上海财经大学

Shanghai University of Finance & Economics

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	AGAINST:
PHAR LAP ALLEVAMENTO	**BLACK BEAUTY EQUESTRIAN**
RUE FRANKEL 1	2 SEABISCUIT DRIVE
CAPITAL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
CLAIMANT	**RESPONDENT**

XING LIANG – ZIWEI LIU – HAOYANG MA – SHUQI WANG

YUXUAN YANG – LAN YU– GUOFANG XUE – CHI ZHANG

SHANGHAI, CHINA

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INDEX OF ABBREVIATIONS

AC	Advisory Council
Art. / Arts.	Art. / Art.s
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Contract for the International Sale of Goods
CISG-AC	CISG Advisory Council
Cl.	CLAIMANT
CLOUT	Case Law on UNCITRAL Texts
CJEU	Court of Justice of the European Union
the Contract/the Sales Contract	Frozen Semen Sales Contract
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules
ICA	International commercial arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IBA	International Bar Association
Ltd.	Limited Liability Company
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
Mr.	Mister
No. / Nos.	Number / Numbers
NoA	Notice of Arbitration
Op.	Opinion

p. / pp.	Page / Pages
Para. / Paras.	Paragraph / Paragraphs
PO1	Procedural Order 1
PO2	Procedural Order 2
P.R.C.	People's Republic of China
R.	RESPONDENT
s. / ss.	Section / Sections
SoF	Statement of Facts
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts

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CISG	United Nations Convention on Contracts for the International Sale of Goods 11 April 1980, Vienna	57,67,69,70,71,72,73, 82,83,84,85,86,88
Commentary on IBA Rules 2010	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Sub-committee published in 2 B.L.I., pp. 16-36 (2000)	30
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STATEMENT OF FACTS

1. Phar Lap Allevamento (CLAIMANT) is a company located in Mediterraneo. It operates stud farm covering all areas of the equestrian sport and owns various kinds of horses, including its well-known racehorses, the most famous of which is called Nijinsky III.

2. Black Beauty Equestrian (RESPONDENT), which is famous for its broodmare lines, decided to establish a racehorse stable three years ago. At the moment, when RESPONDENT contacted CLAIMANT to ask for information about the availability of frozen semen, the Equatoriana Government had imposed serious restrictions on the transportation of all living animals.

3. At that time, CLAIMANT was told that RESPONDENT's investors were keen to commence a racehorse breeding programme taking advantage of the temporary lift of the ban on artificial insemination. The former did not question it with intention to increase revenues.

4. On 24 March 2017, CLAIMANT sent the offer by email. The RESPONDENT raised no objection except three terms: delivery, choice of law and the forum selection clause. In several communications, the Parties agreed on the hardship clause, choice of law and arbitration clause in the end. Unfortunately, the original negotiators of the Parties were severely injured in an accident, resulting in their absence from the finalization of the contract.

5. To the Parties' astonishment, a new President of Mediterraneo announced 25% tariffs on agricultural products from Equatoriana. And then the Equatoriana government imposed 30% tariffs on selected products from Mediterraneo including on animal semen. The Parties started negotiations regarding a price adjustment for the frozen semen immediately, and RESPONDENT appeared to generally accept the need for a price increase. However, these negotiations were abruptly terminated by the RESPONDENT's CEO before agreement was reached on a price adaptation

6. Taking account of all facts above, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

ARGUMENTS

ISSUE A: THE TRIBUNAL HAS THE JURISTICTION AND/OR POWER UNDER THE ARBITRATION AGREEMENT, WHICH SHOULD BE GOVERNED BY MEDITERRANEO LAW, TO ADAPT THE CONTRACT

I. the law of Mediterraneo shall govern the arbitration agreement

1. RESPONDENT has contested the arbitral tribunal's jurisdiction or power to adapt the contract, which in essence challenges the applicable law governing the arbitration clause. The law of Mediterraneo shall govern the arbitration agreement because both parties chose the law of Mediterraneo either expressly or impliedly (A) and under no circumstances can the law of Danubia govern the arbitration agreement (B).

A. both parties chose the law of Mediterraneo

2. To solve this issue, a widely accepted three-stage test deriving from the *Sulamérica* case should be applied, which has been followed by other courts [*BCY v BCZ at Para.40; Arsanovia at Para. 20*]. The English Court of Appeal held in the *Sulamérica* case that the governing law of an arbitration agreement is to be determined in accordance with express choice; if not, then implied choice; failing which then the closest and most real connection [*Sulamérica at Para. 9. 25*]. In this case both parties chose the law of Mediterraneo explicitly (i); impliedly (ii); and the result of *Sulamérica* shall be distinguished (iii).

(i) both parties have explicitly chosen the law of Mediterraneo to govern the arbitration agreement

3. The *Sulamérica* approach takes the law of the contract as its starting point. The Court of Appeal held that where the arbitration agreement forms part of a substantive contract, an express choice of proper law to govern that contract is an important factor to be taken into account [*Sulamérica at Para. 26*]. In the *Arsanovia* case, the English High Court also held that the wording of "this agreement should be governed by" naturally expresses the choice of law governing the arbitration clause as well as the substantive contract [*Arsanovia at Para. 22*]. In the instant case, "This Sales Contract shall be governed by the law of Mediterraneo" is contained in the contract, which shows parties' intention expressly for the law of Mediterraneo to govern the arbitration

clause.

