**XVI Annual Willem C. Vis (East) International Commercial Arbitration Moot**
**2018 - 2019**


# UNIVERSITY OF VERSAILLES, PARIS SACLAY

# MEMORANDUM FOR CLAIMANT

| **CLAIMANT** | *v.* | **RESPONDENT** |
|---|---|---|
| Phar Lap Allevamento<br>Rue Frankel 1,<br>Capital City, Mediterraneo | | Black Beauty Equestrian<br>2 Seabiscuit Drive,<br>Oceanside, Equatoriana |

**COUNSEL**

**Inès Giauffret • Sarah Lasson • Pierre Nosewicz • Loïc Saint-Martin**
**Paisley Simonnet • Léane Thakrar • Léonard Vanvi • Fanny Vigier**

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| **Art./Arts.** | **Article/Articles** |
| **CISG** | **United Nations Convention on Contracts for the International Sale of Goods of 1980** |
| **CLAIMANT** | **Phar Lap Allevamento** |
| **Contract** | **Contract between Phar Lap Allevamento and Black Beauty Equestrian dated 6 May 2017** |
| **Ed.** | **Edition** |
| ***et al.*** | ***et alii* (and others)** |
| **DDP** | **Delivered Duty Paid, Incoterms 2010** |
| ***i.e.*** | ***id est* (that is)** |
| **IBA Rules** | **International Bar Association Rules on the Taking of Evidence in International Arbitration** |
| ***ibid.*** | ***ibidem* (in the same place)** |
| **ICC** | **International Chamber of Commerce** |
| **ICSID** | **International Centre for Settlement of Investment Disputes** |
| ***infra*** | **Below** |
| **HKIAC** | **Hong Kong International Arbitration Centre** |
| **Mr.** | **Mister** |
| **Ms.** | **Miss** |
| **No./Nos.** | **Number/Numbers** |
| **p./pp.** | **Page/Pages** |
| **In para. /paras.** | **Paragraph/Paragraphs of Memorandum for CLAIMANT** |
| **Parties** | **Phar Lap Allevamento and Black Beauty Equestrian** |
| **PCA** | **Permanent Court of Arbitration** |
| **PO1** | **Procedural Order No. 1** |
| **PO2** | **Procedural Order No. 2** |
| **RESPONDENT** | **Black Beauty Equestrian** |

| | |
|---|---|
| **SEC. COMM.** | **CISG Secretariat Commentary** |
| **SIAC Rules** | **Singapore International Arbitration Centre Rules 2013** |
| ***supra*** | **Above** |
| **UK** | **United Kingdom** |
| **UNCITRAL** | **United Nations Commissions on International Trade Law** |
| **UNCITRAL Model law** | **Arbitration Rules of the United Nations Commissions on International Trade Law** |
| **UNIDROIT Principles** | **Principles of International Commercial Contracts published by the International Institute for the Unification of Private Law** |
| **US/USA** | **United States of America** |
| **USD** | **United States of America currency (United States Dollar)** |
| ***v.*** | ***Versus* (against)** |
| **Vol.** | **Volume** |
| **WTO** | **World Trade Organization** |
| **&** | **And** |
| ***¶/¶¶*** | **Paragraph/Paragraphs** |

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| | **United States Court of Appeal 5th Circuit**<br>13 May 1998<br>*Penzoil Exploration & Prod. Co. v. Ramco Energy Ltd,*<br>*139 F.3d 1061* | *Penzoil Exploration & Prod. Co. v. Ramco Energy*<br>**In para. 62** |
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| | **United States Court of Appeal of Indiana**<br>26 April 2000<br>*SAMAR, INC. v. Jack HOFFERTH*<br>*726 NE2d 1286* | *Samar Inc. v. Jack Hofferth*<br>**In para. 65** |
| | **US District Court for the Southern District of Texas**<br>25 April 2003<br>*Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.,*<br>*907 S.W.2d 517, 520* | *Union Fire v. CBI*<br>**In para. 66** |
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| | **1995**<br>*Interim Award*<br>*ICC Case No.7929*<br>(2000) Yearbook Commercial Arbitration XXV | *ICC Award No.7929*<br>**In paras. 42, 43** |
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| **PCA** | **18 July 2014**<br>*Yukos Universal Limited (Isle of Man) v. The Russian Federation*<br>*PCA Case No.AA 227* | *Yukos Case*<br>**In paras. 85, 102** |

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| **2013 HKIAC Administered Arbitration Rules, 1 November 2013** | *2013 HKIAC Rules* |
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## STATEMENT OF FACTS

**1** Phar Lap Allevamento ("**CLAIMANT**") is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm covering all equestrian sports in that area. It has numerous facilities and owns more than 300 horses. It offers excellence training and professional development courses on horse care. CLAIMANT's breeding success regarding racehorses has made it famous for its professionalism. CLAIMANT is most appreciated for its unique storage technique providing long-living and superior quality semen.

**2** Black Beauty Equestrian ("**RESPONDENT**") is a horse breeding company registered in Oceanside, Equatoriana.

**3** CLAIMANT and RESPONDENT are referred jointly as the Parties ("**Parties**").

**4** On **21 March 2017**, RESPONDENT expressed its interest in Nijinski III, a star among CLAIMANT's stallions considered to be one of the most successful racehorses ever. Willing to start a breeding programme, RESPONDENT sent a letter to CLAIMANT enquiring about the availability of Nijinski III [*EXHIBIT C1, p. 9*]. At that time, the ban on artificial insemination for racehorses had been temporarily lifted in Equatoriana.

**5** On **24 March 2017**, at RESPONDENT's request, CLAIMANT agreed to sell 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards. Although CLAIMANT was usually not inclined to sell high number of doses, it agreed to make an exception for RESPONDENT [*EXHIBIT C2, p. 10*].

**6** However, CLAIMANT expressly stated that it was forbidden for RESPONDENT to resell the frozen semen to third parties without its written consent, and that CLAIMANT would need to be informed about the use of every dose of frozen semen.

**7** On **28 March 2017**, RESPONDENT began the negotiation of the applicable law, jurisdiction, and delivery clauses to be included in the Parties' future Contract. RESPONDENT insisted on a DDP delivery [*Incoterms*] and accepted the application of the law of Mediterraneo to the Contract [*EXHIBIT C3, p. 11*].

**8** On **31 March 2017**, CLAIMANT explained it would only accept a DDP delivery against a moderate price increase by 1000 USD per dose. CLAIMANT's underlying goal was to limit the additional costs associated with this incoterm. It further indicated that it was not willing to take over any further risk associated to delivery and insisted on the inclusion of a hardship clause that would address unforeseeable subsequent changes [*EXHIBIT C4, p. 12*].

**9** In the course of **April 2017**, the Parties completed the negotiation of the hardship clause in order to limit CLAIMANT's risks associated with a DDP delivery [*EXHIBIT C4, p. 12*]. The

Parties also agreed on the choice of law and on an arbitration clause [*EXHIBITS R1, R2, pp. 33-34; EXHIBIT C5, p. 13*].

**10** On **12 April 2017**, Mr. Antley, RESPONDENT's representative, and Ms. Napravnik, CLAIMANT's lawyer, were involved in a severe car accident [*EXHIBIT C8, p. 17*]. Due to their injuries, the final negotiations of the Contract were conducted by CLAIMANT's Chief Executive Officer with the support of Mr. Ferguson [*EXHIBIT C8, p. 17*]. Mr. Krone took over for the final negotiations on RESPONDENT's side [*EXHIBIT R3, p. 35*]. The successors in finalizing the Contract did not include an express reference either in the arbitration agreement nor in the hardship clause they finally negotiated [*EXHIBIT C8, p. 17*].

**11** On **6 May 2017**, the Parties signed the **frozen semen sales agreement** ("**Contract**") to organize the sale of frozen semen used for artificial insemination in racehorse breeding. Under the Contract, CLAIMANT would sell 100 doses of the stallion Nijinsky III against payment by RESPONDENT of USD 99.500 per insemination.

**12** On **20 May 2017**, CLAIMANT sent the first shipment of 25 doses to RESPONDENT.

**13** On **3 October 2017**, CLAIMANT sent the second shipment of 25 doses to RESPONDENT.

**14** In **November 2017**, Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana. As a reaction to this increase, the Equatorianian Government retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo.

**15** On **20 January 2018**, Ms. Napravnik, received the confirmation from the customs authorities that retaliatory measures imposed by the Government of Mediterraneo were applicable to the shipment of all animal products including frozen semen used for artificial insemination in racehorse breeding. In light of this new development, Ms. Napravnik immediately informed RESPONDENT that she had put on hold the third shipment supposed to go out on 22 January 2018. She made it clear that she would authorize the shipment as soon as the Parties would find an agreement on the adjustment of the price.

**16** On **21 January 2018**, Mr. Shoemaker, RESPONDENT's veterinary in charge of the breeding programme including all questions concerning the Contract [*PO2, p. 59, ¶ 32*], expressed its concern about the delivery. According to him, the 50 last doses "*were urgently needed*". Mr. Shoemaker insisted on their interest in a long-term relationship [*EXHIBIT C8, p. 18*] and committed himself to a further adaptation of the price [*EXHIBIT R4, p. 36*].

**17** On **23 January 2018**, CLAIMANT complied with its delivery obligation, trusting RESPONDENT's statement. It delivered the third shipment of 50 doses before the Parties could find an agreement on the new price [*EXHIBIT C8, p. 18*].

**18** Considering itself mislead by RESPONDENT's promise to adapt the price and having complied with its own delivery obligation, CLAIMANT filed a Notice of Arbitration initiating the present proceeding on **31 July 2018**.

