SIXTEENTH WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
31 MARCH – 7 APRIL 2019

UNIVERSITY OF BUCHAREST

MEMORANDUM FOR CLAIMANT

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

COUNSEL FOR CLAIMANT

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BUCHAREST ▪ ROMANIA

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AAA	American Arbitration Association
AB	*Aktiebolag* (limited company)
AG	*Aktiengesellschaft* (joint-stock company)
ANoA	Answer to Notice of Arbitration, dated 24 August 2018
art.	article/articles
BCCI	Bulgarian Chamber of Commerce and Industry
BV	*Besloten vennootschap* (private limited liability company)
CAM	Arbitration Center of Mexico
CAS	Court of Arbitration for Sport
CIETAC	China International Economic and Trade Arbitration Commission, Hong Kong Arbitration Center
Claimant	Phar Lap Allevamento
Co.	Company
Contract	Frozen Semen Sales Agreement, concluded on 6 May 2017
Corp.	Corporation
DAP	Delivered At Place
DAT	Delivered At Terminal
DDP	Delivery Duty Paid
Ed.	publishing house
ed./eds.	editor/editors
et al.	*et alia* (and others)
et seq.	*et sequitur* (and the following)
Ex.	Exhibit
GmbH	*Gesellschaft mit beschränkter Haftung* (private limited liability company)
HKIAC	Hong Kong International Arbitration Center
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
id.	*idem* (the same)
i.e.	*id est* (that is)
Inc.	Incorporated
infra	below

LCIA	London Court of International Arbitration
Ltd.	Private limited company
no.	number/numbers
NoA	Notice of Arbitration, dated 31 July 2018
NV	*Naamloze vennootschap* (public limited company)
p.	page/pages
par.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PO1	Procedural Order of the Tribunal, dated 5 October 2018
PO2	Procedural Order of the Tribunal, dated 2 November 2018
Record	The Willem C. Vis Problem 2018
Respondent	Black Beauty Equestrian
SA	*Société par action* (joint-stock company)
SAS	*Société par actions simplifiée* (joint-stock company)
SpA	*Società per Azioni* (joint-stock company)
SARL	*Société à responsabilité limitée* (limited liability company)
supra	above
TICARCCI	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Tribunal	The arbitral tribunal in the present dispute
UAB	*Uždaroji akcine bendrove* (private limited liability company)
UCCI	Ukrainian Chamber of Commerce and Industry
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US$	U.S. Dollar, monetary unit of the United States of America
v.	versus (against)
vol.	volume/volumes
WTO	World Trade Organization

INDEX OF LEGAL SOURCES

Analytical Index of GATT	Analytical Index of the General Agreement on Tariffs and Trade, contained in Annex 1A of the WTO Agreement, 1994
CISG	United Nations Convention on Contracts for the International Sale of Goods, effective 1 January 1988
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts, adopted on 19 March 2015
HKIAC Rules	Arbitration Rules administered by the Hong Kong International Arbitration Center, as amended in 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, effective 29 May 2010
ICC Hardship Clause	International Chamber of Commerce, Force Majeure and Hardship Clause, 2003
Incoterms	International Commercial Terms, International Chamber of Commerce, amended in 2010
NY Convention	Convention on the Recognition and Enforcement of Foreign Awards, New York, adopted on 10 June 1958, effective 7 June 1959
Rome I	Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, adopted on 17 June 2008, effective 17 December 2009
UNCITRAL ML	Model Law on International Commercial Arbitration, adopted on 11 December 1985, as amended in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 4th edition, adopted on 20 May 2016

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STATEMENT OF FACTS

1. Phar Lap Allevamento ("**Claimant**") is the oldest and most eminent stud farm in Mediterraneo, covering all areas of equestrian sports. In its racehorse section, Claimant provides stallions for breeding, Nijinsky III being one of the most successful racehorses ever [*NoA, p. 4-5, par. 1-2*].
2. Black Beauty Equestrian ("**Respondent**") is located in Equatoriana and is well known in the area of show jumping and dressage for its broodmare lines. In 2014, Respondent had decided to establish a racehorse stable and purchased ten mares to that effect [*NoA, p. 4, par. 4*].
3. In **March 2017**, Respondent contacted Claimant to request 100 doses of Nijinsky III's frozen semen [*Ex. C1, p. 9, par. 3*]. Despite the unusually high amount of semen requested, Claimant accepted the proposal in principle, subject to a number of conditions [*Ex. C2, p. 10*].
4. One such condition was that the semen could not be resold to third parties without Claimant's prior written consent [*Ex. C2, p. 10, par. 3*]. Another condition was that Claimant's Standard Frozen Semen Sales Agreement and General Conditions would apply. Relevantly, these documents provided that the contract would be governed by Mediterraneo law, including the United Nations Convention on Contracts for the International Sale of Goods (the "**CISG**") and the UNIDROIT Principles of International Commercial Contracts (the "**UNIDROIT Principles**"), and that the courts of Mediterraneo would have jurisdiction. They also provided for delivery EXW at Claimant's premises, Capital City, Mediterraneo [*PO2, p. 56, par. 9*].
5. Respondent objected only as to price (Respondent requested a "better price" than US$ 99,500 per dose), delivery terms (Respondent requested delivery DDP, at Respondent's premises, Oceanside, Equatoriana) and jurisdiction (Respondent agreed that Mediterraneo law would be applicable but requested that the courts of Equatoriana would have jurisdiction) [*Ex. C3, p. 11*].
6. Claimant's counter-offer rejected these requests. In particular, Claimant did not agree to lower the price. To the contrary, Claimant agreed to delivery DDP subject to an increase of the purchase price, inclusion of a hardship clause, and without "tak[ing] over any further risks associated with such a change in the delivery terms" [Ex. *C4, p. 12, par. 3-4*]. As to jurisdiction, Claimant suggested arbitration in Mediterraneo [*Ex. C4, p. 12, par. 5*].
7. With respect to the hardship clause, Claimant suggested to use the ICC Hardship Clause [*Ex. R2, p. 34, par. 5*]. Respondent considered it too broad [*ANoA, p. 30, par. 4*]. Ultimately, hardship language, drafted by Respondent, was added to the force majeure language in clause 12 [*PO2, p. 56, par. 12*], and a number of specific risks were separately regulated, such as registry compliance, transportation, and insurance [*Ex. C5, p. 14, clauses 9-13; ANoA, p. 30, par. 4*].

8. With respect to jurisdiction, Respondent sent a first draft of the dispute resolution clause on **10 April 2017**. The draft provided for arbitration administered by the Hong Kong International Arbitration Centre ("**HKIAC**"), in Equatoriana. The draft included an express reference to the arbitration agreement being governed by Equatoriana law [*Ex. R1, p. 33*]. On **11 April 2017**, Claimant responded by agreeing to arbitration administered by HKIAC, but in Danubia, as a neutral country, and deleted the reference to the arbitration agreement being governed by Equatoriana law [*Ex. R2, p. 34, par. 3*]. That was because arbitration in the country of the counterparty or a choice of law in favor of a foreign country required approval from the Creditors' Committee of Claimant [*Ex. R2, p. 34, par. 2; PO2, p. 56-57, par. 14*].
9. On **12 April 2017**, after an additional conversation at the annual colt auction in Danubia, the two main negotiators of the parties, Ms. Napravnik (for Claimant) and Mr. Antley (for Respondent) were severely injured in a car accident [*Ex. C8, p. 17, par. 2; Ex. R3, p. 35, par. 1*]. They were replaced by Mr. Ferguson and Mr. Krone, respectively, who finalized and executed the contract on **6 May 2017** (the "**Contract**"), in Mediterraneo, with the benefit of access to the prior email chains of the original negotiators [*PO2, p. 56, par. 13, p. 55, par. 5*].
10. No adaptation language in case of hardship was expressly included in the Contract but a note of Mr. Antley stated that an open issue on the morning of the accident was "[c]onnection of hardship clause with arbitration clause" [*Ex. R3, p. 35, par. 2*]. The dispute resolution clause contained in clause 15 of the Contract corresponds to Claimant's 11 April 2017 proposal and, unlike the standard HKIAC clause, does not include a choice of law provision. Mediterraneo law provides for a broad interpretation of arbitration agreements, and allows arbitral tribunals to adapt contracts [*NoA, p. 7, par. 16*]. In contrast, Danubia law provides for a strict interpretation of arbitration agreements, under the parol evidence rule, and requires express empowerment of arbitral tribunals to adapt contracts [*PO2, p. 61, par. 45, p. 60, par. 36*].
11. The Contract provided for three shipments of 100 doses and payment of the price of US$ 100,000 per dose in two instalments. The third shipment (50 doses) had to be delivered DDP on **23 January 2018**. The second installment (US$ 5,000,000) was due on **21 January 2018** [*Ex. C5, p. 13-14; PO2, p. 56, par. 11*]. Effective from **15 January 2018**, Equatoriana introduced a 30% tariff on several products from Mediterraneo, including racehorse semen [*PO2, p. 58, par. 25; Ex. C6, p. 15, par. 1*]. This tariff was a retaliation against Mediterraneo imposing a 25% tariff on agricultural products from Equatoriana in 2017 [*PO2, p. 58, par. 23*].
12. As soon as it became clear that the 30% tariff was going to apply to the final shipment, Claimant informed Respondent, on **20 January 2018**, that the shipment could not be authorized unless a mutually acceptable price adjustment solution was found [*Ex. C7, p. 16*]. On **21 January**

2018, after a telephone conversation between the parties, Respondent appeared to accept the need for a price increase [*Ex. C8, p. 17, par. 9*] and urged Claimant to make the delivery of the doses as planned. Respondent invoked the start of the breeding season [*PO2, p. 59, par. 33*] and needed the doses to resell them to other breeders, in breach of the Contract [*PO2, p. 56, par. 11*]. Based on Respondent's assurances, Claimant paid the 30% tariff (amounting to US$ 1,500,000) and made delivery, before a formal agreement was reached on price adaptation.

13. Consistent with the mechanics of the adaptation remedy, Claimant requested a meeting on **12 February 2018** to renegotiate the contractual terms in light of the 30% tariff [*PO2, p. 60, par. 35*]. Respondent was informed of the negative impact that the 30% tariff had on Claimant's financial situation [*PO2, p. 59, par.* 28]. However, Respondent's CEO stormed out during the negotiations [*Ex. C8, p. 18, par. 3*], leaving Claimant no other option but to resort to arbitration.

14. On **31 July 2018**, Claimant initiated the present arbitration against Respondent, requesting this Tribunal to find that it has jurisdiction and power to adapt the contract, to exercise such power in the sense of finding that the 30% tariff represents hardship, and consequently to increase the contract price by US$ 1,250,000 [*NoA, p. 8*]. During the course of the present arbitration, Claimant learned that Respondent is involved, as seller, in another HKIAC arbitration, during the course of which it requested adaptation in similar conditions [*PO2, p. 60, par. 39*].

SUMMARY OF ARGUMENTS

15. **Issue I**. This Tribunal has jurisdiction and power to adapt the contract. The arbitration agreement is governed by Mediterraneo law, not Danubia law. Under Mediterraneo law, adaptation of the contract is the applicable remedy in case of hardship and the parties' intent was to allow this Tribunal to adapt the contract in case of hardship. Art. 79 CISG governs hardship, but does not provide the applicable remedy. Art. 6.2.3 UNIDROIT Principles, applicable through the gap-filling mechanism established in art. 7(2) CISG, sets forth the remedy by providing for renegotiations (which failed) and then for termination or adaptation.