(ii) both parties have impliedly chosen the law of Mediterraneo as the governing law of the arbitration agreement

4. Assuming but not conceding, in the absence of an express choice of governing law of the arbitration agreement, the dispute is over the application of the second step of the test, namely the implied choice. Both parties impliedly chose the law of Mediterraneo as the governing law of the arbitration agreement because the substantive law in the contract (a); negotiation history (b) and arbitration's manifest close relationship all suggest the law of Mediterraneo (c).

(a) express choice of the substantive law also implies parties' choice of law for the arbitration agreement

5. The court in *Sulamérica* case held that in the absence of any indication to the contrary, parties are assumed to have intended the whole of their relationship to be governed by the same system of law. This meant that in the absence of an express choice of law for the arbitration agreement, the "natural inference" was that proper law of the main contract should also govern the arbitration agreement [*Sulamérica at Para. 11*]

6. Also, mere presence of the choice of seat is insufficient to defeat the presumption that the parties intended to be governed by the same system of law [*BMO v. BMP at Para.40; Arsanovia at Para. 21*]. In the present case, by only referring to "This Sales Contract shall be governed by the law of Mediterraneo" and deleting the reference to any other choice of law, both parties regarded it unnecessary to choose another law to govern the arbitration clause.

(b) negotiation history suggested parties intended the law of Mediterraneo to govern the arbitration

7. Party autonomy is the main pillar of international arbitration. Party autonomy denotes the ability of parties "to decide on all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law" [*Böckstiegel, Para. 1*]. Therefore, when deciding the law governing the arbitration, the tribunal shall respect parties' true intention.

8. CLAIMANT has emphasized several times its intent to adhere to the Law of Mediterraneo regarding procedure issues [*Cl. Ex.4, 10, Para.5; R. Ex.2, Para 6*]. It would be inconsistent with

CLAIMANT's stance if the revised arbitration clause is viewed as an acceptance of Danubian law as the governing law of the arbitration clause. CLAIMANT firstly offered RESPONDENT the Law of Mediterraneo to govern the arbitration clause along with jurisdiction in Mediterranean Court [*Cl. Ex. 2, 10, Para 5*]. RESPONDENT accepted the Law of Mediterraneo on the condition that Mediterranean courts would not have jurisdiction [*Cl. Ex.3, 11, Para. 3*]. After changing from court proceeding to arbitration and deleting RESPONDENT's proposed choice of law governing the arbitration clause, CLAIMANT never conceded its stance on the Law of Mediterraneo. Without any objection from RESPONDENT, RESPONDENT had agreed to be bound by the Law of Mediterraneo as the governing law of the arbitration clause.

9. Furthermore, the draft of the arbitration clause under the same heading of the contract is a strong indicator of parties' intention to be governed by the same system of law [*Klöckner at Para. 4*]. In the instant case, RESPONDENT expressly put the contract's stipulation on the governing law and arbitration clause together under the same heading entitled "Applicable Law and Dispute Resolution" [*Cl. Ex. 3, 11, Para.5*]. Moreover, this arbitration clause was all the time negotiated as a part of the Sales Contract [*Cl. Ex.3, 11, Para.5; R. Ex.2, 34, Para.6*].

(c) parties' implied choice is also demonstrated by arbitration's manifest close relationship with the law of Mediterraneo

10. English case law also confirms the elements in numerous disputes to justify the finding of implied choice: dispute resolution clauses; standard forms; the existence of connected contracts; the place of performance and effects of the contract; the level of sophistication and neutrality of the potential laws; the currency, place and mode of payment [*Manuel Penades, p.247*]. EU's Rome I indicates that in sales contracts the closest connection is with the seller's place of habitual residence or in the case of a company, the seller's place of central administration.
11. In the present case, the parties agreed on DDP, Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery [*PO2, 56, Para. 10*]. The general contract law Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1, 53, Para. 4*]. This Sales Agreement is concluded based on the template of the law of Mediterraneo [*PO2, 55, Para.3*]. The final negotiations and the signing of the Agreement took place in Mediterraneo on 6 May 2017 [*PO2,*

56, Para.13].

(iii) the result of the Sulamérica case shall be distinguished

12. Although the Court in *Sulamérica* case held that the law of the seat should be the governing law of the arbitration agreement, such result is distinguishable from the present case. More specifically, the Court in the *Sulamérica* case based its decision on two factors.

13. Firstly, the Court found that the choice of the seat tended to suggest that the parties intended the law of the seat to govern the arbitration agreement. However, in this case, when RESPONDENT signed the contract, they never intended the Danubian Law to govern the arbitration clause [*R. Ex.2, 34, Para.6; R. Ex.3, 35, Para.7*]. Secondly, in the *Sulamérica* case, if the contractual law was chosen, the arbitration agreement would only be enforceable with both parties' consent, which greatly diminished the effect of the arbitration agreement. However, under the current case, the choice of the Danubian Law would actually impede the enforcement of the arbitration agreement. In line with the pro-arbitration position developed by modern court jurisprudence worldwide, the Law of Mediterraneo shall apply.

