SOUTH CHINA NORMAL UNIVERSITY

SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR
31ST MARCH TO 7TH APRIL, 2019

MEMORANDUM FOR CLAIMANT

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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NUOQING ZHAO • LIN CEN • QIANHUI JIN • JINGJIE ZOU

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LIST OF ABBREVIATIONS

%	per cent
&	and
¶	Paragraph
AAA	American Arbitration Association
Art (s).	Art.(s)
Aug.	August
CISG	United Nations Convention on the International Sale of Goods
CISG-AC	CISG Advisory Council
Cl.	Claimant
CLOUT	Case Law On UNCITRAL Texts
Ex	Exhibit
IBA	The International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
Jan.	January
No.	Number(s)
P (p).	Pages
p.	page
Res.	Respondent
Sept.	September
U. S.	United States of America
UNICTRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus

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CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for The International Sale Of Goods
HKIAC Rules	Hong Kong International Arbitration Center Rules
IBA rules	*IBA Rules on the Taking of Evidence in International Arbitration*
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on international commercial arbitration
UNIDROIT	International Institute for The Unification of Private Law

SUMMARY OF FACTS

The CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company renowned for its horse care, breeding and riding/driving registered and located in Capital City, Mediterraneo.

The RESPONDENT, Black Beauty Equestrian (Black Beauty), a company located in Oceanside, Equatoriana, which is known as its incredibly triumphant broodmare lines.

2017	
21 March	RESPONDENT contacted CLAIMANT, inquiring about the availability of the sales of frozen semen from Nijinsky III for its newly started breeding program.
24 March	Phar Lap offered Black Beauty 100 doses of Nijinsky III`s frozen semen.
28 March	RESPONDENT accepted the general applicability of the general terms and conditions CLAIMANT offered but objecting to the choice of law and the forum selection clause and insisted on a delivery DDP.
31 March	With Black Beauty's insistence, Phar Lap accepted the delivery DDP only against a moderate price increase but refused to take over any further risks associated with the changed delivery terms and proposed that hardship clauses should be included in the contract.
10 April	RESPONDENT`s proposed that an

	arbitration agreement should be governed by the law of the place of arbitration and not by the law of the contract in Mr. Antley`s latest draft.
11 April	CLAIMANT had changed the suggested place of arbitration but not objected to RESPONDENT'S proposal that the law of the place of arbitration should govern the arbitration agreement under the rules of the HKIAC.
12 April	The car accident happened to the agents of the Parties, Mr. Napravnik and Mr. Antley, both of them were severely injured and unable to sign the final contract but they successfully reached some oral consent.
6 May	CLAIMANT and RESPONDENT signed the FROZEN SEMEN SALES AGREEMENT.
20 May	First delivery of 25 doses by CLAIMANT.
3 October	Second delivery of 25 doses by CLAIMANT.
19 December	The government of Equotoriana made an announcement to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as retaliation.
2018	
20 January	E-mail from CLAIMANT to RESPONDENT informed RESPONDENT to find a solution in adjusting the price of the frozen semen in light of Equotoriana's new policy on tariffs

	before the third delivery.
21 January	Telephone call from RESPONDENT to CLAIMANT informed with a certain statement that a solution would be found through negotiation after the third delivery.
23 January	CLAIMANT complied with its delivery obligation and completed the third delivery of 50 doses after the statement by RESPONDENT.
12 February	RESONDENT's CEO stopped the negotiations and refused to pay any additional amount for the tariffs in a meeting.
31 July	CLAIMANT submitted a request for arbitratioin to Hong Kong International Arbitration Center.
2 October	CLAIMANT submitted to the arbitral tribunal the materials from the other arbitration relevant to this case.

SUMMARY OF ARGUMENT

APPLICABLE LAW TO ARBITRATION AGREEMENT

1. According to Parties` express intent, the Parties did choose the law of Mediterraneo to govern the Arbitration Agreement. And according to the generally-accepted choice-of-law rules, even if the tribunal found that Parties did not choose the law applicable to the Arbitration Agreement, the Mediterraneo Law shall still be the governing law of Arbitration Agreement.

JURISDICTION TO ADAPT THE CONTRACT

2. CLAIMANT submits that the adaptation of the contract falls into the scope of Arbitration Agreement, which could be supported by broad interpretation of Arbitration Agreement, through the way that, the interpretation of words of Arbitration Agreement as well as the determination of intention of parties.

ADMISSIBILITY OF THE EVIDENCE

3. CLAIMANT is entitled to submit the contested evidence even under the assumption that such evidence is obtained through an illegal hack. Since the Tribunal has discretion to determine the admissibility of the evidence from other arbitration proceedings and order its disclosure while the IBA Rules do not apply to this arbitration. As well the evidence from the other arbitration proceedings is sufficiently material and relevant to a substantially and procedurally fair outcome, and may serve as a strong reference and will be used in a proper way to retain its confidentiality.

ENTITLEMENT TO PAYMENT

4. CLAIMANT is entitled to the payment of US$ 1,250,000 no matter under clause 12 of the contract or under the CISG. Because a mechanism of adapting the contract by the Arbitral Tribunal was established between the Parties, CLAIMANT is entitled to the full payment of US$ 1,250,000 when confronted with hardship circumstance.

ARGUMENT

I. THIS TRIBUNAL HAS THE JURISDICTION AND THE POWERS TO ADAPT THE CONTRACT AS THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

5. It is a "fundamental principle" of arbitration that "arbitrators have the power to rule on their own jurisdiction" *[Gaillard, Emmanuel & Savage, John, ¶ 416, 212]*. This precept of *Kompetenz-Kompetenz* is borne out by the applicable arbitration rules in the present case *[Art. 19 HKIAC Rules]*. Moreover, the Tribunal has the authority to determine the scope of the arbitration clause *[Art. 19(1) HKIAC Rules]*. Accordingly, the Tribunal has the authority to rule on RESPONDENT` s objections to jurisdiction.

6. For the purpose of this Tribunal to settle down the dispute due to the price changes caused by the new policy, CLAIMANT respectfully requests the Tribunal to find that, first of all, the law of Mediterraneo governs the arbitration agreement and its interpretation **(A)**. Further, the adaptation of the contract falls into the scope of *"dispute arising out of this contract"* under the interpretation of Arbitration Agreement provided by the law of Mediterraneo **(B)**. To uphold the Arbitration Agreement, this Tribunal should exercise the jurisdiction to adapt the contract **(C)**.

A. The law of Mediterraneo governs the arbitration agreement and its interpretation.

7. CLAIMANT submit that Doctrine of Separability merely refers to the separations of validity and the governing law of the contract is not necessarily in applicable to the arbitration agreement **(1)**, in the present case, the parties expressly agreed on the application of the law of Mediterraneo to Arbitration Agreement **(2)**. Even in the absence of an express choice-of-law governing Arbitration Agreement, the governing law of underlying contract shall be regarded as an implied choice of the law applicable to the Arbitration Agreement **(3)**. Hence, the law of Mediterraneo governs the arbitration agreement and its interpretation.

1. Doctrine of Separability merely refers to the separations of validity and the governing law of the contract is not necessarily inapplicable to the arbitration

agreement.

8. Doctrine of Separability raised by RESPONDENT is a general principle which is widely accepted. However, Doctrine of Separability merely refers to the separations of validity **(a)**. The governing law of the contract is not necessarily inapplicable to the arbitration agreement **(b)**.

a. Doctrine of Separability merely refers to the separations of validity.

9. The meaning of Doctrine of Separability is that the invalidity of the contract does not necessarily invalidate their arbitration agreement *[Baku St. U., 98]*. In other words, in the situation where a dispute arises concerning the initial validity or continued existence of the main contract, the arbitration clause, being independent, continues to be valid and binding on the parties even if the main contract is void *[Rosen, 607]*.

