SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH TO 7 APRIL 2019, HONG KONG SAR

MEMORANDUM FOR CLAIMANT

NORTHWEST UNIVERSITY OF POLITICAL SCIENCE AND LAW

ON BEHALF OF	**AGAINST**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL FOR CLAIMANT

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TABLE OF ABBREVIATIONS

ABBREVIATIONS	EXPLANATIONS
§/§§	Section/Sections
¶ /¶¶	Paragraph/Paragraphs
ACCCIB	Arbitration Court of the Chamber of Commerce and Industry of Budapest
ANoA	Answers to Notice of Arbitration
AoA	Agreement on Agriculture (1995)
Art.	Article(s)
BCCI	Bulgarian Chamber of Commerce and Industry
BJC	Belgian Judicial Code (2013)
CCMU	Claims Commission (Mexico and Untied States)
cf.	*confer/conferatur* (Latin for "compare")
CIETAC	China International Commercial and Trade Arbitration Centre
CISG	United Nations Convention on Contracts for International Sales of Goods (1980)
Cl. Ex.	CLAIMANT's Exhibits
CPIL	Switzerland's Federal Code on Private International Law (1987)
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
e.g.	*exempli gratia* (Latin for "for example")
et al.	*et alia* (Latin for "and others")
et seq.	*et sequens* (Latin for "and the following")
European Convention	European Convention on International Commercial Arbitration (1961)

ff.	and the following pages
fn./fns.	Footnote/Footnotes
FCPC	French Civil Procedure Code (1975)
HKIAC	Hong Kong International Arbitration Centre
HKIAC 2018	2018 HKIAC Administrated Arbitration Rules
i.e.	*id est* (Latin for "that is")
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ibid.	*ibidem* (Latin for "in the same place")
ICAC	International Commercial Arbitration and Conciliation
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IFMC	ICC Force Majeure Clause
infra	*infra* (Latin for "below")
IUSCT	Iran-Untied States Claims Tribunal
MAL	Mediterranean Arbitration Law
MCL	Mediterranean Contract Law
Model Law	UNICTRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)
NAI	Netherlands Arbitration Institute
NAFTA	North America Free Trade Agreement (1994)
NoA	Notice to Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law (2002)
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
Pmbl.	Preamble
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Resp. Ex.	RESPONDENT's Exhibits
SHH	Schiedsgericht der Handelskammer Hamburg
supra	*suprā* (Latin for "above")
UNCITRAL	United Nations Commission on Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNRT	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
v.	*Versus* (Latin for "against")
WTO	World Trade Organization

TABLES OF AUTHORITIES

I. LEGAL SOURCES

CITED AS	FULL CITATION
CISG	United Nations Convention on Contracts for International Sales of Goods (1980)
CPIL	Switzerland's Federal Code on Private International Law (1987)
BJC	Belgian Judicial Code (2013)
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DSU	Dispute Settlement Understanding of WTO Agreements (1994)
European Convention	European Convention on International Commercial Arbitration (1961)
HKIAC 2018	HKIAC Administrated Arbitration Rules (2018)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
MAL	Mediterranean Arbitration Law
MCL	Mediterranean Contract Law
Model Law	UNICTRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
PECL	Principles of European Contract Law (2002)
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
UNRT	UNICTRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

PECL	Principles of European Contract Law (2002)
FCPC	French Civil Procedure Code (1975)

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BRITISH COLUMBIA	Globe Union Indus. Corp. *v.* G.A.P. Mktg Corp. Supreme Court of British Columbia (1994)

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CANADA	World LLC *v.* Parenteau Int'l Inc
	Québec Superior Court (1998)
	Case No. 736
	Cited as: *LLC Case*
	Cited in: ¶43
CANADA	Churchill Falls (Labrador) Corporation Ltd. *v.* Hydro-Qué-bec
	Cour d'Appel, Province de Québec, District of Montreal (2016)
	Case No. 500-09-024690-141
	Cited as: *Power Station Case*
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Landgericht Neubrandeburg (2005)

Case No. 10 O 74/04

Cited as: *Vegetable Case*

Cited in: ¶99

GERMANY — Austrian Seller *v.* German Buyer

Bundesgerichtshof [Federal Supreme Court] (1999)

Case No. VIII ZR 121/98

Cited as: *Vine Wax Case*

Cited in: ¶93

GERMANY — Italian Seller *v.* German Buyer

Amtsgericht Charlottenburg (1994)

Case No. 7 b C 34/94

Cited as: *Shoes Case*

Cited in: ¶100

GERMANY — German Seller *v.* English Buyer

Oberlandesgericht Hamburg (1997)

Case No. 1 U 167/95

Cited as: *Iron-Molybdenum Case*

Cited in: ¶103

GERMANY — Italian Seller *v.* German Buyer

AG Alsfeld (1995)

Case No. 31 C 534/94

Cited as: *Flagstone Tiles Case*

Cited in: ¶103

GERMANY — Dutch Seller *v.* German Buyer

Bundesgerichtshof [Federal Supreme Court] (1996)

Case No. VIII ZR 51/95; CLOUT case No. 171

Cited as: *Cobalt Sulphate Case*

Cited in: ¶109

GERMANY	Belgian Seller *v.* German Buyer Bundesgerichtshof [Federal Supreme Court] (2005) Case No. VIII ZR 67/04; CLOUT Case No. 774 Cited as: *Frozen Pork Case* Cited in: ¶109
GREECE	Dutch Seller *v.* Greek Buyer Multi-Member Court of First Instance of Athens (Polimeles Protodikio Athinon) (2009) Case No. 4505/2009 Cited as: *Bullet-Proof Vest Case* Cited in: ¶¶39, 87
INDIA	Aastha Broadcasting Network *v.* Thaicom Public Co. High Court of Delhi (2011) Case No. No. 11308/2011 Cited as: *Aastha Case* Cited in: ¶21
INDIA	Nat'l Thermal Power Corp. *v.* Singer Co. Supreme Court of India (1993) Case No. 1993 AIR 998 Cited as: *Thermal Power Case* Cited in: ¶22
INDIA	M/S Indtel Tech. Servs. Pvt. Ltd *v.* W. S. Atkins Rail Ltd Supreme Court of India (2008) Case No. 10 SCC 308 Cited as: *M/S Case* Cited in: ¶22
ITALY	SO. M. AGRI s.a.s di Ardina Alessandro & C. *v.* Erzeugerorganisation Marchfeldgemüse GmbH & Co.

	KG
	Tribunale [District Court] di Padova (2004)
	Case No. 40552
	Cited as: *Agricultural Products Case*
	Cited in: ¶¶39, 87
ITALY	Italian Seller *v.* Malaysian Buyer
	Suprema Corte di Cassazione [Supreme Court], Sez. Un. (2000)
	Case No. 448; CLOUT Case No. 647
	Cited as: *Metal Processing Plant Case*
	Cited in: ¶87
NETHERLANDS	Italian Seller *v.* Dutch Buyer
	Rechtbank Arnhem (2009)
	Case No. 172920/HA ZA 08-1228
	Cited as: *Trees Case*
	Cited in: ¶99
NETHERLANDS	CME Cooperative Maritime Etaploise S.A.C.V. *v.* Bos Fish-products Urk BV
	Arrondissementsrechtbank Zwolle (1997)
	Case No. HA ZA 95-640
	Cited as: *Fish Case*
	Cited in: ¶110
SINGAPORE	BCY *v.* BCZ
	Singapore High Court (2016)
	Case No. SGHC 249
	Cited as: *BCY Case*
	Cited in: ¶¶20, 22, 24, 25, 29, 34, 35, 42, 43, 44
SINGAPORE	Firstlink Investments Corp. Ltd *v.* GT Payment Pte Ltd

	and others
	Singapore High Court (2014)
	Case No. SGHC 12
	Cited as: *Firstlink Case*
	Cited in: ¶¶20, 22, 24, 35
SINGAPORE	AAY and others *v.* AAZ
	Singapore High Court (2011)
	Case No. [2011] 1 SLR 1093
	Cited as: *AAY Case*
	Cited in: ¶77
SLOVAK	Hungarian Seller *v.* Slovak Buyer
	District Court in Komarno (2009)
	Case No. 5 Cb/254/2008
	Cited as: *Frozen Peas Case*
	Cited in: ¶100
SLOVAK	Czech Seller *v.* Slovak Buyer
	District Court in Komarno (2009)
	Case No. 5 Cb/114/2006
	Cited as: *Potatoes Case*
	Cited in: ¶100
SPAIN	Cherubino Valsangiacomo, S.A. *v.* American Juice Import, Inc.
	Audiencia Provincial de Valencia (2003)
	Case No. 142/2003; CLOUT Case No. 549
	Cited as: *Grape Juice Case*
	Cited in: ¶108
SWITZERLAND	Turkish and Dutch Seller *v.* Spanish Buyer
	Tribunal cantonal [Appellate Court] Vaud (2004)

Case No. 224/2004/PBH; CLOUT Case No. 1401

Cited as: *Cement Case*

Cited in: ¶87

UNITED KINGDOM — Forwood & Co. *v.* Watney

English High Court (1880)

Case No. [1995] LJQB 447

Cited as: *Forwood Case*

Cited in: ¶46

UNITED KINGDOM — Aggeliki Charis Compania Maritima SA *v.* Pagnan SpA

English High Court (1994)

Case No. [1995] 1 Lloyd's Rep 87

Cited as: *Aggeliki Case*

Cited in: ¶46

UNITED KINGDOM — Sulamérica Cia Nacional de Seguros S.A. et al. *v.* Enesa Engenharia S.A. et al.

Court of Appeal of England and Wales, Civil Division (2012)

Case No. A3/2012/0249

Cited as: *Sulamérica Case*

Cited in: ¶¶20, 22, 24, 29, 30, 35, 42, 43

UNITED KINGDOM — Sonatrach Petroleum Corp. (BVI) *v.* Ferrell Int'l Ltd

English High Court (2002)

Case No. 1 All ER

Cited as: *Sonatrach Case*

Cited in: ¶¶20, 22, 25, 43

UNITED KINGDOM — Arsanovia Ltd & Ors *v.* Cruz City 1 Mauritius Holdings

High Court of Justice of England and Wales (2012)

Case No. EWHC 3702

Cited as: *Cruz Case*

Cited in: ¶43

UNITED KINGDOM — Paul Krell *v.* C.S. Henry

Court of Appeal (1903)

Case No. [1903] 2 KB 740

Cited as: *Coronation Case*

Cited in: ¶50

UNITED KINGDOM — Ali Shipping Corporation *v.* Shipyard Trogir

Royal Courts of Justice (1997)

Case No. 1 WLR 314, 317 (CA)

Cited as: *Ali Shipping Case*

Cited in: ¶77

UNITED KINGDOM — John Forster Emmott *v.* Michael Wilson & Partners Limited

The Court of Appeal (Civil Division) (2008)

Case No. [2008] EWCA Civ. 184

Cited as: *Emmott Case*

Cited in: ¶77

UNITED KINGDOM — Hassneh Insurance Co. of Israel *v.* Mew Queen's Bench of High Court in England and Wales (1992)

Case No. [1993] 2 Lloyd's Rep. 243

Cited as: *Hassneh Case*

Cited in: ¶¶75, 76

UNITED KINGDOM — Insurance Co. *v.* Lloyd's Syndicate

Queen's Bench Division (Commercial Court) (1995)

Case No. I Lloyd's Rep. 272

Cited as: *Insurance Case*

Cited in: ¶67

UNITED STATES

Alghanim *v.* Alghanim

United States District Court Southern District of New York (2011)

Case No. 2011. WL. 5978350

Cited as: *Alghanim Case*

Cited in: ¶46

UNITED STATES

Tadeusz Kowalewski *v.* Rudolf Samandarov

United States District Court Southern District of New York (2008)

Case No. 590 F. Supp. 2d. 477

Cited as: *Tadeusz Case*

Cited in: ¶46

UNITED STATES

Bechtel Do Brazil Construcoes LTDA *v.* UEG Araucaria LTDA

United States Court of Appeals, 2nd Circuit (2011)

Case No. 638. F. 3d. 150

Cited as: *Bechtel Case*

Cited in: ¶46

UNITED STATES

Mgt & Tech. Consultants SA *v.* Parsons-Jurden Int'l Corp.

