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HONG KONG

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF INTERNATIONAL BUSINESS AND ECONOMICS SCHOOL OF LAW

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

RUITING LI • CHAO ZHAO • BEN LIU

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DSU	¶84	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT	¶84	General Agreement on Tariff and Trade
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IBA Rules	¶77	IBA Rules on the Taking of Evidence in International Arbitration
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ICC Rule	¶7	Arbitration Rule of International Chamber of Commerce
LCIA Rule	¶7	Arbitration Rule of London Court of International Arbitration

ISIC	¶91	International Standard Industrial Classification of All Economic Activities
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LIST OF ABBREVIATIONS

&	and
¶(¶)	paragraph(s)
A.N.A	Response to the Notice of Arbitration
Art.	Article
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	United Nations Convention in the International Sale of Goods Advisory Council
Co.	Company
DDP	Delivered Duty Paid
e.g.	example given (for instance)
ed.	edition
et al.	et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
ibid.	ibidem (the same)
IBA	International Bar Association
ICC	International Chamber of Commerce
INCOTERMS	International Commercial Terms
ICSID	International Centre for Settlement of Investment Disputes
Ltd.	Limited
Mr.	Mister
N.A.	Notice of Arbitration

No.	Number
OLG	Oberlandesgericht
P(P).	page(s)
PO	Procedural Order
Sales Agreement	Frozen Semen Sales Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
v.	versus

STATEMENT OF FACTS

The parties to these arbitration proceedings are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**", collectively the "**Parties**"). **CLAIMANT** is a company known for its breeding success regarding racehorses seated in Mediterraneo. **RESPONDENT** is a cooperation famous for the broodmare line incorporated in Equatoriana.

21 March 2017	RESPONDENT contacted CLAIMANT and inquired about racehorse semen for its breeding program.
24 March 2017	CLAIMANT submitted a Standard Contract to RESPONDENT.
28 March 2014	RESPONDENT replied with changes to the delivery terms, applicable law and forum selection clause.
31 March 2014	CLAIMANT accepted the delivery terms but requested to include a hardship clause in the contract.
10 April 2017	RESPONDENT submitted the arbitration clause to CLAIMANT.
11 April 2017	CLAIMANT replied with changes to the place of arbitration.
12 April 2017	A car accident happened to the Parties' two main negotiators.
6 May 2017	The Sales Agreement was signed by the Parties.
19 December 2017	Equatoriana announced to impose a 30% retaliatory tariff on agricultural products including racehorse semen from Mediterraneo.
20 January 2018	After communicating with RESPONDENT, CLAIMANT authorized the third shipment.
23 January 2018	CLAIMANT made the third shipment.
12 February 2018	RESPONDENT withdrew from the negotiation.

SUMMARY OF ARGUMENTS

1. The law governing the Arbitration Clause shall be Danubian law, since it has been chosen by the Parties and has the closest connection with the Arbitration Clause. Then, based on "four corners rule" in Danubian law, it shall be interpreted that the Arbitration Clause has excluded the adaptation claim since both the plain meaning of the wording and the intention of the Parties indicate such exclusion **(Issue I).**
2. The contested evidence submitted by CLAIMANT is not admissible before the Tribunal, since such evidence is neither relevant nor material to the current arbitration, and was obtained illegally. Besides, the evidence contradicts IBA rules for confidentiality concern **(Issue II).**
3. RESPONDENT submits that CLAIMANT shall not be entitled to the 25% price adaptation under Clause 12 of the Sales Agreement, because the 30% tariff does not satisfy the requirements for hardship under Clause 12, and the remedy of price adaptation is not applicable under the contract. Besides, the risk of tariff increase has not been shifted to RESPONDENT under DDP, because the Parties have modified the CLAIMANT and CLAIMANT has assumed such risk **[Issue III (i)].**
4. RESPONDENT submits that CLAIMANT shall not be entitled to the 25% price adaptation under CISG. Because Clause 12 is a derogation from Art. 79 and also, Art. 79 shall be of no relevance in the present case since the contract has already been performed. Besides, UPICC shall not be used to fill the gap, and even if it does, the 30% tariff does not satisfy the requirements for hardship under UPICC **[Issue III (ii)]**.

ARGUMENTS

I. THE TRIBUNAL HAS NO JURISDICTION UNDER THE ARBITRATION CLAUSE TO ADAPT THE CONTRACT

1. In the Notice of Arbitration, CLAIMANT contends that the Tribunal has the jurisdiction to adapt the price in the contract between the Parties *[N.A. ¶15]*. CLAIMANT firstly submits that the interpretation of the Arbitration Clause, which determines the scope of the Tribunal's jurisdiction, shall be governed by the law of Mediterraneo *[Cl. Memo ¶9]*. CLAIMANT alternatively contends that even the law of Mediterraneo cannot be applied, the Tribunal still has the jurisdiction to adapt the contract due to the scope of the Arbitration Clause *[Cl. Memo ¶35]*.
2. Contrary to CLAIMANT's contention, RESPONDENT submits that the Tribunal has no jurisdiction to adapt the contract. The Tribunal's jurisdiction is wholly based on the scope of the Arbitration Clause, which is ambiguous in the present case and requires a reasonable interpretation. RESPONDENT submits that the Tribunal has no jurisdiction to adapt the contract, as firstly the Arbitration Clause shall be governed by the law of Danubia (**A**) and secondly the adaptation is not covered by the Arbitration Clause based on the interpretation (**B**).

A. The Arbitration Clause Shall Be Governed by the Law of Danubia

3. The law governing the Arbitration Clause is the law of Danubia. CLAIMANT postulates that the Tribunal should apply the three-tier test in *Sulamérica* case to decide the applicable law on the Arbitration Clause and the main contract law shall govern the Arbitration Clause *[Cl. Memo, ¶¶14, 26-41]*.
4. However, if the *Sulamérica* test is strictly followed in the present case, it will be concluded that the seat law, Danubian law, shall be applied to the Arbitration Clause. The three tiers of the *Sulamérica* test, recognized in UNCITRAL Model Law and New York Convention, in priority order, are: first, the express choice by the Parties; second, the implied choice by the Parties; and third, the law of the closest and more real connection with the Arbitration Clause *[Sulamérica case, ¶9; Model Law, Article 34(2)(a)(i) & Article 36(1)(a)(i); New York Convention, Article 5]*. It is noteworthy that, in this case, none of these

steps can direct the Tribunal to reach CLAIMANT's conclusion, as firstly the Parties have not made an express choice on the governing law of the Arbitration Clause (**1**), secondly the Parties have impliedly chosen the seat law to govern the Arbitration Clause (**2**) and thirdly the seat law has the closest and more real connection with the Arbitration Clause (**3**).

1. The Parties Have Not Made Express Choice on the Governing Law of the Arbitration Clause

5. The Parties have not expressly chosen the governing law of the Arbitration Clause. CLAIMANT submits that according to the text of the Sales Agreement and the negotiation process, the Parties have expressly chosen the law of Mediterraneo as the governing law of the Arbitration Clause *[Cl. Memo ¶21]*.

6. However, contrary to CLAIMANT's allegation, RESPONDENT submits that law of Mediterraneo does not necessarily govern the Arbitration Clause (**a**). Also, no intent from the Parties to subject the Arbitration Clause to the law of the main contract can be found in either the negotiation process or the text of the Sales Agreement (**b**).

(a) The Law of Mediterraneo does not Necessarily Govern the Arbitration Clause

7. The law of Mediterraneo, as the law governing the main contract, does not necessarily govern the Arbitration Clause. In this case, the Parties have chosen Danubia as the seat of the arbitration *[CLAIMANT's Exh C 5, Clause 15]*. Therefore, the applicable *lex arbitri* is Danubian Arbitration law, a verbatim adoption of UNCITRAL Model Law *[PO.1, ¶4]*. In accordance with the Separability Doctrine, which is directly pointed out by CLAIMANT *[Cl. Memo ¶6]* and recognized both in the arbitration rules, HKIAC Rules, and *lex abitri [HKIAC Rules Art.19.2; Model Law Art.16.1]* as well as in other major institutional rules *[ICC Rules Art. 6.4; LCIA Rules Art. 23.2; SIAC Rules Art. 25.2]*, the Arbitration Clause is considered as a separate agreement *[ICC Case No. 8938]*.

8. The original purpose of the Separability Doctrine is to ensure the validity of the Arbitration Clause in case the main contract is avoided *[Sulamérica case, ¶26]*. To fulfill this purpose, the doctrine opens the door to make the Arbitration Clause likely to be governed by a law different from the main contract governing law *[Born, P476]*. Therefore, the governing law on the Arbitration Clause will not necessarily

be the same as the law of the main contract *[ICC Case No. 4131, PP131-132]*.

9. In conclusion, the Arbitration Clause is not necessarily governed by the law of Mediterraneo and shall be considered independently.