16. **Issue II**. Claimant is entitled to submit evidence from the other HKIAC arbitration. The evidence, including the Partial Interim Award, is relevant and material, and can be considered by this Tribunal irrespective of the manner in which Claimant obtained it.

17. **Issue III**. The 30% import tariff imposed by Equatoriana (Respondent's country) represents hardship under clause 12 of the Contract or, alternatively, under the applicable law. Consequently, this Tribunal should adapt the contract price, in the sense of increasing it by US$ 1,250,000 (calculated as the 30% tariff minus Claimant's profit margin of 5%).

ISSUE I: THIS TRIBUNAL HAS JURISDICTION AND POWER TO ADAPT THE CONTRACT

18. Respondent challenged the jurisdiction of this Tribunal to decide the case [*ANoA, p. 31, par. 12*]. In supporting its challenge, Respondent argued that the arbitration agreement is governed by the law of the seat of arbitration, Danubia law [*ANoA, p. 31, par. 13*].

19. Danubia law provides, on the basis of the doctrine of separability, that the CISG does not apply to an arbitration agreement, which is considered to be a procedural contract [*PO2, p. 60, par. 36*]. Danubia Contract Law is, in most aspects, a verbatim adoption of the UNIDROIT Principles. However, Danubia Contract Law differs from the UNIDROIT Principles (and the CISG) which rejected the parol evidence rule [*CISG Op. 3, par. 2.1*]. Art. 4.3 Danubia Contract Law has adopted the parol evidence rule, which, as applied by Danubia courts, has "largely the same effects as a merger clause" under art. 2.1.17 UNIDROIT Principles [*PO2, p. 61, par. 45*].

20. In contrast, case law in Mediterraneo held that the CISG applies to the conclusion and interpretation of arbitration agreements contained in sales contracts governed by the CISG [*PO1, p. 53, par. 4*]. Therefore, absent a merger clause, the interpretation of arbitration agreements is performed pursuant to art. 8 CISG. Consequently, statements and other relevant circumstances can and should be interpreted to ascertain the meaning of contractual clauses.

21. Case law in Danubia has also established that art. 28(3) Danubia Arbitration Law, a verbatim adoption of art. 28(3) UNCITRAL ML [*PO2, p. 60, par. 36*], should be interpreted in the sense that an express conferral of powers is required to authorize arbitral tribunals to adapt contracts [*id.*]. In contrast, under Mediterraneo law, arbitration agreements are interpreted broadly [*NoA, p. 7, par. 16*], and the arbitrators are not bound by an express conferral of powers in order to adapt contracts. Mediterraneo courts held that a standard arbitration agreement is sufficient to grant an arbitral tribunal the same powers as a court has under art. 6.2.3(4)(b) UNIDROIT Principles for contract adaptation [*PO2, p. 60, par. 39*].

22. Claimant submits that the law governing the arbitration agreement is Mediterraneo law, and not Danubia law (**I**). Under Mediterraneo law, this Tribunal has jurisdiction and power to adapt the Contract in case of hardship (**II**). Even if the Danubia law applies to the arbitration agreement, this Tribunal is not prevented from hearing Claimant's adaptation claim (**III**).

I. The law applicable to the arbitration agreement is Mediterraneo law

23. Traditionally, arbitration agreements do not contain an express provision as to the law applicable to the arbitration agreement [*Singh/Kartikey/Foo, par. 1*], which governs matters

that relate to its "existence, scope, validity, interpretation, performance, termination, breach, and enforceability" [*Guide to HKIAC Rules, p. 48, par. 4.19*].

24. The arbitration agreement in the present case was not the typical "midnight clause" [*Redfern/Hunter, p. 73, par. 2.04*]. Instead, it was a provision that the parties negotiated extensively. Several versions of the clause were proposed [*Ex. R1, p. 33; Ex. R2, p. 34*]. Moreover, had it not been for the car accident of 12 April 2017, the arbitration agreement would have likely been further negotiated by the parties. Unfortunately, the final signatories were not aware of the previous intricacies discussed by the original negotiators [*PO2, p. 55, par. 6*].

25. In determining the law applicable to the arbitration agreement, this Tribunal should give effect to the implied choice made by the parties (**A**). In doing so, this Tribunal should find that Mediterraneo law governs, because it is the implied choice of law of the parties (**B**).

A. This Tribunal should observe the implied choice of law made by the parties

26. Respondent argued that Danubia law applies to the arbitration agreement, as opposed to the law of the contract, because there is "no express choice of such law in the arbitration clause nor is there any implied choice" [*ANoA, p. 31, par. 14*]. Claimant agrees that there was no express choice of law within the arbitration agreement itself. However, Claimant disagrees with Respondent's assessment that there was no implied choice.

27. Claimant and Respondent are contracting parties with different nationalities that entered into an international sales contract. They agreed on a neutral seat of arbitration: Danubia. Given these circumstances, absent an express choice of law to govern the arbitration agreement, a conflict of laws arises. The general conflict of laws rules applicable in the three countries involved (the Hague Principles), do not address the law governing arbitration agreements [*art. 1(3)(b) Hague Principles*]. The rationale for excluding arbitration agreements from the scope of the Hague Principles is that, in some states, an arbitration agreement is regarded as an "instrument of substantive contractual law" and, in other states, as "an expression of autonomy based on procedural law" [*Commentary on the Hague Principles, p. 34, par. 1.26; see also Commentary on the Rome I Convention, p. 380, par. 01.943 (applicable to EU Member States)*].

28. Given the absence of an express legal provision identifying a solution to the conflict of laws, this Tribunal should determine the applicable law based on international practice and follow the guidelines set forth in the leading case on the matter, decided by the England and Wales Court of Appeal. The test is two-fold. If there is no express choice of law, an implied choice must be sought. If there is no implied choice, the legal system having "the closest and most real connection" with the arbitration agreement will apply [*Sulamérica case*]. This test was applied

by several other courts in similar cases [*FirstLink case; BCY v. BCZ; Arsanovia case; Expert report case*].

B. Mediterraneo law is the implied choice of law governing the arbitration agreement

29. Claimant submits that Mediterraneo law is the implied choice of law governing the arbitration agreement, and also has "the closest and most real connection" with the arbitration agreement.

30. When assessing whether there was an implied choice of law, "the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense" [*Sulamérica case*]. The same was observed in the *FirstLink* case, where the court stated that "the determination of the implied proper law ultimately remains a question of construction; each case will have to turn on its own facts".

31. Respondent's main objection to the application of Mediterraneo law is based on the principle of separability encompassed in art. 16 UNCITRAL ML [*ANoA, p. 31, par. 14*]. However, the doctrine of separability does not automatically lead to the application of the law of the seat in matters pertaining to the validity and interpretation of the arbitration agreement (**1**).

32. Instead, this Tribunal should look towards the Contract and the arbitration agreement therein, and also take into account the relevant statements and facts surrounding the conclusion of the Contract. The wording of the Contract indicates that Mediterraneo law is also applicable to the arbitration agreement (**2**). This view is supported by the circumstances surrounding the conclusion of the Contract (**3**).

1. Separability does not necessarily render applicable other law than the law of contract

33. The main purpose of the doctrine of separability is to maintain the arbitration agreement independent of the main contract and to ensure its validity in case the main contract is declared null and void [*art. 19.2 HKIAC Rules, art. 16 UNCITRAL ML*]. An independent arbitration agreement gives the arbitral tribunal a basis on which to decide on its own jurisdiction, even if the main contract is terminated [*Redfern/Hunter, p. 94, par. 2.110*]. The autonomy of the arbitration agreement and of the main contract does not mean that they are completely independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the arbitration agreement, without any other formality [*Derains, p. 16-17*].

34. Therefore, the separability doctrine does not mean that the law applicable to the arbitration clause is "necessarily" different from that applicable to the underlying contract [*Born, p. 416*]. It instead means that differing laws *may* apply to the main contract and the arbitration agreement, particularly in order to avoid invalidation of the arbitration agreement under the

law of the main contract. Despite this possibility, in many cases, the same law governs both the arbitration agreement and the main contract [*Born, p. 573*].

35. In any event, "to start from a presumption that the arbitration agreement has an applicable law entirely independent of any contract of which it forms part of is taking the doctrine of separability too far" [*Briggs, par. 8.09*].

36. While art. 36(1)(a)(i) UNCITRAL ML and art. V(1)(a) NY Convention seem to give rise to a rebuttable presumption that the law that governs the validity of the arbitration agreement is the law where the award is to be made [*Mustill/Boyd, p. 63*], in our case Danubia law, this presumption should be rebutted in favor of the law of the main contract where other factors "point clearly" to the implied choice of this system of law [*id.*].

2. The wording of the Contract indicates that Mediterraneo law is also applicable to the arbitration agreement

37. The Contract contains a clear choice of law clause in favor of Mediterraneo law [*Ex. C5, p. 14, par. 14*]. The arbitration agreement comprised in clause 15 of the Contract does not contain a separate choice of law provision, although one was proposed during negotiations and subsequently removed in the drafts exchanged by the parties [*Ex. R1, p. 33, par. 2; Ex. R2, p. 34, par. 4*]. Moreover, the HKIAC model clause contains a distinct choice of law provision within the clause, with the indication that the wording "should be included particularly where the law of the substantive contract and the law of the seat are different".

38. Contrary to Respondent's submissions [*ANoA, p. 32, par. 17*], the above circumstances should lead this Tribunal to the conclusion that the law chosen in clause 14 of the Contract also represents the law applicable to the arbitration agreement.

39. An arbitration agreement will normally also be governed by the law of the contract, regardless of the place of the seat, when there is an express choice of law to govern the contract and there is no express choice of law for the arbitration agreement [*Collins et al., par. 16-017*].

40. Similarly, in the *Sulamérica case*, the England and Wales Court of Appeal noted that it might be assumed that the law that would govern the arbitration agreement is the law that the parties chose to govern the substantive issues of the main contract, absent a specific choice. The same view was supported by the High Court of the Republic of Singapore, which held that when the arbitration agreement represents a part of the main contract, "the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indicators to the contrary" [*BCY v. BCZ, p. 29, par. 65*]. The same court noted that the choice of a seat different from the law of the main contract could not in itself "justify moving away

from the starting point of applying the governing law of the main contract". This opinion was confirmed in other similar cases [*Klöckner Pentaplast case; Arsanovia case; FirstLink case; Habas case; Enercon v. Enercon; NTPC v. Singer*].

41. In this sense, the arbitration agreement represents "only one of many clauses in the contract" [*Redfern/Hunter, p. 158, par. 3.12*]. This Tribunal should therefore give effect to clause 14 of the Contract and hold that Mediterraneo law governs the arbitration agreement.

3. The circumstances surrounding the conclusion of the Contract confirm that Mediterraneo law is also applicable to the arbitration agreement

42. Claimant mentioned, from the beginning of the negotiations, that Mediterraneo law would apply and that the courts in Mediterraneo would have jurisdiction, pursuant to Claimant's General Conditions [*Ex. C2, p. 10, par. 5*]. The first draft sent by Ms. Napravnik contained, at clause 15, a forum selection clause in favor of Mediterraneo courts [*PO2, p. 55, par. 4*].

