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2018/19 • VIENNA

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# UNIVERSITY OF VIENNA



## MEMORANDUM FOR CLAIMANT

*on behalf of*  
**Phar Lap Allevamento**  
CLAIMANT

*against*  
**Black Beauty Equestrian**  
RESPONDENT

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§, §§	Paragraph, paragraphs
%	Per cent
ANoA	Answer to the Notice of Arbitration
AP	Audiencia Provincial (Provincial Court)
Art.	Article
BGH	Bundesgerichtshof (Supreme Court Germany)
C. App.	Court of Appeal
cf.	Confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
DCL	Danubian Contract Law
DDP	Delivery duty paid
e.g.	Exempli gratia; for example (Latin)
Exh.	Exhibit
Gh	Gerechthof's (Regional Court)
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts (2015)
HKIAC-Rules	Rules of the Hong Kong International Arbitration Centre (2018)
IBA-Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ibid	Ibidem; in the same place (Latin)
ICC.	International Chamber of Commerce
Ltd.	Limited
MCA	Milan Chamber of Arbitration



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Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
No.	Number, numbers
NoA	Notice of Arbitration
NYC	New York Convention (1958)
OLG	Oberlandesgericht (Court of Appeals)
p., pp.	Page, pages
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
PO1	Procedural Order No 1
PO2	Procedural Order No 2
Rb	Rechtbank (District Court)
RFCCI	Chamber of Commerce and Industry of the Russian Federation
seq.	And that which follows
seqq.	And those which follow
The Rules	The Rules for the 26th Vis Moot
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
U.S.C.A.	United States Court of Appeals
USD	US Dollar
U.S.S.C.	Supreme Court of the United States
v.	Versus; against (Latin)
VIAC	Vienna International Arbitral Center



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## STATEMENT OF FACTS

Phar Lap Allevamento (“CLAIMANT”) and Black Beauty Equestrian (“RESPONDENT”) are the parties involved in this arbitration (“the Parties”). CLAIMANT is located in Mediterraneo and operates the country’s oldest and most renowned stud farm. It is famous for its excellent racehorses, especially Nijinsky III, one of the most successful of its kind. RESPONDENT, located in Equatoriana, operates a horse stable famous for its jumpers and international dressage horses and seeks to build up a racehorse breeding programme.

On **21 March 2017** RESPONDENT approached CLAIMANT and asked it to provide an offer for 100 artificial insemination doses of Nijinsky III.

CLAIMANT was hesitant about providing such a large quantity, but nevertheless submitted an offer on **24 March 2017** mainly due to its dire financial situation. The offer provided for delivery EXW (ICC Incoterms 2010) Mediterraneo, a choice-of-law in favour of Mediterranean law and a forum selection clause in favour of Mediterranean courts. Also, CLAIMANT clarified that RESPONDENT must not resell the acquired semen.

RESPONDENT largely accepted the offer on **28 March 2017** but insisted on delivery DDP (ICC Incoterms 2010) Equatoriana due to CLAIMANT’s greater experience in transportation and the delivery’s urgency. Moreover, RESPONDENT accepted the choice of the law of Mediterraneo under the condition that any other forum than the courts of Mediterraneo has jurisdiction and suggested the courts of Equatoriana. On **31 March 2017** CLAIMANT agreed to shipment DDP Equatoriana but made explicitly clear it was not willing to take over any risks associated with changes in customs regulations or import restrictions. For this purpose, CLAIMANT insisted on including a hardship clause. Concerning jurisdiction, CLAIMANT clearly rejected dispute resolution before the courts of Equatoriana but suggested to opt for arbitration in Mediterraneo.

RESPONDENT suggested an arbitration clause on **10 April 2017** providing for arbitration under the rules of the Hong Kong International Arbitration Centre with the seat of arbitration in Equatoriana and Equatorianian law governing the arbitration clause.

In its reply on **11 April 2017** CLAIMANT accepted the institutional rules suggested by RESPONDENT but objected to its suggestion of Equatoriana as seat of arbitration and as the law governing the arbitration clause. Instead, CLAIMANT emphasised again that Mediterranean law shall govern the contract and suggested that the seat of arbitration shall be Danubia as a neutral country.



CLAIMANT and RESPONDENT met in Vindobona on **12 April 2017** to discuss the final terms. They discussed that the contract should provide for adaptation by the arbitral tribunal (“**Tribunal**”) in case the Parties failed to agree on an amendment.

The final contract (“**Sales Agreement**”) was concluded on **6 May 2017**. CLAIMANT agreed to sell 100 doses of Nijinsky III’s semen for the price of 5,000,000 USD for the first two shipments and 5,000,000 USD for the last one. As agreed in the negotiations, the Parties included a hardship clause and an explicit choice for the law of Mediterraneo including the United Nations Convention on Contracts for the International Sale of Goods (“**CISG**”) into the contract. They also incorporated the arbitration clause as suggested by CLAIMANT on **11 April 2017**, providing for a neutral seat of arbitration in Danubia, while also adding the language of the proceeding and the number of arbitrators.

To everybody’s surprise, Equatoriana announced the imposition of 30% import tariffs on agricultural products on **19 December 2017** as a retaliatory measure to 25% import tariffs imposed by the Mediterranean government.

CLAIMANT was informed that the shipment was affected by the tariffs of Equatoriana only when applying for customs clearance on **19 January 2018**. It immediately notified RESPONDENT, stating that a solution needs to be found before CLAIMANT can initiate the last shipment.

On **21 January 2018** RESPONDENT reassured CLAIMANT that a solution regarding the tariffs would be found and strongly urged to issue the shipment. Relying on RESPONDENT’s reassurance, CLAIMANT issued the last shipment.

On **2 February 2018** CLAIMANT found out that RESPONDENT had resold 15 insemination doses of Nijinsky III’s semen in breach of the resale prohibition.

During a meeting to renegotiate on **12 February 2018** CLAIMANT made RESPONDENT aware of its critical financial situation. When confronted with the breach of the resale prohibition, RESPONDENT angrily broke off negotiations and the business relationship.

On **31 July 2018** CLAIMANT submitted the Notice of Arbitration to the Hong Kong International Arbitration Centre based on the arbitration clause of the Sales Agreement.

In **October 2018** CLAIMANT received reliable information that RESPONDENT is involved in a highly comparable proceeding where it requests price adaptation due to the imposition of tariffs by Mediterraneo.



## SUMMARY OF ARGUMENTS

### **I. The Tribunal has jurisdiction to adapt the Sales Agreement**

The Parties expressly subjected the arbitration clause to the law of Mediterraneo by choosing it as the applicable law to the Sales Agreement. Applying the law of the underlying contract is also in line with international practice. Interpretation pursuant to Art. 8 CISG shows that the Sales Agreement provides the Tribunal with jurisdiction to adapt the contract. Denying the Tribunal's power to adapt would lead to the unreasonable result of split jurisdiction.

### **II. CLAIMANT is entitled to submit evidence from the other arbitration**

The Tribunal is obliged to determine the truth and must therefore consider RESPONDENT's contradictory behaviour in the other proceeding because it is relevant and material to the present case as required by Art. 22(3) HKIAC-Rules. Neither the modalities the evidence was obtained by nor confidentiality considerations impede the admissibility of the evidence.

### **III. CLAIMANT is entitled to payment of 1,250,000 USD under Clause 12 of the Sales Agreement**

Clause 12 of the Sales Agreement contains a hardship clause which covers the tariffs imposed by Equatoriana and provides for price adaptation. Since RESPONDENT refused to renegotiate a new price, the Tribunal has to increase the price by 1,250,000 USD to cover CLAIMANT's expenses for the last instalment.

### **IV. In the alternative, CLAIMANT is entitled to payment of 1,250,000 USD under the CISG**

The CISG covers hardship and allows for adaptation of the contract. The respective requirements are met as the unforeseeable tariffs caused CLAIMANT substantial hardship. Due to the circumstances of the case, the hardship threshold is very low and certainly exceeded by CLAIMANT's cost increase of 200%. Since renegotiations have failed, the Tribunal should restore the contract's equilibrium by increasing the price by 1,250,000 USD.



## I. The Tribunal has jurisdiction to adapt the Sales Agreement

1 The Tribunal has jurisdiction to adapt the Sales Agreement under the arbitration clause contained in Clause 15 of the Sales Agreement [*Exh. C5, p. 14 § 15*]. The Parties chose the 2018 HKIAC Administered Arbitration Rules (“HKIAC-Rules”) to be applicable [*PO1, p. 52*]. According to Art. 19(1) HKIAC-Rules, the Tribunal has the authority to rule on its own jurisdiction including the scope of the arbitration clause. This reflects the generally recognised principle of competence-competence [*Fouchard et al., § 416; Born, p. 1051; ICC Award 6515/1994; ICC Award 1526/1974*].

2 The applicable law to the interpretation of the arbitration clause is the law of Mediterraneo (A.). Following the rules of the law of Mediterraneo, CLAIMANT and RESPONDENT empowered the Tribunal to adapt the Sales Agreement (B.). In any event, even if the law of Danubia would be held applicable, the Tribunal has jurisdiction to adapt the Sales Agreement (C.).

### A. The arbitration clause has to be interpreted under the law of Mediterraneo

3 Following the rules of the *lex arbitri* (1.) the Parties subjected the arbitration clause to the law of Mediterraneo. This has to be concluded by looking at the wording of the contract (2.a.) and is confirmed by the Parties’ negotiations (2.b.). In contrast, applying the law of the seat of arbitration would be inappropriate (2.c). Generally, applying the law of the underlying contract to the arbitration clause is also in line with international practice (3.). Over and above, the Tribunal should favour the law of Mediterraneo because it best enables it to hear the case (4.).

#### 1. The law applicable to the arbitration clause must be determined by the conflict of laws rules of the *lex arbitri*

4 In the course of determining the law applicable to the interpretation of the arbitration clause, the Tribunal is requested to apply the conflict of laws rule contained in the *lex arbitri* [*cf. Schwarz, § 8/125; Lew et al., § 6-55*]. The *lex arbitri* is determined by the seat of arbitration [*Redfern/Hunter, § 3.37; Ferrario, p. 85; ICC Award 5294/1988; ICC Award 5029/1986*] which is Danubia [*Exh. C5, p. 14 § 15*]. Accordingly, Art. 34(2)(a)(i) Model Law – which was adopted by Danubia [*PO1, p. 53 § 4*] – stipulates that “*an arbitral award may be set aside [...] if the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State*” [emphasis added]. Even though this provision addresses the annulment of awards, such provisions are nevertheless traditionally seen as conflict of laws rules and are used to determine the law applicable to the arbitration clause [*Lew et al., § 6-55; cf. Born p. 526*]. This approach is also upheld regarding the



almost identical provision of Art. V(1)(a) NYC [*Koller*, § 3/57; *Mankowski*, § 6.28; *Wilske/Fox*, Art. V(1)(a) § 111; *C. App. Genoa*, 3 February 1990]. Therefore, it follows from Art. 34 (2)(a)(i) Model Law that the law applicable to the arbitration clause is primarily determined by the Parties' will [*cf. Wilske/Fox*, Art. V(1)(a) § 113].

## 2. The Parties subjected the arbitration clause to the law of Mediterraneo

### a. Interpretation of the Sales Agreement shows that the law of Mediterraneo governs the arbitration clause

5 In accordance with Art. 34(2)(a)(i) Model Law, the Parties have expressly subjected the arbitration clause to the law of Mediterraneo by choosing this law in Clause 14 [*Exh. C5*, p. 14 § 14] to govern the Sales Agreement. This must be concluded when analysing the wording and the structure of the contract: The arbitration clause and Clause 14 are part of one and the same contract. Clause 14 subjects “[t]his *Sales Agreement*” [*ibid.*, *emphasis added*] to the law of Mediterraneo. This is necessarily also an express choice for the arbitration clause since the arbitration clause embedded in Clause 15 of the Sales Agreement is an integral part of this very Sales Agreement [*Arsonia v. Cruz City*, § 22]. This is also supported by the wording of Clause 15 itself, as it explicitly submits “*any dispute arising out of this contract*” to arbitration and hereby refers back only to this very Sales Agreement [*Exh. C5*, p. 14 § 15, *emphasis added*].

