TWENTY-SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL ARBITRATION MOOT

2018/19 ▪ VIENNA

UNIVERSITY OF VIENNA

MEMORANDUM FOR CLAIMANT

on behalf of
Phar Lap Allevamento
CLAIMANT

against
Black Beauty Equestrian
RESPONDENT

PETER BEHYL ▪ VERENA GATTINGER ▪ FRANZISKA HAUSER

VALENTIN MARGINTER ▪ MARIANA RISTIC

SOPHIE WOTSCHKE ▪ ABDELMONIEM YOUSIF

Counsel for CLAIMANT

TABLE OF CONTENTS

Table of contents **I**

Index of Abbreviations and Definitions **IV**

Index of Authorities **VI**

Index of Cases **XLV**

Statement of Facts **1**

Summary of Arguments **3**

I. The Tribunal has jurisdiction to adapt the Sales Agreement **4**

A. The arbitration clause has to be interpreted under the law of Mediterraneo *4*

1. The law applicable to the arbitration clause must be determined by the conflict of laws rules of the *lex arbitri* 4

2. The Parties subjected the arbitration clause to the law of Mediterraneo 5

a. Interpretation of the Sales Agreement shows that the law of Mediterraneo governs the arbitration clause 5

b. The negotiations confirm the Parties' intent to subject the arbitration clause to the law of Mediterraneo 5

c. Deeming the law of the seat of arbitration applicable would be inappropriate 6

3. A general choice-of-law extends to arbitration clauses 6

4. The Tribunal should choose the law that best enables it to hear the case 7

B. The Parties conferred the power to adapt the Sales Agreement on the Tribunal *7*

1. Interpretation of the Sales Agreement shows that the Tribunal has the power to adapt the contract 8

a. A dispute concerning the adaptation of the Sales Agreement constitutes a dispute arising out of the contract 9

b. The Parties empowered the Tribunal to adapt the contract as they included a hardship clause in the Sales Agreement 10

c. The negotiations confirm the Parties' intent to confer the power to adapt the Sales Agreement on the Tribunal 10

d. The Parties empowered the Tribunal to adapt the contract by choosing a substantive law that provides for adaptation 11

2. The applicable *lex arbitri* does not prohibit the conferral of the power to adapt 12

3. The denial of the Tribunal's power to adapt would lead to unreasonable and inequitable results 13

C. Even if Danubian law should be applicable the Tribunal can still adapt the Sales Agreement *13*

II. CLAIMANT is entitled to submit evidence from the other arbitration **14**

A. The Tribunal's obligation to consider RESPONDENT's contradictory behaviour prevails over RESPONDENT's interest not to disclose information from the other proceeding *15*

1. The evidence shows RESPONDENT's bad faith and is therefore relevant and material to the case 15

2. RESPONDENT has no legitimate interest impeding the admissibility of the evidence 16

B. CLAIMANT's fundamental procedural rights are harmed if the evidence is not admissible *17*

C. Confidentiality is no ground for inadmissibility of evidence in the present case *17*

D. The evidence is admissible even if the information would have been disclosed through a hack *18*

E. RESPONDENT would be under the obligation to disclose the relevant documents from the second arbitration *19*

III. CLAIMANT is entitled to payment of 1,250,000 USD under Clause 12 of the Sales Agreement 19

A. The scope of the hardship term in Clause 12 covers the claim *20*

1. The imposed tariffs are "comparable" to "additional health and safety requirements" 20

2. The tariffs were "*unforeseen*" by CLAIMANT 21

3. The tariffs caused "*hardship*" and made the contract "*more onerous*" for CLAIMANT 21

4. In case the Tribunal finds the hardship wording in Clause 12 ambiguous, it must be construed against RESPONDENT 23

B. The Parties agreed on an adaptation mechanism in the Sales Agreement *23*

1. The negotiations between the Parties confirm their common intent to include an adaptation mechanism in the Sales Agreement 24

2. The nature of hardship clauses shows price adaptation is the only reasonable remedy 24

3. The Parties' subsequent conduct confirms the remedy in the hardship clause 25

a. RESPONDENT admitted that the remedy in the hardship clause is price adaptation 25

b. RESPONDENT is bound by Mr. Shoemaker's representation 25

4. In the alternative, the remedy is provided by the domestic law governing the contract 26

5. The Tribunal should order RESPONDENT to pay 1,250,000 USD 26

IV. In the alternative, CLAIMANT is entitled to payment of 1,250,000 USD under the CISG 26

A. The Parties have not derogated force majeure and hardship provisions of the CISG *27*

B. Under the CISG, there is a hardship exemption leading to adaptation *27*

C. The requirements of Art. 79 CISG with regards to hardship are met *28*

1. The contract equilibrium has been fundamentally altered due to the tariffs 28

a. CLAIMANT's costs have increased by 200% 29

b. The applicable hardship threshold is determined by the case´s individual circumstances 30

c. The applicable hardship threshold is met 31

2. CLAIMANT could not have reasonably taken the imposition of tariffs by Equatoriana into account when concluding the contract 32

3. The imposition of tariffs was beyond CLAIMANT's control and CLAIMANT could neither avoid nor overcome them or their consequences 33

4. The Tribunal should increase the price by 1,250,000 USD to restore a reasonable equilibrium 33

D. Alternatively, CLAIMANT is entitled to receive the payment due to RESPONDENT's inconsistent behaviour *34*

Request for Relief **35**

Certificate **36**

INDEX OF ABBREVIATIONS AND DEFINITIONS

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

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

INDEX OF AUTHORITIES

A/CN.9/264

United Nations

Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration

18th Session
25 March 1985

UN Doc. A/CN.9/264

Cited in: § 40

Almeida Prado

Mauricio Almeida Prado

Le hardship dans le droit du commerce international

Bruylant (2003)

Cited in: § 112

Alvarez

Henri C. Alvarez

Evidentiary Privileges in International Arbitration

in Albert Jan van den Berg

International Arbitration 2006: Back to Basics?

ICCA Congress Series No. 13
pp. 663 - 704

Kluwer Law International (2007)

Cited in: § 72

Atamer

Yesim M. Atamer

Art. 79 CISG

in Stefan Kröll / Loukas Mistelis / Pilar Perales Viscasillas

UN Convention on Contracts for the International Sale of Goods (CISG)

C. H. Beck Verlag (2011)

Cited in: §§114, 121, 123, 132, 134

Azeredo da Silveira

Mercédeh Azeredo da Silveira

Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation

Kluwer Law International (2014)

Cited in: §§ 112, 117, 118, 123, 126, 127

Beisteiner

Lisa Beisteiner

The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective

in Christian Klausegger / Peter Klein / Florian Kremslehner / Alexander Petsche / Nikolaus Pitkowitz / Jenny Power / Irene Welser / Gerold Zeiler

Austrian Yearbook on International Arbitration

pp. 77-122

Manz Verlag (2014)

Cited in: §§ 19, 23, 25, 29, 35, 36, 40

Bennett I

Howard Bennett

Principles of the law of Agency

Hart Publishing (2013)

Cited in: § 101

Bennett II

Howard Bennett

Agency in the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts (2004)

in Uniform Law Review, Volume 11 (2006)
pp. 771-792

Cited in: §101

Berger I

Klaus Peter Berger

Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion

in Albert Jan van den Berg

International Arbitration 2006: Back to Basics?