43. Respondent attempted to negotiate a forum selection clause in favor of Equatoriana courts [*Ex. C2, p. 11, par. 3*]. Claimant could not accept Respondent's proposal [*Ex. C4, p. 12, par. 5*]. The compromise suggested by Claimant was to subject disputes to arbitration in Mediterraneo [*Ex. C4, p. 12, par. 5*]. Then, Respondent suggested an arbitration clause that included a choice of law provision indicating Equatoriana law. Claimant responded that the submission to any foreign law required special approval from its Creditors' Committee [*Ex. R1, p. 33, par. 1; Ex. R2, p. 34, par. 2*]. In order to minimize delays and comply with its internal policy, Claimant proposed Danubia as a neutral seat of arbitration [*PO2, p. 56-57, par. 14*]. This was the only change made by Claimant to the arbitration clause proposed by Respondent [*Ex. R2, p. 34, par. 3*].

44. Respondent might attempt to argue that, because this was the only change made by Claimant and because Claimant's email referred only to the "relevant part" of the clause [*id.*], Claimant accepted Respondent's proposal regarding a choice of law in favor of Equatoriana law which appeared in the following paragraphs, not reproduced by Claimant.

45. That would ignore the remainder of Claimant's email which emphasized that the offer was "naturally on the condition that the law applicable to the [Contract] remains the law of Mediterraneo" [*Ex. R2, p. 34, par. 4*]. Claimant never intended (not could it without approval from its Creditors' Committee) to submit *any* part of the Contract to a law different than Mediterraneo law. The final Contract contains the clause proposed by Claimant, to which the ultimate signatories only added the number of arbitrators and the language of the proceedings [*PO2, p. 55, par. 6*].

46. The record therefore reflects that, throughout the negotiations, Claimant constantly indicated to Respondent that Mediterraneo law would govern the Contract, including the arbitration agreement. The application of Danubia law was never discussed by the parties. The parties chose Danubia only because it represented a neutral venue that had been approved by Claimant's Creditors' Committee [*PO2, p. 56-57, par 14*]. Ms. Napravnik was not familiar with the details of Danubia Arbitration Law and much less with the specifics of Danubia Contract Law [*PO2, p. 56-57, par. 14; PO2, p. 61, par. 45*]. In fact, the only connection of the Contract to Danubia is that two of three authorized mares for the use of the semen are registered in Danubia [*Ex. C5, p. 13*]. That is hardly sufficient to attract application of Danubia law.

47. In contrast, Mediterraneo law was discussed by the parties and is closely connected to the main Contract and to the dispute. The parties expressly chose Mediterraneo law to govern the Contract, which included the arbitration agreement. Moreover, Nijinsky III and, consequently, the goods that form the object of the Contract, are located in Mediterraneo. Payment under the Contract is due to a Mediterraneo bank account [*id.*]. Lastly, the final negotiations of the Contract and the execution of the Contract took place in Mediterraneo [*PO2, p. 56, par. 13*]. These facts emphasize the connection between Claimant's country and the present dispute.

48. In conclusion, absent an express choice of law clause pertaining to the arbitration agreement in favor of Danubia law, there is ample evidence that Mediterraneo law is the implied choice of the parties to govern the arbitration agreement.

II. Under Mediterraneo law, this Tribunal has the jurisdiction and power to adapt the contract in case of hardship

49. The jurisdiction of the arbitral tribunal is derived from the consent of the parties, as shown in the arbitration agreement [*Redfern/Hunter, p. 119, par. 1.59*] and the arbitration agreement represents a source for the powers of the arbitral tribunal [*Redfern/Hunter, p. 118, par. 1.58*].

50. Absent any express indication in the arbitration agreement as to the powers that were granted to the arbitrators or to the extent they can use them, the law governing the arbitration agreement is the immediate source of such powers. Additionally, jurisdiction can only be given to the arbitral tribunal by the parties through their express consent, whereas supplementary powers might be conferred by the applicable law.

51. Respondent argued that it did not consent to granting this Tribunal jurisdiction to hear claims for adaptation of the Contract [*ANoA, p. 31, par. 13*]. To the contrary, the interpretation of the arbitration clause pursuant to art. 8 CISG indicates that the parties did grant this Tribunal

jurisdiction to adapt the Contract in hardship scenarios (**A**). Even if that were not the case, this Tribunal has the power to adapt the contract under Mediterraneo law (**B**).

A. The parties' intent was that claims pertaining to contract adaptation would be submitted to arbitration

52. Under Mediterraneo law, the interpretation of the arbitration clause is performed on the basis of art. 8 CISG [*PO1, p. 53, par. 4*]. According to the quasi-totality of the literature, art. 8 CISG can be used to interpret contractual provisions, including an arbitration clause [*Farnsworth, par. 2.1; Enderlein/Maskow, par. 2.3; Honnold, par. 105; Staudinger/Magnus, par. 3; see also Fruit and vegetables case*].

53. Art. 8(1) CISG provides that "[f]or the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was". Under art. 8(3) CISG, "due consideration is to be given to all relevant circumstances of the case including the negotiations". Negotiations and conduct prior to the conclusion of the contract are used to interpret the parties' intent [*Lookofsky, p. 44; Schlechtriem/Schwenzer, p. 158, par. 32; Huber/Mullis, p. 12, par. 1-2; see also Macromex v. Globex; Scaffold hooks case; Electricity generator case*].

54. On 12 April 2017, Claimant's main negotiator, Ms. Napravnik, informed Mr. Antley, Respondent's main negotiator, that they should provide for a mechanism for contract adaptation [*Ex. C8, p. 17, par. 4*]. Mr. Antley agreed and "replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*id.*]. Unfortunately, later that day, they were involved in a car accident and could not finalize the Contract themselves by adding the adaptation clause that they had agreed to in principle [*id.*]. Two other representatives of the parties signed the Contract on 6 May 2017, which did not include an express adaptation clause [*Ex. C5, p. 13*]. Due to the medical condition of the two negotiators, the ultimate signatories, Mr. Ferguson and Mr. Krone, did not contact them in order to clarify what was discussed on 12 April 2017 [*PO2, p. 55, par. 7*] but they had access to all the prior emails of the two original negotiators [*PO2, p. 55, par. 5*].

55. While the tentative agreement reached in the meeting of 12 April 2017 to grant this Tribunal jurisdiction to adapt the Contract was not reflected in the written form of the Contract, this Tribunal should take it into account under art. 8(3) CISG. Moreover, during the telephone conversation between Ms. Napravnik and Mr. Shoemaker, the latter stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*Ex. R4, p. 36, par. 4*]. This statement represents a promise made

by Respondent that in case of a hardship situation, a solution will be found, *i.e.* price adaptation. Claimant paid the tariff on the basis of that promise. Ms. Napravnik was entitled to rely on that promise because Mr. Shoemaker was introduced to her as being responsible for "all questions concerning the Frozen Semen Sales Agreement" [*PO2, p. 59, par. 32*].

56. In conclusion, by corroborating the tentative agreement reached by Ms. Napravnik and Mr. Antley on their meeting of 12 April 2017 with Mr. Shoemaker's promise to reach an agreement, this Tribunal should interpret the arbitration agreement contained in clause 15 of the Contract as granting it jurisdiction to hear the present claim.

B. This Tribunal has the power to adapt the contract

57. In those legal systems where hardship and contract adaptation as a remedy are recognized as a matter relating to substantive law, national courts are necessarily given the procedural power to adapt the contract [*Brunner, p. 495*]. According to the principle of synchronized competences, arbitral tribunals should have the same powers [*id.*]. This approach is supported by consistent case law in Mediterraneo that, under standard arbitration agreements, arbitral tribunals have the power to hear claims for contract adaptation in cases where a national court would have the power to hear such claims [*PO2, p. 60, par. 39*].

58. In practice, when the contract contains an arbitration clause and arbitrators are asked to give effect to a hardship clause, they consider there to be a dispute and they will therefore interpret or apply the disputed clause [*Fouchard/Gaillard/Goldman, p. 28, par. 41*].

59. In the present case, the arbitration agreement does not restrict the power of this Tribunal to decide on contract adaptation (**1**). Clause 12 of the Contract does not derogate from art. 79 CISG, but only clarifies its scope of application (**2**). Art. 79 CISG covers hardship situations and the remedy of contract adaptation exists under the CISG (**3**). Alternatively, this Tribunal has the power to adapt the contract under art. 6.2.3 UNIDROIT Principles (**4**).

1. The arbitration clause does not restrict the power of this Tribunal to adapt

60. The parties used fairly standard wording for their arbitration agreement, which only slightly deviates from the HKIAC model clause. In the first paragraph, the differences are as follows: "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 noncontractual obligations arising out of or relating to it~~ shall be referred to and finally resolved by arbitration administered by the [HKIAC] under the [HKIAC] Rules in force when the Notice of Arbitration is submitted".

61. It can be easily observed that superfluous language was excluded. For example, "dispute" and "controversy" have similar meanings. The same is true for "arising out of" and "relating to". Respondent stated that its proposal "has narrowed down and streamlined *a little* the fairly broad wording of the clause" [*Ex. R1, p. 33, par. 1, emphasis added*]. The next day after issuing this proposal, Mr. Antley stated that, in his opinion, it should be the task of the arbitrators to adapt the Contract [*Ex. C8, p. 17, par. 4*]. As such, Claimant could not have understood that the intent was to exclude the possibility of a claim for contract adaptation.

62. Even if Respondent's initial intent was to restrict the power of this Tribunal to adapt the Contract, this intent cannot be taken into account, because it was never communicated to Claimant and was directly contradicted by Respondent's statements. Because both art. 8(1) CISG and art. 8(2) CISG assess intent pursuant to the understanding of the other party or of a reasonable person of the same kind as the other party, the intent that one party secretly has is irrelevant [*Textiles case; Military weapons case*].

63. Respondent argued that is deleted "any reference which could be interpreted as an empowerment for contract adaptation" [*ANoA, p. 31, par. 13*]. Respondent is referring to the removal of the phrase "any dispute regarding noncontractual obligations arising out of or relating to [the contract]" from the scope of the arbitration agreement under the HKIAC model clause. However, many model clauses from reputed arbitral institutions (ICCA, PCA, LCIA) do not contain the reference. Moreover, Claimant's request for adaptation of the price constitutes a contractual matter. First, Claimant requests adaptation of the price relating to the third delivery, in the form of a US$ 1,250,000 increase (calculated as the 30% tariff minus Claimant's profit margin of 5%). Second, Claimant requests that Respondent be ordered to pay this additional amount. As such, Claimant's request has a contractual basis, because it pertains to the buyer's obligation to pay the price as adjusted by this Tribunal.

64. In addition, there is an ongoing trend in international arbitration to understand the term "dispute" in a broad manner, so as to include any differences of opinion or "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons". Therefore, the term "dispute" includes the notion of contract adaptation [*Brunner, p. 496*].

65. Consequently, Respondent's allegations relating to the alleged narrow wording of the arbitration clause are unfounded. Clause 14 represents a standard arbitration agreement which does not restrict the power of this Tribunal to adapt the Contract.