United States Court of Appeals, 9th Circuit (1987)

Case No. 820 F. 2d. 1531

Cited as: *Mgt/Tech Case*

Cited in: ¶46

UNITED STATES

Mastrobuono *v.* Shearson Lehman Hutton, Inc.

United States Court of Appeals, 7th Circuit (1995)

Case No. 94-18

Cited as: *Mastrobuono Case*

Cited in: ¶46

UNITED STATES — Louis Dreyfus Negoco SA *v.* Blystad Shipping & Trading, Inc.
United States Court of Appeals, 2nd Circuit (2001)
Case No. 00-7382
Cited as: *Louis Case*
Cited in: ¶46

UNITED STATES — Sweet Dreams Unlimited, Inc. *v.* Dial-A-Mattress, Int'l, Ltd
United States Court of Appeals, 7th Circuit (1993)
Case No. 92-3506
Cited as: *Sweet Dreams Case*
Cited in: ¶46

UNITED STATES — Telenor Mobile Commc'ns AS *v.* Storm LLC
United States Court of Appeals (2009)
Case No. 584 F. 3d 396
Cited as: *Telenor Case*
Cited in: ¶21

UNITED STATES — Motorola Credit Corp. *v.* Uzan
United States Court of Appeals (2004)
Case No. 388 F. 3d 39
Cited as: *Motorola Case*
Cited in: ¶¶21, 30

UNITED STATES — FR 8 Singapore Pte Ltd *v.* Albacore Maritime Inc.
United States District Court (2011)
Case No. 754 F. Supp. 2d 628
Cited as: *FR Case*
Cited in: ¶21

UNITED STATES	CCP Sys. AG *v.* Samsung Elecs. Corp. United States District Court (2010) Case No. 2010 WL 2546074 Cited as: *CCP Case* Cited in: ¶21
UNITED STATES	US Buyer *v.* South Korean Seller U.S. District Court, Southern District of New York (2011) Case No. 06 Civ. 3972 Cited as: *Liquid Phenol Case* Cited in: ¶99
UNITED STATES	Raw Materials Inc. *v.* Manfred Forberich GmbH & Co., KG U.S. District Court, Northern District of Illinois, Eastern Division [federal court of 1st instance] (2004) Case No. 03 C 1154 Cited as: *Rail Case* Cited in: ¶93
UNITED STATES	Forestal Guarani S.A. *v.* Daros International, Inc. United States Court of Appeals for the Third Circuit [Federal Court of Second Instance] (2010) Case No. 08-4488 Cited as: *Wooden Finger-Joints Case* Cited in: ¶109
UNITED STATES	Delchi Carrier, S.p.A. *v.* Rotorex Corp. U.S. Circuit Court of Appeals (2d. Cir.) [federal appellate court] (1995) Case Nos. 185, 717; CLOUT Case No. 138 Cited as: *Air Conditioners Case*

Cited in: ¶109

IV. ARBITRAL AWARDS

INSTITUTIONS	FULL CITATION
ACCCIB	Yugoslavian Seller *v.* Hungarian Buyer (1996) Case No. VB 96074 Cited as: *Caviar Case* Cited in: ¶¶92, 100
BCCI	Russia Seller *v.* Bulgarian Buyer (1996) Case No. 11/1996 Cited as: *Steel Ropes Case* Cited in: ¶103
CIETAC	Chinese Seller *v.* U.S. Buyer (1997) Case No. CISG/1997/11 Cited as: *Sanguinarine Case* Cited in: ¶¶92, 93
ICAC RUSSIA	Bahamian Seller *v.* Italian Buyer (2006) Case No. 105/2005 Cited as: *Certain Goods Case I* Cited in: ¶110
ICC	Dallah Real Estate & Tourism Holding Co. *v.* Ministry of Religious Affairs, Gov't of Pakistan (2010) Case No. 9987 Cited as: *Dallah Case* Cited in: ¶24
ICC	Italian Company *v.* Austrian Company (2000) Case No.10021 of 2000 Cited as: *Shareholders Agreement Case* Cited in: ¶50
ICC	Czechoslovakian Buyer *v.* Italian Seller (1994)

	Case No. 7660/JK
	Cited as: *Machinery Case*
	Cited in: ¶99
ICC	Egyptian Buyer *v.* Yugoslavian Seller (1989)
	Case No. 6281 of 1989
	Cited as: *Steel Bars Case II*
	Cited in: ¶93
ICC	Dutch Manufacturer *v.* Turkish Buyer (1996)
	ICC Case No. 8486
	Cited as: *Manufacturing Plant Case*
	Cited in: ¶103
ICC	Egyptian company *v.* Yugoslav company (1989)
	Case No. 102
	Cited as: *Replacement Case*
	Cited in: ¶103
ICC	Austrian Seller *v.* Swiss Buyer (1995)
	Case No. 8128
	Cited as: *Chemical Fertilizer Case*
	Cited in: ¶103
ICSID	BSG Resources Limited *v.* Republic of Guinea (2018)
	Case No. ARB/14/22
	Cited as: *BSG Case*
	Cited in: ¶80
IUSCT	Ultrasys Incorporated *v.* the Islamic Republic of Iran (1993)
	Case No. 27-84-3
	Cited as: *Ultrasys Case*
	Cited in: ¶62

NAI	Dutch Seller *v.* British Buyer (2002) Case No. 2319; CLOUT Case No. 720 Cited as: *Condensate Crude Oil Mix Case* Cited in: ¶109
NAI	Dutch Seller *v.* Italian Buyer (2005) Case No. 20050210 Cited as: *Certain Goods Case II* Cited in: ¶110
SHH	Hong Kong Seller *v.* German Buyer (1996) Case No. 166 Cited as: *Chinese Goods Case* Cited in: ¶103

STATEMENT OF FACTS

1. Phar Lap Allevamento ("CLAIMANT"), registered and located in Capital City, Mediterraneo, operates an illustrious stud farm. CLAIMANT is proficient in business relevant to horses, and additionally offers frozen semen of its champion stallions for artificial insemination in breeding season.

2. Black Beauty Equestrian ("RESPONDENT"), in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. On **21 March 2017**, RESPONDENT cordially conveyed its interest in importing 100 doses frozen semen of Nijinsky III. Three days later, on **24 March 2017**, CLAIMANT expressed its consentience to supply RESPONDENT with 100 doses frozen semen of Nijinsky III along with its conditions including the price, the installment of delivery and the stipulation of resale, notwithstanding the quantity surprised it.

4. RESPONDENT negotiated further with CLAIMANT on **28 March 2017** that they would insist for this contract on a delivery on the basis of DDP. RESPONDENT suggested submitting jurisdiction in the court of Equatoriana under the law of Mediterraneo. After an internal discussion, CLAIMANT accepted on **31 March 2017** to adopt the delivery DDP upon RESPONDENT's request but stated that CLAIMANT should not bear all risks associated with such delivery, in particular, not those in association with changes in customs regulations or import restrictions. CLAIMANT also suggested a hardship clause shall be included in the contract and opted to submit to the jurisdiction of arbitration in Mediterraneo.

5. On **10 April 2017**, RESPONDENT proposed its wish for an arbitration agreement which was governed by the law of Equatoriana and the law of in that country. CLAIMANT consented to an arbitration in a neutral country (Danubia) which is governed by the law of Mediterraneo on **11 April 2017**.

6. Both Parties' representatives were severely injured in a serious car accident on **12 April 2017**, leading to the change of both Parties' representatives. Julian Krone, the representative of RESPONDENT, did not attempt to clarify what was in the note with either Napravnik or Antley. Consequently, Mr. Krone was not clear what Mr. Antley, the former representative of RESPONDENT, meant with applicable law as well as hardship clause referred in Antley's note.

7. Both Parties signed the contract of FROZEN SEMEN SALES AGREEMENT in Mediterraneo on **6 May 2017**.

8. CLAIMANT sent the first and second shipment of 25 doses frozen semen each in succession on **20 May 2017** and **3 October 2017**.

9. The Government of Equatoriana announced to impose a tariff of 30 per cent upon all agricultural goods, even including horse frozen semen, from Mediterraneo as a retaliation for the recent restriction imposed by the newly elected President of Mediterraneo. Receiving such information, CLAIMANT made an urgent call to RESPONDENT immediately on **20 January 2018** to find a solution but was unable to contact RESPONDENT.

10. Later, on **21 January 2018**, RESPONDENT contacted CLAIMANT that they had made clear during the contract negotiation that the timely delivery is of pivotal importance. At the same time, RESPONDENT appeared to generally accept the need for a price increase.

11. CLAIMANT delivered the remaining 50 doses on **23 January 2018**, before an agreement on the new price had been reached.

12. RESPONDENT claimed that they did not consent to any adaptation following CLAIMANT's request in January 2018. Mr. Shoemaker, the representative of RESPONDENT, submitted in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs, but he would verify that with the persons involved in drafting. Mr. Shoemaker did not reject CLAIMANT's request outright since he worried CLAIMANT would stop delivery.

13. CLAIMANT informed Arbitral Tribunal on **2 October 2018** that there is another case involving RESPONDENT with one of its customers under the HKIAC Rules, where RESPONDENT claimed that they had been affected by the unforeseen tariff of 25% announced by the president of Mediterraneo and wanted to adapt the contract.

14. RESPONDENT denounced CLAIMANT on **3 October 2018** that the submission CLAIMANT will submit is either obtained by a breach of confidentiality or a hack of RESPONDENT's computer system and shall not be accepted by Arbitral Tribunal.