ICCA Congress Series No. 13
pp. 301-334

Kluwer Law International (2007)

Cited in: § 16

Berger II

Klaus Peter Berger

Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense

in Arbitration International, Volume 17 (2001)
pp. 1-17

Cited in: §§ 19, 23

Berger III

Klaus Peter Berger

Neuverhandlungs-, Revisions- und Sprechklauseln im internationalen Wirtschaftsvertragsrecht

in Recht der Internationalen Wirtschaft (2000)
pp. 1-13

Cited in: §§ 19, 35, 62

Berger IV

Klaus Peter Berger

Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration

3rd Edition

Kluwer Law International (2015)

Cited in: § 126

Bernardini

Piero Bernardini

Communications: Adaptation of contracts

in Pieters Sanders

New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions

ICCA Congress Series No. 1
pp. 211 - 216

Kluwer Law International (1983)

Cited in: § 76

Besson/Dupeyron

Sébastien Besson / Carine Dupeyron

L'interprétation du contrat et l'arbitrage, à la lumière de la réforme du droit français des obligations

in Revue de l'Arbitrage, Volume 2017 (2017)
pp. 115-134

Cited in: § 46

Binder

Peter Binder

The UNCITRAL Model Law on International Commercial Arbitration: A Commentary and International Comparison of Its Adoption

Sweet & Maxwell (2000)

Cited in: § 40

Binnie

Ian Binnie

in Paris Aboro

Columbia Arbitration day 2017 - striking a balance: confronting tensions in international arbitration

in American Review of International Arbitration, Volume 28 (2017)
pp. 183-185

Cited in: § 69

Bonell

Michael Joachim Bonell

Art. 7 CISG

in Cesare Massimo Bianca / Michael Joachim Bonell

Commentary on the International Sales Law

Giuffrè Milan (1987)

Cited in: §§ 54, 97

Born

Gary B. Born

International Commercial Arbitration

2nd Edition

Kluwer Law International (2014)

Cited in: §§ 1, 4, 15, 16, 21, 27, 42, 62, 65

Briner

Robert Briner

Special Considerations Which May Affect the Procedure (Interim Measures, Amiable Composition, Adoption of Contracts, Agreed Settlement)

in Albert Jan van den Berg

Planning Efficient Arbitration Proceedings: The Law applicable in International Arbitration

ICCA Congress Series No. 7
pp. 362-373

Kluwer Law International (1996)

Cited in: § 35

Brunner I

Christoph Brunner

Force Majeure and Hardship under General Contract Principles: Exemption from Non-performance in International Arbitration

Kluwer Law International (2008)

Cited in: §§ 19, 25, 38, 79, 87, 96, 103, 104, 107, 125, 130

Brunner II

Christoph Brunner

UN-Kaufrecht - CISG, Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980

Stämpfli Verlag (2004)

Cited in: §§ 97,

Bund

Jennifer M. Bund

Force Majeure Clauses: Drafting Advice for the CISG Practitioner

in Journal of Law and Commerce, Volume 17 (1998)
pp. 381-413

Cited in: §

Carlsen

Anja Carlsen

Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law?

Pace Essay Submission (1998)

Cited in: §

Carvalhal Sica

Lucia Carvalhal Sica

Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?

Nordic Journal of Commercial Law (2006)

Cited in: §

Cave/Miller

Andrew Cave / Alex Miller

The big business behind horse racing

The Telegraph (17 March 2016)

Cited in: § 132

CISG AC 7

CISG Advisory Council

Opinion No. 7
Exemption of Liability for Damages under Article 79 of the CISG

Rapporteur: Alejandro M. Garro
(2007)

Cited in: §§ 111, 114

CISG AC 13

CISG Advisory Council

Opinion No. 13
Inclusion of Standard Terms under the CISG

Rapporteur: Professor Sieg Eiselen
(2013)

Cited in: § 91

Coetzee

Juana Coetzee

The Interplay between the CISG and INCOTERMS

in Journal of Law and Commerce, Volume 32 (2013)
pp. 1-21

Cited in: §§

Cohen

Daniel Cohen

Le contrat devant l'arbitre: Pacta sunt servanda et/ou adaptation ?

Revue de l'Arbitrage (2017)
pp. 87-92

Cited in: § 29

Craig et al.

Laurence Craig / William Park / Jan Paulsson

International Chamber of Commerce Arbitration

2nd Edition

Oceana Publications (1990)

Cited in: § 15

Cremades/Cortés

Bernardo M. Cremades / Rodrigo Cortés

The Principle of Confidentiality in Arbitration: A Necessary Crisis

in Journal of Arbitration Studies, Volume 23 (2013)
pp. 25-38

Cited in: § 65

Crookenden

Simon Crookenden

Who Should Decide Arbitration Confidentiality Issues?

in Arbitration International, Volume 25 (2009)
pp. 603-614

Cited in: § 65

Dalhuisen

Jan Dalhuisen

Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law, Volume 2: Contract and Movable Property

Hart Publishing (2014)

Cited in: § 126

Derains

Yves Derains

ICC Arbitral Process: Part VIII. Choice of Law Applicable to the Contract and International Arbitration

in ICC International Court of Arbitration Bulletin, Volume 6 (1995)
pp. 10-18

Cited in: §§ 13, 15

Demeyere

Luc Demeyere

The Search for the "Truth": Rendering Evidence under Common Law and Civil Law

in Zeitschrift für Schiedsverfahren, Volume 6 (2003)
pp. 247-253

Cited in: § 48

Dicey et al.

Albert Venn Dicey / John Humphrey / Carlile Morris / Lawrence Collins

Dicey, Morris and Collins on the conflict of laws

Sweet & Maxwell (2012)

Cited in: § 13

DiMatteo

Larry A. DiMatteo

Excuse: Impossibility and Hardship

in Larry A. DiMatteo / André Janssen / Ulrich Magnus / Reiner Schulze

International Sales Law, Contract, Principles & Practice

Nomos, C. H. Beck Verlag, Hart Publishing (2016)

Cited in: §§ 96, 121

Eberl

Walter Eberl

Beweis im Schiedsverfahren

Nomos (2015)

Cited in: § 62

El Ahdab/Bouchenaki

Jalal El Ahdab / Amal Bouchenaki

Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?

in Albert Jan van den Berg

Arbitration Advocacy in Changing Times

ICCA Congress Series, Volume 15 (2011)
pp. 65-113

Cited in: §§ 48, 51, 72

Enderlein/Maskow

Fritz Enderlein / Dietrich Maskow

International Sales Law, United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods

Oceana Publications (1992)

Cited in: §§ 127, 130, 142

Farnsworth

Edward Allan Farnsworth

Art. 8 CISG

in Cesare Massimo Bianca / Michael Joachim Bonell

Commentary on the International Sales Law

Giuffrè Milan (1987)

Cited in: §§ 20, 99

Felemegas

John Felemegas

Introduction

in John Felemegas

An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law

Cambridge University Press (2007)

Cited in: § 112

Ferrari

Franco Ferrari

Interpretation of statements: Article 8

in Franco Ferrari / Harry Flechtner / Ronald A. Brand

The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention

European Law Publishers (2003)

Cited in: §§ 20, 54, 144

Ferrario

Pietro Ferrario

The Adaptation of Long-Term Gas Sale Agreements by Arbitrators

Kluwer Law International (2017)

Cited in: §§ 4, 11, 25, 29, 40

Flechtner

Harry Flechtner

CISG Article 79: Getting Scafomed

in Joseph Lookofsky / Mads Bryde Andersen

The CISG Convention and domestic contract law: harmony, cross-inspiration, or discord?

Djøf Publishing (2014)

Cited in: §§ 121, 130

Fontaine/De Ly

Marcel Fontaine / Filip De Ly

Drafting International Contracts, An Analysis of Contract Clauses

Martinus Nijhoff Publishers (2009)

Cited in: §§ 84, 86

Fouchard et al.

Philippe Fouchard / Emmanuel Gaillard / Berthold Goldman

International Commercial Arbitration

Kluwer Law International (1999)

Cited in: §§ 1, 15, 19, 29, 54

Fouchard

Philippe Fouchard

Suggestions to Improve the International Efficacy of Arbitral Awards

in Albert Jan van den Berg

Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention

in ICCA Congress Series, No. 9 (1998)
pp. 601-615

Cited in: § 15

Frick

Joachim Frick

Arbitration and complex International Contracts

Kluwer Law International (2001)

Cited in: §§19, 23, 40, 42

Frieden/Trachtman

Jeffry Frieden / Joel Trachtman

U.S. Trade Policy: Going it Alone vs. Abiding by the World Trade Organization

Harvard University and The Fletcher School of Law and Diplomacy, Tufts University (2008)

Cited in: § 132

Fucci

Frederick R. Fucci

Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts
Practical Considerations in International Infrastructure Investment and Finance

American Bar Association Section of International Law Spring Meeting (April 2006)

Cited in: § 128

Garro

Alejandro M. Garro

Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG

in Tulane Law Review, Volume 69 (1995)
pp. 1149-1190

Cited in: §

Gillette/Walt

Clayton P. Gillette / Steven D. Walt

The UN Convention on Contracts for the International Sale of Goods: theory and practice

Cambridge University Press (2016)

