptation.

B. Even if the Arbitration Agreement were Governed by Mediterranean Law the Arbitral Tribunal would not have Jurisdiction to Adapt the Contract

66 Under the law of Mediterraneo the contract could still not be adapted since (**1**) the "interpretation" in the wording of the AC does not entail adaptation of the contract and (**2**) the hardship clause does not function as an express authorisation for the empowerment of the Tribunal.

I. The Interpretation of "Interpretation" in the Wording of the Arbitration Agreement does not Entail Adaptation of the Contract

67 The contract cannot be adapted since the wording of the AC does not mention any kind of "adaptation" of the contract in clause 15 of the FSSA. The clause specifically defines the scope of the Tribunals powers which entail: *"[resolving disputes concerning] the existence, validity, interpretation, performance [and] breach or termination"* [*CE 5, para. 15*]. This list is final and does not include **adaptation** of the contract, hence there is no general authority granted to the Tribunal.

68 Contrary to CLAIMANT's statement [*CM, para. 38*], Art. 8 CISG is not the relevant provision to the interpretation of the AC, since the CISG is not applicable to procedural contracts like the AC [*Kröll (III) (2) (b)*]. Even if through consistent jurisprudence in Mediterraneo the CISG governs the AC, under Art. 8 (1), the intent of the both Parties always has to be taken into account. CLAIMANT only refers to the witness statement from Ms. Napravnik [*CE 8, p. 17*], which is only CLAIMANT's side, therefore it the intent of the two parties at that time cannot be fully comprehended.

69 While it is true that Mr. Antley at the time of the drafting of the arbitration agreement *"suggest[ed] that he [would] return with a proposal*" [*CM, para. 39*], Ms. Napravnik first *"suggested to clarify that issue and to include an express reference into [..] the arbitration clause"* [*CE 8, p.17*]. But in fact, Ms. Napravnik's opinion was in fact not shared by Mr. Antley who only stated *"that he would come back with a proposal the next morning"* [*CE 8, p.17*], which could have contained an entirely new approach to the subject of negotiations.

II. The Hardship Clause does not Function as an Express Authorisation for the Tribunal

70 Contrary to CLAIMANT's opinion [*CM, para. 40*], the AC and the underlying contract have to be considered separate from each other due to the doctrine of separability [*Weigand, para. 1.239*], as already clarified above. This means that the hardship clause in the FSSA cannot function as an express authorisation as such would need to be directly mentioned in the AC.

71 Mr. Antley left a note with a *"list of **issues** for further **negotiations** [emphasis added]*" [*RE 3, p. 35*]. The only conclusion CLAIMANT should have been able to draw from this informal paper is that the "connection of hardship clause with arbitration clause" – topic was due to its neutral wording still supposed to be subject of further discussion and most likely subject of controversy since Mr. Antley must have had the understanding that the contract and AC are not connected.

72 Further, contrary to CLAIMANT's opinion [*CM, para. 41*], the deviation from the Model HKIAC-Arbitration Clause does relate to an adaptation as a remedy since the exact wording of the clause is the outcome of the Parties' autonomy and done on purpose with the limitation of the Tribunal's authorisation in mind. There is no ground for adaptation in the case of tariffs in the contract, since clause 12 of the contract only entails costs stemming from health and safety requirements [*CE 5, p. 14, para. 12*]. As the wording does not include any reference to adaptation in case of tariffs, the matter has to be regarded as a dispute beyond the contractual bonds, specifically left out in the deviation from the Model HKIAC-Arbitration Clause.

73 After the accident Mr. Krone, who was not involved in the negotiations before, had to replace Mr. Antley for the finalisation of the contract, but nevertheless he **purposefully** drafted the

narrowly worded hardship clause [*RE 3, p. 35*]. While it was unclear what Mr. Antley exactly meant with the note he left, Mr. Krone had to make his own decisions which are now evidenced in the final FSSA and a narrow hardship reference in the force majeure clause [*RE 3, p.35*].

74 Finally, RESPONDENT's position in the other arbitration does not matter contrary to CLAIMANT's belief [*CM, para. 43*], since the documents from the other arbitration shall be kept confidential and therefore cannot be relied upon, as shown above.

ARGUMENTS ON THE SUBSTANTIVE ISSUES

ISSUE 3: CLAIMANT IS NOT ENTITLED TO PAYMENT OF US$ 1,500,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT

75 The Tribunal should not adapt the purchase price and not award CLAIMANT US$ 1,500,000 under Cl. 12 of the FSSA. The increased cost of performance due to the imposed tariffs does not amount to hardship under Cl. 12 of the FSSA and thus does not meet the respective conditions (**A.**). But even if the Tribunal should find that the conditions of Cl. 12 are fulfilled, Cl.12 does not shift the additional cost of performance to RESPONDENT (**B.**).

A. The Increased Cost of Performance due to the Imposed Tariffs does not Amount to Hardship under Clause 12 of the FSSA since the Prerequisites are not met

76 As outlined by CLAIMANT [*CM, para. 51*], Cl. 12 of the FSSA covers cases where *"additional health and safety requirements or comparable unforeseen events making the contract more onerous"* cause hardship. These prerequisites of application for the Cl. 12 of the FSSA are not fulfilled. The increase of customs duties neither is a comparable unforeseen event to additional health and safety requirements (**I.**), nor does it make the contract sufficiently onerous in the sense of a fundamental alteration in order to amount to hardship (**II.**).

I. The Increase of Customs Duties is not a Comparable Unforeseen Event to Additional Health and Safety Requirements

77 The increase of customs duties is not an unforeseen event comparable to additional health and safety requirements. Contrary to CLAIMANT's approach, comparability and unforseeability are separate prerequisites. The imposed tariffs are neither comparable to additional health and safety requirements (**1.**), nor have they been unforeseeable for CLAIMANT (**2.**).

