SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION

HONG KONG SAR
31ST MARCH TO 7TH APRIL 2019

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:

Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

CLAIMANT

AGAINST:

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

RESPONDENT

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LIST OF ABBREVIATIONS

&	and
%	percent
¶ or para(s).	paragraph/paragraphs
AAA	American Arbitration Association
AG	Amtgerich, Lower Court, Germany
Ans. NOA	Answer to Notice of Arbitration
Arb.	Arbitration
Art(s).	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Cl.	Clause
Dec	December
DDP	Delivered Duty Paid
DIS	German Institute of Arbitration
et al.	and others
Exhibit C	Claimant's Exhibit
Exhibit R	Respondent's Exhibit
Hague Principles	The Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ibid.	ibidem (in the same place)
IBA	International Bar Association

ICC	International Chamber of Commerce
ICDR	International Center for Dispute Resolution
Jan	January
LCIA	The London Court of International Arbitration
Model Law	UNCITRAL Model Law
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number
NOA	Notice of Arbitration
OLG	Oberlandesgericht, Appellate Court, Germany
p./pp.	page/pages
PCA	The Permanent Court of Arbitration at the Hague
PO 2	Procedural Order No. 2 of 2 November 2018
Res.	Response
Sales Agreement	Frozen Semen Sales Agreement
SCC	The Arbitration Institute of Stockholm Chamber of Commerce
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
USD	United States Dollar
v.	versus

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Cited as	Source
CISG	United Nations Convention on Contracts for the International Sale of Goods
Hague Principles	The Hague Conference on Private International Law Principles on Choice of Law in International Commercial Contracts
IBA Rules of Evidence	International Bar Association Rules of Evidence
ICC Rules	International Chamber of Commerce Rules of Arbitration
UN-ECE Rules	United Nations Economic Commission for Europe Rules
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration with the 2006 Amendments
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	UNIDROIT Principles of International Commercial Contracts

STATEMENT OF FACTS

1. Phar Lap Allevamento [CLAIMANT] operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. Owning three hundred horses, CLAIMANT is recognized for its excellence in horse care, breeding and riding/driving. In its racehorse section, CLAIMANT is particularly known for the breeding of Ninjinsky III, who is one of the most successful racehorses ever and one of the most sought-after stallions for breeding.

2. Black Beauty Equestrian [RESPONDENT] is famous for its broodmare lines in Oceanside, Equatoriana. With the growing popularity of horse racing in Equatoriana, RESPONDENT decided to start a racehorse breeding program.

3. Upon learning CLAIMANT'S reputation in racehorse breeding, RESPONDENT contacted CLAIMANT and inquired the availability of a large quantity of frozen semen from Nijinsky III in March 2017. RESPONDENT intended to take advantage of the special situation in Equatoriana where the ban on artificial insemination for race horses has been temporarily lifted. [*Exhibit C-1, p. 9*].

4. CLAIMANT was surprised by RESPONDENT'S large request but made an exception due to RESPONDENT'S reputation in the racehorse industry. In its response, CLAIMANT offered to sell 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards, providing basic conditions – including a price of USD $99,500 per dose, pick-up at its premises, and prohibition of resale to third-parties – to be followed. [*Exhibit C-2, p. 10*].

5. On 28 March 2017, RESPONDENT agreed to most of the terms of the offer but proposed different terms with respect to the dispute resolution clause and price and delivery terms. The PARTIES thus entered into a series of negotiations, from which the PARTIES eventually arrived at common understandings.

6. For the dispute resolution clause, RESPONDENT objected to submit to the jurisdiction of Mediterranean courts and proposed that it would accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction. [*Exhibit C-3, p. 11*]. Considering the desirability of a long-term business relationship, CLAIMANT proposed, which RESPONDENT did not object, that

the Law of Mediterraneo is applicable and the PARTIES will submit to arbitrate in a neutral country, Danubia. [*Exhibit R-2, p. 34*].

7. For the price and delivery terms, RESPONDENT asked for a better price and insisted on a delivery on the basis of DDP. However, CLAIMANT was only willing to accept delivery DDP if there was a moderate price increase (additional USD $1,000 per dose), transfer of certain risks to RESPONDENT, and inclusion of a hardship clause to temper additional risks. [*Exhibit C-4, p. 12*]. In April 2017, RESPONDENT agreed to all three conditions. [*Notice of Arbitration, p. 5, para. 8*].

8. Due to an unfortunate car accident, CLAIMANT and RESPONDENT'S main negotiators, Ms. Napravnik and Mr. Antley, respectively, were unable to finalize the agreement to reflect what had already been negotiated. [*Notice of Arbitration, p. 5, para. 8; Exhibit C-8, p. 17*].

9. On **6 May 2017**, the PARTIES, through negotiators Ms. Krone and Mr. Ferguson, finalized the Frozen Semen Sales Agreement ("Sales Agreement") with the following terms: (1) the purchase price has to be paid in two instalments – the first instalment of USD $5,000,000 on 18 May 2017 and the second instalment of USD $5,000,000 on 21 Jan 2018; (2) CLAIMANT will ship three installments DDP of Nijinsky III's 100 doses of frozen semen – the first shipment of 25 doses DDP on 20 May 2017, the second shipment of 25 doses DDP on 3 Oct 2017, and the third and last shipment of 50 doses DDP on 23 Jan 2018; (3) the Law of Mediterraneo as well as CISG shall govern. [*Exhibit C-5, p. 13*; *Exhibit C-8, p.17*].

10. Per the terms of the Sales Agreement, CLAIMANT sent the first two shipments of 25 doses DDP on scheduled dates. [*Notice of Arbitration, p. 6, para. 9*]. However, in November 2017, right before the scheduled last shipment, Mediterraneo announced a 25% tariff on agricultural products from Equitoriana, to which the Equitorianian government responded with a 30% tariff on selected products from Mediterraneo, including animal semen. [*Exhibit C-6, p. 15*].

11. On **20 January 2018**, CLAIMANT was surprised that frozen semen fell under the new tariffs-regime and immediately started negotiating a price adjustment for the frozen semen. [*Exhibit C-7, p. 16*]. On **21 January 2018**, RESPONDENT insisted on timely delivery of the semen and appeared to accept the need for a price increase. [*Exhibit C-8, p.18*]. On **23 January 2018**, CLAIMANT relied

on RESPONDENT'S acceptance of the price adaptation, paid the 30% tariff and delivered the last shipment of frozen semen. [*Exhibit C-8, p. 18*].

12. On **12 February 2018**, CLAIMANT discovered that RESPONDENT breached the resale prohibition under the contract, using part of the doses shipped for commitments toward other parties. When confronted with this information, RESPONDENT'S CEO stopped negotiations and refused to pay any additional amount of the tariffs. [*Exhibit C-8, p. 18*]. As a result, on **31 July 2018**, CLAIMANT filed a Notice of Arbitration, in compliance with the Arbitration Clause of the Sales Agreement.

13. On **2 October 2018**, approximately two months after filing a Notice of Arbitration, CLAIMANT learned of RESPONDENT'S involvement in another arbitration concerning the sale of a promising mare that was affected by the unforeseen 25% tariff imposed by the President of Mediterraneo. Negatively affected by the sudden imposition of tariff, RESPONDENT ironically asked for an adaptation of the price, taking the same position as CLAIMANT here. [*HKIAC Email, p. 50*].

SUMMARY OF ARGUMENT

14. The Arbitral Tribunal has the jurisdiction and power to adapt the Sales Agreement. By choosing to arbitrate under the HKIAC Rules, the PARTIES granted this Tribunal the power to apply the Law of Meditteraneo to interpret the Arbitration Clause, which provides for a broad interpretation that would allow this Tribunal to adapt the contract. Accordingly, the Arbitration Clause confers this Tribunal the power to adapt the tax tariff in the event that the PARTIES cannot agree. Even if the Law of Meditteraneo does not apply, under the Law of Danubia, this Tribunal still has the power to decide a claim for an increased remuneration because a reasonable construction of the Arbitration Clause allows for such adaptability.

15. In support of its claim for adaptation, CLAIMANT is entitled to submit evidence a copy of an award granted to RESPONDENT in a previous arbitration into evidence. CLAIMANT asserts the following reasons for submission: (1) RESPONDENT agrees with CLAIMANT'S position with regard to a contract adaptation which is shown through an award granted to RESPONDENT in a previous arbitration; (2) RESPONDENT'S contradictory behavior and bad faith in performing the contract is relevant to this Tribunal's decision; and (3) the evidence is not barred from admission even though it may have been obtained through disgruntled employees or an illegal hacking.

16. Pursuant to the Sales Agreement, CLAIMANT is entitled to a price adaptation to include the tariff under Clause 12 ("Hardship Clause"). According to the governing law CISG, the Hardship Clause should be interpreted to reflect the PARTIES' intent of limiting CLAIMANT'S shipping risks. The sudden imposition of tariff was unforeseeable and completely out of CLAIMANT'S control. Even if this Tribunal ruled otherwise, CLAIMANT is entitled to a price adaptation in accordance with CISG Art. 79 and UNIDROIT Principles. CLAIMANT asked for a price adaptation without undue delay and made good faith explanation of its financial situation. Requiring CLAIMANT to bear the increased 30% tariff would endanger CLAIMANT'S business, which fundamentally alters the equilibrium of the contract. Given the fact that RESPONDENT is unfairly enriched by breaching its promise and reselling the semen to other buyers, CLAIMANT is entitled to a price adaptation by this Tribunal.