SUMMARY OF ARGUMENTS

PART ONE

15. Contrary to RESPONDENT's allegation, CLAIMANT maintains that the arbitration agreement is governed by the law of Mediterraneo which should be deemed as an implied choice in the Sales Agreement and negotiation. Moreover, the Tribunal has the power to adapt the contract under the law of Mediterraneo. Even if the governing law of the arbitration clause is Danubian law, the Tribunal still has the power to adapt the contract under Clause 15 of the Agreement.

PART TWO

16. The Tribunal shall find that the evidence to be submitted by CLAIMANT is sufficiently relevant in the present arbitral proceedings as the dispute underlying the two cases are quite similar. Since RESPONDENT failed to fulfil its burden of proof, while the confidentiality obligations cannot be applied to CLAIMANT, CLAIMANT's submission of evidence should be adopted by the Tribunal. Moreover, the Tribunal shall find materiality and weight of the evidence.

PART THREE

17. The Parties have agreed that the definition of hardship has been modified into the provision in Clause 12 and to derogate from Art. 79 CISG. In this case, the situation CLAIMANT encountered should be regarded as one of the circumstances of the narrowed hardship. Accordingly, CLAIMANT is entitled to the adjusted price under Art. 79 (5) CISG because the special regulation of Art. 79, *i.e.* Clause 12, has been triggered.

ARGUMENTS

PART ONE: THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

18. RESPONDENT challenged the power of the Tribunal to adapt the contract insisting that the law of Danubia governs the arbitration agreement [*ANoA, ¶13*]. Contrary to RESPONDENT's allegation, CLAIMANT maintains that the arbitration agreement is governed by the law of Mediterraneo, deemed as an implied choice in the Sales Agreement and negotiation **(I.)**. Under the law of Mediterraneo, the Tribunal has the power to adapt the contract **(II.)**. Even if under the law of Danubia, the Tribunal still has the power to adapt the contract **(III.).**

I. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF MEDITERRANEO INSTEAD OF THE LAW OF DANUBIA

19. On 6 May 2017, the Parties signed the Sales Agreement and agreed this contract should be governed by the law of Mediterraneo [*Cl. Ex. 5*]. CLAIMANT maintains that, Mediterranean law, an implied choice formed in the contract and during the negotiation should govern the arbitration agreement **(A.)**. In addition, the choice of the arbitral seat is not strong enough to support that the law of the seat prevails over the law of the main contract **(B.)**. The doctrine of separability that RESPONDENT proposed [*ANoA, ¶14*] cannot be applied to the determination on the choice of law of the arbitration agreement (hereinafter "proper law") **(C.)**.

A. The law of Mediterraneo as an implied choice governs the whole contract including the arbitration agreement

20. The three-stage test is widely accepted to be used to determine the choice of the proper law: (i) the express choice of the Parties; (ii) the implied choice in the absence of an express choice; or (iii) the law which the arbitration agreement has its closest and most real connection with. Each of these stages must be embarked upon separately and in that order [*Sulamérica Case; FirstLink Case; BCY Case; Sonatrach Case; Born, p. 526; Nacimiento, pp. 205-224*]. In this dispute, due to the absence of the express choice of proper law, the significant point lies in stage (ii) that the implied choice of proper law can be found in the Sales Agreement [*Cl. Ex. 5*] which refers to the law of Mediterraneo, *i.e.* the law of the main contract ***(1.)***. The pre-contractual negotiations and correspondence demonstrate that both Parties intended the law of Mediterraneo to govern the whole contract, including the arbitration clause ***(2.)***.

1. Implied choice can be found in the Sales Agreement referring to Mediterranean law

21. The choice of Mediterranean law applicable to the arbitration clause can be found in the contract [*Cl. Ex. 5*]. If there is no express choice of proper law, the law chosen by the Parties in their final agreement to govern their underlying contract is also applied to the associated arbitration agreement [*Telenor Case; Motorola Case; FR Case; CCP Case; Aastha Case; Recyclers Case; Merkin, ¶7.21; Collins, p. 127; Goldman, ¶59; Jarvin, p. 52*]. The arbitration clause is the only one of many clauses in the whole contract and the express choice of law is a particular law that the Parties only choose based on private autonomy [*Bermann, p. 142; Redfern/Hunter, p. 158; Bühler/Webster, p. 78; Nacimiento, pp. 205, 223*].

22. In the present case, on 6 May 2017, the Parties entered into the contract and agreed that "[t]his 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)" [*Cl. Ex. 5*]. Since both Parties have expressly chosen the governing law of the whole contract [*Thermal Power Case; M/S Case; Sulamérica Case; FirstLink Case; BCY Case; Sonatrach case*], it is fairly well-settled that when an arbitration agreement is silent to the proper law, the law governing the arbitration agreement would ordinarily be the same as the law governing the main contract *per se* [*Poudret/Besson, ¶178; Redfern/Hunter, p. 158; Nacimiento, p. 205; Mustill/Boyd, p. 63; Petrochilos, p .33; Goldman, ¶59*].

23. Therefore, although there is no express choice of the proper law, the law of Mediterraneo only expressly chosen by the Parties based on their autonomy shall be deemed as the implied choice of the proper law.

2. Negotiations and correspondence have shown the Parties' intention to apply Mediterranean law to the arbitration agreement

24. The Parties' implied choice of the proper law is also reflected in contractual correspondence. In addition to the express choice of law of the underlying contract as an implied choice of the proper law on the basis of the only express choice of law based on party autonomy [*supra ¶¶21-23*], the Parties' intention through negotiations and correspondence is also an approach to determine the implied choice [*Bermann, pp. 137, 1017; Born, §4.04; Dallah Case; Sulamérica Case; FirstLink Case; BCY Case*]. The Parties' intention as an implied choice has demonstrated that the arbitration agreement is governed by the law of the main contract.

25. Firstly, the Parties were negotiating on the law applicable to the contract, on 28 March 2017 RESPONDENT "accept[ed] the application of the law of Mediterraneo" [*Cl. Ex. 3*]. On 11 April 2017, in the course of the negotiation for the arbitration agreement, CLAIMANT reaffirmed that "[t]hat offer [of the arbitration clause] is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo" [*Resp. Ex. 2*]. Thus, both Parties have agreed to apply the law of Mediterraneo to the whole contract, naturally including the arbitration clause [*Bermann, p. 143; Born, pp. 581-582; Kaplan/Moser, p. 138; Sonatrach case; BCY Case*].

26. Secondly, it ought to be noted that there is an expression of the subjunctive mood of Witness Statement of Julian Krone [*Resp. Ex. 3*], the representative of RESPONDENT [*ibid.; ANoA, ¶8; Cl. Ex. 5*]. He emphasised that had he known at the time that Mr. Antley's intention, he would have definitively included an express reference to the law of Danubia as the proper law into the arbitration agreement. Equally, he would have objected to transfer powers to Arbitral Tribunal to increase the price upon its discretion [*Resp. Ex. 3*]. This expression can be interpreted that Julian Krone neglected the alleged intention of the proper law, instead, he did not object but agreed to render Mediterranean law govern the whole contract and transfer powers to Arbitral Tribunal to adapt the price upon its discretion.

27. Lastly, the Parties have presupposed some specific conditions in Clause 12 that may lead to adjustment of the contract. It can be inferred that the adaptation to the Sales Agreement is necessary during the performance of the contract [*Cl. Ex. 5*] if the agreed conditions happen. However, the law of Danubia, unlike the law of Mediterraneo, recognises that arbitrators may adapt contracts only when an express conferral of powers is given [*PO2, ¶36*]. Under that circumstances, the agreed hardship exemption [*infra ¶¶99-101*] in the Sales Agreement [*Cl. Ex. 5*] will lose its significance if the law of the seat, the law of Danubia, is applied. Hence, the dispute cannot be solved under the law of Danubia as the proper law.

28. To conclude, the Parties have shown their intention through negotiations and correspondence that the law of Mediterraneo should govern the arbitration agreement.

B. The choice of Danubia as the arbitral seat cannot exclude the application of the law of Mediterraneo as the proper law

29. The choice of Danubia as the arbitration seat does not determine to favour that the law of Danubia prevails over Mediterranean law as the applicable law of the main contract [*BCY Case*]. In this case, there are three reasons to uphold it. First, the governing law of the main

contract should only be displaced if the consequences of choosing it as the proper law would negate the arbitration agreement [*Redfern/Hunter, p. 161; Brunner/Lew, p. 143; Sulamérica case*]. Nonetheless, in this dispute, there exists no circumstance to invalidate the arbitration agreement when Mediterranean law governs the arbitration clause **(*1.*)**. The desire for neutrality of Danubia is an important factor which should be taken into account, but it is not a sufficiently strong reason to choose the law of the seat as the proper law [*BCY Case*] **(*2.*)**. Additionally, the choice of Danubia as the arbitral seat does not determine the application of its law under the delocalised arbitration **(*3.*)**.

1. The application of Mediterranean law as the proper law will not invalidate the arbitration clause

30. In this case, there is no situation nullifying the arbitration agreement when Mediterranean law governs the arbitration clause. The law governing the agreement which contains the arbitration clause also governs the arbitration agreement [*Redfern/Hunter, p. 158; Born, p. 515; Brunner/Lew, p. 143*]. The governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would undermine the arbitration agreement [*Redfern/Hunter, p. 161; Sulamérica case*].

31. To apply the law of the seat, two preconditions should be complied with: (i) the Parties have chosen the arbitration seat and the governing law of the main contract; and (ii) the application of the law of the main contract will invalidate the arbitration agreement [*ibid.*].

32. In the case at hand, the arbitration agreement is a part of the contract [*supra ¶21*]. At the same time, the Parties made an express choice of the governing law of the main contract, which is the law of Mediterraneo [*Cl. Ex. 5*]. The Sales Agreement provides, "[t]his 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)" [*ibid.*]. In accordance with the three-stage test, the Parties in this case also reached an agreement to the seat of arbitration [*ibid.*]. However, the application of the governing law of the main contract, which is Mediterranean law, will not fundamentally undercut the entire arbitration agreement [*Brunner/Lew, p. 143; Dicey/Morris; Redfern/Hunter, p. 158; Merkin, ¶7.21; Motorola Case*].

33. Therefore, given that the Parties have chosen Mediterranean law as the law of the main contract that does not annul the arbitration clause, it is not justifiable to exclude Mediterranean law as the proper law then resource to Danubian law, which is the law of arbitral seat, to be the proper law.

2. The geographic neutrality of Danubia does not inevitably subject the arbitration agreement to Danubian law

34. Danubian law does not necessarily apply to the arbitration agreement simply because of Danubian geographic neutrality. Even if the seat of arbitration meets the Parties' need for neutrality, however, the presumed desire for neutrality is not unavoidably a strong enough reason for favouring the law of the seat over the law of the main contract [*BCY Case*].

35. Neutrality refers to the fact that the application of a particular law does not put any party at a disadvantage [*Petsche, p. 34*]. By virtue of the interpretation of neutrality, the essential neutrality means that the law balances the respective rights and obligations of the Parties [*ibid.*]. The desire for a neutral place is one of the reasons for the choice of the arbitration seat, and that the law of the seat is usually different from the law of the main contract [*Sulamérica Case*]. However, there were no material differences between the law of the seat and the law of the main contract [*FirstLink case; BCY Case*]. It can be concluded that the law of the seat can also has connection with the Parties concerned. Therefore, the law of the seat may not be essentially neutral, although the arbitral seat is neutral [*ibid.*].