2. Clause 12 of the Contract simply clarifies the provisions of art. 79 CISG

66. Respondent argued that the parties excluded the application of art. 79 CISG by including a hardship clause into the Contract [*ANoA, p. 32, par. 20*]. Under art. 6 CISG, the general principle of party autonomy enables parties to exclude the application of the CISG in whole or in part [*Schlechtriem/Schwenzer, p. 115, par. 27; CISG Op. 16, par. 1.1*].

67. There is broad consensus among legal scholars that a clear intent to derogate from a CISG provision is required pursuant to art. 6 CISG [*CISG Op. 16, par 3.1*; *Schlechtriem/Schwenzer, p. 103, par. 3; Enderlein/Maskow (1992), p. 48-49, par. 1.2-1.3*]. Implicit exclusions have also been upheld. However, in accordance with cases and commentary, the balance should generally tip in favor of non-exclusion where the facts do not support an inference of clear intent to exclude [*Spagnolo, p. 208, Corn case; see also Gasoline and gas oil case*].

68. In the present case, there is no express exclusion of the application of art. 79 CISG. "[I]n the absence of a clear intent to exclude, parties should be reasonably understood as not evincing intent to opt out." [*CISG Op. 16, p. 6, par. 3.7; Schroeter, p. 8, par. 2*].

69. The conduct of the parties also does not amount to an implied exclusion. Implied exclusions can be achieved by adopting provisions that stipulate different solutions from those in the CISG [*Guide to CISG Article 6, par. 1*]. When a contractual clause governs a specific matter that is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular issue [*Machine case*]. However, clause 12 of the Contract is not in contradiction with art. 79 CISG, it only clarifies the scope of application of art. 79 CISG.

70. The clause simply outlines certain examples of scenarios of *force majeure* ("missed flights, weather delays, failure of third party service, or acts of God") and hardship ("additional health and safety requirements"). The examples provided are not limitative, as reflected by the use of the phrases "such as" and "comparable unforeseen events". Therefore, the parties did not exclude the application of art. 79 CISG explicitly or implicitly.

3. Art. 79 CISG governs hardship

71. Respondent argued that art. 79 CISG does not govern hardship [*ANoA, p. 32, par. 21*]. The very essence of hardship, despite national and international variations, is that it arises due to certain events that alter the contractual equilibrium between the parties [*Schlechtriem/Schwenzer, p. 90, par. 42; Schwenzer (2008), p. 714-715, par. 2; Kröll/Mistelis/Viscasillas, p. 1088; Brunner, p. 221, par. 3; Girsberger/Zapolskis, p. 122; Scafom v. Lorraine Tubes; Aeronautical project case; Nuova Fucinatti v. Fondmetall; Machinery case; Europa Group v. Kleta; V.D. v. AB bank*].

72. Respondent might seek to rely on the drafting history of art. 79 CISG which reflects that several proposals to include hardship in art. 79 CISG were rejected. However, "[t]he legislative as well as the drafting history of [art. 79 CISG] is not conclusive enough to warrant a conclusion that the hardship problem was meant to be excluded or included within its scope" [*CISG Op. 7, par. 27; see also Schwenzer (2008), p. 712, par. 2*]. Subsequent developments must be considered.

73. Today, it is almost unanimously accepted by legal scholars and case law that art. 79 CISG covers hardship [*CISG Op. 7, par. 3.1; DiMatteo, p. 259-260; Schlechtriem (2007), par. 291; Schwenzer (2008*), *p. 713, par. 1; Schwenzer/Leisinger, p. 272-273; Lindström, p. 23-24; Brunner, p. 218; Scafom v. Lorraine Tubes; Steel ropes case; Vital Berry v. Dira-Frost; Nuova Fucinatti v. Fondmetall; Société Romay v. Behr*]. The word "impediment" used in art. 79(1) CISG does not equate with an event that makes performance absolutely impossible [*CISG Op. 7, par. 3.1*]. Impediments that render performance of the contract "excessively onerous" may qualify as impediments under art. 79(1) CISG [*CISG Op. 7, par. 3.1; see also Schwenzer (2008), p. 714, par. 2; Schlechtriem/Schwenzer (2005), p. 64; Tallon, par. 3.2; but see Sunflower seed case; FeMo alloy case (market price increase of 30%-200% above contract price)*].

74. Respondent also argued that art. 79 CISG does not provide for the remedy of adaptation [*ANoA, p. 32, par. 21*]. However, the most authoritative commentary on art. 79 CISG, the Advisory Council Opinion no. 7, provides: "In a situation of hardship under [art. 79 CISG], the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based" [*CISG Op. 7, par. 3.2*]. The opinion also notes: "One may infer from the obligation to interpret the Convention in good faith a duty imposed upon the parties to renegotiate the terms of the contract [...]. In case negotiations fail [...], [e]ven if one were not ready to stretch the principle of good faith buried in [art. 7(1) CISG] in order to find a balance of the performances, [art. 79(5) CISG] may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances" [*CISG Op. 7, par. 40*].

75. Professor Schlechtriem also took the view that hardship is a matter governed but not settled by the CISG, and that the remedy of adaptation is implicitly allowed under the CISG [*Flechtner, p. 237*]. For example, the price reduction remedy under art. 50 CISG can be seen as an "adjustment of the contract to reflect a disturbed balance between performance on one side and obligation on the other side" akin to adaptation [*id.*].

76. This view is supported by the underlying principles of uniformity, good faith and internationality on which the CISG is based [*Schlechtriem/Schwenzer, p. 123, par. 10; Ferrari, p. 419; Malloy, p. 667, note 17; Andersen, p. 47; Huber/Mullis, p. 7-8*]. A party which fails to

perform its obligations (as is, for example, the case of Respondent itself, which did not deliver the mare in the other arbitration Respondent is involved in in front of a HKIAC tribunal) would be entitled to defend itself by arguing that art. 79 CISG exempts it from liability.

77. To the contrary, a party which undertook additional efforts to perform the contract (as is the case of Claimant) would not be entitled to recover the losses incurred. This would create unjust inequality between parties facing similar difficulties. This would also encourage parties to withhold performance of the contract in order to benefit from an exemption of liability, which would undermine the goal of the CISG to develop international trade on the basis of mutual benefit [*Schlechtriem/Schwenzer, p. 16, par. 8; see also Geneva v. Barr*].

78. Lastly, if we were to accept that remedies such as renegotiation and adaptation are not encompassed by the CISG, courts and arbitral tribunals faced with requests similar to that of Claimant would be required to fill the supposed gap in art. 79 CISG by resorting to the remedies provided by domestic law under art. 7(2) CISG. This would undermine the uniform application of the CISG [*Schlechtriem/Schwenzer, p. 123, par. 10; Honnold, p. 109; Huber/Mullis, p. 7-8*].

79. Therefore, this Tribunal should find that hardship situations, and the corresponding remedies (including renegotiation and adaptation), fall under the scope of art. 79 CISG.

4. Art. 6.2.3 UNIDROIT Principles provides for contract adaptation

80. If this Tribunal determines that art. 79 CISG does not provide for the remedy of adaptation, it would mean that hardship is governed, but not settled, by the CISG, which would amount to a gap in the CISG. Art. 7 CISG can be used fill the gap in art. 79 CISG [*Lookofsky (2006), p. 88-90; Huber/Mullis, p. 324*]. Consequently, Claimant can then rely on the application of art. 6.2.2 and art. 6.2.3 UNIDROIT Principles to supplement art. 79 CISG.

81. Case law has determined that hardship falls within the CISG and that the UNIDROIT Principles define the scope and consequences of hardship [*D2i v. Gabo 2; Scafom v. Lorraine Tubes; Veneziano, p. 144*]. The court in *Scafom v. Lorraine Tubes* resorted to the UNIDROIT Principles under art. 7(1) and art. 7(2) CISG and concluded that the unforeseen increases in the price of steel "gave rise to a serious imbalance" of the contract. Ultimately, the court granted the seller the right to request a renegotiation of the contract even though the parties had not agreed on this nor applied the UNIDROIT Principles to their contract.

82. Under art. 6.2.3 UNIDROIT Principles, the disadvantaged party is entitled to request renegotiations. If the parties fail to reach an amicable agreement, either party may request the adaptation of the contract [*Brunner, p. 488*], with the aim of restoring its equilibrium, which can be done by adapting the price [*UNIDROIT Principles Commentary (2016), p. 208*].

83. In the present case, Claimant initiated the renegotiations by organizing the meeting on 12 February 2018 [*PO2, p. 59, par. 1*]. Because the parties could not reach an amicable agreement, Claimant's request for adaptation of the price may be heard by this Tribunal.

III. <u>Even if Danubia law applies, this Tribunal has jurisdiction and power to adapt</u>

84. In the telephone conference organized by this Tribunal on 4 October 2018, the parties agreed that if Danubia law applies, "there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by [this] Tribunal" [*PO1, p. 52, par. II.3*]. The parties have since obtained further information regarding the content of Danubia law, by means of the procedural order issued by this Tribunal on 2 November 2018. The additional information makes it less likely that this Tribunal would find that it does not have jurisdiction or power to adapt the contract under Danubia law. Claimant submits that if Danubia law applies, this Tribunal *should* find that it has jurisdiction and power to adapt the Contract.

85. First, art. 28(3) of Danubia Arbitration Law is identical to art. 28(3) UNCITRAL ML. This provision states that "[t]he arbitral tribunal shall decide *ex aequo et bono* or *as amiable compositeur* only if the parties have expressly authorized it to do so". Danubia courts interpret this provision in the sense that an express conferral of powers is required for arbitral tribunals to adapt contracts [*PO2, p. 60, par. 36*]. This Tribunal should not follow this interpretation. That is because art. 28 UNCITRAL ML refers to the rules applicable to the substance of a dispute (not to the arbitration agreement), which would be replaced with equity. In the present case, Claimant does not request this Tribunal to decide in equity, but only asks this Tribunal to apply a remedy that is provided for in the Contract and covered by the substantive law.

86. Second, the interpretation of Danubia courts is based on the power of arbitral tribunals to adapt contracts being an "exceptional power" [*id.*]. The power to adapt a contract is not regarded as an exceptional power anymore. Many countries have generally included the remedy of adaptation in their national legislations [*DiMatteo, p. 260-261, par. 2*]. As such, national courts have the power to adapt contracts. The modern approach generated by the principle of synchronized competences is that "[a]rbitral tribunals should not be treated differently than state courts" [*Brunner, p. 495; see also supra, par. 57*].

87. Third, art. 28(3) of Danubia Arbitration Law does not, *per se*, prohibit adaptation by arbitral tribunals. That rule comes from a judicial interpretation of a statutory provision, Danubia being a common law country [*PO2, p. 61, par. 44*]. As such, nothing prevents Danubia courts from overruling their precedent in order to better reflect changes in international practice.

88. Fourth, if this Tribunal finds that it has power to adapt the Contract under Danubia law and the award is subsequently annulled by Danubia courts based on existing case law, Claimant would still have access to the adaptation remedy. It would start litigation in Equatoriana (Respondent's country), but Mediterraneo law would apply, and Mediterraneo law provides for the adaptation remedy [*PO1, p. 53, par. III.4; see supra par. 71-83*]. Therefore, distinguishing between the powers of this Tribunal and the powers of a national court would only have an impact on the duration and costs incurred by the parties.
89. Consequently, Claimant urges this Tribunal not follow the existing case law in Danubia.
90. **Conclusion.** This Tribunal has jurisdiction and the necessary powers to adapt the Contract in case of hardship, under Mediterraneo law, and, in the alternative, under Danubia law.

