MEMORANDUM FOR

RESPONDENT

SNULAW

SEOUL NATIONAL UNIVERSITY
SCHOOL OF LAW

ON BEHALF OF:

BLACK BEAUTY EQUESTRIAN
2 Seabiscuit Drive
Oceanside
Equatoriana
RESPONDENT

AGAINST :

PHAR LAP ALLEVAMENTO
Rue Frankel 1
Capital City
Mediterraneo
CLAIMANT

COUNSEL

ChaeRin Kim ● Hakyoo Kim ● HyeongMi Jeon
MinKyeong Cho ● NakWon Choi ● SeungMin Jeon

Table of Contents

STATEMENT OF FACTS

CLAIMANT	Phar Lap Allevamento (Hereafter CLAIMANT) is a company renown for all areas of equestrian sport and its own mare herd, offspring and stallion depot. CLAIMANT is registered and located in Capital City, Mediterraneo.
RESPONDENT	Black Beauty Equestrian (Hereafter RESPONDENT) is a company based in Oceanside, Equatoriana, and is famous for its broodmare lines that have resulted in a several world champions in equestrian sports.
January 2017	A candidate for president of Mediterraneo showed protective stance to international trade, particularly in relation to agricultural products. Both Parties were able to expect an increase in tariff from this time.
21 March 2017	RESPONDENT sent an e-mail to CLAIMANT, inquiring whether they can use frozen semen of Nijinsky III for their own breeding program.
28 March 2017	RESPONDENT insisted on a delivery DDP, for CLAIMANT has an expertise in the transportation of frozen semen.
31 March 2017	CLAIMANT accepted the delivery DDP. Considering this, both Parties agreed on increment of the price from 99,500 USD to 100,500 USD. CLAIMANT expected the delivery cost can be increased up to 40% [*Cl. Ex. 4, p.12*].
10 April 2017	In RESPONDENT's first suggestion, both "[t]he seat of arbitration shall be Equatoriana" and "[t]he law of this arbitration clause shall be the law of Equatoriana" were written. This draft was narrowed version of HKIAC Model clause [*Rs. Ex. 1, p.33*].

11 April 2017	Then in CLAIMANT's reply, the representative revised the seat sentence "[t]he seat of arbitration shall be danubia". By appointing their seat of arbitration as Danubia, Danubian law is the govering law of this contract. Moreover, in this reply, the CLAIMANT suggested to rely on ICC hardship clause[*Rs. Ex . 2, p.34*].
12 April 2017	During the negotiation, RESPONDENT emphasized the importance of timely delivery. At the same day, the negotiators from both sides were injured from accident, and Mr. Antley was in in a coma for four weeks. Due to the accident, the negotiators of the contract from both sides were replaced for the finalization of the contract.
6 May 2017	The Frozen Semen Sales Agreement was finalized by two different negotiators from Parties who had not been involved in the previous negotiation in Mediterraneo.
19 December 2017	The Equatorianian Government announced that it will impose a tariff of 30 per cen upon all agricultural goods from Mediterraneo.
20 January 2018	While tariffs imposed by both governments took effect on 15 January, CLAIMANT recognized that this tariff was applied to frozen semen as well. Thus, CLAIMANT sent an e-mail to RESPONDENT to discuss the situation.
21 January 2018	During the telephone conversation between Ms. Napravnik and Mr. Shoemaker, Mr. Shoemaker explained the situation which RESPONDENT had confronted. He pointed out that he is not a lawyer, and he had no authority to agree on contract adaptation [*Rs. Ex. 4, p.36*]. RESPONDENT indicated DDP meant that all risks had to be borne by CLAIMANT. Also, RESPONDENT initiated the payment of the second installment.

30 May 2018	Kieron Velazquez, who worked for the Mediterranean buyer in the other arbitration, told CLAIMANT's CEO about the other arbitration between RESPONDENT and the Mediterranean buyer.
6 July 2018	Two employees of RESPONDENT who had been witnesses in the other arbitration were fired, and they had been under a contractual obligation to keep all information about the other arbitral proceedings confidential.
September 2018	RESPONDENT's computer system was hacked, and there is a possibility that this hacking was done by CLAIMANT.
2 October 2018	CLAIMANT informed the Arbitral Tribunal of RESPONDENT's other arbitration between RESPONDENT and the Mediterranean buyer, which RESPONDENT required Arbitral Tribunal to adapt the contract. However, this arbitration is different from present case, for the contract in that case contained ICC Hardship Clause 2003 and a choice of law in favor of Mediterranean law and the Model HKIAC Arbitration Clause with all additions [*PO2, ∫39*].

ARGUMENTS

ISSUE I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

A. ARBITRATION AGREEMENT DOES NOT GRANT REMEDY TO ADAPT THE CONTRACT.

1 In determining the scope of the tribunal's authority, the law applicable to the arbitration agreement is crucial since the authority of the arbitrator is based on the agreement. In the present case, the sentence explicitly stipulating which law is applied to interpret the agreement is absent in the arbitration agreement between CLAIMANT and RESPODENT. The only thing clear in the arbitration clause is that the seat of arbitration shall be Vidobona, Danubia [*Cl. Ex. 5, p.14*]. Considering the arbitral clause itself, Parties' intent and the seat of arbitration, the law applied to the interpretation of the arbitration agreement shall be the law of Danubia, not the law of Mediterraneo and CISG.

1. Under the doctrine of separability, without explicit consent and means by which to choose the applicable law, the main contract and the arbitration agreement shall be separate; subsequently the law governing the contract is not immediately applied to the arbitration agreement.

2 An international arbitration agreement is presumptively treated as separable from the substantive contract which contains the arbitration clause, according to the "doctrine of separability" [*Born, pp.349-350*]. The doctrine of separability is widely accepted in both common law and civil law perspective. "[T]he arbitral clause is autonomous and juridically independent from the main contract in which it is contained" [*Final Award in ICC Case No. 8938*]. Several international arbitration conventions include provisions assuming the separability presumption: New York Convention Art. II and V(1)(a), European Convention Art. I(2)(a), and ICSID Additional Facility Rules, Rule 45(1). The doctrine is also desirable in terms of parties' autonomy and has central importance since it is the foundation of the contemporary legal regime applicable to international arbitration agreements: especially related to the issues of choice of law, contractual validity, and competence-competence.

3 Under the doctrine of separability, the arbitration agreement is an agreement that is separate and distinct from the Sales Agreement. Therefore, even though there is a clause stating the governing

law of SALES AGREEMENT [*Cl. Ex. 5, p.14*], the clause has no automatic binding effect on the arbitration agreement. Namely, "arbitration agreement and the main contract can be subject to different laws" [*Judgment of 21 March 1995 (1997)*].

2. The law governing the arbitration agreement is the law of Danubia.

a) When the choice of law is under dispute, the law of the seat, *lex arbitri*, shall be the top priority since the seat of arbitration has irreplaceable importance according to the New York Convention and UNCITRAL Model law.

4 The seat of arbitration not only determines the procedural law applicable to arbitration, *lex arbitri* and "place where an award is made," but also the law applicable to the arbitration agreements when the choice of law is absent. Almost all jurisdictions have applied "the same law to the interpretation of an arbitration agreement as to its formation and substantive validity" [*Born, p.635*].

5 Regarding the validity of arbitration agreement, New York Convention Art. V(1)(a) specifies that the applicable law of the arbitration agreement should be the one where the award is made, i.e., the seat of the arbitration when express agreement between the parties is absent. Like New York Convention, the UNCITRAL Model Law Art. 34(2)(a)(i) and 36(1)(a)(i) state if parties do not choose which law specifically governs the arbitration agreement, validity will most likely be determined by the law of the seat of arbitration. That is, the law of the country where the award was made governs the arbitration agreement. Moreover, judicial authorities in UNCITRAL Model Law jurisdictions have also uniformly recognized that international arbitration agreements are often governed by a different law than that governing the underlying contract [*Born, pp.479- 480*].

b) Given the importance of the seat, when there is no choice of law applicable to arbitration agreement, choice of the seat in an arbitration shows parties' implied intent that *lex arbitri* govern the agreement to arbitrate.