### b. The negotiations confirm the Parties' intent to subject the arbitration clause to the law of Mediterraneo

6 The Parties never agreed on a separate choice-of-law for the arbitration clause. Instead, CLAIMANT emphasised that the law of Mediterraneo shall govern the whole contract.

7 RESPONDENT's first draft of the arbitration clause provided for Equatoriana as seat of arbitration and Equatorianian law as the law of the arbitration clause [*Exh. R1*, p. 33]. In its answer, CLAIMANT clearly rejected the choice of a law other than the law of Mediterraneo [*Exh. R2*, p. 34]. Furthermore, CLAIMANT stated that submitting contracts to a foreign law requires its creditors' committee's approval [*ibid.*].

8 Also, the inclusion of a separate choice in the initial draft by RESPONDENT shows that both Parties were aware of the possibility to choose a separate law for the arbitration clause. As CLAIMANT subsequently excluded it [*cf. Exh. R2*, p. 34], it cannot be assumed that the Parties chose the law only for the main contract and wanted the law for the arbitration clause to remain unregulated [*Koller*, § 3/61].

9 These statements and conduct confirm that RESPONDENT knew of CLAIMANT's intent to have the whole contract governed by the law of Mediterraneo and did not object to it. Therefore, it was the Parties' will [cf. Art. 34(2)(a)(i) Model Law] to subject the arbitration clause to the law of Mediterraneo.

**c. Deeming the law of the seat of arbitration applicable would be inappropriate**

10 In any case, the Tribunal should not apply the law of the seat of arbitration to the interpretation of the arbitration clause as in the underlying dispute this would be arbitrary.

11 By choosing a seat of arbitration, parties regularly do not intend to choose the substantive law of that place but rather seek to find a compromise on a neutral venue [cf. *Redfern/Hunter*, § 3.206; *Lew et al.*, § 4-48; *Ferrario p. 135 seq.*; *Lew I*, p. 180; *ICC Award 3540/1980*]. This was precisely the case in the underlying dispute: after extensive negotiations on whether the dispute resolution forum should be Mediterraneo or Equatoriana [Exh. C3 p. 11; Exh. C4, p. 12; Exh. R1, p. 33], CLAIMANT suggested as a compromise to agree on arbitration in Danubia as a neutral place [Exh. R2, p. 34; PO2, p. 57 § 14].

12 As this is the only reason the Parties chose Danubia as seat of arbitration, it is clear that the Parties did not intend to choose Danubian law as the law applicable to the arbitration clause and thus applying it would be completely unfounded.

**3. A general choice-of-law extends to arbitration clauses**

13 As a general rule, in the absence of a separate choice for a specific law in the arbitration clause, it must be assumed that the Parties' choice-of-law for their substantive agreement also constitutes an agreement on the law governing the arbitration clause [see *Redfern/Hunter*, § 3.12; *Lew et al.*, § 6-58; *Nazzini*, p. 688-689; *Derains*, p. 16; *Dicey et al.*, § 16.017; *Lew II*, p. 143].

14 Accordingly, arbitral tribunals as well as the majority of courts follow this approach [e.g. *BMO v. BMP*, § 35-43; *Klößner Pentaplast v. Advance Technology*, § 7-8; *Tonicstar v. American Home Assurance*, § 11; *M/S Indtel Tech v. W.S. Atkins Rail*, § 24; *Inheritance Case*; *ICC Award 2626/1977*; *ICC Award 6840/1991*]. One leading decision accurately states that "[...] parties entering into a contract [...] are likely to intend that the whole of their relationship, including the agreement to arbitrate, is to be governed by the same system of law" [*Sulamérica v. Enesa*, § 15].

15 This also remains unaffected by the doctrine of separability [*Koller*, § 3/61; *Glick/Venkatesan*, p. 137], according to which the substantive agreement and the related arbitration clause are separate agreements and not necessarily governed by the same laws [*Craig et al.*, p. 72; *Trittmann/Hanefeld*, p. 83; cf. *BGH*, 28 November 1963]. The purpose of the doctrine of separability is to give effect to the parties' intention that their arbitration clause remains effective even if the substantive agreement shall be void or

terminated [cf. Art. 16(1) Model Law; Lew et al., § 6-10; Born, p. 401; Glick/Venkatesan, p. 136; Miles/Goh, p. 388; BCY v. BCZ, § 60]. Thus, separability does not isolate the arbitration agreement from the substantive contract for all purposes [Sulamérica v. Enesa, § 26; cf. Redfern/Hunter, p. 159; Derains, p. 16]. For the purpose of the formation of the contract and the Parties' choice-of-law, the agreements have to be assessed jointly [cf. Glick/Venkatesan, p. 137]. After all, irrespective of the procedural purpose of the arbitration clause, it remains a contract [Fouchard et al., § 424; BGH, 30 January 1957]. The question of contract interpretation remains a contractual issue and therefore a substantive matter to which the law of the underlying contract is suitable [Schwenzer/Jaeger, p. 319] and, to cite one authority, "the law of the seat of arbitration [...] hardly has any entitlement to apply" [Fouchard, p. 604].

#### 4. The Tribunal should choose the law that best enables it to hear the case

16 In order to be endowed with the broadest possible competence to achieve the most efficient dispute resolution possible, the Tribunal should clearly favour the application of the law of Mediterraneo. This is due to the fact that the law of Mediterraneo allows a wide interpretation of contracts and does not contain any idiosyncratic conditions which could impede the jurisdiction of the Tribunal [cf. Born, p. 476]. Accordingly, arbitrators seek to uphold the arbitration agreement if possible, and therefore choose the law that gives them jurisdiction to decide the case [cf. Lew II, p. 140]. This stems from the parties' genuine commercial interest to have their disputes resolved by arbitration as one single efficient dispute resolution mechanism [Born, p. 542; cf. Pearson, p. 125; Berger I, p. 312 seq.; Sulamérica v. Enesa; ICC Award 6162/1990; ICC Second Interim Award 4145/1987]. Following this, it is highly contradictory to first opt for arbitration and to subsequently object to the Tribunal's jurisdiction, as RESPONDENT does.

17 Furthermore, RESPONDENT relying on the doctrine of separability to argue the applicability of a law that puts the Tribunal's jurisdiction in question [ANoA, p. 31 § 14] completely contradicts the doctrine's very purpose, which is, as mentioned above (see § 15), to uphold the effectiveness of the arbitration agreement.

Concluding part (A.), the Parties expressly chose Mediterranean law to govern the arbitration clause which is in line with well-established and prevailing authority.

#### B. The Parties conferred the power to adapt the Sales Agreement on the Tribunal

18 After having established that the law of Mediterraneo is applicable to the interpretation of the arbitration clause, it will be illustrated that the Tribunal has the power to adapt the contract by interpreting the Sales Agreement (1.). This is also in line with the applicable *lex arbitri* (2.). Over and above, the denial of the Tribunal's power to adapt would lead to unreasonable and inequitable results (3.).



### 1. Interpretation of the Sales Agreement shows that the Tribunal has the power to adapt the contract

- 19 In general, contract adaptation is an issue which can be referred to arbitration and therefore arbitral tribunals can be empowered to adapt contracts [*Beisteiner*, p. 105; *Berger II*, p. 17, *Brunner I*, p. 493; *Schlosser*, p. 23 § 29]. In this regard, the Tribunal is empowered to adapt the Sales Agreement if the Parties authorised it to do so [*Berger III*, p. 8; *Fouchard et al.*, § 41; *Frick*, p. 196]. In this dispute, the Parties indeed conferred the power to adapt the contract on the Tribunal. This is confirmed by interpreting the arbitration clause under the interpretation rules of the CISG. The CISG is applicable because it forms part of Mediterranean law [*PO1*, p. 53 § 4] which was chosen by the Parties to apply to the arbitration clause (see §§ 3 seqq.).
- 20 Pursuant to Art. 8 CISG, contract provisions ought to be interpreted according to the common intention of the Parties [*Schmidt-Kessel*, Art. 8 § 22; *Saenger*, Art. 8 § 2; *Huber/Alastair*, p. 12]. The common intention must be established by a separate analysis of the parties' statements [*Schmidt-Kessel*, Art. 8 § 4]. The primary starting-point to evaluate the meaning is the wording of the contract [*cf. Schmidt-Kessel*, Art. 8 § 13; *Schwenzer et al.*, § 26.16]. Art. 8(1) CISG stipulates that statements made by a party are to be interpreted according to its "subjective intent" [*Zeller*, p. 91; *Ferrari*, p. 177] which the other party knew or could not have been unaware of. Furthermore, Art. 8(2) CISG provides that the hypothetical understanding of a reasonable third person of the same kind as the other party in the same circumstances has to be taken into account when interpreting statements and other conduct of a party [*Schmidt-Kessel*, Art. 8 § 20; *Farnsworth*, Art. 8 § 2.4; *Magnus I*, Art. 8 § 17; *Melis*, Art. 8 § 9; *Magnesium Case*; *Marble Case*]. In determining the subjective and objective intent of the parties, Art. 8(3) CISG stipulates that all relevant circumstances such as subsequent conduct and particularly the negotiations which led to the conclusion of the Sales Agreement are to be considered [*Art. 8(3) CISG*; *Schmidt-Kessel*, Art. 8 § 20; *Zuppi*, Art. 8 § 25].
- 21 Furthermore, in sales agreements which are governed by the CISG, the latter also applies to the interpretation of the arbitration clause contained in such a contract [*cf. Schmidt-Kessel*, Art. 8 § 5; *Born*, p. 505; *Schmidt-Ahrendts*, § 1.2; *Perales Viscasillas/Ramos Muñoz*, p. 71; *Teguflex Case* § 2.5; *Tissue Machine Case* § 22; *Generators Case*; *Chateau v. Sabaté*]. Accordingly, the jurisprudence in Mediterraneo also follows this approach [*cf. PO1*, p. 53 § 4].
- 22 Following the rules of the CISG, the Tribunal's power to adapt the Sales Agreement is revealed through a systematic interpretation of the Sales Agreement (a.)(b.) and confirmed by the common intent

evidenced in the negotiations (c.). Moreover, the Parties authorised the Tribunal to adapt the contract by choosing a substantive law which provides for adaptation (d.).

**a. A dispute concerning the adaptation of the Sales Agreement constitutes a dispute arising out of the contract**

23 The question whether the Parties have authorised the Tribunal to adapt the Sales Agreement is answered by interpreting the scope of the arbitration clause [*Beisteiner*, p. 108; *Berger II*, p. 5; *Frick*, p. 197; *Kröll I*, p. 11; cf. *National Thermal Power v. Singer*, § 28]. As stated above, primarily the wording of the arbitration clause must be interpreted (see § 20).

24 The arbitration clause reads:

“Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be [...] finally resolved by arbitration [...]”  
[*Exh. C5*, p. 14 § 15].

25 In this regard, the legal notion of “dispute” generally means “a conflict or controversy” [*Black’s Law Dictionary*] which cannot be solved by mutual agreement [*Ferrario*, p. 146]. Since the Parties cannot agree on the issue of price adaptation, the conflict between the Parties concerning the adaptation of a contract in light of supervening events is naturally encompassed by this definition [*Ferrario*, p. 146; *Beisteiner*, p. 106; cf. *Brunner I*, p. 496].

26 Furthermore, from the wording of the arbitration clause and from the interpretation principle according to which the contract needs to be interpreted as a whole [*Schmidt-Kessel*, Art. 8 § 30; *Nabati*, p. 254; *RFCCI Award 95/2004*, § 3.3.3], it follows that price adaptation is a dispute specifically “**arising out of this contract**” [*Exh. C5*, p. 14 § 15, *emphasis added*]. This is firstly because the dispute between the Parties concerns the price which forms a core element of the contract [cf. *Schroeter I*, Art 14 § 3]. Secondly, the Parties in Clause 12 of the Sales Agreement included a hardship clause [*Exh. C5*, p. 14 § 12], which, as illustrated below, foresees contract adaptation as remedy (see § 145). Hence, by systematically looking at the connection between the arbitration clause and the hardship clause, it must be concluded that the adaptation of the price constitutes a dispute arising out of this contract. This is also how a reasonable person would understand the Sales Agreement [cf. *Art. 8(2) CISG*].