1. Clause 12 Covers Cases of Hardship caused by Additional Health and Safety Requirements or Comparable Events and the Imposed Tariffs are not Comparable to Additional Health and Safety Requirements

78 First, contrary to CLAIMANT's opinion, the prerequisites in Cl. 12 of comparability and unforeseeability must be treated separately. Cl. 12 covers events causing hardship which are comparable to additional health and safety requirements. Thus, "comparable" relates to events, not to the equal standard of unforeseeability. This is also suggested by the negotiations between the Parties, which can be used for interpretation of the contract and 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*]. In the negotiations, CLAIMANT mentioned a case of foot and mouth disease, which led to additional health and safety requirements, increasing the cost of performance [*CE 4, p. 12, para.4*]. Thereby, CLAIMANT itself wanted to refer to such changes in Cl. 12. Thus, the drafting history of Cl. 12 shows the intention of the Parties to refer only to additional health and safety requirements or comparable events to them. Consequently, unforeseeability and comparability to additional health and safety requirements are two different prerequisites of Cl. 12.

79 Secondly, the increase of customs duties is not comparable to additional health and safety requirements. Health and safety requirements relate to the goods themselves. They are meant to ensure a high standard of quality of the imported goods in terms of additional requirements regarding the goods, whereas customs duties in a strict sense are only money related regulations. The imposed tariffs as a trade sanction affect the price of the goods and are meant to restrict imports. Moreover, the imposed tariffs do not even result out of any requirement regarding health and safety restrictions. Instead, they have a political background. The purpose of the tariffs was for the Equatorianian government to retaliate upon the President of Mediterraneo [*NoA, p. 6, para. 9*].

80 Thereby, the imposed tariffs are not comparable to additional health and safety requirements under Cl. 12.

2. The Increase of Customs Duties is a Foreseeable Event

81 As stated above, besides being comparable, the event must be unforeseen in order to amount to hardship in the sense of Cl.12. The imposition of tariffs has been a foreseeable event. Any occurrence of events may be deemed foreseeable when the obligor could be reasonably expected to have taken the impediment into account at the time of the conclusion of the contract. The circumstances surrounding the conclusion of the contract must be considered in concreto [*Azeredo, p. 224*]. For CLAIMANT the political situation was foreseeable.

82 First, the imposition of the Mediterranean tariffs was foreseeable. It was no surprise that the President of Mediterraneo announced 25 percent tariffs on agricultural goods from Equatoriana [*NoA, p. 6, para. 9*]. The President of Mediterraneo was elected prior to the conclusion of the FSSA and was widely known as a protectionist [*CM, para. 56*]. In his election program, the President of Mediterraneo already announced a certain preference for a more protectionist approach to international trade [*CE 6, p.15*]. CLAIMANT could not have been unaware of it since it has its place of business in Mediterraneo. Furthermore, already before the FSSA had been concluded, one of the most ardent critics of free trade who was an outspoken protectionist

for years was appointed as a minister for agriculture, trade and economics in Mediterraneo [*PO 2, p. 58, para. 23*]. CLAIMANT must have foreseen the imposition of import tariffs as a trade sanction, since the "superminister" was advocating to limit access of foreign agricultural products to the Mediterranean market [*PO 2, p. 58, para. 23*].

83 Secondly, the reaction of the Equatorianian government [*NoA, p. 6, para. 10*] was foreseeable. The political situation in Equatoriana concerning free trade was very conspicuous. Already two years before RESPONDENT contacted CLAIMANT the first time in March 2017, the Equatorianian government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease [*NoA, p. 5, para. 5*]. Furthermore, it put a ban on artificial insemination for racehorses [*NoA, p. 5, para. 5*]. RESPONDENT even informed CLAIMANT about the ban and told it that the ban was only exceptionally temporarily lifted [*CE 1, p. 9, para. 1*]. Also, an Equatorianian Government under the Prime Minister from the National Party, which is more critical to free trade, had once already taken retaliatory measures against free trade restrictions imposed by a third state [*NoA, p. 7, para. 19*]. Thereby, CLAIMANT could be reasonably expected to have taken the tariffs from the President of Equatoriana into account, thus they were foreseeable.

84 Thirdly, contrary to CLAIMANT's opinion, it could have foreseen or at least taken into account that the Equatorianian tariffs on agricultural goods would affect the sale of the frozen semen. CLAIMANT is right about frozen semen not being generally considered to be an agricultural good. But in this case, CLAIMANT could not have been unaware of the possible change of the coverage of agricultural goods due to the appointment of the protectionist "superminister" of Mediterraneo. This is because she was *inter alia* appointed the minister of agriculture and for years apparently planning radical changes to the trade system, especially concerning foreign agricultural products [*PO 2, p. 58, para. 23*].

85 The fact that it took CLAIMANT four weeks to find out that frozen semen was affected by the tariffs, does not indicate the unforseeability of their coverage. It was CLAIMANT's responsibility to inform itself about the tariffs, which were already officially announced on 19 December 2017 [*PO 2, p. 58, para. 26*].

86 Furthermore, CLAIMANT as a sophisticated commercial entity interacting with international companies especially in Equatoriana [*CM, para 76; NoA, p. 5, para. 3*] must be aware of the political situation in the country of its contract partners. Also, as CLAIMANT submitted the Peak Business News as its exhibit [*CE 6, p. 15*], it had access to political press. CLAIMANT must have been aware of the political situation and hence of the tariff on animal semen at the time of the conclusion of the FSSA.

