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WILLEM C. VIS INTERNATIONAL ARBITRATION MOOT

2018/19 ▪ VIENNA

UNIVERSITY OF VIENNA

MEMORANDUM FOR RESPONDENT

on behalf of
Black Beauty Equestrian
RESPONDENT

against
Phar Lap Allevamento
CLAIMANT

PETER BEHYL ▪ VERENA GATTINGER ▪ FRANZISKA HAUSER

VALENTIN MARGINTER ▪ MARIANA RISTIC

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Counsel for RESPONDENT

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INDEX OF ABBREVIATIONS AND DEFINITIONS

§, §§	Paragraph, paragraphs
%	Per cent
ANoA	Answer to the Notice of Arbitration
Art.	Article
AUS	Australia
BGH	Bundesgerichtshof (Supreme Court Germany)
C. App	Court of Appeal
cf.	Confer
CISG	United Nations Convention on Contracts for the International Sale of Goods
Corp.	Corporation
DAP	Delivered at Place
DCL	Danubian Contract Law
DDP	Delivered Duty Paid
Dep.	Department
et al.	*Et alii*; and others (Latin)
Exh.	Exhibit
G20	Group of Twenty
GmbH	Gesellschaft mit beschränkter Haftung (Limited Company in Germany and Austria)
Hague Principles (2015)	Hague Principles on Choice of Law in International Commercial Contracts
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
Inc.	Incorporated
IRL	Ireland
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Arbitration
Mr.	Mister

Ms.	Miss
No.	Number, numbers
MfC	Memorandum for CLAIMANT
NoA	Notice of Arbitration
NYC	New York Convention (1958)
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
SA	Sociedad Anónima (Limited Company in Spain)
seq.	*Et sequens*; and the following
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
USA	United States of America
USD	US Dollar
v.	*Versus*; against (Latin)
VAT	Value Added Tax
VIAC	Vienna International Arbitral Center
WTO	World Trade Organisation

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STATEMENT OF FACTS

The Parties to this arbitration ("**the Parties**") are Black Beauty Equestrian ("**RESPONDENT**") and Phar Lap Allevamento ("**CLAIMANT**"). RESPONDENT operates a horse stable in Equatoriana. It is famous for its world-champion show jumpers and international dressage champions. CLAIMANT, who is located in Mediterraneo, operates a stud farm known for its racehorses.

On **6 May 2017** the Parties concluded a contract ("**Sales Agreement**") under which CLAIMANT was obligated to deliver 100 doses of frozen racehorse semen of the famous stallion Nijinsky III for the price of 10,000,000 USD. The Sales Agreement provides for Hong Kong International Arbitration Centre ("**HKIAC**") administered arbitration with the seat in Vindobona, Danubia. The agreed substantive law for the Sales Agreement is the law of Mediterraneo including the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**").

In May and October 2017, CLAIMANT completed the first two shipments of 25 frozen semen doses each. After the first two shipments, Mediterraneo imposed extensive import tariffs on all agricultural products. As a retaliatory measure, Equatoriana announced on **19 December 2017** that it would impose 30% import tariffs covering all agricultural products from Mediterraneo. CLAIMANT learned about this announcement on **20 December 2018**. The tariffs imposed by Equatoriana took effect 26 days later on **15 January 2018**. The last shipment of semen was due on **23 January 2018**.

As CLAIMANT had not informed itself about the tariffs earlier, it only realised on **19 January 2018** that the final shipment of 50 frozen semen doses to Equatoriana was subject to Equatoriana's import tariffs. According to the Sales Agreement, CLAIMANT has to bear all import duties under the agreed shipping condition of "*Delivered Duty Paid*" ("**DDP**", ICC INCOTERMS 2010). Refusing to comply with the contractual allocation of import duties, CLAIMANT threatened that it would withhold the delivery of the last 50 doses if RESPONDENT refused "*to find a solution*" [*Exh. C7, p. 16*]. On **21 January 2018,** RESPONDENT insisted on the delivery of the last shipment in accordance with the Sales Agreement, stating that in its view the agreed DDP shipping condition meant that CLAIMANT had to bear the increased import duties. At that time, RESPONDENT had already initiated the payment of 5,000,000 USD for the last shipment of semen. CLAIMANT subsequently shipped the last instalment of the frozen semen without further discussions about the issue of tariffs and paid the 30% in import tariffs under the Equatorianian regulations.

In the further discussions between the Parties, RESPONDENT refused to deviate from the contractual cost allocation for import tariffs and denied CLAIMANT's request for additional payment. CLAIMANT in turn requests an increase of the sales price in the amount of 1,250,000 USD based on Clause 12 of the

Sales Agreement. This clause exempts CLAIMANT from liability for "*lost semen shipments or delays in delivery not within the control of the Seller*", "*or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". The history of the contract negotiations shows that the Parties consciously agreed that CLAIMANT should be responsible for compliance with import customs and has to bear all costs and risks associated with the delivery in return for an increase of the sales price: On **21 March 2017** RESPONDENT contacted CLAIMANT and requested an offer for the purchase of 100 artificial insemination doses from Nijinsky III. CLAIMANT submitted a corresponding offer providing for *Ex Works* ("**EXW**", ICC INCOTERMS 2010). In its reply of **28 March 2017**, RESPONDENT stressed that it preferred delivery to Equatoriana under the **DDP** INCOTERM, as it did not want to handle the shipment and the export and import formalities. In its response of **31 March 2017** CLAIMANT accepted DDP Equatoriana as the shipment term, in return it demanded a price increase. However, CLAIMANT was concerned about unforeseen health and safety requirements due to its past experiences. The Parties' resolved these concerns by including Clause 12 into the Sales Agreement and incorporated the DDP shipping condition in Clause 8.

As the Parties were unable to agree on a court in either of their home countries as dispute resolution forum, CLAIMANT suggested arbitration. On **10 April 2017,** RESPONDENT proposed a draft of the arbitration agreement based on the **HKIAC** Model Clause. The draft clause had, however, a narrower scope than the model clause. In the draft, RESPONDENT proposed Equatoriana as the seat of arbitration and Equatorianian law as the law applicable to the arbitration agreement. CLAIMANT generally accepted the suggested arbitration clause but proposed Danubia as a neutral seat of arbitration instead of Equatoriana. Following a serious accident of the main negotiators of the Parties, the arbitration agreement was inserted in Clause 15 into the final version of the Sales Agreement without further discussion of its content.

On **31 July 2018** CLAIMANT submitted the Notice of Arbitration to the HKIAC, initiating the present proceedings on the basis of this arbitration agreement.

SUMMARY OF ARGUMENTS

I. The Tribunal lacks jurisdiction to adapt the Sales Agreement

The Parties' arbitration agreement qualifies as a procedural contract which has to be assessed separately from the substantive part of the Sales Agreement. The Parties subjected this arbitration agreement to the law of Danubia by selecting Danubia as the seat of arbitration. Danubian Arbitration Law requires that parties to a contract expressly authorise an arbitral tribunal to adapt contracts. Neither the Sales Agreement nor the interpretation of the arbitration agreement under Danubian law show that the Parties authorised the Tribunal to adapt the Sales Agreement.

II. The submission of the arbitral award by CLAIMANT is inadmissible

The arbitral award was obtained by illegal means and, in any event, is confidential. If CLAIMANT submits illegally obtained information, it would breach its duty to act in good faith and put RESPONDENT at a disadvantage. This would deprive RESPONDENT of its fundamental right to a fair and equal trial. Furthermore, the confidentiality of the arbitral award constitutes a legal impediment to its admissibility. In any event, the arbitral award is irrelevant and not material for the outcome of the case as its factual and legal matrix is fundamentally different.

III. CLAIMANT is not entitled to any additional payment under the Sales Agreement

CLAIMANT is obligated to pay the import tariffs as the Parties agreed on a delivery under the condition of DDP (INCOTERM). Clause 12 of the Sales Agreement does not exempt CLAIMANT from this obligation: A cost increase of only 15 % does not constitute hardship under Clause 12 of the Sales Agreement. Furthermore, the additional costs were not a result of health and safety requirements or comparable events. Moreover, the imposition of the import tariffs could have been both foreseen and avoided by CLAIMANT. Finally, in any event, CLAIMANT cannot seek an adaptation of the sales price as Clause 12 only provides for an exemption from liability.

IV. CLAIMANT is not entitled to any payment under the CISG

The Parties derogated from Art. 79 CISG by including an exemption from liability clause in Clause 12 of the Sales Agreement. Even if Art. 79 CISG were applicable, a 15% increase of CLAIMANT'S costs does not justify an exemption from liability under Art. 79 CISG. Additionally, Equatoriana's import tariffs were foreseeable and CLAIMANT could have avoided the additional costs by shipping earlier. In any event, Art. 79 CISG only provides for an exemption from liability and does not allow for price adaptation.

I. The Tribunal lacks jurisdiction to adapt the Sales Agreement

1 CLAIMANT requests this arbitral tribunal ("**Tribunal**") to increase the sales price for 100 doses of horse semen by 1,250,000 USD [*MfC, § 101*]. This is not possible because the Tribunal does not have jurisdiction to adapt the sales price under the arbitration agreement contained in Clause 15 of the Sales Agreement [*cf. Exh. C5, p. 14 § 15*] for the following reasons: The law applicable to the arbitration agreement is the law of Danubia **(A.)**. Pursuant to Danubian law, the Tribunal lacks jurisdiction to adapt the Sales Agreement **(B.)**. Even if the law of Mediterraneo were applicable to the arbitration agreement, as purported by CLAIMANT, the Tribunal would still lack the power to adapt the agreed sales price **(C.)**.

A. The arbitration agreement has to be interpreted under the law of Danubia

2 The Parties agreed on the 2018 HKIAC Administered Arbitration Rules ("**HKIAC-Rules**") as the rules governing this arbitration [*PO1, p. 52*]. Pursuant to Art. 19(1) HKIAC-Rules, the Tribunal has the authority to rule on its own jurisdiction. This reflects the generally recognised principle of competence-competence [*Born I, p. 1051; Fouchard et al., § 416; ICC Award 6515/1994; ICC Award 1526/1974*].

3 As a starting point to determine the law applicable to the arbitration agreement, the Tribunal should use the agreement of the Parties and – in absence of such agreement – the *lex arbitri* [*Born I, p. 525; cf. Schwarz, § 8/125; Lew et al., § 6-55*]. The *lex arbitri* is determined by the seat of arbitration [*Redfern/Hunter, § 3.37; ICC Award 5294/1988; ICC Award 5029/1986*]. The seat of arbitration is Danubia [*Exh. C5, p. 14 § 15*], which has adopted the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") as Danubian Arbitration Law [*PO1, p. 53*]. Art. 34(2)(a)(i) Model Law 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*], the latter referring to the seat of arbitration [*Miles/Goh, p. 389*]. Although this provision primarily addresses the annulment of awards, arbitral tribunals also widely use it to determine the law applicable to the arbitration agreement [*Lew et al., § 6-55; cf. Born I, p. 526*]. This approach has also been adopted for the almost identical provision of Art. V(1)(a) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") [*Koller, § 3/57; Mankowski, § 6.28; Wilske/Fox, Art. V(1)(a) § 111; C. App. Genoa, 3 February 1990*]. Accordingly, the law applicable to the arbitration agreement is primarily determined by the Parties' agreement and, in the absence of an agreement, the law of the seat of arbitration is applicable [*cf. Wilske/Fox, Art. V(1)(a) § 113*].

4 In this case, the Parties agreed to the application of the law of Danubia to the arbitration agreement by choosing Danubia as the seat of arbitration **(1.)**. The choice-of-law clause in the Sales Agreement does

not extend to the arbitration agreement (**2.**). Furthermore, the Parties' choice of Danubian law is also confirmed by the drafting history of the arbitration agreement (**3.**). In any event, the fallback rule in the absence of the Parties' choice-of-law applicable to the arbitration agreement leads to Danubian law (**4.**).