27 Over and above, if a contract comprises an arbitration clause which foresees that “[a]ny disputes arising out of this contract” [*Exh. C5*, p. 14 § 15] should be solved by arbitration, the arbitration clause must be interpreted broadly as to encompass all disputes between the Parties in connection with this contract [cf. *Born*, p. 1346; *Lew et al.*, § 7.66; *Welser/Molitoris*, p. 24 seq.; *Loan Agreement Case*]. Accordingly,



this approach is upheld by Mediterranean courts [*NoA*, p. 7 § 15 seq.; *PO2*, p. 60 § 39]. Despite the tendency in former common law decisions to interpret such clauses narrowly, this stance was lastly also forthrightly confirmed in a decision by the English Court of Appeal [*Fiona Trust Case*, § 17].

**b. The Parties empowered the Tribunal to adapt the contract as they included a hardship clause in the Sales Agreement**

28 Interpreting the Sales Agreement as a whole, one does not only conclude that contract adaptation is a dispute arising out of the contract but one further must infer that the Parties conferred the power to adapt on the Tribunal.

29 Regarding this, arbitration clauses must be interpreted as part of the particular contract in which they appear [*Ferrario*, p. 146; cf. *Measuring Instruments Case*] and therefore the arbitration clause may comprise the relevant authorisation even if this is not written out word-for-word [cf. *Beisteiner*, p. 110; cf. *ICC Award 5754/1988*]. This is regularly the case if the contract contains an adaptation clause [*Beisteiner*, p. 110; *Ferrario*, p. 168; *Fouchard et al.*, § 41; *Cohen*, p. 90]. As has been outlined above (see § 26) the Parties inserted a hardship clause which provides for adaptation [*Exh. C5*, p. 14 § 12]. Viewing the arbitration clause in combination with the hardship clause and in order to give effect to the latter the Tribunal therefore must also have the power to adapt the Sales Agreement [cf. *Quintette Case*].

30 Hence, it follows from a systematic interpretation of the Sales Agreement that the Tribunal is authorised to adapt the Sales Agreement.

**c. The negotiations confirm the Parties' intent to confer the power to adapt the Sales Agreement on the Tribunal**

31 Furthermore, examining the negotiations between the Parties it becomes even clearer that the Parties agreed to refer the power to adapt the Sales Agreement to the Tribunal. In this respect, as has already been outlined above (see § 20), the negotiations have to be taken into account in order to establish the Parties' common intent [cf. *Art. 8(3) CISG*].

32 At the meeting in Vindobona on 12 April 2017 CLAIMANT, represented by Ms. Napravnik, emphasised its intent to incorporate an adaptation mechanism into the Sales Agreement [*Exh. C8*, p. 17]. RESPONDENT's representative Mr. Antley agreed, replying that it should be the task of the arbitrators to adapt the Sales Agreement if the Parties could not find a solution [*ibid.*]. CLAIMANT consented to this suggestion [*Exh. C8*, p. 17]. Therefore, the Parties expressed their common intent to grant the Tribunal the power to adapt the Sales Agreement [cf. *Schmidt-Kessel*, Art. 8 § 11; *Zuppi*, Art. 8 § 16] and thus reached an agreement. This is corroborated by the fact that after that meeting in Vindobona,

RESPONDENT's representative indicated in his negotiation file that the "*connection of hardship clause with arbitration clause*" needed to be finished [Exh. R3, p. 35]. Knowing the context in which this statement was written, it must be concluded that Mr. Antley wrote it down as a reminder to draft an arbitration clause which would be connected to the hardship clause and thus would clarify that the Tribunal has the power to adapt the Sales Agreement. Considering these negotiations, any reasonable person [cf. Art. 8(2) CISG] would also come to the conclusion that the Parties agreed to empower the Tribunal to adapt the contract.

- 33 The Parties' intent did not change after the principal negotiators had to be replaced after the accident. Mr. Krone, who took over the negotiations for RESPONDENT, himself admits that he tried to finalise the Sales Agreement "taking into account as much as possible the content of the note" [Exh. R3, p. 35] and furthermore used the information available in the previously exchanged mails [PO2, p. 55 § 6]. Over and above, he even himself admits that the Parties have reached an agreement as to the transfer of powers to the Tribunal by stating that in hindsight he should have objected to such a conferral [Exh. R3, p. 35]. For all these reasons, RESPONDENT's intent expressed by its principal negotiator must be upheld.
- 34 As a result, the negotiations between the Parties confirm that the Parties authorised the Tribunal to adapt the Sales Agreement.

**d. The Parties empowered the Tribunal to adapt the contract by choosing a substantive law that provides for adaptation**

- 35 The fact that the Parties conferred the power to adapt on the Tribunal does not only follow from the interpretation of the arbitration clause itself. It is further derived from the law applicable to the substance of the dispute which was chosen by the Parties [Beisteiner, p. 111; Briner, p. 371; Berger III, p. 9; Schlosser, p. 543 § 744; cf. Kröll II, p. 245].
- 36 In Clause 14 of the Sales Agreement, the Parties agreed that the law applicable to the Sales Agreement is the law of Mediterraneo including the CISG [Exh. C5, p. 14]. Both the law of Mediterraneo as well as the CISG comprise provisions which provide for contract adaptation. Firstly, Art. 6.2.3 PICC – which is the contract law of Mediterraneo [PO1, p. 53 § 4] – explicitly stipulates that courts can adapt the contract in case of hardship [cf. McKendrick, Art. 6.2.3 § 7]. Secondly, Art. 50 CISG undisputedly foresees a contract adjustment mechanism in the form of price reduction [Müller-Chen, Art. 50 § 1; Schlechtriem/Schroeter, § 495; Karollus I, p. 157] and furthermore as shown below, allows for contract adaptation under Art. 79 CISG (see § 112). Accordingly, the expectation of every reasonable party is that the instruments which the selected law provides for are enforceable in their chosen dispute resolution



forum [*cf. Beisteiner, p. 111*]. Therefore, by choosing a law which foresees contract adjustment mechanisms the Parties intention must naturally be understood as also empowering the Tribunal to adapt the contract, because otherwise the provisions would remain unenforceable.

37 Consequently it follows from the Parties substantive choice-of-law that the Tribunal's competence extends to the revision of the contract.

## 2. The applicable *lex arbitri* does not prohibit the conferral of the power to adapt

38 The Tribunal is also authorised to adapt the Sales Agreement under the applicable *lex arbitri*. The *lex arbitri* is the law governing the arbitration proceeding [*Redfern/Hunter, § 3.42; Schwarz, § 8/126; ICC award 5294/1988*] and is determined by the seat of arbitration (*see § 4*). It is generally to be considered in order to verify that no mandatory rules prohibit the conferral of certain powers by the parties [*Redfern/Hunter, § 5.14; Brunner I, p. 493; Schlosser, § 744*].

39 Regarding this, under Danubian law it is generally allowed to empower an arbitral tribunal to adapt a contract [*ANoA, p. 31 § 13; cf. PO2, p. 60 § 36; PO2, p. 61 § 45*]. For this, an express authorisation of the Tribunal is required [*PO2, p. 60 § 36; PO2, p. 61 § 45*]. In this context, the authorisation required by Art. 28(3) Model Law – which is the Danubian arbitration law [*PO1, p. 53 § 4*] – does not have to be written down word-for-word in order to be express [*cf. Heiss/Loacker, § 9/173; Girsberger/Voser, p. 362; Liberty Canada v. QBE Europe*] but must rather be assessed pursuant to the Parties' clear, discernible will [*cf. Heiss/Loacker, § 9/173*]. As has been explained above (*see §§ 19 seqq.*), the conferral of powers is clearly carried by the will of the Parties. This has been set forth expressly enough in the Sales Agreement by including both a hardship clause (*see §§ 23 seqq.*) and furthermore agreeing on Mediterranean law and the CISG as applicable law which expressly provide for adaptation (*see §§ 35 seqq.*).

40 In any event, the Danubian courts' jurisprudence, according to which Art. 28(3) Model Law constitutes a general standard and thus an express conferral of the power to adapt is required [*PO2, p. 60 § 36*], is not relevant here. Art. 28(3) Model Law refers to *ex aequo et bono* decision making and requires an express authorisation in order to protect unwary parties from surprise decisions [*A/CN.9/264, p. 63; Beisteiner p. 116; Holtzmann/Neuhaus, p. 770; Binder, p. 185*]. In this dispute, however, it does not come as a surprise to the Parties that the Tribunal adapted the Sales Agreement, since it is carried by their will – expressed in multiple ways – which should prevail over any possible restrictions [*cf. Frick, p. 194; Ferrario p. 168*].

### 3. The denial of the Tribunal's power to adapt would lead to unreasonable and inequitable results

41 Denying the Tribunal's competence would lead to the intolerable situation of a split jurisdiction. The interpretation of whether a hardship situation exists falls indisputably under the jurisdiction of the Tribunal [*Exh. C5, p. 14, § 15*]. If the Tribunal is now denied the jurisdiction to adapt, the subsequent adaptation would then, however, have to be done by a national court. Additionally, it could potentially lead to a denial of justice if both the national court and the tribunal assess the limits of its jurisdiction differently [*cf. Landolt, § 2-027*].

42 Hence, in the absence of an express statement to the contrary, it would be intolerable to assume that the Parties wanted to have a split jurisdiction [*Lew et al. p. 153 § 7.67; cf. Sutton et al., § 2-070*]. In this respect, also the House of Lords decided in favour of one-stop adjudication, the principle according to which the Parties have presumably agreed to one dispute resolution forum [*cf. Sutton et al., § 2-070; Veeder/Stanley, § 3-008; Landolt, § 2-027; Harbour Assurance Case, § 62*]. It held that an arbitration clause must be interpreted in light of the rational commercial purpose that businessmen strive to achieve by including it into their contract [*Premium Nafta v. Fili Shipping, § 5 seq.; cf. Illmer, p. 314*]. This purpose is to refer all disputes arising out of the relationship to be decided by one tribunal. The clause, therefore, should be construed in accordance with that assumption unless the Parties expressly exclude certain issues from the arbitrator's jurisdiction [*Premium Nafta v. Fili Shipping, § 13; cf. also Zhongji Case, § 59; BGH, 27 February 1970*]. Therefore, the arbitration clause should generally be interpreted in an expansive manner and in doubt be extended to comprise disputed claims [*Born, 1326; cf. Frick p. 197; cf. Mitsubishi Motors v. Soler Chrysler-Plymouth; PRM Energy Sys. v. Primeenergy LLC; Measuring Instruments Case*].

43 Concluding part (B.), the interpretation of the Sales Agreement shows that the Parties authorised the Tribunal to adapt the contract. This is also in line with the *lex arbitri*. The denial of the Tribunals competence would lead to the unacceptable situation of a split jurisdiction.

#### C. Even if Danubian law should be applicable the Tribunal can still adapt the Sales Agreement

44 Alternatively, even if Danubian law is to be applied to the interpretation of the arbitration clause, the Tribunal is still authorised to adapt the Sales Agreement.

45 Art. 4.3 DCL entails the "four corners rule" according to which extraneous evidence for interpreting the contract is excluded [*PO1, p. 52 § 2; PO2, p. 61 § 45*]. Even if the Tribunal chooses to apply this rule strictly, it has been explained above (see §§ 19 seqq.), that also by solely interpreting the arbitration clause (see §§ 23 seqq.) and the choice-of-law of the Parties (see §§ 35 seqq.) within the four corners of



the written contract, one necessarily concludes that it was the Parties' common intent to authorise the Tribunal to adapt the Sales Agreement.