B. under no circumstances can the Danubian Law be regarded as the law governing arbitration clause

(i) the doctrine of separability is not sufficient for establishing the law of the seat to govern the arbitration agreement

14. As enshrined in Art. of the 19.2 of the HKIAC Rules, for the validity of the arbitration agreement, the arbitration agreement shall be treated as an agreement independent of the other terms of the contract. The purpose of the doctrine of separability is to give the arbitration clause independent validity so that arbitration proceedings may still arise even if the main contract's validity is challenged [*Redfern & Hunter, Para. 2.101*]. The court in the *BCY v BCZ* also held that the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause-embodying their chosen method of dispute resolution- remains effective even if the main contract is alleged or found to be invalid. It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed. Resort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged

[*BCY v BCZ, Para.60*].

15. As the Hong Kong Court of Appeal held in *Klöckner* case, that only in extreme circumstances where there is no express choice as to the proper law of the contract, will the court consider the implication that the law of the seat applies [*Klöckner at Para. 5*]. However, in the instant case, both parties expressly chose the law of Mediterraneo to govern the substantive contract, leaving no room for this tribunal to apply the law of the seat.

16. Furthermore, this arbitration agreement is not freestanding. The Singapore High Court acknowledged that freestanding arbitration agreements are rare and gave two examples: firstly, in highly complex transactions, where parties enter into a single arbitration agreement covering disputes arising out of several contracts or an overall project; and secondly, an arbitration agreement concluded after a dispute has arisen [*BCY v BCZ* at Para. 66]. However, the arbitration agreement in the instant case did not cover different contracts nor was it concluded after the adaptation dispute. This arbitration agreement was signed on 6 May 2017 [*PO2, 56, Para.13*]. Thus, the doctrine of separability does not invalidate CLAIMANT previous interpretation of the Contract.

(ii) the concern for neutrality does not arise

17. RESPONDENT may argue that the seat of arbitration is chosen based on a desire for a neutral forum and the law of the seat will usually be different from the law governing the main agreement. However, the court in the *BCY v BCZ* held that the law of the seat governs the procedure of the arbitration; it does not necessarily follow that the seat's substantive law, i.e. the law of contract which would govern the formation of an arbitration agreement-would be neutral [*BCY v BCZ,* Para. 63]. In the instant case, there is no neutrality no matter what contract law is applied. If the contract law of Danubia is applied, it will unduly favor the *RESPONDENT*. Therefore, neutrality is not the key point in the present case.

II. the arbitral tribunal has the jurisdiction and power to adapt the contract

A. the arbitral tribunal has the jurisdiction to adapt the contract

18. CLAIMANT and RESPONDENT consented to submit disputes to arbitration administered by HKIAC under the arbitration clause in the Frozen Semen Sales Agreement. Pursuant to Art.

19.1 of HKIAC Rules as well as the competence-competence doctrine enshrined in Art. 16 of Model Law, the arbitral tribunal may rule on its own jurisdiction [*Redfern & Hunter, Para. 1.53-1.54*].

19. Further, Clause 15 of the Sales Agreement provides that "**Any** dispute arising out of this contract… shall be referred to and finally resolved by arbitration administered by the HKIAC". As a result, **any** dispute concerning the contract shall be decided by the arbitral tribunal. Clause 12 is a disputed hardship clause, which is a "dispute arising out of this contract" within the scope of the Clause 15. Therefore, this arbitral tribunal has the jurisdiction to adapt the contract.

B. the arbitral tribunal has the power to adapt the contract

20. Under the law of Mediterraneo, the arbitral tribunal has the power to adapt the contract based on Art. 6.2.3 (4)(b) of the UNIDROIT Principle (i); and on Art. 8(3) of the CISG (ii).

(i) pursuant to Art. 6.2.3(4)(b) of the UNIDROIT Principles, the tribunal has the power to adapt the contract

21. Since Mediterraneo contract law is a verbatim adoption of the UNIDROIT Principles, UNIDROIT Principles can also be applied to this case. Art. 6.2.3(4) (b) of the UNIDROIT Principles provides that if the court finds hardship, it may adapt the contract with a view to restoring its equilibrium. As Art. 1.11 of UNIDROIT Principles specifies that court includes the arbitration tribunal.

22. CLAIMANT, as a disadvantaged party in a trade war, who paid the whole tariff, is entitled to request renegotiation of the price. Because, firstly, the Sales Agreement did not incorporate a clause for the automatic adaptation of the contract [*Cl. Ex.5, 14*]. Second, due to the changed circumstances, CLAIMANT requested renegotiation of the price as soon as possible [*Cl. Ex.7, 16*]. Thirdly, with the *RESPONDENT*'s rejection of the request for adaptation, CLAIMANT is financially endangered by paying the 30% tariffs [*PO2, 59, Para. 29*]. *RESPONDENT* was fully aware of the impact of the 30% tariff on CLAIMANT's financial situation [*PO2, 59, Para.28*]. Based on the foregoing reasons, the tribunal has the power to adapt the contract.