1. The Parties chose Danubian law to govern the arbitration agreement, by selecting Danubia as the seat of arbitration

5 According to the universally recognised separability doctrine [*Fouchard et al., § 392; Born II, p. 56; Redfern/Hunter, § 2.111; Masser, p. 2773*], an arbitration agreement is **distinct and separate** from the main contract in which it is included [*Redfern/Hunter, § 2.101; Born I, p. 350; Berlingher/Cret, p. 2*]. Hence, the arbitration agreement is subject to its own governing law [*Dicey et al., § 16-008; cf. Lew et al., § 6-23*; *Sulamérica, § 25; Abuja v. Meredien, § 22*].

6 As recognised by the case law in Danubia [*PO2, p. 60 § 36*], an arbitration agreement is a procedural contract [*Kröll III, p. 46*; *VIAC Case, § 4.2; OGH, 22 February 2007; Jörg v. Jörg; cf. Jugomineral v. Grillo*]. As such, the arbitration agreement has a fundamentally different function than the main contract [*Tobler v. Schwyz; Lionnet/Lionnet, p. 170*]: While the substantive provisions of the contract stipulate the parties' rights and obligations under a contract, the arbitration agreement provides for a mechanism in case of a dispute arising out of such a contract.

7 Therefore, the considerations relevant for determining the law applicable to the arbitration agreement are different from those involved in choosing the law governing the main contract [*Lew et al., § 6-23*]. Rather than applying the substantive law of the main contract to the arbitration agreement, reasonable parties in general prefer consistency between the law governing the procedure and the law governing the arbitration agreement [*FirstLink, § 15; cf. Lionnet/Lionnet, p. 170*]. This is because conflicts between these two different laws would lead to inextricable complications in the decision-making process of the Tribunal and, subsequently, in setting aside proceedings before the relevant national court [*van den Berg, p. 292; cf. Berger I, p. 321; Koller, § 3/61*]. This is particularly relevant in the present case because there is a discrepancy between the law of Mediterraneo and the law of Danubia regarding the requirements for granting an arbitral tribunal the power to adapt contracts (see § 47), the core of this dispute.

8 In order to avoid the possible conflict between the applicable laws, absent other special indications showing the contrary, the choice for the seat of arbitration generally entails the choice for the law governing the arbitration agreement [*van den Berg, p. 293; Berger I, p. 320; Schlosser § 254; Glick/Venkatesan, p. 146*]. This approach was adopted by arbitral tribunals [*cf. ICC Award 6149/1990; ICC Award 6719/1994; ICC Award 1507/1970; BCCI Award 52/65*] and national courts in common law as well as in civil law jurisdictions [*Bulbank Case; BGH, 10 May 1984; FirstLink, § 16; Rocco Giuseppe v. Federal Commerce, § 4; cf. Glecer v. Glecer, § 10; Arms Trade Fair Case, § 7; Japan Educational v. Field, § 3; Misr Insurance v. MV Dominion*].

9 In this arbitration, the Parties chose Danubia as the seat of arbitration [*cf. Exh. C5, p. 14 § 15*]. This agreement on the seat of arbitration entails the choice of Danubian law as the law applicable to the arbitration agreement.

10 Contrary to CLAIMANT's assertions [*MfC, § 23*], Art. 4 Hague Principles does not affect the application of Danubian law. First, arbitration agreements are explicitly excluded from the Hague Principles' scope of application [*Art. 1(3)(b) Hague Principles*]. Second, even if they were applicable to arbitration agreements, Art. 4 Hague Principles only provides that a choice for the seat of arbitration shall not determine the **substantive law of the contract**. However, the substantive law of the contract is not even in dispute here.

2. The choice-of-law clause in the Sales Agreement does not extend to the arbitration agreement

11 Clause 14 of the Sales Agreement provides that "[*t*]*his Sales Agreement shall be governed by the law of Mediterraneo, including the* [*CISG*]" [*Exh. C5, p. 14*]. Contrary to CLAIMANT's assertion [*MfC, § 27*], this choice-of-law was not meant to determine the law governing the arbitration agreement.

12 First, when parties choose a law for their contract, they rarely ever think about the law governing the arbitration agreement [*Lew et al., § 6-24; cf. Schwenzer/Jaeger, p. 318*]. Thus, it cannot be presumed that the Parties intended this choice to extend to their arbitration agreement [*cf. Schwenzer/Jaeger, p. 318; Schlosser § 254; Lionnet/Lionnet, p. 170*]. This was exactly the case in this dispute. As shown below (see § 18), the Parties did not think about the law of the arbitration agreement when they chose the law of Mediterraneo for the main contract as they had chosen it before they agreed on the arbitration agreement.

13 Second, Clause 14 was inserted **below** all contract's substantive provisions but **above** the arbitration agreement [*cf. Exh. C5, p. 14*]. If the Parties had intended the choice-of-law in Clause 14 to apply also to the arbitration agreement, they would have specified this and inserted the choice of law clause after the arbitration agreement. Moreover, the Parties did not merely refer to the law of Mediterraneo, but specifically to the CISG. The CISG's scope of application is **limited** to contracts for the **sale of goods** [*Art. 1(1) CISG*]. In this regard, the courts of Danubia, in line with the understanding of scholars and courts, agree that the CISG cannot apply to arbitration agreements as they are procedural contracts

[*PO2, p. 60 § 36; Schlechtriem/Butler, p. 42 seq.; Kröll III, p. 44; Construction Materials Case; cf. Janssen/Spilker, pp. 154 seq.; Textiles Case I*].

14 For all those reasons, Clause 14 was only meant to govern the substantive part of the Sales Agreement and therefore does not extend to the arbitration agreement.

3. The negotiations confirm the choice of Danubian law

15 As established above (see § 8), the Parties' choice of the seat constitutes a choice of the law for the arbitration agreement. This is confirmed by the drafting history of the arbitration agreement.

16 Danubian Contract Law is largely a verbatim adoption of the PICC [*PO2, p. 61 § 45*]. Pursuant to Art. 4.1 (1) PICC, contractual provisions ought to be interpreted based on the common intent of the parties [*Art. 4.1(1) PICC; Vogenauer, Art. 4.1 § 3; Komarov, p. 32; ICC Award 83/2008*] as manifested in the wording of the contract [*cf. Vogenauer, Art. 4.3 § 3*]. If the intent of the Parties cannot be established, Art. 4.1(2) PICC provides that the contract shall be interpreted according to the hypothetical intent of reasonable persons of the same kind as the parties in the same circumstances [*Vogenauer, Art. 4.1 § 5; ICC Award 9875/2000*]. Furthermore, unilateral statements and other conduct by either party are to be interpreted according to the intent which the other party knew or could not have been unaware of [*Art. 4.2(1) PICC*]. Notably, Art. 4.3 PICC is replaced in Danubian Contract Law by the "*four corners rule*" for the interpretation of written contracts [*PO1, p. 52 § 2; PO2, p. 61 § 45*]. According to this rule, the interpretation of contract terms is limited to its wording [*cf. Rosengren, p. 6; Goldman v. White Plains*]. Preliminary negotiations may not be considered to supplement or contradict the wording of the contract, but they can be used to interpret it [*PO2, p. 61 § 45; Kleinheisterkamp, Art. 2.1.17 § 4; PICC 2016 Comment, Art. 2.1.17; Peel, § 6-013; Chitty, § 12-096; Müller, p. 27*]. In the present case, the interpretation of the text of the arbitration agreement is confirmed by the Parties' negotiations and, therefore, can be used in accordance with the four corners rule.

17 RESPONDENT suggested the first draft of the arbitration agreement [*Exh. R1, p. 33*], which served as the basis for Clause 15 of the final Sales Agreement [*PO2, p. 55 § 6*]. RESPONDENT's proposal provided that the seat of the arbitration should be in Equatoriana, and that Equatorianian law should apply to the arbitration agreement. Hence, it was RESPONDENT's intention that the law of the seat of arbitration and the law of the arbitration agreement should be aligned. CLAIMANT agreed to this proposal by replying that it "*would largely accept* [*RESPONDENT's*] *proposal*" [*Exh. R2, p. 34*]. It only asked to change the seat of arbitration to Danubia to have a neutral dispute resolution forum [*ibid.*]. Significantly, CLAIMANT did not show any intent to submit the arbitration agreement to another law than the law of the seat of arbitration. Thus, RESPONDENT could not have been aware of such intent. This shows that the Parties agreed that the seat of arbitration should determine the law applicable to the arbitration agreement. CLAIMANT alleges that sending the incomplete draft of the arbitration agreement to RESPONDENT without a clarifying choice-of-law constitutes an objection to a separate law governing the arbitration agreement [*MfC, §§ 17, 21*]. This allegation is incorrect. CLAIMANT's answer only included what it considered to be "*the relevant part*" of the arbitration agreement that needed to be amended and did not concern the choice-of-law [*Exh. R2, p. 34*]. Moreover, the final arbitration agreement contains provisions that were also not included in this incomplete draft of CLAIMANT.

18 Contrary to CLAIMANT's assertions [*MfC, § 27*], it is clear that the Parties intended Mediterranean law to only govern the substantive part of the Sales Agreement. The Parties had agreed on Mediterranean law as the substantive law **before** the arbitration agreement was drafted [*Exh. C3, p. 11*; *Exh. C4, p. 12; Exh. R1, p. 33*]. This is evidenced in RESPONDENT's email of 10 April 2017, in which it proposed the first draft of the arbitration agreement and RESPONDENT explained that it would be appropriate "*in light of the fact that the Sales Agreement* ***is governed*** *by the law of Mediterraneo*" [*cf. Exh. R1, p. 33; emphasis added*]. In this context, CLAIMANT's answer that "*the law applicable to the Sales Agreement* ***remains*** *the law of Mediterraneo*" [*Exh. R2, p. 34; emphasis added*] can only be understood as a reaffirmation of the already agreed upon choice of Mediterranean law as the substantive law of the Sales Agreement. Contrary to CLAIMANT'S allegations [*MfC, § 17*], this was not a statement that this choice for a substantive law shall extend to the arbitration agreement.

19 For these reasons, the negotiations confirm that the Parties' choice for Danubia as seat of arbitration also constitutes a choice-of-law for the arbitration agreement.

4. Even in absence of an agreement Danubian law applies to the arbitration agreement

20 Even if the Tribunal finds that there has been no agreement regarding the law governing the arbitration agreement, Danubian law still applies. This is provided by the applicable default rule. As laid out above (see § 3), the *lex arbitri* stipulates that in absence of an agreement the arbitration agreement is governed by the law of the seat of arbitration.

21 The seat of arbitration is the most significant factor in the determination of the applicable law [*Fouchard et al., § 429*]. This is because the arbitration agreement has, as one frequently cited decision put it, a "*closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract*" [*C v. D, § 26*]. This again follows from the procedural nature and purpose (see § 6) of the arbitration agreement [*Lew I, p. 141; Bernardini I, p. 201*]. Moreover, this has also been held in the leading *Sulamérica* decision [*Sulamérica, § 32*] CLAIMANT is relying on [*MfC, § 25*] to argue the applicability of the law of Mediterraneo. However, in this decision, the court **applied the law of the seat** to the arbitration agreement. It is thus unclear how CLAIMANT concludes that the law of the substantive contract has the "*closest connection*" [*MfC, § 25*] to the arbitration agreement based on the decision in *Sulamérica*.

22 Also, the so-called "*validation principle*" CLAIMANT relies upon [*MfC, §§ 29 seq.*] is not a ground to deny the application of Danubian law [*cf. Glick/Venkatesan, pp. 148, 149*]. The validity of the arbitration agreement is not in dispute [*PO2, p. 61, § 48*]. Rather, the dispute relates to the scope of the Parties' arbitration agreement [*PO1, p. 52, § III*]. Furthermore, applying such a "*pro-arbitration-bias*" to the question of scope of the arbitration agreement would completely disregard the Parties' autonomy in deciding which matters they want to refer to arbitration [*cf. Brekoulakis, p. 364*]. In other words, the answer to those questions about the scope of the arbitration agreement can in no way be determined by any desired outcome.

23 Concluding (**A.**), the Parties chose Danubian law to govern the arbitration agreement by selecting Danubia as seat of arbitration. In any case, the applicable fallback provision leads to the same result.