36. Contrary to aforementioned, the law of the arbitral seat alleged by RESPONDENT is not substantially neutral. RESPONDENT insists to apply the law of the seat to govern to arbitration clause because the law of Danubia satisfies the hypothesis of RESPONDENT that Arbitral Tribunal has no jurisdiction to adapt the contract [*ANoA, ¶13*] because of the express mandate of contractual adjustment to the Tribunal is required under Danubian legal regime [*PO2, ¶36*]. That intention of the choice of proper law is in favour of RESPONDENT, while poses CLAIMANT at a disadvantage. Thus, the law of the arbitral seat, the law of Danubia, is not an essential neutral choice.

37. Therefore, the alleged neutrality is not an adequately strong reason for favouring the law of the seat over the law of the main contract.

3. The arbitral seat does not determine the application of its law under delocalisation doctrine

38. Danubian law, which is the law of the place of arbitral proceedings, does not inevitably apply to the arbitration agreement under delocalisation doctrine. Delocalisation is sometimes used to refer to the point that Parties to arbitration are at liberty to escape the civil procedure rules and choice of law rules followed by courts in the arbitral situs [*Toope, p. 19; Bermann, p. 211*]. Under delocalisation doctrine, the international commercial arbitration is not restricted by

the law of the seat [*Mann, p. 158; Nakamura, pp. 23-29; Rubins, pp. 23-28*]. The Parties and Arbitral Tribunal can choose the rules of procedure other than the law of the seat of arbitration to regulate the arbitration [*ibid.*]. In the choice of the procedural law of arbitration, all arbitration laws should be equally considered [*Redfern/Hunter, p. 89*]. Thus, the choice of the arbitration seat, Danubia, does not determine the application of the arbitration law of Danubia as the proper law. The doctrine has been adopted by an increasing number of international conventions, *e.g.* European Convention and the International Convention on the Settlement of Investment Disputes. In addition, some countries, such as Switzerland [*Art. 20 CPIL*], France [*Art. 1494; 1495 FCPC*] and Belgium [*Art. 1717 BGC*] have recognised the delocalisation theory in the form of legislation.

39. The principle of party autonomy is fundamental in arbitrations [*Bullet-Proof Vest Case; Agricultural Products Case; Design of Radio Phone Case; Granite Stone Case, etc.*]. The choice of the arbitration law should be completely based on party autonomy [*Janićijević, p. 65*]. In addition, the reasons for the Parties to choose a seat of arbitration mainly focus on practicality, neutrality and convenience, which supposedly has nothing to do with the Parties' preference for the laws of that particular country [*Brazil-David, p. 456; Brunner/Lew, p. 180; Heiskanen, pp. 449-450*]. However, it does not necessarily mean that the Parties should bind themselves to the mandatory laws of the arbitral seat [*Kremer; Kaufmann-Kohler, pp. 1313–1315*].

40. In the case at hand, however, the Parties did not agree that the chosen arbitral rules shall be subject to the arbitration law on the seat [*Cl. Ex. 5*]. As aforementioned, the Parties' implied choice is the law of Mediterraneo, not the law of Danubia [*supra ¶¶21-28*]. Thus, it would be unreasonable to conclude that the Danubian law as the law of arbitral situs is the proper law.

41. Therefore, choosing Danubia as the arbitral seat does not empower the application of the law of Danubia as the proper law under a delocalised arbitration.

C. The doctrine of separability cannot be applied to the choice of the proper law

42. RESPONDENT alleged the doctrine of separability [*Art. 16 DAL; Art. 16 MAL; Art. 16 Model law*] apply to the selection of the proper law [*NoA, ¶14*]. CLAIMANT maintains that RESPONDENT's reliance on the separability doctrine has been misplaced as this doctrine cannot be applied to the choice of the proper law [*Briggs, §14.37; Derains, pp. 16-17; Sulamérica Case; BCY Case*].

43. The doctrine of separability is to prevent the invalidity of the matrix contract *ipso facto* to undermine the validity of the arbitration agreement [*Art. 16 (1) Model Law; Sanders, p. 31; Redfern/Hunter, pp. 158-159; Briggs, §14.37; Derains, pp. 16-17; Cecrop Case; LLC Case; Indus*

Case]. However, it does not follow that the law of the main contract and the law of the arbitration agreement also should be treated distinctly [*Kaplan/Moser, pp. 137, 139, 388; Sulamérica Case; BCY Case; Sonatrach Case*] and cannot be applied to the choice of the proper law [*Kaplan/Moser, pp. 131-150; Sulamérica Case; BCY Case; Cruz Case*].

44. In this case, the arbitration clause is valid [*NoA, ¶15*] and there is nothing to do with invalidity of the matrix contract to undermine the validity of the arbitration agreement. Therefore, the doctrine of separability cannot be applied to this dispute and it is not justifiable to treat the arbitration agreement as a distinct part in regard to the choice of law.

II. UNDER THE LAW OF MEDITERRANEO, THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

45. Under the law of Danubia, an express conferral of power is required for the Tribunal to adapt the contract [*PO2, ¶36*]. However, the law of Mediterraneo may not be the case, which provides for a broad interpretation [*NoA, ¶14*]. The term "*arising out of this contract, including the performance thereof*" (emphasis added) in Clause 15 [*Cl. Ex. 5*] can extend to the changed circumstances CLAIMANT encountered [*Cl. Ex. 6; NoA, ¶10; PO2, ¶25*], thereby mandating the Tribunal to adapt the contract [*NoA, ¶14*]. In addition, the Parties have intended to grant the power to the Tribunal to adapt the contract [*Cl. Ex. 8*].

46. Firstly, both Parties have agreed to resolve "*any dispute arising out of this contract, including the performance thereof*" (emphasis added) through arbitration [*Cl. Ex. 5*]. The words "arising out of" can cover every dispute having any plausible factual or legal relation to the Parties' agreement or dealings [*Bechtel Case; Mgt/Tech Case; Alghanim Case; Tadeusz Case; Aggeliki Case*] because rational businessmen presumptively intend to resolve all disputes related to the contract [*Born, p. 1319; Redfern/Hunter, p. 94; Sandrock, p. 60; Fiona Trust Case*]. In this case, according to Mediterranean law, this stipulation "arising out of" can also be broadly interpreted [*NoA, ¶14*] that the Tribunal has the power to adapt contract [*Forwood Case; Mastrobuono Case; Louis Case; Sweet Dreams Case*].

47. Secondly, the Parties have intended to grant the power to the Tribunal for contract adaptation through their negotiation history [*Cl. Ex. 8*]. When CLAIMANT proposed a mechanism for contract adaptation of any unforeseen event in the negotiation on 12 April 2017, RESPONDENT clearly replied that "it should be the task of the arbitrators to adapt the contract if the Parties could not agree" [*ibid.*]. And then CLAIMANT agreed to include an express authorisation for the Tribunal in the arbitration clause [*ibid.; Cl. Ex. 5; supra ¶46*]. Thus, it can be noted that

the Parties have common intention to grant the power to the Tribunal to adapt the contract.

48. In conclusion, the Parties have agreed to resolve "any dispute arising out of this contract" and this provision in their agreement can be broadly interpreted under the law of Mediterraneo to grant the power to the Tribunal for contract adaptation. Moreover, the Parties have shown their intention to mandate the Tribunal to adapt the contract through their correspondence.

III. EVEN IF DANUBIAN LAW APPLIES TO THE ARBITRATION CLAUSE, THE TRIBUNAL COULD STILL HAVE THE POWER TO ADAPT THE CONTRACT

49. Even if the proper law is the law of Danubia, the Tribunal still has the power to adapt the contract under Clause 15 of the Sales Agreement.

50. Clause 15 of the contract regulates that "any dispute *arising out of this contract, including the performance* thereof shall be referred to and finally resolved by" Arbitral Tribunal (emphasis added) [*Cl. Ex. 5*]. The hardship concept is situated in a context of contract performance [*Brunner/Lew, p. 533; Shareholders Agreement Case; Loan Agreement Case; Power Station Case, etc.*] and is typically used to characterise all situations in which performance has become more onerous or less profitable for a party, as well as a sub-category of situations of decreased profitability [*Da Silveira, p. 323; Dias Simões, p. 59; Coronation Case*]. Additionally, by its very nature, hardship can only become of relevance with respect to performances still to be rendered [*PICC, p. 218*]. Therefore, hardship occurs during the performance of the contract, for which the contract could be adapted.

51. In the case at hand, the government of Equatoriana suddenly announced an 30% imposition on the tariffs on 19 December 2017 before the last shipment of 50 doses was due [*Cl. Ex. 5; PO2, ¶25*]. The tariff event is a hardship which occurred during the performance of the contract. Under such circumstances, therefore, Arbitral Tribunal has been empowered by the reference of "performance" in Clause 15 to adjust the contract.

CONCLUSION TO PART ONE

52. In conclusion, although there is no express choice to determine the specific law to govern the arbitration agreement, the implied choice can be found to be the law of Mediterraneo. The cases and delocalisation doctrine give a support for applying the law of Mediterraneo, not the law of the seat. In accordance with the law of Mediterraneo, the Tribunal has the power to adapt the contract. Even if the law of Danubia applies to the arbitration clause, the contract could still be adapted under Clause 15 of Sales Agreement.

PART TWO: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FOR IT HAS FULFILLED REQUIREMENTS OF ADMISSIBILITY, RELEVANCE, MATERIALITY AND WEIGHT

53. Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence [*Art. 22.2 HKIAC 2018; Art. 9.1 IBA Rules*]. The Tribunal shall find that the evidence to be submitted by CLAIMANT is adequately relevant in the present arbitral proceedings as the dispute underlying the two cases are quite similar **(I.)**. Since RESPONDENT failed to fulfil its burden of proof which it shall bear, while the confidentiality obligations cannot be applied to CLAIMANT, CLAIMANT's submission of evidence should be adopted by the Tribunal **(II.)**. Moreover, Arbitral Tribunal shall find the evidence material in the case at hand **(III.)**.

I. THE SIMILARITIES IN THESE TWO CASES ARE SUFFICIENT TO PROVE THE RELEVANCE OF THE EVIDENCE

54. As it could be referred from the "Partial Interim Award" together with some other reliable information which CLAIMANT is promised, the arbitration which RESPONDENT had with one of its consumers enjoys much resemblance which is adequate to fulfil the requirements set forth in HKAIC 2018 [*Art. 22.2 HKIAC 2018; Langweiler (2 Oct 2018); PO2, ¶39*].