(ii) pursuant to Art. 8(3) of the CISG, the tribunal has the power to adapt the contract

23. There is consistent jurisprudence in Mediterraneo that in sales contacts governed by the CISG,

the latter also applies to the conclusion and interpretation of the arbitration clause contained in such contracts [*PO1, 53, Para. 4*]. Art. 8(3) of CISG provides that in determining the intent a party would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations. Art. 11 provides that a contract of sale need not be concluded by writing and may be proved by any means, including witnesses. As Schwenzer has pointed out that according to Art. 8(3) and Art. 11 of CISG is incompatible with a general exclusion of the parol evidence rule. Furthermore, barring evidence of prior oral agreements is contrary to Art. 11 [*Schlechtriem & Schwenzer, p.33, p.159*].

24. On 12 April 2017, Ms. Napravnik and Mr. Antley had a meeting, in which Mr. Antley said that in his view that it should probably be the task of the arbitrators to adapt the contract if the parties could not agree. It was also Ms. Napravnik's preference and understanding of the existing provisions [*Cl. Ex.8, Para. 4*] This shows that both parties have agreed to give the tribunal the power to adapt the contract. Therefore, the Tribunal has the jurisdiction and power to adapt the contract.

ISSUE B: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

25. Submitting evidence to support one's claim is an inherent right of either party involved in an arbitration, as well as a burden has to be born. Art. 22.1 of HKIAC Rules provides that each party shall have the burden of proving the facts relied on to support its claim or defence. CLAIMANT now seeks to prove that the tariffs imposed between the two states are unforeseeable and constitutes hardship which gives rise to contract adaptation. In supporting such claim, CLAIMANT intends to submit evidence from the other arbitration proceedings also with Black Beauty Equestrian there involved. For the avoidance of any doubt, CLAIMANT will refer to the other arbitration as the mare arbitration (as RESPONDENT in that case was selling a mare), and the present arbitration as the semen arbitration.

26. More specifically, CLAIMANT would like to submit Black Beauty's submissions from the mare arbitration, as well as the Partial Interim Award issued by the tribunal. CLAIMANT now is not in possession of such documents but have been promised those. CLAIMANT's basic stance is that he is entitled to submit these evidence to the tribunal and the tribunal should accept it; or alternatively, CLAIMANT is making a request for RESPONDENT to produce such documents in front of the tribunal, and the tribunal should order it accordingly.
27. There are four reasons to support CLAIMANT's basic stance: (A) the evidential rules in ICA; (B) the relevance and materiality of the evidence; (C) no compelling confidentiality interests; and lastly (D) illegally obtained evidence can be admitted if the clean-hand doctrine is satisfied.

A. the evidential rules in international arbitration is flexible and subject to parties' choice.

28. International arbitration features flexible evidence rules and party autonomy is paramount [*Waincymer, 754*]. Strict rules of evidence from domestic litigations do not apply automatically in international arbitration and preclude illegally obtained evidence. According to HKIAC Rules Art. 22.2, the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. Art. 22.3 further provides that the tribunal shall have the power to admit or exclude any documents, exhibits or other evidence. Therefore, CLAIMANT is entitled to submit the evidence before the tribunal regardless of the assumption. It is the tribunal that has the authority to decide whether the so-called illegal evidence is admissible.
29. As Professor Sandifer has indicated, in the absence of the provision of a specific ground of exclusion in the arbitral agreement, there is no rule of law that can be invoked as binding a tribunal to exclude particular evidence. In practice, arbitration tribunals have been unwilling to exclude evidence in reliance upon general rules of principles, drawn from the practice of other tribunals or from municipal law. Procedural fairness entails parties' right to submit evidence for the sake of their claim or defence, and the burden is upon the party who are challenging any piece of evidence to their relevant basis. He also acknowledged that it may be appropriate for the international tribunal to adopt a more flexible approach, not rejecting evidence that might normally be excluded in municipal litigation because the members of the tribunal, being jurists

trained in the sifting of evidence, are competent to appreciate the evidence according to its intrinsic and relative value [*Sandifer, 767*]. *Lauterpacht* has also pointed out that international judicial settlement may be relied upon to produce, independently of any particular system of law, rules appropriate to its own requirements and circumstances [*Lauterpacht, 56*]. Whatever may the merits of any strict domestic law rules be regulating the admissibility of evidence and of burden of proof, it is not practicable to adopted them in a wholesale in the international context. In fact, they have been expressly repudiated in almost all the institutional rules and great discretion is given to the arbitration tribunal to decide which rule of evidence to apply.

(i) in absence of parties' choice, CLAIMANT proposes to adopt IBA Rules governing the issues of admissibility and document production

30. For nearly three decades, IBA Rules has been widely used in international arbitrations to provide detailed provisions on evidentiary procedures. Parties of international arbitration may agree to incorporate it, or tribunals can always refer to it as useful soft-law or guidelines. During its drafting and revisions, the International Bar Association has been cautiously striking a balance between rules of evidence from both common law and civil jurisdictions and applying a best practice doctrine to ensure harmonization [*Commentary on IBA Rules 2010, Para. 3,5*]. In this way, it preserves procedural fairness between the parties, as well as uphold party autonomy and flexibility, which are among the significant advantages in international arbitration.

31. Therefore, in the present case, in absence of parties' choice on rules of evidence, CLAIMANT proposes to adopt IBA Rules to govern the issue of document production and admissibility. This would provide helpful considerations and standards for both parties and the tribunal, which would also enhance efficiency in this arbitration.