Cited in: § 114

Girsberger/Voser

Daniel Girsberger / Nathalie Voser

International Arbitration: Comparative and Swiss Perspective

3rd Edition

Kluwer Law International (2016)

Cited in: § 39

Girsberger/Zapolskis Daniel Girsberger / Paulius Zapolskis

Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption

Mykolas Romeris University (2012)

Cited in: §§ 118, 123, 126

Glick/Venkatesan Ian Glick / Niranjan Venkatesan

Choosing the Law Governing the Arbitration Agreement

in Neil Kaplan / Michael Moser

Jurisdiction, Admissibility and Choice of Law in International Arbitration

Kluwer Law International (2018)

pp. 131-150

Cited in: § 15

Goode et al. Roy Goode / Herbert Kronke / Ewan McKendrick / Jeffrey Wool

Transnational Commercial Law, International Instruments and Commentary

Oxford University Press (2004)

Cited in: § 101

Hartnell Helen Elizabeth Hartnell

Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods

in Yale Journal of International Law, Volume 18 (1993)
pp. 1-93

Cited in: § 100

Heiss/Loacker

Helmut Heiss / Leander D. Loacker

Anwendbares Recht

in Christoph Liebscher / Paul Oberhammer / Walter H. Rechberger

Schiedsverfahrensrecht Handbuch: Band II

Verlag Österreich (2016)

pp. 189-298

Cited in: § 39

Helmer

Elena V. Helmer

International Commercial Arbitration: Americanized, "Civilized," or Harmonized?

in Ohio State Journal on Dispute Resolution, Volume 19 (2003)
pp. 35-67

Cited in: § 48

Henriques

Duarte Gorjão Henriques

The role of good faith in arbitration: are arbitrators and tribunal institutions bound to act in good faith?

in ASA Bulletin, Volume 33 (2015)
pp. 514-532

Cited in: § 54

Herber/Czerwenka

Rolf Herber / Beate Czerwenka

Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf

C. H. Beck Verlag (1991)

Cited in: § 81

Hillman

Robert Hillman

Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity

Cornell Review of the Convention on Contracts for the International Sale of Goods (1995)

Cited in: §§ 128, 136

Holtzmann/Neuhaus

Howard M. Holtzmann / Joseph E. Neuhaus

A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary

Kluwer Law International (1989)

Cited in: § 40

Huber/Alastair

Peter Huber / Mullis Alastair

The CISG A new textbook for students and practitioners

Sellier European Law Publishers (2007)

Cited in: § 20

ICC Guide to Incoterms

Jan Ramberg

ICC Guide to Incoterms® 2010, Understanding and Practical Use

ICC Publication (2011)

Cited in: §§ 82, 108

ICC Hardship Clause

International Chamber of Commerce

ICC Force Majeure Clause 2003, ICC Hardship Clause 2003

ICC Publishing (2003)
p. 15

Cited in: §§ 56, 87

Illmer

Martin Illmer

International Arbitration in England and Wales

in Stephan Balthasar

International Commercial Arbitration

C. H. Beck Verlag (2016)

pp. 299-352

Cited in: § 42

Jana et al.

Andrés Jana / Angie Armer / Johanna Klein Kranenberg

Article V(1)(b) New York Convention

in Herbert Kronke / Patricia Nacimiento / Dirk Otto / Nicola Christine Port

Recognition and Enforcement of Foreign Arbitral Awards. A global commentary on the New York Convention

Kluwer Law International (2010)

Cited in: § 62

Jenkins

Sarah Howard Jenkins

Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Analysis

in Tulane Law Review, Volume 72 (1998)
pp. 2015-2030

Cited in: § 118

Karollus I

Martin Karollus

UN-Kaufrecht

Springer Verlag (1991)

Cited in: § 36

Karollus II

Martin Karollus

Judicial Interpretation and Application of the CISG in Germany 1988-1994

in Cornell Review of the Convention on Contracts for the International Sale of Goods

Kluwer Law International (1995)

pp. 51-94

Cited in: § 100

Kessedjian

Catherine Kessedjian

Competing Approaches to Force Majeure and Hardship

in International Review of Law and Economics, Volume 25 (2005) pp. 415-433

Cited in: § 114

Koller

Christian Koller

Die Schiedsvereinbarung

in Christoph Liebscher / Paul Oberhammer / Walter H. Rechberger

Schiedsverfahrensrecht Handbuch: Band I
Verlag Österreich (2011)

pp. 92-339

Cited in: §§ 4, 8, 15

Krebs

Thomas Krebs

Article 2.2.5 PICC

in Stefan Vogenauer / Jan Kleinheisterkamp

Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)

Oxford University Press (2009)

Cited in: § 101

Kröll I

Stefan Kröll

Contractual gap-filling by arbitration tribunals

in International Arbitration Law Review, Volume 9 (1999)
pp. 9-16

Cited in: § 23

Kröll II

Stefan Kröll

Ergänzung und Anpassung von Verträgen durch Schiedsgerichte

Carl Heymanns Verlag (1998)

Cited in: § 35

Kruisinga

Sonja Kruisinga

(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?

Intersentia (2004)

Cited in: § 112

Landolt

Phillip Landolt

Arbitration Clauses and Competition Law

in Gordon Blanke / Phillip Landolt

EU and US Antitrust Arbitration: A Handbook for Practitioners

Kluwer Law International (2011)

pp. 69-89

Cited in: §§ 41, 42

Lautenschlager Felix Lautenschlager

Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG - The Reasonable Third Person, Language Problems and Standard Terms and Conditions

in Vindobona Journal of International Commercial Law and Arbitration, Volume 11 (2007)
pp. 259-290

Cited in: § 99

Lew I Julian D. M. Lew

Achieving the Dream: Autonomous Arbitration

in Arbitration International, Volume 22 (2006)

pp. 179–204

Cited in: § 11

Lew II Julian D. M. Lew

The Law Applicable to the Form and Substance of the Arbitration Clause

in Albert Jan van den Berg

Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention

Kluwer Law International (1999)

Cited in: §§ 13, 16

Lew et al. Julian D. M. Lew / Loukas Mistelis / Stefan Kröll

Comparative International Commercial Arbitration

Kluwer Law International (2003)

Cited in: §§ 4, 11, 13, 15, 27, 42

Lookofsky

Joseph Lookofsky

Not Running Wild with the CISG

in Journal of Law and Commerce, Volume 29 (2011)
pp. 141-169

Cited in: § 114

Lorenz

Manula Lorenz

Art. 6, 73

in Wofgang Witz / Hanns-Christian Salger/ Manuel Lorenz

International Einheitliches Kaufrecht

2nd Edition

Deutscher Fachverlag (2016)

Cited in: § 107

Magnus I

Ulrich Magnus

Wiener UN-Kaufrecht

in Julius von Staudinger

Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen

Sellier de Gruyter Berlin (2018)

Cited in: §§ 20, 54, 55, 91, 124,

Magnus II

Ulrich Magnus

Art. 79 CISG

in Heinrich Honsell

Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)

2nd Edition

Springer Verlag (2010)

Cited in: § 134

Mankowski

Peter Mankowski

Anwendbares Recht

in Dieter Czernich / Astrid Deixler-Huebner / Martin Schauer

Handbuch Schiedsrecht

Manz Verlag (2018)

Cited in: § 4

Marghitola

Reto Marghitola

Document Production in International Arbitration

Kluwer Law International (2015)

Cited in: § 48

Maskow

Dietrich Maskow

Hardship and Force Majeure

in The American Journal of Comparative Law, Volume 40 (1992) pp. 657–669

Cited in: § 130

McKendrick

Ewan McKendrick

Art. 6.2.2 and 6.2.3 PICC

in Stefan Vogenauer / Jan Kleinheisterkamp

Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)

Oxford University Press (2009)

Cited in: §§ 36, 118,

Melis

Werner Melis

Art. 8 CISG

in Heinrich Honsell

Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)

2nd Edition

Springer Verlag (2010)

Cited in: §§, 20, 99

Metzler

Elisabeth Metzler

The Arbitrator and the Arbitration Procedure, The Tension Between Document Disclosure and Legal Privilege in International Commercial Arbitration - An Austrian Perspective

in Christian Klausegger / Peter Klein / Florian Kremslehner / Alexander Petsche / Nikolaus Pitkowitz / Jenny Power / Irene Welser / Gerold Zeiler