**19** On **24 August 2018**, RESPONDENT filed its Response to Notice of Arbitration.

## APPLICABLE LAW

**20** The Parties have chosen the law of Mediterraneo and the CISG as the applicable law to their Contract [*EXHIBIT C5 p. 14, ¶ 14*]. The general contract law of both Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 52, ¶ III*]. The UNIDROIT Principles are used for filling gaps in the CISG [*BONELL, p. 26-39; MAGNUS; PRUJINER, p. 574, ¶ 2*]. It has also been argued that the UNIDROIT Principles can be made applicable to a contract governed by the CISG as trade usages pursuant to Art. 9(2) CISG [*FAWCETT HARRIS BRIDGE, pp. 935-936; KOMAROV, pp. 658-659; Hertogenbosch*].

**21** Danubia has also adopted the UNCITRAL Model law on International Commercial Arbitration with the 2006 amendments [*PO1, p. 52, ¶ III*].

**22** The arbitration agreement initially provided for the applicability of the 2013 HKIAC Rules [*Notice of Arbitration, p. 6, ¶ 14*]. However, both Parties finally agreed to conduct the proceedings under the 2018 HKIAC Rules [*PO1, p. 51, ¶ II*].

**23** Finally, Mediterraneo and Equatoriana are both part of the WTO and must comply with international trade law [*PO2, p. 61, ¶ 47*].

## STATEMENT OF ARGUMENTS

**24** RESPONDENT is avoiding its obligation resulting from the economic change of circumstances in Equatoriana. The Parties have agreed to insert a hardship clause in their Contract. The newly imposed tariffs on all animal products is comparable to hardship pursuant to UNIDROIT Principles.

**25** This request is made necessary considering CLAIMANT's financial situation, which has worsened due to this event. According to the Contract and the CISG, CLAIMANT should not be responsible for bearing additional costs and must be entitled to the payment of USD 1.250.000 or any other amount resulting from an adaption of the price.

**26** Even if the Tribunal decides otherwise, CLAIMANT should be able to receive any other amount in compensation of the prejudice it suffered and the losses involved (**Issue III.**).

**27** The Parties' prevision for the merits must be guaranteed by an effective remedy to avoid future disagreement in the determination of the price. RESPONDENT cannot contest jurisdiction of the Tribunal to proceed with the adaptation of the Contract.

**28** Mainly, the Tribunal has jurisdiction and the power to adapt the Contract according to the arbitration agreement, the law of Mediterraneo and the procedural law.

**29** In the unlikely event the Tribunal decides that the law of Danubia shall govern the arbitration clause, it would still have jurisdiction to adapt the Contract (**Issue I.**).

**30** RESPONDENT is subject of two different arbitration proceedings that concern the necessity to adapt the price in case of an unforeseeable change of circumstances. RESPONDENT's opinion as to the need of this adaptation changes depending on its position within the tribunal. This behavior reflects a clear contradiction, preventing CLAIMANT from obtaining reason on the merits. This can be proven by submitting evidence from this other arbitration proceeding. RESPONDENT's objection according to which such evidence cannot be submitted because it has been obtained through illegal means or a breach of confidentiality is not founded. Not only CLAIMANT is not part to the other proceeding, but the Tribunal is also empowered to admit the evidence brought by CLAIMANT even if it arises from another arbitration proceeding, because nothing conflicts with it. Indeed, there are no elements in the case that prove that CLAIMANT is the author of either of the wrongdoings. Besides, the elements contained in this evidence are crucial for the outcome of the case and were not protected by any substantial barriers (**Issue II.**).

## ARGUMENTS

### I. The Tribunal has jurisdiction and the power under the law of Mediterraneo to adapt the Contract

**31** The arbitration clause is governed by the law of Mediterraneo (**A.**), which allows the Tribunal to adapt the Contract according to principles of law (**B.**). However, in the unlikely event that the law of Danubia governs the arbitration clause, the Tribunal still has jurisdiction to adapt the Contract (**C.**).

#### A. The arbitration clause is governed by the law of Mediterraneo

**32** The law applicable to the Contract governs the arbitration clause because it respects the Parties' intention (**1.**). The law of Mediterraneo has the closest connection with the arbitration clause (**2.**) and does not conflict with the separability doctrine (**3.**).

##### 1. The applicable law chosen by the Parties applies to the entire Contract, including the arbitration clause

**33** Section 14 of the Contract states that the law of Mediterraneo governs the Contract, but the arbitration clause does not contain any express choice of law [*EXHIBIT C5, p. 14*]. Nevertheless, the law applicable to arbitration clauses is rarely distinguished from the substantive law of the contract in which it is contained [*BORN, p. 580; REDFERN HUNTER, p. 158, HARISANKAR, p. 630*]. Indeed, when the arbitration clause is part of a contract, the governing law reflects the parties' intention [*Sulamérica v. Enesa, ¶ 26; Sonatrach v. Ferrell, ¶ 32; Svenska, ¶ 76*]. Accordingly, the law governing the Contract in the case at hand is most likely to be the law of Mediterraneo [*EXHIBIT C5, p. 14*]. Indeed, RESPONDENT made no objection to its application to the Contract during the negotiations [*EXHIBIT C3, p. 11*].

**34** Moreover, it has already been decided that the express choice of law in an agreement governs and determines the construction of all the clauses in the said agreement, including the arbitration clause [*Arsanovia v. Cruz, ¶ 22, cited in BCY v. BCZ, ¶ 59*]. Therefore, in the case at hand, the law of the main Contract, *i.e.* the law of Mediterraneo, should govern Section 15, which deals with the choice to resort to arbitration in case of dispute.

##### 2. The law of Mediterraneo has the closest connection with the arbitration clause

**35** A "*closest-connection*" test is usually used to identify the law governing an arbitration clause [*Sulamérica v. Enesa, ¶ 26; YIFEI, p. 79*]. However, this test cannot apply to the present case, because the Parties have precisely not concluded a "*freestanding agreement*" to arbitrate, but have incorporated a clause to the main Contract [*Sulamérica v. Enesa, ¶ 26*]. The Parties have

never debated the fact that the arbitration clause is part of a substantive contract [*EXHIBIT R3, p. 35*]. During the whole process of negotiations, CLAIMANT did not hide its ambition to draft such arbitration clause. Likewise, RESPONDENT demonstrated serious intent to include an arbitration clause in said Contract [*EXHIBIT R1, p. 33*]. Thus, the use of the "*closest-connection"* test should be excluded.

**36** In the case where the Tribunal would still decide to implement the "*closest connection"* test, the law of Mediterraneo would still be applicable. Indeed, arbitrators have the power to take into account the place of conclusion of the arbitration agreement to ascertain its applicable law [*ICC Award 1990, ¶¶ 1029, 1033, cited by BORN, p. 524; YIFEI, p. 79*]. Accordingly, since the Contract was negotiated and signed in Mediterraneo by the Parties' representatives [*PO2, p. 56, ¶ 13*], the law of this country should apply to the arbitration clause too. In addition, the law of Mediterraneo also governs the merits of the case, which can be identified as a supplementary "*connection*" in favor of the law of Mediterraneo.

#### 3. The law applicable to the Contract should apply to the arbitration clause despite its autonomy

**37** The doctrine of separability and the applicability of the substantive law to the clause are not incompatible [*BORN, p. 476; DERAINS, pp. 16-17; KAPLAN MOSER, p. 388*]. Although the separability doctrine provides that the regime of a contract and an arbitration clause that it contains should be independent, it does not necessarily imply that the law applicable cannot be the same [*KRÖLL MISTELIS LEW, p. 107*]. Indeed, this principle of separability has a narrow scope and is only applicable when the validity of the main contract is challenged [*BCY v. BCZ, ¶ 61*; *KAPLAN MOSER, p. 388*]. However, the Parties are not arguing the validity of the Contract itself [*Answer to the Notice of Arbitration, p. 32*] but the law to which is must comply with. This is why it does not apply to the case at hand.

### B. The Tribunal has the power to adapt the Contract

**38** The Tribunal's power to adapt the Contract arises from the arbitration clause (**1.**), the law of Mediterraneo (**2.**) and from the procedural law (**3.**).

#### 1. The Parties expressly agreed to confer adaptation powers to the Tribunal

**39** The power of contract adaptation arises from the arbitration clause (**a.**) and is further confirmed by the drafting history of the Contract and the arbitration clause (**b.**).

**a. The Tribunal's power to adapt the Contract flows from the arbitration clause**

**40** The Tribunal has jurisdiction only when the dispute is within the scope of the arbitration clause [*BORN, pp. 1317-1318; GIRSBERGER VOSER, p. 64; REDFERN HUNTER, p. 92; FOUCHARD GAILLARD GOLDMAN, p. 393; Nejapa Power Company LLC v. CEL*]. "*Any dispute arising out of this contract*" is usually interpreted in such way to include any type of litigation: all the issues from a single contractual relationship are taken into consideration, even non-contractual and tortious claims [*KRÖLL MISTELIS LEW, p. 151*; *BORN, p. 1354; Kaverit Steel v. Kone; Bechtel v. UEG; "Angelic Grace" Case*]. A similar solution is retained from the wording "*and/or*" [*WADA Case*]. A broadly worded arbitration clause creates an all-encompassing jurisdiction to arbitral tribunals [*MOLITORIS WELSER, p. 18*].

**41** In the case at hand, the clause provides "*any disputes arising out of this Contract, **including** existence, validity, interpretation and performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by HKIAC*". The word "*including*" is only indicative and not limitative. This is a strong indication that the Parties were willing to submit any and all disputes arising from the Contract to the Tribunal's jurisdiction. Furthermore, the Parties have chosen to model their arbitration clause after the standard arbitration clause recommended by the HKIAC [*EXHIBIT C5, p. 13, ¶ 15*]. Besides, the arbitration clause would have been drafted narrowly if the Parties had the intention to reduce the Tribunal's jurisdiction [*Compagnie Maritime Belge v. N.V. Distrigas*]. By not specifying any carve-out to the Tribunal's jurisdiction, it was not their intention to limit the Tribunal's powers.