6 Given the importance of the choice of the seat in an arbitration, the English Court of Appeal's stated in *C v D* that it would be "rare" for the governing law of the arbitration to be different from that of the law of the seat [*C v D, §14*]. Furthermore, in the *FirstLink* the Singapore High Court ruled that in the absence of contrary indications, parties will have impliedly chosen the law of the seat of the arbitration to govern the agreement to arbitrate. The Court reasoned that parties would conceivably demand that the law of the seat of the arbitration govern the arbitration agreement in order to achieve consistency between the *lex arbitri* and the governing law of the arbitration

agreement. This was because "commercial parties would not […] select a place to be the seat if they do not at least have the notional confidence that the supervisory court would recognise and give effect to the arbitration agreement in the first place" [*Firstlink, §15*]. A decision by Tokyo High Court also states that "the law of the place where the arbitration proceedings are held" shows an implied choice of law by the parties through their selection of the arbitral seat [*Born, p. 253*; *Judgment of 30 May 1994 (1995)*].

7 Therefore, adhering to the express language of arbitral clause, as there is no separate choice of law governing arbitration agreement, the substantive law of Danubia where explicitly decided as the seat of arbitration shall be the criteria of interpretation of the agreement.

c) Even though the intent of Parties is deemed unclear, the law applicable to arbitration agreement shall be law of the seat of arbitration, Danubian law, because in the present case the seat has the most significant relationship with the Parties' arbitration clause.

8 If which law regulates arbitral clause is under dispute without explicit or implicit consent, "the law where the arbitration takes place and where the award is rendered" seem to be appropriate application, which is supported also by the Article V(1)(a) of NYC as mentioned earlier [*Interim Award in ICC Case No. 6149 (1995)*]. That is, when the seat of arbitration is determined but not applicable law of the agreement, the seat of arbitration is *prima facie* evidence of governing law of the agreement. In an ICC arbitration, the arbitral tribunal concluded that the arbitration agreement was subject to the law of the seat, not the law applicable to the merits [*ICC Award in Case No. 6162 (1992)*].

9 Moreover, in terms of fairness, the law of the third nation shall be applied in the present case. Parties decided a third nation as the seat of arbitration to avoid either side's national impact and to be neutral, while the law governing the Sales Agreement was determined as Mediterraneo law only because CLAIMANT had much greater experience in the shipment of frozen semen [*Cl. Ex. 2, p.10; Cl. Ex. 3, p.11*]. Accordingly, since arbitration agreement itself has nothing to do with the professionality in semen production and delivery area, applying governing law of the SALES AGREEMENT to the arbitration agreement as well will result in partiality and injustice between the Parties. Consequently, to address the dispute fairly, the applicable law to the arbitration agreement be the Danubian law. It is also desirable considering the seat of arbitration regulates procedure of arbitration because the arbitration can be held under consistency.

10 CLAIMANT alleged that arbitration agreement be governed by the law of Mediterraneo following the underlying contract. However, the law applicable to determination of the scope and the effects of an arbitration clause is not necessarily the same as the law applicable to the merits of the dispute referred to the arbitration [*Interim Award in ICC Case No. 4131 (1984)*]. Rather, in most cases the main contract and the arbitration agreement "are both governed by the same law, not because of their interdependence but because their juridical 'location' is, in fact, most often the same" [*Goldman*].

11 In conclusion, the law governing the arbitration agreement between CLAIMANT and RESPONDENT is Danubian law - the law of the seat - not Mediterraneo law - the applicable law of the main contract - in the light of Parties' explicit or implicit intent, significance of the seat, and fairness.

3. Pursuant to the four corners rule (under the law of Danubia), the arbitration agreement shall be interpreted narrowly, excluding contract adaptation.

a) The arbitration agreement should be interpreted only by what is explicitly stated within the four corners of the contract.

12 Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (hereinafter "UNIDROIT Principles") with two relevant exceptions [*PO2, §45*]. One exception is the four corners rule, and the substance of four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Art. 2.1.17 of the UNIDROIT Principles. [*PO2, §45*] According to Art. 2.1.17, "a contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements".

b) Contract adaptation is not empowered within the four corners of the contract.

13 The arbitration agreement reads, "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof." [*Cl. Ex. 8, p.14*]. Courts from Common Law Countries have famously distinguished between "narrow" clauses (where only disputes "out of the contract" were referred to arbitration) and "wide" clauses (those that encompass disputes "out of the contract" as well as those "in connection with" the contract). The narrow clauses were held to include only disputes on contractual obligations, while wide clauses

are also applied to non-contractual obligations – such as contract adaptation – in connection with the contractual relationship of the parties [*Kinoshita & Co Ltd et al. v. American Oceanic Corporation; Mediterranean Enterprises Inc v. Ssangyong Corporation; Tracer Research Corporation v. National Environmental Services Company*].

14 According to cases such as *Simula Inc. v. Autoliv. Inc*, "arising out of" is considerably narrower than "arising in connection with." [*Simula, Inc. v. Autoliv. Inc.*] Therefore, an examination of the arbitration agreement through its language reveals that the contract adaptation is not included within the scope of arbitration. Also, it is unreasonable to assume that representatives of both parties were unaware of said Common Law practice when they chose such specific language in the arbitration agreement. The term "arising out of" was hardly chosen at random and the choice of language further reveals both Parties' intent and consent to exclude adaptation from the jurisdiction of an Arbitral Tribunal. This is even more obvious in light of that fact that representatives of the both sides, John Ferguson and Julian Krone, were lawyers who had been or at least should have been familiar with such jurisprudence. [*Rs. Ex. 3, p.35; Cl. Ex. 8, p.17*].

15 More importantly, both Parties agreed in the telephone conference of 4 October 2018 that according to Danubian Contract Law, which contains the "four corners rule," arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal [*PO1, p.52, §II*]. So long as the law of Danubia applies, the arbitration agreement unequivocally does not grant the Tribunal power to adapt the contract.

4. Even if the four corners rule does not apply, Parties have not consented to include the adaptation of the contract in the scope of arbitration.

a) Drafting history rather reveals the intent of Parties to leave out matters regarding contract adaptation from arbitration.

16 Even if the drafting history is considered, it rather strengthens RESPONDENT's submission that both Parties had not intended to include contract adaptation within the jurisdiction of the Tribunal. The Parties have agreed upon a very narrow arbitration clause. RESPONDENT, via email, had suggested a narrowed down version of the HKIAC model cause for guidance. [*Rs. ANoA, §13*]

17 The HKIAC model Clause reads, "Any dispute, controversy, difference or claim arising out of **or relating to** this contract, including the existence, validity, interpretation, performance, breach or termination thereof **or any dispute regarding non-contractual obligations arising out of or**

relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre(HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice or Arbitration is submitted".

18 Under the broader HKIAC model, contract adaptation may be within the jurisdiction of the Tribunal. However, the underlined phrases have been redacted by RESPONDENT in its email to CLAIMANT. While reserving concerns regarding the place of arbitration, CLAIMANT did not challenge the narrower version and the arbitration agreement was ultimately signed as drafted by RESPONDENT. This shows explicit will of RESPONDENT to exclude contract adaptation within the scope of an arbitration through the broader HKIAC model, and CLAIMANT's implicit consent to meet such concern.

19 Therefore, even according to the drafting history, not only did Parties fail to explicitly grant the Tribunal the authority, they also specifically intended to leave out said authority through mutual consent. Such party autonomy to carve out matters pertaining to contract adaptation from the jurisdiction of the tribunal should be respected.

B. *LEX CAUSAE* DOES NOT GRANT REMEDY TO ADAPT THE CONTRACT. (FUTHER ELABORATED IN THE MERITS)

1. The Tribunal cannot adapt the contract under *lex causae* of the contract.

a) SALES AGREEMENT Clause 12 does not grant the Tribunal authority to adapt the contract; it merely exempts CLAIMANT from liability.