B. the evidence from the mare arbitration is relevant and material to the semen arbitration

32. Art. 3.3(b) of IBA Rules provides that the party that requires document production shall prove that how the documents are relevant to the case and material to the outcome. Art. 3.7 also provides that in determining the ordering of the document, the tribunal shall also take into

consideration of the relevance and materiality of evidence. Art. 9.2(a) stipulates that the tribunal shall exclude evidence on the basis of lack of sufficient relevance to the case or materiality to its outcome. CLAIMANT here submits that the documents from the mare arbitration are sufficiently relevant and material.

(i) the evidence from the mare arbitration is sufficiently relevant to the semen arbitration

33. The two arbitrations happened in parallel under the same context, i.e. during the trade war between the two states. Parties both faced the disruptions brought by tariffs during the contract enforcement and therefore identical issue arises on the foreseeability of the tariffs and whether or not hardship clause is satisfied and may further give rise to contract adpation. More importantly, these two arbitrations involve one same party, Black Beauty Equestrian. More specifically, RESPONDENT who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price on the basis of unforeseeable tariffs. Therefore, the evidence from the mare arbitration is sufficiently relevant to the semen arbitration.

(ii) the evidence from the mare arbitration is sufficiently material to the outcome of the semen arbitration

34. Both arbitrations have referred to ICC Hardship Clause, in which foreseeability is one of the key tests or factors. While determining the issue of foreseeability, the tribunal should take into consideration of all circumstances. RESPONDENT is one business entity in the race horse breeding industry. Whether or not he has foreseen the tariffs or been able to do so can certainly be inferred from his deals and sales in the same business period. Being self-contradictory on the same issue in two relevant arbitrations can also indicates a violation of the good faith principle, which may also affect the deliberation of the tribunal in the semen arbitration.

C. no compelling commercial confidentiality interests involved

35. RESPONDENT submits the evidence shall be rejected as it is confidential. However, being confidential alone is not sufficient enough to reject the evidence or refuse to produce. Art. 3 of IBA Rules specifies the standards for document production, which indicates that admitting

internal documents from one party is not only possible but also in line with the mechanism to enhance efficiency of the arbitration [*Ashford, 65*]. Art. 9.2 (e) provides the threshold for confidentiality shall be "compelling".

36. In the present case, it is hard to find any compelling commercial confidentiality interests involved, such as trade secrets, patents, know-how, etc. What CLAIMANT has requested is submissions and the partial interim award from the mare arbitration which may furnish more legal reference to the tribunal in the semen arbitration while determining the issue of foreseeability and hardship.

37. In addition, the duty of confidentiality in ICA is far from universal [*Born, 2014, 2103; Marlon Meza-Salas, Para. 1*]. There is no uniform approach among jurisdictions and arbitration institutions. Many national legislations on arbitration do not reflect the issue of confidentiality. UNICITRAL Model Law also contains no provisions in this regard. Many arbitration institutions regulate confidentiality in their rules but the content and scope various significantly. Moreover, the current trend of case law has seen the diminishing the confidentiality in ICA proceedings as a whole [*Redfern & Hunter, Para 2.164; Esso/BHP; U.S. v. Panhandle*].

38. More importantly, CLAIMANT is not under any confidentiality obligation, under which he shall refrain from disclosing the material he possesses. In fact, it is RESPONDENT's employees that might have breached their confidentiality duty. Therefore, such confidentiality requirements shall not impose any burden on CLAIMANT, especially should not hinder CLAIMANT be pursuing its legal rights and interests.

(i) Protection measures may be adopted if necessary

39. Art. 45.1 of HKIAC Rules impose broad confidentiality duty to the parties in one arbitration conducted under HKIAC Rules. If the documents from the mare arbitration is introduced to the semen arbitration, the disclosure is limited into a very small scope where all the parties are bound by confidentiality. Furthermore, under Art. 9.4 of IBA Rules provides that the tribunal may make reasonable arrangements to furnish confidentiality protection. The tribunal should consider such protection measures available and strike a balance between CLAIMANT's right to a just outcome and RESPONDENT's expectations to confidentiality. CLAIMANT here submits that

the balance should tip over in favour of us.

(ii) CLAIMANT is entitled to submit the evidence if such usage can be justified by analogy to the recognized exceptions of confidentiality duty for a party

40. CLAIMANT submits that best way to justify the entitlement on such submission is to weigh the duty of confidentiality against other competing interests which are recognized by caselaw as certain limitations or exceptions to the duty of confidentiality. CLAIMANT further submits that, as a third-party and information recipient, if the usage of information is analogous to the recognized exception scenarios, then such entitlement is justified. This also celebrates the principle of transparency enshrined in UNCITRAL Rules on Transparency.

(a) such submission is reasonably necessary for CLAIMANT to protect its legitimate interests

41. The test in case law set for the exceptions on proceeding materials and documents is, firstly, whether or not such disclosure is reasonably necessary to establish or protect the legitimate interests of an arbitrating party [*Hassneh Insurance*]; or secondly, whether or not such disclosure is required by the interests of justice and fair disposal of the disputes [*John Forster Emmott*].