ISSUE II: THIS TRIBUNAL SHOULD ALLOW EVIDENCE FROM THE OTHER HKIAC ARBITRATION

91. Respondent is part of another HKIAC arbitration, currently in progress. Respondent is the claimant in that arbitration, as the seller. The defendant is a company from Mediterraneo, as the buyer. The legal and factual circumstances of that arbitration are similar to those in the present arbitration [*Record, p. 50*]. That dispute concerned Respondent's refusal to deliver a mare to the buyer, due to the application of the 25% tariff imposed by Mediterraneo on agricultural products [*PO2, p. 58, par. 24*]. Respondent requested adaptation of the contract on the basis of a hardship clause [*PO2, p. 60, par. 39*].
92. Claimant's CEO learned about this dispute at the annual breeder conference, from Mr. Velazquez, the new CEO of one of Claimant's regular customers. Until May 2018, Mr. Velazquez worked for the buyer in the other arbitration [*PO2, p. 60, par. 40*]. Although he had not been involved in those proceedings, Mr. Velazquez was aware of the main issues in the dispute and provided Claimant with relevant information [*id.*].
93. The fact-finding mission of this Tribunal has revealed that the arbitral tribunal in the other HKIAC arbitration rendered, on 29 June 2018, a Partial Interim Award on the procedural issues [*PO2, p. 60, par. 39*]. That tribunal affirmed its power to adapt the contract should the 25% tariff imposed by Mediterraneo be found to constitute hardship for Respondent [*id.*].
94. Claimant brought the existence of the arbitration to the attention of this Tribunal on 2 October 2018 and indicated that it "has been promised a copy of the award and the relevant submission and will immediately submit them once they have been received" [*Record, p. 50*]. Respondent objected to the submission of this evidence on 3 October 2018 [*Record, p. 51*]. On 2 October 2018, Claimant mentioned that if need be, the other party in the other arbitration proceedings

"may also be joined". Claimant would like to clarify that it does not presently intend to submit a formal request for joinder, including because the substantive and procedural requirements of art. 27(1) and art. 27(3) HKIAC Rules are not met, and Respondent objected.

95. The relevant standard for deciding the issue is provided by art. 22.2 HKIAC Rules, which states that this Tribunal shall have the power "to determine the *admissibility, relevance, materiality and weight* of the evidence, including whether to apply strict rules of evidence" [*emphasis added*]. Arbitral tribunals have broad discretion to determine the admissibility of evidence and are not bound by strict rules [*Guide to HKIAC Rules, p. 191, par. 9153*].

96. Claimant will first argue that the evidence fulfils the criteria of relevance, materiality and weight (**I**), and second, that the evidence is admissible irrespective of the fact that it was obtained through a breach of confidentiality or through an illegal hack (**II**).

I. <u>The evidence fulfills the criteria of relevance, materiality and weight</u>

97. Both civil and common law jurisdictions see "relevance" as a matter of common sense and reasoning [*Pilkov, p. 149, par. 1*]. The purpose of the requirement is to exclude documents that do not relate to the case or to the party's allegations [*Marghitola, p. 48-49; Sattar, p. 7, par. 4*]. "Materiality" deals with the connection of evidence to the outcome of the case and its sufficiency [*Pilkov, p. 149, par. 3*]. Lastly, "weight" of the evidence concerns its persuasive effect and may include questions of credibility, reliability and authenticity [*Pilkov, p. 153, par. 2*].

98. The evidence proposed by Claimant meets the required threshold of relevance (**A**), as well as the conditions related to materiality and weight (**B**).

A. The evidence is relevant

99. The evidence proposed by Claimant is relevant because there are several compelling similarities between the two arbitrations. In both proceedings, the law applicable to the arbitration agreements and to the contracts was Mediterraneo law. Additionally, both contracts provided for delivery DDP Mediterraneo, a hardship clause, and arbitration under the HKIAC Rules. The contract in those other proceedings was also negotiated by Mr. Antley on behalf of Respondent [*PO2, p. 60, par. 39*]. After Mediterraneo imposed the 25% tariff, Respondent requested adaptation of the contract on the basis of the hardship clause [*id.*]. These similarities in terms of facts and legal background should convince this Tribunal to follow the same rationale and find that it has the power to adapt the Contract.

100. Respondent will likely emphasize that there are differences between the two arbitrations. However, these are immaterial to the issue of the Tribunal's power to adapt. First, the

circumstances in which Respondent requested adaptation in the other HKIAC arbitration were even less favorable for Respondent than they are for Claimant in the present arbitration. Second, the difference in wording between the ICC Hardship Clause and clause 12 has no relevant implications on the outcome. Their effects are similar and both lead to the possibility of contractual adaptation [*see infra, par. 126-130*]. Similarly, the difference in wording between the HKIAC model clause and clause 15 does not exclude the possibility of price adaptation by this Tribunal because it does not represent a limitation of powers [*see supra, par. 60-65*].

101. The evidence is all the more relevant now, because Claimant is entitled to dissipate any doubts that may exist regarding the veracity of the information that it provided to this Tribunal on 2 October 2018 [*Record, p. 50*]. On 3 October 2018, Respondent opened a Pandora box when it wrote to this Tribunal that "the allegations by Claimant do not reflect reality and are taken out of context" [*Record, p. 51*]. Claimant must be now allowed to prove that it did not make unfounded allegations, which the record developed so far is already starting to support [*PO2, p. 60, par. 39; PO2, p. 60, par. 41*]. Consequently, the Partial Interim Award and Respondent's submissions are relevant.

B. The evidence meets the threshold of materiality and weight

102. The materiality and weigh of the evidence stem from the persuasive value of the Partial Interim Award in the light of the uniformity principle. Art. 2A UNCITRAL ML advocates for a uniform practice in arbitration: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith". The HKIAC has embraced this principle [*Guide to HKIAC Rules, p. 342*].

103. A uniform HKIAC arbitration practice can only emerge if different HKIAC tribunals confronted with similar issues arrive at similar results. The arbitrators involved in the other HKIAC arbitration are not the same as those involved in the present HKIAC arbitration [*PO2, p. 60, par. 37*]. As such, this Tribunal could promote uniformity and avoid conflicting decisions on similar matters under the rules of the same institution by allowing the evidence requested by Claimant and reviewing the manner in which the other tribunal motivated the award, interpreted and applied the HKIAC Rules and the UNCITRAL ML.

104. Claimant would like to clarify that the Partial Interim Award from the other HKIAC arbitration does not represent a precedent that would bind this Tribunal. However, Claimant submits that it should be given high persuasive value by this Tribunal. Arbitration, like any disputable

proceedings, must be based on foreseeability and predictability, principles that can be respected through the uniformity of the arbitration practice.

105. In conclusion, the evidence that Claimant is seeking to introduce is relevant, material and carries weight regarding the present dispute. For these reasons, Claimant notes that this Tribunal could also request Respondent to produce the aforementioned evidence under art. 22.3 HKIAC Rules, as it is "relevant to the case and material to its outcome".

II. <u>The evidence is admissible irrespective of the way it was obtained</u>

106. Respondent argued that the evidence is not admissible before this Tribunal because it was obtained in an illicit manner, either through an illegal hack of Respondent's computer system or through a breach of the confidentiality agreements by two former employees of Respondent. Unlawfully obtained evidence can be analyzed under the "relevance" requirement [*Methanex case; Opic Karimum case*] or under the "admissibility" requirement. Claimant opted for the second option simply for reasons of ensuring a comprehensive presentation.
107. Claimant invites this Tribunal to analyze the issue under the IBA Rules and international practice (**A**), according to which the evidence proposed by a party is inadmissible if the party was involved in illegal acts. Claimant will demonstrate that it was not (**B**).

A. The IBA Rules and international practice are relevant

108. The IBA Rules are commonly adopted or referred to in HKIAC arbitration [*Guide to HKIAC Rules, p. 191, par. 9155*]. The IBA Rules are considered to be "an internationally applicable standard" [*Finizio/Speller, p. 63; Marghitola, p. 32*] or "best practices" [*Waincymer, p. 760; Noble Ventures v Romania; Biwater Gauff v.Tanzania; Railroad Development v. Guatemala*] and they are frequently used in practice irrespective of the legal background of the parties [*Marghitola, p. 32*].
109. Under art. 9(2)(b) IBA Rules, the arbitral tribunal "shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: […] (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable".
110. There are no specific rules in either of the countries involved regarding the admissibility of evidence that was obtained illegally [*PO2, p. 61, par. 46*]. It is therefore the prerogative of this Tribunal to determine the admissibility of the evidence and, in doing so, this Tribunal enjoys broad discretion and is not bound by strict rules [*Guide to HKIAC Rules, p. 191, par. 9153*].

111. According to international practice, the question of whether the party seeking to introduce unlawfully obtained evidence into proceedings has played any part in procuring that evidence is essential to determine its admissibility. This legality requirement is a manifestation of the clean hands doctrine [*Dumberry, p. 230, par. 1; see also Llamzon/Sinclair, p. 451, p. 509*]. Moreover, courts sometimes admitted illegally obtained evidence by "balancing the interest in finding the truth against the legal interests which were harmed when the evidence was obtained" [*Segesser, p. 1; see also FC Metalist case; FC Karpaty case*].

B. No illegal acts were committed by either Claimant or the intelligence company

112. Claimant did not make use of any illegal means to obtain the evidence. At the recommendation of a professional, Claimant reached out to a private intelligence company in the horse racing industry [*PO2, p. 60-61, par. 41*]. Requesting business intelligence services represents a common practice in any business field. Absent such services, numerous arbitration claims and legal memoranda would be deprived of an abundance of cases that are reproduced or analyzed by specialized blogs and law reviews and that are otherwise restricted from public access.
113. Respondent will likely argue that, because of the alleged doubtful reputation of the company [*PO2, p. 60-61, par. 41*], Claimant should have known that the award was obtained in an illicit manner. However, Claimant had no duty, and no means, to verify what methods the company would use. The company refused to disclose its sources [*PO2, p. 61, par. 41*].
114. Furthermore, if the company did obtain the evidence from the person(s) who hacked Respondent's computer system or from its former employees, any illegal conduct would have likely been performed by those persons. As such, it is likely that not even the intelligence company itself directly committed an illegal act. Consequently, any improper way of obtaining the evidence cannot be connected to Claimant or the company providing the intelligence. Neither participated in any illegal activity.
115. If the evidence was obtained as a result of an illegal hack, Claimant could not have known that Respondent did not take the necessary precautions to protect its computer system. Respondent used an outdated firewall, which made it easy to hack into the system [*PO2, p. 61, par. 42*].
116. If the evidence was obtained from Respondent's former employees, there would be no illegal action, but rather a breach of a contractual relationship between Respondent and its former employees. Respondent has remedies to act against the employees to recover any losses incurred. "A breach of contract action is the most obvious remedy for a former employer when a former employee has wrongly disclosed information" [*Becker, p. 981*].