B. Pursuant to Danubian law the Tribunal lacks jurisdiction to adapt the Sales Agreement

24 After having established that the arbitration agreement is governed by the law of Danubia, it will be shown that the Tribunal lacks the power to adapt the Sales Agreement. Danubian Arbitration Law requires an express authorisation for the adaptation of contracts. This requirement is not met (**1.**). Also, the interpretation of the scope of the arbitration agreement shows that in fact the Parties did not intend to authorise the Tribunal to adapt the Sales Agreement (**2.**). This is confirmed by the Parties' negotiations (**3.**). Consequently, if the Tribunal adapts the Sales Agreement, the award will be subject to annulment (**4.**).

1. The requirements set forth by Danubian Arbitration Law for empowering the Tribunal to adapt the Sales Agreement are not met

25 The relationship between parties to a contract is generally governed by two fundamental principles of contract law: Party autonomy and *pacta sunt servanda* [*cf. Chengwei, § 1 seq.; Goode et al., p. 41*]. Accordingly, an arbitral tribunal does not have the inherent power to change the contractual terms which the parties originally agreed upon and adapt it to what the tribunal might consider to be appropriate [*cf. Redfern/Hunter, § 9.65; Fouchard et al., § 36 seq.; Al Faruque, p. 154; Aminoil Award, § 74; Himpurna v. PLN, § 199; ICC Award 2216/1974*]. As the traditional task of arbitrators is to adjudicate disputes based on pre-existing rights and obligations in the parties' contract, the modification of those rights and obligations through adaptation is an **exceptional power** [*cf. Kröll I, p. 451; Bernardini II, p. 421; PO2 p. 60 § 36*]. As a consequence, it is recognised that the Tribunal can only adapt the Sales Agreement if the Parties **expressly** conferred this powers to it [*Al Faruque, p. 162; Bernardini II, p. 421; Aminoil Award, § 74; cf. Berger IV, p. 30; Redfern/Hunter, § 9.68 seq.; Waincymer p. 1115 seq.*].

26 This is also the standard set forth by Danubian Arbitration Law, which is the *lex arbitri* in this dispute: The power to adapt qualifies as an **exceptional power** [*PO2, p. 60 § 36*]. In this regard, Danubian courts hold that Art. 28(3) Model Law – which regulates *ex aequo et bono* decisions – sets a general requirement for the conferral of exceptional powers: an **express authorisation** by the parties [*PO2, p. 60 § 36*]. Accordingly, the Parties have to expressly confer the power to adapt the contract on the Tribunal. The same requirement applies to the national courts of Danubia [*PO2, p. 61 § 45*].

27 The arbitration agreement contained in Clause 15 of the Sales Agreement lacks such an express authorisation. "*Express*" generally means "*directly stated*" [*Black's Law Dictionary*]. Neither in the arbitration agreement [*cf. Exh. C5, p. 14 § 15*] nor anywhere else in the Sales Agreement [*cf. Exh. C5, pp. 13-14*] did the Parties make any reference to adaptation. Thus, they did clearly not "*directly state*" that the Tribunal is authorised to adapt the Sales Agreement. The requirement of an express conferral of powers as set out in the *lex arbitri* is hence not fulfilled.

28 The fact that an express authorisation is missing allows to draw conclusions as to the intent of the Parties. Reasonable parties would have included an express referral if they wanted to confer the exceptional power to adapt the Sales Agreement [*cf. Art 4.1(2) PICC*]. The standard of reasonableness under Art. 4.1(2) PICC is individualised depending on who drafted the contract [*cf. ICC Award 10422/2003*; *Vogenauer, Art. 4.1 § 6*]. In this case, both Parties were represented by lawyers [*cf. Exh. C8, p. 17; Exh. R3, p. 35*] who would reasonably inform themselves about the requirements set out in the law they chose for the arbitration agreement and include an express authorisation.

2. Interpretation of the arbitration agreement shows that the Parties did not intend to confer the power to adapt the Sales Agreement on the Tribunal

29 Irrespective of the fact that an express authorisation is required, as set forth by the *lex arbitri*, the interpretation of the arbitration agreement leads to the conclusion that the Parties did not intend to empower the Tribunal to adapt the Sales Agreement. The Tribunal can only have jurisdiction to adapt the Sales Agreement if this claim falls within the scope of the arbitration agreement [*cf. Berger II, p. 8; Sutton et al., 2-071; Born II, p. 86*]. The scope of the arbitration agreement is determined through its interpretation in accordance with the Parties' intention [*Lew et al., § 7-59; Koller, § 3/258; Joseph,*

§ 4.46] as manifested in the wording of the arbitration agreement [*cf. Vogenauer, Art. 4.3 § 3*]. For this purpose, the interpretation rules of Danubian Contract Law (see § 16) must be applied. Notably, under Danubian law, arbitration agreements are interpreted narrowly [*PO1, p. 52 § II*]. In this context, both Parties agree that under Danubian law there is "*a high likelihood*" [*PO1, p. 52 § II*] that the Tribunal is not authorised to adapt the Sales Agreement [*MfC, § 24; PO1, p. 52 § 2*].

30 Regarding this, it has been held in case law that if arbitration agreements are drafted narrowly, it cannot be presumed that they would include all disputes related to the parties' relationship [*Century v. Lloyd's, § 4; AFL-CIO v. Verizon, § III; cf. Michele v. Fisheries*]. Rather, depending on the wording and the type of disputes referred to in the arbitration agreement, the scope may differ [*cf. Granite Rock Case; Aguero v. Laporte; MEI v. Ssangyong; Negrin v. Kalina, p. 14*]. As the tribunal's jurisdiction naturally depends on the parties' will, arbitration agreements should be interpreted strictly [*ICC Award 2138/1974; ICC Award 7920/1993*].

31 As a matter of fact, the Parties based their final arbitration agreement on the HKIAC Model Clause but deliberately narrowed down its broad wording [*Exh. R1 p. 33; Exh. R2 p. 34; PO2 p. 55 § 6*]. The arbitration agreement reads in its relevant parts:

> "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to* [...] *arbitration* [...]" [*Exh. C5, p. 14 § 15*].

32 Compared to this, the HKIAC Model Clause reads as follows:

> "*Any dispute,* ***controversy, difference or claim*** *arising out of* ***or relating to*** *this contract, including the existence, validity, interpretation, performance, breach or termination thereof* ***or any dispute regarding non-contractual obligations arising out of or relating to it*** *shall be referred to* [*arbitration*]" [*HKIAC Model Clause; emphasis added to parts which were excluded from the Parties' arbitration agreement*].

33 Already by looking at the considerably narrower wording of the Parties' arbitration agreement, the Tribunal must conclude that it was the intention of the Parties [*cf. Art 4.1(1) PICC*] to only submit a **limited range of disputes** to arbitration. For this reason, CLAIMANT also cannot rely on any "*pro-arbitration presumption*" [*MfC, § 32*] which would suggest otherwise, because this would clearly contradict the Parties' intent.

34 Furthermore, the reference to the kind of disputes which was left in the narrowed arbitration agreement shows that the scope of the disputes falling under the jurisdiction of the Tribunal are disputes over the existence, validity, interpretation, performance, breach or termination only of **existing rights and obligations** in the Parties' Sales Agreement. In contrast, by adapting the Sales Agreement, the Tribunal would modify the price agreed between the Parties by changing the existing allocation of obligations and risks between the Parties. Importantly, this right to an increased price **does not exist prior to adaptation** [*cf. Kröll II, p. 4; Berger II, 2; Beisteiner p. 84; Cohen p. 88 seq.*]. This modification is not comparable to the types of judicial tasks the Parties referred to in the arbitration agreement. Quite to the contrary, adaptation is qualified as inherently different from traditional judicial acts [*Kröll II, p. 4; cf. Bernardini II, p. 420 seq.; Redfern/Hunter, § 9.65*] as those listed in the arbitration agreement. Therefore, one must conclude that the Parties did not intend contract adaptation to be a task which should be performed by the Tribunal [*cf. Art 4.1(1) PICC*].

35 This is strengthened by interpreting the arbitration agreement as part of the particular contract in which it appears [*Art 4.4 PICC; Ferrario, p. 146; cf. Measuring Instruments Case*]. Contrary to CLAIMANT's assertions [*MfC, § 33*], the Sales Agreement does not contain **any** provision concerning contract adaptation (see § 99 seq.). This again supports that the scope of the agreement does not entail the power to adapt contracts as there is no provision on which such a claim could be based on. All this is in line with the narrow interpretation as provided by Danubian law [*PO1, p. 52 § II*].

36 Moreover, contract adaptation is not regarded as naturally falling within the scope of an arbitration agreement but as an enhanced power [*Bernardini III, p. 56; cf. Paulsson et al., p. 101; Craig et al., p. 114 seq.*]. If parties want to confer this power on a tribunal, the scope of the arbitration agreement should be widened accordingly [*ibid.*]. This is also reflected in decisions where tribunals adapted contracts, as those contracts included an explicit referral of powers to the Tribunal [*cf. Atlantic Case; ICC Award 13504/2007; ICC Award 7544/1995*].

37 CLAIMANT can also not convincingly argue that the Parties' intent to empower the Tribunal to adapt the Sales Agreement is supported by trade usages observed in international trade by parties involved in long-term agreements [*MfC, § 34*]. The long-term agreements referred to by CLAIMANT are contracts which run for over ten years, as the authorities CLAIMANT relies on accurately illustrate [*cf. Ferrario, p. 72; Atlantic Case; Quintette Case*]. This is clearly not comparable to the Parties' Sales Agreement which only lasted for a few months.

38 In light of all this, the arbitration agreement should be construed narrowly to give effect to the Parties' intent to have a narrow agreement which only confers jurisdiction for a limited range of disputes. As the Parties did not express their intent to also include disputes concerning the modification of the Sales Agreement, the Tribunal consequently lacks the power to adapt the Sales Agreement.

3. The negotiations confirm that the Tribunal lacks the power to adapt the Sales Agreement

39 As established above (see § 16) the drafting history cannot be used to supplement or contradict the agreement, but it can serve to interpret the wording of the written contract. In this case, the negotiations confirm that the Parties did not intend to empower the Tribunal to adapt the Sales Agreement.

40 In its email from 10 April 2017 [*Exh. R1, p. 34*], RESPONDENT suggested the narrowed down arbitration agreement as described above (see § 31). In its response, CLAIMANT consented to this proposal without any amendment to its scope [*Exh. R2, p. 35*]. Notably, in this email exchange the Parties did not mention adaptation at all. Ultimately, the Parties' representatives who concluded and signed the contract based the final arbitration agreement only on this email conversation [*PO2, p. 55 §§ 5-6*]. Therefore, the Parties' common intention [*cf. Art 4.1(1) PICC*] at the time of the conclusion of the Sales Agreement was to include an arbitration agreement with a narrow scope. As adaptation was not discussed during this email exchange, they consequently could not have intended to confer this power on the Tribunal.

41 Contrary to CLAIMANT's allegations [*MfC, §§ 11, 31, 57*], the Parties never concluded a "*verbal agreement*" that the Tribunal should be empowered to adapt the Sales Agreement during their meeting in Vindobona [*Exh. C4, p. 12*]. The Parties' initial representatives discussed the option to include an adaptation mechanism into the Sales Agreement [*Exh. C8, p. 17*].

42 However, this discussion was never communicated to the Parties' representatives which concluded and signed the Sales Agreement later on. Thus, RESPONDENT could not have been aware [*Art. 4.2(1) PICC*] of CLAIMANT's wish to put an adaptation mechanism in the Sales Agreement. In fact, this provision was never included in the final version of the Sales Agreement.

43 In any event, even if the Tribunal would attribute value to the discussion in Vindobona, the outcome remains unchanged. Because there is no reference to the power to adapt in the Sales Agreement, the Tribunal would be supplementing the Sales Agreement by using this discussion. However, the Tribunal is barred from doing so because under Danubian law, the four corner rule prevents the drafting history to be considered in order to supplement the written contract (see § 16).