46 Furthermore, the Parties' negotiations (see §§ 31 seqq.) can and should be taken into account when interpreting the Sales Agreement. This is because Art. 4.3 DCL has the same effects as a merger clause under Art. 2.1.17 PICC [PO2, p. 61 § 45]. Accordingly, statements made prior to the conclusion of the Sales Agreement may very well be used to interpret its writing in order to eliminate any ambiguities with respect to its meaning [van Houtte, p. 559; cf. Besson/Dupeyron p. 128 § 52; MCA Award; Scotia Homes v. McLean; Westvilla v. Dow]. Thus, the Tribunal shall in case of applying Danubian law also consider the negotiations as they confirm the Tribunals authorisation to adapt the contract.

47 In conclusion, the Parties chose the law of Mediterraneo to apply to the arbitration clause. Following the interpretation of the Sales Agreement under the law of Mediterraneo, CLAIMANT and RESPONDENT empowered the Tribunal to adapt the Sales Agreement. This is also in line with the *lex arbitri*. In any case, denying the Tribunal's power to adapt would lead to unreasonable and inequitable results. Even if the law of Danubia would be held applicable, the Tribunal has jurisdiction to adapt the Sales Agreement.

## II. CLAIMANT is entitled to submit evidence from the other arbitration

48 The Tribunal is requested to deem the evidence from the other arbitration admissible. Pursuant to Art. 22 HKIAC-Rules, the Tribunal has the power to determine the admissibility of the evidence brought forward by the Parties. Supplementary, the IBA-Rules on the Taking of Evidence in International Arbitration ("IBA-Rules") should be used by the Tribunal as a general guideline. They are universally recognised as best practice in international arbitration [Redfern/Hunter, p. 381; Welser/De Berti, p. 80; El Ahdab/Bouchenaki, p. 90; Helmer, p. 60; Marghitola, p. 33; Schumacher, § 20; Demeyere, p. 249] and constitute a fair balance between both civil and common law tradition [Helmer, p. 51; cf. Preamble IBA-Rules].

49 In this context, evidence from the other arbitration which shows RESPONDENT's contradictory behavior must be considered by the Tribunal in the present case.

50 Firstly, the Tribunal's obligation to determine the truth prevails over RESPONDENT's interest to deem the evidence inadmissible because the evidence is necessary to prove that RESPONDENT is in bad faith rejecting contract adaptation (A.). Moreover, deeming the evidence inadmissible violates CLAIMANT's fundamental procedural rights (B.). Furthermore, neither confidentiality (C) nor the way the



information was obtained (D.) can be a ground for rejecting the evidence (D.). Either way, RESPONDENT would be obliged to disclose the information in course of document production anyway (E.).

**A. The Tribunal’s obligation to consider RESPONDENT’s contradictory behaviour prevails over RESPONDENT’s interest not to disclose information from the other proceeding**

51 Overall, the Tribunal’s obligation is to render a final award which is enforceable and based on true facts [cf. *Redfern/Hunter*, p. 549; cf. *VIAC Case*]. When deciding on admissibility of evidence, arbitrators – regardless of their legal background – are pursuing the truth [cf. *El Ahdab/Bouchenaki*, p. 88]: They focus on establishing the necessary facts to render an award and are reluctant to be limited by technical rules of evidence that might prevent them from achieving their obligation to establish the truth [Redfern/Hunter, p. 377; Saleh, p. 156]. Since the evidence CLAIMANT seeks to submit is relevant and material to the case (1.), this obligation prevails over any possible interest on RESPONDENT’s side (2.).

**1. The evidence shows RESPONDENT’s bad faith and is therefore relevant and material to the case**

52 The Tribunal has to consider evidence that is relevant to the case and material to its outcome. This is reflected in Art. 22(3) HKIAC-Rules and in line with Art. 9(2) IBA-Rules. A document is “*relevant*” if the information put forward supports a claim of the submitting party [O’Malley, § 3.69]. The requirement of “*materiality*” is fulfilled when the information will affect the Tribunal’s decision on the merits of the case [O’Malley, § 9.13 seqq.]. The information CLAIMANT seeks to submit clearly fulfils both requirements:

53 RESPONDENT acts in bad faith denying CLAIMANT’s claim for contract adaptation in the present proceeding while itself demanding contract adaptation in a highly similar proceeding where contract adaptation is to its advantage.

54 The obligation to act in good faith constitutes a general principle in international arbitration [Fouchard *et al.*, § 1479; Henriques, p. 526; Veeder, p. 124] and is enshrined in the applicable substantive laws, i.e. the PICC and the CISG [Exh. C5, p. 14, § 14]. Art. 1.7 PICC requires parties to act in accordance with good faith and fair dealing in international trade and the notion of good faith in Art. 7(1) CISG applies to the parties’ conduct in contractual relationships [Ferrari, Art. 7 § 26; Magnus I, Art. 7 § 29; Perales Viscasillas II, Art. 7 § 27 seq.; Beer Case]. Therefore, the Tribunal has to take the good faith obligation into account when deciding the case [Magnus I, Art. 7 § 24; Bonell, Art. 7 § 2.4.1; OLG Hamburg, 5 October 1998].

55 The obligation to act in good faith prohibits contradictory behaviour [Magnus I, Art. 7 § 24; cf. *Surface Protective Film Case*]. The contradictory nature of RESPONDENT’s behavior results from the fact that this

proceeding and the other proceeding are highly comparable: Firstly, both issues are rooted in the same cause since RESPONDENT's claims in the other proceeding are also based on the unexpected imposition of tariffs on agricultural products [PO2, p. 60 § 39]. Secondly, the contracts which the claims are based on are similar: Both have a choice of law clause in favour of the law of Mediterraneo [PO2, p. 60 § 39; p. 14 § 14], both contain a hardship clause and both provide for delivery DDP [PO2, p. 60 § 39; Exh. C5, p. 14 § 8].

56 The contradiction becomes even clearer when looking at the respective hardship clauses in detail: The contract of the other arbitration includes the ICC Hardship Clause 2003 [PO2, p. 60 § 39], which only provides for a right to renegotiate if performance of the contract becomes “*excessively onerous*” for the disadvantaged party [cf. *ICC Hardship Clause*]. Clause 12 of the Parties' Sales Agreement provides for hardship already when the contract becomes “*more onerous*” [Exh. C5, p. 14 § 12]. Consequently, the hardship clause in the present proceeding is broader than the clause RESPONDENT is relying on in the other proceeding. Furthermore, in the other case, the tariffs RESPONDENT is affected by amount to 25% while the tariffs imposed on CLAIMANT in the context of the present proceeding amount to 30% [Letter by Langweiler, p. 50].

57 Accordingly, RESPONDENT acts highly contradictory and therefore in bad faith when requesting contract adaptation in the other arbitration under an even **narrower hardship clause**, when it is affected by even **lower tariffs**. This behavior is particularly reprehensible, considering that RESPONDENT is represented by the same counsel in both proceedings [PO2, p. 60 § 38].

58 This conduct severely undermines the credibility and veracity of RESPONDENT's submissions in the present proceeding and will therefore affect the deliberations of the Tribunal on the merits. Hence, the information is relevant and material to the outcome of the case.

## 2. RESPONDENT has no legitimate interest impeding the admissibility of the evidence

59 Considering that RESPONDENT failed to specify how its interests would be affected if the evidence was held admissible [see Letter by Fasttrack, p. 51], it is difficult to avoid the impression that RESPONDENT's predominant objective is to hide its contradictory conduct in the other proceeding. This can, however, not be a legitimate interest to keep the information that CLAIMANT seeks to submit confidential because arbitrators should only accede to a claim of confidentiality when it is made in good faith [Mosk/Ginsburg, p. 346].

60 A legitimate interest of RESPONDENT would be to prevent disclosure of legally privileged information, such as business secrets or technical information [cf. O'Malley, § 9.83]. These interests can easily be

secured. In the case that the Partial Interim Award rendered in the other proceeding contains such information, the Tribunal can take adequate precautions to allow the relevant and admissible information to be used as evidence in the proceeding while safeguarding information which must for legitimate reasons stay secret [see Art. 9.4 IBA-Rules; Zuberbühler et al., Art. 9 § 50; Pörnbacher/Knief, § 9.20].

61 Concluding part (A.), the evidence from the other proceeding must be considered because it shows  
RESPONDENT's bad faith. It can be deemed admissible without hurting any of RESPONDENT's legitimate  
interests.

**B. CLAIMANT's fundamental procedural rights are harmed if the evidence is not admissible**

62 CLAIMANT's right to be heard would be violated if the arbitral tribunal disregards the relevant and  
material evidence submitted by it, because parties in arbitral proceedings must be permitted to present  
relevant evidence [*Jana et al.*, p. 248; *Eberl*, § 1.19 seq.; *Schwab/Walter*, § 15.9]. Therefore, deeming the  
evidence inadmissible would deprive CLAIMANT of its fundamental procedural rights, namely the right  
to fairness, the right to be heard and the right to present its case [*Born*, p. 152; *Metzler*, p. 242; *O'Malley*,  
§ 9.115; *Reiner*, p. 52], which are also reflected in Art. 13 HKIAC-Rules. A violation of one of these  
fundamental rights would make the award unenforceable under Art. V(1)(b) NYC [*Berger III*, p. 231;  
*Pilkov*, p. 149; *Qingdao v. P & S*; *Iran Aircraft v. Avco*], to which all possible enforcement forums are  
parties to [*The Rules*, § 24].

63 Consequently, based on the Tribunal's obligation to render an enforceable and non-challengeable  
award, the evidence must be deemed admissible.

**C. Confidentiality is no ground for inadmissibility of evidence in the present case**

64 RESPONDENT argues that statutory and contractual confidentiality obligations are violated if the Tribunal  
admits the evidence [*Letter by Fasttrack*, p. 51]. This is false for the following reasons:

65 First, there is no general obligation of confidentiality in international arbitration [*Paulsson/Rawding*,  
p. 303; *Cremades/Cortés*, p. 28]. Second, there are no statutory confidentiality provisions applicable. In  
fact, the Model Law, as the *lex arbitri*, deliberately [*UNCITRAL Report*, p. 90; *Born* p. 2785] leaves the  
issue to the agreement of the parties [*cf. Bulbank Case*]. Third, the confidentiality obligations laid out in  
Art. 42 HKIAC-Rules 2013 **merely bind the parties** and other participants to that proceeding  
[*Crookenden*, p. 609; *Born*, p. 2815]. As CLAIMANT is not a party to the arbitration agreement of the  
other proceeding, he is not bound by the associated confidentiality provision [*Smeureanu*, p. 42; *Esso v.*  
*Plowman*, § 33; *Gotham Holdings v. Health Grades*]. In the same manner, CLAIMANT can not be bound

by any contractual obligations between RESPONDENT and its former employees. After all, third parties can generally not be disbarred from disclosing materials from arbitral proceedings that were provided to them [*Born*, p. 2789]. This fact is well portrayed in one decision of the English High Court. There, the RESPONDENT objected to the evidential admissibility of several documents of a former arbitral proceeding it was party to, including the arbitral award, on the grounds of confidentiality. Justice Webster rejected this, deemed the evidence admissible and accurately stated that “*Arbitrations are [...] private and confidential, but I can find no special privacy or confidentiality in them which entitles parties to them to the protection which [RESPONDENT] seeks to assert*” [*Lehman v. Maclain*].

66 As a result, due to the reasons set out above, confidentiality is not a legal impediment to the admissibility of evidence in the present case.

**D. The evidence is admissible even if the information would have been disclosed through a hack**

67 Even under the assumption that the evidence had been obtained by hacking, the admissibility of the evidence remains unaffected. There is neither a general rule in international arbitration that prevents the admissibility of “*illegally*” obtained evidence [*Sicard-Mirabal/Derains*, p. 208] nor a provision in this regard applicable in the present proceeding.