**42** In practice, it is widely recognized that general rules of contract interpretation can be used to determine the meaning and scope of arbitration clauses [*BORN, p. 1321*; *ICC Award No.7920; ICC Award No.7929*]. As mentioned above, the law of Mediterraneo governs the arbitration clause. Therefore, the clause must be interpreted in light of this law. The law of Mediterraneo specifically encourages broad interpretation, regardless of narrow wording [*supra ¶ 35; Notice of Arbitration, p. 7, ¶ 16*].

**43** Such rules of interpretation require seeking the Parties' common intent to discover their legitimate expectations [*KRÖLL MISTELIS LEW, p. 150; REDFERN HUNTER, p. 71; ICC award No.7929*]. In international arbitration, the parties' legitimate expectations are predicted to be the concentration of every litigation aspect in a unique arbitration procedure [*BORN, p. 1326; Ceskoslovenska v. Slovak Repub.*]. By deciding to settle any dispute arising from the Contract through arbitration at an early stage during their negotiations [*EXHIBIT R1, p. 33; EXHIBIT R2, p. 34*], the Parties intended to submit their arbitration proceeding to a sole Tribunal empowered

to adapt the Contract. The opposite solution would contradict with the Parties' legitimate expectations.

**44** Moreover, it appears that RESPONDENT's legitimate expectation was to confer to the Tribunal powers to adapt the Contract. Indeed, RESPONDENT used the same standard clause in another arbitral proceeding and chose it to be conducted under the same law as the situation at hand [*PO2, p. 60, ¶ 39*]. In that case, RESPONDENT claimed that such a clause granted arbitrators the power to adapt the Contract [*ibid.*]; it is hence hard to conceive that this time, RESPONDENT's expectations were to forbid the Tribunal to proceed to such adaptation.

**45** The powers' conferment is further confirmed by the intention of the Parties as reflected by drafting history of both the Contract and the arbitration clause.

**b. The Tribunal's power to adapt the Contract is confirmed by the drafting history of the Contract and of the arbitration clause**

**46** A contract providing for adjustment in case of change of circumstance requires an authority empowered to proceed to such adaptation, in case the parties fail to reach an agreement. This applies to contracts that contain clauses drafted to anticipate change of circumstances [*BERGER, pp. 11-12*]. Such clauses would remain without effect if the *lex causae; i.e.* the law applicable to the substance of the Contract; authorizes the adaptation and no corresponding authority for the Tribunal is found [*ibid.*]. Consequently, the Tribunal's power to adapt is deemed to be conferred when an arbitration clause is included in a contract requiring such adjustment [*ICC Award No.5754, cited by BORDACAHAR, pp. 1-3*].

**47** CLAIMANT's previous professional experiences and financial difficulties [*PO2, pp. 56-58, ¶¶ 14-21*] led the Parties to anticipate changes by drafting a specific clause in the Contract. They expressed their willingness to predict any change of circumstance throughout their negotiations and paired it with an arbitration clause. Indeed, CLAIMANT "*insisted on the inclusion of the adaptation clause*" and RESPONDENT "*had consented to that*" [*Notice of Arbitration, p. 7, ¶ 19; EXHIBIT C5, p. 14, ¶ 12*]. It is therefore evident that the Parties intended to confer such power of adaptation to the Tribunal.

**2. Based on the law of Mediterraneo, the Tribunal has the power to adapt the Contract**

**48** The Tribunal has to consider that pursuant to the provisions contained in that law, the Tribunal has legal authority to adapt the Contract.

**49** The law applicable to the clause also governs the interpretation of the arbitration clause [*BORN, p. 635; REDFERN HUNTER, pp. 158-159; FOUCHARD GAILLARD GOLDMAN, p. 255*]. The Tribunal is enabled to adapt the Contract only in the case where both the *lex causae*, and the law applicable to the arbitration clause authorize so [*BERGER, pp. 11-12; REDFERN HUNTER, pp. 306-307; BRUNNER, p. 498; BERNARDINI, p. 211*]. In the case at hand, both refer to the law of Mediterraneo [*supra ¶¶ 32-34; EXHIBIT C5, p. 14, ¶ 14*]. Consequently, contractual adaptation must be authorized in accordance with this law.

**50** The UNIDROIT Principles and CISG are part of the law of Mediterraneo [*PO1, p. 52, ¶ 4*]. Pursuant to Art. 6.2.3(4) of the UNIDROIT Principles, the Tribunal may "*if reasonable, adapt the contract with a view to restoring its equilibrium*". In case the Parties cannot find an agreement pursuant to the aforementioned article, the Tribunal has the power to adapt the Contract [*Art. 6.2.3(1-3) UNIDROIT Principles; BRUNNER, pp. 483-489; AZEREDO DA SILVEIRA, p. 345*].

**51** Given that the Contract must be read in light of external elements, the general context installed between the Parties should be taken into consideration [*Art. 4.4 UNIDROIT Principles*]. Upon CLAIMANT's initiative, the Parties started the negotiations to solve the issue of adaptation [*PO2, p. 60, ¶ 35*]. However, RESPONDENT's CEO stopped negotiating and decided that it would not bear any additional amount resulting from the increase of tariffs [*EXHIBIT C8, p. 18*]. Since the Parties were not able to reach an agreement, the power to adapt the Contract pursuing to the UNIDROIT Principles shall be conferred to the Tribunal.

**52** The CISG is applicable to the interpretation of the arbitration clause contained in the Contract [*PO1, p. 52, ¶ III*]. The CISG can be used to determine the content of an arbitration clause, especially when it is also applicable to the contract's merits [*JAEGER SCHWENZER, pp. 322-324*]. In this extent, tribunals take into consideration the statements and the conduct of the parties to understand the meaning of their agreement, pursuing a standard of reference to all relevant circumstances [*Art. 8(1-3) CISG; SEC. COMM., p. 18*].

**53** For CLAIMANT, it was crucial to have a mechanism that would ensure an adaptation of the Contract in the absence of agreement between the Parties. It was suggested to include an express reference in the Contract, but RESPONDENT said that it should be the task of the

arbitrators [*EXHIBIT C8, p. 17, ¶ 4*]. It is solely due to the car accident that the main negotiators were not able to include this reference [*ibid.*]. RESPONDENT further intended to clarify the issue of power's conferment in the note which stated that "*connection of adaptation clause with arbitration clause*" has to be done [*EXHIBIT R3, p. 35, ¶ 2*]. Considering every exchange arisen between the Parties, their conduct, their communications and the drafting history, the Tribunal must be entitled to adapt the Contract.

**3. The Tribunal has the power to adapt the Contract according to procedural law**

**54** The Tribunal's powers to adapt the Contract may be conferred only on the basis of the *lex causae*. Thus, the Tribunal has the power to proceed to contractual adaptation *per se*. In addition, if the procedural law does not contain any restriction to proceed to the Contract's adaptation, this benefits to the Tribunal, which is therefore entitled to use the law of the seat to gap fill its powers to do so [*POUDRET BESSON, pp. 19-20; GIRSBERGER VOSER, p. 64*].

**55** The Parties settled the arbitration proceedings under the conduct of 2018 HKIAC Rules [*PO1, p. 52, ¶ 2*]. Yet, the Rules do not contain any specific provision on the power of adaptation. Therefore, the law of the seat can apply to this purpose: the "*arbitration law of Danubia is the adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments*" [*PO1, p. 53, ¶ 4*]. Courts in Danubia decided that the express conferral of powers is required in order to adapt the Contract [*infra ¶ 63; PO2, p. 60, ¶ 36*]. However, there is no consistent jurisprudence on the interpretation of this rule [*infra ¶ 63; PO2, p. 61, ¶ 45*]. As the procedural law does not expressly preclude such power conferment, the Tribunal has the power to adapt the Contract.

**C. Even if the arbitration clause is governed by the law of Danubia, the Tribunal has jurisdiction to adapt the Contract**

**56** The Tribunal does not have a specific *lex fori*, which means that it is not bound by the law of Danubia and may disregard the Parol evidence rule (**1.**). Moreover, there are various exceptions to this Parol evidence rule. Indeed, it does not apply when a contract is ambiguous (**2.**), nor when surrounding circumstances reveal the Parties' intention (**3.**).

### 1. The Tribunal is empowered to disregard the Parol evidence rule

**57** Danubia is a common law system [*PO2, p. 61, ¶ 44*]. Like other common law systems, it applies the Parol evidence rule [*Answer to the Notice of Arbitration, p. 32, ¶ 16*].

**58** The Parol evidence rule is an interpretation rule that allows limiting the scope of arbitration clauses by considering that the terms of the written contract are the final expression of the parties' will [*SCOTT KRAUS, pp. 537-539; Barron's Canadian law dictionary*].

**59** However, in the case at hand, the Tribunal is not held by any established rule of evidence relating to the interpretation of contracts, especially since the Parties have agreed on the application of specific institutional rules [*BQP v. BQQ; ROSENGREN, p. 8; PO1, p. 51, ¶ 2*].

**60** Art. 22.2 of 2018 HKIAC Rules provides that "*the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence including whether to apply strict rules of evidence*". Further, by relying on Art. 16.2 of 2013 SIAC Rules, which is the equivalent of Art. 22.2 of 2018 HKIAC Rules, arbitrators have already decided that pre-contractual negotiations can be used to interpret the contract [*TAN NG; HWANG CHAN; BQP v. BQQ*]. Consequently, the Tribunal should consider 2018 HKIAC Rules instead of the Parol evidence rule to interpret extensively the arbitration clause.

**61** In addition, when parties do not determine the law applicable to arbitration clauses, arbitrators are not bound by any national approach [*FOUCHARD GAILLARD GOLDMAN, p. 218; WAINCYMER, pp. 792-793*]. Rules of evidence in court proceedings are not necessarily the ones stemming from the law of the seat [*ibid.*]. Accordingly, since the arbitration clause does not provide for an express choice of law nothing constrains the Tribunal to apply the law of Danubia [*EXHIBIT C5, p. 14, ¶ 15*].