44 As a result, the negotiations confirm that the Tribunal does not have the power to adapt the Sales Agreement.

4. If the Tribunal exceeds its powers, the award is subject to annulment

45 As arbitrators only have the authority to decide on issues which fall within the scope of the arbitration agreement, an adaptation of the price in the present case constitutes an excess of authority.

Art. 34(2)(a)(iii) Model Law stipulates that an award is subject to annulment if a tribunal decides on issues which are outside the scope of the arbitration agreement [*Born I, p. 3288; cf. Holtzmann/Neuhaus, p. 1059; Port et al., p. 258; Borris/Hennecke, § 196; Katz v. Feinberg; Nielsen Case*]. This is particularly the case if the Tribunal makes use of exceptional powers such as contract adaptation (see § 25 seq.) without an express authorisation by the Parties [*cf. Thyssen v. Maaden; Riverstone v. Brouard; DBM v. WRT*]. Consequently, if the Tribunal decided to adapt the Sales Agreement, it would render an award which would subsequently be annulled.

46 Concluding **(B.)**, the Tribunal does not have the jurisdiction to adapt the Sales Agreement under Danubian law. The Parties did not expressly authorise the Tribunal, as required by the *lex arbitri*. As the interpretation of the arbitration agreement shows, the Parties also did not intend to empower the Tribunal to adapt the Sales Agreement. Therefore, the award would be subject to annulment.

C. Even if Mediterranean law should be applicable, the Tribunal still lacks the power to adapt the Sales Agreement

47 Under Mediterranean law, arbitration agreements are interpreted broadly [*NoA, p. 7 § 16*]. Also, as CLAIMANT proposes [*MfC, p. 12 § 31*], a standard arbitration agreement would be enough to empower tribunals to adapt contracts [*PO2, p. 60 § 39*]. Nevertheless, the Tribunal still lacks the power to adapt the Sales Agreement.

48 Irrespective of the law governing the interpretation of the arbitration agreement, the applicable *lex arbitri* in this dispute remains Danubian Arbitration Law. It governs the present proceedings [*cf. Redfern/Hunter, § 3.42; Belohlavek, p. 274; ICC Award 5294/1988*] and thus has to be considered in order to assess the powers of the Tribunal [*cf. Redfern/Hunter, § 5.13 seq.*]. Hence, the Tribunal may only adapt the Sales Agreement if this is permitted under the applicable *lex arbitri* [*Kröll II, p. 20; Berger IV, p. 9; Ferrario, pp. 75 seq.; cf. Schlosser, § 744; Brunner I, p. 493*]. The *lex arbitri* subjects the Tribunal's power to the Parties' express authorisation which, as shown above (see §§ 27 seq.), is clearly missing.

49 In this case, the Parties consciously narrowed down the HKIAC Model Clause (see § 32). Consequently, the broad approach under Mediterranean law cannot be applied.

* * *

50 In conclusion of submission **(I.)**, the law applicable to the arbitration agreement is the law of Danubia as the Parties chose Danubia as the seat of arbitration. The requirement of an express conferral of powers to adapt the contract on the Tribunal set out by Danubian Arbitration Law is not met. Furthermore, the interpretation of the arbitration agreement under Danubian law shows that the Parties did not intend to empower the Tribunal to adapt the Sales Agreement. This remains unchanged even if the law of Mediterraneo is applicable to the arbitration agreement. For all those reasons, the Tribunal lacks jurisdiction to adapt the Sales Agreement.

II. The award CLAIMANT seeks to submit in the arbitration proceeding is inadmissible

51 RESPONDENT requests the Tribunal to reject the award rendered in another confidential arbitration proceeding between RESPONDENT and a third party (“**Mediterranean Proceeding**”) which is completely unrelated to this dispute. In the Mediterranean Proceeding, a partial interim award was rendered [*PO2, p. 60 § 41*]. This award was illegally obtained either by hackers or by RESPONDENT’s former employees [*ibid.*]. The award is currently in possession of a company with a doubtful reputation [*ibid.*]. CLAIMANT now intends to buy the award from this very company in order to submit it in the present proceedings [*ibid.*].

52 The Tribunal has the discretion to determine whether this award is admissible pursuant to Art. 22 HKIAC-Rules. Additionally, the Tribunal should take into account the IBA-Rules on the Taking of Evidence in International Arbitration (“**IBA-Rules**”). The IBA-Rules are universally recognised as best practice in international arbitration [*Redfern/Hunter, § 6.95; Born I, p. 2212; Welser/De Berti, p. 80; El Ahdab/Bouchenaki, p. 90; Helmer, p. 60; Marghitola, p. 33; Schumacher, § 20; Demeyere, p. 249*] and should be used to complement the provisions of the HKIAC-Rules.

53 Bases on the HKIAC-Rules and the IBA-Rules, the award cannot be submitted in the present proceeding. This is due to the fact that it was illegally obtained **(A.)**, it is confidential **(B.)**, and, in any event, is irrelevant and not material for the outcome of this case **(C.)**.

A. CLAIMANT acts in bad faith and breaches fundamental procedural rights by submitting illegally obtained information

54 CLAIMANT asserts that illegality does not affect the admissibility of the information [*MfC, § 47*]. This is incorrect for the following reasons:

55 First, admitting illegally obtained evidence “*would be contrary to the principles of good faith and fair dealing required in international arbitration*” [*EDF v. Romania, § 38*]. The obligation to act in good faith constitutes a general principle in international arbitration [*Fouchard et al., § 1479; Henriques, p. 526; Veeder, p. 124; Berger/Kellerhals, § 1320*]. This also applies to the submission of evidence [*Preamble IBA-Rules § 3; Zuberbühler et al., Preamble § 14; cf. Berger/Kellerhals, § 1320*]. Therefore,

parties are barred from submitting illegally obtained information [*cf. Methanex Case, Part II, Chapter I, p. 26, § 54, EDF v. Romania, § 38*]. As a result, if CLAIMANT submitted the illegally obtained award as it plans to do [*Letter by Langweiler, p. 50*], it would clearly act in bad faith.

56 Second, as outlined in Art. 9(2)(g) IBA-Rules, the Tribunal must consider rules of fairness when deciding on the admissibility of evidence [*cf. Fernandez-Ballester/Arias, p. 1029 seq.*]. The right to a fair trial – which is reflected in Art. 13(5) HKIAC-Rules – entails the principle of equality of arms. This principle stipulates that parties in arbitral proceedings must have equal opportunities to present their case and no party should be disadvantaged in the preparation of its case [*Lau, p. 560; O'Malley, § 9.116; Schumacher, § 41*]. In the case at hand, CLAIMANT seeks to obtain an unfair advantage over RESPONDENT: It will knowingly acquire an illegally obtained award for 1,000 USD from a company with a doubtful reputation that is unlawfully in possession of the award [*ibid.*]. In doing so, CLAIMANT itself would be actively involved in obtaining the information it wants to submit. This would deprive RESPONDENT of its fundamental procedural right to a fair trial [*Methanex Case, Part II, Chapter I, p. 26, § 54; EDF v. Romania, § 38; Libananco Case; Adamu Award, § 69*]. Therefore, allowing CLAIMANT to submit the partial interim award would severely disadvantage RESPONDENT, who unlike CLAIMANT, abides by the rules.

57 Third, the admissibility of illegally obtained evidence would entail far-reaching consequences [*cf. Reisman/Freedman, p. 738*]. It would constitute an inducement to unlawful actions where parties are encouraged to disregard statutory law and to violate their good faith obligations. An exclusion of illegally obtained evidence is an effective and fair solution to prevent such illicit acts in the course of taking evidence [*cf. Madalena, p. 254*].

58 Concluding **(A.)**, CLAIMANT is acting in bad faith if it submits the illegally obtained partial interim award. Its active involvement gives CLAIMANT an unfair advantage which deprives RESPONDENT of its fundamental procedural rights. Additionally, admitting the evidence would have adverse consequences, as it would set the wrong incentives. Thus, the Tribunal should reject the evidence.

B. The confidentiality of the award renders it inadmissible

59 Art. 9(2)(b) IBA-Rules stipulates that an arbitral tribunal shall exclude evidence if there is a legal impediment under legal or ethical rules which the tribunal determines to be applicable. The confidentiality of the Mediterranean Proceeding constitutes such a legal impediment for the following reasons:

60 Confidentiality is one of the cornerstones of arbitration, being one of the main objectives for parties to opt for arbitration and one of its distinct advantages over state litigation [*Redfern/Hunter, § 2.161; Noussia, pp. 67, 122; Günther, p. 342; Poorooye/Feehily, pp. 277 seq.; Russel v. Russel; cf. Waincymer, p. 798*]. This is confirmed by courts which hold that the right to confidentiality arises out of the very nature of arbitration [*Dolling-Baker v. Merrett; Ali Shipping v. Shipyard Trogir; Aita v. Ojjeh; cf. True North v. Bleustein*]. The HKIAC-Rules incorporate this right to confidentiality: Pursuant to Art. 45 HKIAC-Rules and Art. 42 2013 HKIAC-Rules, which is applicable in the Mediterranean Proceeding, all information from the proceeding, including the awards rendered, are confidential and shall not be disclosed to third parties. As they apply in both proceedings and stipulate a right that arises out of the nature of arbitration, the Tribunal should consider to be bound by them and thus qualify confidentiality as a "*legal impediment*" pursuant to Art. 9(2)(b) IBA-Rules.

61 Moreover, CLAIMANT itself affirms that the Tribunal has the power to order document production [*MfC, § 41*]. Still by seeking to submit illegally obtained evidence, it tries to circumvent the orderly process of document production under Art. 22(3) HKIAC-Rules and Art. 3(2) IBA-Rules. According to these rules, CLAIMANT would have to make a request for document production in order to obtain documents which are not in its possession. RESPONDENT then would have had the opportunity to respond and raise confidentiality objections [*cf. Emanuele et al., pp. 73 seq.; Zuberbühler et al., Art. 3 § 160 seq.*]. CLAIMANT, however, does not abide by this process but instead wants to buy the illegally obtained award. This shows that CLAIMANT is well aware of the fact that the Tribunal would abstain from producing the award due to its confidentiality.

62 Finally, allowing the submission of confidential information would undermine confidence in arbitration [*Reuben, p. 1281*]. Parties considering opting for arbitration would be reluctant to use it if their behaviour within that allegedly private sphere can be admitted as evidence in another arbitral proceeding [*ibid., p. 1287*]. It could also affect the reputation of the HKIAC itself if it became public that an award which is confidential under the HKIAC-Rules can be submitted in an unrelated arbitration without any consequences.

63 In order to justify its behaviour, CLAIMANT tries to rely on different grounds: It seeks to rely on the exemption from confidentiality set out in Art 42(3) 2013 HKIAC-Rules , alleging that it can disregard the confidentiality of the partial interim award because it needs to "*pursue a legal right*" [*MfC, § 50*] . However, CLAIMANT misunderstands the way this provision works. This provision makes clear that only the parties to the Mediterranean Proceeding themselves can be exempted to "*pursue a legal right*" and not CLAIMANT who is a third party [*cf. Hassneh Insurance v. Mew; Ali Shipping v. Shipyard Trogir*].

Also, CLAIMANT's assertion that the way the evidence was obtained by (see § 51) constitutes a "*disclosure waiving confidentiality obligations*" [*MfC, § 47*] is wrong. A "*waiver*" is a "*voluntary relinquishment or abandonment* [...] *of a legal right or advantage*" [*Black's Law Dictionary*]. As the award left RESPONDENT's sphere illegally with neither its knowledge nor consent this constitutes no "*voluntary*" relinquishment of their right to confidentiality.

64 Moreover, CLAIMANT's considerations on transparency to justify breaches of confidentiality [*MfC, §§ 44 seq.*] are clearly out of place Transparency in arbitration is meant to promote the publicity of investor-state arbitration disputes, where at least one state or state-owned entity is involved and public policy matters such as health, environment or energy are concerned [*cf. Peterson, p. 4; cf. Levander, p. 513*]. Those are matters of public interest. In contrast, commercial arbitration involves two private parties disputing over their business relations [*cf. Blackaby, pp. 218 seq.*]. Those parties, as in the present case, legitimately prefer to keep their dispute private by litigating under confidentiality provisions [*cf. Born I, p. 2828*].