87 Thus, the increase of custom duties is not a comparable unforeseen event to additional health and safety requirements. The conditions of Cl. 12 are not met.

II. The Increased Cost of Delivery does not Make the Contract Sufficiently Onerous to Amount to Hardship

88 The increased cost of delivery does not make the contract sufficiently onerous so that it does not amount to hardship.

89 First, referring to what CLAIMANT states [*CM, para. 62*], the commercial basis of the deal was not destroyed. Part of the commercial basis of the deal was, that all risks were allocated to CLAIMANT. CLAIMANT accepted DDP delivery [*CE 4, p.12, para.3*]. DDP delivery shifts all cost to the seller, in this case to CLAIMANT [*Schlechtriem/ Schwenzer*]. Thereby, the risk of additional cost was burdened on CLAIMANT, so that the commercial basis of the deal was not destroyed when the risk materialized. As a global player CLAIMANT should have estimated the profitableness and its own risks. Hence, one cannot conclude that the commercial basis of the deal was destroyed.

90 Secondly, the Parties have not departed from the general understanding of hardship according to which only a fundamental alteration would suffice. CLAIMANT is right about RESPONDENT finding the ICC Hardship Clause 2003 too broad only in the sense of the events covered by it [*CM, para. 66*]. RESPONDENT did not object to the standard of onerousness, which constitutes hardship [*PO 2, p. 56, para. 12*] from the ICC Hardship Clause 2003 suggested by CLAIMANT [*RE 2, p.34, para. 6*]. Contrary to CLAIMANT's opinion, this leads to a general understanding of onerousness for a reasonable person.

91 The general understanding can be derived by the ICC Hardship Clause 2003. It requires that performance has become excessively onerous [*ICC hardship cl. 2003, 2a*].

92 The general understanding of hardship can be also derived by international soft-law instruments, e.g. the PICC as a widely accepted legal source [*Vogenauer, UNIDROIT Grundregeln, ZEuP 2013, 7*]. According to Art. 6.2.2 PICC, hardship occurs where unforeseen events fundamentally alter the equilibrium of the contract.

93 While there is no explicit threshold, in domestic markets an alteration of at least 100 per cent is required [*Brunner, Hardship, p. 431*]. In international markets like in this case a threshold of 150-200 per cent seems advisable [*Schwenzer, Hardship, p. 717*]. Performance must have become excessively onerous, not merely more onerous [*Azeredo, p. 317*]. In this case the imposed tariffs made the delivery for CLAIMANT only 30 per cent more expensive which is clearly lower than the common threshold. Consequently, the imposed tariffs cannot amount to hardship.

94 Even if one would accept to lower the threshold for hardship in cases where the debtor is threatened by its financial ruin as some scholars do [*Brunner, Hardship, p. 432*], in this case it cannot be lowered to such extent. Even if one lowered the general threshold by half, this would not cover an alteration by only 30 per cent like in the present case. Moreover, RESPONDENT was not even aware of the financial difficulties before the negotiations about the price adaptation [*PO 2, p. 58, para. 22*]. Thus, RESPONDENT had no knowledge of how grave those difficulties were and to what extend they limit CLAIMANT's economic performance. Furthermore, the financial difficulties of CLAIMANT were due to its mismanaging for years and not only because of this deal [*PO 2, p. 59, para. 29*]. This cannot attribute to RESPONDENT.

95 Even if the Tribunal should find that the standard of onerousness is a matter of contractual interpretation and that the Parties did not want to derive the meaning of hardship from a general understanding, the tariffs do not amount to hardship. In this case, the term "sufficiently onerous" must be interpreted under Art. 8 CISG. Under Art. 8 (2) CISG a reasonable person would understand "onerous" in the sense that the Parties discussed during negotiations. CLAIMANT itself was talking about a 40 per cent increase of the cost [*CE 4, p.12, para.4*]. Thereby, a reasonable person would understand "onerous" as an increase of at least 40 percent. In this case the cost only increased by 30 percent which is lower and thus does not make the FSSA sufficiently onerous. Moreover, the Mediterranean law, which was chosen to govern the contract besides the CISG [*CE 5, p. 14, para. 14*] requires a fundamental alteration of the contract equilibrium in Art. 6.2.2.

96 Finally, in opposition to CLAIMANT's opinion, the increase of cost in this case is not 600 per cent but only 30 per cent. It relates to the extra costs CLAIMANT must bear and not to its effect to the profit margin.

97 Thereby, the increased cost of delivery does not make the contract sufficiently onerous so that it does not amount to hardship.

B. In any Case Clause 12 does not Provide for the Price Adaptation Sought by Claimant

98 In any case Cl. 12 does not provide for the price adaptation sought by CLAIMANT. This is the case, because firstly, RESPONDENT did not assume the risk of the imposed tariffs (**I.**) and secondly, because the legal consequence of Cl. 12 in case of hardship is not price adaptation (**II.**).

I. Respondent did not Assume the Risk of the Imposed Tariffs

99 Contrary to CLAIMANT's opinion, hardship is not to be denied and RESPONDENT did not assume the risk of events causing hardship. CLAIMANT accepted DDP delivery [*CE 4, p. 12,*

para. 3] which shifts all cost to CLAIMANT [*see supra, para. 89*]. Even if, CLAIMANT did not want to bear the extensive risk obligation, RESPONDENT did not accept a full relief from all risks. The Parties rather concentrated on the inclusion of a hardship clause with predefined cases, in which the specific risks are managed. This leads to a restricted interpretation of Cl. 12. Contrary to CLAIMANT's opinion, the hardship clause does not allocate the risk of events constituting hardship to RESPONDENT. CLAIMANT is right nonetheless, that Clause 9 and 10 of the FSSA allocate the named risk to RESPONDENT [*CE 5, p. 14*]. Still, CLAIMANT wrongly interprets Cl. 12. In contrast to Clause 9 and 10 where the *"Buyer is responsible"*, the wording in Cl. 12 states that the "*Seller shall not be responsible*".