ARGUMENT

ISSUE I: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND POWER UNDER THE ARBITRATION CLAUSE TO ADAPT THE SALES AGREEMENT TO INCLUDE AN INCREASED REMUNERATION CLAIM

17. Pursuant to the Arbitration Clause contained in the Sales Agreement, this Arbitral Tribunal has the jurisdiction and power to adapt the contract. As a threshold matter, this Arbitral Tribunal has the jurisdiction to decide its own jurisdiction. By agreeing to arbitrate under the HKIAC Administered Arbitration Rules ("HKIAC Rules"), the PARTIES conferred this Arbitral Tribunal the jurisdiction to decide any dispute arising out of the Sales Agreement, including the conclusion and interpretation of the Arbitration Clause. As for the power to adapt a contract, the Arbitration Clause should be interpreted under the Law of Mediterraneo based on the PARTIES' common intention during the negotiations. Applying the Law of Mediterraneo, the Arbitration Clause grants this Arbitral Tribunal broad power to rule on any dispute arising out of the legal relationship between CLAIMANT and RESPONDENT. Even if the Arbitral Tribunal applies the Law of Danubia to this dispute, it still has the power to decide CLAIMANT'S increased remuneration claim.

A. The HKIAC Administered Arbitration Rules Grant This Arbitral Tribunal the Authority to Decide Upon Its Own Jurisdiction

18. The HKIAC Rules, which the PARTIES agreed would govern this dispute, grant this Arbitral Tribunal the authority to rule on its own jurisdiction. The Sales Agreement states "[a]ny dispute arising out of this contract shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre under the HKIAC Administered Arbitration Rules." [*Exhibit C-5, p. 14, para. 15*]. Article 19 of the HKIAC Administered Arbitration Rules states "[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity, or scope of the arbitration agreement." [*HKIAC Rules, Art. 19, Cl. 1*]. Accordingly, this Arbitral Tribunal may use its power to "investigate and decide on its jurisdiction." [*Chang, p. 182*].

19. The principle, competence-competence, has been incorporated into most modern arbitral rules and national legal systems. [*Moses, p. 96, para. 2*; *Chang, p. 182*; *Roger/Townsend, p. 70; China Minmetals v. Chi Mei, p. 287-89* (stating "international arbitration rules tend to favor the rule of competence-competence")]. The competence-competence doctrine authorizes this Arbitral

Tribunal to rule on its own jurisdiction and the scope of its authority. [*Blackaby, p. 346, para. 5.98*; *Bai Line v. Société, p. 25* (finding that an arbitrator must rule on the limits of his jurisdiction, not a court)]. In the present case, CLAIMANT and RESPONDENT agreed to the Arbitration Clause, and therefore agreed that the competent-competence doctrine under Art. 19(1) of the HKIAC applies. Under the doctrine of competence-competence, this Arbitral Tribunal has the authority to determine its own jurisdiction and decide the remaining issues presented before them.

B. The Law of Mediterraneo Governs the Arbitration Clause and the Interpretation of the Arbitration Clause

20. The Law of Mediterraneo governs the entire Sales Agreement, including the Arbitration Clause, which was listed as one of the many clauses in the Sales Agreement. This governing law informs this Arbitral Tribunal how to construe the terms of the Sales Agreement, including the Arbitration Clause. Under the principle of interpretation in good faith, the Arbitration Clause confers broad power to this Arbitral Tribunal to decide a claim for increased remuneration.

1. The PARTIES Agreed that the Law of Mediterraneo, CISG, Governs the Entire Sales Agreement, Including the Arbitration Clause

21. This Arbitral Tribunal should find that the Law of Mediterraneo applies to the interpretation and ultimate decisions regarding the substantive issues in the Sales Agreement and the Arbitration Clause because the PARTIES agreed to such application of law. The PARTIES entered into the Sales Agreement, specifying their intent in express language: "this Sales Agreement shall be governed by the Law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980)." [*Notice of Arbitration, p. 7, para. 15; Exhibit C-5, p. 14, para. 14*]. In the following clause, the PARTIES agreed to arbitrate in compliance with the HKIAC Rules without any additional reference to a separate governing law. [*Notice of Arbitration, p. 14, para. 15*]. As the PARTIES did not include a separate choice-of-law clause in the Arbitration Clause, the PARITIES must have intended the Law of Mediterraneo to govern the entire Sales Agreement including the Arbitration Clause.

22. Generally, the same law which governs the substantive agreement also applies to the arbitration agreement absent express reference. [*Blackaby, p. 166, para. 3.10*]. When the Arbitration Clause is "only one of many clauses in a contract," it is reasonable to "assume that the law chosen by the

parties to govern the contract will also govern the arbitration clause." [*Lew, p. 136*; *see also Union of India v. McDonnell*.]. Here, the structure of the Sales Agreement indicates that the Arbitration Clause is only one of many clauses within the PARTIES' contract. As the Arbitration Clause immediately followed the choice-of-law clause and did not include a separate choice-of-law provision, the PARTIES intended for the Law of Mediterraneo to apply to the entire Sales Agreement.

23. Moreover, the doctrine of party autonomy confirms that the PARTIES' express choice-of-law clause should be honored in accordance with the PARTIES' intent. The doctrine of party autonomy, broadly accepted in the international commercial arbitration, allows parties to an international commercial agreement the freedom to "choose for themselves the law (or the legal rules) applicable to that agreement." [*Blackaby, p. 195, para. 3.94*]. This doctrine also gives parties the freedom to insert a choice-of-law clause into their contract. [*Blackaby, p. 198, para. 3.104*]. It is not uncommon in the international commercial practice that parties only agree to a single choice-of-law clause governing their arbitration agreement. [*Born, p. 92, para. 3*]. It is a widely accepted view that, absent express designation, the choice-of-law clause included in a parties' contract "necessarily extends to all the provisions" of that contract including the arbitration agreement because "acceptance of the contract entails acceptance of the [arbitration] clause. [*Blackaby, p. 167, para. 3.13*; *Born, p. 92, para. 3*; *Derains, p. 16-17*]. Therefore, when the PARTIES accepted and signed the Sales Agreement on 6 May 2017, they agreed that the Law of Mediterraneo applied to all the clauses contained in the Sales Agreement, including the Arbitration Clause.

2. Even if the Choice-of-Law Clause in the Sales Agreement Does Not Include the Arbitration Clause, the Law of Mediterraneo Still Applies Based on the PARTIES' Common Intention

24. Even if, as RESPONDENT alleges, the Arbitration Clause is severable from the rest of the Sales Agreement, this Arbitral Tribunal should find that the Law of Mediterraneo applies to the Arbitration Clause because the PARTIES' correspondences in forming the Sales Agreement have shown such intention. Although there is a presumption that an arbitration agreement is independent from the underlying contract, such separability presumption is not necessarily to conclude that the PARTIES intended for a separate law governing the arbitration agreement. [*Blackaby, p. 166, para. 3.06*]. The rationale for the separability presumption is to provide this Arbitral Tribunal with

jurisdiction to decide claims or disputes under the PARTIES' contract even when the underlying contract is deemed to be null or invalid. [*Born, p. 86-87*]. In the present case, the PARTIES do not dispute whether the Sales Agreement is null or invalid.

25. When the contracting parties do not select a different governing law for the Arbitration Clause, this Arbitral Tribunal is vested in the jurisdiction to decide the governing law. [*Blackaby, p. 174, para 3.36*; *Moses, p. 84, para. 2*]. Specifically, in absence of the choice of law by the parties, the arbitral tribunal has the jurisdiction to "apply the rules of law which it determines to be appropriate." [*HKIAC Rules, Art. 36.1*].

26. When deciding the appropriate governing law, this Arbitral Tribunal will generally choose either the law of the contract, or *lex arbitri* (the law of the seat of the arbitration). [*Blackaby, p. 172, para. 3.30*; *Born, p. 69-70*]. Looking at the language of the Arbitration Clause, this Arbitral Tribunal can easily infer that *lex arbitri* does not apply. The HKIAC Rules noted that there shall be a specific choice-of-law clause contained in the Arbitration Clause "where the law of the substantive contract and the law of the seat are different." [*HKIAC Rules 2013. p. 2*]. Both CLAIMANT and RESPONDENT were aware that the law of the substantive contract and the law of the seat of arbitration were different at the conclusion of the Sales Agreement. Nonetheless, there was no separate choice-of-law clause contained in the Arbitration Clause. Under such situation, the PARTIES' common intention is of particular importance. [*Blackaby, p. 172, para. 3.31*; *Gaillard/Savage, p. 230, para. 437*; *Municipalité v. Sté Dalico*].

27. When the PARTIES chose a neutral location, Danubia, for the seat of arbitration, that choice did not necessarily mandate that the PARTIES "intend[ed] to choose the law of that place to govern their relationship." [*Blackaby, p.174, para. 3.36*]. Specifically, in institutional arbitrations, parties' choice of the seat of arbitration "has little or nothing to do with the parties or with the contract under which the dispute arises." [*Blackaby, p. 174, para. 3.38*]. The reason for CLAIMANT selecting Danubia as the seat of arbitration was to seek approval from the creditors' committee, and therefore it was never the PARTIES' intention that Danubian law would govern their relationship. [*Exhibit R-2, p. 34*]. The correspondences between the PARTIES are evident that CLAIMANT did not intend to choose the Law of Danubia by selecting Danubia as the seat of arbitration.