10. Art. 19.2 of HKIAC rules sates the provision about separability of arbitration agreement, "*an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract*" .However, the following sentence is "*A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration clause.*" Art. 16(1) of the Model Law sates similar provision. They indicate that the Doctrine of Separability is to make sure that dispute can be settled through arbitration even under the circumstances that other parts of contract is invalid. Hence,Doctrine of Separability merely refers to the separations of validity.

b. The governing law of the contract is not necessarily inapplicable to the arbitration agreement.

11. RESPONDENT wrongly applied the doctrine of separability to reason that the law of the matrix contract "*cannot be interpreted as an implicit choice for the arbitration agreement" [PRO 31]*. The separability presumption never categorically exclude the possibility to apply the law of the contract to the law of the arbitration agreement. The separability only extends to the validity of the arbitration agreement but no necessarily leads to the different choice of law of the contract and the arbitration agreement.

12. As Ian Glick QC and V. Niranjan conclude, "there is no rule that the arbitration agreement must be governed by the same law which applies to the rest of the contract or that it cannot be *[Ian Glick QC & V. Niranjan, 137]*." Therefore, CLAIMANT holds that the law of the matrix contract, i.e. the law of Mediterraneo, is not necessarily, as RESPONDENT stated, inapplicable to the arbitration agreement.

2. The Parties expressly chose the law of Mediterraneo to govern the Arbitration Agreement.

13. Party autonomy is a guiding principle in international commercial arbitration *[Redfern 6-03]* and dictates that parties to a contract are free to choose the law that shall be applied in dispute arising between them *[Lew, Mistelis & Kröll 124]*. In the present case, the parties had already chosen the law of Mediterraneo to govern the Arbitration Agreement.

14. The FROZEN SEMEN SALES AGREEMENT signed by parties stated that 'This Sales Agreement shall be governed by the law of Mediterraneo *[CL. Ex5]*. The law of Meditterraneo shall apply to the whole Sales Agreement, including the arbitration agreement **(a)**. Moreover, The comparison with the Model Clause of HKIAC rules also indicates that the parties intent to choose the law of Mediterraneo to govern the Arbitration Agreement since the Sales Agreement contains the Arbitration agreement. **(b)**.

a. The law of Meditterraneo shall apply to the whole Sales Agreement, including the arbitration agreement.

15. The arbitration agreement shall be viewed as an integral clause of the Sales Agreement. The acceptance of the Sales Agreement entails acceptance of the clause *[Derains 16 – 17]*. Arbitration agreements are typically never concluded in a vacuum and are usually part of a substantive contract *[BCY v. BCZ]*. As the arbitration clause is considered to be simply one of the rights and obligations assumed by the parties in the agreement, it could be seen as an express choice that the arbitration clause also be governed by the law which governs the contract *[Lew 464]*.

16. As a court held, where the proper law of the contract is expressly chosen by the parties, as

in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract *[National Thermal Power Corp v. Singer Co]*.

17. In the case at hand, the capitalized letters "S" and "A" in Clause 14 of the Sales Agreement indicates that the "Sales Agreement" therein is a specific term which equals to the "FROZEN SEMEN SALES AGREEMENT", rather than the sole part of the underlying contract *[Ex. C5]*. Moreover, after negotiations, the Parties reached an agreement in which clause 15 read "The parties hereto understand and agree to abide by the terms and conditions as set forth in this Agreement." *[Ex. C5]*. As the last sentence plays a role of conclusion *[Bellanca]*, and the words "this agreement" indicates the consistency of the arbitration clause and the Sales Agreement *[Rosen, 599]*.
18. Thus, Clause 14 of the Sales Agreement clearly means that all the clauses contained in the agreement shall be governed by the law of Meditterraneo, definitely including Clause 15 , which is an arbitration clause. The law of Meditterraneo should cover the whole Sales Agreement, including arbitration clause.

b. The comparison with the Model Clause of HKIAC rules also indicates that the parties intent to choose the law of Mediterraneo to govern the Arbitration Agreement since the Sales Agreement contains the Arbitration agreement.

19. Confronted with the question about arbitration clause, tribunals and scholars frequently compare the arbitration clause with the model clauses of the arbitral institution to infer the parties` intention *[ICC AWARD NO.4472; HOCHBAUM, 65]*.
20. The Parties` intention to choose the law of Mediterraneo to govern the Sales Agreement as well as the Arbitration agreement becomes apparent when the Suggested Clause is compared to the Parties` Dispute Resolution Clause in the sales agreement.

Suggested Clauses **【2013 HKIAC ADMINISTERED ARBITRATION RULES】**	**Dispute Resolution Clause** *[EX. C 5]*

Any dispute ..... 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 of Arbitration is submitted.	Any dispute ..... 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 of Arbitration is submitted.
(1) The law of this arbitration clause shall be ... (Hong Kong law).	
(2) The seat of arbitration shall be .... (Hong Kong).	The seat of arbitration shall be Vindobona, Danubia.
(3) The number of arbitrators shall be ... (one or three).	The number of arbitrators shall be three.
(4) The arbitration proceedings shall be conducted in ... (insert language).	The arbitration proceedings shall be conducted in English.

21. The comparison of the two clauses demonstrates that the Parties` Dispute Resolution Clause was undeniably based on the Model Clause. In regard to this, what was filled in or deleted **speaks** to the intention behind the agreement. The modification essentially relates to a significant point: **The choice of law governing the Arbitration Clause was deleted.**
22. The parties could not have been unaware of the demonstration of such Suggest Clause provided by HKIAC Rules. It is also recognized by RESPONDENT that it is one of the distinguishing features of the selected institutions that their model clause contains an explicit reference to the law governing the arbitration agreement *[PRO 31]*. Furthermore, when taking the choice of law governing the Sales Agreement by parties into account, the conduct of deliberate deletion revealed parties` explicit intention to choose the law of Mediterraneo to govern the Sales Agreement as well as the Arbitration agreement. Since the arbitration agreement should be deemed as a whole altogether with the underlying contract as stated above, there is no need to write an additional article about the applicable law to the arbitration agreement which has been already stated in Clause 14 of

the Sales Agreement. Moreover, RESPONDENT had never raised any objection or shown their intent to object the applicable law to the arbitration agreement.

23. To conclude, the Parties expressly agreed on the law of Mediterraneo as the applicable law to the arbitration agreement.

3. Even if the tribunal find that the parties did not expressly choose the law governing the arbitration agreement, the governing law of the matrix contract shall be regarded as an implied choice of law to govern the arbitration agreement.

24. Even if the tribunal found that the provision "*This Sales Agreement shall be governed by the law of Mediterraneo*" is not an express choice-of-law governing Arbitration Agreement, such provision shall be regarded as an implied choice of the law applicable to the Arbitration Agreement.

25. In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion.

26. In a recent case *BCY v. BCZ* occurred in 2016, the Sale and Purchase Agreement provided for New York law as the governing law of underlying contact, the seat of arbitration is Singapore, and there is no provision about the governing law of arbitration agreement. The Singapore High Court emphasized that the governing law of the main contract is a "*strong indicator*" of the governing law of the arbitration agreement. In particular, where an arbitration agreement is a clause constituting part of a main contract (as opposed to a free-standing agreement), it is reasonable to assume that the parties intend their entire relationship to be governed by the same legal system – if the intention was otherwise it is not unreasonable to expect them to specifically provide so. Further, the Court noted that "*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 negate the*

arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes" *[BCY v. BCZ , 33]*. Obviously, the law of Mediterraneo would not negate the arbitration agreement in the present case.