**62** Furthermore, the Parol evidence rule, as a general interpretation rule applicable to contractual relationships, is also overruled by a pro-arbitration presumption called the "*Principle of Effective Interpretation*" [*BORN, pp. 1325-1326; FOUCHARD GAILLARD GOLDMAN, pp. 258-259*]. According to this principle, the terms of an arbitration clause should be interpreted so as to give effect to all the terms rather than to deprive some of them of effect. The pro-arbitration rule "*applies with special force in the field of international commerce*" [*Penzoil Exploration & Prod. Co. v. Ramco Energy*], and equally to both narrow and broad arbitration clauses [*Ivax Corp. v. B. Braun of Am*]. When parties agree on an arbitration clause, the restrictive interpretation of this agreement cannot apply [*Sonatrach v. K.C.A. Drilling Ltd; VAN DEN BERG, pp. 617-620*], and when the latter is very generally and broadly drafted, it should be interpreted as in favor of resorting to arbitration [*Mitsubishi Motors Corp. v. Soler*

*Chrysler-Plymouth, Inc., ¶ 626; German shipping Company v. Japanese shipyard; VAN DEN BERG, pp. 617-620*].

**63** Finally, the law of Danubia has adopted the UNCITRAL Model law [*PO1, p. 52, ¶ III*] and a verbatim adoption of the UNIDROIT Principles without any exception [*PO2, p. 61, ¶ 45*]. Art. 6.2.3(4)(b) of the UNIDROIT Principles has been modified by the law of Danubia by introducing the power "*to adapt*" the contract only "*if authorized*"; however, there is no consistent jurisprudence on the interpretation of this modification yet [*PO2, p. 61, ¶ 45*]. The UNCITRAL Model law recognizes the pro-arbitration presumption [*BORN, pp. 1334-1335*], and Art. 4.5 of the UNIDROIT Principles embodies the "*Principle of Effective Interpretation*" of contracts [*FOUCHARD GAILLARD GOLDMAN, pp. 258-259*].

**64** As a consequence, the pro-arbitration presumption should prevail over the Parol evidence rule, granting the Tribunal power to adapt the Contract. For these reasons, the Tribunal must dismiss the Parol evidence rule and adopt a broad interpretation of the arbitration clause.

### 2. The Parol evidence rule does not apply to ambiguous contracts

**65** The Parol evidence rule has numerous exceptions [*WONG, p. 2; MARGHITOLA, p. 144; Barron's Canadian law dictionary; PIETRANTONI, p. 134*]. Among them, the ambiguity of a contract justifies the exclusion of narrow interpretation [*ibid.; PERELL, p. 22*]. Even in countries where this rule has a major influence, it is not applied when the language of the contract is ambiguous or uncertain [*COLE, p. 5; Samar Inc v. Hofferth*].

**66** The Parol evidence rule is also excluded to comply with the real intent of the parties [*MAYSON, p. 499*]. To identify whether a contract is ambiguous, the tribunal examines "*the contract as a whole, in light of the circumstances present when the contract was entered*" [*Balandran v. Safeco; Union Fire v. CBI*; *Sun Oil v. Madeley*]. Tribunals also qualify a contract as ambiguous when it is "*subject to two or more reasonable interpretations after applying the pertinent rules*" [*Columbia Gas v. New Ulm*].

**67** In the case at hand, due to an unfortunate accident involving the two main negotiators of the Parties, the written Contract was drafted in the midst of the rush [*EXHIBIT R3, p. 35; Notice of Arbitration, p. 5, ¶ 8*]. The clause has not been entirely drafted by the Parties themselves; they chose to use a vague standard arbitration clause without any personal adaptation [*supra ¶ 41*].

**68** This is why the ambiguity affecting the power of the Tribunal must be clarified in light of the pre-negotiation terms exchanged between the Parties.

### 3. The Parol evidence rule does not apply when surrounding circumstances reveal the Parties' intention

**69** A distinction must be made between the Parol evidence rule and the surrounding circumstances. The surrounding circumstances are the evidence that enlightens the intention of the parties as expressed in the words of the contract [*Sattva Capital v. Creston Moly; Hamelin v. Mousseau*]. The Parol evidence rule only precludes the admissibility of "*evidence outside the words of the written contract that would add to, substract from, vary, or contradict a contract that has been wholly reduced to writing"* [*Sattva Capital v. Creston Moly*], which does not involve the circumstances surrounding the conclusion of the contract.

**70** The content of the Emails exchanged during the negotiation process reflects the willingness of the Parties to adapt the Contract [*EXHIBIT C4, p. 12*]. The arbitration clause provides that the Tribunal has jurisdiction for "*any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination*" [*EXHIBIT C5, p. 14, ¶ 15; supra ¶ 41*]. This wording does not expressly state the possibility for the Tribunal to adapt the Contract. Yet, the negotiations between the Parties are surrounding circumstances that clarify the wording of the arbitration clause, stressing the ability of the Tribunal to adapt the Contract.

**71** Consequently, the Tribunal must read the Contract in light of the pre-negotiation terms exchanged between the Parties as surrounding circumstances dispelling the ambiguity of the arbitration clause. These elements justify the ability for the Tribunal to proceed with the adaptation of the Contract if it decides to apply the law of Danubia.

## Conclusion of ISSUE I

**72** In the light of the foregoing, despite the principle of autonomy of the arbitration clause, the applicable law chosen by the Parties applies to the entire Contract, including the clause itself. Therefore, the law of Mediterraneo applies to both.

**73** The Tribunal is empowered to adapt the Contract according to the arbitration clause agreed upon by the Parties. In addition, both the law of Mediterraneo and the procedural law confer such a power to the Tribunal.

**74** In the alternative, should the Tribunal consider that the law of Danubia is applicable to the arbitration clause, the Tribunal should either disregard the Parol evidence rule or apply its exception of ambiguity. According to the Parties' intent, the Tribunal has jurisdiction and power to adapt the Contract.

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

**75** The Tribunal has complete discretion to decide on the admissibility of the evidence brought by CLAIMANT (**A.**). Despite its acquisition through a breach of confidentiality or a hack of RESPONDENT's computer system, the evidence remains admissible (**B.**).

### A. The Tribunal enjoys broad discretion to decide on the admissibility of the evidence

**76** The arbitral proceeding is presently conducted under 2018 HKIAC Rules [*PO1, p. 51, ¶ II*]. The Parties have not agreed on specific dispositions regarding the admissibility of evidence, and 2018 HKIAC Rules broadly recognize the power of the Tribunal *"to admit or exclude any documents, exhibits or other evidence"* [*Art. 22.3, 2018 HKIAC Rules*].

**77** Furthermore, according to UNCITRAL Model law, "*the arbitral tribunal may [...] conduct the arbitration in such manner as it considers appropriate. It includes the power to determine the admissibility, relevance, materiality and weight of any evidence*" [*Art. 19.2 UNCITRAL Rules*].

**78** Arbitrators are not prohibited from taking evidence from another arbitration proceeding into account [*PILKOV, pp. 147-150; MARELLA, p. 1154; MALINTOPPI VALENCIA-OSPINA, p. 242; Art. 3.3 IBA RULES*]. Therefore, nothing prevents the Tribunal in the case at hand from using evidence from RESPONDENT's other arbitration proceeding.

**79** Moreover, the IBA Rules are supplementary in nature and are applicable when the institutional rules are silent and the parties have not agreed otherwise [*O'MALLEY, p. 10; HONLET, pp. 701-702*]. By applying Art. 3.8 of the IBA Rules *a contrario*, a review of the evidence presented by CLAIMANT suffices for the Tribunal to identify its relevancy. In addition, Art. 9.2 (a) of the IBA Rules provides that *"the arbitral tribunal shall […] exclude from evidence or production any document […] for lack of sufficient relevance to the case or materiality to its outcome"*. Therefore, arbitrators are charged with the duty of determining what evidence is relevant [*BORN, pp. 2120-2318; Laminoirs Etc. v. Southwire Co.*]. In the case at hand, considering that the evidence would help to decide on the merits, the arbitrators are likely to attest its relevancy and admit it.

### B. The evidence is admissible despite its acquisition through illegal means or a breach of confidentiality

**80** CLAIMANT is not part of the proceedings in the other arbitration opposing RESPONDENT and the third party. Therefore, CLAIMANT is not concerned by any implied duty of confidentiality arising from the mentioned proceeding that RESPONDENT would like to oppose.

**81** Not only did CLAIMANT have no involvement in obtaining the evidence in the first place (**1.**), but its relevancy for the outcome of CLAIMANT's request on the merits also justifies its admissibility (**2.**).

### 1. CLAIMANT did not have any involvement in obtaining this evidence

**82** A first investigation has disclosed that the only source of the information promised could only be two former employees of RESPONDENT or a hack of RESPONDENT's computer system [*Letter by Fasttrack, p. 50; PO2, p. 60, ¶ 41*]. Moreover, it is not clear whether the person who provided the award to the press company was the hacker or one of the former employees of RESPONDENT [*PO2, p. 60, ¶ 41*]. Thus, CLAIMANT has never been considered a suspect for any of these actions. Accordingly, CLAIMANT is not in breach of its good-faith obligations that are implied by arbitration proceedings [*KAHN, pp. 305-308; KOTUBY SOBOTA, p. 88*].

**83** The doctrine of "*clean hands*" considers whether the party wanting to use the evidence in its favor is the author of the wrongdoing or not. This doctrine is frequently asserted to qualify as a "*general principle of international law*" pursuant to Art. 38(1)(c) of the ICJ Statute, as well as opinions by Judges of the Permanent Court of International Justice [*LLAMZON SINCLAIR, p. 456*]. This doctrine comes from the Latin quote "*ex turpi causa non oritur action*" according to which a right cannot stem from a wrong.