117. In order for this Tribunal to reject Claimant's request on the basis of art. 9.2(b) IBA Rules, a legal impediment or professional privilege would be required. However, there is no indication in the record that the confidentiality agreement between Respondent and its former employees amounts to a professional privilege. A professional privilege is reserved for certain categories of advisors (for example, the attorney-client privilege) and is protected by express legal provisions (for example, deontological rules adopted by Bar associations).
118. Moreover, the fact that the employees served as witnesses in the proceedings [*PO2, p. 61, par. 41*] does not amount to a privileged relationship. Art. 45.1 and art. 45.2 HKIAC Rules address confidentiality concerning witnesses. However, art. 9(2)(b) IBA Rules refers specifically to professional confidentiality [*Commentary on the IBA Rules 2010, p. 25, par. 5*]. Art. 9(3) IBA Rules, which provides clarifications as to the notion of privilege, does not refer to witness confidentiality. Therefore, the confidentiality requirement applicable to witnesses in arbitration does not amount to a privilege or legal impediment under art. 9(2)(b) IBA Rules.
119. Consequently, under the clean hands doctrine, this Tribunal should find no obstacle preventing Claimant from submitting the evidence it seeks to admit, because both the illegal hack and the confidentiality agreement that Respondent concluded with its former employees fall outside the restrictions set out under art. 9.2(b) IBA Rules.
120. **Conclusion.** This Tribunal should find that Claimant is entitled to submit evidence from the other arbitration proceedings, irrespective of the way in which it was obtained.

ISSUE III: THIS TRIBUNAL SHOULD ADAPT THE CONTRACT AND ORDER RESPONDENT TO PAY AN ADDITIONAL AMOUNT

121. Pursuant to the instructions of this Tribunal, Claimant will discuss if "[it] is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price (i) under clause 12 of the contract or (ii) under the CISG" [*PO1, p. 53, III, 1(c)*]. This Tribunal can adapt the contract price [*see supra, par. 49-83*] and adaptation should be ordered if hardship is found. Claimant submits that the 30% tariff imposed by the Government of Equatoriana constitutes hardship (**I**). Therefore, Claimant is entitled to the amount of US$ 1,250,000 (**II**).

I. <u>The 30% tariff constitutes hardship</u>

122. The Government of Equatoriana announced the new 30% tariff on 19 December 2017, applicable starting 15 January 2018 [*PO2, p. 58, par. 25; Ex. C6, p. 15, par. 1*]. This retaliatory measure affected the last shipment under the Contract (50 doses), which was due on 23 January 2018 [*Ex. C5, p. 14, clause 8*]. Claimant paid the 30% tariff, which amounted to US$ 1,500,000,

15% over the total contract price of US$ 10,000,000. This additional cost represents hardship under the Contract (**A**) and under the CISG (**B**).

A. The 30% tariff constitutes hardship under the Contract

123. Clause 12 of the Contract, in its relevant part, states that "[s]eller shall not be responsible for […] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C5, p. 14, clause 12*]. Respondent argued that this clause is narrowly worded and does not cover the 30% tariff [*ANoA, p. 32, par. 19*]. However, clause 12 is broad and represents an adjustment of the DDP delivery (**1**). Moreover, the import tariff fits squarely within the language of clause 12 (**2**).

1. Clause 12 is broad and represents an adjustment of the DDP delivery

124. Narrow hardship clauses contain specific situations in which they apply [*Fontaine/Ly, p. 461*]. In contrast, if broad coverage is sought, words such as "unduly onerous" suffice [*Ullman, p. 91*]. Clause 12 of the Contract is broad because it references the onerous standard and and does not contain a list of specific situations constitutive of hardship. It generally refers to "hardship, caused by [...] unforeseen events making the contract more onerous".
125. Clause 12 only lists one specific situation, namely "additional health and safety requirements". This particular example was introduced due to past experiences of the parties. Claimant wrote to Respondent on 31 March 2017: "As we both know from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary" [*Ex. C4, p. 12, par. 4*]. The context of this statement is that in 2014 Claimant had sold three mares DDP Danubia. Because foot and mouth disease was discovered, Danubia had imposed very strict new health and safety requirements. In that particular case, the additional tests required and the long quarantine amounted to 40% of the sales price. Claimant had to bear these costs, because no hardship clause had been included in the contract, which nearly resulted in the insolvency of Claimant [*PO2, p. 58, par. 21*].
126. Given the singularity of the 2014 situation, and lack of any indication that the parties intended to limit the hardship clause only to this type of situation, clause 12 of the Contract should be interpreted broadly, according to its plain language. Use of examples in such broadly formulated clauses does not restrict the general character of the language [*Böckstiegel, p. 166*].
127. Respondent might attempt to persuade this Tribunal to adopt a narrow reading of the hardship clause, based on the fact that Respondent expressly rejected Claimant's proposal to use the ICC Hardship Clause in the Contract [*Ex. R2, p. 34, par. 5; Ex. R3, p. 35, note; PO2, p. 56, par.*

12]. The ICC Hardship Clause is considered broad, in terms of the events constitutive of hardship [*Clerc et al., p. 3*] and the remedies it provides [*Fucci, par. 131; Kessedijan, p. 424*].

128. Given that Respondent failed to include a witness statement of Mr. Antley regarding why he considered the clause to be broad, Claimant can only speculate.

129. If the objection was with respect to what constitutes hardship, Respondent's argument must fail because clause 12 includes more lenient criteria than the ICC Hardship Clause. For example, while the ICC Hardship Clause references events that make performance "excessively onerous", clause 12 requires only that performance be "more onerous". Moreover, the ICC Hardship Clause includes two additional conditions that do not appear in clause 12: (i) the event was beyond the reasonable control of the party and (ii) the party could not have reasonably avoided or overcome the event or its consequences.

130. If the objection was with respect to the remedies provided by the ICC Hardship Clause (mandatory negotiation and termination of the contract), that also represents a non-issue. In this respect, while the parties undertook negotiations (which failed), Claimant is not requesting termination of the Contract, but adaptation of the Contract.

131. The final language that appears in clause 12 was drafted by Respondent [*PO2, p. 56, par. 12*]. If any ambiguity is perceived, as a tool of last resort, clause 12 should be interpreted against Respondent, pursuant to the *contra proferentem* rule embodied in art. 8 CISG and art. 4.6 UNIDROIT Principles [*Schlechtriem/Schwenzer, p. 168, par. 49; Honnold, p. 118, par. 107.1; Schmidt-Kessel, p. 178, par. 68; Magnus, art. 8, par. 18; see also German athlete case; Land sale case; Fashion products case; Shares sale case; Rioplatense v. Joao Fortes; Faw v. UEFA*].

132. Because Respondent both drafted clause 12 and insisted on DDP delivery, any argument of Respondent that DDP delivery excludes the possibility of invoking an increase of import tariffs as hardship under clause 12 must fail.

133. The standard DDP Incoterm provides that "the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination" [*Ramberg, p. 149, par. 2*].

134. The main difference between the DDP Incoterm and the other destination terms or D-terms (DAT and DAP) is that the seller "bears all costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities" [*Schlechtriem/Schwenzer, p. 1366*].

135. Even if the standard DDP Incoterm means that the seller undertakes the risk of import tariffs, the interplay between the DDP Incoterm and other contractual stipulations or the governing

law must be analyzed [*Coetzee, p. 206, par. 3, p. 307 par. 2; see also Oil case*]. That is because it is widely recognized that Incoterms do not cover issues such as hardship [*Ziegler, p. 1*]. In the present case, clause 10 of the Contract represents a derogation from the standard DDP Incoterm, while clause 12 of the Contract softens the DDP Incoterm in the sense that unforeseen tariffs need not be paid by the seller [*Ex. C5, p. 14*].

136. Claimant agreed to delivery DDP subject to an increase of the price by US$ 1,000 per dose and inclusion of a hardship clause. Respondent ultimately agreed to an increase of US$ 500 per dose. Of this amount, US$ 200 represent direct additional costs associated with transportation and DDP delivery [*PO2, p. 56, par. 8*]. It would be unreasonable to assume that Claimant undertook all risks related to changes of import tariffs in exchange for a net price increase of US$ 300 per dose (US$ 30,000 in total). Claimant expressly disclaimed assumption of these risks: "we can accept for this contract a delivery DDP [...] [but] we are not willing to take over any further risks associated with such a change in delivery terms, in particular [...] changes in custom regulation or *import restrictions*" [*Ex. C4, p. 12, par. 3-4, emphasis added*].

137. If Respondent wanted Claimant to bear the risk of import tariffs in all cases, it should have made its intent known because the subjective intent of a party is irrelevant unless it is manifested in some fashion [*Textiles case; Military weapons case*]. This subjective intent would also be contradicted by Respondent's own statement that DDP was requested given the urgency of the delivery and primarily due to Claimant's "much greater experience in the shipment of frozen semen" [*Ex. C3, p. 11. par. 2; see also PO2, p. 56, par. 9*].

138. In conclusion, clause 12 of the Contract is a broad hardship clause and DDP delivery does not prevent Claimant from invoking hardship if a tariff meets the requirements of clause 12.

2. The tariff falls under the scope of clause 12

139. Clause 12 of the Contract sets forth the criteria that need to be fulfilled in order for an event to be considered hardship. The 30% tariff meets these criteria because it was comparable to health and safety requirements (**a**), was unforeseen (**b**), and made the contract more onerous (**c**).

a. The tariff is comparable to health and safety requirements

140. On 31 March 2017, Ms. Napravnik made a parallel in her email to Respondent between "customs regulation [and] import restrictions" and the "health and safety requirements" [*Ex. C4, p. 12, par. 4*]. She did so in order to clearly state all the risks associated with the DDP term that Claimant was *not* willing to assume and that should be covered by the hardship clause.

141. The tariff at issue here and health and safety requirements, such as those related to the foot and mouth disease (consisting of testing and quarantine), are "comparable" because they represent state interventions that restrict free trade. They both require compliance in order to be able to perform the contractual obligations.

142. They are also "comparable" in magnitude. The additional health and safety requirements that were imposed in 2014 amounted to 40% of the sales price, threatened to destroy the commercial basis of the deal, and nearly resulted in the insolvency of Claimant [*PO2, p. 58, par. 21*]. Similarly, the import tariff at issue here represents 30% of the sales price for the third shipment, destroyed Claimant's profit margin [*PO2, p. 59, par. 31*], resulted in a loss for Claimant [*see infra, par. 171*], and might result in the insolvency of Claimant [*see infra, par. 172-173*].

143. Consequently, the effect of the 30% tariff is comparable to the effect of the previously imposed health and safety requirements.

b. The tariff was unforeseen

144. In order to assert the foreseeability of an impediment, the test is whether a reasonable person ought to have foreseen the impediment's initial or subsequent existence, in light of "the actual circumstances at the time of the conclusion of the contract and taking into account the trade practices" [*Schlechtriem/Schwenzer, p. 1134, par. 14; see also Lindström, p. 1, 8; Brunner, p. 156 et seq.; Tallon, par. 2.6.3; Zeller, p. 157; Staudinger/Magnus, art. 79, par. 5.3*].

145. In the present case, the parties never conducted any business in the past [*PO2, p. 55, par. 1*]. Therefore, no practices were established between them. When the parties began their negotiations, Claimant had never sold racehorse semen before and it did not receive any previous requests, presumably because the ban had just been lifted [*PO2, p. 57, par. 15; PO2, p. 56, par. 11*]. As such, there are no trade usages regarding the sale of frozen racehorse semen.