(b) The Intent to Subject the Arbitration Clause to the Law of Main Contract Can Not Be Found in the Negotiation Process or the Text of the Sales Agreement

10. The Parties have not expressly chosen the governing law of the Arbitration Clause. CLAIMANT alleges that the Parties' express choice on the law of Mediterraneo can be identified through the text of the Sales Agreement and the negotiation process *[Cl. Memo, ¶¶29,32]*. However, RESPONDENT submits that this alleged intent from the Parties cannot be found in either the negotiation process or the text of the Sales Agreement.

i. The Intent Cannot Be Found in the Text of the Sales Agreement

11. Contrary to CLAIMANT's submission, the intention cannot be found from the text of the Sales Agreement. CLAIMANT submits that the "Sales Agreement" in Art. 14 of the contract covers all clauses including the Arbitration Clause *[Cl. Memo, ¶17]*. However, the terminology of this contract indicates the contrary conclusion.

12. Individual terms shall be interpreted within the whole context of the contract *[Schlechtriem/Schwenzer, ¶30]*. Clauses 2, 5 and 14 are all based on the basic industry template from Mediterraneo *[PO.2, ¶3]*. In Clauses 2 and 5, the Parties use "Agreement" to refer to the whole contract *[Exh. C5]*. "Sales Agreement" in Clause 14, comparatively, should be understood to refer to the "Sales part of the Agreement". Therefore, Clause 14 is an express choice of the governing law on the main contract, not the Arbitration Clause.

13. In conclusion, there is no express choice of the Parties on governing law of the Arbitration Clause.

ii. The Intent Cannot Be Found in the Negotiation Process

14. The intention cannot be found from the negotiation process of the Parties. Art. 8 of CISG governs the interpretation of statements made by and other conduct of the Parties of a contract subject to

CISG and the interpretation of contracts *[Schlechtriem/Schwenzer, ¶¶1,3]*. The statements, conduct and contract shall be interpreted according to a party's intent where the other party knew or could not have been unaware of. *[Art.8(1) CISG]*. Such an intention can be identified from the negotiation process, which is part of the surrounding circumstances of the contract *[Art.8(3) CISG]*.

15. During the negotiation, RESPONDENT initially proposed to choose the law of Equatoriana as the governing law of the Arbitration Clause specifically *[Exh. R1]*. This proposal conveys a clear intention to choose a governing law of the Arbitration Clause different from the main contract governing law, which CLAIMANT cannot be unaware of. As the facts show, CLAIMANT *"largely accepted the proposal with an amendment as to the place of arbitration" [Exh. R2]*, but there is no evidence indicating CLAIMANT's clear rejection to apply different laws on the main contract and the Arbitration Clause *[Fabric case, ¶3]*. Even such intent exists, it has not been communicated to RESPONDENT in any manner *[Roland case, ¶4]*. Therefore, no express choice can be identified from the negotiation process.

2. <u>The Parties Have Impliedly Chosen the Law of Seat to Govern the Arbitration Clause</u>

16. The Parties have impliedly chosen the law of Danubia, not the law of Mediterraneo, to govern the Arbitration Clause. CLAIMANT postulates that, in absence of contrary indications, the main contract law shall be presumably applied to govern the Arbitration Clause *[Cl. Memo, ¶17]*. According to *Sulamérica* case cited by CLAIMANT, such presumption is rebuttable if there is sufficient contrary indication *[Sulamérica case, ¶30; Habas Sinai Case, ¶101]*. In this case, there are sufficient contrary indications to rebut this presumption.
17. In *Sulamérica*, there are two contrary indications to rebut the main contract presumption. The first is the choice of seat whose law is different from the main contract governing law. The second is the requirement for enforcement *[Sulamérica case, ¶30]*. The Court concluded that the two indications are sufficient to rebut the main contract presumption.
18. In this case, both two contrary indications can be found. First, the Parties also chose a seat, Danubia, whose law is different from the main contract governing law, Mediterraneo. The choice of seat means the acceptance by the Parties of the seat law relating to the conduct and supervision of arbitrations *[XL Insurance case, P24]*. It indicates the Parties' intent to apply the seat law to govern all aspects of the

jurisdiction of the arbitration agreement *[BCY v. BCZ, ¶45]*. Therefore, it shall be considered as a contrary indication against the main contract presumption.

19. Second, the Parties independently negotiated the content of the Arbitration Clause. CLAIMANT alleges that in case of the Arbitration Clause forming part of the contract, not an independent agreement, the main contract presumption will be stronger. Respondent submits that this understanding is mainly based on that the Arbitration Clause is usually the "midnight clause" concluded at the last minute *[BCY v. BCZ, ¶61; Firstlink case, ¶1]*. In the present case, however, the Arbitration Clause, as one of the "last open points" of the negotiation, was negotiated independently between the Parties *[Exh. R1, R2]*. Such independent negotiation process is sufficient to show the Parties' intent to subject the Arbitration Clause to a different law.

20. In conclusion, considering the two contrary indications, the main contract presumption has been rebutted and the seat law shall be considered as the implied choice between the Parties on the governing law of the Arbitration Clause.

3. The Seat Law Has the Closest and More Real Connection with the Arbitration Clause

21. If the Tribunal finds that there is neither an express nor an implied choice from the Parties concerning the governing law of the Arbitration Clause, RESPONDENT submits that the seat law shall be applied according to the doctrine of the closest and more real connection.

22. Compared with the law of the main contract, the seat law has a closer connection with the Arbitration Clause *[C v. D ¶26; Firstlink case, ¶14; Sulamérica case, ¶32]*, because the seat law will provide the supporting and supervisory jurisdiction to ensure that the arbitration proceeding is effective *[Sulamérica case, ¶32]*. To the contrast, the connection between the law of the main contract and the law of the Arbitration Clause is not that close because their nature and purpose are different *[Sulamérica case, ¶32]*. This conclusion has been affirmed by other decisions *[Abuja case, P461]*.

23. CLAIMANT contends that since Mediterraneo is the location of one party and the place of performance, it has a closer connection to the Arbitration Clause *[Cl. Memo, ¶33]*. However, these two elements are valuable in determining the connection with the contract, not the Arbitration Clause prepared particularly for dispute resolution. It is the seat law that has a closer connection to the

Arbitration Clause in case the main contract law is from one of the Parties' location and the seat law is from a neutral forum *[Born, P518]*, which perfectly match the context in this case.

24. Therefore, the seat law has a closer connection with the Arbitration Clause and shall be applied to interpret the Arbitration Clause.

B. The Arbitration Clause Shall Be Interpreted to Exclude the Claim of Adaptation

25. As RESPONDENT has established that the governing law of the Arbitration Clause is the law of Danubia *[Re. Memo, ¶¶3-24]*, RESPONDENT further contends that the Arbitration Clause shall be interpreted as excluding claim of adaptation under the law of Danubia, which contains "four corners rule" excluding most extrinsic evidence *[A.N.A, ¶16]*.

26. It is agreed by both Parties that if this rule is applied, there is a high likelihood that the Arbitration Clause would not be interpreted as authorizing a contract adaptation by the Tribunal *[PO1, ¶II.2]*. However, CLAIMANT alleges that, according to the "pro-arbitration" rule established by *Fiona Trust*, the wording of the Arbitration Clause, and a previous negotiation in which RESPONDENT mentioned the adaptation issue, the adaptation claim falls into the scope of arbitration *[Cl. Memo, ¶35]*. RESPONDENT disagrees with such allegation. Against the arguments drawn by CLAIMANT, RESPONDENT submits that, under Danubian law, the adaptation claim has been excluded from the wording of the Arbitration Clause (**1**), and the "pro-arbitration" rule is of no relevance since RESPONDENT expressed clear intention to exclude the adaptation claim (**2**).

27. In the alternative, even if the Tribunal finds that Danubian law shall not be applied to interpret the arbitration clause, the *contra proferentem* rule shall be applied to interpret the Arbitration Clause against its drafter, which is CLAIMANT in this case, to exclude the claim of adaptation from the scope of arbitration (**3**).

1. <u>The Adaptation Claim Has Been Excluded from the Wording of the Arbitration Clause</u>

28. CLAIMANT argues that the adaptation claim is covered by the wording "any disputes arising out of this contract" in the Arbitration Clause, since both "any disputes" and "arising out of" are broad terms. Also, the adaptation claim is related to "performance" and "breach" issues mentioned in the clause *[Cl.*

Memo, ¶¶*42-46]*. However, RESPONDENT submits that CLAIMANT has distorted the fact. Under "four corners rule" of Danubian law, previous negotiations on which CLAIMANT relies shall be excluded (**a**). When interpreting the contract, the Tribunal shall rely on the terms left in the clause, which shall be interpreted narrowly (**b**).

29. Alternatively, even if the Tribunal decides to accept extrinsic evidence, RESPONDENT submits that the adaptation claim still falls out of the scope of arbitration, since the Parties share a common intention to exclude the adaptation claim (**c**).

(a) Previous Negotiations on Which CLAIMANT Relies Are Not Applicable Here

30. CLAIMANT, relying on previous negotiations between the two negotiators of the Parties, draws the conclusion that both Parties agreed to expand the scope of the Arbitration Clause to include the adaptation claim *[Cl. Memo,* ¶*48, Exh. C8]*. RESPONDENT disagrees and argues that the previous negotiations on which CLAIMANT relies are not applicable under Danubian Law.