65 Concluding **(B.)**, the confidential nature of the partial interim award constitutes a legal impediment to its admissibility in the present proceeding. Moreover, this confidentiality cannot be disregarded on grounds of transparency or any "*exemption*" CLAIMANT tries to rely on. After all, CLAIMANT tries to unjustly circumvent the orderly course of document production.

C. The award is irrelevant and not material to the present proceeding

66 As reflected in Art. 22(3) HKIAC-Rules and Art. 9(2)(a) IBA-Rules the Tribunal should consider evidence only if it is **relevant** and **material** to the case [*Zuberbühler et al., Art. 9 § 36; Sutton et al., § 5-136*]. Evidence is relevant if the information put forward supports a claim of the submitting party [*O'Malley, § 3.69*]. Furthermore, it is material if the information will affect the tribunal's deliberations on the merits of the case [*ibid., §§ 9.13 seq.*]. In this regard, the burden of proof lies with CLAIMANT [*cf. ibid., § 3.69; Schumacher, § 222*].

67 In this dispute, the information CLAIMANT wants to submit does not fulfil these requirements, because, contrary to CLAIMANT's assertions [*MfC, § 43*], RESPONDENT's conduct in the other proceeding is by no means contradictory to the present arbitration. The Mediterranean Proceeding is **fundamentally different** in several decisive facts and legally relevant issues.

68 First, the dispute underlying the Mediterranean Proceeding arose out of a different contract regarding different goods and between different parties [*PO2, p. 61 § 39*]. Moreover, the dispute relates to a completely different factual matrix. It is based on different tariffs which were imposed by different governments [*PO2, p. 58 §§ 23, 25*]. In this regard, it is noteworthy that not only RESPONDENT but also its opponent from the Mediterranean Proceeding, states that CLAIMANT's allegations "*do not reflect reality and are taken out of context*" [*Letter by Fasttrack, p. 51*].

69 Second, the legal framework is entirely different, as the contract in the Mediterranean Proceeding contains an ICC Hardship Clause [*PO2, p. 60 § 39*]. In this dispute, as explained below (see § 99), the Sales Agreement entails a clause that merely provides for exemption from liability [*cf. Exh. C5, p. 14 § 12*]. Furthermore, in the Mediterranean Proceeding the parties have chosen a different seat, namely Mediterraneo [*PO2, p. 60, § 39*]. As outlined above (see § 26), the jurisprudence in Danubia in fact stipulates stricter requirements than the arbitration law of Mediterraneo regarding the empowerment of a tribunal to adapt contracts [*cf. PO2, p. 60, §§ 36, 39*]. Finally, in the first proceeding the parties to the Mediterranean Proceedings chose the HKIAC Model Clause with all additions, while in the present proceeding the clause was narrowed down [*Exh. R1, p. 33; Exh. C5, p. 14*]. In light of these fundamental differences, RESPONDENT's submissions in this case are in no way contradictory to its behavior in the Mediterranean Proceeding. Thus, it does not support CLAIMANT's request and would not have any impact on the decision by the Tribunal.

70 Concluding **(C.)**, the information should be rejected by the Tribunal because it is neither relevant nor material to this dispute due to the fundamental factual and legal differences to the present proceedings.

* * *

71 In conclusion of submission **(II.)**, the award is confidential and was obtained illegally. If CLAIMANT submitted such illegally obtained information, it would be in breach of good faith. Also, as CLAIMANT would be actively engaged in obtaining the award it would put RESPONDENT at a disadvantage and would thus deprive RESPONDENT of its fundamental procedural rights. Moreover, the confidentiality of the award constitutes a legal impediment to its admissibility under Art. 9(2)(b) IBA-Rules. Lastly, due to the completely different factual background and legal context of the Mediterranean Proceeding, the award lacks relevance and materiality to the present case. For all those reasons, the award is inadmissible and must be rejected.

III. CLAIMANT is not entitled to any additional payment under the Sales Agreement

72 The Parties agreed upon the sale of 100 artificial insemination doses against the payment of 10,000,000 USD. In Clause 8 of the Sales Agreement the Parties agreed that CLAIMANT ships the doses "*Delivered Duty Paid*" (DDP, INCOTERMS 2010) to Equatoriana. CLAIMANT delivered the 100 doses in accordance with Clause 8 of the Sales Agreement. CLAIMANT now requests an adaptation of the sales price in order to receive an additional payment of 1,250,000 USD.

73 This claim is baseless for the following reasons: First, CLAIMANT is obligated to pay all import tariffs pursuant to Clause 8 of the Sales Agreement (**A.**). Second, CLAIMANT is not exempted from the payment of the import tariffs under Clause 12 of the Sales Agreement (**B.**). In any event, Clause 12 of the Sales Agreement does not provide for the possibility to adapt the contract price (**C.**).

A. CLAIMANT was obligated to pay the import tariffs

74 In Clause 8 of the Sales Agreement, the Parties agreed that the "[*s*]*eller will ship 3 instalments DDP* [*INCOTERMS 2010*]" [*Exh. C5, p. 14 § 8; PO2, p. 56 § 10*]. DDP means that the seller must deliver the goods cleared for import and placed at the disposal of the buyer at the named place of destination [*ICC Guide to Incoterms, p. 149; Schwenzer et al., § 38.19; Brunner II, p. 681 seq.; Coetzee, p. 123*]. Therefore, the **seller bears all the costs and risks** related to the delivery of the goods to the place of destination and has an obligation to clear the goods for export and for import [*ibid.; Dutton, p. 273; Jimenez, p. 294*].

75 DDP is the only INCOTERM allocating any VAT or other taxes payable upon import to the seller **unless expressly agreed otherwise** in the sales contract [*ICC Guide to Incoterms, p. 149*]. In the case at hand, the only deviation from standard DDP is in Clause 10 of the Sales Agreement. In Clause 10 the Parties expressly allocated certain costs and risks associated with the delivery of the goods ("*tank rental and handling fees*") to RESPONDENT [*Exh. C5, p. 14 § 10*].

76 Had the Parties intended to shift additional risks and costs associated with the delivery of the goods, including newly imposed import tariffs, to RESPONDENT they would have chosen a different INCOTERM such as DAT or DAP [*cf. Ettinger et al., "Responsibility for Duty Payment"; Gibbons, p. 16; ICC Guide to Incoterms*]. Particularly, the DAP INCOTERM would have provided for what CLAIMANT is claiming now. The only difference between DAP and DDP is that under DAP the buyer bears all the costs and risks associated with the import of the goods [*ICC Guide to Incoterms, p. 143*]. Another way to deviate from CLAIMANT's obligation of clearing the goods for import would have been to add the

phrase "*not cleared for import*" or "*tariffs unpaid*" after DDP [*ibid., p. 150 seq.*]. Since the Parties included no such phrases they clearly did not intend to alter its meaning [*cf. ANoA, p. 30 § 4*].

77 Hence, by agreeing on the DDP INCOTERM in the Sales Agreement the Parties consciously allocated all costs and risks associated with the delivery to CLAIMANT, including newly imposed import tariffs. Consequently, the Parties are bound by the DDP INCOTERM which they have agreed upon [*cf. Magnus, Art. 9 § 8; Witz, Art. 9 § 5; Schmidt-Kessel, Art. 9 § 6; Melis, Art. 9 § 7; Bonell, Art. 9 § 2.1.2.; Perales Viscasillas, Art. 9 § 15*].

78 Concluding **(A.)**, CLAIMANT is obligated to pay the import tariffs imposed by Equatoriana because the Parties expressly agreed on "*3 instalments DDP*" without any additions or amendments [*Exh. C5, p. 14 § 8*].

B. CLAIMANT cannot rely upon Clause 12 of the Sales Agreement

79 CLAIMANT relies on Clause 12 of the Sales Agreement to claim price adaptation on the grounds of hardship. However, this claim is baseless as the requirements set forth in Clause 12 are not met.

80 In order to establish what the Parties agreed upon in Clause 12 it has to be interpreted pursuant to Art. 8 CISG. The primary starting point to evaluate its meaning is the wording of the Sales Agreement [*cf. Schmidt-Kessel, Art. 8 § 13; Schwenzer et al., § 26.16*]. Accordingly, contractual provisions are to be interpreted according to the common intention of the Parties [*Schmidt-Kessel, Art. 8 § 22; Saenger, Art. 8 § 2; Huber/Alastair, p. 12*]. Art. 8(1) CISG stipulates that statements made by a party are to be interpreted according to its "*subjective intent*" [*Zeller, p. 91; Ferrari I, p. 177*] if the other party knew or could not have been unaware of it. Furthermore, Art. 8(2) CISG provides that the hypothetical understanding of a reasonable third person ("*objective intent*") has to be taken into account when the "*subjective intent*" cannot be established [*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 intent of the parties, Art. 8(3) CISG stipulates that all relevant circumstances such as the negotiations are to be considered [*Art. 8(3) CISG; Schmidt- Kessel, Art. 8 § 20; Zuppi, Art. 8 § 25*].

81 In this regard, Clause 12 that CLAIMANT relies on to request additional payment stipulates:

> "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the seller such as missed flights, weather delays, failure of third-party service, or acts of God neither for* ***hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous***" [*Exh. C4, p. 14 § 12; emphasis added*].

82 Clause 12 is an exemption from liability clause, as it specifies certain events the "[s]*eller shall not be responsible for*". Such clauses generally "*exempt a party from liability which he would have borne had it not been for the clause*" [*Black's Law Dictionary*]. Clause 12 also entails elements of force majeure, as it covers unforeseeable, uncontrollable events that make performance impossible [*cf. Fontaine/De Ly, p. 403; DiMatteo I, p. 667*]. Force majeure clauses are also qualified as exemption clauses [*cf. Fontaine/de Ly, p. 356; Kleinheisterkamp, Art. 7.1.7 PICC § 6*] as their legal remedy is to exempt a breaching party from liability [*DiMatteo III, § 3.22*]. Accordingly, Clause 12 was referred to as a force majeure clause in the record [*Exh. R3, p. 35; PO2, p. 56 § 12; ANoA, p. 30, 32 §§ 9, 18*]. Upon CLAIMANT's request, RESPONDENT also agreed to incorporate a narrow hardship wording into this exemption from liability clause [*Exh. R3, p. 35; PO2, p. 56 § 12*]. Thus, it also covers a narrow scope of events that fundamentally alter the economic equilibrium of the Sales Agreement ("*hardship*"), as opposed to making performance physically impossible ("*acts of God*").

83 The circumstances and requirements set forth in Clause 12 are not fulfilled: The import tariffs set by Equatoriana are neither a case of "*lost semen shipments*" nor a "*delay in delivery*". CLAIMANT hence cannot rely upon the first two circumstances of Clause 12. The import tariffs set by Equatoriana are also not an "*act of God*", as they are not an overwhelming, unpreventable event by a natural cause [*Black's Law Dictionary; cf. Webster Dictionary; Collins Dictionary*]. Therefore, CLAIMANT bases its request for additional payment on the hardship exemption in Clause 12 [*MfC, §§ 55 seq.*]. However, CLAIMANT cannot do so, because the requirements set forth in Clause 12 regarding hardship are not fulfilled: CLAIMANT's cost increase was only moderate and, thus, cannot even be considered "*hardship*" **(1.)**. Furthermore, retaliatory import tariffs are neither "*additional health and safety requirements*" nor a "*comparable*" event thereto **(2.)**. Lastly, Equatoriana's import tariffs were not "*unforeseen*" **(3.)** and not unavoidable **(4.)**.

1. Equatoriana's import tariffs did not fundamentally alter the equilibrium of the Sales Agreement

84 Clause 12 of the Sales Agreement is only applicable in the case of "*hardship*" [*Exh. C5, p. 14 § 12*]. Hardship is defined as a fundamental alteration of the contractual equilibrium and covers only excessive disproportions in the balance of performance and counter-performance [*Brunner I, p. 391 seq.*]. A party can claim hardship if the costs of its performance increase extremely due to an unexpected and unavoidable event [*cf. Brunner I, p. 423*] which "*must make performance significantly harder*" [*Schwenzer et al., p. 652 § 45.12*]. In the current case, the alteration of the contract equilibrium was only moderate at best and therefore cannot constitute hardship pursuant to Clause 12.