68 The only reasons under which the Tribunal could reasonably reject the evidence would be that it would impede procedural fairness or would have been obtained by CLAIMANT’s active involvement [*cf. Sicard-Mirabal/Derains*, p. 208]. None of these requirements are met:

69 Firstly, admitting the evidence would **promote rather than impede procedural fairness** because barring CLAIMANT from submitting relevant and material evidence that shows RESPONDENT’s bad faith (see §§ 52-58) would harm CLAIMANT’s fundamental procedural rights (see §§ 62, 63). Secondly, CLAIMANT **has acted in good faith**, as it was neither directly nor indirectly implicated in obtaining the evidence [*cf. Waincymer*, p. 797; *cf. Binnie*, p. 184]. Such lack of involvement had been a decisive reason for admissibility in the past [*cf. Kazakhstan Case; Football case; cf. VIAC-Case*]. In concreto, the evidence was made available either through RESPONDENT’s former employees or through a hack. CLAIMANT only found out about the other arbitration by coincidence from Mr. Velazquez [*PO2*, p. 60 § 40]. Thus, CLAIMANT was not involved in obtaining the information from RESPONDENT and cannot be accused to have acted in bad faith.

70 Consequently, the means by which the Partial Interim Award of the other proceeding left RESPONDENT’s sphere does not impede its admissibility as evidence.



**E. RESPONDENT would be under the obligation to disclose the relevant documents from the second arbitration**

71 CLAIMANT will be in possession of the Partial Interim Award from the second proceeding [*PO2, p. 61 § 41*] and can thus provide the evidence to the Tribunal. However, even if CLAIMANT could not provide the documents, RESPONDENT would be under the obligation to disclose them under the rules of document production as set out in Art. 22(3) HKIAC-Rules and in line with Art. 3.9 of the IBA-Rules.

72 All requirements set out in those provisions are fulfilled: CLAIMANT wants to rely on the Partial Interim Award and RESPONDENT's submission which are specific documents. Thus, the requested documents are **sufficiently identified** as required by Art. 3(3)(a)(i) IBA-Rules [*El Ahdab/Bouchenaki, p. 96*]. Also, the document is undoubtedly in RESPONDENT's "*custody, possession or control*" [Art. 3(7) IBA-Rules; see *Letter by Fasttrack, p. 51*]. As already outlined above (see §§ 55-57) the document shows RESPONDENT's contradictory behaviour and is therefore **relevant** and **material** to the outcome of the case as required by Art. 22(3) HKIAC-Rules [*cf. Zuberbühler et. al, Art. 3 IBA-Rules, § 129 seqq.*]. Lastly, as required by Art. 3(7) IBA-Rules, there is no **legal privilege** or other **legal impediment** attached to the evidence, such as an attorney-client privilege, business secrets or any other legally recognised rights that constitute public policy [*Mosk/Ginsburg, p. 346; cf. Alvarez, p. 665 seqq.*], since – as laid out above (see § 65) – the confidentiality claim can merely be based on contractual obligations CLAIMANT is not bound by.

73 Thus, RESPONDENT would be under the obligation to disclose the Partial Interim Award under Art. 22.3 HKIAC-Rules.

74 In conclusion, the Tribunal must consider the evidence because it is necessary to prove that RESPONDENT is in bad faith rejecting contract adaptation. Declaring the evidence inadmissible would violate CLAIMANT's fundamental procedural rights. Neither confidentiality nor the way the information was obtained by can be a ground for rejecting the evidence. After all, RESPONDENT would have to disclose the documents either way through document production. For all these reasons, the Tribunal should deem the evidence admissible.

**III. CLAIMANT is entitled to payment of 1,250,000 USD under Clause 12 of the Sales Agreement**

75 CLAIMANT's costs to provide RESPONDENT with the frozen semen increased tremendously due to the unexpectedly imposed tariffs. The Parties agreed on a hardship clause in Clause 12 of the Sales Agreement, allowing the price to be adapted in case such tariffs are imposed.



76 Hardship clauses generally have a defined scope and provide a legal remedy in case the scope covers the situation [*Bernardini*, p. 213]. Accordingly, Clause 12 of the Sales Agreement defines both the conditions for its application (“*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*” [*Exh. C4*, p. 14, § 12]) and its consequences on the contractual relationship (“*Seller shall not be responsible*”). Due to the tariffs imposed by Equatoriana, these conditions are fulfilled (A.) The Parties agreed that the contract should be adapted in such cases (B.).

**A. The scope of the hardship term in Clause 12 covers the claim**

77 Clause 12 has to be interpreted under the rules of Art. 8 CISG as it has been chosen as the law governing the Sales Agreement (see § 8383).

78 The imposition of the tariffs is both “*comparable*” to “*additional health and safety requirements*” (1.), “*unforeseen*” (2.) caused “*hardship*” and made the contract “*more onerous*” (3.) for CLAIMANT. The situation at hand is thus an event as provided for by Clause 12. Should the Tribunal find Clause 12 ambiguous, it must be interpreted against RESPONDENT (4.).

**1. The imposed tariffs are “comparable” to “additional health and safety requirements”**

79 Additional health and safety requirements are impositions that are based on acts of public authority [*cf. Brunner I*, p. 264] and result in additional costs. Clause 12 also covers “*comparable events*” and is thus applicable to any acts of public authority affecting the Sales Agreement in a similar way. The tariffs that were imposed in the case at hand are based on acts of public authority and likewise result in additional costs. Both are the consequence of a change of legislation. Thus, the tariffs must be reasonably [*cf. Art. 8(2) CISG*] understood to be “*similar (...) in quality*” [*Cambridge Dictionary*, ‘*comparable*’].

80 Moreover, the negotiations [*cf. Art. 8(3) CISG*] show that the Parties agreed [*cf. Art. 8(1) CISG*] that the current situation in the wording “*comparable*”. During the negotiations, CLAIMANT agreed in an email on 31 March 2017 to delivery DDP only under the condition it would be shielded from certain risks by a hardship clause [*Exh. C4*, p. 12]. RESPONDENT must have reasonably understood CLAIMANT’s intent in the respective email to cover situations such as the current tariffs in the Clause. Moreover, RESPONDENT consented to this suggestion and rendered the Clause applicable to the case at hand [see § 83].

81 In the mentioned email [*Exh. C4*, p. 12], CLAIMANT made clear that it would not accept to take over “*any further risks*” associated with DDP delivery, particularly “*changes in customs regulations or import restrictions*” [*Exh. C4*, p. 12]. The current tariffs are the very definition thereof. To give an example,

CLAIMANT referred to a transaction where it incurred additional costs due to additional health and safety requirements in an earlier horse sale [*ibid.*, PO2, p. 58 § 21]. CLAIMANT did not consent to be financially burdened by “*such changes*” [Exh. C4, p. 12]. RESPONDENT as a “*normally diligent businessman*” [Herber/Czerwenka, Art. 8 § 6] reasonably understood that CLAIMANT only agreed to delivery DDP if *any* changes in import legislation were covered by Clause 12, not merely health and safety issues. The only reason tariffs are not explicitly listed in the Clause is their unexpectedness at the time of contract conclusion [NoA, p. 7 § 19; see § 132].

82 The DDP term was by no means meant to limit the scope of the clause. INCOTERMS 2010, including DDP, do not exclude invocation of hardship clauses [ICC Guide to Incoterms, p. 18]. RESPONDENT itself did not insist on DDP delivery in order to avoid risks of import restrictions but primarily due to “*urgency*” and the logistic “*experience*” of CLAIMANT in delivering frozen semen [Exh. C3, p. 11, § 2; Exh. C8, p. 17-18]. CLAIMANT was even able to offer significantly lower delivery costs than what RESPONDENT itself would have to pay under EXW Mediterraneo [NoA, p. 7, § 18] offered in CLAIMANT’s standard terms [Exh. C2, p. 10]. Hence, RESPONDENT must have reasonably understood CLAIMANT’s email as a suggestion to cover the present tariffs under the Clause.

83 Moreover, RESPONDENT suggested the final wording of Clause 12 explicitly referring to that email [PO2, p. 56, § 12]. This reference was understood by CLAIMANT as RESPONDENT’s consent to cover the aforementioned risks. “*Comparable*” pursuant to Clause 12 consequently covers the tariffs in the case at hand.

## 2. The tariffs were “*unforeseen*” by CLAIMANT

84 Clause 12 requires the event to be “*unforeseen*”, meaning “*not expected*” [cf. Cambridge Dictionary]. Thus, the requirement of the clause is lack of foresight of the party claiming hardship in respect of the event [cf. Fontaine/De Ly, p. 463]. The import tariffs could by no means have been foreseen by CLAIMANT [NoA, p. 6 §§ 9-11, § 19; Exh. C6, p. 15; Exh. C7, p. 16; Exh. C8, p. 17; PO2, p. 58 §§ 23, 25, 26]; the applicability of the tariffs to frozen racehorse semen even less [Exh. C6, p. 15; NoA, p. 6 § 11].

## 3. The tariffs caused “*hardship*” and made the contract “*more onerous*” for CLAIMANT

85 In order to allow for an exemption, the event has to cause “*hardship*” [cf. Exh. C5, p. 14 § 12] and make the contract “*more onerous*” for a party. The usual meaning of “*onerous*” is “*difficult to do or needing a lot of effort*” [Cambridge Dictionary]) is very close to the usual meaning of the word “*hardship*” (“*something that causes difficult or unpleasant conditions of life*” [Cambridge Dictionary]). This is very close to the usual meaning of the word “*hardship*” which is “*something that causes difficult or*

*unpleasant conditions of life*” [Cambridge Dictionary]. Hence, “*more onerous*” defines the threshold of hardship in Clause 12.

86 “[*M*ore onerous” sets a *subjective* criterion of hardship, stressing the individual situation of CLAIMANT [cf. *Fontaine/De Ly*, p. 472]. CLAIMANT has to bear additional 1,500,000 USD not agreed upon in the Sales Agreement [*NoA*, p. 7, § 18]. That this requirement is fulfilled is evidenced by the wording of the Clause [*Art. 8(2) CISG*] and demonstrated by the common intent of both Parties pursuant to Art. 8(1), which can be derived from the negotiations [*Art. 8(3) CISG*].

87 Contractual hardship provisions should be measured against standard hardship provisions [cf. *Brunner I*, p. 515]. The wording “*more onerous*” sets a comparatively lower threshold than standard hardship provisions. Both the ICC and the PICC Hardship Clauses set a higher standard regarding the degree of onerousness required to constitute hardship [cf. *ICC Hardship Clause 2003*, § 1; *PICC 6.2.1*]. The ICC Clause requires circumstances to be “*excessively onerous*” [cf. *ICC Hardship Clause 2003*, § 1]. Furthermore, according to the PICC, a performance that becomes “*more onerous*” does not allow invoking hardship and the parties are “*bound to perform*” [*PICC Art. 6.2.1*]. In this case, all negotiators of the Sales Agreement are law practitioners in countries where the PICC constitutes general statutory contract law [*PO1*, p. 53 § III.4] and must have been acquainted with its hardship provisions. By choosing “*more onerous*” as the hardship threshold, the Parties clearly deviated from such a strict understanding [cf. *Brunner I*, p. 515], covering situations even when statutory provisions might not grant relief.

88 This understanding is confirmed by the negotiations [Art. 8(3) CISG]. When suggesting the inclusion of a hardship clause, Ms. Napravnik referred to CLAIMANT’s earlier transaction with a third party in her email of 31 March 2017 [*Exh. C4*, p. 12]. Due to that experience, CLAIMANT did not want to take over “*any further risks*” of import restrictions that would “*destroy the commercial basis of the deal*” [*ibid.*]. When suggesting the clause, RESPONDENT made reference to this email of CLAIMANT. With this reference, RESPONDENT consented to the conditions suggested by CLAIMANT [cf. *Art. 8(2)*]. Bearing all costs of current tariffs imposed by Equatoria would lead to CLAIMANT making a loss of 1,250,000 USD on the last instalment and 1,000,000 USD on the whole contract. Therefore, the “*commercial basis of the deal*” [*Exh. C4*, p. 12] was destroyed as not even the costs of the last instalment are covered anymore.