31. Under the "four corners rule" prescribed by Danubian Contract Law, the wording of the contract completely embodies the whole agreement between the Parties. All extrinsic evidence, including previous negotiations, is of no relevance unless it is able to help to interpret the wording without contradicting or supplementing it *[PO2,* ¶*45; Art.2.1.17, UPICC]*.

32. In the present case, the negotiations CLAIMANT relies on mainly focuses on whether to insert an express reference to the hardship clause, which is an expression that does not appear in the final agreement. Given that "supplement" means supplying something additional or adding what is lacking in the contract, while "interpret" means determining the meaning of something that exists in the contract *[Black's Law Dictionary, "supplement", "interpret"]*, if these negotiations are taken into consideration by the Tribunal, they will constitute a supplement to, rather than an interpretation of, the contract, with an express reference to the hardship clause, which is not allowed under "four corners rule".

33. Thus, the negotiations on which CLAIMANT relies are not applicable in the present case.

(b) The Terms Left in the Arbitration Clause Shall Be Interpreted Narrowly to Exclude the Adaptation Claim

34. CLAIMANT submits that the wording in the Arbitration Clause, "any dispute arising out of this contract", shall be interpreted broadly and cover every dispute between the Parties, including the adaptation claim *[Cl. Memo, ¶¶42-46]*. However, in practice, these terms are not absolutely broad and may convey narrow meanings as well. Here, RESPONDENT argues that "arising out of" (***i***) and "all disputes" (***ii***) contain narrow meanings in the present case, and thus do not cover the adaptation claim.

i. The term "arising out of" shall be interpreted narrowly

35. The scope of the term "arising out of" has been debated in English courts for a long time. A number of cases turn out to confirm the narrow meaning of the term "arising out of". Briefly, "out of this contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract *[Fillite case, P10; Union of India case, P8]*.
36. Here, the adaptation of the contract has never been a specific obligation of any Party incorporated in the contract. Even the word "adapt" does not appear in the wording of the contract. Even in the hardship clause, which has the closest relation to adaptation as a remedy, such expression does not appear *[Exh. C5, ¶12]*. Thus, whether to adapt the contract or not is not a dispute "arising out of" the contract and falls out of the scope of arbitration.

ii. The term "all disputes" shall be interpreted narrowly

37. Once the term "arising out of" is interpreted narrowly, it shall be noticed that the scope of "all disputes" has been limited. Even though "all disputes" may contain broad meanings, the scope of its meaning is confined by the meaning contained in the term "arising out of", since the latter modifies "all disputes". Thus, "all disputes" shall be interpreted narrowly corresponding to "arising out of".
38. Therefore, since the terms in the Arbitration Clause contain narrow meanings, the adaptation claim shall be excluded from the scope of arbitration.
39. In conclusion, the wording of the Arbitration Clause is narrow enough to exclude the adaptation claim, since the Parties' intention, the view of a reasonable third person, and the narrow meanings contained

in the terms of the clause have conveyed such meaning.

(c) Alternatively, the Parties Share a Common Intention to Exclude the Adaptation Claim

40. Even if the Tribunal decides to accept extrinsic evidence, the adaptation claim shall still be excluded from the scope of arbitration since the Parties share a common intention to exclude the adaptation claim, which can be embodied by RESPONDENT's omission of broad terms in the arbitration clause (i). Also, a reasonable person is capable of understanding such intent of RESPONDENT (ii).

i. Adaptation Claim Has Been Excluded Due to RESPONDENT's Omission of the Broad Terms

41. CLAIMANT mainly relies on terms left in the Arbitration Clause, explaining their broad meanings in judicial practices *[Cl. Memo, ¶¶42-46]*. However, CLAIMANT ignores the true intention of the Parties, which shall be considered in the first place when interpreting the contract and may differ from the literal meanings of the terms *[UPICC Comment, Art.4.1]*. Here, RESPONDENT has shown a clear intention to exclude the adaptation claim from the scope of arbitration by omitting the broad terms.

42. Under Danubian Contract Law, which is a largely verbatim adoption of UPICC, a contract shall be, in the first place, interpreted according to the common intention of the parties *[Art.4.1(1), UPICC]*. This common intention requires a higher standard of proof than that of a communicated intention, which is the standard of the subjective test in CISG *[Art.8(1), CISG]*. The latter only requires the parties to communicate their intentions, that is, leave the sphere of its own formulation to connect with the other party *[Schlechtriem/Schwenzer, P149]*, while the former one requires the result that the understandings of the parties are indeed common *[UPICC Comment, Art.4.1]*.

43. In the present case, the intent of RESPONDENT excluding adaptation of the contract from the scope of arbitration is well evidenced in the email sent to CLAIMANT on April 10th, 2017 *[Exh. R1]*, which shall be used to interpret the true meaning of the wording of the Arbitration Clause. In the email, RESPONDENT proposed a revised version of the model arbitration clause provided by HKIAC. It is noteworthy that several broad terms were omitted, which are demonstrated below:

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

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

44. Here in this arbitration clause, the terms underlined are those contained in the original model clause but omitted in RESPONDENT's proposal of the Arbitration Clause. It can be clearly observed that, through the omission of those terms, the intent of RESPONDENT is to restrict the scope of arbitration. In particular, by omitting "difference" from the model clause, RESPONDENT directly expressed the intent to exclude adaptation of the contract from the scope of arbitration, since the adaptation of the contract has been specifically defined as a "difference" *[F&G case, P57]*.

45. The unequivocal intent of a single party is equivalent to common intention *[Schlechtriem/Schwenzer, P155; TETA case, note 3.3]*. When the Parties entered into the contract, it shall be deduced that CLAIMANT reached a meeting of mind with RESPONDENT to exclude the adaptation claim from this arbitration clause, without which the contract could not be formed.

46. Thus, a narrow interpretation shall be made to exclude adaptation of the contract from the scope of arbitration, due to RESPONDENT's clear intention to do so.

ii. Even if the Parties' Intent Cannot Be Discovered, a Reasonable Person Is Capable of Understanding RESPONDENT's Intent to Exclude the Adaptation Claim in the Wording

47. Alternatively, if the Tribunal decides that the Parties' intention could not be identified by the aforementioned subjective test, RESPONDENT here submits that it will be necessary to further apply the objective test, which is supplementary and applicable to interpret the wording of the contract when the subjective test is not effective *[Swiss case 2008, P3; Art.4.1(2), UPICC]*. Under the objective test, RESPONDENT has expressed a clear intention to exclude the adaptation claim from the scope of arbitration from a reasonable person's view.

48. Under the objective test, prior statements of the Parties are competent for interpreting the wording of the contract *[Art.2.1.17, UPICC]*. Statements are to be interpreted according to the understanding that a reasonable person in the shoes of the other party would have had *[Bianca/Bonell, Art.8, note 2.4]*. The standard is thus the hypothetical understanding of a reasonable person of the same kind as the other

party, and who is also in the same external circumstances *[Fletchner, Art.8, ¶107.1; Schlechtriem/Schwenzer, P155]*.

49. In the present case, when CLAIMANT received RESPONDENT's proposal of the Arbitration Clause, CLAIMANT shall be well aware of RESPONDENT's intent to exclude adaptation from the scope of arbitration by omitting all ambiguous expressions in the clause which may lead to a broad interpretation. A reasonable third person of the same kind disagreeing with RESPONDENT would have clearly and directly expressed their opinion in the reply to RESPONDENT. However, when CLAIMANT received this proposal, it stated directly that it largely accepted RESPONDENT's proposal only with an amendment as to the place of arbitration *[Exh. R2]*, which shall be interpreted that it accepted everything in the proposal except the place of arbitration. Thus, it shall be interpreted that CLAIMANT acknowledged the exclusion of adaptation claim.

50. Therefore, from a reasonable person's view, RESPONDENT has expressed a clear intention to exclude the adaptation claim from the wording of the Arbitration Clause, with which CLAIMANT could not have disagreed.

2. <u>The "Pro-Arbitration" Presumption Is of No Relevance Here</u>

51. CLAIMANT alleges that the Arbitration Clause shall be presumptively interpreted broadly to include all disputes between the Parties into the scope of arbitration since reasonable businessmen intend to settle all the disputes within a single proceeding *[Cl. Memo, ¶¶36-41]*. However, CLAIMANT has distorted the conditions to apply this presumption. RESPONDENT here submits that the pro-arbitration presumption is of no relevance.

52. CLAIMANT submits the "pro-arbitration" presumption based on the *Fiona Trust* case *[Cl. Memo, ¶38]*. However, CLAIMANT ignores the condition concluded by that court when applying this presumption. As the purpose of this presumption is determining the scope of arbitration without a clear language of the Parties, according to Lord Hoffman, this presumption is not applicable when the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction *[Fiona Trust case, ¶13]*. Also, Art.28 of UNCITRAL Model Law states that: *"The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."* In other

words, tribunals are only bound by rules or laws chosen by the parties. Tribunals are not obliged to apply other rules not designated by the parties *[Model Law Art.28]*.