20 Clause 12 reads, "[t]he seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller…." While it relives the seller from paying damages due to failure of delivery under certain circumstances, it does not grant for price adjustment when the goods have already been delivered. In the present case, even if the circumstances stated in Clause 12 had been met (RESPONDENT is of the submission that it had not) CLAIMANT would merely have been able to withhold delivery without having to pay damages upon failure of performance. CLAIMANT still would not be able to request for renegotiation of the price under this Tribunal.

b) CISG does not allow for the adaptation of the contract, merely the exemption of liability.

21 Art.79.1. of the CISG reads, "[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences". As stated above, exemption from liability does not grant authority to adapt or supplement the contract. The remedy provided in Art.79 is exemption from liability not renegotiation.

c) The UNIDROIT Principles do not apply.

22 Art.7.2. of the CISG reads, "[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principle on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law".

23 However, there is no room for application of UNIDROIT Principles in the present case. Both domestic law and general principles may be applied on when there exists legal vacuum under either the contract or the applicable law. While UNIDROIT Principles are either the general principle or the general contract law of Mediterraneo, both SALES AGREEMENT and CISG themselves evidently express the remedy through Clause 12. Thus, there is no margin of application of UNIDROIT Principles according to Art.7.2. of CISG.

C. EVEN IF THE CONDITIONS OF ARBITRATION AGREEMENT AND *LEX CAUSAE* ARE MET, THE TRIBUNAL CANNOT ADAPT THE CONTRACT IF THE DOMESTIC PROCEDURAL LAW OF THE SEAT PREVENTS THEM.

24 RESPONDENT is primarily of the position that the arbitration agreement does not reflect the consent of Parties to empower the arbitrator the authority to adapt or supplement a contract. Even if, *arguendo*, the arbitration agreement does grant arbitrators power, the Tribunal does not have jurisdiction to adapt the contract unless the *lex arbitri* also grants said authority.

1. It is not the arbitration agreement alone, but the agreement in its combined effect with the *lex arbitri*, which conveys the necessary authority to the arbitral tribunal.

25 While the arbitration agreement provides the basic authority to adapt or supplement a contract, it is the law applicable to the arbitration, *lex arbitri*, which determines whether the arbitrators are

procedurally authorized to decide on the contract adaptation or supplementation. [*Berger, p.10*] Examination of arbitration laws, which contain express provisions pertaining to the arbitral tribunal the power to adapt or supplement the contract, reveals where the tribunal power to adapt the contract originates from: the arbitration agreement and the *lex arbitri*.

26 For instance, the 1986 Dutch Arbitration Act provides in section 1020(3) that "the parties may agree to submit … to arbitration … the filling of gaps in, or the modification of, the legal relationship between the parties." Likewise, paragraph1(2) of Swedish Arbitration Act provides that "the parties may authorize the arbitrators to supplement contracts beyond the boundaries of the principles of the construction of contracts." Both the Arbitration Acts provide two fundamental premises of the tribunal's authority to adapt the contract. First, the arbitrator needs an authorization from the parties in order to intervene. Secondly, both the arbitration agreement and the *lex arbitri*, in their combined effect, convey the necessary authority to the arbitral tribunal. [*Berger, p.25*]

2. The lex arbitri (law of Danubia) does not allow for adaptation without expressed conferral of powers.

27 The Courts in Danubia are of the view that Art. 28(3) of the Danubian Arbitration Law (identical to Art. 28(3) UNCITRAL Model Law) contains a general standard to be applied to the conferral of exceptional powers to the Arbitral Tribunal [*PO2, ∫36*]. Also, the Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles, except the Article 6.2.3 (4)(b), which is worded differently granting the power "to adapt the contract" to the court only "if authorized" [*PO2, ∫45*]. Thus, while "procedurally" the Parties may authorize Arbitral Tribunals to adapt contracts, a conferral of powers is required. The fact that Danubian law specifically added "if authorized" to the original UNIDROIT Principles suggests legislator's intent to set a higher bar for granting authority. Therefore, "if authorized" should be interpreted as a requirement for unequivocal authorization in writing. Otherwise, there would not have been a need to alter the UNIDROIT Principles in its incorporation into Danubian law. The *lex arbitri* did not intend to confer power to the Tribunal when authorization of Parties is nonexistent or dubious at best.

D. PRICE ADAPTATION WOULD ULTIMATELY RENDER THE AWARD UNENFORCEABLE UNDER THE NEW YORK CONVENTION.

28 An arbitrator bears the responsibility to render an enforceable award. In the present case, even if the Tribunal assumes jurisdiction under either the arbitration agreement or the *lex causae*, the New York convention would render the award unenforceable if no authority exists under *lex arbitri*. The enforceability of an awards is decided not by *lex fori* of the enforcement court but by the law applicable to the arbitral procedure [*Van den Berg, p.46*]. As the Danubian Arbitration Law requires explicit consent of Parties for the Tribunal to adapt the contract, any award rendered in the contrary will eventually be null and void in Mediterraneo, Equatoriana, and Danubia (all of which are New York Convention Signatories).

ISSUE II. CLAIMANT SHOULD NOT BE ALLOWED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS SINCE THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

A. THE ARBITRAL TRIBUNAL HAS A FULL DISCRETION ON EVIDENTIARY ISSUES IN ACCORDANCE WITH HKIAC ARBITRATION RULES ("HKIAC RULES") AND IBA RULES ON TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION ("IBA RULES").

1. HKIAC Rules and IBA Rules should be applied on evidentiary issues.

29 Taking of evidence is typically considered as a procedural issue since evidentiary issue is more related to court proceedings rather than the substantial aspect of a case. Thus, evidentiary issue should be governed by procedural law. The Arbitral Tribunal should be bound by the law of Danubia in the current case.

30 Since there are no specific rules on evidence and how to deal with evidence obtained in a breach of contractual obligations or by illicit means in Danubia [*PO2, §46*] and the Parties remain silent on any specific rules on taking of evidence, it is most reasonable to conclude that institutional rules of HKIAC and IBA Rules should be applied.

2. The Arbitral Tribunal has the discretion to determine the admissibility of evidence.

31 According to Art. 22.2 of HKIAC 2018 Rules, the arbitral tribunal has the discretion to determine the admissibility, relevance, materiality, and weight of the evidence, including whether to apply strict rules of evidence.

32 Article 1.5 of IBA Rules demonstrates that the arbitral tribunal shall conduct the taking of evidence as it deems appropriate in accordance with the general principles of the IBA Rules, insofar as the IBA Rules are silent on any matter concerning the taking of evidence and the parties have not agreed otherwise. The IBA Rules also states that applicability of evidence is granted at the discretion of the Arbitral Tribunal.

3. International arbitration practice does not always adopt a loose standard on the admissibility of evidence.

33 There are several cases where the tribunal rejects certain evidences of which the sources are illegal

or questionable. In *Libananco Holdings v Turkey*, the respondent submitted evidence which had been obtained through illegal surveillance on more than 2000 privileged and/or confidential emails exchanged between the claimant and its counsel [*Libananco Holding Co Limited v. Turkey*]. In *Methanex v USA*, Methanex(claimant) illegally trespassed into the office of a lobbying organization and obtained personal notes, private correspondence and material through searching internal trashcans and dumpsters every morning [*Methanex v. USA*]. In both cases, the tribunal did not admit the problematic evidences by emphasizing good faith and procedural fairness.

34 It is not disputable that tribunals should take an active role in discovering facts. However, this does not mean that tribunals can admit any evidences. It is hard to agree that international arbitration practice adopts a loose standard on the admissibility of evidence.

35 Even if there is an international practice as claimant asserts, tribunals are not bound to any authorities. Rather, tribunals should strive to reach the most reasonable conclusion in individual cases.

36 Nothing prevents tribunals from admitting certain documents as evidences that may have been obtained through unlawful process. However, previous cases have shown that tribunals will most likely to reject such documents on the grounds of 'procedural fairness'.