100 Hence, in comparison to prior clauses, Cl. 12 does not shift responsibility to RESPONDENT.

101 Contrary to CLAIMANT's opinion, it did not assure that RESPONDENT would bear the bulk of additional costs. Ms. Napravnik only talked to Mr. Shoemaker, who clarified right away that he had no permission to authorize any additional payment [*CE 8, p. 18*]. To the contrary, he stated *"I was not a lawyer and had not been involved in the negotiations of the contract. (...) I never committed to any adaptation of the price and would also not have had the required authority to do so.*" [*RE 4, p. 36 para. 4*].

102 Ms. Napravnik unsophisticatedly interpreted his request to forward the question to his management in her favor and did not question it any after. Of course, Mr. Shoemaker replied politely, delivering a diplomatic, forwarding answer like any prudent employee would do. The fact that Ms. Napravnik did not pursue to enquire her demand to the legal department, but rushed to authorize the last delivery, is negligent [*CE 8, p. 18*]. She even states that she acted merely on an "impression" that RESPONDENT accepted the additional financial burden [*CE 8, p. 18*]. RESPONDENT had no chance to state its position in this manner.

103 From this point of view, it is to presume that the reasonable person of the same kind, which is lead on by CLAIMANT for the most time of its argumentation [*CM, paras. 80-82*], would do quite the opposite. Contrary to CLAIMANT's actions, the reasonable person would assure that no uncertain legal situation arose in order to protect the contracting parties from further cost, including costs of arbitration, securing the recently launched long-term relationship.

104 Thus, CLAIMANT's position is not justified, as well as the statement that RESPONDENT would have knowingly agreed upon Ms. Napravniks' request and therefore assumed the risk.

II. The Legal Consequences of Cl. 12 in Case of Hardship do not Include Price Adaptation

105 Cl. 12 does neither expressly nor impliedly provide for adaptation of the price. The wording of Cl. 12 does not indicate for a specific remedy. Hence, there is no expressly stated remedy in the

FSSA. This is recognized by CLAIMANT as well [*CM, para. 76*]. Contrary to CLAIMANT's opinion, Cl. 12 does neither provide for price adaptation impliedly.

106 Firstly, CLAIMANT tests Art. 8 (1) CISG to its subjective conditions, that a contractual clause is to be interpreted by its drafter's intent and if the other party knew or could not have been aware of that intent. In the negotiations RESPONDENT did not assume responsibility for the listed events and CLAIMANT could have been aware of this [*see supra, para. 89*].

107 CLAIMANT is misled too, arguing that Ms. Napravnik is legally trained, especially in Mediterranean law and therefore the remedy "Hardship" under Cl. 12 must be understood in sense of said law. As a well-trained lawyer, Ms. Napravnik will know that a contract under the CISG is governed by and interpreted under the light of the CISG. Including its international conventions, which also counts for its remedies of course. Hence, is not to be understood under Mediterranean law.

108 Contrary to CLAIMANT's opinion, the email exchange between the prior negotiators Ms. Napravnik and Mr. Antley does not provide for the impression of an agreement. This is not comprehensible since the negotiators were exchanged and the afterwards leading negotiators did not decide to include adaptation as a remedy. This cannot be a case of confusion related to the tragic incident since both negotiators of the Parties had access to prior email chains and will have taken the communication into account, if deemed necessary. [*PO 2, p. 55 para 5*].

109 The mail exchange between the prior negotiators is not a resistant argument for an agreement on the remedy of hardship.

110 Furthermore, the communication between the prior negotiators cannot be taken into account, since the following negotiators could not get the essence of what was talked explicitly. Mr. Krone states that he was never complete clear what Mr. Antley meant in his note after one of said talks.

111 Therefore, the communication between the prior negotiators cannot be of relevance to the negotiations for Cl. 12.

112 In conclusion to Art. 8 (1) CISG, CLAIMANT's interpretation of the subjective test under Art. 8 (1) CISG must fail.

113 Secondly, CLAIMANT argues with the reasonable person of the same kind as CLAIMANT according to Art. 8 (2) CISG [*CM, para. 78*]. CLAIMANT fails to understand that the reasonable person of the same kind as the other party in Art. 8 (2) is only applicable to unilateral matters [*Schwenzer Art. 8, para. 19*]. A contract however is a two-sided declaration of intent and therefore the application of Art. 8 (2) CISG is modified. The reasonable person is not to be interpreted in perspective of the other party, but from an average business persons' point of view [*Schwenzer Art. 8, para. 24*].

114 One can come close to this requirement by analysing both views of the Parties. Hence, legitimate doubt is appropriate where CLAIMANT uses Art. 8 (2) incorrectly.

115 CLAIMANT cannot use the interim award in RESPONDENT's MA to indicate any intention of RESPONDENT regarding Cl. 12. According to case practice every case is individual. Also, the current case of the Parties has the particularity that CLAIMANT did come up with the ICC Clause. This invalidates the argument of CLAIMANT, that it thought RESPONDENT intended to use the ICC Clause as done in previous arbitrations [*CM, para. 73*]. At the time of contract conclusion CLAIMANT did not know about the MA. Logically following, it could not influence what CLAIMANT thought of RESPONDENT intents.