28. Moreover, under the Hague Principles of Choice of Law, the intention of the parties in respect of a choice-of-law can be evident through the conduct of the parties and other factors surrounding the formation of the contract. [*The Hague Principles, p. 46, para. 4.13*]. During the negotiations, the PARTIES exchanged several correspondences regarding the governing law for the arbitration. Initially, RESPONDENT offered that "the seat of arbitration shall be Equatoriana [and] the law of this arbitration clause shall be the law of Equatoriana." [*Exhibit C-3, p. 11*]. In response, CLAIMANT rejected such language and informed RESPONDENT that the seat of arbitration be a neutral country, Danubia. [*Exhibit C-4, p, 12*]. Further, CLAIMANT clearly indicated, and RESPONDENT did not object, that the governing law "applicable to the Frozen Semen Sales Agreement remains the Law of Mediterraneo." [*Exhibit R-2, p. 34*]. Pursuant to the PARTIES' correspondences and ultimate decision for the choice-of-law clause in the Sales Agreement, the PARTIES understood that the Law of Mediterraneo applies to the Arbitration Clause irrespective of the separability presumption.

C. Applying the Law of Mediterraneo, the Arbitration Clause Grants This Arbitral Tribunal the Power to Adapt the Sales Agreement

29. By choosing to arbitrate under the HKIAC Rules, the PARTIES confer this Arbitral Tribunal the power to apply the Law of Meditteraneo when interpreting the Sales Agreement including the Arbitration Clause. The HKIAC Rules provides that "the arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part." [*HKIAC Rules, Art. 19, Cl. 2*]. As such, the Arbitration Clause confers this Arbitral Tribunal the ability to "decide any and all of the dispute that come within the ambit of that agreement." [*Blackaby, p. 106, para. 2.55*].

30. Generally, this Arbitral Tribunal "will have the power to fill in any gaps in the arbitral process" and can also be given the force of law to order interim measures that reach beyond the parties themselves. [*Blackaby, p. 190, para 3.76-77*; *see also Honnold, p. 139, para (2)*]. Here, the PARTIES confer this Arbitral Tribunal the power of gap-filling by agreeing to arbitration in accordance with HKIAC Rules. [*see also Blackaby, p. 315, para. 5.09*]. As stated above, the HKIAC confers this Arbitration Tribunal the power to fill in gap, including choosing the Law of Meditteraneo as the governing law. This power also authorizes the Arbitral Tribunal to apply the Law of Mediterraneo to the entire Sales Agreement.

31. The Law of Mediterraneo provides for a broad interpretation of the Arbitration Clause, which in turn confers this Arbitral Tribunal the power to adapt the Sales Agreement in the event that the PARTIES cannot agree. [*Notice of Arbitration, p. 7, para. 16*]. The Law of Mediterraneo provides that CISG applies to the conclusion and interpretation of the Arbitration Clause contained in such contracts. [*PO, p. 52, para. 4*]. Under CISG, this Arbitral Tribunal has the authority to adapt the contract and provide for CLAIMANT'S reimbursement because the negotiations between the PARTIES show that both CLAIMANT and RESPONDENT understood CLAIMANT'S intent to minimize liability for further shipment costs.

1. The Arbitration Clause Grants This Arbitral Tribunal Broad Power

32. This Arbitral Tribunal would not exceed its jurisdiction and power to adapt the contract because the language "arising out of this contract" confers a broad power. The means of interpretation, under the applicable law which governs the Arbitration Clause, will determine whether this Arbitral Tribunal has the power to decide the present dispute. [*Blackaby, p. 314, para. 5.06; Wesler/Molitoris, p. 18*].

33. The modern trend in the international commercial practices is that a broad interpretation should be applied to the scope of arbitration agreements, ensuring the uniformity and efficiency. [*Blackaby, p. 314, para. 5.06*; *Wesler/Molitoris, p. 19*; *Moses, p. 158, para. D*]. Especially, the view that arbitration agreements should be distinguished based on "narrow" or "wide" wordings has been heavily criticized in international practices. [*Wesler/Molitoris, p. 20*]. Under this view, a "narrow" arbitration clause, referring only to disputes "out of the contract," was considered to include only disputes on contractual obligations, while a "wide" arbitration clause, referring to disputes "out of the contract" as well as those "in connection" with the contract, was held applying to contractual obligations as well as "non-contractual obligations in connection with the contractual relationship of the parties." [*Wesler/Molitoris, p. 20*; *see also Schlosser, para. 421*].

34. This view has been criticized as "being too formalized, not reflecting the true intentions of the parties, and unnecessarily fragmenting separate proceedings that deal with the same facts merely because they are based on different legal grounds." [*Wesler/Molitoris, p. 20*; *see also Koller, para. 3/259*]. For example, in 2007, the UK courts abandoned such distinction and held that an arbitration clause containing "any dispute arising under this charter" shall be construed that the parties

intended for the same tribunal to decide any dispute arising out of "the relationship into which they had entered." [*Nafta v. Fili, para. 13*]. The Austrian Supreme Court also follows the UK courts and tends to apply an "expansive interpretation of the scope of arbitration agreement." [*Wesler/Molitoris, p. 21*; *see also Hausmaninger, para. 226*; *Reigler/Fremuth-Wolf, para. 48; OGH 4 Ob 80/08f*].

35. In the present case, it is only reasonable to infer that the Arbitration Clause, referring "any dispute arising out of this contract," confers an expansive power to this Arbitral Tribunal to decide any claims arising out of the legal relationship between CLAIMANT and RESPONDENT. An interpretation focusing on the mere formality of the wording is in direct contradiction against the PARTIES' intention to arbitrate in accordance with the HKIAC Rules.

2. Under CISG, the Arbitration Clause Allows This Arbitral Tribunal the Power to Adapt the Sales Agreement

36. Applying the Law of Mediterraneo, the Arbitration Clause confers this Arbitration Tribunal the power to look beyond the parole evidence rule and to adapt the contract terms when the parties cannot reach a solution. Under CISG, gap-filling is a widely recognized principle for not expressly stated matters to be settled "in conformity with the law applicable by virtue of the rules of private international law." [*CISG, Art. 7, Cl. 2; see also Honnold, p. 138; ICC Award No. 7197; OGH 3 ND 509/02; Wire and cable case*]. Thus, when interpreting the Sales Agreement, this Arbitral Tribunal may look at the PARTIES' conduct and statements and give due considerations to "all relevant circumstances of the case including the negotiations" while determining the PARTIES' intent to conform with the Sales Agreement. [*CISG, Art. 8, Cl. 1 & 3; see also Honnold, p. 144*].

37. When interpreting the Arbitration Clause under CISG, "the first and most widely accepted principle of interpretation is … the principle of interpretation in good faith." [*Gaillard/Savage, p. 257, para. 477; SO.M.AGRI v. GmbH*]. This rule provides that "a party's true intention should always prevail over its declared intention, where the two are not the same." [*Id.*]. In applying this rule, the arbitral tribunal "must look for the parties' common intention, rather than simply restricting oneself to examining the literal meaning of the terms uses." [*Amco v. Republic of Indonesia*].

38. In the present case, the sale of horse semen between the PARTIES was extraordinary from the beginning. [*Exhibit C-2, p. 10*]. In a typical sale, CLAIMANT was not responsible for shipment because semen doses were picked up on CLAIMANT'S premises. [*Exhibit C-2, p. 10*]. However, RESPONDENT insisted that CLAIMANT deliver the semen through DDP. [*Exhibit C-3, p. 11*]. In response, CLAIMANT specified its unwillingness to take over any risks associated with change in delivery term, "in particular not those associated with changes in customs regulation or import restrictions" which can "destroy the commercial basis of the deal." [*Exhibit C-4, p. 12*].

39. RESPONDENT, having been advised of CLAIMANT'S expressed intent to limit liability for shipment risks and costs, agreed that "[s]eller shall not be responsible for lost semen shipments or delays in delivery not within the control of the [s]eller" in the Terms and Conditions of the Sales Agreement. [*Exhibit C-5, p. 12*]. Pursuant to CISG, this Arbitral Tribunal has the authority to supply missing terms regarding the unforeseen tariff consistent with both parties' intention to limit CLAIMANT'S responsibility for shipment risks. The PARTIES' negotiations clearly show CLAIMANT'S intent and RESPONDENT'S knowledge of that intent to minimize shipment costs, and this Arbitral Tribunal can provide additional terms to adjudicate this case to reflect the PARTIES' intentions.

D. Even if the Law of Danubia Applies, This Arbitral Tribunal Still Has the Power to Adapt the Sales Agreement

40. Even if this Arbitral Tribunal were to determine that the Law of Danubia, *lex arbitri*, applies to the Arbitration Clause, this Arbitral Tribunal still has the power to decide a claim for an increased remuneration and find for CLAIMANT because a reasonable construction of the Arbitration Clause allows for such adaptability.