53. In the case at hand, as established above, RESPONDENT has already expressed a clear intention to exclude the adaptation claim from the scope of arbitration, and such intention has been acknowledged by CLAIMANT *[Re. Memo, ¶¶40-50]*. Here, with a clear intention of the Parties, this presumption shall be superseded. Also, the Parties have never reached any agreement to apply this pro-arbitration rule. The tribunal shall not apply this rule to the present case.
54. Thus, given that a clear intention exists between the Parties, the "pro-arbitration" presumption shall not prevail.

3. Alternatively, the *Contra Proferentem* Rule Shall Be Applied to Interpret the Arbitration Clause Against Its Drafter

55. Even if the Tribunal decides not to apply Danubian Law as the governing law of the Arbitration Clause, the adaptation claim is still excluded according to the *contra proferentem* rule.
56. Under both Mediterranean and Danubian Law, *contra proferentem* rule is acknowledged as an interpreting method *[Art.4.6, UPICC]*, since both states have adopted the same article from UPICC *[PO1, ¶III.4, PO2, ¶45]*. This rule is founded on the basic principle that the Party that has drafted a certain term must bear the risk of its possible ambiguity *[Art.4.6, UPICC]*. Further, this rule is applicable only when there is ambiguity in determining the intent of the Parties *[Marzipian Paste case ¶17, BGH case 2014 ¶23]*.
57. In the present case, the final version of the Arbitration Clause was drafted by CLAIMANT in its email on April 11th, 2017*[Exh. R2]*, in which the governing law clause of the Arbitration Clause was deleted by CLAIMANT. This deletion was not clearly understood by the new negotiators *[Exh. R2]*, and was finally embodied in the contract *[Exh. C5]*, in which the governing law of the Arbitration Clause was not defined clearly. Therefore, CLAIMANT shall be seen as the final drafter of the Arbitration Clause. Furthermore, it is without doubt that there is ambiguity in defining the Parties' intent. Ambiguity will raise if the drafter fails to be clear in language despite inquiry *[Glass Tube case, ¶20]*. Here, CLAIMANT failed to be clear in its draft clause since the governing law is completely absent. Also, both former negotiators were severely injured in the car accident, so the new negotiators had no opportunity to ask

the former negotiators to clarify the governing law of the clause.

58. Thus, the *contra proferentem* rule is applicable here since it was CLAIMANT's fault that led to this ambiguity in the governing law of the Arbitration Clause. The Tribunal shall interpret the arbitration clause against CLAIMANT and exclude the adaptation claim from the scope of arbitration.

59. In conclusion, as to the interpretation of the Arbitration Clause, CLAIMANT's argument appealing for a broad interpretation shall not be adopted by the Tribunal for four grounds. First, the adaptation claim has already been excluded from the wording of the Arbitration Clause. Second, previous negotiations cited by CLAIMANT are not applicable since they contradict Danubian Contract Law. Third, the "pro-arbitration" presumption is of no relevance here, because it is superseded by the Parties' clear intent. Finally, even Danubian Law does not govern the Arbitration Clause, the *contra proferentem* rule shall be applied to interpret the Arbitration Clause against CLAIMANT. Based on these, the adaptation claim shall be dismissed by the Tribunal.

Conclusion to the First Issue

60. The law of Danubia is the governing law of the Arbitration Clause because of the Parties' implied choice and its closest and more real connection with the Arbitration Clause. Further, in accordance with the "four corners rule" interpretation method under the law of Danubia, most extrinsic evidence is excluded from the interpretation and the adaptation claim is excluded from the wording of the Arbitration Clause. The "pro-arbitration" presumption cannot be applied here. The *contra proferentem* rule will support RESPONDENT's argument. Therefore, the Tribunal has no jurisdiction to adapt the contract.

II. THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING IS NOT ADMISSIBLE BEFORE THE TRIBUNAL

61. The contested evidence is not admissible before the Tribunal. CLAIMANT alleges that this evidence is admissible under the HKIAC Rules, *lex arbitri* and IBA Rules. Contrary to CLAIMANT's allegation, RESPONDENT submits that this evidence is inadmissible because this evidence is irrelevant to the case or material to its outcome (**A**), this evidence was obtained illegally (**B**) and this evidence is

confidential and thus shall be excluded according to IBA Rules (**C**).

A. This Evidence Is Not Admissible Because It Is Not Relevant to the Case or Material to its Outcome

62. This evidence is not admissible before this Tribunal because it is not relevant to the case or material to its outcome. CLAIMANT postulates that this evidence is relevant to the present case because the two cases share similar fact and context. CLAIMANT further contends that this evidence is material to this case because, based on the similar fact and context, RESPONDENT's position in that case can show the same opinion with CLAIMANT in this case.

63. Nonetheless, this evidence is not relevant because the key facts in two cases are different (**1**). This evidence is of no materiality because RESPONDENT's position is based on specific circumstances (**2**).

1. <u>This Evidence Is Not Relevant to the Case Because the Key Facts in Two Cases Are Different</u>

64. The evidence relating to the other arbitration is not relevant to this case because the key facts in the two cases are different. The evidence is relevant when it is useful to establish the facts of the submitting party's factual allegations *[HKIAC Guide, ¶9.161]*. CLAIMANT asserts that in the two cases all the parties apply ICC Hardship Clause as the same risk-allocation clause *[Cl. Memo, ¶61]*. However, while ICC Hardship Clause in the other arbitration is applied in full, the Parties in this arbitration have modified the content of it specifically *[PO.2, ¶¶12,39]*.

65. Moreover, CLAIMANT postulates that "both contracts included a choice of law clause in favor of the law of Mediterraneo" *[Cl. Memo, ¶61]*. However, the choice of law clause in the other arbitration clearly declares that the law of Mediterraneo will govern the Arbitration Clause *[PO.2, ¶39]*. In this case, the governing law of the Arbitration Clause is still at issue.

66. In conclusion, since the applicable law as well as clauses in procedural and substantive issues, as the key facts, in the two cases are different, it is unreasonable to consider the award and legal submissions in the other arbitration relevant in this case. Therefore, this evidence shall not be admissible.

2. <u>This Evidence Is Not Material to the Consequence of the Case</u>

67. The content of evidence is not material to this case. An evidence is material when the document is needed as an element to allow complete consideration as to whether a factual allegation is true *[HKIAC Guide, ¶9.161]*. CLAIMANT asserts that the contested evidence can indicate RESPONDENT's consent that additional payments due to the unforeseen tariffs shall be borne by the buyer.

68. However, CLAIMANT's allegation is completely out of the context *[E-mail Oct.3, Problem, ¶2]*. RESPONDENT's position is that under the specific circumstance in that case, including different applicable law and fact of performance, RESPONDENT should be paid by additional payment. RESPONDENT has never argued for a general rule that it is the seller who should always be paid when an unforeseen event happened.

69. In conclusion, the evidence is not material because it cannot support CLAIMANT's contention regarding additional payment in this case. Therefore, this evidence shall not be admissible.

B. The Evidence Is Not Admissible Because It Is Obtained Illegally

70. It is RESPONDENT's position that the contested evidence obtained through illegal hacking shall be excluded. The inclusion of illegal evidence is a violation of basic principles of justice and fairness required of all Parties in every international arbitration *[Methanex case, ¶59]*. It is a mainstream practice for international courts and tribunals to exclude illegal evidence from the proceedings with its discretion *[EDF case, ¶35; Iranian Hostages case, ¶108; Libananco case, ¶82; Methanex case, ¶59]*.

71. CLAIMANT contends that the illegal evidence shall be admitted because CLAIMANT is not involved in the illegal hacking *[Cl. Memo, ¶61]*. This argument has been summarized by scholars as "clean hand doctrine" *[Blair, P256]*. However, the "clean hand doctrine" is not strictly followed by international courts and tribunals in determining the admissibility of illegal evidence. In *Corfu Channel*, the International Court of Justice impliedly admits the illegal evidence even it was obtained illegally by British Navy *[Corfu Channel case, ¶35]*. The determining standard is whether the evidence is material and necessary to result in a manifestly right decision *[Blair, P258; J.H. Boykin, P34]*. In the *Corfu Channel* case, the information about Albania's knowledge of mines within its territory was under exclusive control of Albania and British was in no way to obtain this information *[Corfu Channel case, P18]*. In *Methanex*, the Tribunal found that the "Vind Documents" was of only marginal evidential significance in support

of the case and therefore shall not be admitted *[Methanex case, ¶56]*.

72. As RESPONDENT demonstrated above, the content of contested evidence in the other arbitration is under different context and rationale compared with the present case *[Re. Memo, ¶66]*. Therefore, the evidence is not material, or at least of only marginal value to the present case.
73. In alternative, if the "clean hand doctrine" is applicable in this case, the evidence is still not admissible because CLAIMANT acted in bad faith and with unclean hand. CLAIMANT purchased this evidence from an intelligence company with a doubtful reputation *[PO.2, ¶41]*. It means that CLAIMANT knowingly purchased the evidence when there was a likelihood that it was obtained illegally. Under such circumstances, CLAIMANT cannot be considered to have acted in good faith and with a clean hand.
74. In conclusion, this illegal evidence shall be excluded because it is not material and CLAIMANT acted in bad faith.