B. CLAIMANT'S EVIDENCES ARE IRRELEVANT AND NOT MATERIAL TO THE OUTCOME OF THE CASE.

37 According to Article 9.2 (a) of IBA Rules, the Arbitral Tribunal shall exclude from evidence when the evidence lacks sufficient relevance to the case or materiality to its outcome.

1. The other arbitration is a fundamentally different case.

38 The contract between RESPONDENT and a Mediterranean buyer was concerning the sale of a mare. Also, specific details about how the Parties reached a contract, relationship between the Parties, express or implied contents of the contract are entirely different in both cases.

39 These two cases are fundamentally different in two major aspects. First, in the other arbitration, RESPONDENT, the seller, refused to deliver the mare and asked for a renegotiation of the price. Second, the legal basis of RESPONDENT's request was ICC Hardship Clause 2003 [*PO2, §9*]. In contrast, CLAIMANT have already delivered its product before renegotiation even took place. Also, the hardship clause between CLAIMANT and RESPONDENT was narrower than original

ICC Hardship Clause 2003.

40 Thus, the other arbitration is irrelevant to the present case.

2. RESPONDENT is not obliged to repeat its argument in a different arbitration case.

41 That is, RESPONDENT can make a contradictory argument. Considering that Arbitral Tribunal and Parties are not bound by precedent in international arbitration, RESPONDENT is doubtful about the relevance and materiality of CLAIMANT's evidence to the outcome of the present case.

C. CLAIMANT'S EVIDENCES SHOULD BE EXCLUDED ACCORDING TO THE LOGIC OF ARTICLE 9.2 OF 2010 IBA RULES.

42 According to Art. 9.2 (b) of IBA Rules, a tribunal may apply either a legal or ethical rule of privilege to proclaim evidence inadmissible or protected from disclosure.

43 When determining whether a rule of privilege may apply, a tribunal should consider mandatory law and *lex arbitri*. If mandatory law and *lex arbitri* do not contain a rule of privilege directly applicable to an international arbitration, the tribunal may consider its general obligation to ensure procedural fairness and to evade serious procedural defect [*O'Malley, p.276*].

44 According to Art. 42 of HKIAC 2013 Rules, partial interim award of an arbitration is subject to confidentiality protection. Thus, considering HKIAC Rules as applicable mandatory law, Tribunal should determine that this evidence should be protected from disclosure. Also, possibility of illegal hacking and breach of contractual obligations by former employees are enough to threaten procedural fairness.

D. EVEN IF THE ARBITRAL TRIBUNAL ADMITS THAT CLAIMANT'S EVIDENCES ARE RELEVANT AND MATERIAL TO THE OUTCOME OF THIS CASE, CLAIMANT'S EVIDENCE SHOULD NOT BE ACCEPTED SO AS TO PROTECT THE INTEGRITY OF ARBITRATION.

1. Confidentiality of an arbitral award is one of the most important and major objectives of international commercial arbitration.

45 Confidentiality plays a crucial role in fulfilling the objectives of an international arbitration

agreement. International arbitration is chosen by parties so as to provide a single, impartial, efficient and internationally-binding means of dispute resolution. These objectives are substantially advanced by implying confidentiality obligations on the parties, which serve to focus the parties' efforts to resolve their dispute on participation in presenting evidence and legal argument in a centralized, neutral dispute resolution process.

46 For all these reasons, most recent revisions of institutional arbitration rules have tightened up the confidentiality obligations on both parties and arbitratoRs. as well as witnesses and experts.

2. CLAIMANT's submission could only occur in violation of contractual and statutory confidentiality obligations.

47 The fact that 'partial interim award' which is supposed to be kept confidential was leaked should be emphasized, and how the award was leaked is of less importance.

48 There is a possibility that two former employees of RESPONDENT who were witnesses in the other arbitration may have disclosed information against confidentiality obligation. Also, there was a hack of RESPONDENT's computer system in September 2018. Hackers had managed to retrieve a considerable amount of data. The award might have been leaked during this illegal hacking. Either way, the award that should have been kept between RESPONDENT and its counterparty at the other arbitration was disclosed.

49 CLAIMANT may argue that CLAIMANT is not obliged under Art. 42(3) of HKIAC 2013 Rules. However, the Tribunal of the current case should focus on the fact that RESPONDENT's privilege of confidentiality was infringed, and not how the arbitration award was disclosed. Regardless of who was subject to confidentiality obligation, the award could only be disclosed in violation of contractual and statutory confidentiality obligations.

50 Also, if the disclosure or hacking had been instigated by CLAIMANT or at least if CLAIMANT was aware of the possibility of unlawful disclosure, it would likely be considered a 'bad faith action'. The Tribunal can refuse to admit the evidence, according to the logic of Art. 9.7 of IBA Rules.

3. The evidence should be excluded following the logic of Article 9.2(g) of IBA Rules.

51 According to Art. 9.2 (g) of IBA Rules, Tribunals should consider procedural economy, proportionality, fairness or equality of the Parties. When admission of a certain evidence threatens fairness and equality of the Parties, the Tribunals should exclude from evidence.

52 In *Methanex v USA*, Methanex attempted to submit evidences that was obtained through illegal trespassing into the office of a lobbying organization and rummage around internal trashcans and dumpsters every morning. Tribunals refused to accept this evidence. Specifically, tribunals held that the parties owed each other and the tribunal a general duty to act in good faith and to respect the equality of arms between the parties and procedural fairness imposed by the Art. 15(1) UNCITRAL Rules. Tribunals stated that "just as it would be wrong for the USA ex hypothesi to misuse its intelligence assets to spy on Methanex and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully" [*Methanex v USA, §54*].

53 In the present case, it would be wrong for CLAIMANT to introduce evidence obtained in a questionable matter, just as it would be wrong for RESPONDENT *ex hypothesi* to conduct suspicious behaviors and introduce materials obtained in a questionable manner into this arbitration.

4. Admission of an evidence which is likely to have been obtained through unlawful means can corrupt the whole proceedings of the present case and further, threaten the integrity of arbitration.

54 Even if there is no direct evidence to prove that CLAIMANT's evidence was obtained unlawfully and in bad faith, the fact that its source is being questioned is more than enough to reject admissibility.

55 There are several cases where the Arbitral Tribunal declined the admission of certain confidential information and evidences obtained in a questionable manner [*Libananco Holdings v. Turkey*]. In these cases, the tribunal weighed the importance of confidentiality and the obligation of all parties to arbitrate fairly and in good faith and determined to exclude evidence of all privileged and confidential communication. Considering the importance of fairness and integrity of an arbitral proceeding, it is reasonable to conclude that CLAIMANT's evidence should be rejected.

56 Once the proceeding is contaminated by an evidence which has been obtained against confidentiality mandates, it is irrevocable. Confidentiality obligation of an arbitration proceedings is the core and the main reason why many parties choose to arbitrate. If evidences that are obtained illegally through breaking the contractual and statutory confidentiality obligation are admitted as evidence in arbitral proceedings, it would seriously harm the integrity of the proceedings and the

essence of arbitration itself.

5. The Tribunal has an obligation to render an 'enforceable' award, and the submission of illegally obtained evidence may harm the integrity and enforceability of the final award.

57 There is a high chance that the final award might be set aside due to a violation of public policy.

58 According to Art. 5.2(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), recognition and enforcement of the award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

59 Both Parties as well as more than 180 countries are member states of this convention. Illegal hacking or breach of confidentiality obligation are usually considered as 'against public policy' in most states. For example, in the United States, courts have reached a narrow concept of public policy, which is the 'fundamental notions of morality and justice' [*Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier*].

60 If the Tribunal accepts CLAIMANT's evidences that are obtained by foul means, it is evident that the enforcement will be against fundamental notions of morality and justice. Thus, it is very likely that the final award will be set aside.

61 Also, a failure to observe the principles of fairness and equality in IBA Rules might result in a challenge of an award.

6. Admission of this evidence can aggravate further breach of confidentiality obligations in other numerous arbitration.

62 If this Tribunal finds that evidences obtained in questionable manner can be admissible in arbitration court, it will be followed by countless attempts to indirectly breach confidentiality obligations of arbitral awards.