55. HKIAC 2018 prescribes that the Tribunal shall determine the relevance of evidence in arbitral proceedings [*Art. 22.2 HKIAC 2018; Moser/Bao, p. 272*]. The term "relevance" has been defined as the document "[…] useful for the line of evidence by the requesting party in order to establish the truth of its factual allegations" [*Raeschke-Kessler, p. 427; Moser/Bao, p. 274*]. To be precise, the rule in regard to the relevance simply and merely calls for the "moving party to articulate convincingly why it believes the document submitted to the Tribunal will support its allegations" [*O'Malley, p. 56*].

56. In that arbitration, the sale is also affected by the unforeseen tariff which was imposed by the Government of Mediterraneo [*Langweiler (2 Oct 2018)*]. However, while RESPONDENT who is vigorously denying any need to adapt the contract here, it asked for an adaption of the price invoking an unforeseeable change of circumstances in that arbitration [*ibid.*]. The situation in these two cases are quite similar, and the only difference between them seems to be that RESPONDENT has been negatively affected by the tariffs in that case [*ibid.*]. Furthermore, it is utterly contradictory that in such case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable retaliatory tariff of 30% allegedly does not justify an adaption when it is to RESPONDENT's detriment [*ibid.*]. From the Partial Interim

Award, it could be concluded that the Tribunal in that arbitral proceedings has confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT [*PO2, ¶39*].

57. RESPONDENT may allege that there are differences in these two cases [*Fasttrack (3 Oct 2018)*], but it is universally acknowledged that the two completely consistent cases cannot exist in the world. What Arbitral Tribunal need to focus on is that the common grounds underlying these two cases. The similitudes in these two cases are sufficient for the Tribunal to determine that the evidence is highly relevant to the present case [*O'Malley, p. 56; Langweiler (2 Oct 2018)*].

58. Taking everything into account, Arbitral Tribunal is respectfully requested to find that the two cases have many common points, which is sufficient to fulfil the requirements of relevance of evidence set forth in Art. 22.1 HKIAC 2018.

II. CLAIMANT'S SUBMISSION OF EVIDENCE HAS MET THE ADMISSIBILITY REQUIREMENTS

59. RESPONDENT bears the burden of proving to reveal CLAIMANT absolute illegal measures when obtaining the evidence, otherwise the evidence to be submitted by CLAIMANT should be adopted by the Tribunal **(A.)**. Further, confidentiality obligation should not be CLAIMANT's concern when submitting the evidence **(B.)**.

A. RESPONDENT failed to prove CLAIMANT's illegal conduct

60. CLAIMANT fulfilled its burden of proof under HKIAC 2018 when the letter on 2 October 2018 was delivered [*Langweiler (2 Oct 2018)*]. RESPONDENT bears the burden to demonstrate its allegations on CLAIMANT's illegal behaviours in obtaining the copy of the award [*Art. 22.1 HKIAC 2018*], but RESPONDENT failed to prove that. Under such circumstances, the evidence to be submitted should be adopted by the Tribunal.

61. When it comes to procurement of evidence, the party claiming that the evidence was to be procured illegally must also bear the burden of providing *prima facie* evidence to support its position because the mere allegation is not a sufficient basis for excluding the evidence from the record [*O'Malley, p. 322*].

62. Further, in international practice, a "balance of probabilities" or "more likely than not" should be taken into account in international commercial arbitration [*Born, p. 2314; Caron/Caplan, p. 561; Hunter, pp. 345, 352; Reiner, p. 3*]. Such standard is also confirmed by Arbitral Tribunal that "the Tribunal is authorised to draw adverse inferences from the failure of that party to

produce such evidence when a party has access to relevant evidence" [*Ultrasys Case*].

63. In this case, the letter delivered to Arbitral Tribunal on 2 October 2018 indicates that CLAIMANT may submit evidence regarding the award and the relevant submissions of the other arbitration in which RESPONDENT was involved. RESPONDENT alleges that the evidence will be obtained by illegal means and should not be admitted in the arbitration [*Fasttrack (3 Oct 2018)*]. However, the concrete fact is CLAIMANT arranged to acquire the Partial Interim Award through purchasing from an intelligence company on horseracing industry [*PO2, ¶41*]. Buying itself amounts to a legal conduct.

64. Meanwhile, the mere fact that the intelligence company has a doubtful reputation [*ibid.*] does not necessarily derive a solid conclusion that the company obtained the evidence in a definite illegal way. Therefore, RESPONDENT is not able to illustrate the CLAIMANT's illegal means of obtaining evidence.

65. May Arbitral Tribunal find that CLAIMANT's evidence is in line with its burden of proof [*Art. 22.1 HKIAC 2018*]. The acquisition of the information was through a typical purchase [*PO2, ¶41*], which is absolutely legal, with no direct evidence demonstrating the illegal nature of the information obtained by CLAIMANT. The failure of proving CLAIMANT's illegal taking evidence should result in an inference in favour of CLAIMANT that the evidence submitted by CLAIMANT should be admitted by the Tribunal.

B. CLAIMANT does not bear confidentiality obligations when submitting the evidence

66. The arbitral award in another arbitral proceedings is a potentially public rather than confidential document **(*1.*)**. RESPONDENT alleges the submission by CLAIMANT could only occur in violation of contractual and statutory confidentiality obligations [*Fasttrack (3 Oct 2018)*]. However, both contractual and statutory confidentiality obligations do not exert binding force on CLAIMANT **(*2.*)**. If the Tribunal finds that CLAIMANT bears a general confidential obligation, it still has right to submit the evidence for its submission is to protect its legal interests [*Art. 3.13 IBA Rules*; *Art. 45. 3 HKIAC 2018*] **(3.)**. Even if the Tribunal rejects CLAIMANT's pleading on its legal interests, UNRT would still be applied to justify the submission of evidence **(*4.*)**.

1. Awards are not to be considered confidential

67. Unlike other documents used in an arbitration, the characteristics of arbitral awards, considering that they may be supervised or enforced by courts, are considered to be "potentially

public documents" [*Insurance Case*].

Therefore, the award of another arbitral proceedings submitted by CLAIMANT was disclosed legitimately and shall be escaped from the obligation of confidentiality.

2. CLAIMANT is not bound by contractual and statutory confidentiality obligations

68. RESPONDENT claims that CLAIMANT's conducts of submission of evidence is in violation of contractual and statutory confidentiality obligations [*Fasttrack (3 Oct 2018)*]. Nevertheless, since CLAIMANT is not a party in the confidential agreement between RESPONDENT and its consumer of that arbitral proceedings, nor a party which is defined in accordance with the relevant provisions of HKIAC 2018 [*Art. 2.7, 45 HKIAC 2018*], neither contractual nor statutory confidential obligations should CLAIMANT bear in the current situation.

69. RESPONDENT alleges that CLAIMANT shall bear the contractual confidentiality obligations [*Fasttrack (3 Oct 2018)*]. However, the confidentiality agreement in the other arbitral proceedings only exists between RESPONDENT and its consumer [*Langweiler (2 Oct 2018); PO2, ¶39*]. Such a contractual confidentiality obligation has no binding force vis-à-vis CLAIMANT for it is not the Party of that arbitral proceedings [*PO2, ¶39*].

70. Meanwhile, RESPONDENT asserts that CLAIMANT has violated the statutory confidentiality obligations in accordance with the Art. 45 HKIAC 2018 [*Fasttrack (3 Oct 2018)*]. However, HKAIC 2018 prescribes that only "party" shall adhere the confidentiality obligations [*Art. 45.1 HKIAC 2018*]. Pursuant to Art. 2.7 HKIAC 2018, the references to "party or parties" merely embrace "CLAIMANT, RESPONDENT or an additional party" in that arbitral proceedings [*Art. 2.7 HKIAC 2018; Moser/Bao, p. 122*].

71. In this case, even stretching the sphere of entities who bear the confidentiality obligation to the maximum degree, only the Parties, member of the Tribunal, attorneys representing the Parties and the arbitration institution in that arbitral proceedings shall abide by the statutory confidentiality obligations [*Art. 45.1 HKIAC 2018; Moser/Bao, pp. 122, 386; Smeureanu, p. 133*]. Accordingly, CLAIMANT does not fall in the scope of the entities involved in that arbitral proceedings, it should not bear statutory confidentiality obligations under HKIAC 2018.

72. To sum up, since there is no basis for CLAIMANT to comply with the contractual and statutory obligations maintained by RESPONDENT, the Tribunal shall find that CLAIMANT's submission of evidence is eligible correspondingly.

3. Protection of legal interests gives rise to the submission of evidence even if CLAIMANT bear a general obligation of confidentiality

73. Even Arbitral Tribunal finds that CLAIMANT shall bear a general obligation of confidentiality, since the CLAIMANT's purpose is to purse its legal rights in the present arbitral proceedings [*Langweiler (2 Oct 2018); Art. 45.3 HKIAC 2018; Art. 3.13 IBA Rules*], the Tribunal shall find that CLAIMANT is entitled to submit the evidence.

74. The duty of confidentiality related to arbitral proceedings is not absolute in arbitration administered by HKIAC [*Moser/Bao, p. 387*]. The relevant provisions of confidentiality in HKIAC 2018 prescribes that Art. 45.1 HKIAC 2018 does not prevent the submission of evidence under the circumstances where a party is seeking to "protect or pursue a legal right or interest of the party" [*Art. 45.3 HKIAC 2018; ibid.*]. In addition, IBA Rules, which has been "commonly adopted and referred to in HKIAC arbitration" [*Moser/Bao, p. 271*] also regard the "protection of legal rights" as the one of the exceptions to confidentiality [*Art. 3.13 IBA Rules*].

75. When it comes to the question on whether a party to an arbitration could disclose an arbitral award in separate arbitral proceedings against a third party in order to justify its claim, the Tribunal ought to hold that the award could be disclosed (setting aside the general duty of confidentiality) in circumstances where the disclosure was reasonably necessary to establish or protect a party's legal rights against a third party [*Hassneh Case*].

76. The Tribunal may hold that CLAIMANT shall bear a general duty of confidentiality for the "inherent element of arbitration" [*Waincymer, p. 798*], but such an opinion has "no general rules to support" [*O'Malley, p. 87; Partasides, p. 12; Dimolista, p. 5*], it shall be recognised as an extreme approach and assumption to confidentiality obligation [*Waincymer, p. 798; O'Malley, p. 87*].

77. In the present case, CLAIMANT's intention on submitting of evidence is to assure its legitimate interests [*Langweiler (2 Oct 2018)*], which has constituted an exception to the general obligation of confidentiality pursuant to the correlative provisions of HKIAC 2018 and IBA Rules [*Art. 45.3 HKIAC 2018; Art. 3.13 IBA Rules; Moser/Bao, p. 387*], and has been widely affirmed in international arbitration practice by leading cases[*O'Malley, p. 94; Ali Shipping Case; Telesat Case; Emmott Case; Hassneh Case; AAY Case, etc.*].

78. In conclusion, all efforts regarding the submission of evidence by CLAIMANT is to protect its legitimate interests in the current arbitral proceedings. Hence, since it has established an exception of the general confidentiality duty under HKIAC 2018 [*Art. 45.3 HKIAC 2018*], the

Tribunal is respectfully requested to find that CLAIMANT is entitled to submit the evidence.