C. This Evidence Shall Be Excluded According to IBA Rules Because of the Confidentiality Concern

75. The contested evidence is of confidentiality and shall be excluded according to IBA Rules. The Tribunal shall take into account any sensitivity, legal impediments or privileges inherent in the evidence *[O. Ireton, P238]*. In CLAIMANT's written submission, CLAIMANT argues for an irrelevant privilege under IBA Rules about settlement *[Cl. Memo, ¶¶78-80]*. Further, CLAIMANT asserts that such privilege has been waived by RESPONDENT *[Cl. Memo, ¶81]*.
76. However, RESPONDENT submits that settlement privilege is not relevant here. The contested evidence is about another arbitration. Arbitration and settlement are undoubtedly different dispute resolution methods. Therefore, the settlement privilege argument shall not be adopted.
77. Instead, the contested evidence shall be excluded because it is of technical and commercial confidentiality *[IBA Rules, Art. 9.2.e]*. The contested evidence is confidential under HKIAC Rules. According to HKIAC Rules, no party or party representative can disclose documents related to HKIAC Arbitration *[HKIAC Rules, Art.45.1]*. Therefore, the evidence shall be excluded on this ground.
78. CLAIMANT contends that CLAIMANT itself is not bound by the obligation, hence CLAIMANT is not prohibited from submitting the evidence *[Cl. Memo, ¶67]*. Nonetheless, the case at hand is whether

the Tribunal shall exclude or admit this case. The exclusion ground, according to IBA Rules, is determined by the confidential character of the evidence itself, not whether CLAIMANT is permitted to submit this evidence. Therefore, CLAIMANT's argument in this regard is baseless.

79. In conclusion, the contested evidence shall be excluded under IBA Rules because it is of confidentiality.

Conclusion to the Second Issue

80. The contested evidence is not admissible before the Tribunal. First, the evidence is not relevant or material to the consequence of this case. Second, the evidence is illegally obtained and clean hand doctrine cannot justify the admission of such illegal evidence. Third, the evidence shall be excluded according to IBA Rules since it is confidential under HKIAC Rules.

III. (i). CLAIMANT IS NOT ENTITLED TO THE REMEDY OF PRICE ADAPTATION UNDER CLAUSE 12 OF THE SALES AGREEMENT

81. Contrary to CLAIMANT's allegation, CLAIMANT is not entitled to the remedy of 25% price adaptation, because the literal meaning of Clause 12 does not grant CLAIMANT the 25% price adaptation (**A**) and the DDP does not imply that RESPONDENT bears the risk of the tariff increase (**B**).

A. The Literal Meaning of Clause 12 Does Not Grant the 25% Price Adaptation

82. CLAIMANT contends that the 25% price adaptation in case of tariff can be deduced based on the literal meaning of Clause 12 *[Cl. Memo, ¶99]*. However, such allegation is an erroneous interpretation of Clause 12. The 30% tariff is not covered by the hardship circumstances listed in Clause 12 (**1**) and the remedy of price adaptation is not provided in Clause 12 (**2**). Also, even if CLAIMANT is entitled to the remedy of price adaptation, the amount of adaptation shall not be 25% (**3**).

1. <u>The 30% Tariff Is Not Covered by the Hardship Circumstances Listed in Clause 12</u>

83. Clause 12 of the Sales Agreement reads "*Seller shall not be responsible… neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" *[Exh. C5,*

Clause 12]. The wording of Clause 12 provides for three requirements for hardship: "comparable to health and safety requirements", "unforeseen" and "more onerous". RESPONDENT submits that the 30% tariff does not fall into the purview of hardship specified in Clause 12, as the tariff is not comparable to health and safety requirement (**a**) and it is not an unforeseen event (**b**). Besides, it has not made the contract performance more onerous (**c**).

(a) The Tariff Is Not Comparable to Health and Safety Requirements

84. CLAIMANT submits that tariff is comparable to health and safety requirements, as they are both governmental measures *[Cl. Memo, ¶99]*. However, RESPONDENT submits that tariff and health and safety requirements are not comparable. Equatoriana and Mediterraneo are both members of WTO *[PO2, P61, ¶47]*. Under the WTO system, health and safety requirements and tariff have different nature. Health and safety requirements, satisfying certain conditions, are allowed under the "General Exceptions" and "Security Exceptions" *[GATT, Art.10 and Art.11]*. Retaliatory tariff, as a form of unilateral measures, is strictly forbidden under WTO *[DSU, Art.23]*. Since the Parties intend to insert a narrow hardship clause *[PO2, P56, ¶12]*, a restrictive approach of interpretation shall be applied. Due to their differences under the WTO system, the tariff is not comparable to health and safety requirements.

(b) The Tariff Is Not an Unforeseen Event

85. The word "unforeseen" used in Clause 12 is different from the "unforeseeable" standard in the applicable law *[Art.79 CISG; Art.6.2.2 UPICC]*. While "unforeseeable" describes something that may be not anticipated, "unforeseen" means not anticipated or expected *[Webster Dictionary]*. "Unforeseeable" is about whether it is reasonable for the disadvantaged party to foresee the risk at the conclusion of the contract *[Bianca/Bonell, Art.79, note 2.6.3; Schlechtriem/Schwenzer, P1133; Zeller, P151]*. Since it is about reasonableness, it is an objective standard. On the other hand, "unforeseen" concerns whether the risk is *de facto* anticipated by the party invoking hardship, which is a subjective standard.

86. The Tribunal may consider that the wording of "unforeseen" seemingly applies a subjective standard for the determination of hardship. However, RESPONDENT submits that the word "unforeseen" in

fact means "unforeseeable" (**i**) and the 30% Tariff is not an unforeseeable event (**ii**).

i. The Word "Unforeseen" In Fact Means "Unforeseeable"

87. Art. 8(1) CISG stipulates that the contract shall first be interpreted "*according to his intent where the other party knew or could not have been unaware what that intent was*". And even if the wording of the contract is seemingly unambiguous, external evidence shall still be taken into consideration *[CISG-AC-op3; Williston, P80-83]*. Besides, the true intention of the Parties shall still take priority if they know what the intent is, even when the contract is wrongly formulated *[Najork, P14; Schlechtriem/Schwenzer P146]*.

88. In this case, even though the contract used the word "unforeseen", which is seemingly a subjective standard, the intent of the Parties is in fact "unforeseeable". During the negotiation process, CLAIMANT mentioned "unforeseeable additional health and safety requirements" to RESPONDENT *[Exh. C4, ¶4]*. "Unforeseeable" is the criteria for hardship used in the applicable laws of the Sales Agreement *[Art. 79 CISG; Art. 6.2.2 UPICC]*. Also, the final version of Clause 12 was drafted with particular reference to the abovementioned negotiation process *[PO2, P56, ¶12]*, during which no discussion concerning the change of standard from "unforeseeable" to "unforeseen" was mentioned. Considering the limited time of the finalization of the contract *[PO2, ¶12]*, it is highly possible that the successive negotiators were not sensitive about such change of words and misuse the word "unforeseen". Hence in this case, an objective standard of "unforeseeable" shall be applied.

ii. The 30% Tariff Is Not an Unforeseeable Event

89. CLAIMANT wrongfully contends that the 30% tariff is unforeseeable for it *[Cl. Memo, ¶125]*. When determining the foreseeability of an event, the test applied is whether a reasonable person in the shoes of the promisor, considering the actual circumstances at the time of the conclusion of the contract, ought to have foreseen the initial or subsequent existence *[Bianca/Bonell, Art 79, note 2.6.3; Schlechtriem/Schwenzer, Art.79, ¶14; Zeller, P151]*. Besides, the objective and subjective conditions of the party shall be considered *[Koch, ¶5]*. When an average merchant in the same field can foresee the event *[ibid.; Babiak, P118; Horn/Schmitthoff, P89]*, or certain special knowledge of the party enables him to foresee the event *[Enderlein/Maskow, ¶4.2; Liu, ¶8.2]*, it shall be concluded that such event is foreseeable.

90. Here in this case, CLAIMANT is an experienced company practicing in the field of agriculture *[N.A., ¶1]*. A reasonable person in the shoes of CLAIMANT should be highly sensitive about the policy change in this field. Many events before the conclusion of the contract indicate the possibility of a trade war between Equatoriana and other countries. During the election in January 2017, the President of Equatoriana has already announced a certain preference for a more protectionist trade measure *[Exh. C6, ¶2]*. Moreover, on May 5, just one day before the conclusion of the contract, he appointed an outspoken protectionist for years to be his super-minister for economics, trade and agriculture *[PO2, P58, ¶23]*. Such radical measures are likely to give rise to retaliatory measures from other countries. These factors should have been taken into account by CLAIMANT.