1. The PARTIES' Modifications to the HKIAC Model Clause Permit This Arbitral Tribunal's Ability to Adapt the Sales Agreement

41. The PARTIES' modifications to the HKIAC Model Clause, namely removing the language "or relating to," permit the power of this Arbitral Tribunal to rule on a claim for increased remuneration and adapt the Sales Agreement under the law of Danubia. The Law of Danubia, like the arbitration law of Mediterraneo, is the verbatim adoption of UNCITRAL Model Law with 2006 Amendment ("Model Law"). [*PO 2, p. 57, para. 1*].

42. The Model Law has been amended to align with "current practices in international trade." [*Moses, p. 23, para. B*]. When parties submit their agreement to arbitrate, they submit "all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not." [*UNCITRAL Model Law (2006), Art. 7, Cl. 1*]. *Travasux préparatoires* note that this clause should be given a wide interpretation "so as to cover all non-contractual commercial cases occurring in practice." [*A/CN.9/264, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, under Article 7, Para. 4*]. Recent cases in Canada, when determining whether there is a need for express empowerment for adapting the contract, have held that an agreement to arbitrate "is not subject to special or distinctive formal requirements." [*Achilles v. Plastics*; *Charlevoix v. Gestion*].

43. Applying the principles of the Law of Danubia, it is reasonable to construe that the Arbitration Clause permits this Arbitral Tribunal to rule on a claim of increased remuneration absent express agreement. A claim for increased remuneration is a dispute arose out of a legally defined relationship between CLAIMANT and RESPONDENT, which is within the power of this Arbitral Tribunal to decide.

2. Applying the Law of Danubia, This Arbitral Tribunal Has the Power to Adapt Where Necessary

44. Under the Model Law, the Arbitral Tribunal may "conduct the arbitration in such manner, as it considers appropriate" when there is no agreement by the parties. [*UNCITRAL Model Law (2006), Art. 19, Cl. 2*]. Such power of the Arbitral Tribunal to determine appropriate procedure includes "the power to determine the applicable, or apply its own, rules of evidence" and the power of the arbitrators. [*UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration. P. 101. Para. 7*; *see also Blackaby, p.174, para. 3.42-43*]. In interpreting Article 19 of the Model Law, the courts have consistently read that internatinoal arbitral tribunals are given wide plenary authority to exercise such powers. [*Jardine v. SJO*; *Dongwoo. v. Mann+Hummel GmbH*].

45. The Model Law restricts the power of the arbitrators by setting forth the possibility of setting aside the arbitral award in the event of failure to conform to either the parties' agreement or to the law absent the parties' agreement. [*UNCITRAL Model Law (2006), Art. 34, Cl. 2(a)(iii)*]. For example,

the Court of Appeal for Ontario, when reviewing the scope of the arbitral tribunal's power, held that an arbitral award for remuneration of unexpected losses not contained in the contract does not exceed the tribunal's power under the Model Law Art. 34 and therefore did not warrant the reviewing court to set aside the award. [*Mexico v. Cargill, para. 3*]. In so holding, the court reasoned that international arbitration tribunals are generally given high degree of deference because the tribunals have broad power to interpret the contract terms and adapt the contract when the parties have submitted for arbitration. [*Id.* at para. 33]. However, because the law of Danubia provides this Arbitral Tribunal the authority to decide on its own power and on the selection of rules of evidence, this Arbitral Tribunal's power to render an award in favor of the CLAIMANT for its claim of increased remuneration does not exceed its power vested by the Arbitration Clause and is therefore not restricted by the law.

46. In conclusion, pursuant to the PARTIES' express agreement and common intention, this Arbitral Tribunal has the authority to interpret the Sales Agreement and decide the claim of increased price remuneration to reflect CLAIMANT'S outstanding reimbursement to cover unexpected shipping costs.

ISSUE II: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM RESPONDENT'S PRIOR ARBITRATION PROCEEDINGS

47. CLAIMANT seeks to introduce into evidence a copy of an award granted to RESPONDENT in a previous arbitration, which clearly indicates Respondent's contradictory behavior in regard to adaptation of contract price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterraneo Contract Law (UNIDROIT Principles). CLAIMANT is entitled to submit this evidence for three reasons: (1) RESPONDENT agrees with CLAIMANT'S position with regard to a contract adaptation which is shown through an award granted to RESPONDENT in a previous arbitration; (2) RESPONDENT'S contradictory behavior and bad faith in performing the contract is relevant to this Arbitral Tribunal's decision; and (3) the evidence is not barred from admission even though it may have been obtained through disgruntled employees or an illegal hacking.

A. CLAIMANT Received Evidence that RESPONDENT Has Taken a Contradictory Position on the Issue of Contract Adaptation on a Nearly Identical Case

48. RESPONDENT'S position that CLAIMANT "has no right to ask for an adaptation of the contract" is inconsistent with its behavior in a previous arbitration in which RESPONDENT sought similar relief. During that arbitration, which was governed by the HKIAC Rules, RESPONDENT invoked an unforeseeable change of circumstances and asked an arbitral tribunal to adapt a contract that involved the sale of a mare in Mediterraneo that was affected by the 25% tariff imposed by that government. [*Langweiler Letter, p. 49*]. Here, however, RESPONDENT rejects the right to ask for an adaptation and asserts that this Arbitral Tribunal should not adapt the contract. [*Answer to Notice of Arbitration, p. 32, para. 18*]. The similarities between the 25% tariff imposed in the previous arbitration and the 30% tariff imposed in this dispute are too obvious to ignore. The 25% tariff constituted an unforeseeable change of circumstances in the same way the 30% retaliatory tariff was unlikely to be imposed. Since the 25% tariff justifies a request for a contract adaptation than an even unlikelier retaliatory 30% tariff should justify a contract adaptation as well.

49. Additionally, RESPONDENT'S position is undermined by its own request during contract negotiations. At that time, RESPONDENT requested, and CLAIMANT agreed, that this Arbitral Tribunal should adapt the contract in the event that the PARTIES could not agree to an amendment of the contract. [*Exhibit C-8, p. 17*]. RESPONDENT'S prior arbitral award demonstrates that it takes the position that this Arbitral Tribunal should adapt the contract if performance is affected by unforeseen tariffs and reject the argument where RESPONDENT asserts the opposite.

B. Evidence of RESPONDENT'S Contradictory Behavior is Relevant and Should Be Taken into Consideration by This Arbitral Tribunal

50. RESPONDENT'S prior arbitral award, in conjunction with its performance in regard to the Sales Agreement, demonstrates a pattern of deceptive business practices that indicates: (1) RESPONDENT always planned to violate the contract, and (2) RESPONDENT now seeks to present a false interpretation of the Sales Agreement.

1. RESPONDENT'S Pattern of Deceptive Business Practices Demonstrates that It Planned to Violate the Sales Agreement from the Beginning

51. RESPONDENT'S behavior shows that it planned to resell the frozen semen in direct violation of the Sales Agreement. Shortly after the final shipment of semen, CLAIMANT discovered that RESPONDENT was reselling the semen to third parties in breach of the Sales Agreement. [*Exhibit C-8, p. 18*; *Exhibit C-5, pp. 13-14*]. The contract specified that the semen was to be used for insemination of specific mares. It did not specify that the semen could be used for resale to third-parties. Moreover, CLAIMANT made it clear during contract negotiations that the semen "may not be resold to third-parties without [CLAIMANT'S] express consent." [*Exhibit C-2, p. 10*]. RESPONDENT made no objection at all to this condition; instead, RESPONDENT made a counter-offer agreeing with "most of the terms of [CLAIMANT'S] offer … including the general applicability of [CLAIMANT'S] general terms and conditions." [*Exhibit C-3, p. 11*]. In effect, RESPONDENT agreed to the prohibition of resale of the semen. RESPONDENT'S agreement to the condition is evidenced by the fact that, of the terms Respondent objected to, none dealt with the prohibition of the reselling of the semen. [*Exhibit C-3, p. 11*].

52. Shortly after CLAIMANT confronted RESPONDENT with concerns of a violation, RESPONDENT immediately stopped negotiations in regard to the tariffs, claiming that the reselling of the semen had no basis in the contract. [*Exhibit C-8, p. 18*]. RESPONDENT'S argument fails since its letter of 28 March 2017 demonstrates that Respondent did in fact agree with the condition regarding the resale of the semen. [*Exhibit C-3, p. 11*]. Reasonable minds could not disagree. RESPONDENT then used this claim to end negotiations with CLAIMANT and refuse payment on the tariffs. [*Exhibit C-8, p. 18*]. Yet, RESPONDENT knew from the beginning of the contract negotiations that CLAIMANT would never enter into the Sales Agreement if RESPONDENT planned to resell the semen. [*Exhibit C-2, p. 10*]. RESPONDENT deceived CLAIMANT by not addressing its intent to resale the semen during contract negotiations, thus demonstrating that it always had the intention to breach the Sales Agreement.