42. In certain circumstances, the parties' legitimate interests may override the implied duty of confidentiality. In *Hassneh*, the defendant was reinsured by the plaintiff under reinsurance contracts. After the defendant commenced an arbitration for recovery under the policies and having obtained an interim award, they as the reassured wished to proceed against the placing broker, a third party, and therefore wanted to disclose to the broker the interim award as well as the reasoning and other documents from the first arbitration. It was held by the English High Court that the disclosure of the award was reasonable and necessary, which saw a step further in recognizing that exceptions to confidentiality may exist, in order to facilitate subsequent proceedings.

43. The same analogy may apply in the present case. Although CLAIMANT is not a party to the arbitration between RESPONDENT and its customer, these two concurrent arbitrations share the high level of similarity and are mutually affected. The arbitration between RESPONDENT and its

customer is regarding the sale of a mare to Mediterraneo, which is also affected by the trade conflicts and unexpected tariffs, where the core issue is also on an adaptation of price invoking an unforeseeable change of circumstances [*Email by Langweiler, 49, Para.3; PO2, 60, Para.39*]. RESPONDENT'S contradictory statements in these two arbitrations regarding the same issue, especially on the foreseeability of tariff of 25% and 30%, substantially undermines its legal arguments against CLAIMANT. Thus, by analogy, it is reasonable and necessary for CLAIMANT to submit the information received and promised in this regard.

(b) such submission is required by the interests of justice and fair disposal of the disputes

44. Alternatively, it is CLAIMANT'S position that interests of justice entail the evidence of RESPONDENT's contradictory statements on foreseeability and further necessity of price adaptation. In the *John Forster Emmott* case, MWP initiated an arbitration against Emmott in London, while at the same time MWP initiated litigation in New South Wales and the British Virgin Islands against people closely associated with Mr. Emmott on the basis of them committing fraud and conspiracy. Mr. Emmott sought to disclose information of the arbitration to the parties in the litigation. The interests of justice required that, the English court, so far as possible, should ensure that parties to London arbitration should not seek to use the cloak of confidentiality, with a view to mislead or potentially misleading foreign courts.
45. In the present arbitration, a judgement on foreseeability so closely related to facts and as the basis of the primary claim should be subject to the principle of estoppel. It is highly contradictory that in one case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable 30% allegedly does not [*Email by Langweiler, 49, Para.3*]. If such evidence is precluded on the basis of confidentiality, the confidentiality duty of ICA is deployed by RESPONDENT as a disguise in hiding its inconsistent descriptions of facts and claims and violation of the principle of good faith, on essentially the same legal issue under the same context.
46. Furthermore, these two parallel arbitrations are both conducted under HKIAC Rules and this institution with RESPONDENT as the mutual party. CLAIMANT's submission of communicating

on the issue of foreseeability prevents the party from distorting the facts whenever it is to his detriment and manipulating the tribunal which may create significant inequality and injustice, to all the parties RESPONDENT is against.

(iii) to submit the award from the other arbitration proceedings is also justified

47. CLAIMANT further submits that, other than information and submissions from the proceedings, the Tribunal should accept the award that CLAIMANT has been promised from the other proceedings. In the case law, it is stated that the arbitral award can be distinguished from other proceeding materials in terms of the nature of confidentiality. The test set is whether or not it constitutes a legitimate use of the earlier award in a later proceeding. Specifically, relying on the principle of estoppel in a subsequent arbitration can be a legitimate use of the earlier award which may outweigh the confidentiality duty [*Associated Electric & Gas Ins. Serv. Ltd.(AEGIS)*].

48. The *AEGIS* case involved two successive arbitrations between the same parties (AEGIS and European Re), arising out of two separate disputes under a facultative reinsurance agreement. Both disputes, involved the obligation of European Re to indemnify AEGIS. European Re sought to introduce the award from the first arbitration to establish an estoppel defense, arguing that the findings in the earlier proceedings about the rights of the parties under the disputed art. of the reinsurance agreement, were binding, on the parties and the arbitrators, in the second proceeding.

(a) such submission enhances the enforcement of the previous award in essence

49. The reliance of the award in a later arbitration in the form of estoppel can constitute a kind of enforcement of that previous award. The court recognized that the essential purpose and foundation of arbitration was determination of the parties' rights by the arbitrators pursuant to the authority given to them by the parties. In the subsequent arbitration where there is the same claim of indemnity between the same parties, the earlier award must prevent Aegis from disputing the arbitrator's decision from the first arbitration. This reliance appreciates the very purpose of ICA, and constitutes a legitimate use of the earlier award.

50. In the present case, CLAIMANT submits that it is entitle to such reliance as well. Admittedly,

CLAIMANT is not a party to the other arbitration. However, the two arbitrations are under the same context of trade conflicts, have RESPONDENT as the mutual party and concern the same issue in dispute, namely, whether the additional tariff is reasonably foreseeable and therefore justifies a price adaptation. It is determined by the award from the other arbitration that is binding on RESPONDENT based on its consent to the original arbitration agreement. Acceptance and communication of such award in the present arbitration is consistent with its enforcement and the principle of estoppel which prevents the abuse of procedure and enhances equality and fairness between the parties.