Austrian Yearbook on International Arbitration

Manz Verlag (2015)

pp. 231-276

Cited in: § 62

Miles/Goh

Wendy Miles / Nelson Goh

A Principled Approach Towards the Law Governing Arbitration Agreements

in Neil Kaplan / Michael Moser

Jurisdiction, Admissibility and Choice of Law in International Arbitration

Kluwer Law International (2018)

pp. 385-394

Cited in: § 15

Mosk/Ginsburg

Richard M. Mosk / Tom Ginsburg

Evidentiary Privileges in International Arbitration

International and Comparative Law Quarterly, Volume 50 (2001)
pp. 345-385

Cited in: §§ 59, 72

Müller-Chen

Markus Müller-Chen

Art. 50 CISG

in Peter Schlechtriem / Ingeborg Schwenzer

Commentary on the UN Convention on the International Sales of Goods (CISG)

4th Edition

Oxford University Press (2016)

Cited in: § 36

Nazzini

Renato Nazzini

The Law Applicable on Arbitration Agreements: Towards Transnational Principles

in International and Comparative Law Quarterly, Volume 65 (2016)

pp. 681-703

Cited in: § 13

Nabati

Mikaël Nabati

Les règles d'interprétation des contrats dans les Principes d'UNIDROIT et la CVIM : entre unité structurelle et diversité fonctionnelle

in Uniform Law Review, Volume 12 (2007)
pp. 247-262

Cited in: § 26

O´Malley

Nathan D. O'Malley

Rules of Evidence in International Arbitration: An Annotated Guide

Informa Law (2012)

Cited in: §§ 52, 60, 62

Omlor

Sebastian Omlor

Inflationsbewältigung im UN-Kaufrecht

in Juristenzeitung, Volume 20 (2013)
pp. 967-975

Cited in: § 114

Paulsson/Rawding

Jan Paulsson / Nigel Rawding

The Trouble with Confidentiality

in Arbitration International, Volume 11 (1995)
pp. 303–320

Cited in: § 65

Pearson

Sabrina Pearson

Sulamerica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement

in Arbitration International, Volume 29 (2013)
pp. 115-126

Cited in: § 16

Perales Viscasillas I

María Pilar Perales Viscasillas

Interpretation and gap-filling under the CISG: contrast and convergence with the UNIDROIT Principles

in Uniform Law Review, Volume 22 (2017)
pp. 4-28

Cited in: § 113

Perales Viscasillas II

María Pilar Perales Viscasillas

Art. 7 CISG

in Stefan Kröll / Loukas Mistelis / Pilar Perales Viscasillas

UN Convention on Contracts for the International Sale of Goods (CISG)

C. H. Beck Verlag (2011)

Cited in: § 54

Perales Viscasillas/ Ramos Muñoz

María Pilar Perales Viscasillas / David Ramos Muñoz

CISG & Arbitration

in Spain Arbitration Review, Volume 10 (2011)
pp. 63-84

Cited in: § 21

Perillo

Joseph M. Perillo

Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts

in Tulane Journal of International & Comparative Law, Volume 5 (1997)
pp. 5-28

Cited in: § 132

PICC 1994 Comment

International Institute for the Unification of Private Law

UNIDROIT Principles of International Commercial Contracts

UNIDROIT (1994)

Cited in: § 130

PICC 2016 Comment

International Institute for the Unification of Private Law

UNIDROIT Principles of International Commercial Contracts

UNIDROIT (2016)

Cited in: §§ 118, 121,

Pirozzi

Roberto Pirozzi

The Effect of Changing Circumstances in International Commercial Contracts: the Scaform Case

in Vindobona Journal of International Commercial Law and Arbitration, Volume 16 (2012)
pp. 207-222

Cited in: § 113

Pörnbacher/Knief

Karl Pörnbacher / Inke Knief

Der Geheimnisschutz im internationalen Schiedsverfahren

in Walter Eberl

Beweis im Schiedsverfahren

Nomos (2015)

Cited in: § 60

Redfern/Hunter

Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter

Redfern and Hunter on International Arbitration

6th Edition

Oxford University Press (2015)

Cited in: § 4, 13, 15, 38, 48, 51

Reiley

Eldon H. Reiley

International sales contracts: the UN convention and related transnational law

Carolina Academic Press (2008)

Cited in: § 113

Reiner

Andreas Reiner

Schiedsverfahren und rechtliches Gehör

in Zeitschrift für Europarecht, internationales Privatrecht & Rechtsvergleichung (2003)
pp. 52-74

Cited in: § 62

Saenger

Ingo Saenger

Art. 8 CISG

in Franco Ferrari / Eva-Maria Kieninger / Peter Mankowski / Karsten Otte / Ingo Saenger / Götz Joachim Schulze / Ansgar Staudinger

Internationales Vertragsrecht: Rom I-VO, CISG, CMR, FactÜ: Kommentar
2nd Edition

C. H. Beck Verlag (2012)

Cited in: §§ 20, 134

Saintier

Severine Saintier

Agency and Distribution Agreements

in Larry A. DiMatteo / André Janssen / Ulrich Magnus / Reiner Schulze

International Sales Law, Contract, Principles & Practice

Nomos, C. H. Beck Verlag, Hart Publishing (2016)

Cited in: § 101

Saleh

Samir A. Saleh

Reflections on Admissibility of Evidence: Interrelation Between Domestic Law and International Arbitration

in Arbitration International, Volume 15 (1999)
pp. 141-160

Cited in: § 51

Schlechtriem I

Peter Schlechtriem

Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods

Manz Verlag (1986)

Cited in: § 124

Schlechtriem II

Peter Schlechtriem

in Harry E. Flechtner

Transcript of a Workshop on the Sales Convention: Leading CISG scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and much more

in Journal of Law and Commerce, Volume 18 (1999)
pp. 191-258

Cited in: § 114

Schlechtriem/Schroeter

Peter Schlechtriem / Ulrich G. Schroeter

Internationales UN-Kaufrecht

5th Edition

Mohr Siebeck (2013)

Cited in: § 36

Schlosser

Peter Schlosser

Das Recht der internationalen privaten Schiedsgerichtsbarkeit

2nd Edition

J.C.B. Mohr (Paul Siebeck) (1989)

Cited in: §§ 19, 35, 38

Schmidt-Ahrendts

Nils Schmidt-Ahrendts

CISG and Arbitration

in Belgrade Law Review (2011)
pp. 211-223

Cited in: § 21

Schmidt-Kessel

Martin Schmidt-Kessel

Art. 8 CISG

in Peter Schlechtriem / Ingeborg Schwenzer

Commentary on the UN Convention on the International Sales of Goods (CISG)

4th Edition

Oxford University Press (2016)

Cited in: §§ 20, 21, 26, 32, 91, 97, 99

Schroeter I

Ulrich G. Schroeter

Art. 14 CISG

in Peter Schlechtriem / Ingeborg Schwenzer

Commentary on the UN Convention on the International Sales of Goods (CISG)

4th Edition

Oxford University Press (2016)

Cited in: § 26

Schroeter II

Ulrich G. Schroeter

The Modern Travelling Merchant: Mobile Communication in International Contract Law

in Contratto e impresa/Europa (2015)
pp. 29-43

Cited in: § 97

Schwab/Walter

Karl Heinz Schwab / Gerhard Walter

Schiedsgerichtsbarkeit

7th Edition

C. H. Beck Verlag (2005)

Cited in: § 62

Schwenzer I

Ingeborg Schwenzer

Art. 79 CISG

in Peter Schlechtriem / Ingeborg Schwenzer

Commentary on the UN Convention on the International Sales of Goods (CISG)

4th Edition

Oxford University Press (2016)

Cited in: §§ 121, 123, 132

Schwenzer II

Ingeborg Schwenzer

Force Majeure and Hardship in International Sales Contracts

in VUW Law Review, Volume 39 (2008)
pp. 709-725

Cited in: §§ 113, 123

Schwenzer III

Ingeborg Schwenzer

Exemption in Case of Force Majeure and Hardship

in Paulo Nalin / Renata C. Steiner / Luciana Pedroso Xavier
Compra e Venda Internacional de Mercadorias

Jurua Editora (2014)

Cited in: §§ 125, 126, 130

Schwenzer/Hachem

Ingeborg Schwenzer / Pascal Hachem

Art. 6 CISG

in Peter Schlechtriem / Ingeborg Schwenzer

Commentary on the UN Convention on the International Sales of Goods (CISG)

4th Edition

Oxford University Press (2016)

Cited in: § 107

Schwenzer/Jaeger

Ingeborg Schwenzer / Florence Jaeger

The CISG in International Arbitration

in Patricia Shaughnessy / Sherlin Tung

The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer

Kluwer Law International (2017)

pp. 311-326

Cited in: § 15

Schwenzer et al.