89 Furthermore, in exchange for DDP delivery CLAIMANT suggested a price increase of 1,000 USD per dose and the inclusion of a hardship clause [*Exh. C4*, p. 12]. However, RESPONDENT uses CLAIMANT’s unwillingness to take over further risks involved with this change in delivery terms as an argument to lower the price [*ibid.*; *PO 2*, p. 56 § 8]. Hence the Parties ended up with a price increase of only 500 USD.



In light of this fact, it is unreasonable to believe CLAIMANT would have accepted any more risks in exchange for less remuneration.

90 The tariffs are a “*comparable*” event covered by the Clause and, therefore, the wording “*more onerous*” must be interpreted accordingly to cover the situation at hand.

**4. In case the Tribunal finds the hardship wording in Clause 12 ambiguous, it must be construed against RESPONDENT**

91 Ambiguities of a contractual term are to be interpreted against its drafter, according to the construction principle of *contra proferentem* contained in the CISG [CISG AC 13; Schmidt-Kessel, Art. 8 §§ 49-50; Magnus I, Art. 8 § 18; Automobile Case; Cysteine Case]. RESPONDENT supplied the final wording to the concept of hardship underlying the Sales Agreement. Should the Tribunal find any respective wording in Clause 12 to be ambiguous, it should be construed against RESPONDENT [PO2, p. 56 § 12].

92 Concluding part (A.), it must be concluded that Clause 12 covers the tariffs imposed by Equatoriana. The tariffs were an “*unforeseen*” event, “*comparable*” to health and safety requirements and rendering the Sales Agreement “*more onerous*” [Exh. C5, p. 14 § 12] for CLAIMANT.

**B. The Parties agreed on an adaptation mechanism in the Sales Agreement**

93 Clause 12 of the Sales Agreement states that the “*Seller shall not be responsible*” in cases of hardship [Exh. C5, p. 14 § 12]. Not being “*responsible*” means that one is not obliged to pay a sum for which one is liable or to discharge an obligation which one may be under [cf. Black’s Law Dictionary]. Hence, this wording reflects that the Parties did not want CLAIMANT to bear the costs in case of hardship and a reasonable person would understand the Clause the same way. Naturally, this result can only be achieved by adapting the price of the Sales Agreement. This is demonstrated by the Parties negotiations (1.), the general nature of hardship clauses (2.) and the Parties’ subsequent conduct (3.). In the alternative, the domestic law may supplement the remedy (4.). Therefore, the price should be increased by 1,250,000 USD (5.).

**1. The negotiations between the Parties confirm their common intent to include an adaptation mechanism in the Sales Agreement**

94 The Parties' common intent was to include an adaptation mechanism in the hardship clause. This is confirmed by interpreting the term "*responsible*" taking into account the Parties' negotiations [Art. 8(3) CISG].

95 In the case at hand, the Parties agreed to incorporate the possibility to adapt the Sales Agreement. CLAIMANT clearly emphasised its intent to incorporate an adaptation mechanism. Firstly, CLAIMANT had mentioned to RESPONDENT that it was important for CLAIMANT to "*have a mechanism in place which would ensure an adaptation of the contract*" [Exh. C8, p. 17]. RESPONDENT agreed to that. [ibid.]. Hereby, the Parties reached a "*meeting of minds*" [Schmidt-Kessel, Art. 8 § 11; Zuppi, Art. 8 § 16] as RESPONDENT definitely knew of CLAIMANT's intent and even agreed to it. Considering the Parties' common legal background, in this context it is only natural for them to incorporate an adaptation mechanism as a remedy for a hardship situation. The states RESPONDENT and CLAIMANT are situated in (namely Mediterraneo and Equatoriana) both have a verbatim adoption of the PICC as their domestic general contract law [PO1, p. 53 § 4]. Under the PICC, adaptation is the typical hardship remedy [McKendrick, Art. 6.2.3 §§ 6, 7]. Thus, it can be reasonably assumed that the Parties intended adaptation as their preferred contractual hardship remedy.

**2. The nature of hardship clauses shows price adaptation is the only reasonable remedy**

96 From the point of view of a reasonable person, Clause 12 of the Sales Agreement must encompass an adaptation mechanism as a consequence of a hardship situation. Unlike force majeure clauses, hardship clauses seek to maintain the contract through adaptation when supervening events have severely disrupted the contractual equilibrium [DiMatteo, p. 708 § 132; Brunner I, p. 514]. In the case at hand, the Parties did not want CLAIMANT to bear additional costs related to changes in customs regulation [see § 81], thus maintaining the contractual equilibrium of the Sales Agreement [see §§ 99, 143]. Therefore, the Clause reasonably must also have an adaptation mechanism.

97 Having such a clause without an adequate remedy would also undermine the general principle of "*favor negotii*" which is based on the considerations rooted in Art. 8 CISG that parties want to conclude a meaningful contract [Schmidt-Kessel, Art. 8 § 51; cf. Schroeter II, p. 36; cf. Art. 5:106 PECL; Bonell, Art. 7 § 2.3.2.2; Brunner II, Art. 8 § 21; Zuppi, Art. 8 § 29]. Therefore, a reasonable person would understand the hardship clause to contain an adaptation mechanism.

### 3. The Parties' subsequent conduct confirms the remedy in the hardship clause

98 In the phone conversation between Mr. Shoemaker on behalf of RESPONDENT and Ms. Napravnik on behalf of CLAIMANT, Mr. Shoemaker admitted the Sales Agreement to contain an adaptation mechanism (a.). Mr. Shoemaker's representation was also legally binding RESPONDENT in this matter (b.).

#### a. RESPONDENT admitted that the remedy in the hardship clause is price adaptation

99 The phone conversation between Mr. Shoemaker and CLAIMANT is particularly relevant since the "subsequent conduct" of the Parties should also be taken into account when interpreting contracts from the view of a reasonable person [Art. 8(2),(3) CISG]. This is because subsequent conduct permits conclusions regarding the original intent or understanding of the parties [Schmidt-Kessel, Art. 8 § 54; Zuppi, Art. 8 § 26; Melis, Art. 8 § 14; Farnsworth, Art. 8 § 2.6; Lautenschlager, p. 266; Witz, Art. 8 § 13]. Mr. Shoemaker states that the remedy of a "high additional tariff" [Exh. R4, p. 36], thereby referring to the hardship situation under the Sales Agreement, is to "certainly find an agreement on the price" [ibid.]. This reference constitutes unequivocal acknowledgement of the adaptation mechanism. Thus, RESPONDENT admitted not only that the tariffs are high but also that the remedy of the hardship clause must be a price adaptation.

#### b. RESPONDENT is bound by Mr. Shoemaker's representation

100 RESPONDENT is also bound by Mr. Shoemaker's representation. Since the CISG does not regulate agency [Hartnell, p. 64; Karollus II, p. 58; Textiles Case; Wine Case], this matter must be solved according to the domestic general contract law of Mediterraneo which is a verbatim adoption of the PICC [PO1, p. 53 § 4].

101 According to Art. 2.2.5(2) PICC the principal may not invoke the agent's lack of authority when the third party reasonably believes that the agent has authority to act on the principal's behalf [cf. Goode et al., p. 294; Schwenger et al., § 13.12; Bennett II, p. 782; Saintier, p. 922 § 47]. In the case at hand, CLAIMANT reasonably believed that Mr. Shoemaker had authority because RESPONDENT had introduced Mr. Shoemaker as the person responsible for the racehorse breeding program including all questions concerning the Sales Agreement [Exh. R4, p. 36; PO2, p. 59 § 32]. By doing so, RESPONDENT caused his apparent authority, by making an express declaration implying that Mr. Shoemaker has such authority [Krebs, Art. 2.2.5 § 5; Bennett I, § 4.1]. Furthermore, Mr. Shoemaker appeared at a meeting at a senior management level [PO2, p. 60 § 35]. He was thus clearly able to legally represent RESPONDENT in all

matters regarding the Sales Agreement. Therefore, it must be concluded that Mr. Shoemaker's conduct must be considered as RESPONDENT's conduct [*cf. Bennett II, p. 782; Art. 2.2.3 PICC*].

**4. In the alternative, the remedy is provided by the domestic law governing the contract**

102 However, even if the Tribunal found that the Parties did not agree on a remedy, the remedy would have to be supplemented by the applicable substantive law governing the contract [*cf. Brunner I, p. 517*]. Since the applicable substantive law in this case is the CISG and it includes an adaptation mechanism in cases of hardship [*see § 112*], this would lead to the same result.

**5. The Tribunal should order RESPONDENT to pay 1,250,000 USD**

103 Since the requirements are fulfilled and RESPONDENT refused to renegotiate the price, the Tribunal should seek to adapt the price in order to shield CLAIMANT from the destruction of the commercial basis of the Sales Agreement [*see § 88*].

104 This result is achieved when CLAIMANT's loss on the last instalment is covered. This corresponds to the risk CLAIMANT assumed [*cf. Brunner I, p. 499*]. The loss on the last instalment was 1,250,000 USD [*cf. Exh. C5, p. 15 §§ 6, 8; Exh. C7, p. 16; PO2, p. 59 § 31*]. Therefore, the price of the Sales Agreement should at the very minimum be increased by this amount.

105 In conclusion, the tariffs imposed by Equatoriana are covered by the hardship clause in the Sales Agreement. They were unforeseeable and make the agreement more onerous. Thus, the requirements set out in the hardship clause are met. Also, the hardship clause provides for contract adaptation as a remedy. For all these reasons, the Tribunal should increase the price by 1,250,000 USD.

**IV. In the alternative, CLAIMANT is entitled to payment of 1,250,000 USD under the CISG**

106 In case the Tribunal finds that Clause 12 of the Sales Agreement does not entitle CLAIMANT to the payment of 1,250,000 USD, the applicable statutory provisions of the CISG provide for the same relief. This is because neither Clause 12 of the Sales Agreement nor the inclusion of the delivery term "DDP" derogated CISG provisions on *force majeure* and *hardship* (A.). A price adaptation mechanism is available under the CISG (B.) and the requirements for a hardship exemption under Art. 79 CISG are met, allowing for a price adaptation by the Tribunal (C.).

**A. The Parties have not derogated force majeure and hardship provisions of the CISG**

107 The Parties made a choice-of-law referring to the law of Mediterraneo, including the CISG [*Exh. C5, p. 14 § 14*]. A derogation therefrom may only result from the Parties' intent which has to be determined along the lines of Art. 8 CISG [*cf. Schwenger/Hachem, Art. 6 § 25; Lorenz Art. 6 §§ 7,17*]. There are no signs of intent by any party to derogate from Art. 79 CISG and its effects by incorporating Clause 12. In such cases, it must be assumed that the Parties did not want to derogate from the CISG and that Clause 12 is not exclusive but rather supplementary [*cf. Brunner I, p. 386; cf. Iron Molybdenum Case*]. Hence, Art. 79 CISG is applicable.

108 Furthermore, the incorporation of the DDP Incoterm in an agreement does not preclude the application of hardship provisions under the applicable law [*cf. ICC Guide to Incoterms, p. 11 seqq.; Coetzee, p. 7 seqq.*]. Thus, Art. 79 CISG is applicable.

**B. Under the CISG, there is a hardship exemption leading to adaptation**

109 Art. 79 CISG covers hardship and the remedy of adaptation is provided by Art. 6.2.3 PICC.

110 Art. 79 CISG contains an exemption relieving a party from liability for damages if it does not perform its contractual duties due to an “*impediment beyond his control*” [Art. 79(1),(5) CISG].

111 The “impediment” of Art. 79 is generally understood to cover hardship [*Scafom Case; Shoes Case; Coke Fuel Case; Polyurethane Case; Dupiré v. Gabo; SHS Hamburg, 12 March 1996; Raw Materials v. Manfred Forberich; CISG AC 7; Stoll, Art. 79 § 40; Schwenger, Art. 79, § 55; Carlsen, D.1*]. Consequently, hardship is a topic governed by the CISG [*cf. Schwenger II, p. 713; Nuova v. Fondmetal*]. The default mechanism in Art. 79 allows a party to not perform and avoid liability if certain conditions are met. However, a legal remedy allowing the contract to continue and be adapted to changed circumstances is equally available under the CISG.