(b) such submission reduces inconsistency of arbitration awards with a mutual party

51. Moreover, CLAIMANT submits that the inconsistency between the awards would be reduced by such reliance, especially regarding the same legal issue in the same context conducted under the same arbitration rule in the same arbitration institution. In addition, the private and, in theory, confidential nature of arbitration, should not pave the way for parties to arbitrate the same point *ad infinitum* to get the result they prefer by manipulating and twisting the facts and the law in multiple arbitrations.

D. illegally obtained evidence can be admitted if the clean-hand doctrine is satisfied

52. In general, in international arbitration, there are no mandatory rules prevents the tribunal from admitting into evidence documents that may be unlawfully obtained [*John, Para.6*]. In fact, there has been tribunals accepted evidence obtained by computer hack. In the *Caratube* case, the tribunal took considerations of the relevance and materiality of the evidence and placed special emphasis on the fact that they were "lawfully available to the public". The Tribunal found that firstly, the plaintiffs alleged the documents were material and relevant to the dispute; and secondly, the documents were now in the public domain. Thus, the tribunal found that the balance tipped in favor of admitting the documents. This well reflects the flexibility on the rules of evidence in international arbitrations and tribunal's consideration on striking a balance.
53. Reisman and Freedman have also pointed out that decision makers in the international commercial context, when presented with claims supported by illegally obtained evidence, must balance the needs of a good faith plaintiff to secure evidence for its case against the rights of

the defendant to the integrity of its own processes of confidentiality. They also give one explanation of such practice of liberal admission before international tribunals that the nature of the cases presented and of the tribunals themselves demands an especially broad tolerance. After all, tribunals in the international law context have traditionally been viewed as creatures of consent with only those powers the parties have accorded them [*Reisman & Freedman, 738*].

54. In *Persia v Council* case, the CJEU introduced the concept of "clean hands" and stated that since the CLAIMANT was not involved in the disclosure of the diplomatic cables, the possibly unlawful nature of that disclosure could not be held against it. In the present case, CLAIMANT should also be regarded as clean-handed as they have not conducted any computer hack against RESPONDENT, nor did they breach any confidential agreement with RESPONDENT as there haven't been any. Being the innocent recipient of the relevant information, CLAIMANT's right to submit the evidence and defend its case shall prevail.

ISSUE C: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT, OR UNDER THE CISG.

I. CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Clause 12 of the contract.

55. There are four reasons supporting CLAIMANT's claim: (A) Clause 12 is composed of a hardship clause and a force majeure clause [*Answer to NoA, 30, Para.4*]; (B) The hardship clause is a revision of the ICC Hardship Clause 2003, which amends the latter's components but acknowledges its principal effect; (C) in the present case, all the components under the hardship clause are fulfilled; and (D) by applying Clause 12, CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price.

A. Clause 12 is composed of both a hardship clause and a force majeure clause

56. Clause 12 of the Sales Agreement is a combination of a force majeure clause and a hardship clause. The force majeure clause reads, *"Seller shall not be responsible for… or acts of God"* and the hardship clause reads that *"neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [*Answer to*

NoA, 30, Para. 4; Cl. Ex.5,13]. Parties put the two clauses together in Clause 12 only for the sake of convenience, and never intended to subject the hardship clause to the force majeure clause. In addition, the effects of the two clauses are different. Therefore, the two clauses should be interpreted separately.

B. The hardship clause is a revision of the ICC Hardship Clause 2003, which amends the latter's components but acknowledges its effect

57. It is undisputed that the law governing the main contract is the law of Mediterraneo. Since the law of Mediterraneo is a verbatim adoption of the UNIDROIT Principle and Mediterraneo is a Contracting State of the CISG, CISG can be used to interpret the main contract including the hardship clause under Clause 12 [*PO1, 52, Para. 4*]. Art. 8 of CISG provides that parties' statements and conducts can be interpreted according to their common intention or from a reasonable person standard. Due consideration should be given to all relevant circumstances including the negotiations. In the present case, it is (i) parties' common intention, if not then (ii) a reasonable person's understanding on the hardship clause is a revision of the ICC Hardship Clause 2003, which amends the latter's components but acknowledges its principal effects.

(i) parties' common intention

58. After CLAIMANT's proposal on including a hardship clause [*Cl. Ex.4, 12*], and relying on ICC Hardship Clause [*R. Ex.2, 34; PO2, 60, Para. 39*], RESPONDENT did not challenge the effect or the admissibility of the general provision in ICC Hardship Clause, but merely concerned that it was too broad [*R. Ex.3; Answer to the NoA, Para. 9*]. Subsequently, by adding a restrictive wording to the general "hardship" in relation to ICC Hardship Clause, the parties had mutually agreed on provisions in ICC Hardship Clause with modified scope of hardship. Therefore, the preliminary negotiations prove that parties' common intention is to apply a modified hardship clause with exactly the same effect as the ICC Hardship Clause.