**84** In application of this doctrine, CLAIMANT has the right to use this evidence, since it is not the author of the wrongdoing. Especially because the information obtained is favorable to its claim. Indeed, a line should be drawn between the fact that CLAIMANT is seeking to benefit from the evidence, and the illegal means by which they were obtained. CLAIMANT cannot be held responsible for that.

**85** Following the same idea, tribunals have already relied on Wikileaks cables without any discussion on the admissibility of such documents in the award, because they were obtained and disseminated by a third-party, and not by the party who they would benefit to [*ROSS; Yukos Case*]. Similarly, arbitrators in the Caratube Case relied on confidential information obtained illegally from a third party. Since there was no party wrongdoing, the tribunal held that in principle the evidence could be used [*ROSS; Caratube Case*].

**86** According to these elements, CLAIMANT did not have any involvement in the obtaining of the evidence, and should therefore be able to use it to its advantage.

### 2. The documents are relevant to the outcome of the case

**87** The necessity of the evidence for CLAIMANT's fair disposal of the action (**a.**) and for the finding of the truth (**b.**) justifies its admission by the Tribunal.

**a. The Tribunal has the power to admit evidence where it is necessary for the Parties' fair disposal of the action**

**88** It seems difficult for the Tribunal to decide on the admissibility of the evidence brought by CLAIMANT without even having the possibility to see it. An express exclusion of the evidence would deny CLAIMANT's opportunity to present its allegations and to get a true overview of the case. Supporting this affirmation, in UNCITRAL Model law "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*" [*Art. 18 UNCITRAL Rules*]. Balancing the opposite interests of CLAIMANT and RESPONDENT would entitle CLAIMANT to bring the evidence, and promote procedurally fair and efficient arbitration while discouraging questionable conduct [*SHARPE, p. 550*]. Indeed, it is commonly admitted in international arbitration that certain considerations in the arbitral proceeding should override one party's intent to keep secret its proceeding with another party [*BORN, p. 864*].

**89** In the case at hand, RESPONDENT is vigorously denying any need to adapt the Contract to a change of circumstance when itself asked for an adaptation of a price invoking an unforeseeable change of circumstance in a previous proceeding [*Letter by Langweiler, p. 49*]. The only difference between the two arbitration proceedings is that in the other case, RESPONDENT has been negatively affected by the tariffs, which is highly contradictory and demonstrates a bad faith behavior to CLAIMANT's detriment [*PO2, p. 60, ¶ 39*]. This is why the use of the "*Partial Interim Award*" is necessary for CLAIMANT's action and would help the efficient outcome of the case and explains why the Tribunal should consider its admissibility [*WEBSTER, pp. 143-162; Art. 13.5, 2018 HKIAC Rules*].

**90** In addition, RESPONDENT's behavior clearly contradicts with CLAIMANT's right to a fair disposal of the action, because it is not acting in good faith. The Tribunal is allowed to decide the case in light of the UNIDROIT Principles, which means that the Parties have to comply with them. Precisely, Art. 1.7 of the UNIDROIT Principles states that *"each party must act in accordance with good faith and fair dealing in international trade and may not exclude or limit this duty"*. The Parties have expressly agreed on conducting the proceeding in good faith. Yet, RESPONDENT is presently violating this agreement.

**91** Equally, the IBA Rules use good faith as guiding principle of procedural matters. This is made plain by the third paragraph of the opening preamble: "*the taking of evidence shall be conducted in the principles that each party shall act in good faith*" [*O'MALLEY, p. 10; MARTINEZ-FRAGA, p. 387*]. Nevertheless, RESPONDENT's behavior goes against its obligation to act in good faith, because it is preventing the use of evidence that would clarify the situation at hand.

**92** In the same perspective, there are illustrations of cases where the disclosure of documents from another arbitration proceeding was allowed if a contradictory behavior such as an Estoppel argument was expected to succeed [*Ali Shipping; Telesat Canada*]. The relevance of the information to identify the estoppel justified its admissibility, despite a confidentiality agreement.

**93** The tribunal before the other proceeding on 29 June 2018 confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT. That is in line with consistent jurisprudence of the courts in Mediterraneo [*PO2, p. 60, ¶ 39*]. The dispute in the other proceeding is exactly the same as CLAIMANT's request in the present case. For all these reasons, the final outcome of the case would be highly predictable if the "*Partial Interim Award*" was to be used before the Tribunal by the Parties, which comforts the necessity for CLAIMANT and the Tribunal to admit this evidence.

**94** Finally CLAIMANT ensures that the submission of evidence would be in line with the prevailing principles of transparency as evidenced in the Transparency Rules of UNCITRAL. Contrarily to RESPONDENT's objection to the application of these principles [*Letters by Langweiler and Fasttrack, pp. 49-50*], there are theories in favour of an increase of Transparency principles for consistency, predictability and efficiency in international commercial arbitration [*BUYS, p. 121; ROGERS, p. 1303*]. Precisely, in the present situation the Parties have not expressly opted out of the Rules on Transparency, which means that they can still be invoked by them.

**95** It would be contrary to the principles of equal treatment and fairness to prohibit CLAIMANT from producing elements necessary to prove its point, while RESPONDENT is offered the choice to produce or not the evidence of its contradictory behavior. Indeed, Art. 45.3 of 2018 HKIAC Rules allows RESPONDENT only to use confidential elements from a pending arbitration proceeding, depriving CLAIMANT from proving its right.

**96** From a due process perspective, it would also be fair to rely on evidence providing from an earlier case in favour of the person with the burden of proof in the latter, since it would help in gaining time deciding on the outcome of the award [*COE, pp. 54-69*].

**97** CLAIMANT is not acting in bad faith nor trying to constitute a "*fishing expedition*" or delaying tactic with the intention of wasting time since it has not required the production of the entire award, nor a high quantity of documents, but only the "*Partial Interim Award*" itself, which only represents a small part of the pending proceeding [*IBA WORKING PARTY, p. 7; BROWN PRICE, p. 11; FRECON, p. 43*].

**98** Allowing CLAIMANT to dispose fairly of its action would permit the Tribunal to find the truth about RESPONDENT's contradictory behavior.

**b. The evidence is relevant to find the truth**

**99** CLAIMANT's interest in finding the truth about RESPONDENT's contradictory behavior overrides the illegality of the way the evidence was obtained. Indeed, as RESPONDENT considers a similar situation to the present case as being an unforeseeable change of circumstances, CLAIMANT's request to adapt the Contract is legitimate.

**100** In the same perspective, if a party has given inconsistent evidence in two separate arbitrations, it is clear that the interests of justice, sometimes called public interest, requires disclosure of documents in spite of any obligation of confidentiality. *A fortiori*, when the parties do not convene on a specific clause of confidentiality, as it is the case for the Parties, they can only be more likely to disclose [*SMEUREANU, p. 39*]. However, disclosure of arbitration documents subject to an obligation of confidentiality should go no further than what is reasonably necessary to achieve the purpose of that public interest [*Dr Ghaith*].

**101** According to the principle "*res judicata pro veritate accipitur*", what has been adjudged must be taken for truth. Although the arbitral tribunal in the other proceedings has not yet decided a final award on the merits, a "*Partial Interim Award*" has been rendered [*PO2, p. 60, ¶ 39*]. The pursuit of the truth as an element of fairness implies that the Parties should be entitled to use the elements that led to this "*Partial Interim Award*" to obtain a correct outcome in the case at hand. Indeed, if evidence demonstrates that a party deserves to succeed on the merits, even though normal procedures were not followed to obtain it, it has been decided that the arbitral tribunal can more lenient as to its admissibility. This means that it is likely to be a discretionary matter for the arbitral tribunal and may depend on the circumstances of the case [*WAINCYMER, p. 797*].

**102** For instance, in the Yukos case, the arbitral tribunal relied extensively on confidential documents that had been illegally obtained and published on WikiLeaks [*SUSSMAN; Yukos Case*]. Other published awards in investor state cases have specifically addressed the admissibility of evidence obtained through cyber intrusion. More particularly, Government documents uploaded by hackers, which weren't protected by privilege, were admitted [*Caratube Case*]. Even though these methods of analysis appear more frequently in investment arbitration, equal considerations are at issue in commercial arbitration. Finally, it would be in in favour of legal certainty to refer to this information in the case at hand.

### 3. Moreover, there were no substantial barriers to access these documents

**103** Considering the information was already in the public domain, and that RESPONDENT did not take any measures to protect it, there are no doubts as to the admissibility of the evidence.

**104** Firstly, RESPONDENT considers the evidence should not be admitted in the arbitration even if it had been made public in the worldwide web [*Letter by Fasttrack, p. 50*]. Therefore, RESPONDENT admits the information has been made public. However, once made public, an award falls in the public domain. This implies all the resulting consequences of disclosure. Some arbitration institutions even adopt a default rule of publicity, applicable immediately once the award is issued or after a certain period of time, unless one of the parties' objects [*SMEUREANU, p. 87*].

**105** In the case at hand, CLAIMANT has the opportunity to acquire the "*Partial Interim Award*" from a company that provides intelligence on the horseracing industry. It remains uncertain as to where this company gets its information from, and it has refused to disclose its sources. Yet, the aforementioned company is seeking to make profit from the information by selling it to any individual interested in it, such as CLAIMANT [*PO2, pp. 60-61, ¶ 41*]. RESPONDENT cannot complain from CLAIMANT bringing this evidence, since it has already been made public.

**106** Secondly, RESPONDENT used an outdated firewall to protect its computer system, which made it easier for the hackers to enter the system [*PO2, p. 61, ¶ 42*]. However, the UNCITRAL Notes advise parties to consider issues of storage, access and data security when selecting electronic means of communications [*UNCITRAL Notes, pp. 1-40*]. They also explain that when parties accept the use of electronic means, they should consider issues arising from the use of these means.