27. Additionally, in the *Case Arsanovia Ltd v. Cruz City 1 Mauritius Holdings*, which is highly similar to the present case, there are no clear terms to stipulate the law governing the arbitration agreement in Sales Agreement, the parties merely selected Indian law to govern the substantive contract and London as the seat of arbitration. Then, the determination of the law applicable to the arbitration agreement became a controversy. Under such circumstances, the authority held that the choice-of-law clause in underlying contract impliedly chose the law governing arbitration agreement despite London seat.
28. In conclusion, the Arbitral Tribunal is respectfully requested to follow the above examples. In this case, the applicable law of the substantive contract was expressly chosen by the parties, i.e. the law of Mediterraneo. Moreover, there is no any explicit term or intention indicating that the parties object to choose the law of Mediterraneo to govern the Arbitration Agreement. Therefore, the choice of law governing substantive contract shall be regarded as an implied choice of the law applicable to the Arbitration Agreement.

B. The adaptation of the contract falls into the scope of *"dispute arising out of this contract"* under the interpretation of Arbitration Agreement provided by the law of Mediterraneo.

29. As is proved above, the law of Mediterraneo governs the arbitration agreement and its interpretation. As a matter of fact, the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements. *[PRO. 7]*
30. Contrary to RESPONDENT`s allegations, CLAIMANT submits that the adaptation of the contract falls into the scope of Arbitration Agreement. When interpreting Arbitration Agreement, the ultimate touchstone is the language of the arbitration clause and the intentions of the parties *[Born 1374]*. CLAIMANT`s submission could be supported by broad interpretation of Arbitration Agreement, through the way that, the interpretation of

words of Arbitration Agreement **(1)** as well the determination of intention of parties **(2).**

1. The words of the Arbitration Agreement indicate the scope of *"dispute"* including the adaptation of the contract.

31. There are a limited number of fairly standard formula used in arbitration agreements to describe the scope of such provisions. Judicial and arbitral decisions interpreting particular phrases or language can still be relevant, and sometimes decisive, in subsequently construing other agreements *[Born 1345, 1347]*.

a. The interpretation of "<u>any disputes</u>".

32. Various authorities have interpreted the "any disputes" formula broadly, usually concluding that they extend to all disputes having any plausible factual or legal relation to the parties` agreement or dealings. *[Bechtel Do Brasil Construcoes LTDA v. UEG Araucaria LTDA]*

33. Prominently, as an awards read, "an agreement to arbitrate 'any dispute` without strong limiting or excepting language immediately following it logically includes not only the dispute, but the consequences naturally flowing from it – **here, the amount of additional compensation**".*[Mgt & Tech. Consultants SA v. Parsons-Jurden Int`l Corp.]*. Summarily, in the present case, CLAIMANT is seeking for an additional compensation which ineluctably require the adaptation of the contract by tribunal.

34. In conclusion, the Arbitral Tribunal is requested to follow the examples of the above cases. When disputes goes beyond the requirements of a strict literal interpretation, it is logical for arbitrators to put the adaptation of contract into the dispute, since the new-circumstance had occurred, which leads to a dispute between the parties about a new claim- whether CLAIMANT is entitled to the additional payment out of the original contract, which indicates a direct result of the necessity for adaptation of the contract. Consequently, the adaptation of the contract is the dispute referred in Arbitration Agreement.

b. The interpretation of "<u>arising out of</u>".

35. Authorities have widely held that "arising out of" language ordinarily extended to

disputes, controversies, or claims which relate to the parties` contractual dealings and obligations *[The Eschersheim; Ulysses Compania Naviera SA v. Huntingdon Petroleum Serv.]*.

36. Additionally, several courts repeatedly concluded that the "relating to" formula encompasses non-contractual claims, as well as contractual claims and "that it reaches any disputes that 'touch` or have a factual relationship to the parties` contract." *[Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd; Tigra Tech. v. Techsport Ltd]*.
37. Importantly, as one court remarked, these linguistic differences are "largely semantic," and there is "no substantive difference in the present context between the phrases 'relating to,` 'in connection with` or 'arising from.`" *[Roby v. Corp. of Lloyd`s]* Thus, "arising out of" shall be regarded same to "*relating to*".
38. In conclusion, back to this case, the adaptation of the contract obviously relates to the parties` contractual dealings and obligations which "touch" the parties` contract. Hence, the adaptation of the contract shall fall into the scope of Arbitration Agreement.

2. The intention of the parties indicates the scope of *"dispute"* includes the adaptation of the contract.

39. Invariably, where an issue arises concerning the validity, existence or scope of the arbitration agreement, the court or tribunal will have to interpret the parties' intention *[Comparative International Commercial Arbitration. ¶7-59]*. The parties desire effective means of resolving any disputes between them while enter into an arbitration agreement **(a)**. The Parties` discussion indicates that they intended to put the adaptation into the scope of the Arbitration Agreement according to Art. 8 CISG **(b)**.

a. The parties desire for effective means of resolving any dispute between them while entering into an arbitration agreement.

40. Presumptions regarding the parties` intent play an important and often decisive role in determining the meaning of such agreements. These presumptions seek to identify the reasonable, good faith intentions of commercially reasonable parties and to further the purposes of international arbitration agreements and contemporary national arbitration

legislation. *[Born 1325]*. Exactly, while interpreting the arbitration agreement, genuine commercial intentions of parties cannot be ignored.

41. Undeniably, the parties desire for effective means of resolving any dispute between themselves while entering into an arbitration agreement. Thus, it is reasonable to find that the concept of dispute clearly refers to and includes any conflict or difference between the parties on a particular matter that could not be solved by mutual agreement. *[D.J. Sutton, J. Gill & M. Gearing, Russell On Arbitration, 10–11]*
42. A series of authorities have considered disputes involving "significant aspects of [parties` contractual] relationship" *[Morgan v. Smith Barney, Harris Upham & Co.]*, "derive from the [contractual] relationship," *[Kroll v. Doctor`s Assocs., Inc.]* , have "a sufficiently close connection [to] the transaction," *[Woolf v. Collis Removal Serv.]*. These formulae all usefully capture the core concept that the focus of analysis should be on the underlying commercial setting as well as on the parties` presumed desire for efficient, centralized and fair proceedings.
43. In this case at hand, the request of adaptation of contract results from the fact that CLAIMANT paid the additional 30% tariff while delivering the goods in the contract. Thus, it is undeniable that the adaption of contract has "a sufficiently close connection to the transaction" and "derive from the contractual relationship". Hence, following the above cases, the adaption of contract shall fell into the scope of arbitration agreement.
44. What`s more, a court expressly stated that the adaptation of contract falls within the scope of "Any dispute" stated in the arbitration clause.*[SpA Romea v. Gottfried Ortner GmbH and Co. KG, Corte di Cassazione]*.
45. All authorities in above cases made such interpretation of arbitration agreement based on the inference of the parties` original commercial expectation as well as the objective of solving international dispute in good faith while they enter into an arbitration agreement. As a tribunal held "it would be illogical to suppose that the parties would have wanted a 'split` jurisdiction." *[Germany No. 15, Etablissement A v. Lawyer B]*, CLAMANT and RESPONDENT intent to seek a means of resolving any disputes may arise between

themselves while finalizing the Arbitration Agreement amicably, thus, the tribunal shall conclude the interpretation that the adaption fell into the scope of Arbitration Agreement.

b. The Parties` discussion indicates that they intended to put the adaptation into the scope of the Arbitration Agreement according to Art. 8 CISG.