63 To prevent these tragic consequences, RESPONDENT strongly asserts that confidentiality of arbitral awards should be protected strictly.

ISSUE III. CLAIMANT ISN'T ENTITLED TO THE PAYMENT OF US $ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE (I) UNDER CLAUSE 12 OF THE CONTRACT OR (II) OR UNDER THE CISG.

64 Even if the Arbitral Tribunal decides that it has the authority to adapt the product price of the contract between two Parties, CLAIMANT has no legal ground for requesting price adaptation as a relief in the present case.

65 CLAIMANT might seek request either under the clauses of SALES AGREEMENT or *lex causae* governing SALES AGREEMENT. *Lex causae* found in Clause 14 of the SALES AGREEMENT acts as a choice of law clause. Clause 14 reads "*This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods* (1980) (CISG)." Thus, *lex causae*, the law governing the substantive issue, are the CISG and the domestic contract law of Mediterraneo.

66 However, both clauses of SALES AGREEMENT and *lex causae* lack legal ground on which CLAIMANT may rely in order to request price adaptation. RESPONDENT submits that current situation of CLAIMANT does not constitute hardship of SALES AGREEMENT and even if it constitutes, CLAIMANT is not entitled to request for additional remuneration under SALES AGREEMENT. In addition, *lex causae*, the CISG and the domestic contract law of Mediterraneo also do not entitle RESPONDENT for additional remuneration.

A. SALES AGREEMENT DOES NOT PROVIDE LEGAL GROUND FOR PRICE ADAPTATION CLAIMANT IS REQUESTING FOR.

1. In SALES AGREEMENT, the Parties explicitly agreed that all the costs and risk related to the delivery is allocated to CLAIMANT.

67 Allocation of risk regarding delivery is explicitly and evidently consented by party agreement. This risk allocation is expressed by the definitive term of SALES AGREEMENT and the detailed process of the negotiation between the parties. By agreeing the delivery term to follow DDP (delivery duty paid) rule, both CLAIMANT and RESPONDENT agreed that all risk related to the delivery shall be burdened by the provider of the product, CLAIMANT.

a) The parties have agreed that the delivery term shall follow DDP rule of Incoterms® rules 2010.

68 Clause 8 of SALES AGREEMENT expressly states that the delivery term of SALES AGREEMENT will follow DDP rule. It is an undisputed fact that both Parties had agreed on "DDP, Seabiscuit Drive, Oceanside, Equatoriana" following Incoterms® rules 2010 by the DDP stated in Clause 8 of SALES AGREEMENT [*PO2, ∫ 10*].

b) DDP of Incoterms® rules 2010 stipulates that CLAIMANT bears all the costs and risks involved in the delivery.

69 Guidance Note from Incoterms® rules 2010 describes DDP as a contract term in which "[t]he seller bears all the costs and risks involved in bringing the good to the place of destination […] and has obligation […] to pay any duty for both export and import and to carry out all customs formalities." In addition, it is clear that DDP of Incoterms® rules 2010 stipulates that the costs and risks to the point of delivery are for the account of the seller.

70 It is much more clear from specific terms of DDP rule stipulated by Incoterms® rules 2010 that both Parties have agreed the Seller, CLAIMANT, is to bear all the costs and risks arising from or related to the delivery. Incoterms® rules 2010 also explicitly regulates that "the costs and risks arising from or related to the delivery" include duty such as taxes and tariffs.

71 Clause A6 of DDP rule from Incoterms® rules 2010, envisaging "Allocation of costs," stipulates that "[t]he seller must pay […] c) where applicable, the costs of customs formalities necessary for export and import as well as all duties, taxes and other charges payable upon export and import of the goods, and the costs for their transport through any country prior to delivery […]." There is no dispute that newly increased cost, for which CLAIMANT requests additional remuneration, is a tariff and amounts to "all duties, taxes and other charges payable upon […] import of the goods" of Clause A6 of the DDP.

72 Guidance Note of Incoterms® rules 2010 also explicitly states that "[a]ny VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sale contract." Thus, the fact that the Parties have agreed that problematic tariff of the present case was to be burdened by CLAIMANT is evident and undisputed.

c) CLAIMANT'S argument that the delivery term of the contract is modified from DDP of Incoterms® 2010 is not admissible.

73 As discussed above, DDP rule in general assumes that the provider shall be responsible for the

costs and risks related to tariff unless Parties have explicitly agreed to different terms or conditions. However, in the present case, no agreement was made between the Parties regarding the delivery term other than DDP rule.

a No consent to the request by CLAIMANT was made by RESPONDENT.

74 As the delivery condition, DDP rule was suggested by RESPONDENT [*Cl. Ex. 3, p.11*], and was agreed by two Parties [*Cl. Ex. 5, p14*].

75 As CLAIMANT argues, it is true that CLAIMANT had once expressed one's reluctance that CLAIMANT was "not willing to take over any further risks associated with such a change in the delivery terms[*Cl. Ex. 4, p.12*]. However, no consent was made to CLAIMANT's request. The only product of the negotiation regarding delivery term between two Parties is "DDP, Seabiscuit Drive, Oceanside, Equatoriana" following Incoterms® rules 2010[*PO2, ∫10*]. No clause or circumstantial evidence provides basis for CLAIMANT's argument that both Parties have expressly agreed to the term other than DDP of Incoterms® rules 2010.

b If the Parties have intended the risks and costs associated to tariff to be allocated to RESPONDENT, the Parties would have chosen another term from the Incoterms® rules 2010.

76 Among eleven rules provided by Incoterms® rules 2010, DDP rule is the only rule which requires the provider to be responsible for the duty and tariff. In the present case, it is evident that both Parties have agreed to the undisputed wording of DDP rule. Thus, deliberate choice of DDP rule from other alternatives is another evidence showing that both Parties' intent was for CLAIMANT to assume entire risks and costs.

77 In addition, it is common practice in international commerce that DDP rule should not be used when the parties' intent is not to assume burden of tariff to the provider. This is even clearly emphasized by Guidance Note of Incoterms® rules 2010 that "DDP represents the maximum obligation for the seller" and recommended that "[t]he parties are well advised not to use DDP if the seller is unable directly or indirectly to obtain import clearance. If the parties wish the buyer to bear all risks and costs of import clearance, the DAP rule should be used."

d) Burden of the risk should be determined by the contract term, not by the 'close association' that CLAIMANT argues for.

78 CLAIMANT argues that the burden of the risk should be determined by evaluating relatedness of the Parties to the risk and alleges RESPONDENT should bear the burden of the risk because RESPONDENT is "closer associated" with Equatorianian government's newly imposed tariff [*Cl. NoA, §18*].

79 However, the most primary and important matter to be considered in the contract is the intent of both parties that shall be interpreted from the terms of the contract at first. Other circumstantial issues are to be utilized when the intent cannot be interpreted by the terms of the contract. As RESPONDENT submitted above, intent by both Parties regarding the matter of delivery risk allocation is clear and express that the provider, who is CLAIMANT in the present issue, is to bear the burden according to Clause 14 stipulating DDP rule. Thus, the standard, provided by CLAIMANT, to determine risk allocation is both unnecessary and insignificant.

2. CLAUSE 12 of SALES AGREEMENT cannot exempt CLAIMANT from one's obligation.

80 Upon CLAIMANT's obligation levied by SALES AGREEMENT, CLAIMANT argued that it has been free from its responsibility grounding on hardship clause, Clause 12, of SALES AGREEMENT. However, Clause 12 does not provide legal ground for CLAIMANT to argue exemption from its responsibility or additional remuneration in the present case.

a) Written language of Clause 12 does not cover the current situation.

81 The scope of hardship regulated in Clause 12 of SALES AGREEMENT does not cover the difficulty argued by CLAIMANT in the present case. Clause 12 reads, "Seller shall not be responsible […] *for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" Thus, CLAIMANT's argument that the current situation amounts to hardship of the Clause 12 can be admitted only when the imposition of new tax amounts to either "*additional health and safety requirements*" (a) or *"comparable unforeseen events making the contract more onerous*." (b). However, in light of the facts and details about the recent tariff, the current situation, which CLAIMANT alleges to be hardship, does not amount to neither of stated conditions.

a The Contra Proferentem Rule does not govern the present case.