85 Equatoriana imposed 30% import tariffs on all agricultural goods that only impacted CLAIMANT's final shipment of 50 doses [*Exh. C6, p. 15*]. In its memorandum, CLAIMANT states that "*its cost of performance increased by 30% for the final shipment*" [*MfC, § 68*]. Hereby, CLAIMANT only takes into account 50 doses. This means, in establishing the cost increase, CLAIMANT only took into account half the costs it should have taken into account. However, the entire contract forms one commercial unit and the additional costs caused by the import tariffs have to be put in relation to CLAIMANT's total costs [*cf. Brunner I, p. 462*]. Therefore, the actual cost increase is merely 15%. Such a cost increase is moderate and does not amount to "*hardship*".

86 Even if one were to assume that the wording "*more onerous*" indicates a somewhat lower hardship threshold, as CLAIMANT asserts [*MfC, § 65*], it cannot cover a 15% cost increase. Even CLAIMANT itself referred to a cost increase of 40% as hardship during the negotiations [*Exh. C4, p. 12*]. It is thus unreasonable to assume that RESPONDENT would have covered less than half of this increase in costs under this wording in Clause 12.

2. The imposed import tariffs are not "*comparable*" to "*health and safety requirements*"

87 According to Clause 12 hardship has to be caused by "*health and safety requirements*" or an event "*comparable*" thereto [*Exh. C5, p. 14 § 12*]. Health and safety requirements are "*regulations and standards* […] *adopted to aim at protecting human safety or health*" [*WTO (online)*]. These requirements are classified as technical regulations [*ibid.*]. Such technical regulations set out specific **characteristics of a product** such as its size, shape, design, functions and performance [*ibid.*]. Consequently, only other technical regulations which impose such characteristics on a product can be "*comparable*" to "*health and safety requirements*".

88 Equatoriana's import tariffs in contrast are not a technical regulation connected to the characteristics of a product but rather a charge for the import of goods. Moreover, the imposed import tariffs were only a reaction to tariffs imposed by Mediterraneo [*Exh. C6, p. 15*]. Such **retaliatory tariffs** evidently do not aim at protecting human safety or health as their only purpose is to "*pressure another country into removing its own tariffs*" [*cf. Black's Law Dictionary*]. As a result, Equatoriana's retaliatory measures are not "*health* [*or*] *safety requirements*".

89 Similarly, the retaliatory import tariffs are not "*comparable*" to "*health and safety requirements*" in the sense of Clause 12. In the case at hand, "*comparable*" must be understood in a narrow manner because the Parties only agreed to incorporate a narrow "*hardship reference*" [*Exh. R3, p. 35; ANoA, p. 30-32 §§ 9, 19; PO2, p. 56 § 12*]. Thus, only events closely related to health and safety requirements can be deemed "*comparable*". Such comparable events might be, for example, the imposition of additional quality standards or certain environmental standards to be met when producing the goods.

90 In its submission, CLAIMANT wrongly asserts that the Parties intended retaliatory tariffs imposed by Equatoriana as an event "*comparable*" to "*health and safety requirements*" [*MfC, §§ 59 seq.*]. In doing so, it refers to an email CLAIMANT sent to RESPONDENT on 31 March 2017 [*MfC, § 63*]. In this email CLAIMANT made two proposals: The first was to exclude "*changes in customs regulations or import restrictions*" from the DDP obligation [*Exh. C4, p. 12*]. The Parties rejected this suggestion [*cf. Exh. C5, p. 14 § 12*]. The second proposal was the inclusion of a hardship exemption. The Parties agreed on this proposal. This is clearly reflected in the Sales Agreement as it does not contain any reference to "*changes in customs regulations or import restrictions*". Instead, it contains the hardship exemption in Clause 12. Therefore, CLAIMANT's assertion that the import tariffs are "*comparable*" to "*health and safety requirements*" because they are "*changes in customs regulations*" is wrong, as it is relying on a proposal rejected by the Parties.

91 As a result, contrary to CLAIMANT's assertions [*MfC, § 63*], Equatoriana's retaliatory import tariffs cannot be understood to be "*comparable*" to "*health and safety requirements*" as such an understanding of Clause 12 is incompatible with the wording of the Sales Agreement and the Parties' negotiations.

3. The imposition of Equatoriana's import tariffs was not "*unforeseen*"

92 Pursuant to Clause 12 the imposition of import tariffs by Equatoriana has to be "*unforeseen*". This is in line with the standard of "*unforeseeability*" that is required to claim hardship [*cf. Rimke, p. 199; Doudko, p. 494; ICC Hardship Clause; PICC 6.2.2*], as scholars use the words "*unforeseen*" and "*unforeseeable*" interchangeably [*cf. Dalhuisen, p. 103; Uribe, p. 245 seq.; Bernardini IV, p. 214*]. In this regard, "*unforeseen*" cannot set a more lenient standard, as this would "*result in allowing the enforceability of contractual obligations to be challenged upon the occurrence of the slightest difficulty*" [*ICC Award 4462/1991; cf. Berger VI, p. 141*]. Therefore, as CLAIMANT correctly contends, it is required that the event could not have been reasonably foreseen [*MfC, § 59*], and thus was unforeseeable. In this case, the imposition of retaliatory import tariffs by Equatoriana targeting Mediterraneo was reasonably foreseeable and CLAIMANT thus cannot be exempted under Clause 12.

93 Tariffs are frequently imposed, even by WTO member states. To illustrate this, over the last 10 years, the G20 states alone have set protectionist measures 9041 times [*Fuster, Neue Zürcher Zeitung*]. Hence, in international trade the imposition of import tariffs is within the "*ordinary range of commercial probability*" [*Atamer, Art. 79 § 51*] and therefore certainly not unforeseeable. This is even more so in the case at hand: First, it had been very likely before the conclusion of the Sales Agreement that Mediterraneo, CLAIMANT's seat of business, would impose extensive tariffs covering all agricultural products. This is because prior to conclusion of the Sales Agreement the country elected Mr. Bouckaert as President [*Exh. C6, p. 15*]. It had been clear from the election campaign that he was going to pursue a "*more protectionist approach*" on international trade [*ibid.*]. This became even more evident with Ms. Frankel's appointment as the president's "*superminister*", as she is "*one of the most ardent critics of free trade*" and advocated limiting foreign access to Mediterraneo's agricultural market [*PO2, p. 58 § 23*]. Therefore, it was foreseeable that Mediterraneo would impose extensive tariffs before conclusion of the Sales Agreement.

94 Second, given the political circumstances in Mediterraneo the assertion that Equatoriana's retaliation measures were "*outside of the bounds of probability*" is wrong [*MfC, § 59*]. Contrary to what CLAIMANT alleges [*MfC, § 83*], there even was a historical basis to foresee this, as Equatoriana has retaliated to tariffs before [*Exh. C6, p. 15*]. Additionally, the measure taken by Equatoriana appears to be justified, as other states affected by Mediterraneo's policy are considering retaliation as well [*Exh. C6, p. 15*]. Therefore, CLAIMANT could have foreseen that other countries, including Equatoriana, would impose import tariffs against Mediterraneo due to its policies. This is even more so given CLAIMANT's experience in international shipping and with export and import customs [*NoA, §18; Exh. C8, p. 18*].

4. CLAIMANT could have avoided incurring additional costs

95 Although not expressly provided in Clause 12, "*unavoidability*" is a one of the requirements to claim hardship [*Brunner I, p. 423; DiMatteo I, p. 666; PICC Art. 6.2.2; ICC Hardship Clause*]. Accordingly, reasonable Parties would understand that an event constituting hardship in accordance with Clause 12 of the Sales Agreement has to be unavoidable [*cf. Art. 8(2) CISG*]. This is even more the case as CLAIMANT originally proposed the inclusion of the ICC Hardship Clause that sets forth the requirement of unavoidability. [*Exh. R2, p. 34; cf. ICC Hardship Clause*]. In the case at hand, CLAIMANT could have avoided paying Equatoriana's import tariffs by shipping the last instalment earlier because it knew about their imposition 26 days before they actually took effect.

96 Equatoriana announced import tariffs on "*all agricultural products*" on 19 December 2018 and CLAIMANT knew about the imposition one day later [*PO2, p. 58 § 26*]. At this point it should have at least considered that the import tariffs could affect its sales to Equatoriana [*cf. PO2, p. 58 § 26*]. After all, CLAIMANT is an experienced businessman in both the sale of horses and horse semen as well as the transportation thereof [*NoA, p. 7 § 18*]. Moreover, the import and export of horses and horse semen are generally regulated by governmental departments of agriculture [*Dep. of Agriculture USA; Dep. of*

Agriculture IRL; Dep. of Agriculture AUS]. Therefore, CLAIMANT should have informed itself about the extent of the import tariffs that cover agricultural products. By doing so, it would have known shortly after their announcement that frozen horse semen fall under Equatoriana's import tariffs [*NoA, p. 6 § 11*]. As CLAIMANT bore the risks and costs associated with the delivery to Equatoriana under the agreed upon DDP delivery term (see § 74) it was in CLAIMANT's best interest to clarify whether the import tariffs would affect its sales. Special diligence could have also been expected given the magnitude of the sale compared to CLAIMANT's usual business deals [*NoA, p. 7 § 18; Exh. C2, p. 10*].

97 The import tariffs only took effect on 15 January 2018. Hence, CLAIMANT knew that Equatoriana had imposed import tariffs on agricultural goods 26 days before they actually took effect. Thus, CLAIMANT had ample time to inform itself whether the import tariffs would affect the last shipment and to then take the necessary steps to avoid the additional costs. CLAIMANT must not wait like a "*casual bystander*" [*Atamer, Art. 79 § 54*], but rather is required to accelerate its efforts to fulfil the contract in full and in any case perform at least partially [*Magnus, Art. 79 §§ 32, 34; cf. Secretariat Commentary, Art. 79 § 7*]. For these reasons, it could reasonably have been expected from CLAIMANT to take all necessary measures to ship the last instalment before the 15 January 2018 to avoid incurring additional costs.

98 Concluding **(B.)**, CLAIMANT's cost increase was only moderate and therefore does not constitute "*hardship*". Furthermore, the retaliatory import tariffs set by Equatoriana are not "*comparable*" to "*health and safety requirements*" covered under Clause 12. Finally, the import tariffs were foreseeable and avoidable. For all these reasons, CLAIMANT cannot rely upon the hardship exemption under Clause 12.

C. Clause 12 does not provide for price adaptation

99 CLAIMANT cannot request price adaptation as a legal remedy in the case of hardship pursuant to Clause 12, as this clause only provides for an exemption from liability. This is demonstrated by the wording of the Clause **(1.)** and the Parties' negotiations **(2.)**. The statements made by RESPONDENT's employee Mr. Shoemaker after contract conclusion did not affect this legal relationship **(3.)**.

1. The wording "[*s*]*eller shall not be responsible*" only provides for an exemption from liability

100 The legal remedy chosen in Clause 12 is that the "[*s*]*eller shall not be responsible*". Not being "*responsible*" means that one is not obligated to pay a sum for which one is liable [*cf. Black's Law Dictionary*]. Therefore, the remedy the Parties agreed upon is that the **seller shall not be held liable for damages in cases of non-performance** due to the events described in Clause 12. This does certainly not entail the possibility to claim any additional costs in the case of hardship. In this regard, as CLAIMANT suggests, "*this Tribunal should follow the language of the Contract because contracts are at the top of the legal instrument hierarchy that govern the parties' relationship*" [*MfC, § 59*].