**107** Indeed, cyber-security bears particular significance in international arbitration. The risks faced by each participant, the need to share information between the parties, the arbitral tribunal and the institution increase the likelihood that data will be lost or breached [*MOREL DE WESTGAVER*]. Consequently, RESPONDENT could have expected that international arbitration is a target for hackers and should have taken higher precautions as to the protection of its information. If confidentiality was such a preoccupation for RESPONDENT and its customer, they should have agreed on a level of minimum security against third parties' unwanted access. The parties to an arbitration proceeding remain responsible for taking appropriate measures to avoid this problem [*ICC DIGITAL LIBRARY, p. 77*].

**108** The facility with which the hackers entered the system [*PO2, p. 61, ¶ 42*] demonstrates RESPONDENT's neglect in not considering useful to update its firewall system and releases CLAIMANT from any burden.

**Conclusion of ISSUE II**

**109** RESPONDENT's argument according to which CLAIMANT cannot use evidence from another arbitration proceeding is not properly founded. Indeed, the Tribunal has the power to decide on its admissibility and there is no disposition that prohibits such power. CLAIMANT is not bound by the confidentiality agreement from the arbitration proceeding between RESPONDENT and its customer.

**110** Since CLAIMANT cannot be proven guilty for the breach of confidentiality or the illegal means, it is allowed to use such evidence to prove RESPONDENT's bad faith and contradictory behavior. Also, the admissibility of this evidence is necessary for the Tribunal to decide on a fair and equal outcome. In any case, the documents had not been sufficiently protected and are already in the public domain, which justifies again its admissibility.

## III. CLAIMANT is entitled to the payment of USD 1.250.000 or any other amount resulting from an adaptation of the price

**111** Following the sudden increase of customs tariffs by both Equatoriana and Mediterraneo Governments, CLAIMANT was compelled to pay 30 per cent more than what the Parties agreed in the Contract [*Notice of arbitration, p. 6, ¶¶ 9-10*]. However, both the negotiation and the Contract itself show that CLAIMANT should not be responsible for bearing such a cost.

**112** CLAIMANT is entitled to adapt the Contract. Indeed, not only did the Parties expressly agree on the implementation of a hardship clause (**A**.), but the newly increased tariffs also fall within the scope of said hardship clause (**B**.). Should the Tribunal decide otherwise, CLAIMANT is still entitled to be compensated for the prejudice resulting from the bad intention of RESPONDENT and its misrepresentation of the situation (**C**.).

### A. CLAIMANT is entitled to adapt the Contract where the Parties expressly agreed through the implementation of a hardship clause

**113** Clause 12 of the Contract is a hardship clause (**1.**) and the newly imposed tariffs imposed by the Government of Equatoriana trigger the applicability of the hardship (**2.**).

### 1. Clause 12 of the Contract is a hardship clause

**114** The second part of Clause 12 is comparable to a provision of hardship, which must be distinguished from *force majeure*. Hardship does not require any additional "*criteria*" than *force majeure* [*Arts. 6.2.2, 7.1.7 UNIDROIT Principles*]. However, hardship is more specific and narrower in its scope since only the "*impediments*", which "*fundamentally alter the equilibrium of the contract*" must be considered [*BRUNNER, pp. 397-399*].

**115** Art. 6.2.2 of the UNIDROIT Principles defines hardship by specifying the nature of the burden, but also other factors that must be combined with the burden to make it legally relevant [*PERILLO, p. 22*]. There is hardship where the occurrence "*of events fundamentally altering the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished […]*" [*Art. 6.2.2 UNIDROIT Principles; PERILLO, p. 22*].

**116** Hardship and *force majeure* also differ in their legal consequences, as hardship does not operate as an excuse for non-performance, but as a tool enabling adaptation of a contract which has become excessively onerous to perform for one party [*BRUNNER, pp. 399-400*].

**117** Based on the wording of Clause 12 of the Contract, a hardship provision can easily be identified. It shall exempt CLAIMANT from any liability arising from the payment of the newly imposed tariffs.

**118** CLAIMANT suggested inserting hardship wording within the Contract. It was finally added to the *force majeure* clause [*EXHIBIT C5, p. 12, ¶ 12; PO2, p. 56, ¶ 12*]. More precisely, Clause 12 of the Contract reads: "*Seller shall not be responsible for […]* ***hardship****, caused by additional health and safety requirements or comparable* ***unforeseen events*** *making the contract more onerous*" [*EXHIBIT C5, p. 14, ¶ 12*].

**119** The clause expressly contains the word "*hardship*". It implements the fundamental unforeseen event criteria as well as the idea that the Contract would become significantly imbalanced and "*more onerous*". These elements are exactly the ones defining a provision of hardship.

**120** Originally, CLAIMANT specifically pointed out that it was not willing to take over "*any further risks*" associated with a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions [*EXHIBIT C4, p. 12, ¶ 4*]. CLAIMANT absolutely wanted to avoid a situation where a price increase would "*destroy the commercial basis of the deal*" [*EXHIBIT C4, p. 12, ¶ 4*], rendering the Contract economically imbalanced and impracticable. What CLAIMANT intended to cover perfectly matches with what a hardship provision aims at.

**121** Also, the Parties' original idea was to introduce a hardship clause, and in particular an ICC-hardship clause. However, as RESPONDENT considered this ICC model clause to be too broad, a narrower provision was inserted to the existing *force majeure* clause, which explains the text font difference within the Clause 12 [*Answer to the Notice of Arbitration, p. 30, ¶ 4; EXHIBIT R3, p. 35; PO2, p. 56, ¶ 12*].

**122** For all the reasons stated above, Clause 12 of the Contract is a hardship clause.

### 2. The newly imposed tariffs trigger the applicability of Clause 12

**123** As mentioned above, Clause 12 states that the Seller shall not be held responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the Contract more onerous [*EXHIBIT C5, p. 14, ¶ 12*].

**124** The newly imposed tariffs constitute an unforeseen event beyond CLAIMANT's control (**b.**) which fundamentally alters the equilibrium of the Contract (**a.**).

#### a. The imposition of new tariffs fundamentally alters the equilibrium of the Contract

**125** Hardship is a situation where the occurrence of events fundamentally alters the equilibrium of the contract. The alteration is either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished [*Art. 6.2.2 UNIDROIT Principles; GIRSBERGER ZAPOLSKIS, pp. 122-125, 136; BONELL I, p. 117*]. The cause of the alteration may be factual or legal [*Art. 6.2.2 UNIDROIT Principles; MCKENDRICK, p. 721*].

**126** It may be the case, when a new law makes the performance of a party's contractual obligations more onerous or when the value it receives from the performance of the other party is severely reduced [*ICC Award No.9479*]. Whether a party faces hardship can only be determined on a case-by-case basis considering, among other things, the cost increase or value loss in percentage, the counter-performance to be received by the obligor, its financial situation, and the specifics of a possible explicit or implicit risk allocation by the parties [*AZEREDO DA SILVEIRA, pp. 321-348*].

**127** In the case at hand, due to the newly imposed tariffs, CLAIMANT had to suffer from an increase of 30 per cent in the cost of shipping and saw its 5 per cent profit margin destroyed [*EXHIBIT C8, p. 17, ¶ 6*]. The planned margin was low from the beginning, but the increase of tariffs worsened the situation. It did not permit CLAIMANT to realize the profit it had anticipated and created a significant imbalance [*EXHIBIT C8, p. 17, ¶ 6*]. As mentioned above, CLAIMANT expressed its intent to avoid a situation where a price increase would "*destroy the commercial basis of the deal*" [*EXHIBIT C4, p. 12, ¶ 4*].

**128** Hence, such event constitutes a substantial increase in the cost of performing obligation for CLAIMANT and create, in this occasion, a significant imbalance making the Contract more onerous.

**b. The newly imposed tariffs constitute an unforeseen event beyond CLAIMANT's control**

**129** Hereafter the alteration of the equilibrium of the contract, there is additional requirement for hardship to arise under international law [*Art. 6.2.2 UNIDROIT Principles*]. Such events must occur or be acknowledged by the disadvantaged party after the conclusion of the Contract. Even if the change of circumstances occurs after the conclusion of the Contract, such circumstances cannot cause hardship if they could reasonably have been predicted by the disadvantaged party at the time the Contract was concluded. In addition, hardship can only arise if the events are beyond the control of the disadvantaged party, which is the case of "*acts of rulers and governments*", which imply a human intervention [*Art. 6.2.2 UNIDROIT Principles; MCKENDRICK, p. 724*].

**130** Moreover, as a WTO member [*PO2, p.61, ¶ 47*], Equatoriana must comply with international trade law. Pursuant to these rules, safeguard measures are "*emergency actions*" that react to the increase of imports on particular products, when such imports cause serious injury to the importing member's domestic industry [*Art. XIX GATT 1994; LISSEL, p. 2; SYKES, p. 259*]. Indeed, greater protection could arise in the form of direct legislation to protect injured industries [*SYKES, p. 273*]. The broad language of the safeguard measures is presumably meant to cover a wide range of unexpected circumstances, which by definition are difficult to anticipate precisely [*MONTAGUTI, p. 10; LAWTEACHER, ¶ 5*].

**131** In the case at hand, the tariffs imposed by the Government of Mediterraneo were the starting point of the retaliation measures taken by Equatoriana [*Letter by Fasttrack, p. 50, ¶ 23*]. This event was completely unexpected and is comparable to a safety requirement as mentioned under Clause 12. Equatoriana took a "*safeguard*" action to protect the industry from an increase of import tariffs implemented by Mediterraneo that threatened to cause serious injury to the industry.

**132** The newly imposed tariffs took effect eight month after the conclusion of the Contract and "*came as a big surprise*" for both Parties and most analysts [*EXHIBIT C5, p. 14; EXHIBIT C6, p. 15, ¶ 2; PO2, p. 58, ¶ 25*]. There have been few countries in the past which had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size, but Mediterraneo was not one of them [*PO2, p. 58, ¶ 23*]. It is extraordinary in several regards, *i.e.*

"*the breadth of the goods and the countries covered, the amount and the speed with which it had been imposed*" [*ibid.*].