82 As CLAIMANT has submitted, the interpretation of the contract should emanate from the intent

of the parties[*MfC, p.20, §68; CISG Art. 8 (1)*]. It is also true that the written agreement by the parties, SALES AGREEMENT in the present dispute, should be the most primary source to interpret the intent by parties. However, regarding interpretation, on the contrary to CLAIMANT's submission, the Contra Proferentem Rule does not govern the present case[*MfC, p.20, §69*].

83 The basic principle behind Contra Proferentem Rule is to disadvantage the party who supplied the contract terms because that party has provided "lack of clarity" and is "responsible for the formulation of a particular term"[*Vogenauer, p.146*]. The party may be responsible for supplying the contract term by solely drafting the contract terms or using the standard terms. However, neither of the possibility applies in the present dispute.

84 As CLAIMANT has submitted, it is true that the wording of Clause 12 was suggested by RESPONDENT[*MfC, p.20, §69; PO2,§12*]. However, SALES AGREEMENT in the present dispute was written by both of the parties. The template for the contract was provided by CLAIMANT and the detailed content was added and modified by consent from both parties. Especially, Clause 12 is a delicate result of both parties' negotiation as it can be seen in thorough negotiation by the parties shown by exhibits submitted and intended italic font of SALES AGREEMENT [*PO2, §3*].

85 When the parties have both contributed in writing the contract and had equal bargaining power in the process of negotiation, the Contra Proferentem Rule cannot be applied. Thus, the cases CLAIMANT has submitted in the memorandum cannot be invoked in the present dispute. The cases referred by CLAIMANT have fundamentally different background facts. For example, in *Bowling alleys case,* the Contra Proferentem Rule was applied because the contract was made using the standard terms provided by the one side. However, as discussed above, SALES AGREEMENT of the present case is different from using the verbatim adoption of the standard terms provided by RESPONDENT.

b Imposition of new tariff is not additional health and safety requirement.

86 Equatorianian government's newly imposed tariff does not amount to "*additional health and safety requirement*" stated in Clause 12 of SALES AGREEMENT. First of all, measure by Equatorianian government does not have purpose of "health and safety." Rather than having a goal of protecting "health and safety," Equatorianian government' major and only purpose was a political retaliation. It is hard to find legitimate public interest regarding "health and safety" issue for Equatorianian

government to protect by imposing new tariff in the current case. There was no disease or contamination as health and safety problem. Instead, it is clear and evident from circumstances and known facts that Equatorianian government's action was derived from political and economic drive. As it is expressly provided by the exhibit CLAIMANT has submitted [*Cl. Ex. 6, p.15*] and the way CLAIMANT describes Equatorianian government's measure in one's 'statement of facts' [*Cl. NoA, ∫ 10*], the very basic nature of new tax imposition was retaliatory measure in order to achieve own country's political or economic benefit.

87 Secondly, the measure by Equatorianian government is not a "requirement." According to Black's Law Dictionary, the word "requirement" means that "any demands, constrains, needs, necessities needed to be met" [*Black, p.4073*]. Thus, "health and safety requirement" should be an administrative restriction permitting the distribution of goods of specific area only when the goods meet the certain and specific conditions set to prevent outbreak of concerned health or safety event. However, the measure by Equatorianian government did not set any condition to be fulfilled by the "agricultural goods." Thus, 30% of tariff, which does not prohibit distribution of any good, cannot be construed as "requirement" stated in Clause 12 of SALES AGREEMENT.

c Imposition of new tariff does not amount to "*comparable unforeseen events making the contract more onerous*".

88 Secondly, the current situation that the CLAIMNANT argues to be hardship under the Clause 12 of the sales agreement does not amount to "comparable unforeseen events making the contract more onerous." To fulfill the condition of the second part in the Clause 12, the difficulty has to be both (a) "unforeseen" and (b) "making the contract more onerous." In addition, to argue applicability of the hardship clause, responsibility of proof lies on CLAIMANT. However, CLAIMANT has failed to prove the both points that (a) the difficulty that CLAIMANT faces was not foreseeable, and (b) the difficulty is making the contract more onerous.

i. Measure imposed by Equatorianian government is not "comparable" to health and safety requirement.

89 To constitute hardship set up in Clause 12 of SALES AGREEMENT, measure imposed by Equatorianian government has to be at least comparable to health and safety requirement. However, it is difficult to state that this comparability requirement is fulfilled for the current case. Mostly, as discussed above, newly imposed tariff is neither a requirement nor a measure with a purpose of health and safety protection. Considering circumstances, main intent of Equatorianian government

to imposed such tariff was a retaliation for 'political and economic' reason.

90 Even if the "comparable" is to be interpreted much broadly, the measure in question has to have a purpose of public interest issue comparable to health and safety problem at least. The main reason that health and safety issues are accepted as justified exemption for economic restriction especially in the issue of expropriation, is that the health and safety issues are usually related to irreversible and emergent public interest. However, since it is an exception granting a special occasion for illegitimate actions not to be illegal, determining whether the action has arisen from public welfare issue should be carefully done. Exemption should be admitted only when there were significant reasons to protect public interest, the actions were done in due process and intensity of measure was proportional to the potential threat the government had faced. However, it is difficult to find any related justifiable public interest from Equatorianian government's new imposition of the tariff in the present case.

91 In addition, on the contrary to CLAIMANT's memorandum, the fact that both parties are the members of WTO cannot be a good reason to argue that Equatorianian government's tariff imposition is comparable to the health and safety requirement. On the contrary to the statement in CLAIMANT's memorandum, WTO website does not contain the definition for "import restrictions" category. [*MfC, p.41, §71*] No article in the WTO website provided by CLAIMANT describes tariffs and health and safety requirement under the same category [*WTO website*].

ii. Measure by Equatorianian government was not "unforeseeable".

92 First of all, CLAIMANT failed to provide substantive evidence in order to prove that the measure by Equatorianian government was unforeseeable. On this issue, CLAIMANT argues historical and political circumstances as main grounds for one's argument. CLAIMANT argues that it was difficult for both Parties to predict restrictive measure, equivalent to the problematic tariff of the current case, considering a political stance of the current regime and historical evidence of Equatorianian government's stance on international commercial matter. However, historical or political perspective cannot be a solid ground to prove that the measure by Equatorianian government was unforeseeable. Political and historical background, which is capricious in nature, cannot be a legitimate excuse to cause one party's responsibility from the agreement to be exempted.

93 The scope of circumstances where doctrine of *Rebus Sic Stantibus* is admitted by courts should be limited only to cases of fundamental change of circumstances. The scope of 'fundamental,' also,

should be interpreted narrowly. If fundamental changes are interpreted broadly and the doctrine of *Rebus Sic Stantibus* is approved widely, then the contract between parties would derogate from *Pacta sunt servanda*. Such interpretation of the contract should be restricted, unless the intention is to reduce the contract agreement to the remains but nothing.

94 Furthermore, various facts indicate that there was high possibility of predicting such circumstance to occur and it was very likely for CLAIMANT to include a concern of tariff matter as a risk in making important business decision. As CLAIMANT stated in one's submission as a fact, there was a precedent of Equatorianian government making retaliatory tariff imposition in the past. More importantly, prelude to a change in political and economic situation among Equatoriania and Mediterraneo was apparent from the point even before the contract was signed by the Parties. Mediterranean President Bouckaert was elected on 25 April 2017 and Ms. Cecil Frankel, "the most ardent critics of free trade" was "appointed as "superminister" for agriculture, trade and economics on 5 May 2017"[*PO2, ∫ 23*]. On the other hand, SALES AGREEMENT was signed by both Parties on 6 May 2017[*Cl. Ex. 5, p.14*]. Thus, from drastic change in Mediterranean politics, change in international commercial condition or tariff policy of Equatoriana and Mediterraneo was foreseeable to either of Parties and general public.