46. Under the governing of law of Mediterraneo, there is consistent jurisprudence in Mediterraneo that the CISG applies to the interpretation of the arbitration clause contained in such contracts *[PO1, III No.4]*. Such interpretation is conducted in accordance with Art. 8 CISG *[Kröll/Mistelis/Viscasillas/Zuppi, Art. 8 CISG, ¶ 1]*. Art.8 (1) CISG stipulates that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was ", it provides for a subjective interpretation of Arbitration Agreement.

47. In the case at hand, Mr. Antley, the negotiator of the contract on RESPONDENT`s side had a long discussion with Julie Napravnik who is on behalf CLAIMANT. During their discussion, CLAIMANT mentioned the matters about the adaptation of the contract, Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree *[EX. C8]*. This clearly demonstrates that RESPONDENT intended to request arbitrators to adapt the contract. Moreover, there is no further express statement or objection about the adaptation of contract by the parties. Thus, CLAIMANT submits that the adaptation of contract falls into the scope of "any dispute" stated in the Arbitration Agreement which RESPONDENT knew and could not have been unaware.

48. To sum up, any reasonable person would accord the discussions between the parties, understand the Parties` such intention. Therefore, the Arbitration Agreement shall be interpreted as that the adaptation of contract falls into its scope.

C. To uphold the Arbitration Agreement, this Tribunal should exercise jurisdiction to adapt the contract.

49. Summarizing, as prescribed above, first placing the law of Mediterraneo governs the arbitration agreement and its interpretation, and then the adaptation of the contract falls

into the scope of arbitration agreement, the only logical interpretation of the Arbitration Clause is that the parties intended to bring any dispute, including the adaptation of contract before this Arbitral Tribunal.

50. In accordance with general principles, the arbitration agreement forms the basis of this Tribunal`s jurisdiction. *[Gaillard, E., Goldman 199; Redfern 6-7].* Therefore, it is indisputable for tribunal to lead the conclusion that the tribunal has the jurisdiction and powers to adapt the contract under the arbitration agreement.

CONCLUSION OF THE FIRST ISSUE

Parties` autonomy guides the choice-of-law to arbitration agreement. Fristly, according to Parties` express intent, they did choose the law of Mediterraneo to govern the Arbitration Agreement. And even if the tribunal found that Parties did not expressly choose the law applicable to the Arbitration Agreement, the law of Mediterraneo is an implied choice of law of the Arbitration Agreement. Secondly, the adaptation of the contract falls into the scope of Arbitration Agreement, under broad interpretation of Arbitration Agreement and the interpretation of words of Arbitration Agreement as well as the intention of parties. Therefore, this tribunal has jurisdiction and powers to adapt the contract.

II. CLAIMANT SHALL BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

51. For the purpose to support CLAIMANT`s entitlement to submit the evidence from the other arbitration proceeding, CLAIMANT submit the following aspects. Firstly, the Tribunal has discretion to determine the admissibility of the evidence and is not bound by any strict rules of evidence **(A)**. Secondly, the contested evidence is necessary for the present arbitration **(B)**. Thirdly, CLAIMANT is entitled to submit the contested evidence even under the assumption that such evidence was obtained through a breach of confidentiality **(C)**. Finally, CLAIMANT is entitled to submit the contested evidence even under the assumption that such evidence obtained through an illegal hack **(D)**.

A. The Tribunal has discretion to determine the admissibility of the evidence and is not

bound by any strict rules of evidence.

52. According to the common consent of the Parties and under HKIAC Arbitration Rules, the IBA Rules do not apply to this arbitration **(1)**. Under the applicable HKIAC Arbitration Rules, the Tribunal has discretion to determine the admissibility of the evidence, which is in line with UNCITRAL Model Law **(2)**.

1. The IBA Rules do not apply to this arbitration.

53. CLAIMANT may urge the Tribunal to take reference from the IBA Rules. Party autonomy is the fundamental cornerstone of international commercial arbitration [*Redfern/Hunter 365*]. In this case, the parties did not include the IBA Rules in any part of the Contract. Parties wishing to adopt the IBA Rules should provide for this in their arbitration agreement since the IBA Rules cannot have any direct binding force upon the tribunal without the parties' consent [*Lew 560; Waincymer 757*]. Thus, that the Parties have not chosen nor negotiated to choose the IBA Rules in their arbitration agreement suggests that they never had wished the IBA Rules to apply. The IBA Rules do not bind the Tribunal as the parties did not adopt them.

54. Furthermore, the Tribunal is not bound to apply other rules of evidence apart from the HKIAC Rules, the governing arbitration law chosen by the Parties. In addition, nothing in the HKIAC Rules or requires or inclines the Tribunal to apply the IBA Rules. Hence, the Tribunal is not bound to apply the IBA Rules.

2. According to UNCITRAL Model Law and HKIAC Rules, the Tribunal has broad discretion to determine the admissibility of the evidence and is not bound by any strict rules of evidence.

55. Under the Art. 22.2 of HKIAC Rules, the arbitral tribunal is not bound by any strict rules of evidence and enjoys broad discretion to determine the admissibility, relevance, materiality, and weight of any evidence. *[A Guide [9.153]]*.

56. As Danubia is the seat of arbitration, the UNCITRAL Model Law governs the proceedings as *lex loci arbitri [PO1]*. Similarly, Art. 19(2) UNCITRAL Model Law provides that "the power conferred upon the arbitral tribunal includes the power to

determine the admissibility, relevance, materiality and weight of any evidence." The Model Law's drafting history underscores the arbitrators' broad discretion over issues of the admissibility and relevance of evidence: "In making rulings on the evidence, arbitrators should enjoy the greatest possible freedom and they are therefore freed from having to observe the strict legal rules of evidence." *[UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules, for Optional Use in Ad Hoc Arbitration Relating to International Trade, Eighth Session, U.N. Doc. A/CN.9/97, VI UNCITRAL Y.B. 163, 176 (1975).]*

57. Therefore, the Tribunal has discretion to determine the admissibility of the evidence and is not bound by any strict rules of evidence.

B. The contested evidence is necessary for the present arbitration.

58. The contested evidence is necessary for the present arbitration to pursue a fair outcome. From the substantive perspective, the contested evidence is sufficiently material and relevant in consideration of its similarity and relevance to the present case **(1)**. From the procedural perspective, the admittance of the contested evidence safeguards CLAIMANT`s procedural fairness and would not prejudice RESPONDENT`s procedural fairness and finally ensure a fair arbitration **(2)**.

1. The contested evidence is sufficiently material and relevant to the outcome of the arbitration from a substantive perspective.

a. Critical substantive facts evidenced in the other arbitration proceedings are similar to this case.

59. CLAIMANT respectfully requests the Tribunal to find that the evidence from other arbitration RESPONDENT relies on is admissible, in which the critical substantive facts are highly similar to the present case.

60. Firstly, both cases occurred under an unforeseen imposition of additional tariff *[PRO 49]*. Secondly, both parties had claimed an adaptation of the contact in light of the changed circumstances *[PRO 49]*. The former similar point is one of the key conditions for the Tribunal to value the necessity to adapt the contract in the case. And the latter point well

indicates that an adaptation under the changed circumstance is acceptable to RESPONDENT.