101 Furthermore, the PICC – which is the law of both Equatoriana and Mediterraneo [*PO1, p. 53 § 4*] – also provide for an exemption from liability as a remedy in the case of *force majeure* [*Kleinheisterkamp, Art. 7.1.7 PICC § 26; see also Art. 8:108 PECL*]. For hardship cases, the PICC allow for contract adaptation [*cf. Art. 6.2.3 PICC*]. The Parties thus must have reasonably known of the possibility to include an adaptation mechanism in the Sales Agreement. However, by not amending the wording "*shall not be responsible*", they expressly agreed that in the case of hardship CLAIMANT would be exempted from liability, as opposed to having the right to adapt the Sales Agreement. Thus, it must be concluded that they merely added a further event into the exemption from liability clause [*cf. Fontaine/De Ly, p. 446; Polkinghorne/Rosenberg, p. 58*]. As the representative on RESPONDENT's behalf stated, the Parties only agreed to include a "*narrow hardship reference into the force majeure clause*" [*cf. Exh. R3, p. 35*] which is reflected in the wording of Clause 12.

2. The negotiations confirm the Parties did not agree to have price adaptation as the remedy

102 The negotiations show that the representatives who concluded and signed the Sales Agreement [*PO2, p. 55 § 4; Exh. C5, p. 14*] did not consider price adaptation as a possible remedy for Clause 12. The representatives only had access to the prior email chain of their predecessors [*PO2, p. 55 § 5*]. Price adaptation was at no point mentioned in this email exchange. The only other remedy the final representatives could have been aware of is the remedy of the ICC Hardship Clause suggested by CLAIMANT [*Exh. R2, p. 34*]. However, its remedy is termination [*ICC Hardship Clause 2003*] and the Parties clearly did not incorporate this remedy in Clause 12. Even if they had done so, its effect would be similar to an exemption from liability for non-performance and would in no way entitle CLAIMANT to adapt the price [*cf. Brunner I, pp. 508-509; Fontaine/De Ly, p. 430*].

103 On top of this, a remedy that would increase the price of the Sales Agreement would disregard RESPONDENT's interests as it considered the price for the purchase of the 100 doses to be too high from the very beginning [*Exh. C3, p. 11*]. In fact, the price was already increased before the conclusion of the Sales Agreement due to CLAIMANT's insistence on a higher price in exchange for the incorporation of the DDP INCOTERM [*PO2, p. 56 § 8*]. Therefore, as RESPONDENT already consented to increase a price it considered too high from the beginning [*Exh. C3, p. 11*], it would never have agreed to include a mechanism that would entitle CLAIMANT to increase the price even further.

104 Lastly, contrary to CLAIMANT's assertions [*MfC, § 57*], the conversation between the Parties' initial representatives [*Exh. C8, p. 17*] is not to be considered when determining the legal remedy provided in Clause 12 in the case of hardship. The subsequent representatives who concluded and signed the Sales Agreement had no knowledge of this conversation as it was not reflected in the email chain. Therefore, they clearly did not consider any adaptation mechanism in the Sales Agreement. As a matter of fact, RESPONDENT's final representative would have never agreed to such a remedy [*Exh. R3, p. 35*]. Moreover, even if the conversation is to be considered relevant, the initial representatives made no binding commitments at that stage. In fact, nothing discussed in this conversation was implemented in the Sales Agreement [*Exh. C4, pp. 13-14*] (see § 40). As a result, the Parties agreed to leave the remedy in Clause 12 unchanged.

3. Mr. Shoemaker's statements are of no relevance

105 RESPONDENT strongly objects to CLAIMANT's serious accusations of intentionally misleading behaviour of RESPONDENT's employee, Mr. Shoemaker [*MfC, § 99*]. This accusation is based on the phone conversation of 21 January between CLAIMANT and Mr. Shoemaker. In the phone conversation, Mr. Shoemaker stated that "***if** the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price*" [*Exh. R4, p. 36; emphasis added*]. In other words, Mr. Shoemaker made clear that he is sure the Parties will do as provided in the Sales Agreement. However, as already explained, the Sales Agreement does not provide for the modification of the contract price in the case of the imposition of import tariffs (see § 99). Mr. Shoemaker even clarified in the phone conversation that to his understanding "*DDP meant that all risks had to be borne by* [*CLAIMANT*]" [*Exh. R4, p. 35*]. Therefore, Mr. Shoemaker did not act misleadingly in any way.

106 Furthermore, Mr. Shoemaker would also not have had the authority to consent to additional payments [*Exh. R4, p. 36*]. Since the CISG does not regulate agency [*Hartnell, p. 64; Karollus I, p. 58; Textiles Case II; Wine Case*], this matter must be solved according to the contract law of Mediterraneo, which is a verbatim adoption of the PICC [*PO1, p. 53 § 4*]. According to Art. 2.2.2 and 2.2.5 PICC, a party only has authority when the principal has granted it expressly or impliedly or when it has caused the other party to reasonably believe it had done so [*cf. Goode et al., p. 294; Schwenzer et al., § 13.12; Bennett, p. 782; Saintier, p. 922 § 47*]. RESPONDENT never granted Mr. Shoemaker the authority to make any binding commitments regarding the adaptation of the price [*Exh. R4, p. 36; Exh. C8, p. 18; ANoA, p. 30 § 10*]. As a matter of fact, Mr. Shoemaker himself clarified from the beginning that he "*had no authority to consent to additional payments*" [*Exh. R4, p. 36*] and CLAIMANT even confirmed it was aware of this [*Exh. C8, p. 18*]. CLAIMANT's accusations based on the statements of RESPONDENT's employee [*Exh. R4,* *p. 36; PO2, p. 59 § 34*] are thus baseless. For these reasons, Mr. Shoemaker clearly did not make any binding commitments regarding the adaptation of the Sales Agreement.

107 Concluding (**C.**), Clause 12 only provides for an exemption from liability which is also confirmed by the negotiations. Moreover, Mr. Shoemaker did not consent to any additional payment.

* * *

108 In conclusion of submission (**III.**), CLAIMANT is obligated to pay for Equatoriana's import tariffs under Clause 8 of the Sales Agreement that specifies delivery under the conditions of DDP (INCOTERMS 2010). By agreeing upon DDP the Parties allocated all risks and costs associated with the delivery to CLAIMANT, including any newly imposed import tariffs. Moreover, CLAIMANT cannot rely upon Clause 12 to request additional payment because the import tariffs do not fulfil its requirements. Irrespective of whether the requirements are met, Clause 12 does not provide for price adaptation as a remedy. Therefore, CLAIMANT is not entitled to any payment under the Sales Agreement.

IV. The claim to adapt the Sales Agreement under the CISG is unfounded

109 Pursuant to Clause 8 of the Sales Agreement, CLAIMANT is obligated to pay the import tariffs set by Equatoriana. Contrary to CLAIMANT's assertions, it cannot rely on Art. 79 CISG to request 1,250,000 USD on the grounds of hardship. First, the Parties derogated from Art. 79 CISG by expressly agreeing on an exemption from liability clause in the Sales Agreement (**A.**). Second, the imposition of import tariffs does not constitute an impediment pursuant to Art. 79 CISG and the requirements of unforeseeability and unavoidability are not met (**B.**). Third, in any event, the CISG does not foresee the possibility of contract adaptation (**C.**).

A. The Parties derogated from Art. 79 CISG

110 CLAIMANT bases its request for additional payment on the grounds of hardship under Art. 79 CISG [*MfC, § 78*] and Art. 6.2.2 PICC [*MfC, § 95*]. However, CLAIMANT cannot rely on Art. 79 CISG because the Parties derogated from it by agreeing on the inclusion of Clause 12 in the Sales Agreement.

111 Pursuant to Art. 6 CISG, parties can expressly or impliedly "*derogate from or vary the effect of any of* [*the CISG's*] *provisions*" [*cf. Schlechtriem II, § 12*]. If parties to a contract agree upon a clause incompatible with default CISG provisions, these provisions are suppressed [*Magnus III, Art. 6 § 41; Siehr, Art. 6 § 9; Mistelis, Art. 6 § 13*]. In the case at hand, the narrow hardship wording in Clause 12 is not compatible with Art. 79 CISG. This is because Clause 12 only exempts hardship in case of "*additional health and safety requirements or comparable* [...] *events*" [*Exh. C5, p. 14 § 12*]. Therefore, the scope of Clause 12 is limited to certain kinds of events. In contrast, the scope of Art. 79 CISG – which covers hardship (see § 118) – is not limited as it generally refers to an "*impediment*" [*cf. Art. 79 CISG*]. Hence, Clause 12 is not compatible with Art. 79 CISG and thus derogates from it. As one arbitral tribunal ruled, "*when a contractual clause governing a particular matter is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular question*" [*ICC Award 11333/2002*].

112 This derogation is further evidenced by the negotiations of the Sales Agreement [*Art. 8(3) CISG*]. RESPONDENT consented to CLAIMANT's suggestion to include a hardship exemption but only under the condition that it was narrow [*PO2, p. 56 § 12*] and covered few expressly mentioned events (see § 89). By drafting such a narrow wording, RESPONDENT showed its intent [*cf. Art. 8(1) CISG*] to deviate from hardship where the events are not limited to a certain kind [*cf. DiMatteo I, p. 694*]. CLAIMANT could not have been unaware of this intent [*cf. Art. 8(1) CISG*]. By consenting to the narrow hardship exemption in Clause 12, CLAIMANT agreed to regulate hardship exhaustively therein.

113 Concluding **(A.)**, recourse to Art. 79 CISG is not possible as the Parties derogated from it by agreeing on Clause 12 of the Sales Agreement.

B. In any event, the requirements of Art. 79 CISG are not met

114 Even if the Parties had not derogated from Art. 79 CISG, its requirements would not be fulfilled and CLAIMANT could thus not be exempted from liability. *Pacta sunt servanda* is not only an important underlying principle of the CISG [*Magnus II, § 5.b.2*], but also a universally accepted cornerstone of contract law [*Chengwei, § 1 seq.*]. This principle stipulates that parties to a contract are bound by their promises [*Maskow, p. 658; Rimke, § I*]. According to this principle parties cannot easily be released from their obligations because the economic circumstances of a deal have changed [*Berger III, p. 6*].

115 Pursuant to Art. 79 CISG, a party is not liable for a failure to perform its obligations if it proves that the failure was due to "*an **impediment beyond** [**its**] **control** and that* [*it*] *could not reasonably be expected to have **taken the impediment into account** at the time of the conclusion of the contract or to have **avoided or overcome it, or its consequences***" [*Art. 79 CISG; emphasis added*]. CLAIMANT carries the burden of proof that all these requirements are met [*DiMatteo II, p. 275 seq.; Magnus II § 5.1.26; Salger, Art. 79 § 14; Janssen/Kiene, p. 277; Ferrari II, § II; Al Palazzo v. Bernardaud; Shirt Case*]. However, CLAIMANT fails to prove the requirements are met: First and foremost, the additional costs caused by the imposition of Equatoriana's import tariffs do not constitute an impediment pursuant to Art. 79 CISG

(**1.**). Additionally, the imposition of import tariffs by Equatoriana was neither unforeseeable (**2.**) nor unavoidable (**3.**).

1. The additional costs caused by the import tariffs do not constitute an impediment under Art. 79 CISG

116 It is highly disputed whether economic hardship can even constitute an impediment under Art. 79 CISG. Some authors deny any possibility of such an exemption [*Tallon, § 2.6.4; Nicholas, p. 235; Heuzé, § 471*], and even authors approving a hardship exemption do so reluctantly: Only the most drastic changes in the economic circumstances of a business deal could justify an exemption under the CISG [*cf. Schlechtriem, p. 102; Honnold/Flechtner, p. 629 § 432.2; p. 484; Brunner II, Art. 79 § 23; Herber/Czerwenka, Art. 79 § 8; Magnus I, Art. 79 § 24; Saenger, Art. 79 § 7*].