116 Though CLAIMANT is right that initially RESPONDENT did not exclude the remedy of adaptation – the responsibility lies within CLAIMANT, when it suggested reliance on the ICC Hardship Clause 2003 [*RE 2, p. 34, para. 6*]. The added examples of different situations leading to hardship bear no relevance to the chosen remedy of the ICC Hardship Clause 2003 as a force majeure clause. CLAIMANT's approach initiated a force majeure clause to which certain risks were added afterwards [*PO2, p. 56 para. 12*]. The legal remedy under the ICC Clause 2003 is termination of the contract [*ICC p. 14*]. RESPONDENT objected only that the ICC Hardship Clause 2003 was too broad in sense of covered events but did not object to the legal circumstances and most certainly not the ensuing remedy of termination [*CM, para 71*]. Hence, Cl. 12 not only was initiated with the remedy of termination, but also by CLAIMANT.

117 To conclude, CLAIMANT cannot consist in argumentation of any kind that price adaptation instead of contract termination is indeed the legal consequence of Cl. 12.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO PAYMENT OF US$ 1,500,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG

118 CLAIMANT has no right to price adaptation resulting out of Art. 79 CISG. The CISG is already not applicable in the present case because the Parties derogated from its provisions (**A**). But even if the Tribunal should find the CISG applicable, the price adaptation sought by CLAIMANT is not justified. Neither do the Equatorianian tariffs constitute hardship under the CISG (**B**), nor does the CISG provide for price adaptation as remedy (**C**). Even though the right to price adaptation is already non-existent, also the claimed amount of US$ 1,500,000 would be unsuitable to restore the contract equilibrium (**D**).

A. The CISG is not Applicable on Hardship Issues Because the Parties Derogated from its Provisions

119 The CISG is not applicable on hardship related issues in the present case because the Parties included a hardship clause into the FSSA [*CE 5, p. 14, para. 12*]. Even if the CISG contained provisions dealing with hardship, they would be displaced by the prevailing individual agreement of the Parties. Insofar, the Parties derogated from the CISG in the sense of Art. 6 CISG.

120 A derogation from CISG provisions does not require an express agreement of the Parties but can also be implicitly agreed on [*Serbian Chamber of Commerce, 28.1.2009, CISG Pace; OLG München, 9.7.1997, CISG-online 282; OGH, 22.10.2001, CISG-online 614; Arbitral Award, ICC Court of International Arbitration Award 11333 of 2002, CISG-Online 1420; Ferrari et al./Saenger, Internationales Vertragsrecht, Art. 6, para. 2; Kröll et al./Mistelis, Art. 6, para. 15; Schlechtriem/Schwenzer/Ferrari, Art. 6 para. 18*]. To determine whether the Parties implicitly agreed to exclude certain provisions, their clear and real intention must be determined by contract interpretation under Art. 8 CISG [*Kröll et al./Mistelis, Art. 6, para. 16; Schlechtriem/Schwenzer/Ferrari Art. 6, para. 18*].

121 Contrary to CLAIMANT's position [*CM, para. 94*], the inclusion of an individually negotiated hardship clause into the FSSA indicates the Parties' intention to displace any default provisions on hardship. Art. 79 CISG, which is considered to be a hardship provision by CLAIMANT would therefore not be applicable. After detailed negotiations, the Parties agreed on a hardship clause they found suitable to distribute the risks associated with hardship fairly. The restriction to certain events giving rise to hardship is a conscious decision of the Parties. This is well evidenced by the negotiation history of Cl. 12, which must be considered for contract interpretation under Art. 8 (3) CISG. RESPONDENT objected to CLAIMANT's initial proposal to use the ICC Hardship Clause 2003 in the FSSA because it was too broad [*PO 2,*

para. 12]. Thereupon, the Parties restricted the scope of the final hardship clause. Their intention was to find an exhaustive regulation of hardship in Cl. 12. Consequently, recourse to potentially wider CISG provisions would contradict the Parties' intentions, so that application of the CISG on issues of hardship is excluded in the present case.

B. In any Case, the Equatorianian Tariffs do not Constitute Hardship under the Art. 79 CISG

122 Even if the Tribunal found the CISG applicable, the Equatorianian Tariffs do not constitute hardship under the CISG. The term "*impediment"* in Art. 79 CISG does not cover cases of hardship (**I.**). But even if the Tribunal should understand the Equatorianian Tariffs as an impediment, they could have been overcome by CLAIMANT (**II.**). Furthermore, the imposition of the tariffs was foreseeable for CLAIMANT (**III.**).

I. The Term "Impediment" in Art. 79 CISG does not Cover Cases of Hardship

123 The term "impediment" does not cover cases of hardship, it only covers cases of force majeure where there is physical hindrance to performance [*Gillette/Walt, UN Convention, pp. 309–315; Aksoy, Impossibility, pp. 108–111; Flambouras*, *Impossibility of Performance, 13 Pace International Law Review 261, 291et seq.].* Contrary to CLAIMANT's approach, interpretation of Art. 79 (1) CISG cannot be done with reference to the general understanding of hardship but must be done autonomously from the CISG itself [*Kröll, et al./Perales Viscasillas, Art. 7, para. 12*].

124 Interpretation of a CISG provision must start with its wording [*Brunner CISG, Art. 7 para. 5*]. Literal interpretation of the term "*impediment*" indicates a restriction to cases of physical hindrance to performance. An impediment is a synonym for obstruction or hindrance and describes a circumstance which makes something more difficult [*Oxford Dict.*]. In contrast to that, in a case of unaffordability performance itself does not become more difficult, only the economic effort increases. Consequently, cases of hardship should not be understood as an "impediment" in the sense of Art. 79 (1) CISG. This interpretation leads to more legal certainty because it allows a clear demarcation of the scope of Art. 79 (1) CISG [*Fischer, p. 197*]

125 For interpretation of the CISG also its diplomatic history must be taken into consideration [*Art. 32 Vienna Conv.*]. As also CLAIMANT states [*CM, para. 90*], the Working Group of UNCITRAL considered but eventually rejected a proposal to include a hardship provision into the CISG [*CISG-AC Op. No. 7, para. 29*]. Even if the working group did not provide any reasons for its decision, the mere fact that a hardship provision was part of the negotiations gives evidence that its non-consideration was a conscious decision of the drafters [*Fischer, p. 196 et seq.*].