61. CLAIMANT had learned from another arbitration that RESPONDENT had accepted the request of adaptation. It is highly contradictory that in that 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 adaptation when it is to RESPONDENT`s detriment *[PRO 49]*.
62. RESPONDENT`s inconsistency regarding the adaptation of contract under the circumstance of an unpredictable imposition of additional tariff gives rise to justifiable doubt of RESPONDENT`s vigorous objection to adapt the contract in this case. Should the Tribunal not admit this significant evidence from the other relevant arbitration, the outcome of this arbitration might be put at stake of the absence of an important reference to RESPONDENT's intention.
63. RESPONDENT may argue that the evidence from the other arbitration is based on a breach of confidentiality. Confidentiality, although implicitly read into the arbitral proceedings, is not and could not be absolute. Disclosure "reasonably necessary for the protection of the legitimate interests of an arbitrating party" is deemed as an exception to the confidentiality of the arbitration *[Ali Shipping v Shipyard Trogir]*.
64. In this case, CLAIMANT is entitled to the payment resulting from an adaptation of the price. And the evidence from the other arbitration manifestly indicates RESPONDENT`s positive attitude to the adaptation of contract under the similar circumstance in this case. To protect CLAIMANT`s legal interest from obtaining the deserved payment, the disclosure of the relevant evidence from other arbitration is therefore necessary.

b. The contested evidence shall be admitted for the necessity to present a complete picture of RESPONDENT`s manifestation of intention

65. Where cases were being advanced in proceedings, it was for the interest of justice to disclose the relevant evidence from the previous proceedings so that the Tribunal would not be, or could not potentially be, misled *[Emmott v. MWP Ltd,Court of Appeal]*. A

complete picture of RESPONDENT`s manifestation of intention towards the adaptation of the contract under the changed circumstance cannot be guaranteed if the contested evidences were not disclosed to the Tribunal.

66. RESPONDENT`s objection to the admissibility of the contested evidence is presenting the Tribunal with a misleading or inaccurate picture. Disclosure is in the interests of justice and reasonably necessary to enable CLAIMANT to protect his legitimate rights, and caused no prejudice to RESPONDENT *[Emmott v. MWP Ltd,Court of Appeal]*.

2. The Tribunal must consider the relevant evidence from the other arbitration proceedings to safeguard the procedural fairness under HKIAC Rules and UNCITRAL Model Law.

67. Art. 13.1 HKIAC Rules provided that the tribunal should adopt suitable procedures that afford the parties a reasonable opportunity to present their case. 'A reasonable opportunity to present a case' is one of the two bedrock principles of arbitration. The tribunal cannot derogate from these principles when fixing the procedures for the arbitration. Art. 13.1 HKIAC Rules is the extensions of the principles in Art. 18 of UNCITRAL Model Law demanding that "each party shall be given a full opportunity of presenting his case" *[A Guide [9.12]]*, which has been described as a key element of the "Magna Carta of Arbitral Procedure" *[Howard M. Holtzmann /Joseph]*.

a. CLAIMANT`s right to procedural fairness would be violated if the Tribunal disregards the relevant evidence from the other arbitration.

68. A fundamental aspect of procedural fairness is the right to be heard. Indeed, this mandatory right is so important that it is guaranteed in all arbitral rules *[Petrochilos ¶4.85; Waincymer ¶12.2]*, including Art. 13.1 HKIAC Rules and Art. 18 UNCITRAL Model Law which provides that each party must be granted a reasonable opportunity to fully state its case. This right encompasses that a party may introduce relevant evidence *[MERKIN ¶ 15.24]*. Should the Tribunal disregard the relevant evidence from the other arbitration proceedings, CLAIMANT will be unfairly deprived of a fair opportunity to present its case to pursue its legal right and interest. CLAIMANT`s due process rights

would be violated.

69. The fundamental right to be heard of a party in a dispute therefore guarantees the parties a variety of specific rights such as inter alia the right to produce all evidence they may deem necessary for the resolution of their dispute *[Jaksic 239]*. This is confirmed by Art. 18 UNCITRAL Model Law which means inter alia right to all information in submissions *[Matti S/Santtu 187]*. The right to evidence can only be denied in case the evidence offered is not admissible, suitable or relevant *[Jaksic 239]*.

70. As outlined above, the contested evidence is of great relevance and necessity to the interest of CLAIMANT in the present arbitration proceedings. The contested evidence is crucial for proving RESPONDENT`s understanding of such a circumstance and how RESPONDENT would react under the similar circumstances to that with CLAIMANT. Hence, no reason justifies rejecting CLAIMANT`s evidence for it to fully present its case. Doing so amounts to a violation of its right to be heard. The mandatory nature of this right has been consistently upheld by courts as being so foundational that parties may not derogate from them *[Digest on the case of UNCITRAL Model Law 97]*.

b. On the other hand, RESPONDENT`s right to procedural fairness would not be prejudiced if the Tribunal considers the relevant evidence from the other arbitration.

71. Procedural fairness also requires that a party be informed of and permitted to respond to evidence and argument of the opposing party or parties *[Gary Born 26]*. The parties` right to present the cases and opportunity to be heard include the presenting evidence and examining witnesses as well as challenging the evidence presented by the other party *[Matti S/Santtu 140]*.

72. While every party shall be given the opportunity to understand, test and rebut its opponent's case in the arbitration proceeding, the Tribunal can allow for RESPONDENT to challenge the contested evidence. This adequately preserves RESPONDENT`s due process rights since RESPONDENT can still present its case fully. The Tribunal can further evaluate the evidence by assessing its internal consistency and the reasonableness

of his opinion.

73. RESPONDENT alleged in its letter that CLAIMANT did not reflect reality and are taken out of the context for the other arbitral proceedings involved. In that case, RESPONDENT should be inclined to present its subjective viewpoints on the evidence to safeguard its justice.

c. The Tribunal must consider the relevant evidence to ensure a fair arbitration.

74. Given the importance of the contested evidence, procedural fairness would be better served if it is considered. When both parties are allowed to present their subjective viewpoints, the Tribunal would be able to explore the issues from all angles and to reconstruct events more accurately. This aids the Tribunal in reaching a just and balanced determination *[Kurkela/Turunen 38]*.

75. The core of fair arbitration is the fairness of the procedure itself, including a reasonable opportunity to present one's case. The fairness of procedure is an intrinsic value, but it also has an instrumental dimension. If the procedure is fair, substantive right are more likely to be enforced *[Matti S/Santtu 185]* .

3. The contested evidence helps ensure the efficiency of the arbitration.

76. According to HKIAC Rules Art.13.5 the arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration. The contested evidence is beneficial to present a full picture which will help the Tribunal to save the time of fact-finding thus promote the efficiency in this case.

C. CLAIMANT is entitled to submit the contested evidence even under the assumption that such evidence had been obtained through a breach of confidentiality.

77. To retain the confidentiality of the arbitration, the contested evidence will be used in a proper and legitimate way under the discretion of the Tribunal **(1)**. In this way, the evidence may provide a helpful analysis which may serve as a strong reference **(2)**.

1. The Evidence will be used in a proper way to retain its confidentiality under the discretion of arbitral tribunal.

a. The tribunal may exercise its discretion to disclose the evidence from the other arbitration.

78. Most disclosure in international arbitration occurs entirely within the context of the arbitration, under the control of the arbitral tribunal, and only involving the parties to the arbitration (and not third parties). Disclosure between the parties is almost entirely subject to the parties' agreement and the arbitrators' discretion, implemented through procedural rules and orders *[Born 2321]*. Accordingly, the arbitral tribunal in this case may exercise its discretion to disclose the evidence from the other arbitration.

b. The contested evidence will be disclosed and used in a proper and legitimate way.

79. The disclosure of the evidence from the other arbitration will be confined in the award of the previous arbitration. In the other words, the "raw material" leading to the award will still be preserved and remain confidential. In the first place, the arbitral award identified the parties' respective rights and obligations, and in so far as directing one party to pay or do something to the other, it generated an independent obligation to perform. Second, awards were "at least potentially public documents" for the purposes of supervision or enforcement by the courts *[Hassneh Insurance v. Stewart J. Mew]* . Accordingly, awards could be set aside "in open court" let alone in a confidential commercial arbitration. Furthermore, another arbitration was also held in HKIAC thus the disclosure will also be limited in the same arbitral institution.