146. At the time of the conclusion of the Contract, neither party expected such a drastic measure. Equatoriana, Respondent's country, had always been a supporter of free trade [*NoA, p. 6, par. 10*]. Previous restrictions imposed by other countries affecting imports from Equatoriana had not resulted in direct retaliatory measures, with only one exception [*Ex. C6, p. 15, par. 2; NoA, p. 7-8, par. 19*]. Mediterraneo, Claimant's country, had never imposed tariffs on foreign agricultural products of a comparable size [*PO2, p. 58, par. 23*].

147. Moreover, until 2018, no tariff had been imposed on agricultural goods (much less on horse semen) in Equatoriana or Mediterraneo [*PO2, p. 58, par. 25*]. Consequently, the retaliation, as well as the size of the tariff, "came as a surprise even to informed circles" [*Ex. C6, p. 15, par. 3*].

148. The situation between Equatoriana and Mediterraneo is almost identical with the current trade war between the United States and China. Earlier this year, President Trump announced that the United States would impose a 25% tariff on US$ 50 billion of imported Chinese goods. The final list released comprised 1,102 product lines containing industrially significant technology. Following this announcement, the Chinese authorities responded that, "in order to safeguard China's own legitimate rights and interests", China would apply a 25% additional tariff to a list of American products, including agricultural products [*Hong Kong Information Note, p. 10, par. 2.12(c)(i), p. 7, par. 2.11(c)(i)*].

149. In the present case, although the tariff imposed by Equatoriana had been announced on 19 December 2017, effective 15 January 2018 [*PO2, p. 58, par. 25*], it is undisputed that neither party knew, or understood, that it would apply to frozen semen prior to 20 January 2018. It was actually Claimant who learned this first from Equatoriana's customs authorities [*Ex. C7, p. 16, par. 1*]. Respondent then confirmed it with the Equatoriana Ministry of Economics [*PO2, p. 59, par. 34*].

150. Respondent may argue that, because both parties read the article from 20 December 2017 that presented the new tariff on agricultural goods including "animal products" [*PO2, p. 58, par. 26*], Claimant should have foreseen the imposition of the tariff on horse semen. However, pursuant to Mr. Shoemaker's witness statement, not even the Equatoriana Ministry of Economics had understood this: "the employees I spoke to first, were not certain whether frozen racehorse semen was covered" [*Ex. R4, p. 36, par. 2*].

151. Claimant had no obligation to inquire about what products were listed in the schedule released by the Equatoriana Ministry of Agriculture [*NoA, p. 11, par. 6*]. If anything, Respondent had this duty. In the famous *Mussels case*, the court ruled that "a foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports". At most, "the buyer can be expected to have such expert knowledge [and] can be expected to inform the seller accordingly".

152. Moreover, from the perspective of foreign policy, the tariff could not have been foreseen. Both Equatoriana and Mediterraneo are members of the WTO [*PO2, p. 61, par. 47*]. The WTO system does not allow retaliation where the first round of tariffs has a legal basis, such as national security [*Bown, par. 3*]. The tariff imposed by Mediterraneo on foreign agricultural products was "extraordinary" but it was imposed in order to protect the national economy of Mediterraneo, as part of national security, because farmers of Mediterraneo were badly treated in other markets [*PO2, p. 58, par. 23*]. Countries such as China and the United States also consider agriculture and food supply as a matter of national security [*Harkness, p. 1, par. 3;*

Perez, p. 17, par. 3]. When Sweden introduced a similar measure, it was considered an economic defense as an integral part of the country's security policy [*Analytical Index of GATT, art. XXII*].

153. Therefore, Equatoriana was not allowed to retaliate. This Tribunal should also remember that in the other HKIAC arbitration where Respondent is a party as the claimant seeking adaptation, it probably argued that the tariff imposed by Mediterraneo was unforeseeable. If that is the case, the retaliatory tariff imposed by Equatoriana is all the more unforeseeable.
154. In conclusion, the tariff imposed by Equatoriana was not foreseen and could not be foreseen.

c. The tariff made the Contract more onerous

155. Clause 12 of the Contract only requires an event that makes the contract "more onerous" [*Ex. C5, p. 14, clause 12*]. This standard is lower than the "excessively onerous" standard [*ICC Hardship Clause, par. 2(a); CISG Op. 7, par. 3.1*] and the UNIDROIT Principles standard, requiring fundamental alteration of the equilibrium of the contract [*see infra, par. 168-169*].
156. The payment of the 30% tariff certainly makes the Contract more onerous for Claimant. Such payment had two consequences. First, it destroyed Claimant's 5% profit margin and second, it created a 25% loss [*see infra, par. 168-177*].
157. Consequently, the 30% tariff represents hardship under clause 12 of the Contract.

B. The 30% tariff constitutes hardship under the CISG

158. Even if this Tribunal finds that clause 12 does not cover the 30% tariff, Claimant is entitled to adaptation of the price under the applicable law. Art. 79 CISG provides that the impediment must be "beyond [the party's] control and that [the party] could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".
159. The 30% tariff meets the requirements of art. 79 CISG. It was beyond Claimant's control (**1**), it was unforeseeable at the time of the conclusion of the contract, a condition also provided in clause 12 of the Contract [*see supra, par. 144-154*], and it was unavoidable (**2**). Moreover, art. 79 CISG is applicable not only in cases of non-performance, but also when the contract was executed and there is an excessive increase in costs. The tariff resulted in such an increase (**3**).

1. The tariff was uncontrollable

160. Art. 79(1) CISG provides that the impediment must be beyond the control of the promisor. Objective impediments that are external to the promisor qualify as uncontrollable impediments.
161. The contractual allocation of risks is relevant for assessing whether the risk was controllable [*Schlechtriem/Schwenzer, p. 1133-1134, par. 12-13; Staudinger/Magnus, art. 79, par. 16;*

Huber/Mullis, p. 259; Vine wax case; Iron molybdenum case]. As discussed before, Claimant did not undertake the risk of increased import tariffs [*see supra, par. 140-157*].

162. Natural catastrophes, war or terrorist attacks, and governmental measures affecting trade qualify as impediments that exceed a party's sphere of control [*McKendrick, p. 721*]. According to legal scholars, "[s]tate interventions preventing performance generally lie outside the parties' sphere of control" [*Schlechtriem/Schwenzer, p. 1137, par. 18*]. In particular, a change in law or the imposition of a trade sanction is beyond the control of private parties [*Silveira, p. 203; Coal case; Trademark case*].

163. Therefore, the 30% tariff was an uncontrollable impediment under art. 79 CISG.

2. The tariff was unavoidable

164. Art. 79(1) CISG provides that the impediment must be such that the promisor could not reasonably avoid it or overcome it or its consequences. In contracts for the sale of specific goods, as opposed to generic goods, additional efforts to overcome the impediment can constitute hardship [*Brunner, p. 337, par.* 3]. In the present case, Claimant's additional efforts amount to the payment of the tariff. Claimant could not avoid the consequences of the impediment because payment of the 30% tariff was mandatory in order to make the last shipment and fulfill its contractual duties [*PO2, p. 58, par. 27*].

165. Moreover, Claimant had to send the last shipment on 22 January 2018 for it to be received by Respondent DDP on 23 January 2018 [*Ex. C7, p. 16, par. 2; Ex. C5, p. 14, clause 8*]. Respondent needed the doses urgently, before 2 February 2018, due to the start of the breeding season [*PO2, p. 59, par. 33; Ex. R4, p. 36, par. 3*]. Both parties only learned on 20 January 2018 that the 30% tariff was applicable to the last shipment [*Ex. C7, p. 16, par. 1; Ex. R4, p. 36, par. 2*]. That only left Claimant with a little over 24 hours, on a weekend, to decide whether to breach the Contract by postponing delivery or not, and potentially expose itself to a claim for damages from Respondent in case of non-delivery.

166. Ms. Napravnik had to authorize the shipment by 21 January 2018, in the evening [*Ex. C7, p. 16, par. 3*]. As such, she could not insist on an additional payment being made by Respondent prior to authorizing the shipment, for two reasons. First, Mr. Shoemaker had told Ms. Napravnik that he "had already initiated the payment of the second installment" [*Ex. C8, p. 18, par. 1*], which was due on 21 January 2018 [*Ex. C5, p. 14, clause 6*]. Second, Respondent could not have made an additional payment on 21 January 2018, because it was a Sunday.

167. Therefore, the 30% tariff was an unavoidable impediment under art. 79 CISG.

3. The tariff resulted in an excessive increase in costs

168. As discussed above, art. 79 CISG governs hardship and any gaps in the CISG can be filled by resorting to the UNIDROIT Principles [*see supra, par. 71-83*]. Because hardship is not defined in the CISG, it can be assessed on the basis of the definition contained in art. 6.2.2 UNIDROIT Principles, pursuant to which hardship is an event which "fundamentally alters the equilibrium of the contract [...] because the cost of a party's performance has increased" [*see also CISG Op. 7, par. 3.1; Schlechtriem/Schwenzer, p. 90, par. 42; Brunner, p. 322, par. 4; Tallon, par. 3.2; Lindström, p. 25*].

169. Several legal scholars noted that, under this standard, an alteration would need to amount to at least 50% or even 150-200% to constitute hardship [*Schwenzer (2008), p. 717, par. 1; Brunner, p. 432, par. 1; Girsberger/Zapolskis, p. 126; UNIDROIT Principles Commentary (1994), p. 147, par. 1*]. However, the establishment of a universal and mathematically precise alteration threshold would not be wise. Legal scholars also noted that "in ascertaining whether any alteration amounts to hardship, primary consideration is to be given to the circumstances of the individual case" [*Schwenzer (2008), p. 716, par. 2*].

170. In the present case, the impediment altered the price of the third shipment by 30% (an additional US$ 1,500,000) and the total contract price by 15%. Although these percentages might not seem high in the absolute, they must be assessed against four particular circumstances.

171. First, the bearing of the 30% tariff resulted in a loss for Claimant. It did not simply diminish Claimant's profit, it completely erased any profit, given that Claimant's profit margin per dose was small to begin with, only 5% [*PO2, p. 59, par. 31*]. The first two shipments resulted in a profit of US$ 5,000 per dose. In contrast, each dose delivered in the last shipment implied a loss of US$ 25,000 per dose. Claimant's total loss was therefore US$ 1,250,000.

172. Second, the bearing of the tariff may result in Claimant's insolvency. Legal scholars noted that if the impediment brings the financial ruin of the party facing it, the threshold for assessing hardship is lowered [*Schwenzer (2008), p. 716, par. 3; Brunner, p. 438, par. 3*].

173. Claimant might become insolvent because the automatic prolongation of its two lines of credit depends on Claimant making a profit of US$ 480,000 in 2017 and 2018, which should have essentially been financed from its US$ 500,000 profit from the Contract with Respondent (5% of the total sales price of US$ 10,000,000) [*PO2, p. 59, par. 29, par. 31*]. That profit margin is now gone. In the absence of a profit, negotiations of a new credit line will be necessary, and they will be very difficult. They might require Claimant to sale part of its business. One of Claimant's creditors is now the bank of Claimant's largest competitor and plans to make the

sale of Claimant's dressage business a precondition to agreeing to a new line of credit [*PO2, p. 59, par. 29*]. Respondent had knowledge of this financial impact [*PO2, p. 59, par. 28*].