2. RESPONDENT'S Pattern of Deceptive Business Practices Demonstrates that It Sought to Present a False Interpretation of the Sales Agreement

53. RESPONDENT seeks to present an interpretation of the Sales Agreement that would place the risk of unforeseeable tariffs on CLAIMANT. Clauses 9-13 of the contract, however, address which party

will assume the risk under various circumstances. [*Exhibit C-5, p. 14*]. Each clause places the risk on RESPONDENT, which reflects the intentions of the PARTIES during contract negotiations. CLAIMANT made clear in its email on 31 March 2017 that it was "not willing to take over any further risks associated with [delivering the horse semen], in particular not those associated with changes in customs regulation or import restrictions." [*Exhibit C-4, p. 12*]. RESPONDENT seeks to present an interpretation that the Sales Agreement will not extend to unforeseeable tariffs, which is exactly the type of concern CLAIMANT sought to avoid. This Arbitral Tribunal should reject RESPONDENT'S attempt to present an interpretation of the Sales Agreement that was never intended by CLAIMANT.

C. The Manner in Which the Evidence was Obtained Does Not Erode This Arbitral Tribunal's Power to Admit It

54. This Arbitral Tribunal has the authority to admit a previous arbitral award despite RESPONDENT'S argument to the contrary for three reasons: (1) HKIAC Rules allow the admission of RESPONDENT'S prior arbitral award; (2) General principles of arbitration confidentiality do not bar evidence of RESPONDENT'S prior arbitral award; and (3) RESPONDENT'S prior arbitral award is not barred from being admitted into evidence even though it may have been obtained through dissatisfied employees or illegal hacking.

1. Evidence of RESPONDENT'S Contradictory Behavior is Not Barred by the HKIAC Rules

55. Article 45 of the HKIAC Rules allows evidence of RESPONDENT'S contradictory behavior to be admitted into evidence. [*HKIAC Rules, Art. 45, Cl. 3*]. RESPONDENT relies on Article 42 of the HKIAC Rules and incorrectly argues that it excludes documents from a prior arbitration proceeding under a general rule of confidentiality. [*Fasttrack Letter, p. 50*]. In fact, Article 45 in the HKIAC Rules addresses confidentiality, and under Section 3 of that Article an exception exists that allows parties to disclose information barred under Section 1. The specific language of that exception states that disclosure is permitted "to protect or pursue a legal right or interest." [*HKIAC Rules, Art. 45, Cl. 3*]. Here, the legal right being sought is the USD $1,250,000 dollars for losses CLAIMANT has suffered as a result of RESPONDENT'S failure to perform under the terms of the contract. Under the HKIAC Rules, CLAIMANT is not barred from submitting RESPONDENT'S prior arbitral award into evidence.

2. Evidence of RESPONDENT'S Contradictory Behavior is Not Barred by General Principles of Arbitration Confidentiality

56. General principles of arbitration confidentiality do not bar admission of RESPONDENT's prior arbitral award. Confidentiality in arbitral proceedings must be secured either through: (1) the arbitral rules, (2) the parties themselves, or (3) an implied confidentiality theory. [*Fábián; see also Fortier*]. Here, the HKIAC Rules apply. [*Exhibit C5, p. 13, para. 15*]. Under the HKIAC Rules, information that a party discloses "to protect or pursue a legal right or interest" is not protected under the general rule of confidentiality. [*HKIAC Rules Art. 45, Cl. 3*]. As discussed earlier, the legal right being sought is the USD $1,250,000 million CLAIMANT suffered by paying the tariff.

57. The PARTIES did not sign any confidentiality agreement, nor was confidentiality discussed during contract negotiations or expressed in the contract. Furthermore, any perceived confidentiality requirements do not extend to arbitral awards relevant to the current proceedings. In *AEGIS v. European Re.*, the English Privy Council ruled that the "legitimate use" of an award from a prior arbitration that is protected by a confidentiality agreement and is used in a current arbitration does not violate the confidentiality agreement so long as the parties are the same. [*AEGIS v. European Re.*]. This Arbitral Tribunal should find that the circumstances here are nearly identical; the only difference being that the third-party has not yet been attached to this proceeding but may be attached if so required.

58. Finally, in countries where an implied duty of confidentiality arising out of arbitration exists, there also exists an exception that allows a party to introduce evidence that would normally be barred by confidentiality if there is an overriding "public interest." [*Tweeddale*]. An English court upheld this exception ruling that "a party to court proceedings was entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views expressed by him in that proof were at odds with his views as expressed in the court proceedings." [*London & Leeds. v. Paribas*]. The English and Wales Court of Appeals expanded on that principle ruling that there is "no reason why such a principle, which [the court] would approve, should not equally apply to witnesses of fact who may be demonstrated to have given a materially different version of events upon a previous occasion." [*Ali v. Trogir*].

59. The concept of transparency is also considered by Model Law, which states that "orders, decisions, and awards of the arbitral tribunal" "shall be made available to the public." [*UNCITRAL RTTISA, Art. 3, Cl. 1*]. This indicates that the Model Law authors intended a general rule of transparency. Under the exceptions to transparency in Article 7, none prevents CLAIMANT from submitting RESPONDENT'S prior arbitral award. Hence, RESPONDENT'S position that this Arbitral Tribunal should not adapt the Sales Agreement contradicts its position in a previous arbitration and is no different than an expert witness providing different explanations in multiple arbitral proceedings, or a witness of fact providing a different story before another arbitral tribunal.

60. Therefore, this Arbitral Tribunal should find that the submission of RESPONDENT'S prior arbitral award is: (1) allowed under the HKIAC Rules; (2) not barred from submission by any agreement of the PARTIES; and (3) necessary in order to examine RESPONDENT'S deceptive business tactics when considering its argument.

3. Evidence of RESPONDENT'S Contradictory Behavior is Not Barred Even Though It May Have Been Obtained through Dissatisfied Employees or Illegal Hacking

61. CLAIMANT is entitled to submit evidence of RESPONDENT'S contradictory behavior because admission of extrinsic evidence is not barred by the law. While most common law states, including the United States, Australia, and South Africa, rely on the protection of the parol evidence rule to uphold the plain meaning of the contract, those courts often find contract language to be ambiguous and allow admission of extrinsic evidence to clarify that language. [*DiMatteo/Ostas, Art. 3; see also MCC-Marble v. Ceramic; Codelfa v. State Rail; Union Government v. Vianini*]. CISG and recent case law go beyond the scope of the common law's parol evidence rule and allow for the liberal admission of extrinsic evidence, even when it has been obtained through dissatisfied employees under a confidentiality agreement or by illegal hacking.

a. Evidence Should Not be Barred Even Though It May Have Been Disclosed by Dissatisfied Employees

62. CISG rejects the common law's parol evidence rule and provides for the liberal admission of parol evidence and other types of extrinsic evidence. [*CISG Art. 8, Note 1*]. In fact, CISG gives consideration to relevant circumstances surrounding the formation of the contract including negotiations, practices between the parties, and customary usages. [*Cross, pp. 146-147*]; Article

8(3) of the CISG does not set any express limitations on the admissibility of extrinsic evidence but trusts the courts to assess their probative value and allow admission accordingly. (*ibid.*). In light of the existence, nature and scope of the duty of confidentiality as well as sanctions associated with a breach of that duty, recent case law has challenged the general assumption that arbitration proceedings are both private and confidential. [*Samuel*].

63. The Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v. Al Trade Finance Inc.* was among the first to reject any implied duty of confidentiality in arbitration under the UN-ECE Rules or Swedish law. [*Bulbank case*]. Similarly, the Australian High Court in *Esso/BHP v. Plowman* concluded that "private arbitration hearings do not clothe the disclosed information and documents with absolute confidentiality" since such confidentiality is absent in Australia. [*Esso/BHP v. Plowman*]. Although the holdings in these two cases may not be correct statements of law across the globe, the impact of these decisions cannot be denied – mainly that the extent of confidentiality protection is being discussed.

64. Here, RESPONDENT contends that the prior arbitration is confidential and the employees from which the information was obtained were under a contractual obligation to keep that information confidential. [*Answer to the Notice of Arbitration, page 31, par. 11*; *PO 2, pp. 60-61, para. 41*]. Yet, CLAIMANT had no way of knowing that the information obtained was confidential. CLAIMANT learned about the prior arbitral proceeding at the annual breeder conference. [*PO 2, p. 60, para. 40*]. More specifically, CLAIMANT'S CEO heard about the prior arbitration from Mr. Velazquez, the new CEO of one of CLAIMANT'S regular customers, who, up until 30 May 2018, worked for the Mediterraneo buyer in the other arbitration. (*ibid.*). Mr. Velazquez attempted to acquire the Partial Interim Award from that arbitration but was only able to give CLAIMANT the address of the company which had promised to sell CLAIMANT a copy of the award, but who refused to disclose its sources. [*PO 2, pp. 60-61, para. 41*]. Thus, CLAIMANT had no way of knowing where the information came from and could only assume that it may have come from disgruntled employees.