2. The contested evidence provides a helpful analysis which may serve as a strong reference.

80. Even though arbitral award has no role of precedent, it may serve as a helpful reference and authority *[Born 3824]*. For example, in one ICC award, the tribunal concluded that a prior award did not formally have res judicata effect, but that parts of the previous award represented an "authoritative ruling" on "certain matters that may be relevant" in the subsequent arbitration *[Final Award in ICC Case No. 6363, XVII]*. In another ICC arbitration, the tribunal similarly concluded that, although a prior award did not have

judicata effect, the prior award would be considered persuasive: "the arbitration tribunal is not bound by the X award; nor are the parties to these arbitration proceedings. There can be no issue *Estoppel*. Nonetheless, it provides a helpful analysis of the common factual background to this dispute. Accordingly, we have borne its findings and conclusions in mind, whilst taking care to reach our own conclusions on the materials submitted by these parties in these proceedings." *[Award in ICC Case No. 7061]*

81. The use of the prior award in the subsequent arbitration is in line with the prevailing principles of transparency as now evidence in the Transparency Rules of UNCITRAL. While commercial arbitration does not aspire to the same transparency found in investor-State arbitration, the latter's example has prompted a search for common standards. Most institutional arbitral rules provide for the option of disclosure or publication of awards with the consent of the parties. Arbitral centers seem to favor partial or entire publication of awards in redacted form, without seeking approval from the parties. It appears therefore that the current trend is to allow more transparency for arbitral awards, albeit without revealing the identity of the parties or other identifying details *[Ileana M. Smeureanu 93-94]*.

D. CLAIMANT is entitled to submit the contested evidence even under the assumption that such evidence had been obtained through an illegal hack.

82. Even if under the assumption that the evidence had been obtained through an illegal hack, CLAIMANT is entitled to submit such evidence. Firstly, there is no precise rule that prevents the admission of illegally obtained evidence **(1)**. Secondly, the Tribunal shall admit the evidence through a careful balancing of the interests involved **(2)**.

1. There is no precise rule that prevents the admission of illegally obtained evidence.

83. There is no clear view in public international law as to whether illegally obtained evidence should be accepted by a tribunal. *[W. Michael Reisman & Eric E. Freedman', American Journal of International Law 76 (1982): 737; Mojtaba Kazazi]* In the same way, neither the arbitration rules nor the law of arbitral seat provide for provisions on illegally obtained evidence in the present case.

84. Hence, given the broad discretion of the Tribunal and absence of binding rules in this case, there is no precise rule that prevents the admission of illegally obtained evidence.

2. The Tribunal shall admit the evidence through a careful balancing of the interests involved.

85. There is no doctrine affirming that illegally obtained evidence shall not be used as such. *[Bernard F. Meyer-Hauser,Martina Wirz]*. The decision whether to admit the evidence or not should be taken through a careful balancing of the interests involved *[Alejandro Valverde Belmonte v. CONI & AMA & UCI]*. As a matter of fact, in some international practices, such evidence was allowed by the authorities *[ICSID Case No. ARB/13/13; Corfu Channel Case; Metalist et al. v. FFU]*.

86. As a distinguished scholar stated, where documents are illegally obtained or otherwise stolen, arbitrators must determine, in accordance with mandatory applicable law and the parties' expectations, whether the documents should be admitted for consideration *[Giovannini& Mourre]*. In the present case, there is no precise rules prohibiting the submission of illegally obtained evidence. Moreover, CLAIMANT`s expectation of submitting evidence is to protect his legitimate interests.

87. However, RESPONDENT who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances in another arbitration. RESPONDENT deliberately concealed such truth.

88. In general, a piece of evidence that has been obtained by illegal means can be presented in the proceedings *[Georg E. Kodek]*. Only if the presentation of such evidence would lead to the violation of basic fundamental rights, is the respective piece of evidence inadmissible in proceedings *[Hans Fasching]*. The contested evidence in this case would not lead to the violation of basic fundamental rights of RESPONDENT.

89. The tribunal must balance the interest in protecting the rights infringed by obtaining the evidence against the interest in establishing the truth: where the latter outweighs the first, the court may admit even an illegally obtained piece of evidence *[Berger/Kellerhals, ¶*

1207]. In the case at hand, an illegal hack may infringe privacy or confidentiality to some extent. Nevertheless, as stated above, such evidence will be disclosed and used in a proper and legitimate way. On the other hand, to settle the present dispute, it is necessary for tribunal to find it unreasonable for RESPONDENT to object to the adaptation of the contract. Moreover, such a large amount of remuneration is significant for a company in financial difficulty. Hence, the refusal to admit such evidence may lead to the inference that facts detrimental to the party are being deliberately concealed, the consequence may thus be more detrimental than disclosing the truth.

90. To conclude, taking all factors into account, the tribunal shall admit the contested evidence.

CONCLUSION OF THE SECOND ISSUE：

According to the common consent of the Parties, the IBA Rules do not apply to this arbitration and which is governed by HKIAC Arbitration Rules, providing that the Tribunal has discretion to determine the admissibility of the evidence. In this case, evidence from the other arbitration is sufficiently material and relevant to a fair outcome both substantively and procedurally. Furthermore, the evidence may serve as a strong reference in a legitimate way to retain its confidentiality. Finally, CLAIMANT is entitled to submit the contested evidence even under the assumption that such it is obtained through an illegal hack and the Tribunal should admit it in the consideration of the interest balancing.

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT AND CISG.

91. CLAIMANT submits that on the one hand, CLAIMANT is entitled to the payment resulting from an adaptation of the price under clause 12 of the contract **(A)**. And on the other, is entitled to the payment resulting from an adaptation of the price under the CISG **(B)**. Since CLAIMANT is entitled to the payment, CLAIMANT further submits that it is entitled to the full payment of US$ 1,250,000 **(C)**.

A. CLAIMANT is entitled to the payment resulting from an adaptation of the price under clause 12 of the contract.

92. CLAIMANT respectfully requests the Tribunal to find that the imposition of tariff of 30 percent by Equatorianian government constituted hardship under clause 12 of the Sales Agreement. In the present case, the new tariff of 30 percent came as a surprise to both parties and invoked the clause 12 of the Sales Agreement. The increased tariffs of 30 percent had made claimant a loss of 25 percent instead of making any profit. This situation shall be regarded as a fundamental alternation of contractual equilibrium **(1)**. Thus CLAIMANT contends that the contract price shall be adapted to cover the loss **(2)**.

1. The imposition of tariffs of 30 percent by Equatoriana constitutes hardship under clause 12 of the contract.

93. The precondition for a party to request for an arbitration or litigation is the occurrence of "hardship" circumstances that entitles the party to do so. In the case at hand the imposition of tariffs is such a circumstance because the new tariff of 30 percent was unforeseeable and beyond the control of CLAIMANT **(a)**. As a result of the new tariff on frozen semen, CLAIMANT now makes a loss of 25 percent so that the equilibrium of the contract was fundamentally altered **(b)**. Hence, the imposition of the tariffs of 30 percent constituted an "unforeseen event" and basically made the contract much more "onerous" for CLAIMANT, which was within the scope of clause 12 of the contract **(c)**.

a. The imposed tariffs of 30 percent is unforeseeable and beyond the control of CLAIMANT.

94. The imposition of tariffs of 30 percent could not have been taken into account by both of the Parties when concluding the contract. Firstly, the Parties could not have been aware the conduct of imposing tariffs by Equatoriana, since Equatoriana was a firm supporter of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in such direct retaliatory measures. During the contract negotiation, the Parties had no circumstance to take the possibility of the potential fluctuations of race horses` frozen semen into account. Hence the Parties shared a tacit

assumption that the tariff of the goods would be stable at least during the life of their contract.