4. UNRT ensures CLAIMANT to submit the evidence because the submission involves public interests

79. General Principles of Transparency is evidenced in UNRT and is applicable in the present dispute **(*a.*)**. CLAIMANT's submissions of the contested evidence are related to public interests recognised in UNRT, which ensures CLAIMANT's submission to the Tribunal **(*b.*)**.

a. The prevailing principles of transparency evidenced in the UNRT can be applied in international commercial arbitration

80. The Tribunal should find applicability of the principles of transparency. The notion of transparency can be interpreted as complete visibility, openness, and access to information [*Malintoppi/Limbasan, p. 33; Chaperon Case*], which is recognisable in terms of several characteristics, including approach to arbitral awards [*Ribeiro/Douglas, pp. 51-52*]. The core legislative purpose of Transparency Rules of UNCITRAL can be inferred from the Resolution adopted by the General Assembly of United Nations, because UNRT itself "[r]ecognises the need for provisions on transparency" [*United Nations, p. 1*]. Although the UNRT is generally "elaborated in the framework of UNCITRAL, the Transparency Rules is available for use in non-UNCITRAL arbitrations" [*BSG Case*], and the prevailing principles of arbitration has stretched its influence on the international commercial arbitration between private entities [*Poorooye/Feehily, p. 309; Rogers, p. 1301*], which is evidenced in UNRT.

81. Further, UNRT may supplement the applicable arbitration rules in an arbitration [*Art. 1.7 UNRT*], *i.e.* HKIAC 2018 here. Therefore, the prevailing principle of transparency evidenced in UNRT should be applied.

b. Submission of the award is in line with the UNRT because the evidence is related to public interests

82. Relative public interests in this dispute necessitate a disclosure of the award. Transparency is an exception to confidentiality which have received broad recognition, particularly in the common law countries, like Danubia [*PO2, ¶44*], where the most stringent rules on confidentiality are implemented [*Kenny, p. 489*]. UNRT recognises the need for provisions on transparency taking account of the public interests involved in arbitrations [*United Nations, p. 1*]. The need for transparency in arbitration is often justified by reference to the public interests at stake in such proceedings, as well as the need to increase the legitimacy of such proceedings [*Hay, p. 212*]. In the case at hand, the imposition of tariff is a governmental conduct [*Cl. Ex.*

6], which influences commercial interests among all of the market participants within Mediterraneo and Equatoriana [*ibid.*]. Thus, the principle of transparency helps CLAIMANT to be exempted from general confidentiality obligation [*supra ¶73*] and public interests evidenced therein require a disclosure of the award. Thus, CLAIMANT is entitled to submit the evidence in accordance with the prevailing principles of transparency.

III. THE EVIDENCE IS OF VITAL MATERIALITY AND WEIGHT

83. The term materiality means that the arbitral tribunal must deem it necessary that the document is needed as an element to allow complete consideration as to whether a factual allegation is true or not [*Moser/Bao, p. 274; Raeschke-Kessler, p. 427*]. Moreover, Arbitral Tribunal must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings [*Moser/Bao, p. 477*]. Here, RESPONDENT was negatively affected by the tariff of 25% in the other arbitral proceedings while reduced its cost in the present dispute [*Langweiler (2 Oct 2018)*]. The evidence may exert effects on the result of the case because the contradictive submissions of RESPONDENT in separate arbitral proceedings may indicate its indecisive opinion about price adaptation [*Langweiler (2 Oct 2018)*], further may subdue the credibility of RESPONDENT's statement. In addition, the Partial Interim Award in which the Tribunal decided in favour of Black Beauty Equestrian [*PO2, ¶39; ANoA, ¶22*] may guide the Tribunal to an inference against it for logic consistency. Thus, the evidence that will be submitted by CLAIMANT is of pivotal materiality and weight.

CONCLUSION TO PART TWO

84. In conclusion, the Tribunal should find that CLAIMANT is entitled to submit the contested evidence for it fulfils the requirements of admissibility, relevance, materiality and weight. Therefore, the Tribunal ought to operate further assessment on the evidence.

PART THREE: CLAIMANT IS ENTITLED TO THE ADAPTED PRICE OF US$ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT WITH ART. 79 (5) CISG

85. Arbitral Tribunal should balance the Parties' contractual interests [*Brunner/Lew, p. 500*] and order RESPONDENT to pay CLAIMANT at least US$ 1,250,000, 25% of price for the third delivery of frozen semen, which is the 25% pure loss (with CLAIMANT's profit-margin deduction of 5% from Equatorianian imposition of new tariff of 30%) [*NoA, ¶18; Cl. Ex. 8; PO2, ¶31*]. After a

protracted negotiation of the contract, the Parties have agreed to derogate from Art. 79 CISG [*Cl. Ex. 5; Resp. Ex. 3; ANoA, ¶20*] by replacing "a failure to perform any of his obligations" with a narrow hardship reference in Clause 12 and deleting impediment requirements [*ibid.; cf. Art. 79 CISG*]. In this case, the Parties have provided for a special regulation of the hardship on changed circumstances excluding the application of the non-performance and impediment requirements in Art. 79 CISG and the definition of hardship in Art. 6.2.2 PICC as well as ICC-Hardship Clause or any other legal instruments [*ibid.*]. CLAIMANT submits that the additional tariff in the present case falls in the scope of the narrowed hardship in Clause 12 of the contract **(I.)**. Accordingly, CLAIMANT is entitled to the adjusted price under Art. 79 (5) CISG because the special regulation of Art. 79, *i.e.* Clause 12, has been triggered **(II.)**.

I. THE ADDITIONAL TARIFF FALLS INTO THE SCOPE OF THE HARDSHIP IN CLAUSE 12 OF THE CONTRACT

86. The Parties have agreed that the definition of hardship has been modified into the provision in Clause 12 **(A.)**. In this case, the situation CLAIMANT encountered should be regarded as one of the circumstances of the narrowed hardship **(B.)**.

A. The definition of hardship has been narrowed down into the stipulation in Clause 12 of the contract

87. Clause 12 of the contract includes a restrictive meaning of hardship that "*hardship* [is the situation which is] *caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added) [*Cl. Ex. 5*]. One of the general principles upon which CISG is based is party autonomy [*Art. 6 CISG; Kröll, pp. 99-101; Schwenzer I, Art. 6, ¶8; Lookofsky, p. 24; Bullet-Proof Vest Case; Agricultural Products Case; Design of Radio Phone Case; Granite Rock Case, etc.*]. Hence, the Parties should feel reassured to modify specific terms, provisions or clauses [*Winship, pp. 252-253; Schlechtriem/Butler, p. 3; Printing System and Software Case; Cement Case; Metal Processing Plant Case*], hardship clause included. Specifically, the fact that the Parties have provided for hardship tests with a less stringent wording may suggest that a more relaxed standard including a lower threshold test should apply [*Brunner/Lew, p. 515*]. Moreover, the Parties can make reference to specific circumstances triggering the clause or even to specific consequences arising in certain situations, thus, important insights on the interpretation of the general clause may be gained [*ibid., p. 516; Fontaine/De Ly, p. 509*].

88. In the course of the negotiation of the contract, because RESPONDENT insisted on DDP terms

[*Cl. Ex. 3*], CLAIMANT initially proposed, at minimum, a hardship clause, in particular ICC-Hardship Clause [*Resp. Ex. 2*], should be incorporated to address prospective additional risks [*Cl. Ex. 4*]. However, RESPONDENT reckoned that the ICC-Hardship Clause was too broad [*Resp. Ex. 3; ANoA, ¶4; PO2, ¶12*] and it was RESPONDENT's intent to reject ICC-Hardship Clause as well as to suggest narrowing down the hardship meaning [*Resp. Ex. 3; ANoA, ¶9*]. Finally, regarding the additional risks mentioned by Ms. Napravnik [*Cl. Ex. 4; PO2, ¶12*], the Parties agreed to narrow down the definition of hardship and include Clause 12 with a reference to the narrowed hardship definition [*Cl. Ex. 5; Resp. Ex. 3; PO2, ¶12*]. Thus, in the final contract, the Parties have provided for a less strict wording on hardship elements by reference to specific circumstances [*Brunner/Lew, p. 515; Fontaine/De Ly, p. 509*], which is "*hardship* [is the situation which is] *caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added) [*Cl. Ex. 5*] so that the version that the Parties have chosen prevails [*Art. 6 CISG; Digest, p. 34; Brunner/Lew, p. 515; Fontaine/De Ly, p. 509*]

89. Therefore, Clause 12 restricts the meaning of hardship. Under such circumstances, the definition of hardship either in ICC-Hardship Clause or PICC and other legal instruments cannot be invoked to determine the occurrence of changed circumstances. The Tribunal may only refer to Clause 12 for determination of hardship. However, the effect of the existence of hardship still remains because of non-existence of the modification on it [*infra ¶111*].

B. The impediment at hand is one of the circumstances of the narrowed hardship

90. In light of Clause 12 of the contract, there are three tests for the constitution of the narrowed hardship, which are "[the event is] comparable [to] additional health and safety requirements" **(*1.*)**, "[the event was] unforeseen [at the time of the conclusion of the contract]" **(*2.*)** and " the event mak[es] the contract more onerous [to perform]" **(*3.*)** [*Cl. Ex. 5*].

1. The additional tariff is comparable to additional health and safety requirements

91. The extra import duty imposed by Equatorianian government [*Cl. Ex. 6; NoA, ¶10; PO2, ¶25*] is comparable to the "additional health and safety requirements" in Clause 12 [*Cl. Ex. 5*]. If two or more things are comparable, they are of the same kind or are in the same situation, and so they can reasonably be compared [*Hanks/Urdang*].

92. In the ongoing dispute, "additional health and safety requirements" [*Cl. Ex. 5*] mentioned by Ms. Napravnik [*Cl. Ex. 4; PO2, ¶12*] was conducted by Danubian government [*PO2, ¶21*]. Similarly, the present onerous situation that CLAIMANT confronted with was conducted by

Equatorianian government [*Cl. Ex. 6; NoA, ¶10; PO2, ¶25*]. Moreover, the recent imposition of import duty was also similar to the previous health and safety requirements to the extent of its additional trait [*ibid.*]. Finally, the former restriction and the current circumstance both fall into the sphere of customs regulation or import restrictions [*ibid.*]. To sum up, the Equatorianian imposition of extra import duty and the preceding "additional health and safety requirements" can be reasonably compared because they share the similarities [*Murray et al.*] with regard to additional governmental regulation in nature, import restrictions in particular. It is noticeable that such state interventions are always regarded as the qualified impediment within Art. 79 CISG [*Schwenzer I, Art. 79, ¶18; Kröll, p. 1085; Sanguinarine Case; Caviar Case*]. Thus, the existing situation is "comparable" to the "additional health and safety requirements".