95 Lastly, as CLAIMANT introduces oneself, the contract between the two Parties is a part of the field where CLAIMANT has an expertise at. Thus, it is difficult to interpret in the manner that the terms of sales contract were mistakenly prescribed. Even if the tribunal determines there was an error in the contract or parties' decision in constructing a contract, it is irrational to make RESPONDENT to bear a burden, which is caused by CLAIMANT's mistake. The burden, which CLAIMANT is arguing as hardship, is the result of CLAIMANT's erroneous management decision by a failure to input evident circumstance as a possible risk.

d Measure by Equatorianian government does not make the contract more onerous significantly.

96 The change in the circumstance does not make the contract to be significantly onerous compared to before. Since *Pacta sunt servanda* or the basic principle of civil law should be protected, adjustment to the contract terms can be only admitted when the contract is "excessively onerous," but not when the contract is "mere onerous."

97 Although no clear distinction between "mere onerous" and "excessively onerous" condition can be found in SALES AGREEMENT and the CISG, the commentary to the UNIDROIT Principles

suggest appropriate guide for determining such issue. The commentary states that "onerous" condition in the hardship clause of the UNIDROIT Principles [*UNIDROIT Principles, Art. 6.2.1*] should be interpreted as the circumstance which causes fundamental alteration of the equilibrium of the contract [*Vogenauer, pp.719-720*].

98 In addition, the commentary states, if the performances "are capable of precise measurement in monetary terms," an alteration amounting to at least 50% or more of the cost to the value of the performance may amount to a fundamental alteration [*Zaccaria, p.169; Brunner, p.427*]. Furthermore, it is almost impossible to find precedent in which the court or arbitral tribunal has admitted argument of "excessive onerous" condition when the alteration of burden amounts to less than 50%[*Houtte van, p.190*]. However, as CLAIMANT argues, the alteration caused by the change in circumstance amounts to no more than 30%. Considering previous arbitration cases and commonly shared legal base formed on definition of "excessive onerous," it is obvious that the argument of CLAIMANT opining that 30% increase in cost should be considered as "excessive onerous" case to consider application of the hardship clause is not legitimate.

b) Intent of Parties was also to cover the current situation.

99 As CLAIMANT is arguing in Notice of Arbitration, CLAIMANT asked for increase of the product price and inclusion of hardship clause in exchange for setting delivery term to be DDP [*Cl. Ex. 4, p.12*]. The process and result of negotiation, showing the concession from both of Parties made, exhibits that the original request by CLAIMANT in C4 was not agreed in the final SALE AGREEMENT.

a The price of the product was adjusted as CLAIMANT has request for.

100 CLAIMANT requested for product price increase as a compensation for setting DDP rule as a delivery term [*Cl. Ex. 4, p.12*]. The original product price suggested by CLAIMANT in the beginning stage of negotiation was 99,500 USD per dose [*Cl. Ex. 2, p.10*]. However, the finally agreed price of the product stated in SALES AGREEMENT is 100,000 USD per dose, 500 USD per dose increased from the originally suggested price [*Cl. Ex. 5, p.14*]. Although there is a difference between the price increase made by SALES AGREEMENT and the price increased CLAIMANT requested [*Cl. Ex. 4, p.12*], signing to SALES AGREEMENT should be interpreted as both Parties' expressed intent to agree to the terms of SALES AGREEMENT as the result of the negotiation.

b During negotiation parties agreed that ICC hardship clause 2003 is too broad.

101 CLAIMANT suggested ICC Hardship Clause 2003 as hardship clause [*Rs. Ex. 2, p.34*]. However, during the negotiation, RESPONDENT firmly responded that ICC Hardship Clause 2003 is too broad for SALES AGREEMENT in the present case [*Rs. Ex. 4, p.36; Rs. ANoA, §4*]. RESPONDENT has kept maintaining its position and conveyed its contrary intention clearly to CLAIMANT [*PO2, §4*]. Thus, considering intention of the Parties, Clause 12 should be interpreted to cover narrower scope compared to ICC Hardship Clause 2003.

102 So, if the circumstance is not covered by ICC Hardship Clause 2003, then it would be rational to conclude that the circumstance is not also covered by Clause 12 of SALES AGREEMENT. RESPONDENT submits that the problem of the present case fails even to fulfill following requirements of ICC Hardship Clause 2003. Firstly, as discussed above, increase of the cost in the present case is difficult to be said that it became "excessively onerous." Secondly, as discussed above, the event argued to constitute hardship was foreseeable by the parties. Since the Parties were aware of political change in Mediterraneo and Equatoriana before the contract was signed, the change in tariff policy could "have taken into account at the time of conclusion of the contract."

B. CISG ARTICLE 79 CANNOT PROVIDE EXEMPTION TO CLAIMANT IN THE PRESENT CASE.

1. CISG cannot be applied in the current case.

103 In international arbitration practice, contract or the agreement between the parties is the most primary and prior legal source to be applied. Other laws which govern the substantive matter, including the CISG, should be applied only when interpretation of the contract does not provide sufficient information about parties' intent on the issued matter.

104 However, in SALES AGREEMENT of the present case, Parties' intention regarding the exemption and risk allocation is clear and evident. By DDP rule, both Parties have clearly assumed the responsibility arising from change in delivery condition on CLAIMANT's side. Thus, it is difficult to opine that both Parties also intended the CISG to be also applied regarding the exemption of one party by the contract. Rather, it would be rational to conclude that the Parties have agreed that exemption of responsibility not to occur in the situation other than defined in Clause 12 of SALES AGREEMENT.

2. CLAIMANT does not have legal authority to request for price adaptation based on the CISG article 79.

105 Even if the tribunal decides that the CISG Article 79 can also applied to grant exemption from its liability in the case, Article 79 of the CISG cannot be a legal ground for requesting additional remuneration. Article 79 of the CISG stipulates that "[a] party is not liable for a failure to perform any of his obligations" if the disadvantaged party proves that the impediment was beyond his control and that the impediment could not be reasonably expected. However, for the exemption, the article is only stating 'free from liability' as a remedy for the disadvantaged party.

106 Thus, Article 79 of the CISG should be interpreted as the clause granting the opportunity not to perform one's duty in the case of reasonably unexpected and excessive burden. However, the CISG is not providing a remedy for the case when the disadvantaged party has already fulfilled its liability. Since the CISG is not regulating for a remedy in the case where the disadvantaged party has already fulfilled its responsibility, fulfillment of responsibility should be interpreted as the waiver to the assertion of exemption provided by Article 79 of the CISG. In the present case, CLAIMANT has already fulfilled its liability under SALES AGREEMENT by delivering the frozen semen. So, according to Article 79 of the CISG, there is no legal remedy that CLAIMANT can request for.

3. Even if the Arbitral Tribunal decides that CLAIMANT is entitled to request for price adaptation based on CISG Article 79, the current issue does not amount to the impediment set up in the CISG Article 79.

a) The current situation does not amount to the impediment set up by the CISG Article 79.

107 Even if the Arbitral Tribunal decides that Art. 79(1) CISG provides the remedy requested by CLAIMANT, the imposition of tariffs does not amount to 'impediment' of the Article. Art. 79(1) only covers the situation of impossibility(a), but the tariff imposition does not correspond to 'non-performance' situation(b).

a The circumstances in which the Article 79 of the CISG regulates for the exemption is the "failure to perform [one's] obligation."

108 Art. 79(1) CISG states that "A party is not liable for a failure to perform". The language of the Article itself is clearly restricted to the situation when one of the Parties failed to perform its contractual obligation. On the contrary, hardship refers to to the performance of the disadvantaged

party having become much more burdensome, but not impossible, and therefore, the interpretation that Art. 79(1) covers hardship is agaianst the language of the Article. Accordingly, CLAIMANT should suggest evident legal background proving that such interpretation can be allowed.