91. Besides, according to ISIC, the classification number of stud service is 0162, which is under the title of "Section A: Agriculture" *[ISIC, P73, ¶3]*. ISIC is widely used by WTO members to determine the classification of tariffs *[Hoekman, P590, ¶4],* and both Mediterraneo and Equatoriana are WTO members *[PO2, P61, ¶47]*. As one of the most renowned stud farm, CLAIMANT shall realize that the horses' semen is one of the "agriculture goods", which has been published by the newspaper *[Exh. C6, P15, ¶1]*. All of the evidence shows that the retaliatory tariff was not an unforeseeable event, and CLAIMANT failed to foresee it owing to its own negligence.

92. Therefore, in light of all the behaviors of the government of Equatoriana, CLAIMANT should have foreseen the retaliatory tariff.

(c) The Tariff Has Not Made the Contract More Onerous

93. Clause 12 only provides for a broad and unspecified standard of "more onerous". Onerous means excessively burdensome and troublesome and causing hardship *[Black's Law Dictionary, P1198]*. To determine the specific meaning of "more onerous", the relevant provisions in the applicable law, UPICC in this case, shall be referred to. UPICC requires that the hardship circumstances should have fundamentally change the equilibrium of the contract *[Art.6.2.2 UPICC]*. RESPONDENT submits that the tariff has not fundamentally changed the equilibrium of the contract because the tariff has not met the minimum standard of hardship (**i**) and CLAIMANT's risk of going bankruptcy shall not be considered in this case (**ii**).

i. The Tariff Has Not Met the Minimum Requirement of Hardship

94. The 30% tariff has not met the minimum requirement of hardship. It is generally understood that price fluctuation is a normal risk of international trade *[Chinese Goods case, ¶22; Steel Bar case, ¶86; Tomato case, ¶67]*. Therefore, only extreme price fluctuation may be regarded as "hardship". Scholars and commentaries have proposed diverse minimum standards for hardship. Some scholars and cases hold that the increase or decrease of more than 100% may not be sufficient to establish hardship *[FeMo Alloy case, ¶52; Steel case, ¶3; Schwenzer, P716]*. The 1994 UPICC Commentary suggested a 50% minimum standard for hardship, however, some scholars object to such standard, stating that in practice no hardship has been established based on a 50% price fluctuation *[Doudko, P496; Houtte, P190]*. While in this case, contrary to CLAIMANT's allegation that it has suffered a 30% increase of cost *[Cl. Memo, ¶99]*, the increase of cost is in fact only 15%. The 30% tariff is only imposed on the third shipment, which accounts for half of the total amount *[Exh. C7, ¶1]*. Therefore, the increased cost for the whole sale is only 15%, which is even below the disputed 50% minimum standard in the UPICC commentary.

95. Besides, CLAIMANT alleges that the total amount of increased cost in this case is much higher than that in the *Scafom case*, in which the seller is granted the increase of price. Therefore, it shall also be granted such remedy *[Cl. Memo, ¶118]*. However, in the determination of hardship, what matters is the percentage of fluctuation, not the total amount *[Girsberger, P125]*. Besides, only unforeseeable risk may be used to establish hardship *[UPICC Comment, P220]*. It is, however, a foreseeable risk that the larger the amount is, the more influential the price fluctuation will be. Hence, such risk should have been taken into account by CLAIMANT before the conclusion of the contract. Otherwise, if the amount of fluctuation is to be considered, even a 1% increase may be regarded as a hardship if the total amount is large enough. Hence, a large amount of cost increased shall not entitled CLAIMANT to lower the threshold for hardship. Therefore, the tariff has not met the minimum standard requirement for hardship.

ii. CLAIMANT's Risk of Going Bankruptcy Shall Not Be Considered in this Case

96. CLAIMANT contends that since the tariff affects its financial viability, the threshold for hardship shall be lowered in the present case *[Cl. Memo, ¶115]*. However, CLAIMANT's own financial situation shall

not be taken into account. UPICC adopts an objective standard when determining hardship *[Doudko, P495; Girsberger, P124; Janzen, P165; Rösler, P507]*, which means when ascertaining the threshold for hardship, the criteria shall be as objective as possible, ideally expressed in percentage or other measurable features *[Girsberger, P125]*. Unlike in some domestic law, the Parties' own problems and circumstances shall not affect the determination of hardship *[Maskow, P40; Yildirim, P98]*.

97. In the present case, CLAIMANT is indeed in financial difficulty. However, the objective standard requires the Tribunal to only consider factors in the contract itself, such as the profit margin and the contract's level of speculation. CLAIMANT's own conditions are subjective factors and shall not be looked into. Therefore, CLAIMANT's risk of going bankruptcy shall not affect the criteria for hardship.

2. The Remedy of Price Adaptation Is Not Applicable under Clause 12

98. RESPONDENT submits that the remedy of price adaptation is not applicable under Clause 12, because the wording of Clause 12 does not favor the remedy of price adaptation (**a**) and such remedy is not applicable considering the context of the hardship clause (**b**).

(a) The Wording of Clause 12 Does Not Grant the Remedy of Price Adaptation

99. According to Art.8 CISG, the starting point for contract interpretation should always be the wording of the contract itself *[Ethyl case ¶55; Schlechtriem/Schwenzer, Art.8, ¶13; Witz/Salger, Art.8, ¶11]*. Also, when determining the understanding of a reasonable third person, the wording of the contract shall be given particular weigh *[Ethyl case, ¶42, Schlechtriem/Schwenzer, P153, ¶29; Witz/Salger, Art.8, ¶11]*. The wording of Clause 12 is "Seller shall not be responsible for…". Such expression only grants CLAIMANT the passive right of being exempted from liability based on the circumstances of hardship. Namely, when the buyer requests the seller to perform the contract or claim damages, the seller may not be held liable for such performance or damages based on Clause 12. In this case, however, CLAIMANT is using Clause 12 proactively to adapt the contract, when RESPONDENT has not made any claim. Such remedy is against the passive nature of Clause 12's wording. Hence, CLAIMANT shall not be granted such remedy.

(b) Considering the Context of the Hardship Clause, the Remedy of Price Adaptation Is Not Applicable

100. Under Art.8 CISG, the first step of contract interpretation is the subjective intent of the Parties. When determining the intent of the Parties, the content of a contract shall not be understood separately *[Glass Tube case, ¶18; UPICC Comment, Art.4.2]*. CISG demands the interpretation of contract as a whole *[Air conditioner case, ¶102; Schlechtriem/Schwenzer, Art.8, ¶30]*. For reasonable interpretation of the hardship provision under CISG, consideration shall be given to its context *[Coats case, ¶66]*. The hardship provision in the Sales Agreement was included in the force majeure clause by the final drafters of the contract *[PO2, ¶12]*. When the successive negotiators found the ICC-Hardship Clause too broad, they gave up reliance on it and directly inserted a narrowly-worded hardship provision into the force majeure clause *[ibid.]*.

101. The hardship clause in the Sales Agreement provides for no express form of remedy. However, when interpreting the hardship provision, the context of it shall be considered. The hardship clause is inserted into the force majeure clause, and no other description of remedy can be found. This implies the Parties' intention that the hardship circumstances will share the same remedy as force majeure. Otherwise, the Parties should have drafted a separate hardship clause or set forth more detailed provisions. The combination of force majeure clause and hardship clause demonstrates that hardship in this case invokes the remedy for force majeure, instead of the remedy of price adaptation. Hence, the remedy of price adaptation shall not apply.

3. <u>Even If CLAIMANT Is Entitled to the Remedy of Price Adaptation, the Amount Shall Not Be 25%</u>

102. Even if the CLAIMANT shall be entitled to the remedy of price adaptation, the amount shall not be 25%. CLAIMANT has only suffered 15% of price increase (**a**) and such additional cost shall be distributed equally between the Parties (**b**).

(a) CLAIMANT Has Only Suffered 20% of Price Increase

103. CLAIMANT has miscounted the losses caused by the additional cost by requesting a 25% price

adaptation *[Cl. Memo, ¶99]*. In fact, only the last shipment of 50 doses frozen semen suffered from the 30% retaliatory tariff *[Exh. C7, P16, ¶1]*, and CLAIMANT made profit from all of the three shipments *[Exh. C8, P17,¶6]*. Hence, the cost of the 30% imposed tariff shall not only deduct the 5% profit of the third shipment, but also the 5 % profit of the first and second shipment *[Exh. C8, P17, ¶6]*. Therefore, the increased cost is 20% of the third shipment, instead of 25%.

(b) The 20% Price Increase Should Be Distributed Equally Between the Parties

104. CLAIMANT alleges that RESPONDENT shall fully bear all the increased cost *[Cl. Memo, ¶99]*. However, we submit that the additional cost shall be distributed equally between Parties. When allocating the additional cost, the Tribunal shall adapt it to the new set of circumstances, taking account of the risk allocation of the Parties *[Bianca/Bonell, P592; Rimke, P240]*. In the present case, the additional tariff is equally unforeseeable for both Parties *[Re. Memo, ¶87]*. Therefore, such risk shall be borne by both CLAIMANT and RESPONDENT equally. Even if CLAIMANT is entitled to the remedy of price adaptation, they shall only be entitled to 10% of the price of the third shipment.