2. The present situation cannot be foreseen at the moment of contract conclusion

93. The additional import duty was unforeseeable at the time of the finalisation of the contract [*Kröll, p. 1075; Schwenzer I, Art. 79, ¶14; Lookofsky, p. 134; Rail Case; Steel Bars Case II; Sanguinarine Case*]. Through the praxis, anything which falls within the ordinary range of commercial probability is foreseeable [*ibid.; Vine Wax Case*]. In this case, however, the event fails to qualify the criteria of foreseeability.

94. First, the home country of CLAIMANT, Mediterraneo [*NoA*; *ANoA*], was not amongst the nations which had attempted to protect their farmers through tariffs on foreign agricultural products in the past [*PO2, ¶23*]. Second, it is unreasonable for CLAIMANT to predict that, subsequent to the imposition of 25% tariff on Equatorianian agricultural products announced by newly elected President [*Cl. Ex. 6; NoA, ¶9*], Equatoriana, which is RESPONDENT's home country [*NoA; ANoA*] and was an ardent supporter of free trade who endeavoured to resolve the dispute within WTO dispute resolution mechanism as well as had never relied on retaliations against trade restrictions by other countries [*Cl. Ex. 6; NoA, ¶10*], would initiate a retaliatory imposition of 30% tariff upon all agricultural products from Mediterraneo [*ibid.*]. The retaliation *per se* as well as the size of the tariffs came as a big surprise even to the informed circles [*Cl. Ex. 6*]. Third, there had been no tariffs imposed on agricultural products or horse semen in either Equatoriana or Mediterraneo [*PO2, ¶25*]. Lastly, the scope of the tariff imposed, which is agricultural goods, does not cover (horse) frozen semen [*Annex 1, AoA*] and the Parties have not anticipated the import duty would apply to it [*PO2, ¶26*]. Conclusively, the newly imposition of tariff was out of the expectation of the reasonable person of the same kind in the position of the Parties [*Art. 8 (2) CISG; Kröll, p. 1076; Schwenzer I, Art. 79, ¶14; Brunner/Lew, pp. 156 et seq.*] when they concluded the contract.

3. The newly imposition of tariff has made the contract more onerous to perform

95. The additional import duty has caused the contract more onerous to perform. Unlike the requirements in either ICC-Hardship Clause or Art. 6.2.2 PICC, the Parties have contracted out the requisite elements of hardship, *i.e.* "the occurrence of events fundamentally alters the equilibrium" [*cf. Art. 6.2.2 PICC*] and "[the occurrence of events makes the contract] excessively onerous [to perform]" [*cf. ICC-Hardship Clause*], and modified as well as narrowed the necessary requirements of it to be "[the occurrence of events] mak[es] contract more onerous [to perform]" [*Cl. Ex. 5*]. In other words, the Parties reached an agreement to lower the standard of the default rule of hardship [*Brunner/Lew, pp. 422-423, 424 ff., 431 ff.*] from the existence of the circumstance that the contractual equilibrium must have been fundamentally altered so that performance would be extremely onerous for one of the Parties [*Kröll, p. 1090*] into "mak[es] contract more onerous [to perform]" [*Cl. Ex. 5*]. In this dispute, the situation CLAIMANT faced did make the contract more onerous to perform.

96. Supervening past experience on health and safety requirements implemented by Danubian government [*Cl. Ex. 4; PO2, ¶21*], CLAIMANT has been since then at the edge of insolvency [*ibid.*] and financially difficult [*Cl. Ex. 8*]. In this case, CLAIMANT was impossible to assume 30% additional tariff [*ibid.*] and was seriously endangered if it had to bear such amount [*PO2, ¶29*]. Therefore, the additional tariff even resulted in excessive onerous performance for CLAIMANT. Under such circumstances, the situation CLAIMANT encountered obviously rendered the contractual obligation for CLAIMANT more onerous to perform.

97. In conclusion, the additional import tariff imposed by Equatorianian government constitutes the narrowed hardship within Clause 12 of the contract.

II. CLAIMANT IS ENTITLED TO THE ADDITIONAL PAYMENT UNDER ART. 79 (5) CISG

98. Clause 12 of the contract prescribes that, "Seller shall *not be responsible for … hardship*, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" (emphasis added) [*Cl. Ex. 5*]. Such provision constitutes the partial derogation [*Kröll, p. 107; Schwenzer I, Art. 79, ¶58; Lookofsky, p. 24; Digest, p. 33; Flambouras, p. 283*] of the sphere of applicability of Art. 79 from a failure to perform obligations [*Schwenzer I, Art. 79, ¶6*] into the narrowed "hardship" in Clause 12 [*supra ¶¶87-89*] and its modification [*Women's Clothes Case*] by deleting impediment requirements. Under the circumstance of derogation of the convention, the content of the contract, which is Clause 12, should be preferentially adopted [*Art. 6 CISG; Digest, p. 34; Brunner/Lew, p. 515; Fontaine/De Ly, p. 509; Lando,*

pp. 385-388] and the applicable scope of non-performance as well as impediment tests of Art. 79 shall be excluded [*ibid.; Kröll, p. 107; Printing System and Software Case*] **(A.)**. Since merely the sphere of application and impediment requirements within Art. 79 have been partially derogated, the Tribunal should adapt the contract due to the occurrence of the narrowed hardship [*supra ¶¶90-97*] under Art. 79 (5) CISG **(B.)**.

A. Art. 79 CISG has been partially derogated into Clause 12

99. The Parties have agreed to derogate from Art. 79 CISG [*Art. 6 CISG; Schwenzer I, Art. 6, ¶23*]. For the purpose of that, the Parties agreed to modify the scope of applicability of Art. 79 CISG, which is "a failure to perform any of his obligations", to be the narrowed "hardship" [*supra ¶¶87-89*] in Clause 12 of the contract, and to remove the impediment requirements within Art. 79 [*Cl. Ex. 5*]. Admission of derogation reflects the principle for international sales contract of party autonomy, on which base wording of the contract should be granted priority [*Kröll, p. 99; Digest, p. 33; Lando, p. 385; Carlsen/Copenhagen, ¶11; Printing System and Software Case*; *Granite Stone Case*]. It should be noted that partial [*Schwenzer I, Art. 79, ¶58; Kröll, p. 107; Lookofsky, p. 24; Digest, p. 33; Flambouras, p. 283*] and implied [*Schwenzer I, Art. 79, ¶58; Digest, p. 34; Machinery Case; Steel Bars Case I; Steel Pipes Case; Textile Case; Telephone Case; Women's Clothes Case*; *Stone Slabs Case; Vegetable Case*] derogations are both permitted within CISG regime if the literal modification can be found in the contract [*Kröll, pp. 105, 125*]. If such derogation can be observed in the contractual text, it can be deemed as the Parties' agreement [*ibid.; Trees Case; Liquid Phenol Case; Textile Case*]. In this case, Art. 79 is impliedly and partially derogated, in respect of its premise and its impediment requirements, into Clause 12 with regard to their nature ***(1.)*** and the Parties' agreement ***(2.)***.

1. Art. 79 has been partially derogated into Clause 12 by nature

100. The preconditions of Art. 79 CISG has been derogated into Clause 12 in terms of their nature. Art. 79 CISG is in the nature of a *force majeure* provision [*Brunner/Lew, p. 58, 401 et seq.; Lookofsky, p. 150; Digest, p. 373; Frozen Peas Case; Potatoes Case; Caviar Case*], or at least, an exemption provision [*Kröll, p. 1057; Schwenzer I, Art. 79, ¶1; Schwenzer II, pp. 709, 713; Lookofsky, p. 133; Brunner/Lew, p. 58; Shoes Case; Steel Tubes Case*]. Generally, the *force majeure* or exemption provisions in modern contract clauses and international commercial contract codifications uniformly adopt the wording *e.g.* "a party is excused from", "a party is not liable for" or "a party is not responsible for" *etc.* [*Brunner/Lew, p. 75; cf. IFMC 2003; IFMC 1985; Art. 79 CISG; Art. 7.1.7 PICC; Art. 8:108 PECL*]. In Clause 12 of the contract, the Parties also agreed on the language that resembles to the general exemption clause [*Cl. Ex. 5*]. Hence, Clause 12

modifies and derogates from Art. 79 CISG inasmuch as their essence and function.

2. The Parties have reached an agreement to derogate from Art. 79 CISG into Clause 12

101. The Parties have agreed to replace non-performance [*Art. 7.1.1 PICC*] in Art. 79 with a narrowed hardship [*supra ¶¶87-89*] in Clause 12 and remove impediment requirements within Art. 79. Commonly, an express *force majeure* or exemption clause in the contract will be interpreted as a modification of Art. 79 default rule [*Schwenzer I, Art. 79, ¶58; Lookofsky, p. 133*]. In this case, the Parties made a consensus to incorporate Clause 12 as a *force majeure* clause with a narrowed hardship definition [*Resp. Ex. 3; PO2, ¶12; ANoA, ¶¶4, 20*] and remove the impediment requirements [*Cl. Ex. 5; cf. Art. 79 CISG*]. It constitutes the derogation and modification of Art. 79 CISG in the sense of Art. 6 CISG [*ANoA, ¶20*] by providing for a special regulation of the problem of changed circumstances excluding the default rule of Art. 79 CISG [*ibid.*]. Under this condition, the Parties, CLAIMANT included, is entitled to be exempted from the liability arising out of hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex. 5; supra ¶¶87-89*].

B. The Tribunal should order RESPONDENT to pay CLAIMANT for the adapted price under the CISG Convention

102. As abovementioned, the Parties have provided for a special regulation of the exemption of changed circumstances, thereby excluding the application of the requirements in Art. 79 CISG and the tests of normal hardship [*supra ¶¶87-89*]. Furthermore, the newly imposition of tariff meets all elements of such special regulation prescribed in Clause 12 [*supra ¶¶90-97*]. Therefore, in the final stage, because the additional tariff is not assumed by CLAIMANT ***(1.)***, CLAIMANT is entitled to the adjusted price under Art. 79 (5) ***(2.)***.

1. CLAIMANT is not responsible for the additional costs associated with DDP term

103. As what Clause 12 apparently conveys, CLAIMANT (Seller) is freed from the costs caused by narrowed hardship, including the additional amount associated with DDP in Clause 8 [*Cl. Ex. 5*]. Respective spheres of risk in the contract arranged by the Parties ought to be firstly defined in this regard [*Schwenzer II, p. 715; Katz, pp. 378, 381; Oberman, p. 157; Steel Ropes Case; Chemical Fertilizer Case; Chinese Goods Case*]. Implicit agreements regarding a particular risk allocation should be considered within the contractual framework of the more specific hardship exemption [*Brunner/Lew, p. 423; Replacement Case; Polyurethane Case; Iron-Molybdenum Case*]. Hence, the Parties' contractual risk allocation will be accepted to prevail over general

threshold test of the hardship exemption [*ibid., p. 424; Schwenzer I, Art. 79, ¶58; Flagstone Tiles Case; Manufacturing Plant Case*]. In this case, the Parties have agreed on a specific framework on hardship exemption pertaining to risk distribution.