65. On that basis, RESPONDENT alleges that CLAIMANT breached the contract since arbitral proceedings are intended to protect the identity of their parties. [*Fasttrack Letter, p. 50*]. RESPONDENT further contends that the former employees who may have disclosed the information had been witnesses in the other proceeding and had been under a contractual obligation to keep all information about

the proceeding confidential. [*PO 2, pp. 60-61, para. 41*]. Yet, CLAIMANT was not a party to that proceeding and did not know the contractual obligations of RESPONDENT'S employees. Moreover, Claimant was not under any confidentiality order and did not breach any provision of the Sales Agreement. [*See generally Exhibit C-5, pp. 13-14*].

b. Evidence Should Not be Barred Even Though It May Have Been Disclosed by Computer Hacking

66. In the alternative, RESPONDENT alleges that CLAIMANT obtained information about the prior arbitration through illegal means, particularly through a hack of RESPONDENT'S computer system which occurred on or about 12 September 2018. [*Fasttrack Letter, page 50*]. Yet, as previously mentioned, the way in which the information was obtained is not known because the company which was willing to sell CLAIMANT the Partial Interim Award refused to disclose its sources. [*PO 2, pp. 60-61, para. 41*]. Even if it turned out that the information was obtained through illegal hacking of RESPONDENT'S computer, this Arbitral Tribunal can still admit it into evidence because **t**he admissibility of improperly obtained data as evidence in arbitration proceedings is not clearly defined by the law but instead lies in the *prima facie* analysis of the facts. [*NYU Transnational Notes*/]. Favorable to the CLAIMANT, recent case law has indicated that an international tribunal can admit emails and documents as evidence if those documents were obtained by hacking a computer network. [*Caratube v. Republic of Kazakhstan*].

67. The most relevant cases on this subject comes from Kazakhstan where the arbitral tribunal reached an admissibility decision in which it allowed all documents – other than those protected by legal professional privilege – obtained through a hack of the Kazakhstan government's computer network to be admitted into evidence. (*ibid.*). Reasoning that the plaintiff alleged the documents were material and relevant to the dispute and the documents were now in the public domain (having been leaked and publicized on the WikiLeaks page), the arbitral tribunal found that the weight of the evidence was significant in determining Kazakhstan's involvement in the alleged seizure of oil exploration and production rights.

68. Similarly, here, evidence of RESPONDENT'S contradictory behavior is relevant and material to determine the award. Additionally, the information Respondent deems confidential was publicly and freely discussed by Mr. Valazquez, who knew of at least two other employees with the same

information, and a computer hack that might have disclosed it to many others. [*PO 2, pp. 60-61, paras. 40-41*]. Therefore, this Arbitral Tribunal should follow Kazakhstan's reasoning and allow admission of the evidence.

69. Case law that has held to the contrary and prevented admission of evidence obtained through hacking or other illegal means has come to that conclusion due in part to the untimely submission of that evidence and in part by refusing to address the issue of admissibility. For example, in *ConocoPhillips v. Venezuela*, the arbitral tribunal dealt with new evidence presented by company executives after an award was issued. [*ConocoPhillips v. Venezuela*]. The arbitral tribunal did not address the issue of admissibility but instead found that it did not have the power to reconsider its decision. The dissenting arbitrator attacked the question of admissibility head-on and stated that ignoring the existence of glaring evidence and relevance would be a travesty of justice.

70. In sum, this Arbitral Tribunal has the power to decide what evidence can be admitted and when. Furthermore, nothing prevents this Arbitral Tribunal from admitting into evidence documents that may have been stolen or otherwise unlawfully obtained. Art. 9 of the IBA Rules asks this Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of the evidence when making its decision. [*Moses, Appendix E*; *IBA Rules, Art. 9, para.1*]. But the criteria for exclusion of evidence or production – *(a) lack of sufficient relevance; (b) legal impediment or privilege, (c) unreasonable burden; (d) loss or destruction; (e) compelling commercial or technical grounds; (f) grounds of special political or institutional sensitivity; or (g) consideration of procedural economy, proportionality, fairness or equality* – do not apply for the aforementioned reasons. [*IBA Rules, Art. 9, para. 2*]. Thus, this Arbitral Tribunal should admit evidence of RESPONDENT'S contradictory behavior since there is no good reason to exclude it.

D. This Arbitral Tribunal Should Allow Evidence of the Prior Arbitration because the Similarities between the Proceedings are Vital to Determine an Award for CLAIMANT

71. The very nature of the prior arbitration is almost identical to the one submitted before this Arbitral Tribunal. In the prior arbitration, RESPONDENT attempted to sell a mare to a buyer in Mediterraneo. [*PO 2, p. 60, para. 39*]. The contract, negotiated by Mr. Antley, provided for delivery DDP, contained an ICC Hardship Clause 2003, a choice-of-law clause in favor of Mediterraneo and the Model HKIAC-Arbitration Clause with all additions. (*ibid.*). Following the imposition of the tariff

on agricultural products by the President of Mediterraneo, RESPONDENT asked to renegotiate the contract price under the ICC Hardship Clause 2003 and refused to deliver the mare. In response, the buyer challenged the interpretation of the contract under the hardship clause and sought Respondent's compliance with its terms.

72. CLAIMANT asks for the same type of relief in the present dispute, namely seeking RESPONDENT'S compliance with payment obligations after an attempt to renegotiate the contract price due to an imposition of a 30% tariff on agricultural products. [*Exhibit C 7, p. 16*]. The only difference between the two arbitrations is Respondent's role – first as the party seeking relief and now as the party attempting to bar relief. This Arbitral Tribunal should recognize that Respondent's contradictory behavior in nearly identical contract disputes is relevant to render a decision and therefore admissible as part of the evidence.

ISSUE III: CLAIMANT IS ENTITLED TO PAYMENT FROM AN ADAPTATION OF THE PRICE

73. CLAIMANT respectfully requests that this Arbitral Tribunal find RESPONDENT liable for payment of USD $1,250,000 to CLAIMANT per the language of the contract. CLAIMANT is entitled to a price adaptation to include the tariff under Clause 12 ("Hardship Clause") of the Sales Agreement. Even if this Arbitral Tribunal ruled that the tariff is not covered in the Hardship Clause, CLAIMANT is entitled to a price adaptation according to CISG Art. 79 and UNIDROIT Art. 6.2.3. The Hardship Clause supports an increase in price. [*Exhibit C-5, p. 14*].

A. CLAIMANT is Entitled to USD $1,250,000 from RESPONDENT Under Clause 12 of the Sales Agreement

74. The PARTIES intended the Hardship Clause to limit CLAIMANT'S risk based on an interpretation of CISG Art. 8(1) and 8(2) as well as Art. 6.2.2 of UNIDROIT principles. As PARTIES expressly agreed CISG should govern the interpretation of the Sales Agreement. [*Exhibit C-5, p. 14*]. Article 8 of CISG allows for a contract clause to be interpreted based on one party's intent if the other party "knew or had reason to know of the party's intent." [*CISG Art. 8(1)*]. A reasonable person standard should be used if the other party's intent is unknown under 8(1). [*CISG Art. 8(2)*]. Moreover, a contract clause should be interpreted under all circumstances including all established practices and "usages, and any subsequent conduct of the parties." [*CISG Art. 8(3)*]. Not only the

plain language of the Hardship Clause shows that RESPONDENT knew CLAIMANT did not intend to bear all the shipping risk, but also negotiations and subsequent conduct of CLAIMANT and RESPONDENT show that the PARTIES intended a provision of price adaptation under the Hardship Clause.

1. A Subjective Interpretation of Clause 12 Under CISG Article 8(1) Confirms that RESPONDENT Knew or Could Not Have Been Unaware that CLAIMANT Would Not Bear All the Shipping Risk

75. RESPONDENT knew CLAIMANT did not intend to bear all the shipping risk. [*Exhibit C-4, p. 12*]. The wording of the Clause is relevant to show the PARTIES' intent. [*Fruits and vegetables case*]. Paragraph Art. 8(1) requires the awareness or unawareness of the other party so that one party's subjective intent alone does not prevail. [*Eörsi*]. CLAIMANT expressed in writing to RESPONDENT that CLAIMANT did not accept any risk from "customs regulation or import restrictions" due to the delivery change to DDP. [*Exhibit C-4, p. 12*].

76. Negotiations and subsequent conduct of the PARTIES shows their understanding of the agreement. [*Fruits and vegetables case*]. During negotiations, CLAIMANT specifically stated it would not cover a delay caused by an additional health and safety requirement. [*Exhibit C-5, p. 14*]. CLAIMANT told RESPONDENT in writing that both parties knew unforeseeable additional health and safety requirements could cause a 40% increase for a shipment. [*Exhibit C-4, p. 12*]. Although Ms. Napravnik and Mr. Antley were unable to finalize the contract, the persons who finalized the contract had access to the prior email chains from the original negotiators and could easily infer their intentions. [*PO 2, p. 55, para. 5*]. Additionally, Ms. Napravnik confirmed in her witness statement that "it had been clear to both parties that CLAIMANT should not bear all risks associated with such a delivery." [*Exhibit C-8, p. 17*]. CLAIMANT also told RESPONDENT during negotiations how a 30% tariff would impact CLAIMANT'S financial situation. [*PO 2, p. 59, para 28*]. RESPONDENT knew that CLAIMANT was in financial trouble based on industry rumors and RESPONDENT could not have been unaware of the financial effect of a large tariff increase. [*PO 2, p. 58, para 22*].

77. Subsequent conduct may explain a party's intent at the time of contract formation but the conduct does not unilaterally alter the contract. [*Huber/Mullis, p. 14*]. CLAIMANT'S 20 January 2018 phone call and email to Mr. Shoemaker shows that CLAIMANT did not intend to bear the increased

shipping cost at the time the contract was formed. [*Exhibit C7, p. 16*]. CLAIMANT emphasized that the tariff made the shipment 30% more expensive and surprisingly applied to horse semen so it had to be held until the parties reached a solution. (*ibid*.). Further, the parties' interests and the purpose of the contract at the time of contract was formed may show the parties' intentions. [*Building materials case*]. CLAIMANT was the seller and it was in financial strain, so it clearly had an interest in making a profit from the contract, which would be destroyed by a heavy tariff.