**133** Until 2018, there had been no tariffs imposed on agricultural goods in either Equatoriana or Mediterraneo [*PO2, p. 58, ¶ 25*]. In any event, the Parties never thought that frozen semen could be considered to be an "*agricultural good*" [*PO2, p. 58, ¶ 26*]. Generally, racehorse breeding is categorized differently from pigs, sheep, or cattle [*Notice of arbitration, p. 6, ¶ 11*].

**134** Finally, the new tariffs restriction has been imposed by the customs officials of Equatoriana and implemented by executive order. It is an act of the Government which could not be controlled by CLAIMANT [*PO2, p. 58, ¶ 25; EXHIBIT C8, p. 17, ¶ 6*]. It could not have been exempted from or even obtained a reduction in the additional tariffs charged in the last shipping [*PO2, p. 58, ¶ 27*].

**135** For all these reasons, this newly imposed tariff is an unforeseen event complying with Clause 12 of the Contract. It was completely beyond CLAIMANT's control, which could not have prevented its consequences. Therefore, the price increase could not, in any way, have been taken into account at the conclusion of the Contract.

### B. Since the newly increased tariffs fall within the scope of hardship, CLAIMANT is entitled to request an adaptation of the Contract

**136** CLAIMANT is entitled to a price adaptation as a consequence of the triggering of the hardship clause of the Contract (**1.**). Moreover, the Tribunal should adapt the price of the Contract considering the misrepresented intention of RESPONDENT and its unfair dealing (**2.**).

#### 1. Pursuant to Art. 6.2.3 of UNIDROIT Principles, CLAIMANT is able to request an adaptation of the price

**137** The legal consequence of hardship under Art. 6.2.3 UNIDROIT Principles is the ability to request renegotiations. This request must be made without "*undue delay*" and shall indicate the ground on which it is based [*Art. 6.2.3(1) UNIDROIT Principles*]. In case of hardship, CLAIMANT must first request RESPONDENT to enter into renegotiations in order to adapt the Contract. In the absence of a renegotiation clause, an infringement of the duty to renegotiate should entail consequences in the context of the cost allocation of the subsequent arbitral proceedings [*Art. 6.2.3(1) UNIDROIT Principles*]. However, such a request does not in itself "*exempt*" the aggrieved party from its performance obligation. Withholding such a performance would usually be a very risky action for the aggrieved party, and it could be left liable to pay damages [*Art. 6.2.3 UNIDROIT Principles; BRUNNER, pp. 479, 487-488*].

**138** If the parties cannot find an agreement, "*another possibility would be for a court to adapt the contract with a view to restoring its equilibrium*" and seek to make a fair distribution of the losses between the parties [*ICC Award No.7365; Islamic Republic of Iran v. Cubic Defense Systems, Inc.*]. A fair distribution may, depending on the nature of the hardship, involve a price adaptation.

**139** In the case at hand, shortly after CLAIMANT was informed of the scope of the newly imposed tariffs, CLAIMANT sent an Email to RESPONDENT on 20 January 2018 in order to renegotiate [*EXHIBIT C7, p. 16*]. CLAIMANT also tried to call RESPONDENT, but it never answered. CLAIMANT specifically mentioned the grounds on which it was asking for renegotiation. The newly imposed tariffs "*made the shipment 30 per cent more expensive than anticipated, not only destroying our profit margin of 5 per cent but resulting in considerable hardship*" [*EXHIBIT C8, p. 17, ¶ 6*], which is why it should be allowed to adapt the Contract.

### 2. In any case, the Tribunal must decide on an adaptation of USD 1.250.000 considering RESPONDENT'S misrepresentation and unfair dealing

**140** Based on Art. 7 (1) CISG and Art. 1.7 (1) UNIDROIT Principles, the interpretation of individual contracts and the whole contractual relationship of the Parties must be guided by the maxim of good faith and fair dealing [*MAGNUS*]. However, RESPONDENT misrepresented the Contract and rejected the principle of fair dealing. Above and beyond the general rule of *pacta sunt servanda*, any definition of good faith must include elements of "*honesty, fairness, and reasonableness*" [*HUNTER, pp. 172-174*]. In the case at hand, RESPONDENT promised an adaptation of the price via Mr. Shoemaker (**a.**), and CLAIMANT underwent serious financial difficulties (**b.**). However, the Parties did not agree on a rehabilitation of the price.

#### a. Mr. Shoemaker promised an adaptation of the price on behalf of RESPONDENT

**141** Mr. Shoemaker promised the Parties would find a price adaptation arrangement, and CLAIMANT authorized the third shipment only under the assumption that the price would be further adapted. However, no such arrangement was ever found. RESPONDENT must be held responsible and pay for the extra-costs incurred by CLAIMANT. When making that promise, Mr. Shoemaker did not know anything about the Contract. Moreover, he now admits that if he had not conducted any price adaptation CLAIMANT would not deliver the last shipment [*EXHIBIT R4, p. 36, ¶ 5*].

**142** He became responsible for the horse-breeding program in November 2017, several months after concluding the Contract [*PO2, p. 59, ¶ 34*] and expressly admitted the fact he did not take part to the negotiations [*EXHIBIT R4, p. 36, ¶ 5*].

**143** Mr. Shoemaker only analysed the issue from an economic point of view. He had an economic interest in forcing CLAIMANT to send the third instalment and see his program evolve in the right direction. Mr. Shoemaker even admits his "*primary concern was to ensure that the remaining 50 doses were actually shipped, some of which were urgently needed for the start of the breeding season*" [*EXHIBIT R4, p. 36, ¶ 3*]. He just wanted to make sure that RESPONDENT would be able to comply with its obligations towards its customers but had no concerns as to RESPONDENT's obligations towards CLAIMANT [*PO2, p. 59, ¶ 34*].

**144** He did not foresee the legal consequences of his action, he tried to contact the legal department on a Saturday morning, but no one answered [*PO2, p. 59, ¶ 34*]. Instead of waiting until Monday morning, what would have been the right decision considering the importance of the issue, Mr. Shoemaker rushed the whole decision-making process. Given that the breeding season only started on 15 February 2018 [*PO2, p. 56, ¶ 11*], Mr. Shoemaker could have waited much longer, yet he still requested the shipment as an emergency on 21 January 2018 [*EXHIBIT R4, p. 36, ¶ 3*].

**145** He dealt with an issue falling outside the scope of his mission as well as he relied on the advice of a person who might have been legally qualified but did not know anything about the Contract either: his wife [*EXHIBIT R4, p. 36, ¶ 6*]. It should also be noted that a lawyer providing for legal advice on a case that he is not involved in, is not a reliable lawyer.

**146** This behavior is unjustifiable, both by Mr. Shoemaker and more generally by RESPONDENT. CLAIMANT is not supposed to bear the consequences of Mr. Shoemaker's inability to conduct his mission diligently. He said a solution would be found [*EXHIBIT C8, p. 18, ¶ 7*], he should have done everything possible so as to find the solution and rebalance the Parties' contractual relationship, but failed. Intervention of the Tribunal is therefore required so as to overcome RESPONDENT's incapacity and correct the negative consequences of Mr. Shoemaker's promises to CLAIMANT.

**147** When deciding whether or not CLAIMANT should be entitled to an adaptation of the price, the Tribunal should also consider the Parties' intention to establish a long-term relationship (**i.**) as well as the economic situation of Equatoriana (**ii.**).

**i. An adaptation of the price complies with the original intention of the Parties to establish a long-term relationship**

**148** Since the beginning of the negotiations, the Parties have always shown their mutual intention and interest in entering and maintaining a "*long-term beneficial relationship*" [*EXHIBIT C2, p. 10, ¶ 3; EXHIBIT C4, p. 11, ¶ 2; EXHIBIT C8, p. 18, ¶ 10*]. However, RESPONDENT'S CEO decided, after the event occurred, to put an end to any further cooperation. She expressly shouted that RESPONDENT was "*fed up*" by CLAIMANT and that it was no longer interested "*in a further cooperation*" [*EXHIBIT C8, p. 18, ¶ 12*].

**ii. An adaptation of the price must occur in line with the economic situation of Equatoriana and RESPONDENT's business goal**

**149** The unexpected market fluctuation has a significant effect on the Parties and the industry within which the transaction occurs. From the beginning, the Contract under dispute was concluded in line with RESPONDENT's goal to become a leading company in the field of racehorse breeding and more generally, Equatoriana's flourishing industry.

**150** The business sector's growth rate has "*never been below 4 per cent per year*" [*Notice of Arbitration, p. 5, ¶ 4*]. Investors have expressed "*a clear intention to become within a very short period of time one of the leading breeders for racehorses*" [*EXHIBIT R3, p. 11, ¶ 1*]. The Government of Equatoriana has a strong interest in the good evolution of this business.

**151** On its side, RESPONDENT aims at becoming a leader in the field of horse races. CLAIMANT itself agreed to contract with RESPONDENT knowing that it intended to "*become one of the leading breeders for racehorses*" [*EXHIBIT C3, p. 9, ¶ 1*]. To do so, RESPONDENT launched a racehorse stable and since then, horse racing has become very popular in Equatoriana [*Notice of Arbitration, p. 5, ¶ 4*].

**152** CLAIMANT managed to become a "*center of excellence*" [*Notice of Arbitration, p. 4, ¶ 1*] offering equipment, classes and expertise, which cannot be found elsewhere. RESPONDENT has considered several times during the negotiation CLAIMANT's experience with the use of artificial insemination [*EXHIBIT C1, p. 9, ¶ 3*].