B. The Parties Have Not Mutually Intended for RESPONDENT to Bear the Risk of Tariff Change

105. CLAIMANT erroneously submits that the Parties have intended for RESPONDENT to bear the risk of tariff change *[Cl. Memo, ¶100]*. Such allocation of risk is never intended by the Parties because Clause 12 has not regulated the risk of price fluctuation (**1**) and by failing to address a foreseeable risk in the contract, CLAIMANT has assumed the risk of tariff change (**2**).

1. Clause 12 Does Not Shift the Risk of Tariff Change to RESPONDENT

106. The Parties have chosen the DDP trade term, which means all the risk before the delivery of goods shall be borne by CLAIMANT *[ICC Guide, P149]*. CLAIMANT alleges that according to the negotiation process, the Parties intended that all the risk associated with import restriction is shifted to RESPONDENT *[Cl. Memo, ¶102]*. However, for the interpretation of contract, the starting point should always be the contract itself *[Schletriem/Schwenzer, P151; Witz/Salger, Art.8, ¶11]*. Clause 12 of

the Sales Agreement does not mention "import restriction". The successive negotiators include a narrowly-worded hardship *[PO2, ¶12]*, and merely use the wording of "comparable to health and safety requirements". Therefore, the hardship circumstances have been further narrowed. As has been mentioned, the tariff in the present case is not comparable to health and safety requirements *[Re. Memo, ¶84]*. Hence, not all risk of import restriction has been shifted to RESPONDENT. And tariff in position remains a part of CLAIMANT's risk under DDP.

2. <u>By Failing to Address a Foreseeable Risk in the Contract, CLAIMANT Has Assumed the Risk of Tariff Change</u>

107. If a risk is foreseeable by a party, but that party made no reservation and fails to address such risk in the contract, it shall be understood that that party has assumed such risk *[Bianca/Bonell, Art.79, note 2.6.3; Schlechtriem/Schwenzer, P1131]*. As previously submitted, the tariff change in this case is foreseeable *[Re. Memo, ¶87]*. However, CLAIMANT has never mentioned the change in Mediterraneo's international trade policy to RESPONDENT, nor has it tried to address such change in the contract. Therefore, it should be understood that CLAIMANT has already assumed the risk of tariff change. Hence, RESPONDENT has not assumed the risk of tariff increase.

Conclusion to the Third Issue

108. CLAIMANT is not entitled to the remedy of 25% price adaptation. Firstly, the 30% tariff does not satisfy the requirements of hardship under Clause 12 and the remedy of price adaptation is not applicable under Clause 12. Secondly, the Parties have not intended for RESPONDENT to bear the risk of tariff change, because the negotiation process does not imply the Parties' intent to shift such risk to RESPONDENT and by failing to address a foreseeable risk, CLAIMANT has assumed the risk of tariff increase.

III. (ii)CLAIMANT IS NOT ENTITLED TO THE REMEDY OF 25% PRICE ADAPTATION UNDER CISG

109. Contrary to CLAIMANT's allegation *[Cl. Memo, ¶100]*, under CISG, CLAIMANT is still not entitled

to the 25% price adaptation. Clause 12 of the Sales Agreement is a derogation from Art.79 CISG (**A**). Even if Art.79 can still apply, Art.79 is of no relevance in the present case (**B**). Art.6.2.2-6.2.3 UPICC shall not be used to fill the gap of CISG neither as general principles nor as domestic law (**C**). Even if UPICC applies, the remedy of 25% price adaptation is not applicable under UPICC (**D**).

A. Clause 12 of the Sales Agreement Is a Derogation from Art.79 CISG

110. RESPONDENT submits that Clause 12 of the Sales Agreement is a derogation from Art.79 CISG, because Clause 12 has substantially changed the provisions in Art.79 (**1**) and Clause 12 covered the full scope of impediment under Art.79 (**2**).

1. Clause 12 Has Substantially Changed the Provisions in Art.79

111. According to Art.6 CISG, "*the Parties can… derogate from or vary the effect of any of its provisions*". Parties derogate from provisions of CISG when they modify provisions of CISG by terms and clauses of their contract *[Schlechtriem/Schwenzer, P88]*. If the contract provides for an exhaustive list of circumstances of *force majeure*, the court should only consider the circumstances in the contract when ascertaining the existence of *force majeure [Russia 1995 case, ¶12; Russia Information Letter No. 29]*.

112. In the present case, Clause 12 has limited the hardship to "*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" *[Exh. C5, Clause 12]*, which has limited the conditions and heightened the standards where CLAIMANT may invoke hardship clause. By agreeing to such modification, CLAIMANT is naturally obliged to bear other risks not laid out in Clause 12, which has clearly indicated the Parties' intention to adopt a special provision to regulate the requirements for hardship. The provisions in Clause 12 substantially differ from the provisions in Art.79 CISG. Therefore, Art.79 has been derogated and shall not be applied.

2. Clause 12 Has Covered the Full Scope of Hardship under Art.79

113. CLAIMANT argues that since Clause 12 has not covered the full scope of impediment under Art.79, Clause 12 shall not be considered as a derogation from Art.79 *[Cl. Memo, ¶109]*. However, Clause 12 does cover the full scope of hardship. Under Art.8 CISG, the first step of contract interpretation is the

subjective intent of the Parties. When determining the intent of the Parties, "*due consideration is to be given to all relevant circumstances of the case including the negotiations*" *[Art.8(3) CISG]*.

114. In this case, during the negotiation, the successive negotiators held that ICC-Hardship Clause was too broad and thus gave up relying on it *[PO2, ¶12]*. Such negotiation process indicates that the Parties believe the broad concept of "hardship" is excluded from the Sales Agreement. Only circumstances satisfy the special requirements prescribed in Clause 12 may be regarded as "hardship" in the present case. Therefore, all the circumstances that may invoke hardship clause have been specified in Clause 12. Besides, as have been mentioned above *[Re. Memo, ¶98]*, the remedy applicable in case of hardship can also be used under Clause 12. Therefore, Clause 12 covers the full scope of hardship and constitutes a derogation from Art.79.

115. As Clause 12 constitutes a derogation from Art.79 CISG, matters concerning hardship have already been fully addressed in the contract. As has been previously submitted, CLAIMANT is not entitled to the 25% price adaptation under the Sales Agreement *[Re. Memo, ¶98]*, they shall also not be entitled to such remedy under CISG.

B. Even if Clause 12 Is Not a Derogation, Art.79 CISG Shall Be of No Relevance

116. CLAIMANT relies on Art.79 CISG to justify the remedy of 25% price adaptation *[Cl. Memo, ¶111]*. However, even if Clause 12 is not a derogation from Art.79, Art.79 is of no relevance to the present case, because the contract has already been performed (**1**). Even if Art.79 applies, the 30% tariff does not satisfy the minimum standard for impediment (**2**).

1. <u>Art.79 Is of No Relevance as the Contract Has Already Been Performed</u>

117. Art.79(1) CISG stipulates that "A party is not liable for failure to perform any of his obligation…". One of the preliminary requirements when applying CISG is the fact that one party has not or has not properly performed the contract *[Schlechtriem/Schwenzer, P1131; Witz/Salger, Art.79, ¶2]*.

118. In the present case, the contract has been fully performed by CLAIMANT *[Exh. C7, ¶6]*, and there is no partial performance or any unconformity of products. This case is about the adaptation of contract after the contract has already been fully performed. The situation in this case is a matter different from

what Art.79 CISG deals with. The preliminary requirement for the application in Art.79, "failure to perform", cannot be found in this case. Therefore, Art.79 shall not apply.

2. <u>The 30% Tariff Does Not Satisfy the Requirement for Impediment under Art.79</u>

119. Even if Art.79 applies in this case, the 30% tariff fails to meet the requirements for impediment. Under Art.79, as a general rule, the price fluctuation amounting to over 100% does not yet constitute a ground for exemption *[FeMo Alloy case ¶18; Steel case, ¶101; Brunner, P431; Schlechtriem/Schwenzer, P1142]*. In practice, the courts and tribunals are very reluctant to take economic impossibility as an impediment *[Steel Bar case, ¶84; Lookovsky, P434; Schwenzer, P716]*. The 30% tariff is far below the minimum criteria for impediment.

120. Also, as mentioned above, the tariff fails to satisfy the standard of "unforeseeable" *[Re. Memo, ¶87]*. Hence, even if Art.79 applies, the tariff is not a qualified impediment.

121. Therefore, since Art.79 is of no relevance in the present case, and even if it applies, the tariff does not fall into the purview of impediment, CLAIMANT shall not be entitled to the remedy of 25% price adaptation under CISG.

C. Art. 6.2.3 UPICC Shall Not Be Used to Fill the Gap of CISG Neither as General Principle nor as Domestic Law.

122. CLAIMANT wrongfully alleged that Art. 6.2.2-6.2.3 UPICC shall be used to fill the gap as general principles or as domestic law according to Art. 7 CISG *[Cl. Memo, ¶136]*. CLAIMANT neglects that when applying Art. 7(2) to fill the gap, the Tribunal shall follow a two-step procedure *[Schlechtriem/Schwenzer, P132, ¶4]*. The first step is to fill the internal gaps of CISG using "*general principles on which [this Convention] is based*" to fill the gap *[ibid]*. Only when this step fails can the Tribunal resort to the law applicable by virtue of the rules of private international law *[ibid]*.