Ingeborg Schwenzer / Pascal Hachem / Christopher Kee

Global Sales and Contract Law

Oxford University Press (2012)

Cited in: §§ 20, 101

Sicard-Mirabal/Derains

Josefa Sicard-Mirabal / Yves Derains

Introduction to Investor-State Arbitration

Kluwer Law International (2018)

Cited in: §§ 67, 68

Stoll

Hans Stoll

Art. 79 CISG

in Peter Schlechtriem

Commentary on the United Nations Convention on the International Sale of Goods (CISG)

Clarendon Press (1998)

Cited in: §§ 111, 114

Slater

Scott D. Slater

Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG

in Florida Journal of International Law, Volume 12 (1998)
pp. 231-262

Cited in: § 114

Smeureanu

Ileana M. Smeureanu

Confidentiality in International Commercial Arbitration

Kluwer Law International (2011)

Cited in: § 65

Sutton et al.

John Sutton / Judith Gill / Matthew Gearing

Russell on Arbitration

23rd Edition

Sweet & Maxwell (2007)

Cited in: § 42

Schwarz

Franz Schwarz

Die Durchführung des Schiedsverfahrens

in Christoph Liebscher / Paul Oberhammer / Walter H. Rechberger

Schiedsverfahrensrecht Handbuch: Band II

Verlag Österreich (2016)

pp. 1-187

Cited in: §§ 4, 38

Tallon

Denis Tallon

Art. 79 CISG

in Cesare Massimo Bianca / Michael Joachim Bonell

Commentary on the International Sales Law

Giuffrè Milan (1987)

Cited in: § 132

Trittmann/Hanefeld

Rolf Trittmann / Inka Hanefeld

Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter II: Arbitration Agreement, § 1029 – Definition

in Karl-Heinz Böckstiegel / Stefan Kröll / Patricia Nacimiento

Arbitration in Germany: The Model Law in Practice

2nd Edition

Kluwer Law International (2015)

pp. 79-93

Cited in: § 15

UNCITRAL Report

Report of the Secretary-General on Possible Features of A Model Law on International Commercial Arbitration

in XII UNCITRAL Yearbook (1981)
pp. 75-92

Cited in: § 65

Uribe

Rodrigo Momberg Uribe

Change of circumstances in international instruments of contract law. The approach of the CISG, PICC, PECL and DCFR

in Vindobona Journal of International Commercial Law and Arbitration, Volume 15 (2011)
pp. 233-266

Cited in: § 113

van Houtte

Hans van Houtte

Contract negotiations and the UNIDROIT Principles

in Uniform Law Review, Volume 19 (2014)
pp. 550-560

Cited in: § 46

Veeder

V. V. Veeder

The Lawyers Duty to Arbitrate in Good Faith

in Laurent Lévy / V. V. Veeder

Arbitration and Oral Evidence, Dossiers of the ICC Institute of World Business Law, Volume 2

Kluwer Law International; International Chamber of Commerce (2004)

pp. 115-141

Cited in: § 54

Veeder/Stanley

V.V. Veeder / Paul Stanley

Arbitrating Competition Law Issues: The Arbitrator's Perspective

in Gordon Blanke / Phillip Landolt

EU and US Antitrust Arbitration: A Handbook for Practitioners

Kluwer Law International (2011)

pp. 91-117

Cited in: § 42

Veneziano

Anna Veneziano

UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court

in Uniform Law Review, Volume 15 (2010)
pp. 137–149

Cited in: § 114

Vogenauer

Stefan Vogenauer

Art. 1.8 PICC

in Stefan Vogenauer / Jan Kleinheisterkamp

Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)

Oxford University Press (2009)

Cited in: § 144

Waincymer

Jeffrey Waincymer

Procedure and Evidence in International Arbitration

Kluwer Law International (2012)

Cited in: § 69

Welser/De Berti

Irene Welser / Giovanni De Berti

Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices

in Christian Klausegger / Peter Klein / Florian Kremslehner / Nikolaus Pitkowitz / Jenny Power / Irene Welser / Gerold Zeiler

Austrian Yearbook on International Arbitration

Manz Verlag (2010)

pp. 79-101

Cited in: § 48

Welser/Molitoris

Irene Welser / Susanne Molitoris

The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract …"

in Christian Klausegger / Peter Klein / Florian Kremslehner / Alexander Petsche / Nikolaus Pitkowitz / Jenny Power / Irene Welser / Gerold Zeiler

Austrian Yearbook on International Arbitration

Manz Verlag (2012)

pp. 17-30

Cited in: § 27

Wilske/Fox

Stephan Wilske / Todd J. Fox

Article V(1)(a) New York Convention

in Reinmar Wolff

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

C. H. Beck Verlag (2012)

Cited in: § 4

Witz

Wolfgang Witz

Art. 8

in Wolfgang Witz / Hanns-Christian Salger / Manuel Lorenz

International Einheitliches Kaufrecht

2nd Edition

Deutscher Fachverlag (2016)

Cited in: § 99

Zaccaria

Elena Christine Zaccaria

The Effects of Changed Circumstances in International Commercial Trade

in International Trade and Business Law Review, Volume 9 (2015)
pp. 135-182

Cited in: §§ 118, 136

Zeller

Bruno Zeller

Interpretation of Article 8: Is it Consistent with the Function of the Global Jurisconsultorium?

in Internationales Handelsrecht, Volume 3 (2013)
pp. 89-97

Cited in: § 20

Zuberbühler et al.

Tobias Zuberbühler / Dieter Hofmann / Christian Oetiker / Thomas Rohner

IBA rules of evidence: commentary on the IBA rules on the taking of evidence in international arbitration

Schulthess Verlag (2012)

Cited in: §§ 60, 72

Zuppi

Alberto Zuppi

Art. 8 CISG

in Stefan Kröll / Loukas Mistelis / Pilar Perales Viscasillas

UN Convention on Contracts for the International Sale of Goods (CISG)

C. H. Beck Verlag (2011)

Cited in: §§ 20, 32, 97, 99

INDEX OF CASES

AUSTRALIA

Esso v. Plowman

High Court of Australia

7 April 1995

128 ALR 391

Esso Australia Resources Ltd v. Plowman

Cited in: § 65

AUSTRIA

Inheritance Case

Austrian Supreme Court
Oberster Gerichtshof

8 March 1961

1Ob98/61

Cited in: § 14

Measuring Instruments Case

Austrian Supreme Court
Oberster Gerichtshof

26 August 2008

4Ob80/08f

Cited in: §§ 29, 42

Umbrella Case

Austrian Supreme Court
Oberster Gerichtshof

12 February 1998

2 Ob 328/97t

Cited in: § 118

BELGIUM

Frozen Raspberries Case

Commercial District Court Hasselt
Rechtbank van Koophandel Hasselt

2 May 1995

A.R. 1849/94, 4205/94

Vital Berry Marketing NV v. Dira-Frost NV

Cited in: §§ 121, 124

Scafom Case

Belgium Supreme Court
Cour de Cassation

19 June 2009

C.07.0289.N

Scafom International BV v. Lorraine Tubes S.A.S.

Cited in: §§ 111, 112, 130

CANADA

Liberty Canada v. QBE Europe

Ontario Superior Court of Justice

20 September 2002

CLOUT-Case 507

Liberty Reinsurance Canada v. QBE Insurance and Reinsurance Europe Ltd.