126 The same can be said about the Norwegian proposal [*A/Conf.97/C.1/SR.27 at 10*]. As CLAIMANT states, the proposal was rejected to avoid the introduction of the doctrine of "*imprévision*" into the CISG [*CM, para. 90*]. Since the doctrine of "*imprévision*" provides for a hardship excuse and the drafters did not include it shows that they did not want a hardship excuse to be available under the CISG.

127 Finally, the absence of a suitable remedy for a hardship situation in Art. 79 CISG indicates, that it was not intended to govern hardship. As CLAIMANT sets out in detail [*CM, paras. 98 - 102*], exemption from performance does not help the Parties when in a hardship situation. Since the diplomatic history shows that the issue of hardship was considered, there is no room to assume that there is a gap in Art. 79 CISG. Instead, the fact that the drafters did not include a suitable remedy for hardship in Art. 79 CISG emphasizes their decision against including a hardship provision.

128 Consequently, hardship situations are not covered under the term "impediment" in Art. 79 (1) CISG.

II. Even if the Tariffs could be Understood as an "Impediment", it could have been Overcome by CLAIMANT

129 But even if the tariffs could be understood as an "impediment" in the sense of Art. 79 (1) CISG, the price increase of 30 per cent is not sufficient to constitute hardship. Thereby, they would be an impediment which can be expected to be overcome by CLAIMANT so that the conditions of Art 79 (1) would not be fulfilled.

130 CLAIMANT argues, that under the contractual risk distribution in Cl. 12 of the FSSA RESPONDENT shall bear the risk of imposed tariffs [*CM, para. 92*]. Thereby, CLAIMANT ignores that the risk distribution of Cl. 12 is only effective, if its conditions are fulfilled. As the conditions of Cl. 12 are not fulfilled [*see supra, para. 76 et seq.*], it does not distribute any risks in the present situation.

131 Consequently, the question of whether the imposed tariffs constitute hardship must be answered under the CISG. Even among those who support the opinion that hardship is covered under Art. 79 (1) CISG, it is common ground that a strict standard for hardship must be applied [*Kröll et al./Mistelis, Art. 79, para. 81*]. In general, fluctuations of costs are a normal risk of commercial transactions [*Arbitral Award, Bulgarian Ch. Of Comm., CISG-Online 436; Gillette/Walt, UN Convention, pp. 309–313*]. Only if the contract equilibrium is fundamentally altered, and performance becomes excessively onerous, a hardship excuse can be thought of [*Kröll et al../Mistelis, Art. 79, para. 82*]. Case practice tends to be very restrictive in applying the hardship excuse. The *Scafom* case of the Belgian Supreme Court cited by CLAIMANT, in which the court excused the debtor because of hardship [*Scafom*, *CISG-Online No. 1963*],

remained an isolated decision. But even there, performance became 70 per cent more onerous, which is more than doubled the amount of the 30 per cent cost increase caused by the tariffs in the present case. Besides, it cannot be compared to the present case, because the parties were involved in a long-term contract. Thereby, all prospective deliveries were affected by the price increase, while only one instalment is affected in this case. In fact, several courts or tribunals held that even cost increases of more than 100 per cent would not be sufficient to constitute hardship [Arbitral Award CIETAC, CISG-online 1067; Bulgarian Chamber of Commerce and Industry, CISG-online 436; Cour de Cassation, CISG-online 870; OLG Hamburg, CISG-online 261 (300 per cent)]. Scholars suggest a margin of at least 100 per cent [*Brunner CISG, Art. 79, para. 26*] or 150-200 per cent [*Schwenzer, Vict. Well. Law. Rev. p. 717*] as a general rule of thumb.

132 Thereby, the decisive question is, by which amount the cost of performance has increased. Thus, CLAIMANT's calculation, that the increased cost equal six times CLAIMANT's profit margin is irrelevant insofar [*CM, para. 87*]. The imposition of tariffs increased the costs for performance by only 30 per cent. It is thereby far away from reaching the threshold for hardship and constituting a relevant impediment.

133 As pointed out above [*see supra para. 94*], the financial situation of CLAIMANT shall not be considered by the Tribunal to lower the threshold of hardship.

134 In the present case it must also be considered that neither party was experienced in the sale of frozen semen on such a large scale. It was thereby a speculative business to some extent, as both Parties must have been aware of unexpected difficulties associated with the unusual quantity of sold doses. Therefore, it was not possible for CLAIMANT to rely on absolutely immutable cost for performance, so that its profit margin should have been calculated reasonable from the beginning. Contrary to CLAIMANT's position [*CM, para. 65*], its low profit margin does not indicate that only little risk was assumed by CLAIMANT in this case, because such an assumption requires that the profit margin is calculated reasonably.

135 After all, the price increase of only 30 per cent and the specific circumstances of the case lead to the result that the Equatorianian tariffs do not reach the threshold for hardship and could have been overcome by CLAIMANT.