123. RESPONDENT submits that Art. 6.2.3-6.2.3 UPICC are external principles and on its own are not sufficient to fill the gap of CISG (**1**), and the hardship theory of Art. 6.2.2-6.2.3 UPICC is not applicable since it is against the principle of neutrality and will hurt the uniformity of CISG (**2**). RESPONDENT further submits that Art. 6.2.2-6.2.3 also can not apply as domestic law since the

general principles of good faith and fair dealing can solve the present case (**3**).

1. Art. 6.2.3 UPICC Are External Principles and on Its Own Are Not Sufficient to Fill the Gap of CISG

124. CLAIMANT alleges that UPICC shall be used to fill the gap of CISG *[Cl. Memo, P32, ¶138]*, but CLAIMANT neglects that UPICC, as an international uniform project, is the external principle and is not the principle "*on which the CISG is based*" as required by the wording of Art.7(2) CISG, and thus UPICC is not sufficient to fill the gap *[Gotanda, P116; Schlechtriem/Schwenzer, P135, ¶6]*. In order to use individual provisions of UPICC to fill the gap of CISG, these individual provisions must also be the expression of the general principles underlying the CISG *[Bonell, ¶12]*. Thus, the Tribunal needs to further determine whether Art.6.2.2-6.2.3 UPICC is based on the general principles underlying CISG.

2. The Hardship Theory of Art. 6.2.2-6.2.3 UPICC is Against the General Principle of Neutrality of Art. 79 CISG and Will Hurt the Uniformity of CISG

125. The hardship theory of Art. 6.2.2-6.2.3 UPICC is not applicable, because it is in conflict with the general principle of neutrality, and will harm the uniformity of CISG. Art. 79 CISG reflected the general principles of the neutrality of the CISG *[Schlechtriem/Schwenzer, P135, ¶3]*, and the rationale behind the wording of "*impediment*" is to avoid referring to any domestic legal concept like hardship *[Flambouras, ¶12]*. Hardship is not a universal concept and is only admitted by some countries *[Fucci, P2, ¶2]*. If the hardship clause can be used to fill the gap in Art. 79, Art. 79 would be practically useless in countries admitting hardship since people will prefer to invoke hardship clause which is more easily satisfied *[Tallon, P593, ¶2]*. Also, according to Art. 7 CISG, in the interpretation of CISG, regard is to be had to the need to promote uniformity in its application. If Art. 79 CISG can be interpreted to the extent that it includes the hardship theory, the uniformity of application of CISG would be harmed *[Tallon, P594, ¶1],* since it opens the door for the domestic concept of hardship into CISG. Hence, the hardship doctrine of Art. 6.2.2-6.2.3 CISG shall not be used to fill the gap of CISG since it is in conflict with the general principle of CISG and will hurt the uniformity of CISG.

3. Art. 6.2.2-6.2.3 UPICC Also Can Not Apply as Domestic Law Since the General Principles of Good Faith and Fair Dealing Can Solve the Present Case

126. CLAIMANT wrongfully alleged that in case that UPICC is not used as general principles, it shall be used as domestic law to fill the gap of CISG *[Cl. Memo, P33, ¶142]*. But the real situation is that Art. 6.2.2-6.2.3 UPICC also can not be applied as domestic law since the general principles of good faith and fair dealing can solve the present case.

127. The wording of Art. 7(2) expressly holds domestic law applicable in case that gap-filling by use of general principles on which the CISG is based fails *[Schlechtriem/Schwenzer, P141, ¶1]*. Thus, recourse to domestic law is only a last resort *[ibid]*. The two paragraphs of Art. 7(2) CISG indicate that CISG is intended to constitute a self-contained law of sales and without any reference to or interference from different national laws *[Bonell 2, P66, ¶7]*. Turning to domestic law would involve greater uncertainty because the rules of private international law are neither clear nor uniform; hence there will be doubt and dispute over which law is applicable *[Honnold, P102, ¶2]*. Thus, when the case can be solved by the uniform rules of CISG, the Tribunal shall not resort to the domestic law.

128. The present case can be solved by relying on the general principles of good faith and fair dealing, because according to those principles, if the disadvantaged party has violated the principle of good faith and fair dealing, it will not be granted the remedy of price adaptation *[ICC case 11849, ¶8; Tallon, P579, ¶1]*. After acknowledging the additional tariff for the last shipment, CLAIMANT required RESPONDENT to bear the 30% higher cost, and Ms. Napravnik would put the shipment on hold until the next day's evening *[Exh. C7, P16, ¶¶1,3]*. CLAIMANT was threatened that if RESPONDENT refused to bear the additional tariff, CLAIMANT would suspend the performance of the last shipment. CLAIMANT clearly knew that RESPONDENT urgently needed this shipment owing to the breeding season *[Exh. C8, P18,¶1; PO2, P56, ¶4]*, and RESPONDENT has already paid the money for the last shipment *[Exh. C8, P18,¶1; Exh. C5, P14, ¶4]*. In such a situation, RESPONDENT had no choice but to accept CLAIMANT's unjust threat, which clearly violates the general duty of good faith and fair dealing for CLAIMANT. Hence, CLAIMANT shall not be granted the remedy of price adaptation by the reference to Art.7 CISG.

D. Even if the Tribunal Finds that Art. 6.2.3 Can Be Used to Fill the Gap, the 30% Tariff Does Not Satisfy the Requirements of Hardship

129. According to the definition of hardship in Art. 6.2.2 UPICC, there are five requirements to determine whether an event constitutes hardship. Only if all of the five requirements are satisfied simultaneously will an event constitute a hardship *[UPICC Comment, P218, ¶3]*. In the present case, the retaliatory tariff does not satisfy two of the five requirements of hardship: the retaliatory tariff has not fundamentally altered the equilibrium of the contract and it is foreseeable (**a**). RESPONDENT further submits that CLAIMANT's undue delay of notice also shows that the present case did not constitute hardship (**b**).

1. The Retaliatory Tariff Has Not Fundamentally Altered the Equilibrium of the Contract and It Is Foreseeable

130. Hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental, because the general principle in contract performance is that a usual change in circumstances does not affect the obligation of the performing party *[UPICC Commentary, P218, ¶4]*. As previously submitted, the 30% tariff has not fundamentally changed the equilibrium of the contract, because it only increases CLAIMANT's cost of performance by 15% and CLAIMANT's financial conditions shall not be considered when ascertaining hardship *[Re. Memo, ¶96]*. Also, as mentioned above, the retaliatory tariff is in fact foreseeable for CLAIMANT *[Re. Memo, ¶87]*. Hence, the tariff fails to satisfy the requirements for hardship under UPICC.

2. CLAIMANT's Undue Delay of Notice Also Shows That the Present Case Did Not Constitute Hardship

131. The notice of renegotiation shall be made as quickly as possible after the alleged hardship occurs, and the undue delay of the notice will affect the finding as to whether hardship actually existed and, if so, its consequences for the contract *[UPICC Comment, P224]*. In the present case, while CLAIMANT alleges that the retaliatory tariff constituted hardship under UPICC *[Cl. Memo, ¶139]*, CLAIMANT notified RESPONDENT one month later after CLAIMANT knew the tariff on 20 December 2017

[Exh. C6, P15, ¶1; Exh. C7, P16, ¶1]. Once the retaliatory tariff was imposed, CLAIMANT should have given its notice of renegotiation without undue delay, but CLAIMANT failed to do that. It reflects that the retaliatory tariff was not very hard for CLAIMANT to overcome and did not fundamentally change the equilibrium of the contract. Thus, the present case does not constitute hardship for CLAIMANT. CLAIMANT shall not be entitled the remedy of price adaptation under UPICC.

Conclusion to the Fourth Issue

132. Under CISG, CLAIMANT is not entitled to the remedy of 25% price adaptation. Because Clause 12 is a derogation from Art.79 CISG, and thus Art.79 CISG shall not be applied in this case. Even if Clause 12 is not a derogation from Art. 79, Art. 79 is of no relevance in the present case and thus can not be applied to CLAIMANT's adaptation claim. Moreover, UPICC shall not be resorted to tackle the issue as supplementary rule by referring to Art.7 CISG.

REQUEST FOR RELIEF

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

1) the Tribunal does not have the jurisdiction and the power under the arbitration agreement to adapt the contract.
2) CLAIMANT is not entitled to submit evidence from the other arbitration proceedings.
3) CLAIMANT is not entitled to the payment of US $ 1,250,000 resulting from an adaptation of the price under Clause 12 of the contract.
4) CLAIMANT is not entitled to the payment of US $ 1,250,000 resulting from an adaptation of the price under CISG.

Respectfully signed and submitted by counsels on 24 January 2019

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On behalf of RESPONDENT,
Black Beauty Equestrian