112 Such remedy of adaptation can only be found outside the wording of Art. 79 CISG, constituting a gap in this article. This gap must be filled pursuant to Art. 7(2) CISG. An appropriate provision that reflects the “*general principles on which [the CISG] is based*” [Art. 7(2) CISG] is Art. 6.2.3 PICC and thus can be used to fill this gap [*Azaredo da Silveira, p. 296; Kruisinga, p. 153; Felemegas, p. 9-10; Carvalhal Sica, § III.3*]. Authorities and cases even fill the gap with Art. 6.2.3 PICC without this test and apply it directly [*Scafom Case; Almeida Prado, p. 111 § 162; Brunner II, Art. 79, § 27*]. Art. 6.2.3 PICC allows CLAIMANT to request renegotiations and adaptation of the contract by the Tribunal in case of hardship.

113 Such exemptible hardship is given when an “*impediment*” [Art. 79 CISG] results in a fundamental alteration of the contractual equilibrium. [*cf. Dupiré v. Gabo; Brunner I, p. 221; Schwenger II, p. 713 fn*



23]. Alternatively, direct recourse to the identical definition of hardship in Art. 6.2.2 PICC is also possible without having to rely on the “impediment” [Garro, p. 1156-1184; Bund, p. 394; Pirozzi, p. 219; Perillo, p. 9; Reiley, p. 145; Perales Viscasillas I, p. 22; Uribe, p. 264-265].

114 While there is a broad variety of opinions on hardship under the CISG, most suggestions of scholars and courts lead in the case at hand to precisely the same result as the solution above, or a very similar one. The hardship provisions of the PICC are regularly considered to be an international trade usage pursuant to Art. 9(2) CISG [Atamer, Art. 79 § 86; ICC Award 10021/2000; ICC Award 9479/1999; ICC Award 7365/1997] and therefore can supplement contracts subject to it. Some authors suggest recourse to hardship provisions of the applicable domestic law, either through Art. 7(2) CISG or outside the CISG’s scope of application [Gillette/Walt, p. 313; Slater, p. 258; Lookofsky, p. 167-168; Tørum, p. 235]. This would equally lead to the application of the PICC, adopted as law of Mediterraneo that governs the Sales Agreement. Others suggest contract adaptation as hardship relief while relying on other CISG provisions [CISG AC 7; Magnus I, Art. 79 § 24b; Stoll, Art. 79 § 40; Kessedjian, p. 419; Omlor, p. 973; Veneziano, p. 141 et seq.; Schlechtriem II, p. 237; Schwenger I, § 55].

115 All in all, CLAIMANT can request adaptation of the Sales Agreement pursuant to Art. 6.2.3 PICC given that the economic equilibrium of the contract has been fundamentally altered pursuant to Art. 79 and Art. 6.2.2 PICC, as shown below.

### C. The requirements of Art. 79 CISG with regards to hardship are met

116 The 30% tariffs constitute an impediment in the sense of Art. 79 CISG. This impediment causes substantial hardship for CLAIMANT, due to a fundamental alteration of the economic equilibrium (1.). The tariffs were unforeseeable at the time of contract conclusion (2.). Additionally, the imposition of the tariffs lies beyond CLAIMANT’s control and CLAIMANT could not reasonably be expected to avoid or overcome the impediment or its consequences (3.). Therefore, the price should be increased by 1,250,000 USD pursuant to Art. 6.2.3 (4.).

#### 1. The contract equilibrium has been fundamentally altered due to the tariffs

117 Whether there is a fundamental alteration of the contract equilibrium always has to be assessed on a case-by-case basis [Schwenzer II, p. 716; Azeredo da Silveira, p. 347]: Primarily, one has to look upon CLAIMANT’s cost increase due to the tariffs with regard to the last instalment exclusively (a.). As there is no generally applicable numeric threshold, one has to consider the circumstances of each individual case (b.). In the case at hand, these lead to a low hardship threshold. Thus, the imposition of the 30% tariffs has fundamentally altered the contract’s equilibrium (c.).

a. CLAIMANT's costs have increased by 200%

- 118 The essential criterion to look upon is the difference between the costs CLAIMANT expected when concluding the Sales Agreement and the actual costs of performance after the tariffs were imposed [Azeredo da Silveira, p. 326; Girsberger/Zapolskis, p. 12; Jenkins, p. 2027; Zaccaria, p. 169; PICC 2016 Comment; Art. 6.2.2; McKendrick, Art. 6.2.2 § 2]. The relevant cost increase has to be determined on the basis of CLAIMANT's expected variable costs solely for the last shipment.
- 119 In the case at hand, the Parties agreed upon three **separate shipments** and a strict splitting of the payments to 2017 for the two first shipments and 2018 for the last shipment [Exh. C5, p. 14 § 7]. As every shipment of Nijinsky III's semen is useful to RESPONDENT by itself, the deliveries are separable from one another and the contract as a whole [cf. Cheese Case; Umbrella Case]. Hence, as only the very last instalment was affected by the tariffs, the relevant cost increase needs to be determined in connection with the affected instalments exclusively.
- 120 CLAIMANT assumed 15,000 USD per dose in **variable costs** due to its past experience in selling frozen semen [PO2, p. 59 § 31]. Variable costs are the costs directly related to each unit of output [cf. Collins Dictionary]. They hence depict how much money CLAIMANT has to spend in total to provide RESPONDENT with 50 doses of Nijinsky III's semen.
- 121 Court decisions dealing with matters of hardship due to an increase in costs have looked upon changes in price of the raw materials required to produce the good [Frozen Raspberries Case; Iron Molybdenum Case; Scafom Case; Steel Bars Case; cf. Flechtner, p. 199 seq.] or upon the costs for acquiring substitutes [Tomato Concentrate Case]. Those are costs directly related to and depending on the performance and therefore examples of variable costs. The same goes for the 'market fluctuations' frequently discussed in literature, as changed prices have an impact on acquiring either material needed for production or substitutes [cf. DiMatteo, Art. 79 § 38; Schwenger I, Art. 79 § 31; PICC 2016 Comment, Art. 6.2.2; Atamer, Art. 79 § 82].
- 122 Accordingly, the cost increase has to be determined looking upon CLAIMANT's expected direct costs for the 50 doses of the last instalment. Thus, the expected variable costs are 750,000 USD (15,000 USD per dose times 50) [PO2, p. 59 § 31]. The newly imposed tariffs add to those costs. They amount to 30% of the sales price for the 50 doses: 30% of 5,000,000 equals 1,500,000 USD [Exh. C7, p. 16]. Hence, CLAIMANT's total expenditure has tripled from the expected amount of 750,000 USD to 2,250,000 USD, constituting an increase of 200%.

**b. The applicable hardship threshold is determined by the case's individual circumstances**

- 123 One has to take the special characteristics of the case at hand into account, such as the nature of the costs added, the amount of CLAIMANT's initially expected profit margin, the balance of performance and counter-performance and especially CLAIMANT's dire financial state [*Schwenzer II*, p. 716; *Girsberger/Zapolskis*, p. 129; *Azeredo da Silveira*, p. 347; *Schwenzer I*, Art. 79 § 32; *Atamer*, Art. 79 § 82; cf. *Sports Clothes Case*]. In the case at hand these circumstances collectively set a low hardship threshold.
- 124 The 30% tariffs **do not add to the procurement or production costs** of the frozen semen. Those fall under "*the general risk to acquire the goods*" [*Iron Molybdenum Case*] which the seller primarily assumes [*Schlechtriem I*, p. 102; cf. *Magnus I*, Art. 79 § 14; *Salger*, Art. 79 § 7]. This is a key contrast between the given case and judicial decisions [cf. *Frozen Raspberries Case*; *Tomato Concentrate Case*] setting comparatively high hardship thresholds [cf. *Frozen Raspberries Case*; cf. *Tomato Concentrate Case*]. In this case merely the shipping costs have increased those do not add to procurement or production of the artificial insemination doses. Hence, a substantially lower hardship threshold should be set.
- 125 Moreover, the **typical profit margin** for comparable sales in the racehorse industry is relevant [cf. *Schwenzer III*, p. 373]. This implies how much risk a party has assumed and the applicable hardship threshold should be set accordingly [cf. *Brunner I*, p. 434]. A profit margin of 10% is considered ordinary for natural coverings in the horse industry [*PO2*, p. 57 § 19] while the typical profit margin for natural coverage by Nijinsky III is 15% [*PO2*, p. 57 § 19]. In contrast, CLAIMANT's profit margin in this transaction is only 5% even though the costs incurred with natural covering are lower than with producing frozen semen [cf. *PO2*, p. 57 § 19; *PO2*, p. 59 § 31]. Therefore, CLAIMANT's low profit margin of 5% implies a low standard of risk assumed and thus the application of low hardship standards.
- 126 Additionally, CLAIMANT is in a **dire financial situation** because in 2014 it involuntarily had to pay 3,200,000 USD due to requirements imposed by Danubia [*PO2*, p. 58 § 21]. Subsequently, CLAIMANT had to take out loans and undergo extensive restructuring, including the sale of its transportation division and laying off a considerable part of its workforce [*Exh. C8*, p. 17; *PO2*, p. 56 § 9]. The prolongation of these loans CLAIMANT has taken to prevent bankruptcy strictly depends on CLAIMANT being profitable in 2017 and 2018 [*PO2*, p. 58 § 21; *PO2*, p. 59 § 29]. Paying the 30% tariffs would severely jeopardise this condition and consequently CLAIMANT would have to negotiate for a new credit line. This would be very difficult [*PO2*, p. 59 § 29] and CLAIMANT would most likely have to make the unreasonable sacrifice of selling a part of his business to its biggest competitor [*PO2*, p. 59 § 29;

*cf. Berger V, p. 538*]. Hence, performance without adjusting the sales price would likely result in CLAIMANT's bankruptcy. In such cases of possible financial ruin a correspondingly low hardship threshold is applicable [*Schwenzer III, p. 373; Dalhuisen, p. 110; Azeredo da Silveira, p. 326; Brunner, p. 436; Girsberger/Zapolskis, p. 131*].

127 Another factor to look at is “changes in the ratio between **performance and counter performance**” [*cf. Enderlein/Maskow, Art. 79 § 6.3; cf. Azeredo da Silveira, p. 347*]. The initially agreed upon deal allowed CLAIMANT a profit margin of 5% [*PO2, p. 59 § 29; Exh. C8, p. 17*]. The 30% tariffs, however, cause CLAIMANT a loss of 1,000,000 USD on top of completely destroying the expected profit of 500,000 USD [*NoA, p. 7 § 18; Exh. C8*]. Hence, CLAIMANT is now making a substantive loss instead of the originally agreed upon profit.

128 Additionally, both Parties entered into this voluntary contract in order to mutually gain benefits and thus both owe and expect reasonable cooperation [*cf. Hillman, p. 28*]. Hence, it is also not expected that a party achieves to make **gains beyond what was agreed upon** [*ibid.*]. The Parties deal was only supposed to allow RESPONDENT to establish a prestigious racehorse stable [*Exh. C1, p. 9*], as CLAIMANT clearly objected to RESPONDENT reselling any of the doses without its express consent. RESPONDENT, however, already resold doses of Nijinsky III's semen without CLAIMANT's permission and at a price 20% higher than it had paid itself [*NoA, p. 8, § 20*] and is planning on doing so for 50 doses in total [*PO2, p. 56 § 11*]. Hereby plans on making an additional profit of 1,000,000 USD [*Exh. C2, p. 10; Exh. C4, p. 13*] and is pushing its political agenda of permanently lifting the ban on artificial insemination in Equatoria [*Exh. C8, p. 18*]. The vast extent to which RESPONDENT is benefiting from the transaction has to be taken into account [*Fucci, p. 35*].