104. During the negotiation phase, since RESPONDENT insisted on DDP delivery [*Cl. Ex. 3*], CLAIMANT made clear that CLAIMANT would not bear any further risks associated with DDP terms, in particular not those associated with changes in customs regulation or import restrictions [*Cl. Ex. 4; Cl. Ex. 8*] and CLAIMANT offered an inclusion of hardship clause into the contract [*ibid.*]. Although RESPONDENT was against CLAIMANT's suggestion [*Resp. Ex. 3; ANoA, ¶9*], the Parties still finalised the contract with a hardship exemption mechanism in Clause 12 which allows CLAIMANT to be excused from extra costs arising from DDP terms in Clause 8 associated with customs regulation or import restrictions [*Cl. Ex. 5*].

105. It is noteworthy that, accordingly, such mitigation of CLAIMANT's liability on DDP terms can be also reflected in the price of goods. The initially-proposed price made by CLAIMANT for one dose of frozen semen was 99,500 USD [*Cl. Ex. 2*]. To accommodate RESPONDENT's consideration on efficient transportation and better shipment of goods [*Cl. Ex. 3; Cl. Ex. 8*], CLAIMANT merely increased the price per dose to US$100,000 [*Cl. Ex. 5*] that CLAIMANT would have increased to US$100,500 [*Cl. Ex. 2; Cl. Ex. 4*]. Such a US$500 lower overall price per dose was attributed to the removal of additional risks associated with DDP delivery obligation [*PO2, ¶8*].

106. To conclude, CLAIMANT is not responsible for the additional tariff associated with DDP delivery terms due to the special risk allocations agreed otherwise in hardship exemption in Clause 12.

2. Arbitral Tribunal should find the adjusted price for CLAIMANT under Art. 79 (5) CISG

107. Since CLAIMANT is not responsible for the additional import duties [*supra ¶¶87-89*] and such import duties constitute the agreed hardship [*supra ¶¶90-97*], Arbitral Tribunal should order RESPONDENT to pay for the price prepaid by CLAIMANT **(*c.*)** on the grounds that one of the effects of hardship, *inter alia*, contractual adjustment is compatible to be applied to settle the dispute under CISG **(*a.*)** because CLAIMANT has fulfilled the obligatory renegotiation pursuant to Art. 6.2.3 PICC **(*b.*)**.

a. Contractual adaptation is compatible under CISG

108. It is irrefutable that the Parties' sales contract is governed by CISG either in light of the

application sphere of CISG [*NoA, ¶¶1-4; Art. 1-5 CISG*] or under choice of law in the contract [*Cl. Ex. 5*]. Although, however, there exists neither express wording of hardship nor contractual adaptation within CISG, it is unreasonable to conclude that hardship and its effects generally accepted in PICC is not available under CISG [*Slater, pp. 260-262; Bonell, pp. 38-39; Kofod, §3.2; Steel Tubes Case*]. To better construe the Convention, thereby settling down the ongoing contractual dispute, a set of CISG interpretation tool need to be triggered to regulate the issue [*Kröll, p. 112; Lookofsky, p. 27; Grape Juice Case*].

109. Within the scope of Art. 7 (1) CISG, considering the interpretative principles of CISG, the Convention shall be read in the international context [*Kröll, p. 113; Bonell, pp. 34-35; Ferrari, p. 183; Bergsten, p. 31; Wooden Finger-Joints Case; Cobalt Sulphate Case, etc.*] and in a manner of uniformity of CISG application [*Looofsky, p. 30; Frozen Pork Case; Condensate Crude Oil Mix Case; Air Conditioners Case*]. Regarding the international character of CISG, hardship articles in PICC can be used to interpret and supplement international uniform law instruments, in this case, CISG [*Pmbl. PICC; Kofod, §3.2.3; Slater, p. 245*], notably, to interpret and supplement CISG by reference to Art. 7 CISG [*PICC, p. 5; Kröll, pp. 119, 132; Steel Tubes Case*]. Particularly, in the present dispute, the Parties have agreed to subject their contract to the contract law of Mediterraneo [*Cl. Ex. 5*] which is a verbatim adoption of PICC [*PO1, III.4*], generating binding force of the application of PICC by the Parties agreement [*Art. 6 CISG; Kröll, p. 99; Digest, p. 33; Lando, p. 385; Carlsen/Copenhagen, ¶11; Printing System and Software Case*; *Granite Stone Case*].

110. With respect to Art. 7 (2) CISG, until now, in praxis, it is supported by scholars, courts and arbitrators that PICC, as a tool of complement, considerably facilitates the uniformity of the application of CISG [*ibid.; Kröll, pp. 139-140; Ramberg, p. 20; Stock Equipment Case; Fish Case*] and it is in the sense of article 7 (2) CISG [*Certain Goods Case I; Certain Goods Case II*] to supplement CISG [*Kofod, §§3.2.2-3.2.3; Kröll, pp. 139-140; Schwenzer I, Art. 7, ¶36; Bonell, pp. 33-37*], particularly, in order to settle the issues on changed circumstances under Art. 79 CISG, hardship provisions in PICC, including Art. 6.2.3, are accepted to be applied to gap-fill Art. 79 (5) [*CISG-AC Op. 7, ¶¶26-40; Kofod, §3.2; Steel Tubes Case*] to minimise the confusion surrounding the application of conflict of laws rules and to avoid referring to domestic laws that are ill-suited for international transactions on this issue [*ibid.; Slater, p. 246; Honnold, p. 143*].

111. The Parties may implicitly agree to regulate the consequences of the exemption within Art. 79 CISG [*Schwenzer I, Art. 79, ¶58*]. Such clauses usually also offer more flexibility in terms of the legal consequences than Article 79 does [*Schwenzer I, Art. 79, ¶58 and fn. 176*]. Furthermore,

it is generally accepted that, in accordance with the Parties' agreement, less stringent threshold tests on hardship still result in the default effect of the changed circumstances [*Brunner/Lew, p. 515 and fn. 2543; Fontaine/De Ly, pp. 516-517; Philippe/Herring, p. 271*]. In this case, since the Parties chose to govern their contract to Mediterranean Contract Law and CISG, the Parties impliedly agree [*Kröll, p. 99; Carlsen/Copenhagen, ¶11; Printing System and Software Case*; *Granite Stone Case*] to regulate the effects of hardship exemption in accordance with Art. 6.2.3 PICC [*supra ¶¶108-110*] under Art. 79 (5) CISG. Further, even if the definition of hardship has been modified, the default effects of hardship still retain where no modification thereon may be found [*Brunner/Lew, p. 515 and fn. 2543; Fontaine/De Ly, pp. 516-517; Philippe/Herring, p. 271; Cl. Ex. 5*]. Therefore, as one of the effects of hardship, contractual adaptations [*Art. 6.2.3 (4) (b) PICC*] should be applied here on the grounds that the additional tariff encountered by CLAIMANT falls into the scope of the special definition of hardship (Art. 6.2.2 PICC) [*Cl. Ex. 5*] agreed otherwise in Clause 12 [*supra ¶¶87-89*].

b. CLAIMANT has accomplished the required renegotiation of the contract

112. Within the sphere of remedies of hardship in Art. 6.2.3 PICC under CISG, CLAIMANT is obliged to timely request renegotiations with indication of the grounds on which it is based [*Art. 6.2.3 (1) PICC*] but without withholding performances [*Art. 6.2.3 (2) PICC*]. In this case, on 19 January 2018, after being told the tariff applied to semen as well on 19 January 2018 [*PO2, ¶26*], albeit the fact that the scope of the tariff imposed, which is agricultural goods, does not cover (horse) frozen semen [*Annex 1, AoA*] and the Parties have not anticipated the import duty would apply to it [*Cl. Ex. 8; Resp. Ex. 4; PO2, ¶26*], CLAIMANT connected with Mr. Shoemaker, the representative of RESPONDENT, for a renegotiation of the contract, without undue delay, stating the underlying reason that 30% additional tariff made the contract much more burdensome to perform [*Cl. Ex. 7*]. Moreover, CLAIMANT did not withhold its performance on delivering goods and finally authorised the final shipment on time [*Cl. Ex. 8; Resp. Ex. 4*]. Thus, CLAIMANT has fulfilled all statutory requirements relating to renegotiations pursuant to Art. 6.2.3 PICC.

c. Arbitral Tribunal should order RESPONDENT to pay for CLAIMANT prepaid tariff

113. Because the adjustment of the contract is compatible under Art. 79 (5) [*supra ¶¶108-111*] the Tribunal has been empowered to adjust the contract [*supra ¶¶18-52*], and CLAIMANT has performed all the requirements prior to resorting to the Tribunal [*Art. 1.11 PICC*] in pursuit of the contractual adaptation [*supra ¶112*], Arbitral Tribunal should accordingly adapt the

contract [*Art. 6.2.3 PICC*]. Even if the Tribunal reckons it is inappropriate to adapt the contract by invoking Art. 6.2.3 PICC under Art. 79 (5) CISG, Art. 79 (5) CISG may be relied upon to open up the possibility for Arbitral Tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances [*CISG-AC Op. 7, ¶40*]. Thus, the Tribunal should adapt the contract because RESPONDENT owed CLAIMANT 25% additional tariff (without 5% profit margin) on the basis of the Parties' risk arrangement under the contract [*supra ¶¶103-106*].

114. In conclusion, CLAIMANT is entitled to the adapted price of US$ 1,250,000 under Clause 12 of the contract with Art. 79 (5) CISG.

CONCLUSION TO PART THREE

115. The Parties have agreed to derogate from Art. 79 CISG by replacing non-performance with a narrowed hardship in Clause 12 of the contract and deleting impediment requirements. In this case, the additional tariff falls in the scope of the modified hardship definition, additional risks associated with DDP terms are not assumed by CLAIMANT and the contractual adaptation is one of the available remedies under CISG, Arbitral Tribunal should accordingly order RESPONDENT to pay CLAIMANT for the US$ 1,250,000 adjusted price. In conclusion, CLAIMANT is entitled to the US$ 1,250,000 payment under Clause 12 of the contract with Art. 79 (5) CISG.

PRAYERS FOR RELIEF

For all the foregoing submissions the counsel for CLAIMANT respectfully requests Arbitral Tribunal to find that:

(1) Arbitral Tribunal has the jurisdictions and the powers under the arbitration agreement to adapt the contract, and the law of Mediterraneo governs the arbitration agreement and its interpretation **(PART ONE)**;

(2) CLAIMANT is entitled to submit the evidence from the other arbitration proceedings **(PART TWO)**;

(3) CLAIMANT is entitled to the US$ 1,250,000 payment under Clause 12 of the contract with Art. 79 (5) CISG **(PART THREE)**.

(4) RESPONDENT bears the costs of the arbitration.

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose name are listed below and who signed this certificate.

Respectfully submitted on 6th December 2018 in Xi'an, China.

JIACHEN LIU

HUAIXUAN LIU

HUI NI

JIAWEN WANG

JIAYUAN YAO

GUOLONG CHEN