174. Third, Respondent argued in the other HKIAC arbitration in which it is the claimant and seeks adaptation that the 25% tariff imposed by Mediterraneo should result in adaptation of the contract. As such, the higher (30%) tariff imposed by Equatoriana surely meets the required threshold to justify adaptation of the contract in the present arbitration.

175. Fourth, Claimant also incurred opportunity costs. The opportunity cost represents the benefits an individual, investor or business misses out on when choosing an alternative over another [*Watts, p. 89, par. 2*]. In the present case, the opportunity cost became sharply higher than the one expected at the conclusion of the Contract.

176. Claimant sold its doses to Respondent, which resulted in a 25% loss for the former. Claimant had an opportunity to sell to anyone, because interested buyers in Nijinsky III's frozen semen existed. This is reflected by several facts. First, Nijinsky III is one of the most sought-after stallions for breeding [*NoA, p. 4-5, par. 3*] and the demand for its semen was high. Second, Respondent resold 15 doses to 10 other breeders [*PO2, p. 57, par. 20*]. Third, Claimant would have had the opportunity to sell directly to those breeders [*PO2, p. 57, par. 19*]. One of them approached Claimant about purchasing frozen semen of another stallion [*PO2, p. 57, par. 20*].

177. Those other breeders were willing to pay a higher price for the frozen semen. The record reflects that they were willing to pay 20% more: US$ 120,000 instead of US$ 100,000 [*id.*]. The 20% profit that Respondent made is an opportunity cost for Claimant. In conclusion, the tariff resulted in an excessive increase in costs and represents hardship.

II. <u>This Tribunal should order Respondent to pay an additional amount of US$ 1,250,000</u>

178. The purpose of the hardship clause and of the adaptation remedy is to rectify a contractual imbalance. Pursuant to art. 6.2.3(4)(b) UNIDROIT Principles "[i]f the court finds hardship it may, if reasonable, […] adapt the contract with a view to restoring its equilibrium". The adaptation should result in an "adequate adjustment of the parties' respective obligations" [*Fontaine/Ly, p. 478, par. 5; Chevron v. Ecuador*]. However, "adaptation of the contract […] does not necessarily mean that a perfect equilibrium between the obligations must be sought" [*Mekki, p. 2352, par. 9*]. At the very least, adaptation must "make performance bearable for the aggrieved party" [*Fucci, par. 149; see also Brunner, p. 499*] and the alternative contractual terms should "reasonably allow for the consequences of the event" [*ICC Hardship Clause, par. 2-3*].

179. In the present case, this Tribunal should adapt the contract by increasing the price by US$ 1,250,000 because this represents the most adequate and reasonable approach for restoring

the equilibrium of the Contract. First, the price increase requested is equal to the loss incurred by Claimant and Claimant is waiving all profit. This additional amount would simply make performance bearable for Claimant (**A**). Second, the price increase requested is equal to 83% of the tariff and is therefore proportionate to the risk allocation originally agreed by the parties in the Contract (**B**). Third, a number of equitable considerations support the price increase requested by Claimant as being reasonable (**C**).

A. The price increase requested is equal to Claimant's loss

180. In contract adaptation cases, it is useful to review the expected costs and the objective costs after the occurrence of the supervening event [*Girsberger/Zapolskis, p. 128*]. In the present case, for the 50 doses delivered with the third shipment, Claimant expected a cost of US$ 4,750,000 and incurred an actual cost of US$ 6,250,000.

Claimant's financial outcome	Costs	Contract price	Result (profit/loss)
Expected outcome	US$ 4,750,000	US$ 5,000,000	US$ 250,000 (5% profit)
Current outcome	US$ 6,250,000	US$ 5,000,000	US$ 1,250,000 (25% loss)
Proposed outcome	US$ 5,000,000	US$ 5,000,000	US$ 0 (no profit/no loss)

181. As such, Claimant incurred a loss of US$ 1,250,000 from the third delivery [*see also supra, par. 168-177*]. By requesting that Respondent be ordered to pay an additional amount of US$ 1,250,000 over the agreed upon price, Claimant waives its profit margin of 5% entirely and requests only that it should not suffer a loss under the Contract.

182. If Claimant is left to suffer a loss, performance of the Contract would not be bearable for Claimant. Claimant had a strained financial situation since 2014 [*PO2, p. 57, par. 15, p. 58, par. 21, p. 59, par. 29*]. Now, Claimant's plan to redress its financial situation is seriously endangered [*PO2, p. 59, par. 29*]. On one hand, Respondent could easily bear the amount requested by Claimant [*PO2, p. 59, par. 30*]. On the other hand, Claimant will be financially endangered if it does not receive it [*PO2, p. 59, par. 29, see supra, par. 172-173*].

B. The price increase requested is proportionate to the risk allocation in the Contract

183. In order to adapt the Contract, this Tribunal must look at the equilibrium decided by the parties at the time of conclusion of the Contract [*Maskow, p. 663; Bund, p. 392*]. The final result should be to re-establish a balance fairly close to the original one found in the contract [*Frignani, p. 705; Zaccaria, p. 155; Darankoum, p. 473*] and to provide for a "proportional adaptation of

the price" [*Fontaine/Ly, p. 469, p. 1*]. To establish how to restore the contractual equilibrium, this Tribunal should analyze the contractual allocation of risks between the parties [*UNIDROIT Principles Commentary (2016), p. 226, par. 3; Schlechtriem/Schwenzer, p. 1135, par. 15*].

184. If, pursuant to the contract, the majority of the risks are undertaken by one party, then that party should also bear the majority of the losses resulting from the hardship event. The price increase requested by Claimant is equal to 83% of the tariff (US$ 1,250,000 out of US$ 1,500,000). In this sense, it is proportionate to original risk allocation agreed by the parties in the Contract.

185. As discussed before, Claimant did not undertake the risk of increased import tariffs, and limited its risk by inclusion of the force majeure and hardship language in clause 12 [*see supra, par. 140-157*]. In contrast, Respondent undertook a majority of risks under the Contract. For example, Respondent undertook the risks of the stallion's fertilizing capacity and of no live foals (clauses 2 and 7 of the Contract). Respondent also undertook the risks, obligations and costs associated with: compliance with registry requirements (clause 9 of the Contract), transportation (clause 10 of the Contract), inspection within 24 hours of delivery (clause 10 of the Contract) and insurance (clause 13 of the Contract).

C. Several equitable considerations support the price increase requested

186. Equitable considerations are relevant for the overall analysis in case of adaptation [*Horn, p. 190; Frignani, p. 705*]. First, the price increase requested by Claimant is proportionate to the unjustified profit made by Respondent (**1**). Second, the price increase requested should be granted based on the conduct of the parties (**2**).

1. The price increase requested is proportionate to the profit made by Respondent

187. Respondent beached the Contract and sold 15 doses to 10 different breeders for a price 20% higher than the price Respondent paid to Claimant [*PO2, p. 57, par. 20*]. Actually, the fact-finding mission of this Tribunal revealed that "*from the beginning* Respondent had planned to sell at least 25 doses per year to other breeders" [*PO2, p. 56, par. 11, emphasis added*].

188. Claimant had made the resale to third parties dependent on "express written consent", coupled with an information requirement "about the use of every dose" [*Ex. C2, p. 10, par. 3; PO2, p. 57, par. 16*]. Furthermore, the Contract limited Respondent's use of the doses to the following three mares: Azeri, Ta Wee, and Zenyatta. For any other use, Respondent had to inform Claimant [*Ex. C5, p. 13, par. 3*] and request its express written consent. Respondent complied with none of these requirements, despite being aware that stud owners have an important and legitimate interest in knowing for which mares the semen is used [*PO2, p. 57, par. 19*].

189. The resale prohibition represents an "essential condition" to entering into contract. The test of essentiality requires that the promise was of such importance that the promisee would not have entered into the contract unless the promisee had been assured of strict or substantial performance of the promise and this ought to have been apparent to the promisor [*Tramways v. Luna Park*]. Its essential character stems from industry considerations and is supported by the fact that it was mentioned by Claimant in the very first communication with Respondent, along with the price and delivery terms [*Ex. C2, p. 10, par. 3*]. This communication must at the very least be taken into consideration under art. 8(1) and art. 8(3) CISG.

190. Respondent made a profit of US$ 300,000 from the resale of 15 doses. Coincidentally, this amounts represents the profit that Claimant had to make in 2018 (but will not be able to) in order to benefit from an automatic prolongation of its lines of credit [*PO2, p. 59, par. 29*]. Claimant is not asking this Tribunal to order Respondent to disgorge its profit. Claimant is merely requesting that this profit be taken into consideration for purposes of determining the amount by which the price should be adapted. This would be appropriate also in light of the similarity between the percentages of Respondent's profit (20%) and Claimant's loss (25%) in view of restoring the original equilibrium of the Contract.

2. The conduct of the parties justifies the price increase requested

191. First, Respondent's witness, Mr. Shoemaker, admitted to actively deceiving Claimant: "I knew that C[laimant] would not deliver if I were to reject their request outright" [*Ex. R4, p. 36, par. 5*].

192. Second, a parties' unjustified reluctance to renegotiate may influence the tribunal's final decision [*Horn, p. 190; Zaccaria, p. 154*]. In the present case, it was Claimant who initiated the meeting on 12 February 2018 to discuss adaptation [*PO2, p. 60, par. 35*] but it was Respondent who put an abrupt end to that meeting thereby making recourse to this Tribunal necessary. When confronted with the breach of the resale prohibition, Ms. Kayla Espinoza, Respondent's CEO, stopped the negotiations and stated that she was no longer interested in any further cooperation with Claimant [*Ex. C8, p. 18, par. 4*].

193. **Conclusion.** Claimant is entitled to adaptation and an additional payment of US$ 1,250,000 as the most adequate and reasonable method for restoring the equilibrium of the Contract.

REQUEST FOR RELIEF

194. With respect to the three issues identified by this Tribunal for purposes of the first procedural phase, counsel for Claimant respectfully requests this Tribunal to:

1. Find that the Tribunal has the jurisdiction and the power to adapt the Contract;
2. Admit the evidence related to the other HKIAC arbitral proceedings of Respondent; and
3. Find that Claimant is entitled to the price increase of US $1,250,000.

On behalf of Phar Lap Allevamento

Cezara Diaconescu 

Voica Lupașcu 

Claudia Mihalcea 

Ana Negrea 

Daria Pătrășcoiu 

Ciprian Pozderie 

Bianca Radoslav 

Andreea Radu 

CERTIFICATE AND CHOICE OF FORUM

We, the undersigned, members of the team of the University of Bucharest, hereby certify that this 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.

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

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

- ☑ We are submitting two separately prepared, different Memoranda, to Vis East Moot and to Vienna Vis Moot.
- ☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in
  - ☐ Vis East Moot
  - ☐ Vienna Vis Moot

Cezara Diaconescu

Voica Lupașcu

Claudia Mihalcea

Ana Negrea

Daria Pătrășcoiu

Ciprian Pozderie

Bianca Radoslav

Andreea Radu