III. The Imposition of the Tariffs was also not Unforeseeable for CLAIMANT

136 The imposition of tariffs was also not unforeseeable for CLAIMANT. As shown above, it was well known before conclusion of the contract, that the newly elected President of Mediterraneo was planning fundamental changes of the free trade system to limit the access to the domestic market for foreign goods. It was therefore not unforeseeable for CLAIMANT that countries

affected by those tariffs – like Equatoriana – would impose tariffs as countermeasure by themselves [*see supra para. 81 et seq.*]

C. The CISG does not Provide for the Remedy of Price Adaptation

137 In any case, the CISG does not provide for the remedy of price adaptation. While also CLAIMANT admits that the CISG settles no legal consequence of hardship [*CM, para. 98*], it considers the absence of a suitable remedy to be an internal gap which could be filled by application of Art. 7 (2) CISG. An internal gap in the sense of Art. 7 (2) CISG requires that a matter is governed but not expressly settled in the CISG. If a matter is not governed by the CISG there is an external gap which leaves the matter to the applicable domestic law. As has been pointed out above, the CISG does not govern hardship so that there is no internal, but an external gap in the sense of Art. 7 (2) CISG. But even if the Tribunal should find that the CISG does govern hardship and there is an internal gap regarding its legal consequences, the remedy of price adaptation can neither be derived by analogy from Art. 50 CISG (**1.**), nor from Art. 6.2.3 PICC (**2.**). Finally, even if the Tribunal found Art. 6.2.3 PICC or the Mediterranean contract law applicable, a price adaptation would not be reasonable in the present case (**3.**).

I. A Right to Price Adaptation Cannot be Derived by Analogy from Art. 50 CISG

138 The right to price adaptation cannot be derived by analogy from Art. 50 CISG. If there is an internal gap in the CISG, Art. 7 (2) CISG allows to fill it in conformity with the general principles on which the CISG is based. CLAIMANT argues that the remedy of price reduction after the delivery of non-conforming goods in Art. 50 CISG embodies a general concept of price adaptation in the CISG.

139 It is already questionable if the authors cited by CLAIMANT actually support its view. *Schlechtriem* came up with the idea to use Art. 50 CISG to develop a rule for price adaptation while exchanging ideas with other scholars during a workshop on CISG topics. It cannot be seen as his definitive position on this question as *Schlechtriem* himself stated that his idea was of speculative nature, due to the context of the workshop [*Flechtner*, *Transcript of Workshop*].

140 With a view to the conception of the CISG and the intention of its drafters, one cannot derive a general principle of price adaptation from Art. 50 CISG. In the diplomatic history of Art. 50 CISG differing concepts of the civil law and common law culture collided. While price adaptation is widely accepted as remedy to balance the contract equilibrium after the delivery of non-conforming goods in civil law countries, the concept of price adaptation is unknown in the common law culture [*Bergsten/Miller*, *Reduction of Price*]. There, the seller is subject to strict liability and the buyer can claim damages instead. Neither concept has been fully implemented into the CISG. Instead there is a "hybrid-solution" which includes the price reduction remedy in Art. 50 CISG, but also strict liability in Art. 74 CISG [*Kröll et al./Mistelis, Art. 50, para. 1*].

It is thereby a compromise between the positions of common-lawyers and civil-lawyers for the special situation of delivery of non-conforming goods. The inclusion of the price reduction remedy in Art. 50 CISG constituted a concession of the common-lawyers to the civil-lawyers [*Kröll et al./Mistelis*, *Art. 50, para. 1*]. Therefore, it cannot be considered a general principle of the CISG, since that would undermine the intention of the drafters from common law countries who only accepted it as part of a compromise.

141 Besides, it is controversial whether Art. 50 CISG is a remedy of price adaptation or just damages set-off against the purchase price [*Bergsten/Miller*, *Reduction of Price, 255, 275*]. As it is unclear if even the remedy of Art. 50 CISG itself is price adaptation, one can even less derive a general principle from it.

142 This is further supported by the different effect of Art. 50 CISG and price adaptation in hardship situations. While the purchase price can be reduced under Art. 50 CISG, it would need to be raised in most situations of hardship to restore the contract equilibrium. Thereby, an additional burden would be imposed on the creditor for which there is no basis in Art. 50 CISG.

143 Consequently, Art. 50 CISG contains no general principle of price adaptation, which would allow the derivation of the remedy of price adaptation for hardship situations.

II. Art. 6.2.3 PICC Cannot be Used for Gap-Filling

144 A right to price adaption can neither be derived from Art. 6.2.3 PICC, because the provisions of the PICC cannot be used to fill gaps in the CISG [*Schlechtriem/Schwenzer/Ferrari, Art. 7 para. 62; Ferrari et al., The Inappropriate Use, p. 97; Fischer, p. 203 et seq.; Rizzi, Riv. dir. priv. 1997, 237, 278 et seq.*]. Therefore, according to Art. 7 (2) CISG, they would need to be general principles on which the CISG is based. However, the PICC are no such general principles of the CISG.

145 First, it is not convincing, to find principles on which the CISG "based" in the PICC, since the PICC were published more than 14 years after the CISG [*Ferrari et al., The Inappropriate Use, p. 100 et seq.*] and were prepared by a different institution (UNIDROIT instead of UNCITRAL). Even if the drafters of the CISG relied on earlier work of the UNCITRAL as CLAIMANT puts forward [*CM, para. 112*], it does not justify referring to the later published PICC. It can only allow referring to the materials available at the time before the CISG was adopted.

146 Secondly, contrary to CLAIMANT's opinion, there is no general "significant degree of similarity" between PICC and CISG which would justify understanding the PICC as general principles of the CISG. The PICC are far more extensive and settle more matters than the CISG, with each new edition of PICC containing more provisions than the previous one [*PICC versions 1994, 2004, 2010*]. In particular, the PICC contain provisions on hardship in Art. 6.2.2

et seq. while the CISG does not. One cannot consider the PICC and the CISG similar, where the PICC contain provisions which have no basis in the CISG itself.