129 Moreover, RESPONDENT is arguing in its **other arbitration** that a 25% tariff constitutes a case of excessive onerousness under the ICC Hardship Clause [*PO2, p. 60 § 39*]. As “*excessively onerous*” [*cf. ICC Hardship Clause*] and “*fundamental alteration of the equilibrium*” [*cf. Art. 6.2.2 PICC*] set the same standard [*Schwenzer II, p. 714 seq.*], RESPONDENT contradicts itself when denying a fundamental alteration of the contract's equilibrium in the case of the imposition of a 30% tariff [*see § 56*].

### c. The applicable hardship threshold is met

130 According to literature a price increase of 150-200% fundamentally alters the contractual equilibrium [*cf. Schwenzer III, p. 373; Scafom Case; Brunner, p. 432; Enderlein/Maskow, Art. 79 § 6.3; Schwenzer II, p. 717; Maskow, p. 662*]. Nevertheless, as one has to take the special characteristics of the case at hand into account, a low hardship threshold is applicable. A threshold lower than 100% is sufficient [*Maskow,*

*p. 662; PICC 1994 Comment, Art. 6.2.2; Enderlein/Maskow, Art. 79 § 6.3*], specifically in cases of dawning financial ruin [*Brunner I, p. 431 seqq.*]. In this regard, the Belgian Supreme Court even held that an increase of 70% in the price of steel – which only depicts the variable costs of performance partially and hence likely equated to a 35% increase in total costs [*Flechtner, p. 199 seq.*] – constituted a relevant case of hardship under Art. 79 CISG [*Scafom Case*]. Hence, the threshold applicable to the case at hand is substantially lower than 100% and CLAIMANT’s cost increase of 200% certainly constitutes hardship.

131 As a result, CLAIMANT has incurred a cost increase of 200% with respect to the last instalment, while being in a dire financial situation. Meanwhile, RESPONDENT is deriving disproportionately high benefits. In conclusion, the case’s individual circumstances, especially the disproportionately high benefits RESPONDENT is deriving out of this deal and CLAIMANT’s dire financial situation lead to the application of a low hardship threshold.

**2. CLAIMANT could not have reasonably taken the imposition of tariffs by Equatoriana into account when concluding the contract**

132 CLAIMANT cannot be expected to have taken into account that Equatoriana, one of the biggest supporters of free trade [*Exh. C6, p. 15; NoA, p. 6 § 6*], would suddenly impose a tariff on agricultural products. Mere possibility of an event does not constitute foreseeability [*cf. Animal Sperm Case; Atamer Art. 79 § 51*]. To the contrary, the reference for what has to be foreseen is a reasonable person [*Schwenzer I, Art. 79 § 22; Perillo p. 128; Salger Art. 79 § 5*], This reasonable person has to be seen as “*halfway between the inveterate pessimist who foresees all sorts of disasters and the resolute optimist who never anticipates the least misfortune*” [*Tallon, Art. 79 § 2.6.3*]. The retaliatory tariffs came as a complete surprise even to experts [*Exh. C6, p. 15*]. Equatoriana usually relies upon the dispute resolution mechanism provided by the WTO [*PO2, p. 61 § 47*]. It therefore could not reasonably have been expected that Equatoriana, especially under a progressive liberal Prime Minister [*NoA, p. 17 § 19*], would go against the principles and goals of this very organisation [*WTO, what we stand for; Frieden/Trachtman*].

133 On top of this, it is highly unusual that racehorse semen are covered under agricultural products as horse racing is a part of the sports industry [*cf. Cave/Miller; PO2, p. 55 § 3*]. It was even surprising to RESPONDENT situated in Equatoriana [*Exh. C8, p. 17; Exh. R4, p. 36*]. Additionally, RESPONDENT can hardly deny that the 30% tariffs set by Equatoriana were unforeseeable as they are only a response to the tariffs imposed by Mediterraneo. RESPONDENT itself holds those to be unforeseeable in its other arbitration [*PO2, § 39, p. 60*]. Hence, CLAIMANT can certainly not reasonably be expected to have foreseen the imposition of the 30% by Equatoriana.

**3. The imposition of tariffs was beyond CLAIMANT's control and CLAIMANT could neither avoid nor overcome them or their consequences**

134 The imposition of 30% tariffs by a foreign state clearly lies outside of CLAIMANT's sphere of control. CLAIMANT cannot possibly be expected to assert control over state actions as acts of government generally lie beyond a party's control [*Atamer, Art. 79 § 46; Magnus II, Art. 79 § 12; McKendrick, Art 6.2.2 § 10; Saenger, Art. 79 § 4; Brunner, p. 216*]. For the same reasons the tariffs could not have been avoided or overcome.

135 Furthermore, CLAIMANT could also not avoid or overcome the consequences. This is because the fact that tariffs on "agricultural products" cover racehorse semen was and could not reasonably have been expected (see § 132). CLAIMANT discovered this only shortly before shipping and did not have a chance to avoid paying them. Likewise, CLAIMANT was unable to obtain an exception for the tariffs [*PO2, p. 58 § 27*] and hence could not overcome the consequences.

**4. The Tribunal should increase the price by 1,250,000 USD to restore a reasonable equilibrium**

136 As requested under Art. 6.2.3 PICC, CLAIMANT immediately made RESPONDENT aware of the hardship caused by the tariffs and requested renegotiations [*Exh. C7, p. 16; Exh. C8, p. 17; Exh. R4, p. 36*]. Due to RESPONDENT's reassurance that a solution would be found CLAIMANT issued shipment [*Exh. C8, p. 18*]. Such renegotiations should be conducted by both parties in a constructive manner, with regards to good faith and fair dealings [*PICC 2016 Comment, Art. 6.2.3; Zaccaria p. 171*]. RESPONDENT, however, abruptly broke off renegotiations [*Exh. C8, p. 18*], despite having assured CLAIMANT of its dedication to a long-term business relationship shortly before [*Exh. C8, p. 18*]. Hereby, it is disregarding the cooperation reasonably expected in the Parties' business relationship [*Hillman, p. 28*]. Thus, since the Parties failed to reach an agreement, the Tribunal can and should adapt the contract, pursuant to Art. 6.2.3 § 4 (b) PICC [*PICC 2016 Comment, Art. 6.2.3*].

137 The Tribunal should seek to make a fair distribution of the losses between the Parties when deciding how contracts should be adapted [*Brunner p. 498; PICC 2016 comment, Art. 6.2.3*]. When doing so it should consider all relevant circumstances [*cf. PICC 2016 comment, Art. 6.2.3*]. One of the main factors to consider is to what extent CLAIMANT assumed the materialised risk [*ibid.*]. Firstly, the expected profit margin of CLAIMANT was substantially lower than the ordinary profit margin of similar contracts in the industry which indicates a low risk assumption (see § 125). CLAIMANT generally wanted to assume as little risk as possible due to its financial difficulties at the time of signing the Sales Agreement [see § 126]. Furthermore, the DDP delivery was solely an accomodation of RESPONDENT's wish to receive the goods



quickly and cheaply [*Exh. C3, p. 11*]. CLAIMANT merely received 25,000 USD (500 USD for shipping per dose times 50) in exchange for shipping the last instalment itself while only 15,000 USD covered the low risks assumed [*PO2, p. 56 § 8*].

138 Even for the most diligent business man it would be unreasonable to assume the costs would increase by more than the tenfold of the amount received. The tenfold in this case amounts to 250,000 USD and is therefore the highest amount CLAIMANT could have assumed to pay additionally. As a result, RESPONDENT should bear any amount that exceeds this number, thus 1,250,000 USD in this case.

139 Furthermore, this would also result in a fair distribution for RESPONDENT: Firstly, it would still benefit from the insemination of its mares. Secondly, RESPONDENT is reselling the doses in violation of the Sales Agreement (*see § 128*) at a price 20% higher [*NoA, p. 8 § 20*] and plans on doing so for 50 doses in total [*PO2, p. 56 § 11*]. Thereby, RESPONDENT is attributing to the whole Sales Agreement an additional benefit of 2,000,000 USD. Hence, it would still gain more than it had to pay. This becomes all the more evident as RESPONDENT, while knowing the very high costs of the tariffs, still strongly insisted on delivery of the last instalment. It even mentioned future plans to buy further 50 doses [*Exh. C8, p. 18*] which strongly implies it would still profit from the frozen semen even if RESPONDENT had to pay the tariffs. Meanwhile, CLAIMANT would face imminent bankruptcy if it had to bear this amount.

140 Consequently, a fair distribution of losses would lead to a price increase by at least 1,250,000 USD.

141 Concluding part (C.), the contract's equilibrium has been fundamentally altered by Equatoriana's new import tariffs. Their imposition was both unforeseeable and beyond CLAIMANT's control. Also, CLAIMANT could not overcome or avoid their consequences. As the Parties' renegotiations have failed, the Tribunal should increase the price by 1,250,000 USD and alleviate CLAIMANT's hardship.

**D. Alternatively, CLAIMANT is entitled to receive the payment due to RESPONDENT's inconsistent behaviour**

142 One of the general principles of the CISG is the prohibition of "*venire contra factum proprium*" [*cf. Schmidt-Kessel, Art. 8 § 52; Enderlein/Maskow, Art. 8 § 11; Magnus I, Art. 8 § 26*]. According to this principle a party cannot act inconsistently with an "*understanding it has caused*" the other party to have and "*upon which that other party reasonably has acted in reliance*" [*cf. Art. 1.8 PICC; Ad Hoc Case 2001; Ad Hoc Case 2004*].

143 In the case at hand, RESPONDENT caused CLAIMANT to believe the Parties will agree on an increased price. CLAIMANT had made very clear that it was not shipping the last instalment if they did not agree on a new price [*cf. Exh. C7, p. 16*]. Following this, RESPONDENT assured CLAIMANT that the Parties would come



to an agreement given their plans to have a long-term relationship and RESPONDENT's desire to buy 50 additional doses of semen from CLAIMANT [*Exh. C8, p. 18*]. RESPONDENT also admitted that the tariffs were very high [*Exh. R4, p. 36*] and that they would certainly adapt the contract if the “*contract provides for an increased price*”. Furthermore it urged CLAIMANT to ship the last instalment, knowing that CLAIMANT would only do so if additional payments were made. Considering all these circumstances, CLAIMANT reasonably got the impression RESPONDENT was going to renegotiate a new price. Consequently, CLAIMANT shipped the last instalment and paid the tariffs relying on RESPONDENT's promise [*Exh. C8, p. 18*].

144 However, RESPONDENT unexpectedly stopped negotiations after the semen was shipped and refused to act on its word. The consequence of such inconsistent behaviour is that it can result in the creation or modification of rights the party relied on [*cf. Vogenauer, Art. 1.8 § 14; PICC 2016 Comment, Art. 1.8; Ferrari, p. 183; Alain Veyron v. Ambrosio*]. RESPONDENT caused CLAIMANT to believe that the price will be adapted in a way to cover the costs of the third instalment. Thus, RESPONDENT must bear at least 1,250,000 USD.

145 In conclusion, the CISG covers hardship and allows for adaptation of the contract. All requirements set forth are met, as the unforeseeable tariffs caused CLAIMANT hardship. CLAIMANT's cost increase of 200% exceeds the applicable hardship threshold, which is very low due to the case's particular circumstances. Since renegotiations have failed, the Tribunal should restore the contract's equilibrium by increasing the price by 1,250,000 USD.

## REQUEST FOR RELIEF

CLAIMANT, respectfully requests the Tribunal to find that

1. The Tribunal has jurisdiction and power to adapt the price of the Sales Agreement;
2. The evidence provided by CLAIMANT is admissible;
3. RESPONDENT is obliged to pay CLAIMANT 1,250,000 USD upon adaptation of the Sales Agreement;
4. RESPONDENT bears the costs of the Arbitration.






## CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. Only those sources were used, which are listed in indices.


Vienna, 6 December 2018



Peter Behyl




Verena Gattinger



Franziska Hauser



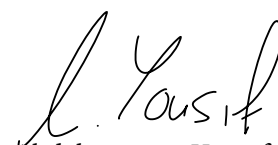
Valentin Marginter



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