Cited in: §§ 39

CHINA

Klöckner Pentaplast v. Advance Technology

High Court of the Hong Kong Special Administrative Region

14 July 2011

HCA 1526/2010

Klöckner Pentaplast Gmbh & CoKg v. Advance Technology (H.K.) Company Limited

Cited in: §§ 14

FRANCE

Alain Veyron v. Ambrosio

Appellate Court Grenoble
Cour d'Appel Grenoble

26 April 1995

93/1613

Enterprise Alain Veyron v. Société E. Ambrosio

Cited in: § 144

Sports Clothes Case

Commercial Court Besancon
Tribunal de commerce de Besançon

19 January 1998

97 009265

Flippe Christian v. SARL Douet Sport Collections

Cited in: §§ 123

Dupiré v. Gabo

French Supreme Court
Cour de Cassation

17 February 2015

12-29550, 13-18956, 13-20230

Dupiré Invicta industrie v. Gabo

Cited in: §§ 111, 113

Polyurethane Case

Appellate Court Colmar
Cour d'Appel de Colmar

12 June 2001

1 A 199800359

Cited in: § 111

GERMANY

Automobile Case

Appellate Court Stuttgart
Oberlandesgericht Stuttgart

31 March 2008

6 U 220/07

Cited in: §§ 91

Beer Case

Appellate Court Brandenburg
Oberlandesgericht Brandenburg

5 February 2013

6 U 5/12

Cited in: §§ 54

BGH, 27 February 1970

Supreme Court
Bundesgerichtshof

27 February 1970

VII ZR 68/68

Cited in: §§ 42

BGH, 28 November 1963

Supreme Court
Bundesgerichtshof

28 November 1963

VII ZR 112/62 (Frankfurt)

Cited in: §§ 15

BGH, 30 January 1957

Supreme Court
Bundesgerichtshof

30 January 1957

V ZR 80/55 (Koblenz)

Cited in: § 15

Generators Case

Appellate Court Düsseldorf
Oberlandesgericht Düsseldorf

30 January 2004

1-23 U 70/03

Cited in: § 21

Iron Molybdenum Case

Appellate Court Hamburg
Oberlandesgericht Hamburg

28 February 1997

1 U 167/95

Cited in: §§ 107, 121, 124

Loan Agreement Case

Appellate Court München
Oberlandesgericht München

13 October 2004

7 U 3722/04

Cited in: §§ 27

OLG Hamburg

Appellate Court München
Oberlandesgericht München

5 October 1998

12 U 62/97

Cited in: §§ 54

Shoes Case	**Lower Court Charlottenburg** Amtsgericht Charlottenburg 4 May 1994 52 S 247/94 Cited in: § 111
Surface Protective Film Case	**Appellate Court Karlsruhe** Oberlandesgericht Karlsruhe 25 June 1997 1 U 280/96 Cited in: §§ 55
Textiles Case	**District Court Hamburg** Landgericht Hamburg 26 September 1990 5 O 543/88 Cited in: §§ 100

Tissue Machine Case

Appellate Court Stuttgart
Oberlandesgericht Stuttgart

15 May 2006

5 U 21/06

Cited in: §§ 21

Tomato Concentrate Case

Appellate Court Hamburg
Oberlandesgericht Hamburg

4 July 1997

1 U 143/95, 410 O 21/95

Cited in: §§ 121, 124

Wine Case

Upper Court Berlin
Kammergericht Berlin

24 January 1994

2 U 7418/92

Cited in: §§ 100

INDIA

M/S Indtel Tech v. W.S. Atkins Rail	**Supreme Court of India** 25 August 2008 No.16 of 2006 *M/S Indtel Tech. Servs. Pvt. Ltd v. W.S. Atkins Rail Ltd* Cited in: § 14
National Thermal Power v. Singer	**Supreme Court of India** 7 May 1992 1992 SCR (3) 106 *National Thermal Power Corporation v. Singer Company And Ors* Cited in: §§ 23

ITALY

C. App. Genoa, 3 February 1990	**Court of Appeals Genoa** Corte di Appello Genoa 3 February 1990 *Bevrachting & Overslagbedrijf BV v. Fallimento Cap. Giovanni Coppola srl, in liquidation* published in van den Berg, Yearbook Commercial Arbitration 1992 - Volume XVII, pp. 542-544 Cited in: §§ 4

Nuova v. Fondmetal

District Court Monza
Tribunale Civile di Monza

14 January 1993

R.G. 4267/88

Nuova Fucinati S.p.A. v. Fondmetal International A.B.

Cited in: § 111

NETHERLANDS

Animal Sperm Case

Court of Appeal 's-Hertogenbosch
Gerechtshof 's-Hertogenbosch

13 September 2016

200.136.885_01

Cited in: §§ 132

Teguflex Case

District Court Arnhem
Rechtbank Arnhem

17 January 2007

HA ZA 06-1789

Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag

Cited in: §§ 21

POLAND

Coke Fuel Case **Supreme Court of Poland**
Sąd Najwyższy
8 February 2012
V CSK 91/11
Cited in: § 111

SINGAPORE

BMO v. BMP **Singapore High Court**
16 May 2017
SGHC 127
BMO v. BMP
Cited in: §§ 14

BCY v. BCV **Singapore High Court**
9 November 2016
SGHC 249
BCY v. BCV
Cited in: §§ 15

SOUTH AFRICA

Zhongji Case

South Africa Supreme Court of Appeal

1 October 2014

421/2013

Zhongji Development Construction Engineering Company Limited v. Kamoto Copper Company SARL

Cited in: §§ 42

SWEDEN

Bulbank Case

Supreme Court of Sweden
Högsta domstolen

27 October 2000

T 1881-99

AI Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.

Cited in: §§ 65

SWITZERLAND

Football Case

Swiss Federal Supreme Court
Schweizerisches Bundesgericht

27 March 2014

4A_362/2013

X v. Football Federation Ukraine

Cited in: § 69

UNITED KINGDOM

Arsonia v. Cruz City

England Commercial Court

20 December 2012

EWHC 3702

Arsanovia Limited & others v. Cruz City 1 Mauritius Holdings

Cited in: § 5

Fiona Trust Case

Court of Appeal of England and Wales

24 January 2007

EWCA Civ 20

Fiona Trust & Holding Corporation v. Yuri Privalov

Cited in: § 27

Harbour Assurance Case

Court of Appeal of England and Wales

28 January 1993

Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd. et al.

published in van den Berg, Yearbook Commercial Arbitration 1995 - Volume XX, pp. 771-790

Cited in: § 42

Lehman v. Maclain

English High Court

8 June 1988

I WLR 946

Lehman Hutton Inc. v. Maclain Watson & Co.

Cited in: § 65

Premium Nafta v. Fili Shipping

House of Lords

17 October 2007

UKHL 40

Premium Nafta Products Ltd. and others v. Fili Shipping Company Ltd. and others

Cited in: § 42

Scotia Homes v. McLean

Sheriffdom of Tayside Central & Fife

30 November 2012

A216/10

Scotia Homes (South) Limited v. McLean

Cited in: § 46

Sulamérica v. Enesa

English Court of Appeal

20 March 2012

EWCA Civ 638

Sulamérica Cia Nacional de Seguros SA and ors v. Enesa Engenharia SA and ors

Cited in: §§ 14, 15, 16

Tonicstar v. American Home Assurance	**English High Court** 26 May 2004 EWHC 1234 *Tonicstar Ltd v. American Home Assurance Company* Cited in: § 14
Westvilla v. Dow	**England and Wales High Court** 15 January 2010 EWHC 30 (Ch) *Westvilla Properties Ltd. v. Dow Properties Ltd.* Cited in: § 46

UNITED STATES

Chateau v. Sabaté	**United States Court of Appeals (9th Circuit)** 5 May 2003 02-15727 *Chateau des Charmes Wines Ltd. v. Sabaté USA, Sabaté S.A.* Cited in: § 21
Gotham Holdings v. Health Grades	**United States Court of Appeals (7th Circuit)** 3 September 2009 09-2377 *Gotham Holdings et al. v. Health Grades* Cited in: § 65

Iran Aircraft v. Avco	**United States Court of Appeals (2th Circuit)** 24 November 1992 92-7217 *Iran Aircraft Industries & Iran Helicopter Support & Renewal Co.* v. Avco Co. Cited in: § 62
Marble Case	**United States Court of Appeals (11th Circuit)** 29 June 1998 97-4250 *MCC-Marble Ceramic Center, Inc v. Ceramica Nuova* D'Agostino S.p.A. Cited in: § 20
Mitsubishi Motors v. Soler Chrysler-Plymouth	**United States Supreme Court** 2 July 1985 83-1569 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc* Cited in: § 42
PRM Energy Sys. v. Primeenerby LLC	**United States Court of Appeals (8th Circuit)** 8 January 2010 08-1987 *PRM Energy Sys., Inc. v. Primeenerby LLC* Cited in: § 42

Raw Materials v. Manfred Forberich

United States District Court, Northern District of Illinois

6 July 2004

03 C 1154

Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG

Cited in: § 111

Qingdao v. P & S

United States District Court

16 September 2009

08-1292-HU

Qingdao Free Trade Zone Genius Int'l Trading Co., LTD v. P and S International, Inc.