147 Thirdly, it is important to notice that the CISG, due to its international character, requires autonomous interpretation and that this principle also applies to gap-filling by means of general principles [*Ferrari et al., The Inappropriate Use, p. 101.; Bianca/Bonell, Art. 7, para. 2.3*]. Therefore, external soft-law instruments like the PICC must be used restrictive and with caution so that a general use of the PICC for gap-filling would contradict the principle of autonomous interpretation.

148 Finally, one must consider the different status of the PICC and CISG. Contrary to the CISG, the PICC has not the status of domestic law in several countries by formal legislation. Instead, the introduction to the 1994 version of PICC itself declares that the PICC are not of a binding nature. It is therefore dubious to apply provisions of the PICC as general principles to the CISG and thereby as provisions in the rank of binding law, while they were not accepted by the countries who adopted the CISG as domestic law [*Ferrari et al., The Inappropriate Use, p. 101*]. This applies *a fortiori* to the legal consequences of hardship, since it is an issue which caused a broad variety of responses among legal systems [*Ferrari et al., The Inappropriate Use, p.101*]. Since consent on the issue of including a remedy for hardship situation was not reached during the drafting process of CISG [*CISG-AC Op. No. 7, para. 29; Fischer, p. 196 sq.*], it would contradict the intention of the drafters of the CISG to include the remedy of price adaptation through the backdoor of Art. 7 (2) via Art. 6.2.3 PICC.

149 Consequently, Art. 6.2.3 PICC is no general principle on which the CISG is based and cannot be used to complement the CISG via Art. 7 (2) CISG. A remedy of price adaptation in the CISG cannot be derived from it.

III. Even if the Tribunal Should Find Art. 6.2.3 PICC or Art. 6.2.3 of the Mediterranean Contract Law Applicable, a Price Adaptation would not be Reasonable in the Present Case

150 Even if the Tribunal should find Art. 6.2.3 PICC or Art. 6.2.3 of the Mediterranean contract law (MCL) applicable, it should not adapt the purchase price because it would not be reasonable in the present case. According to Art. 6.2.3 (4b) PICC or MCL a Tribunal may only adapt a contract, if it is reasonable. Contrary to RESPONDENT's position [*CM, para. 111*], the Tribunal must not decide between terminating and adaptation of the contract but may also – if found reasonable – confirm the terms of the contract as they stand [*Official Cmt. on PICC, Art. 6.2.3, para. 7*]. Therefore, the fact that termination might be an empty remedy does not indicate that an adaptation would be reasonable instead.

151 Adaptation of the FSSA by the Tribunal would not be reasonable. Even though the Parties included a hardship clause into the FSSA, they did not make the remedy of price adaptation available to the aggrieved party [*see supra para. 105 et seq.*]. This decision of the Parties against interference of a third party into the contractual relationship should be observed by the Tribunal on the basis of the principle of autonomy of the parties in Art. 6 CISG. It would therefore be unreasonable to adapt the contract despite the contrary intentions of the Parties at the time of contract conclusion.

152 With regard to the statements of Mr. Shoemaker, RESPONDENT regrets if there were any misunderstandings. Though, RESPONDENT must remark that Mr. Shoemaker made clear at all times that his statements should not be relied on since he was not authorized to make a binding decision [*CE 8, p. 18*] and was not a lawyer. Mr. Shoemaker had – as also CLAIMANT knew – not been involved in the negotiations as he started working for RESPONDENT after the conclusion of the FSSA [*RE 4, p. 36*]

153 Consequently, even if Art. 6.2.3 PICC or MCL was applicable, the Tribunal should not adapt the price, because it would be unreasonable. Instead, it should confirm the terms of the FSSA as they stand.

D. Even if CLAIMANT had a Right to Price Adaptation, an Increase by US$ 1,500,000 would not be Justified

154 Even if CLAIMANT had a right to price adaptation, an increase by US$ 1,500,000 would not be justified. As also CLAIMANT states, any price adaptation must have the aim to restore the equilibrium of the contract by distributing the loss fairly between the Parties [*CM. para. 113*]. However, CLAIMANT wants to shift the full burden of costs to RESPONDENT. CLAIMANT ignores, that the contractual risk allocation of Cl. 12 is not effective, since the imposed tariffs are not within its scope of Cl. 12. Since normal price fluctuations are part of the normal risk of a commercial transaction, RESPONDENT would only have to bear the part of the costs which would cause undue hardship for CLAIMANT. As long as CLAIMANT makes profit there cannot be hardship. Thus, at least the costs up to CLAIMANT's profit margin of US$ 250,000 must be borne by CLAIMANT. The amount on which the price adaptation might be based on, would be less than US$ 1,250,000, since the price adaptation shall not necessarily reflect the whole loss according to Art. 6.2.3 MCL [*Official Cmt. on PICC, Art. 6.2.3, para. 7*]. If this amount would be distributed equally between the Parties, the price adaptation could burden not more than US$ 625,000 on RESPONDENT. At the same time, the Tribunal would have to observe that CLAIMANT must originally bear the risk of price fluctuations, which would make leaving the majority of costs on CLAIMANT's side reasonable.

REQUEST FOR RELIEF

In light of the submissions made above, RESPONDENT respectfully requests the Tribunal

I. To dismiss the claim brought forward by CLAIMANT as inadmissible for a lack of jurisdiction and powers;

II. To find that CLAIMANT is not entitled to submit evidence from the other arbitration proceedings;

III. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT.

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons 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, 24 January 2019

Jule Herbst

Max Beucker

Sina Neumann

Lennard Wieduwild

Jannis Knaack

Johann Potthast