**153** To achieve their long-term goal, both the Government of Equatoriana and RESPONDENT need to be able to maintain a viable business relationship with CLAIMANT. Adaptation of the price would ensure CLAIMANT's financial survival and ability to conduct further business.

**b. An adaptation of the Contract must be considered in light of CLAIMANT's financial situation**

**154** The original financial difficulties CLAIMANT underwent and the loss of profit it suffered due to this price increase also has to be taken into consideration by the Tribunal. Such an adaptation of the price is CLAIMANT's last recourse to rebalance the Contract. Yet, CLAIMANT could not have been exempted from or obtained a reduction in the additional tariffs charged in the last shipping [*PO2, p. 58, ¶ 27*].

**155** The case was widely reported in the press as it nearly resulted in the insolvency of CLAIMANT. CLAIMANT had heavily invested in new stables the year before and was dependent on the revenues from the sale for servicing its debts. It took CLAIMANT some time to convince the Creditors Committee to authorize new loans [*PO2, p. 58, ¶ 21*]. CLAIMANT was already subject to restructuration and had to be profitable for the year 2017 [*PO2, p. 59, ¶ 29*]. Not adapting the price would be very burdensome for CLAIMANT. Negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of CLAIMANT's largest competitor who is interested in buying the dressage part of CLAIMANT. Thus, the bank would probably make the sale a precondition for the entry into a new credit [*PO2, p. 59, ¶ 29*].

**156** RESPONDENT was aware of unspecific rumours in the market that CLAIMANT was still in financial difficulties and had been losing money over the last years [*PO2, p. 58, ¶ 23*]. Also, RESPONDENT was aware of the impact of the 30 per cent tariffs on CLAIMANT's financial situation as CLAIMANT mentioned during the negotiations [*PO2, p. 58, ¶ 28*].

**157** Last but not least, the profit RESPONDENT made due to that price increase shall be taken into consideration by the Tribunal when trying to make a fair distribution of the losses between the Parties [*PO2, p. 57, ¶ 19*]. Adapting the price of the Contract would be the greatest solution as RESPONDENT would not financially be endangered if it bore the USD 1.250.000 [*PO2, p. 59, ¶ 30*].

**158** These elements underline RESPONDENT's bad faith and misrepresentation. They must all be taken into account by the Tribunal when evaluating a fair rehabilitation of the price.

**C. Even if the Tribunal decides otherwise, CLAIMANT is able to receive any other amount in compensation of the prejudice it suffered**

**159** Nothing in the CISG prevents CLAIMANT to be entitled to request any other amount in compensation for damages (**1.**). In any case, CLAIMANT must be entitled to such under the UNIDROIT Principles (**2.**).

### 1. CLAIMANT is entitled to request damages under the CISG

**160** Pursuant to Art. 79(5) CISG, nothing prevents either party from exercising any right other than to claim damages under the CISG. As RESPONDENT stated, since CLAIMANT cannot rely on Art. 79 CISG, it is allowed to request damages [*Answer to Notice of Arbitration, p. 32, ¶¶ 18-21; Art. 79(5) CISG; Handelsgericht*]. Indeed, Art. 79 CISG does not apply in case of hardship.

**161** Arts. 74-77 CISG provide for the party to claim for damages under a breach of Contract. There is no example, within the CISG, of what may constitute a fundamental breach for the purpose of its application but only general interpretive guidelines [*BABIAK, p. 32; GRAFFI, p. 338*]. A mere non-fundamental breach will be sufficient to entitle the aggrieved party to claim damages [*Art. 25 CISG; GRAFFI, p. 338*].

**162** Following this price increase, CLAIMANT is now deprived from the 5 per cent profit expected when signing the Contract [*EXHIBIT C8, p. 17, ¶ 6; PO2, p. 59, ¶ 31*]. As mentioned above, this event makes the Contract more expensive, worsening the financial difficulties suffered by CLAIMANT [*EXHIBIT C8, p. 17, ¶ 6; supra ¶¶ 150-154*], which justifies the request for damages.

### 2. In any case, CLAIMANT is entitled to damages under the UNIDROIT Principles

**163** The provisions of Art. 7.4.1 of the UNIDROIT Principles is helpful interpreting and applying Art. 74 CISG [*EISELEN, ¶ b.*]. The right to damages may arise not only in the context of non-performance, but also during the pre-contractual period [*Art. 7.4.1 UNIDROIT Principles*]. In the case at hand, CLAIMANT is given the right to claim damages considering that negotiations have been conducted in bad faith (**a.**) and a gross disparity is resulting from the disequilibrium of the Contract (**b.**).

#### a. RESPONDENT acted in bad faith during the whole process of negotiation

**164** Bad faith is the fact of entering into negotiations without the intention of reaching an agreement with the other party [*Art. 2.1.15 UNIDROIT Principles*]. It is the case when a party deliberately misleads the other party as to the nature of the terms of the proposed contract by actually misrepresenting facts [*Art. 2.1.15 UNIDROIT Principles*]. As mentioned above, RESPONDENT misled CLAIMANT during the whole negotiation [*supra ¶ 136*]. RESPONDENT was not clear on the application of DDP [*Incoterms*] to the Contract in dispute from the beginning. During the whole process of the negotiations, CLAIMANT made it clear that it was "*not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions*"

[*EXHIBIT C4, p. 12, ¶ 4*]. Consequently, RESPONDENT was clearly acting in bad faith during the negotiations.

**b. A gross disparity arose from the increase of the tariffs and created an excessive advantage in favor of RESPONDENT**

**165** A contract which became grossly unfair and unjustifiably gave the other party an excessive advantage, may be adapted under the rules of hardship [*Art. 3.2.7 UNIDROIT Principles*]. Moreover, a party who knew or ought to have known of a ground for avoidance is liable for damages to the other party [*Art. 3.2.16 UNIDROIT Principles*].

**166** An unjustifiable advantage may occur for instance when one party is inexperienced (**i.**) or when the co-contractor takes advantage of its economic distress and urgent needs (**ii.**).

**i. RESPONDENT has taken advantage of CLAIMANT's inexperience in selling such important quantities of products**

**167** In the other areas of equine sport CLAIMANT had regularly sold frozen semen but never more than 10 doses at a time to one breeder [*PO2, p. 57, ¶ 15*]. The number of doses required by RESPONDENT was unusual [*PO2, p. 57, ¶ 15*]. CLAIMANT would normally not sell such an amount of frozen semen to a single breeder for obvious reasons considering the scarcity of the horse breed and a potential resale of these doses [*EXHIBIT C2, p. 10, ¶ 2*].

**168** Thus, RESPONDENT insisted in the delivery of such a quantity of goods and took advantage of CLAIMANT's inexperience.

**ii. RESPONDENT has taken advantage of CLAIMANT's economic distress and urgent needs**

**169** Despite its inexperience in the sale of such amount of horse semen, CLAIMANT has viewed the Contract "*as a good opportunity to increase their revenues*" [*Notice of Arbitration, p. 5, ¶ 6*]. The financial difficulties of CLAIMANT led to a restructuring plan which included two mains credit lines that respectively depended on being profitable in 2017 and 2018 [*PO2, p. 59, ¶ 29*]. CLAIMANT was therefore in an urgent need to reimburse its creditors [*ibid.*]. The profit CLAIMANT had planned to make (USD 480.000 in both 2017 and 2018) became difficult if not impossible to realize [*ibid.*]. This put CLAIMANT in a very bad position towards the bank and the other potential creditors [*ibid.*]. Moreover, RESPONDENT let CLAIMANT bear all risks by refusing to insert an ICC hardship clause and by imposing a DDP delivery [*PO2, p. 56, ¶ 12*].

**170** Both RESPONDENT's bad intention and the newly imposed tariffs put CLAIMANT in an excessive disadvantaged position. Hence, CLAIMANT is entitled to receive damages resulting from the DDP fees.

**Conclusion of ISSUE III**

**171** As the Parties expressly agreed through the implementation of a hardship clause to the Contract, CLAIMANT is entitled to an adaptation of the price. CLAIMANT sent the last shipment as provided in the Contract despite having to face newly imposed tariffs by Equatoriana's Government. This unforeseen event is entirely beyond CLAIMANT's control and has created a significant imbalance in the Contract.

**172** Any hardship situation triggers a duty to renegotiate the Contract for the Parties and may entail an adaptation of the price.

**173** In any case, even if the Tribunal decides otherwise, CLAIMANT should receive any other amount in compensation for damages endured. Although CLAIMANT cannot rely on Art. 79 CISG, nothing prevents neither in the Contract nor the CISG to request damages resulting from the bad intention of RESPONDENT and the excessive disadvantage.

**174** As a conclusion, for all the reasons detailed above, CLAIMANT is entitled to the payment of USD 1.250.000 or any other amount the Tribunal may see fit as compensation.

## REQUEST FOR RELIEF

In light of the submissions above, CLAIMANT respectfully requests the Tribunal:

**I. To determine that:**

**1.** The Tribunal has jurisdiction to proceed with the adaption of the Contract

**2**. The documents from the second arbitration proceedings are admissible

**II. To determine on the merits of the case that:**

**1.** CLAIMANT request the Tribunal to be entitled of USD 1.250.000 resulting from an adaptation of the price

**2.** Even if the Tribunal decides otherwise, CLAIMANT is able to request any other amount in compensation of the prejudice suffered

**III. To order RESPONDENT to bear all the costs of this arbitration**

Versailles, France,
06/12/2018

On behalf of Phar Lap Allevamento

**Inès Giauffret • Sarah Lasson • Pierre Nosewicz • Loïc Saint-Martin**

**Paisley Simonnet • Léane Thakrar • Léonard Vanvi • Fanny Vigier**

## Certificate and Choice of Forum

To be attached to each Memorandum

I, Maximin DE FONTMICHEL, on behalf of the Team for (name of School)

The University of Versailles hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☑ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☑ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) the University of Versailles

Name: Maximin DE FONTMICHEL

Signature

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