2. An Objective Interpretation of Clause 12 Under CISG Article 8(2) Confirms that a Reasonable Buyer in the RESPONDENT'S Position Would Have Known that CLAIMANT Would Not Bear All the Shipping Risk

78. Any reasonable buyer, who, like RESPONDENT, knew of CLAIMANT'S financial situation and of the importance of the contract would have known that CLAIMANT would not bear all the shipment risk. Art. 8(2) refers to a hypothetical party in a similar circumstance with the same skills, knowledge of prior dealings, and industry knowledge. [*Bianca/Bonell, p. 95-102*]. In the present case, the reasonableness standard refers to a seller in the agricultural industry that knew the lack of the retaliatory tariffs. Courts typically apply the objective standard of Art. 8(2) more often than for Art. 8(1) in accessing the parties' industry knowledge. [*Buildings material case*].

79. RESPONDENT had industry knowledge since it is famous for its broodmare lines, it established a racehorse stable three years prior to its contract with CLAIMANT. [*Notice of Arbitration, p. 4, para. 2*]. In contrast, CLAIMANT never sold semen for racehorse breeding specifically and the most frozen semen it sold was only 10 doses. [*PO 2, p. 57, para. 15*]. RESPONDENT knew about CLAIMANT'S financial difficulties based on industry rumors. [*PO 2, p. 58, paras. 21-22*]. A reasonable buyer in RESPONDENT'S position would have understood the commercial importance of the contract since it would be commercially unreasonable for CLAIMANT to absorb the additional 30% tariff.

80. Commercial reasonableness is also a factor under the objective Art. 8(2) analysis. [*UNCITRAL Digest*]. For example, the Appellate Court of Dresden found that it would have been commercially unreasonable for a buyer to assume that it could render payment for goods outside of the agreed period in a contract. [*Chemical products case*]. Similarly, CLAIMANT emphasized to RESPONDENT that an increased cost due to testing would destroy the commercial basis of the contract. [*Exhibit C7, p. 16*]. Coupled with the widely publicized fees paid by CLAIMANT in 2014, a reasonable buyer in RESPONDENT'S position would have known CLAIMANT would not bear all the shipment risk.

Based on Art. 8 of the CISG, the PARTIES agreed to a hardship clause to cover the imposed tariffs and CLAIMANT is entitled to relief.

3. Clause 12 Follows the Language of Article 6.2.2 of UNIDROIT Principles Allowing the PARTIES Intent for Price Adaptation if Hardship Occurs

81. Art. 6.2.2 of UNIDROIT Principles provides an obligor is entitled to invoke hardship "[1] where the occurrence of events fundamentally alters the equilibrium of the contract and [2] the events occur after the conclusion of the contract, [3] could not reasonably have been taken into account at the time of the conclusion of the contract, [4] beyond the control of the disadvantaged party, and [5] the risk of the event was not assumed by the disadvantaged party." CLAIMANT met all five elements of hardship under UNIDROIT which demonstrate the tariff unexpectedly disrupted the contract equilibrium after contract formation, it was beyond claimant's control, and claimant did not assume the risk.

a. The Sudden Imposition of the Tariff Resulted in an Unpredictable Change in Circumstances Altering the Contractual Equilibrium because the Tariff Dramatically Increased CLAIMANT'S Cost of Performance

82. The fundamental purpose of the contract was for RESPONDENT to receive a product and for CLAIMANT to receive a profit of 5%. [*PO 2, p. 60, para. 31*]. The imposition of 30% tariffs forced CLAIMANT to lose 25% from the purchase price [*Notice of Arbitration, p. 7, para. 18*]. If CLAIMANT bears the cost, then CLAIMANT will be forced to sell part of its business. [*Exhibit C-8, p. 17*]. On the other hand, RESPONDENT will not be financially endangered if it bore the USD $1,250,000.

83. The sudden imposition of tariff in this case was unforeseeable when concluding the contract. In illustration, a political crisis in a country which leads to a massive devaluation of the order of 80% of its currency may constitutes a case of hardship since such a dramatic acceleration of the loss of value of the currency of country X was not foreseeable. [Illustration 3 of Art. 6.2.2. UNIDROIT Principles]. Similarly, in this case, the PARTIES could not have foreseen the sudden imposition of tariff given the fact that until 2018, there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo. [*PO 2, p. 58, para. 23*]. Moreover, CLAIMANT did not assume the risk of the tariff, and the tariff was announced by executive order, which is completed beyond the control of CLAIMANT.

b. The Tariff Did Not Become Known to CLAIMANT Until After Contract Formation when CLAIMANT Attempted the Third Shipment

84. Ms. Napravnik did not know the tariff applied to frozen semen until 20 January 2018. [*PO 2, p. 58, para. 26*]. The sales agreement is dated 6 May 2017, so the tariff became known after contract formation. [*Exhibit C-5, p. 13*]. Traditionally, the government of Equatoriana always supported free trade and did not respond to trade issues with retaliatory measures. [*Exhibit C-6, p. 15*]. Even "informed circles" were shocked by the measure. (*ibid*.). When the tariff was enacted, neither expected the tariff to include frozen semen despite reading the newspaper art. [*PO 2, p. 58, para. 26*]. Additionally, Mediterraneo never tried to protect its farmers by placing tariffs on foreign agricultural products. [*PO 2, p. 58, para 23*].

c. The Tariff was Beyond CLAIMANT'S Control as the Tariff was a Retaliatory Measure Imposed by the Equatorianian Government

85. CLAIMANT did not bear the risk of the tariff because it qualifies as a health and safety Requirement beyond claimant's control. The retaliatory tariff was imposed in response a tariff justified by "national security." [*Exhibit C-4, p. 12*]. RESPONDENT was interested in contracting CLAIMANT because artificial insemination ban had been lifted. [Statement of Facts, para. 5]. The artificial insemination ban was enacted due to health and safety risks stemming from hoof and mouth horse disease (*ibid*.).

86. CLAIMANT was less in control of the tariff than it could have been in control of a missed flight, weather delay, or failure of third-party service, which were mentioned in the Hardship Clause as potential delays to which CLAIMANT did not accept liability. Those delays were common enough for the parties to mention in the contract whereas a retaliatory tariff only happened once in the past. [*Exhibit C-6, p. 15*]. CLAIMANT could not have been exempted or received a reduction for the tariffs impose on the third shipment. [*PO 2, p. 58, para. 27*]. Thus, CLAIMANT could not control the national tariff.

d. CLAIMANT Did Not Intend to Accept the Risk Associated with Delivery DDP Terms and Therefore Did Not Assume the Risk of the Tariff

87. The PARTIES intended to deviate from Incoterms DDP based on their pre-contract negotiations and implementation of the Hardship Clause. Art. 6 of the CISG allows parties to deviate from

Incoterms provision in their contract even if they agree to Incoterms. [*Johnson, p. 421*]. Art. 11 of CISG clarifies that there is not a specific form that the parties must use to show their deviation from Incoterms, only that the intent to deviate must be clear. [(ibid.); *Adams/Zierdt, p. 168*].

88. Here, CLAIMANT only accepted a lower overall price from RESPONDENT in exchange for RESPONDENT bearing the burden of shipment increases traditionally associated with delivery DDP. [*PO 2, p. 56, para. 8; Exhibit C-4, p. 12*]. CLAIMANT reduced the additional charge from USD $1,000 to USD $200 per dose which a small fraction of the overall cost for the third shipment. [*PO 2, p. 56, para. 8*]. Ms. Napravnik confirmed that the PARTIES agreed to delivery DDP only for a better delivery. [*Exhibit C-8, p. 17*]. Even RESPONDENT corroborated the same sole purpose for DDP as Ms. Napravnik described. [*Exhibit C-3, p. 11*]. Based on the extreme decrease in price for the additional delivery DDP, the statements from an original negotiator, and CLAIMANT repeated refusal to accept all risks associated with delivery, the PARTIES adopted a modified version of DDP which limited their liability. Therefore, the sudden imposition of tariff constituted a "hardship" that fundamentally alters the equilibrium of the contract which calls for an adaption of the contract prices according to Art. 6.2.2. of UNIDROIT Principles.

B. Even if This Arbitral Tribunal Rules that the Imposition of the Tariff is Not Covered in the Hardship Clause, CLAIMANT is Entitled to a Price Adaptation According to CISG Article 79 and UNIDROIT Principles

89. Even if this Arbitral Tribunal ruled that the tariff is not covered in the PARTIES' contract, CLAIMANT is entitled to a price adaptation because CISG Art. 79 governs the contract by default, and it should be interpreted to include the hardship concept along the lines of the Hardship Provision in the UNIDROIT Principles. Moreover, CLAIMANT met all the requirements set forth in Art. 6.2.3 of the UNIDROIT Principles. Requiring CLAIMANT to bear the increased 30% tariff would constitute a hardship to CLAIMANT'S existence. Given the fact that RESPONDENT is unfairly enriched by breaching its promise and reselling the semen to other buyers, CLAIMANT is entitled to a price adaptation by this Arbitral Tribunal.