117 In the case at hand, CLAIMANT is not entitled to any exemption under Art. 79 CISG. This is because the increase of CLAIMANT's costs is insufficient and does not amount to a fundamental alteration of the contract equilibrium (**a.**). Moreover, contrary to CLAIMANT's allegations, its own financial condition is irrelevant (**b.**).

a. The increase in CLAIMANT's costs of performance is insufficient

118 To establish whether the contractual equilibrium has been fundamentally altered (see § 84), CLAIMANT's cost increase is the essential criterion [*cf. Girsberger/Zapolskis, p. 12; Jenkins, p. 2027; Zaccaria, p. 169; Schwenzer I, Art. 79 § 31; McKendrick, Art. 6.2.2 § 2*]. The prevailing standard to admit an exemption due to an economic impediment under Art. 79 CISG is very high [*cf. Foam Covers Case; Nuova v. Fondmetall; Tomato Concentrate Case; Frozen Raspberries Case; Steel Ropes Case; Dupiré Invicta Industrie v. Gabo*]. Courts and arbitral tribunals have denied an exemption on the grounds of hardship in all cases [*ibid.; Fontaine, p. 16*] except for the *Scafom Case*, which CLAIMANT cites [*MfC, § 97*]. This decision completely diverges from previous court decisions, has not been repeated and was highly criticised [*Flechtner II p. 197 seq.; Ferrari et al., p. 98; Klamas/Becue, p. 536*]. Moreover, in the *Scafom Case* a 70% cost increase was deemed to be an impediment under the scope of Art. 79 CISG. This is still tremendously higher than CLAIMANT's cost increase of 15% (see § 85).

119 CLAIMANT is further relying on the PICC Comment 1994 where a 50% hardship threshold was suggested [*MfC, § 98; PICC 1994 Comment*]. However, this standard is not relevant, as it was highly criticised for being "*too low and in any event rather arbitrary*" [*Girsberger/Zapolskis, p. 127; Azeredo da Silveira, p. 326; PICC working group 2003, p. 15*] and hence abandoned in following PICC Comments. Herefrom it can be concluded that a cost increase lower than 50% cannot be considered fundamental [*McKendrick, Art. 6.2.2 § 8*]. In fact, scholars favour a significantly higher threshold than this [*Brunner*

I, p. 436; Enderlein/Maskow, Art. 79 § 6.3; Berger V, p. 541; Girsberger/Zapolskis, p. 128] and in international trade "*a **150-200% margin** seems to be advisable*" [*Schwenzer II, p. 717*]. In one case, not even a cost increase by 300% was sufficient under Art. 79 CISG [*cf. Iron Molybdenum Case*].

120 Therefore, the cost increase of 15% caused by the import tariffs (see § 85) does not even come close to meeting any of the standards set out by scholars or case law and hence cannot justify an exemption pursuant to Art. 79 CISG.

b. CLAIMANT's financial condition is irrelevant

121 In its submission, CLAIMANT repeatedly relies on its financial condition in establishing that the cost increase of 15% is relevant under Art. 79 CISG [*MfC, §§ 81, 86-87*]. However, the obligor guarantees its financial capabilities to fulfil what it has contractually promised [*Schlechtriem I, p. 102; Brunner II, Art. 79 § 10; Karollus II, p. 208*]. CLAIMANT agreed to ship DDP and was therefore obligated to both handle import formalities and pay for all costs associated with the import. It thus cannot be exempted under Art. 79 CISG merely because it may lack the sufficient financial capabilities to do as it promised.

122 CLAIMANT's financial condition would only be relevant if CLAIMANT was facing **bankruptcy** [*cf. Schwenzer III, p. 373; Azeredo da Silveira, p. 326; Dalhuisen, p. 110*]. This is not given in the case at hand, as CLAIMANT asserts that "*the Tribunal should also consider* [...] *whether the hardship caused the disadvantaged party to experience financial ruin*" [*MfC, § 80*]. In this regard, financial ruin sets the standard of **bankruptcy**. [*Schwenzer III, p. 373; Azeredo da Silveira, p. 326; Dalhuisen, p. 110*]. However, this is not such a case, as CLAIMANT would not go out of business. It can most likely avoid bankruptcy by selling one of its multiple business units [*PO2, p. 59 § 29; NoA, p. 4 § 1*]. The worst-case scenario would thus probably be that CLAIMANT had to sell a business unit which it is not primarily known for [*PO2, p. 59 § 29*]. However, when assessing the financial situation of a party, a single business unit cannot be the relevant benchmark, but only the company as a whole [*Brunner I, p. 437 seq.*]. Hence, as not the entire company is facing bankruptcy the lack of financial capabilities is irrelevant.

123 CLAIMANT also refers to the financial condition of RESPONDENT and the benefits it is deriving out of the deal [*MfC, §§ 88, 98*]. It even states that "*RESPONDENT,* [...] *would not be endangered at all if it paid the increased cost of performance*" [*MfC, § 81*]. However, RESPONDENT's overall situation does not make CLAIMANT's situation more onerous.

124 CLAIMANT's line of argumentation seems to be based on the notion that merely because RESPONDENT is financially more liquid than CLAIMANT it should alleviate all of CLAIMANT's financial problems. This claim is simply not reflected in Art. 79 CISG. Therefore, the Tribunal should not consider RESPONDENT's financial capabilities in assessing whether CLAIMANT can be exempted under Art. 79 CISG.

125 For all the reasons mentioned above, CLAIMANT's cost increase of 15% cannot justify an exemption under Art. 79 CISG because it does not constitute a fundamental alteration of the contractual equilibrium. Contrary to CLAIMANT's assertions, the financial situation of the Parties is not relevant in this case. Hence, an exemption under Art. 79 CISG is not justified.

2. Equatoriana's import tariffs were foreseeable

126 In order to invoke an exemption under Art. 79 CISG, CLAIMANT has to prove that the import tariffs were not reasonably foreseeable at the time of concluding the Sales Agreement [*Schwenzer I, Art. 79 § 55; Magnus, Art. 79 § 16; Salger, Art. 79 § 5*]. The interpretation of what is considered foreseeable is stringent and it is the most difficult requirement to prove under Art. 79 CISG [*DiMatteo I, Art. 79 §§ 39, 41; Tomato Concentrate Case; Steel Bars Case*]. The question is whether a reasonable person in the shoes of CLAIMANT could have contemplated the possibility that Equatoriana would impose import tariffs on goods from Mediterraneo [*cf. Schwenzer I, Art. 79 § 55*]. In this case, as explained above (see §§ 93, 94), it was very probable that Mediterraneo, CLAIMANT's seat of business, would set extensive tariffs. Hence, retaliatory tariffs targeting Mediterraneo were to be expected and Equatoriana's imposition of retaliatory tariffs was not unforeseeable. Therefore, CLAIMANT could have taken into account the possibility that Equatoriana would impose import tariffs at the time of contract conclusion and hence the requirement of "*unforeseeability*" is not fulfilled.

3. CLAIMANT could have avoided incurring additional costs

127 Art. 79 CISG sets forth the requirement that both the impediment and its consequences have to be unavoidable. CLAIMANT as a diligent businessman must do everything in its capacity to prevent performance from being affected when it becomes apparent that the impediment is approaching [*cf. Magnus, Art. 79 § 16; Schwenzer, Art. 79 § 15; Secretariat Commentary, Art. 79 § 7; Tallon, Art. 79 § 2.6.4*]. Nevertheless, CLAIMANT sets forth no reasons why it could not have avoided the additional costs by simply shipping before the import tariffs took effect [*MfC, §§ 84 seq.*]. CLAIMANT knew that Equatoriana would impose import tariffs 26 days before they took effect [*PO2, p. 58 §§ 25,26*] and thus had enough time to arrange for an earlier shipment. Hence, as explained above (see §§ 96, 97) it could have avoided the additional costs resulting from Equatoriana's import tariffs. Therefore, the requirement of "*unavoidability*" is not met.

128 Concluding (**B.**), the requirements set forth under Art. 79 CISG are not met. The 15% cost increase CLAIMANT incurred does not constitute an impediment under the strict standard of Art. 79 CISG. Additionally, CLAIMANT could have foreseen the imposition of import tariffs by Equatoriana and could have avoided incurring any additional costs. Therefore, CLAIMANT cannot be exempted under Art. 79 CISG.

C. In the alternative, the CISG does not allow for contract adaptation

129 Even if the Tribunal finds that the 15% increase of the contract price constitutes an impediment under Art. 79 CISG, an adaptation of the price is not possible. The CISG does not contain any price adaptation mechanism in case of hardship. Moreover, such adaptation does not constitute a trade usage pursuant to Art. 9 CISG.

130 First, Art. 79 CISG referred to by CLAIMANT [*MfC, § 88*] does not mention any price adaptation but merely an exemption from liability. Only some civil law jurisdictions provide for adaptation in case of a fundamental change of the contractual equilibrium [*DiMatteo I, p. 693; Walt, p. 571*]. In contrast, common law countries are much less favourable to adaptation [*cf. Horn, p. 22*; *cf. Flechtner I, p. 7*]. The CISG is a compromise across legal systems and traditions and has to be interpreted with regard to its "*international character*" [*Art. 7(1) CISG*]. Recourse to doctrines only typical for some jurisdictions undermines this "*international character*" and the uniformity of its application. Furthermore, the drafters of the CISG even considered a hardship provision but did not agree on including one [*cf. Rimke, p. 219*]. Thus, adaptation on the grounds of hardship "*should have no application in contracts governed by the CISG*", as clarified by one of the CISG's drafters [*Honnold/Flechtner, p. 629 § 432.2*]. The impossibility to adapt has been further supported by numerous scholars [*Flechtner I, p. 9; DiMatteo I, p. 693; Fontaine, p. 16-17; Walt, p. 571; Audit, p. 174; Iversen, p. 221; Flambouras, p. 288; Rimke, p. 226; Herber/Czerwenka, Art. 79 § 24*]. Accordingly, price adaptation due to hardship under the CISG is not possible.

131 Reliance on the PICC as an international trade usage pursuant to Art. 9 CISG is also not possible. Several cases have denied using provisions of the PICC as a trade usage, including its hardship provisions [*ICC Award 8873/1997; ICC Award 12446/2004; cf. Accaoui Lorfing, p. 49*]. Furthermore, not even the ICC Hardship Clause [*ICC Hardship Clause*] provides for adaptation as a remedy for hardship. This clause was drafted to be widely used in international sales and is one of the most recognised model hardship clauses [*Schwenzer et al., p. 667 § 45.82*]. The omission of adaptation in this model clause confirms that such a mechanism is not sufficiently prevalent in international transactions [*Azeredo da Silveira, p. 338*]. For these reasons, relying upon the PICC as a usage is inappropriate.

132 In any event, the Parties agreed that the remedy in case of hardship would be an exemption from liability (see §§ 99 seq.). Even if the CISG contains price adaptation in case of hardship, the Parties derogated any such possibility by agreeing on Clause 12 [*cf. Art. 6 CISG*]. Price adaptation by the Tribunal would therefore contravene the most important principle underlying the CISG – **party autonomy** [cf. *Ferrari III, p. 82; Janssen/Kiene, p. 271*]. The possibility of adaptation without the Parties' consent would undermine the Parties' agreement (see §§ 99) and force RESPONDENT into a contract on terms it did not agree to. Hence, the Tribunal should not increase the price of the Sales Agreement.

133 Concluding **(C.)**, Art. 79 CISG only provides for an exemption from liability as its remedy. Adapting the sales price would contradict the principle of party autonomy.

* * *

134 In conclusion of submission **(IV.)** CLAIMANT cannot rely on Art. 79 CISG as the Parties derogated from it by including an exemption from liability clause. Even if Art. 79 CISG were applicable, the requirements for an exemption of liability under the CISG are not met because the imposition of the import tariff does not constitute a fundamental change in the balance of the Sales Agreement. In any event, the CISG does not provide for price adaptation as a remedy in the case of a fundamental change in the balance of a contract. Therefore, CLAIMANT cannot request any payment under the CISG.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that

1. The Tribunal lacks the jurisdiction to adapt the price of the Sales Agreement;
2. The evidence CLAIMANT seeks to admit is inadmissible;
3. CLAIMANT is not entitled to any payment resulting from an adaptation of the Sales Agreement;
4. CLAIMANT 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.

Peter Behyl

Verena Gattinger

Franziska Hauser

Valentin Marginter

Mariana Risic

Sophie Wotschke

Abdelmoniem Yousif

Vienna, 24 January 2019