95. Secondly, the Parties could not have been aware the goods, the frozen semen for race horses, were involved. Commonly, "Agriculture" is defined as "*the science or practice of farming, including cultivation of the soil for the growing of crops and the rearing of animals to provide food, wool, and other products*" *["Agriculture" in Oxford dictionary]*, the involvement of race horses` frozen semen has beyond the common understanding on "Agricultural products". And generally, racehorse breeding is categorized differently from agricultural products *[Ex .C7]*. Taking foregoing factors into account, the Parties could not have been aware the frozen semen was in the list of imposition of tariffs.

96. Thirdly, the tariff policy was a kind of state conducts and state conducts are usually regarded as unforeseeable *[National Oil Company v. Libyan Sun Oil Company, Macromex Srl v. Globex International Inc.]*. Dealing with the unreasonable tariff policy, most governments have to solve disputes by negotiations between countries or via invoking the relevant WTO dispute resolution mechanism *[Ex .C8]*. These issues are not likely to be controlled and resolved by common commercial entities, i.e. neither CLAIMANT nor RESPONDENT. Thus the imposition of the new tariff of 30 percent on the agricultural products including the frozen semen by the government of Equatoriana was beyond the control of the Parties, especially for CLAIMANT.

97. It is undeniable that CLAIMANT should have foreseen several increase of the cost. However, CLAIMANT submits that not only the change of circumstances but also the degree or extent of such a change shall be taken into account *[Tsoneva, 130]*. Although CLAIMANT had predicted the cost may increase due to the change of delivery terms and thus altered the increased price *[Ex C4]*, it could never have reasonably foreseen that the cost may soar and brought a loss of 25 percent of the purchase price.

b. The imposition of tariffs fundamentally altered the equilibrium of the contract.

98. The term "hardship" is typically used to characterize all situations in which a dramatic

change in circumstances leads to a fundamental alternation of the contractual balance. Thus hardship encompasses situations in which performance has become radically more onerous or radically less profitable for a party *[Tsoneva, 323]*. That is to say, whereas a situation makes it more onerous for a party to perform its obligation constitutes a fundamental alternation of the contractual equilibrium.

99. Whether an alteration of the equilibrium of the contract is fundamental or not, or whether the performance for a party becomes more onerous in a given case "will of course depend on the circumstances" *[Lookofsky, 434]*. The characterizing of above issue should be interpreted on case-by-case basis. For instance, in some circumstances change of price may not be substantial to some persons, but substantial to the parties to the contract and constitutes a change of situation, i.e. hardship *[Canned Oranges Case]*. The imposition of the new tariff of 30 percent on the frozen semen by the Equatoriania caused a loss of 25 percent to CLAIMANT, who merely had gotten a profit margin of 5 percent for this transaction. Consequently, the commercial basis of the deal was destroyed.

100. The hardship event broke the reasonable expectation of the contract`s profit. In present case, CLAIMANT request the Tribunal to find that these unforeseen increases in the cost gave rise to a serious imbalance which rendered the further performance of the contracts under unchanged conditions exceptionally detrimental for CLAIMANT *[Scafom International BV v. Lorraine Tubes S.A.S.]*. Although CLAIMANT finally afforded the tariff and handed over the rest of the frozen semen, CLAIMANT still suffers from the new tariff of 30 percent. Additionally, when interpreting the meaning of a term, the interpretation follows the common understanding *[Handelsgericht Zürich, Mattress case; Schmidt-Kessel in: Schlechtriem/Schwenzer, Art. 8 CISG, ¶ 40]*. The word *"onerous"* is defined as "*causing great difficulty or trouble*" *["onerous" in: Cambridge English Dictionary]*. Given the facts that CLAIMANT has financial difficulties in the last two years and would suffer bankruptcy if it bear the 30% tariffs *[PO2. No. 29]*. All these factors manifest a fundamental alteration in the equilibrium of the contract referring to "Increase in cost of performance" *[UNIDROIT Principle Art. 2.2.2. CMT]*.

c. The imposition of the tariffs of 30 percent was in the scope of Clause 12 of the contract.

101. Concerning that RESPONDENT insisted on the DDP-delivery term, CLAIMANT managed to set up a mechanism to cover any further risks arising from the changing term. Whether expressly or impliedly CLAIMANT had made its intent inserted into the Sales Agreement, i.e. the clause 12 of the contract. The Parties explicitly agreed that *"Seller shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [Ex. C4]*.

102. Under this premise that CLAIMANT is unwilling to bear any risk, the interpretation of the term "comparable unforeseen events" shall refer to any other events with the same characteristic as customs regulation which would make CLAIMANT shoulder unexpected risks due to the DDP-delivery term. At present, in light of the unforeseeable imposition of the tariffs of 30 percent, CLAIMANT had shouldered the unexpected risk, which had demonstrated above. Accordingly, the new tariffs of 30 percent shall be defined as *"comparable unforeseen events"* stipulated in the Clause 12 of the contract.

2. Interpretation of the contract under CISG further confirms the conclusion that the parties have established a mechanism in the contract to adapt contract confronted with the imposition of tariffs.

103. Provided a hardship clause being incorporated into the contract, there shall be a remedy. CLAIMANT submits that subjective interpretation of the CISG indicated adaptation of price shall be reached under the new tariffs of 30 percent since the parties have established a mechanism **(a)**. And the objective interpretation of the CISG also leads to the same conclusion **(b)**. Hence the oral consensus on the adaptation Clause was incorporated into the contract **(c)**.

a. Subjective interpretation of the contract under CISG indicated adaptation of price shall be reached under the new tariffs of 30 percent since the parties have established a mechanism.

104. Determining the intent of both parties is based on their statements or other conduct *[Art. 8(1) CISG]*. In view that a hardship clause was to be incorporated into the contract, CLAIMANT mentioned to RESPONDENT that it was important to ensure a mechanism to adapt the contract *[Ex C8]*.

105. RESPONDENT clearly replied that it would be the task of the arbitrators to adapt the contract. In addition, RESPONDENT would like to formulate a detailed proposal in regard to this issue *[Ex C8]*. The conversation reflects that the Parties had already reached a consensus on the mechanism adapting the contract by the arbitral tribunal.

106. Nevertheless such the intent was not clearly reflected in the clause, CLAIMANT submits that since the Parties` intent was clearly known to each other, clause 12 of the contract shall be interpreted that it involves a mechanism of adapting the contract.

b. Objective interpretation of the contract under CISG leads to the conclusion that the parties are supposed to adapt the contract under the new tariffs of 30 percent.

107. RESPONDENT may content that CLAIMANT failed to provide any evidence that RESPONDENT know or could not have been unaware of CLAIMANT`s intent, CISG Art. 8(2) may be applied to interpret the contract. Art. 8(2) reflects the general principle of reasonableness governing CISG: "one has to ask how a reasonable person in the shoes of the other party would have understood the statement." *[Schwenzer/Fountoulakis/Dimsey, 60]*. And in determining the hypothetical understanding of such a reasonable person, consideration must be given to all relevant circumstances under Art. 8.3 CISG.

108. During the negotiation RESPONDENT failed to come up with its own proposal afterwards because of the car accident. Moreover the subsequent negotiator Julian Krone should have expressed to object the mechanism proposed by CLAIMANT but never to do so. Whether or not RESPONDENT intended to exclude any adaptation of the contract is immaterial, however, as RESPONDENT`s intent "must have been known by or, in any case, recognizable" to CLAIMANT *[Schlechtriem I, 38]*. Given the whole negotiation, a

reasonable person had sufficient reasons to conclude that CLAIMANT`s intention was included in the finalized contract.