1. Article 79 of CISG Governs the Hardship Clause of the Sales Agreement, which is a Mere Supplement to the Defaulted CISG Provision

90. Although Art. 6 of CISG allows parties to exclude the application of any provisions of CISG, the exclusion should be explicit, and the contract term should also state which law is to govern. [*Peter*

Winship, p. 525-554; CISG Article 2]. Thus, an express force majeure clause in the contract will usually be interpreted as a modification of (or supplement to) the Art. 79 default rule. [*Lookofsky,p. 133, para. 6.19*].

91. Here, nothing in the contract indicates an exclusion of Art. 79 CISG. The Hardship Clause of the Sales Agreement states, "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, … or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*PO 2, p. 56, para. 12*]. It can only be interpreted as a modification of (or supplement to) the Art. 79 default rule.

2. Article 79 of CISG Should Allow for a Price Adaptation in the Case of Changed Circumstances Along the Lines of the Hardship Provision in Article 6.2.3 of the UNIDROIT Principles

92. The imposition of tariff constitutes a fundamental change in circumstances under Art. 79 of CISG and UNIDROIT Principles. According to Art. 9(2) of CISG, "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract … a trade usage of which the parties knew or ought to have known … in the particular trade concerned." CISG recognizes the "privileged position of trade usages" in the situation of filling in the gaps in the contract and interpreting the contract's terms. [*Pamboukis, p. 107*].

93. Art. 6.2.2. of UNIDROIT Principles defines "hardship" as "where the occurrence of events fundamentally alters 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," and Art. 6.2.3. further provides that the disadvantaged party "is entitled to request renegotiations, and that the court may adapt the contract with a view to restoring its equilibrium." Moreover, the majority of scholarly opinions, consistent with CISG Advisory Council Opinion no 7, also favor that the "hardship" exception should be included in the Art. 79 CISG regime where performance becomes exceptionally and unexpectedly burdensome for the obligor. [*Atamer*].

94. In the *FeMo Alloy* Case, CIETAC Arbitration panel acknowledged that a change of circumstances could be a basis for an impediment claim. [*FeMo Alloy* Case]. In the case at hand, the Contract expressly indicated this Sales Agreement shall be governed by the law of Mediterraneo, including

CISG. [*PO 2, p. 56, para 14*]. Mediterraneo is a contracting state of the CISG and is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. [*PO 2, p. 53 para. 4*]. Accordingly, the default assumption under CISG Art. 9(2) is that the parties have included Art. 6.2.3. of UNIDROIT Principles into the contract as gap-filling international rules, which gives them the right to resort to the court and either demand adaption of the contract or avoidance.

3. CLAIMANT Met the Requirements for Such an Adaptation Under Article 6.2.3 of the UNIDROIT Principles

95. Under Art. 6.2.3. of UNIDROIT Principles, the requesting party need to make the request without undue delay and shall indicate grounds on which it is based. Here, CLAIMANT met all the requirements. After realizing that the racehorse semen was subject to the new tariffs, CLAIMANT immediately contacted RESPONDENT for a price adaptation without undue delay. CLAIMANT also made good faith explanation to its financial situation, and the fact that the tariff constituted a "hardship" that fundamentally altered the equilibrium of the contract

a. The Sudden Imposition of the Tariff Constitutes a "Hardship" that Fundamentally Altered the Equilibrium of the Contract which Calls for an Adaptation of the Price According to Article 6.2.2 of UNIDROIT Principles

96. Art. 6.2.2. of UNIDROIT Principles provides that an obligor is entitled to invoke hardship "where the occurrence of events fundamentally alters the equilibrium of the contract and the events occur after the conclusion of the contract, could not reasonably have been taken into account at the time of the conclusion of the contract, beyond the control of the disadvantaged party, and the risk of the event was not assumed by the disadvantaged party." Here, the sudden imposition of tariff in this case also could not be reasonably foreseen at the time of concluding the contract. Additionally, Mediterraneo never tried to protect its farmers by placing tariffs on foreign agricultural products. [*PO 2, p. 58, para. 23*]. Moreover, CLAIMANT did not assume the risk of the tariff, and the tariff was announced by executive order, which is completely beyond the control of CLAIMANT, and CLAIMANT did not assume the risk of tariff.

b. CLAIMANT Made the Request for Contract Adaptation in a Timely Manner

97. Art. 6.2.3 of UNIDROIT Principles requires that the adaptation request be made "without undue delay." The phrase "without undue delay" which shall be determined upon the circumstance of the

case, and the disadvantage party does not lose its right to request renegotiations simply because it fails to act without undue delay. [*Comment 2 on Art. 6.2.3. UNIDROIT Principles*].

98. Ms. Napravnik immediately contacted Mr. Shoemaker to request for adaption of the contract price after she learned that the tariff applied to horse semen. [*PO 2, p. 57, para. 16; PO 2, p. 58, para. 28*]. The fact that CLAIMANT read the Peak Business News on 20 December 2017 is irrelevant because the frozen semen could not be considered as an "agricultural goods" in their trade usage. [*PO 2, p. 58, para. 26*]. Also, Mr. Shoemaker in his witness statement mentioned that in the ministry, the employees he spoke to were not certain whether frozen racehorse semen was covered under "animal products." [*PO 2, p. 60, para. 36*]. Only when Ms. Napravnik asked for customs clearance on 19 January 2017 was she told by email that the tariff applied to semen as well. [*PO 2, p. 58, para. 26*].

4. The Principles of Fairness and Good Faith are Ubiquitous in International Trade and would be Violated if This Arbitral Tribunal Did Not Proceed Under CISG Article 79

99. Scholars have commented that "the underlying principle of good faith should encourage a wider use of Art. 79, especially when parties overreach, risks are unintentionally misallocated, and where real substantive injustices dictate acts of judicial and arbitral discretion. [*DiMatteo/Ostas*]. Here, CLAIMANT, under the impression of RESPONDENT'S consent to the adaptation shipped the remaining 50 doses semen to cooperate with Respondent's urgency. [*Exhibit C-8, p. 17*]. RESPONDENT not only induced CLAIMANT to ship the semen by referring to a long-term business relationship with CLAIMANT, but also enriched from breaching the non-resale restrictions. The imposition of 30% tariff was too burdensome for CLAIMANT and would force CLAIMANT sell part of its business. [*PO 2, p. 59, para. 29*]. Therefore, the sudden imposition of tariff constituted a "hardship" that fundamentally alters the equilibrium of the contract which calls for an adaption of the contract prices according to Art. 6.2.2. of UNIDROIT Principles.

100. RESPONDENT would be unjustly enriched from its violation of the contract and CLAIMANT'S reliance on Mr. Shoemaker's inducement. Claimant, on the other hand would be buried with debts and forced to sell part of its business as a precondition to entry into a new credit. [*PO 2, p. 59, para. 29*]. The contract provided that RESPONDENT is prohibited from reselling the semen to other buyers. [*PO 2, p. 57, para. 20*]. RESPONDENT, however, breached its contractual requirements not

to resell the semen has done so for 15 doses at a price 20% above the price charged by CLAIMANT. (*ibid.*).

101. As stated in Mr. Shoemaker's acknowledged that, when Mr. Shoemaker told Ms. Napravnik that a solution was certainly be found through negotiation, Mr. Shoemaker knew that CLAIMANT would not deliver if he were to reject the adaptation request outright. [*PO 2, p. 60, para. 36*]. Mr. Shoemaker also urged CLAIMANT to authorize the shipment, emphasizing RESPONDENT'S interest in long-term relationship with CLAIMANT. [*PO 2, p. 57, para. 18*]. As a result, CLAIMANT shipped the semen under Mr. Shoemaker's request and even paid the 30% in tariffs to have the shipments arrived earlier since RESPONDENT emphasized how quickly it needed the shipments. [*PO 2, p. 60, para. 36*]. The principles of fairness and good faith would be violated if the Arbitral Tribunal did not proceed under CISG Art. 79.

102. CLAIMANT met all the requirements set forth in Art. 6.2.3 of the UNIDROIT Principles, and RESPONDENT is unfairly enriched by breaching its promise and reselling the semen to other buyers. Requiring CLAIMANT to bear the increased 30% tariff would constitute a hardship to CLAIMANT'S existence. CLAIMANT is entitled to a price adaptation by the Tribunal under CISG Art. 79.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to find that:

1. the law of Mediterraneo governs the arbitration agreement and its interpretation and the Arbitral Tribunal has the jurisdiction and powers under the arbitration agreement to adapt the contract (**Issue 1**);
2. CLAIMANT should be entitled to submit evidence from RESPONDENT'S prior arbitration proceedings (**Issue 2**);
3. CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price (**Issue 3**).

6 December 2018

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of the student team.

/s/Humza Ansari

Humza Ansari

/s/Sara Geoghegan

Sara Geoghegan

/s/Zhiwen Jie

Zhiwen Jie

/s/Caroline Mazurek

Caroline Mazurek

/s/Gabrielle Neace

Gabrielle Neace

/s/Zike Yang

Zike Yang

Certificate and Choice of Forum

To be attached to each Memorandum

I Kristen E. Hudson, on behalf of the Team for (name of School)

The John Marshall Law School 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:

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Or

- ☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considerec 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 John Marshall Law School

Name Kristen E. Hudson

Signature