Cited in: § 62

AD HOC ARBITRATION

Ad Hoc Case 2004

Ad hoc Arbitration (Place Unknown)

4 April 2004

http://www.unilex.info/case.cfm?id=973

Cited in: § 142

Ad Hoc Case 2001

Ad hoc Arbitration Costa Rica, San José

30 April 2001

http://www.unilex.info/case.cfm?id=1100

Cited in: § 142

Cheese Case

Ad hoc Arbitration Germany, Hamburg
Schiedsgericht Hamburger Freundschaftliche Arbitrage

29 December 1998

CLOUT-Case 293

Cited in: § 119

CHINA INTERNATIONAL ECONOMIC & TRADE ARBITRATION COMMISSION

Cysteine Case

China International Economic & Trade Arbitration Commission (CIETAC)

7 January 2000

CISG/2000/06

Cited in: § 91

COURT OF ARBITRATION OF THE HAMBURG CHAMBER OF COMMERCE

SHS Hamburg, 12 March 1996

Court of Arbitration of the Hamburg Chamber of Commerce
Schiedsgericht der Handelskammer Hamburg

21 March 1996

CLOUT-Case 166

Cited in: § 111

INTERNATONAL CHAMBER OF COMMERCE

ICC Award 10021/2000

International Chamber of Commerce

ICC Case No. 10021

2000

Cited in: § 114

ICC Award 9479/1999

International Chamber of Commerce

ICC Case No. 9479

1999

Cited in: § 114

ICC Award 7365/1997

International Chamber of Commerce

ICC Case No. 7365/FMS

1997

Cited in: § 114

ICC Award 6515/1994

International Chamber of Commerce

Final award of ICC Cases No. 6515 and 6516

1994

Cited in: § 1

ICC Award 6840/1991

International Chamber of Commerce

ICC Case No. 6840

1991

Cited in: § 14

ICC Award 6162/1990

International Chamber of Commerce

ICC Case No. 6162

1990

Cited in: § 16

ICC Award 5754/1988

International Chamber of Commerce

ICC Case No. 5754

1988

unpublished, discussed in:

Brunner I, fn 2430;

Beisteiner, p. 111

Cited in: § 29

ICC Award 5294/1988

International Chamber of Commerce

ICC Case No. 5294

1988

Cited in: §§ 4, 38

ICC Second Interim Award 4145/1987

International Chamber of Commerce

Second Interim Award in ICC Case No. 4145

1987

Cited in: § 16

ICC Award 5029/1986

International Chamber of Commerce

ICC Case No. 5029

1986

Cited in: § 4

ICC Award 3540/1980

International Chamber of Commerce

ICC Case No. 3540

1980

Cited in: § 11

ICC Award No. 2626/1977

International Chamber of Commerce

ICC Case No. 2626

1977

Cited in: § 14

ICC Award 1526/1974

International Chamber of Commerce

ICC Case No. 1526

1974

Cited in: § 1

Magnesium Case

International Chamber of Commerce

ICC Case No. 8324

1995

Cited in: § 20

Steel Bars Case

International Chamber of Commerce

ICC Case No. 6281

1989

Cited in: § 121

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Kazakhstan Case **International Centre for Settlement of Investment Disputes**
Caratube International Oil Company LLP v. The Republic of Kazakhstan
Procedural Order 2
27 September 2017
unpublished, discussed in:
27 July 2015
ICSID Case No. ARB/13/13;
Sicard-Mirabal/Derains, p. 208
Cited in: § 69

MILAN CHAMBER OF ARBITRATION

MCA Award **Milan Chamber of Arbitration**
Camera Arbitrale Nazionale e Internazionale di Milano
28 November 2002
Abstract published under <http://www.unilex.info/case.cfm?id=995>
Cited in: § 46

RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY

RFCCI 95/2004 *Award* **Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry**
27 May 2005
95/2004
Cited in: § 26

VIENNA INTERNATIONAL ARBITRAL CENTER

VIAC Case **VIAC Case**

unpublished, discussed in:

Meyer-Hauser, §§ 161 seqq.

Anwaltsgeheimnis und Schiedsgericht

Schulthess Verlag (2004)

Cited in: §§ 51, 69

OTHER

AWARDS

Quintette Case Arbitration Board

28 May 1990

unpublished, discussed in:

Court of Appeal of British Columbia

24 October 1991

Quintette Coal Ltd. v. Nippon Steel Corporation

-and-

Supreme Court of British Columbia

22 June 1990

Quintette Coal Ltd. v. Nippon Steel Corporation et al.

Cited in: § 29

STATEMENT OF FACTS

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

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

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

RESPONDENT largely accepted the offer on **28 March 2017** but insisted on delivery DDP (ICC Incoterms 2010) Equatoriana due to CLAIMANT's greater experience in transportation and the delivery's urgency. Moreover, RESPONDENT accepted the choice of the law of Mediterraneo under the condition that any other forum than the courts of Mediterraneo has jurisdiction and suggested the courts of Equatoriana.

On **31 March 2017** CLAIMANT agreed to shipment DDP Equatoriana but made explicitly clear it was not willing to take over any risks associated with changes in customs regulations or import restrictions. For this purpose, CLAIMANT insisted on including a hardship clause. Concerning jurisdiction, CLAIMANT clearly rejected dispute resolution before the courts of Equatoriana but suggested to opt for arbitration in Mediterraneo.

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENTS

I. The Tribunal has jurisdiction to adapt the Sales Agreement

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

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

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

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

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

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

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

I. The Tribunal has jurisdiction to adapt the Sales Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 In general, contract adaptation is an issue which can be referred to arbitration and therefore arbitral tribunals can be empowered to adapt contracts [*Beisteiner, p. 105; Berger II, p. 17, Brunner I, p. 493; Schlosser, p. 23 § 29*]. In this regard, the Tribunal is empowered to adapt the Sales Agreement if the Parties authorised it to do so [*Berger III, p. 8; Fouchard et al., § 41; Frick, p. 196*]. In this dispute, the Parties indeed conferred the power to adapt the contract on the Tribunal. This is confirmed by interpreting the arbitration clause under the interpretation rules of the CISG. The CISG is applicable because it forms part of Mediterranean law [*PO1, p. 53 § 4*] which was chosen by the Parties to apply to the arbitration clause (see §§ 3 seqq.).

20 Pursuant to Art. 8 CISG, contract provisions ought to be interpreted according to the common intention of the Parties [*Schmidt-Kessel, Art. 8 § 22; Saenger, Art. 8 § 2; Huber/Alastair, p. 12*]. The common intention must be established by a separate analysis of the parties' statements [*Schmidt-Kessel, Art. 8 § 4*]. The primary starting-point to evaluate the meaning is the wording of the contract [*cf. Schmidt-Kessel, Art. 8 § 13; Schwenzer et al., § 26.16*]. Art. 8(1) CISG stipulates that statements made by a party are to be interpreted according to its "*subjective intent*" [*Zeller, p. 91; Ferrari, p. 177*] which the other party knew or could not have been unaware of. Furthermore, Art. 8(2) CISG provides that the hypothetical understanding of a reasonable third person of the same kind as the other party in the same circumstances has to be taken into account when interpreting statements and other conduct of a party [*Schmidt-Kessel, Art. 8 § 20; Farnsworth, Art. 8 § 2.4; Magnus I, Art. 8 § 17; Melis, Art. 8 § 9; Magnesium Case; Marble Case*]. In determining the subjective and objective intent of the parties, Art. 8(3) CISG stipulates that all relevant circumstances such as subsequent conduct and particularly the negotiations which led to the conclusion of the Sales Agreement are to be considered [*Art. 8(3) CISG; Schmidt-Kessel, Art. 8 § 20; Zuppi, Art. 8 § 25*].