109 In addition, legislative history of Art. 79(1) CISG reveals the drafter's will to exclude hardship from the Article. The drafting history of the Article is described as "it reveals that Article 79 CISG is indeed a stricter version of its predecessor, Article 74 ULIS, which had been criticized for excusing non-performance too readily, such as where performance merely became more difficult. The legislative history of Article 79 also indicates that a party cannot rely on the exemption merely on the ground that performance has become unforeseeably more difficult or unprofitable" [*Flambouras*]. That is, strict interpretation shall be needed in the application of Art. 79 CISG and there is evidently no place in the CISG for any relief on account of economic hardship.

110 Several court decisions have rejected the possibility that negative market developments constitute an impediment within Art. 79(1) CISG, and no court has exempted a party from liability on the grounds of economic hardship [*CISG-AC Opinion*]. In the cases related to Art. 79(1) CISG, the arbitral tribunals have tried to avoid the issue of hardship by either ruling that the economic hardship is not sudden, substantial or unforeseeable and in another case that the impediment could have been taken into account.

111 Based on the language itself, the legislative history and the court practice of Art. 79(1) CISG, there is no clear evidence that hardship can fall within the category of 'impediment' of the Article.

b Even if the tariff imposition of the case corresponds to hardship, and CLIAMNT has already performed its duty.

112 Even if CLAIMANT's submission that the tariff imposition of the present case amounts to hardship is admissible, it is evident that the tariff imposition did not make the contract impossible. As submitted above, 'impediment' of Art. 79 (1) should be strictly restricted to non-performance situation, and therefore, the tariff imposition is not the 'impediment'. Furthermore, the fact that CLAIMANT has already made its shipment further proves that the contract remained still possible even after the tariffs and CLAIMANT has no "failure to perform" that it can be 'not liable for'.

C. THE LAW OF MEDITERRANEO DOES NOT PROVIDE LEGAL GROUND FOR CLAIMANT TO ARGUE EXEMPTION OR ADDITIONAL REMUNERATION IN THIS CASE.

1. The general conflict of laws rules prevents domestic contract law of Mediterraneo to be applied in the present case.

113 For the matters governed by the CISG, parties' agreement should be interpreted first. When the matter is governed but not settled by the agreement, provisions of the CISG can be applied. Furthermore, when the CISG governs the matter but does not settle it, then the general principles of the CISG and the applicable domestic law can be applied [*Honnold, pp.77-87*]. As RESPONDENT submitted above, Clause 12 of SALES AGREEMENT should be interpreted as Parties' intention to limit the circumstance of exemption only to the case of hardship described in the clause. Thus, there is no gap to be filled using other legal sources.

114 However, even if the tribunal decides other legal sources shall be utilized to elaborate parties' intention by Clause 12 of SALES AGREEMENT, the CISG is first to be used. This sequence of legal source application is also explicitly stated in the Article of the CISG. "(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." The article of the CISG expressly excludes application of other legal sources when the issue can be resolved by the CISG.

115 As discussed above, the problematic circumstance argued by CLAIMANT in the present case is governed and settled by the CISG. However, the present situation definitely stays out of the scope in which the CISG grants exemption for. Thus, general principles of the CISG or the domestic law cannot be referred to as a legal source for arguing the remedy in the present case.

2. Even if the Law of Mediterraneo can be applied, the present situation does not amount to the situation set up in the Law of Mediterraneo.

116 Even in the case where the domestic contract law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles [*PO1, ∫ 4*], is applied in this case, CLAIMANT does not have legal ground to argue for exemption from one's duty or additional remuneration.

a) The current situation does not amount to the hardship set up by the Contract Law of Mediterraneo.

117 The clause related to hardship matter in the Contract Law of Mediterraneo or the Article 6.2.2.

(Definition of hardship) of the UNIDROIT Principles requires the event in which the cost of a party's performance has increased shall be determined to be "hardship" only when (i) the event fundamentally alters the equilibrium of the contract, (ii) the event cold not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, and (iii) the risk of the events was not assumed by the disadvantaged party. However, the tariff which is argued in the current issue by CLAIMANT does not fulfill these requirements.

a The imposition of the tariff by the Equatorianian government was not unforeseeable.

118 As submitted in A.2.a)(b), the imposition of the tariff was not unforeseeable. Considering the capricious nature of the governmental policy and past experience of Equatorianian government restriction, CLAIMANT could have easily expected that such governmental restrictions always remains possible. Therefore, the imposition of tariff which CLAIMANT could have possible taken into account cannot cause hardship to arise.

b The risk of the current issue was assumed by CLAIMANT.

119 The official comment of the UNIDROIT Principles 2016 states that "there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. The word "assumption" makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract."

120 As submitted in A.1., the Parties agreed that all the costs and risk related to the delivery is allocated to CLAIMANT. That is, 'the very nature of the contract' stated in the comment would be the DDP contract, based on which CLAIMANT must have assumed the risk of the change in circumstances.

c The current issue did not "fundamentally alter the equilibrium of the contract".

121 The official comments of the UNIDROIT Principles 2016 states that "hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. It also states the cost increase should be 'substantial' and new safety regulation should require 'far more expensive production procedure'.

122 The interpretation of what would be the fundamental alteration can be vague, therefore it should depend upon the circumstances. In the current case, the previous restriction of Equatorianian

government increased the cost by up to 40% [*Cl. Ex. 4, p.12*], and Mediterraneo's new government imposed 25% tariffs on agricultural products [*Cl. NoA, §9*] Compared to those two previous restrictions, the 30% tariffs of Equatorianian government cannot be said 'fundamental'.

Request for Relief

In light of the above submissions, counsel for RESPONDENT respectfully requests the Tribunal to find that:

1) The Tribunal does not have the jurisdiction to adapt the contract between CLAIMANT and RESPONDENT;

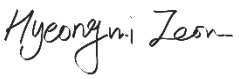
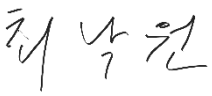
2) The evidence which CLAIMANT obtained from the other arbitration proceedings should not be allowed;

3) CLAIMANT isn't entitled to the payment of the purchase price of US $1,250,000

RESPONDENT reserves the right to amend its request for relief as may be required.

Seoul, 24 January 2019

Respectfully signed by counsels on behalf of RESPONDENT

ChaeRin Kim	**Hakyoo Kim**	**HyeongMi Jeon**
		
MinKyeong Cho	**NakWon Choi**	**SeungMin Jeon**
		

Index of Authorities

Index of Cases

Index of Arbitral Awards

Index of Legal Sources

Cited as	Source
CISG	United Nations Convention on the International Sales of Goods, Vienna, 11 April, 1980
European Convention	European Convention on International Commercial Arbitration, adopted on 21 April 1961, effective from 7 January 1964
HKIAC Rules	HKIAC Administered Arbitration Rules, 2018
ICC Hardship Clause 2003	ICC Hardship Clause 2003
ICSID Additional Facility Rules	International Centre for Settlement of Investment Disputes Additional Facility Rules, adopted on September 27, 1978, effective from January 1 2003
IBA Rules	IBA Rules on the taking of Evidence in International Arbitration, adopted on 29 May 2010
New York Convention	Convention on the Recognition and Enforcement of Foreign Awards, New York, adopted on 10 June 1958, effective 7 June 1959
Prague Rules	Rules on the Efficient Conduct of Proceedings in International Arbitration, draft on 1 September 2018
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, adopted on 21 June 1985, amended in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010

List of Abbreviations

&	and
§(§)	paragraph(s)
ANoA	Answer to Notice of Arbitration
Art.	Article(s)
Cl. Ex.	CLAIMANT's Exhibit Number
HK	Hong Kong
HKIAC	Hong Kong International Arbitration Centre
ICJ	International Court of Justice
MfC	Memorandum for Claimant Submitted by Beijing Normal University
Mr.	Mister
NoA	Notice of Arbitration
p(p).	page(s)
PCIJ	Permanent Court of International Justice
PO	Procedural Order No
Rs. Ex.	Respondent's Exhibit Number
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut International Pour L'Unification du Droit Prive (International Institute for the Unification of Private Law)