109. Furthermore, considering subsequent conducts, CLAIMANT had put the shipment on hold due to the newly imposed tariffs making this shipment 30 percent more expensive and asked for RESPONDENT`s solution. Taking the renegotiations after the imposition of tariff of 30 percent between the Parties into account, the Parties have reached a consensus on adapting the price. Such knowledge was indicated in the Witness Statement made by Mr. Greg Shoemaker. He informed CLAIMANT that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." and asked CLAIMANT to ship the remaining 50 doses immediately *[Ex R4]*. It was the word "we will certainly find an agreement on the price" that convinced CLAIMANT that RESPONDENT have agreed an adaptation of price. Consequently, a reasonable person could not have known that both Parties reached the consensus an adaptation of price.

c. The consensus of the mechanism of adapting the contract constitutes an adaptation clause of the contract.

110. A contract may be proven by a document, oral representations, conduct, or some combination of the three *[Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al.]*. In addition, the CISG provides no restrictions on the form of a contract *[CISG Art. 11]*. In the present case, the Parties reached an agreement that a mechanism of adapting the contract shall be established, thus an adaptation clause was incorporated into the contract, though it was not explicitly stipulated into the written contract.

B. CLAIMANT is entitled to the payment resulting from an adaptation of the price under the CISG.

111. Although the conception "hardship" is not explicitly mentioned under the CISG, let alone its remedy, Art. 79 of the CISG is nevertheless applicable to the present case i.e. the imposition of the tariffs. Because it constituted an impediment **(1)** and since CLAIMANT

has complied with its obligation, the adaptation of the contract of US$ 1,250,000 shall be the chosen remedy under the CISG **(2)**.

1. The new tariffs of 30 percent constitute an "impediment" stipulated by the Art. 79 CISG.

112. The “impediment” does not merely refer to an event that makes performance absolutely impossible. The CISG Advisory Council Opinion states that a change of circumstances that could not reasonably be expected rendering performance excessively onerous may qualify as an "impediment" under Art. 79(1) *[CISG-AC Opinion 7]*. Various learned authors also suggested that hardship can amount to an impediment *[Enderlein, F., Maskow, D., 325; Schlechtriem, P., 618]*. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Art. 79.

113. The wording of Art. 79 “beyond his control” “could not reasonably be expected to have taken the impediment into account” “to have avoided or overcome” indicate the criteria of an impediment, which is an event that is beyond a party`s control and cannot be foreseen by it. The “reasonable expectation test” may help to determine whether the imposition of tariffs fulfill such requirements *[Ishida, 360]*. As is argued above, a “reasonable person” in CLAIMANT`s shoe could not have taken the imposition of tariffs into account. Also, CLAIMANT could not reasonably be expected to have overcome the tariffs. Hence， the imposition of tariffs amounts to an impediment to perform its obligation and CLAIMANT is entitled to a remedy.

2. The adaptation of the contract could be the chosen remedy under the CISG.

114. CLAIMANT submits that Art. 79 (5) may be invoked for an adaptation of the contract **(a)**. Even if the Tribunal finds that the principle revealed in Art. 79 (5) is not sufficient to adapt the contract, Art. 7 is applicable ascertain to such remedy under the CISG **(b)**. And in any case, adapting the contract is practical under the general contract law Mediterraneo **(c)**.

a. Art. 79(5) could be invoked for an adaptation.

115. Although Art. 79 of the CISG does not explicitly provide a mechanism of adapting the

contract, it is the very function of the CISG to interpret and supplement what parties have expressly agreed to *[Ishida, 379]*.In addition, the wordings of the CISG suggest that a party would not necessarily be obliged to take on extraordinary responsibilities in order to perform the contract *[ibid]*. In this sense, where an impediment event occurs, an arbitrator applying the CISG always rewrites or supplements a contract *[Scafom International BV v. Lorraine Tubes S.A.S.]*. Some scholars argued that the purpose of Art. 79(5) was to reserve the right of specific performance for the promise. However, such a view is inconsistent with the rights granted to the party who "is not liable" when performance is barred by an impediment *[Honnold, MICHAEL J. BONELL]*. The provision is not only an entitlement to the promisee but also to the default party, since the wording is "either party" rather than other explicit reference. CISG Art. 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances. Hence, CLAIMANT submits that Art. 79(5) leaves a space for the application of adapting the contract， which is favored by the Advisory Council opinion *[AC-7, CMT 40]*.

b. Article 7 is applicable to ascertain such remedy under the CISG

116. Even if the Tribunal finds that the interpretation rules of the CISG is not sufficient to create an adaptation mechanism for the Parties, Art. 7(2) of the CISG is a helpful tool for plugging certain gaps in the CISG text *[Lookofsky, 88]*. It sets forth questions concerning matters governed by the CISG but not expressly settled shall be settled pursuant to its general principles. While good faith has been found to be a general principle of the CISG *[CISG Digest]*, and the legal basis for the hardship is considered to lie in the principle of good faith *[Brunner, Lew, 394]*. Thus it shall be invoked to resolve the case. As is argued above, CLAIMANT would not bear any unexpected risk arising out of the change of delivery terms, which RESPONDENT could not have been unaware *[Ex. C4]*. Therefore, it is unreasonable and unfair for RESPONDENT to pay the original price because it is not what the parties really intended.

c. In any case, adapting the contract is practical under the general

contract law Mediterraneo.

117. Where no proper remedy is deduced according to explicit stipulations or general principles of the CISG, an external analogy mechanism shall play the rule to fill up the internal gap *[Alan, Alejandro]*. In the case at hand, the Parties made it clear that their contract was subject to the governance of CLAIMANT`s domestic law, which includes the general contract law of Mediterraneo, a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. UNIDROIT Principles Art. 6.2.3 entitles a party to request for an adaptation provided hardship occurs. Hence the Tribunal may make an analogy of the provision, adapting the contract under its power.

CONCLUSION OF THE THIRD ISSUE:

On one hand, the imposition of tariffs of 30 percent by Equatoriana government shall be deemed as “hardship”, which had fundamentally altered the equilibrium of the contract between the parties. On the other, the new tariffs of 30 percent constituted "impediment" under Art.79 CISG. As CLAIMANT fulfilled its obligation faithfully, CLAIMANT is entitled to a remedy for any loss in the performance pursuant to Art.7 CISG. Consequently, since the imposition of tariffs caused CLAIMANT a loss instead of any profits, CLAIMANT is entitled to the payment of US$ 1,250,000 to cover the cost of 25 percent the purchase price.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal:

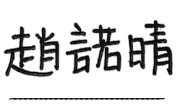
1. Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US$1,250,000 which is 25 percent of the price for the third delivery of semen;
2. Black Beauty Equestrian bears the costs of the Arbitration.

華南師範大學
SOUTH CHINA NORMAL UNIVERSITY

CERTIFICATE

We confirm that the following memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person who is not the member of this team.

6TH December 2018



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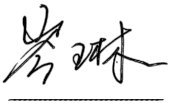

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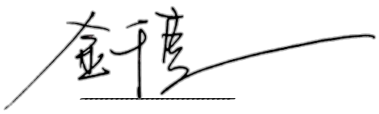

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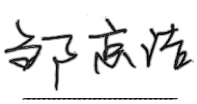

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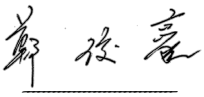

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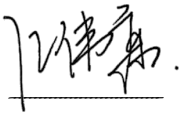

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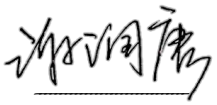

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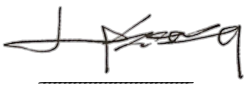

QISHENG QIU