21 Furthermore, in sales agreements which are governed by the CISG, the latter also applies to the interpretation of the arbitration clause contained in such a contract [*cf. Schmidt-Kessel, Art. 8 § 5; Born, p. 505; Schmidt-Ahrendts, § 1.2; Perales Viscasillas/Ramos Muñoz, p. 71; Teguflex Case § 2.5; Tissue Machine Case § 22; Generators Case; Chateau v. Sabaté*]. Accordingly, the jurisprudence in Mediterraneo also follows this approach [*cf. PO1, p. 53 § 4*].

22 Following the rules of the CISG, the Tribunal's power to adapt the Sales Agreement is revealed through a systematic interpretation of the Sales Agreement **(a.)(b.)** and confirmed by the common intent

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

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

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

24 The arbitration clause reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34 As a result, the negotiations between the Parties confirm that the Parties authorised the Tribunal to adapt the Sales Agreement.

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

35 The fact that the Parties conferred the power to adapt on the Tribunal does not only follow from the interpretation of the arbitration clause itself. It is further derived from the law applicable to the substance of the dispute which was chosen by the Parties [*Beisteiner, p. 111; Briner, p. 371; Berger III, p. 9; Schlosser, p. 543 § 744; cf. Kröll II, p. 245*].

36 In Clause 14 of the Sales Agreement, the Parties agreed that the law applicable to the Sales Agreement is the law of Mediterraneo including the CISG [*Exh. C5, p. 14*]. Both the law of Mediterraneo as well as the CISG comprise provisions which provide for contract adaptation. Firstly, Art. 6.2.3 PICC – which is the contract law of Mediterraneo [*PO1, p. 53 § 4*] – explicitly stipulates that courts can adapt the contract in case of hardship [*cf. McKendrick, Art. 6.2.3 § 7*]. Secondly, Art. 50 CISG undisputedly foresees a contract adjustment mechanism in the form of price reduction [*Müller-Chen, Art. 50 § 1; Schlechtriem/Schroeter, § 495; Karollus I, p. 157*] and furthermore as shown below, allows for contract adaptation under Art. 79 CISG (*see § 112*). Accordingly, the expectation of every reasonable party is that the instruments which the selected law provides for are enforceable in their chosen dispute resolution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The imposed tariffs are "comparable" to "additional health and safety requirements"

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

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

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

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

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

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

2. The tariffs were "*unforeseen*" by CLAIMANT

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

3. The tariffs caused "*hardship*" and made the contract "*more onerous*" for CLAIMANT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. CLAIMANT's costs have increased by 200%

118 The essential criterion to look upon is the difference between the costs CLAIMANT expected when concluding the Sales Agreement and the actual costs of performance after the tariffs were imposed [*Azeredo da Silveira, p. 326; Girsberger/Zapolskis, p. 12; Jenkins, p. 2027; Zaccaria, p. 169; PICC 2016 Comment; Art. 6.2.2; McKendrick, Art. 6.2.2 § 2*]. The relevant cost increase has to be determined on the basis of CLAIMANT´s expected variable costs solely for the last shipment.

119 In the case at hand, the Parties agreed upon three **separate shipments** and a strict splitting of the payments to 2017 for the two first shipments and 2018 for the last shipment [*Exh. C5, p. 14 § 7*]. As every shipment of Nijinsky III's semen is useful to RESPONDENT by itself, the deliveries are separable from one another and the contract as a whole [*cf. Cheese Case*; Umbrella Case]. Hence, as only the very last instalment was affected by the tariffs, the relevant cost increase needs to be determined in connection with the affected instalments exclusively.

120 CLAIMANT assumed 15,000 USD per dose in **variable costs** due to its past experience in selling frozen semen [*PO2, p. 59 § 31*]. Variable costs are the costs directly related to each unit of output [*cf. Collins Dictionary*]. They hence depict how much money CLAIMANT has to spend in total to provide RESPONDENT with 50 doses of Nijinsky III's semen.

121 Court decisions dealing with matters of hardship due to an increase in costs have looked upon changes in price of the raw materials required to produce the good [*Frozen Raspberries Case; Iron Molybdenum Case; Scafom Case; Steel Bars Case; cf. Flechtner, p. 199 seq.*] or upon the costs for acquiring substitutes [*Tomato Concentrate Case*]. Those are costs directly related to and depending on the performance and therefore examples of variable costs. The same goes for the 'market fluctuations' frequently discussed in literature, as changed prices have an impact on acquiring either material needed for production or substitutes [*cf. DiMatteo, Art. 79 § 38; Schwenzer I, Art. 79 § 31; PICC 2016 Comment, Art. 6.2.2; Atamer, Art. 79 § 82*].

122 Accordingly, the cost increase has to be determined looking upon CLAIMANT´s expected direct costs for the 50 doses of the last instalment. Thus, the expected variable costs are 750,000 USD (15,000 USD per dose times 50) [*PO2, p. 59 § 31*]. The newly imposed tariffs add to those costs. They amount to 30% of the sales price for the 50 doses: 30% of 5,000,000 equals 1,500,000 USD [*Exh. C7, p. 16*]. Hence, CLAIMANT's total expenditure has tripled from the expected amount of 750,000 USD to 2,250,000 USD, constituting an increase of 200%.

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

123 One has to take the special characteristics of the case at hand into account, such as the nature of the costs added, the amount of CLAIMANT's initially expected profit margin, the balance of performance and counter-performance and especially CLAIMANT's dire financial state [*Schwenzer II, p. 716; Girsberger/Zapolskis, p. 129; Azeredo da Silveira, p. 347; Schwenzer I, Art. 79 § 32; Atamer, Art. 79 § 82; cf. Sports Clothes Case*]. In the case at hand these circumstances collectively set a low hardship threshold.

124 The 30% tariffs **do not add to the procurement or production costs** of the frozen semen. Those fall under "*the general risk to acquire the goods*" [*Iron Molybdenum Case*] which the seller primarily assumes [*Schlechtriem I, p. 102; cf. Magnus I, Art. 79 § 14; Salger, Art. 79 § 7*]. This is a key contrast between the given case and judicial decisions [*cf. Frozen Raspberries Case; Tomato Concentrate Case*] setting comparatively high hardship thresholds [*cf. Frozen Raspberries Case; cf. Tomato Concentrate Case*]. In this case merely the shipping costs have increased those do not add to procurement or production of the artificial insemination doses. Hence, a substantially lower hardship threshold should be set.

125 Moreover, the **typical profit margin** for comparable sales in the racehorse industry is relevant [*cf. Schwenzer III, p. 373*]. This implies how much risk a party has assumed and the applicable hardship threshold should be set accordingly [*cf. Brunner I, p. 434*]. A profit margin of 10% is considered ordinary for natural coverings in the horse industry [*PO2, p. 57 § 19*] while the typical profit margin for natural coverage by Nijinsky III is 15% [*PO2, p. 57 § 19*]. In contrast, CLAIMANT's profit margin in this transaction is only 5% even though the costs incurred with natural covering are lower than with producing frozen semen [*cf. PO2, p. 57 § 19; PO2, p. 59 § 31*]. Therefore, CLAIMANT's low profit margin of 5% implies a low standard of risk assumed and thus the application of low hardship standards.

126 Additionally, CLAIMANT is in a **dire financial situation** because in 2014 it involuntarily had to pay 3,200,000 USD due to requirements imposed by Danubia [*PO2, p. 58 § 21*]. Subsequently, CLAIMANT had to take out loans and undergo extensive restructuring, including the sale of its transportation division and laying off a considerable part of its workforce [*Exh. C8, p. 17; PO2, p. 56 § 9*]. The prolongation of these loans CLAIMANT has taken to prevent bankruptcy strictly depends on CLAIMANT being profitable in 2017 and 2018 [*PO2, p. 58 § 21; PO2, p. 59 § 29*]. Paying the 30% tariffs would severely jeopardise this condition and consequently CLAIMANT would have to negotiate for a new credit line. This would be very difficult [*PO2, p. 59 § 29*] and CLAIMANT would most likely have to make the unreasonable sacrifice of selling a part of his business to its biggest competitor [*PO2, p. 59 § 29;*

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

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

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

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

c. The applicable hardship threshold is met

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUEST FOR RELIEF

CLAIMANT, respectfully requests the Tribunal to find that

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