(ii) a reasonable person's understanding

59. The nature and purpose of Clause 12 is to relieve CLAIMANT from unforeseen onerous obligations when hardship occurs. To achieve this certain purpose, the provision "*Seller shall not be responsible…for hardship*" is effective only if it incorporated the scope and the effect of

"hardship". As the ICC Hardship Clause has been widely adopted in international commercial contracts, it is reasonable for people of the same kind as the parties to associate "hardship" in Clause 12 with ICC Hardship Clause. RESPONDENT's concern about broad wording was settled by adding the wording of "comparable". However, it should be noted that compared to "excessively onerous" and "unforeseeable" in the ICC Hardship Clause, "more onerous" and "unforeseen" in Clause 12 are lower thresholds of requirements. Thus, from a reasonable person's understanding, the hardship clause in Clause 12 is a modified clause which upholds the effect of ICC Hardship Clause.

C. in the present case, all the components under the hardship clause are fulfilled

60. According to the wording of Clause 12, three elements should be satisfied in order to invoke hardship, namely "comparable", "unforeseen" and "more onerous". In the present case, given that (i) the tariff imposition is comparable to additional health and safety requirements, and that (ii) the tariff imposition is an unforeseen event and beyond CLAIMANT's reasonable control to avoid it, and that (iii) the tariff imposition has made the performance more onerous, CLAIMANT can invoke the hardship clause.

(i) the tariff imposition is comparable to additional health and safety requirements

61. The tariffs imposition is comparable to additional health and safety requirements based on two reasons. Firstly, both of them are acts of governments which can suddenly impose higher costs on CLAIMANT to deliver goods through the Customs. Secondly, both of them can result in the same effect, increasing expenses through the deal and causing CLAIMANT great loss. Therefore, the first requirement under the hardship clause is fulfilled.

(ii) the tariff imposition is an unforeseen event and beyond CLAIMANT's reasonable control to avoid

62. The tariff imposition is an unforeseen event based on two reasons. Firstly, the Government of Equatoriana was always an ardent supporter of free trade and had only conducted retaliatory measures once [*Cl Ex.6, 15, Para.2*]. Since one cannot base a pattern on a single incident, the imposition of tariff on this occasion is unforeseen. Secondly, racehorse semen is generally not classified as an agricultural product, because it's used for sports purposes instead of agricultural

ones. In this sense, even the employees from relevant ministry were uncertain whether frozen racehorse semen was covered under "animal products" [*R. Ex.4, 36, Para 2; Cl Ex.8, 17, Para. 6; PO2, 58, Para. 25, 26*]. For the foregoing reasons, CLAIMANT could not foresee the tariff imposition. Additionally, the tariff imposition is an act of the government of Equatoriana, and CLAIMANT thus having no means to avoid it [*PO2, 58, Para. 27*]. Thus, the second requirement under the hardship clause is fulfilled.

(iii) The tariff imposition has made the performance more onerous

63. In determining whether any alterations have made the performance more onerous, profit margin and parties' economic status are usually taken into consideration [*Schwenzer, p.709*]. The latter concerns courts and tribunals most as they strongly disfavor economic ruin of a party resulting from the performance of a contract as a result of unforeseen circumstances [*ICC Case No. 9994; the Reservoir case*].

64. In the present case, CLAIMANT has a relative low profit margin of 5% [*Cl. Ex.8, 17*]. Due to the tariff imposition, CLAIMANT had to bear a burden of 30% additional costs, that is six folds of its limited 5% profit margin, which totally destroyed the economic basis of the deal and would ruin CLAIMANT's financial status [*Cl. Ex.8, 17, Para.6*]. Especially when CLAIMANT is confronting with bankruptcy, the restoration plan from bankruptcy would be seriously endangered if CLAIMANT had to bear the $1,250,000 [*PO2, 59, Para.29*]. Thus, the tariff imposition has made CLAIMANT's performance more onerous.

D. By applying Clause 12, CLAIMANT is entitled to payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price

65. Art. 3 of the ICC Hardship Clause 2003 provides that where alternative contractual terms are not agreed by parties, the party invoking the Clause is entitled to terminate the contract. However, a French case shows that this clause can be invoked to adapt contract price [*the Flippe Christian case*].

66. Here, after the increase of tariff, CLAIMANT immediately initiated negotiation on alternative terms to maintain the equilibrium of the contract [*Cl. Ex.7, 16; R. Ex.4, 36, Para. 2*]. Before the parties reached an agreement, RESPONDENT's CEO became aggressive in a meeting and

thereafter unilaterally stopped the negotiation [*Cl. Ex.8, 17, Para. 11*]. Thus, the negotiation on reasonable alternative terms failed due to the non-cooperative attitude of RESPONDENT, and CLAIMANT had the right to terminate the contract pursuant to article 3 of the ICC Hardship Clause 2003. However, CLAIMANT had made the shipment because of RESPONDENT's previous promise to find a solution and their emphasis on a long-term mutually beneficial relationship [*Cl. Ex.2, 10, Para.3*]. Taking into account CLAIMANT's good faith and desire to maintain the business relationship, the Tribunal shall exercise its power to adapt the contract price.

67. With regard to the amount, CLAIMANT is entitled to US$1,250,000, that is 25% tariff. Under this circumstance, CLAIMANT will use its 5% profit to pay for 5% tariff for RESPONDENT and profits zero itself, suffering a lost profit of 5% [*Art. 74 and Art. 77 CISG, loss includes loss of profits*]. Although RESPONDENT will pay for the 25% tariff, it has already gained 20% profits from the resale, making it also suffer a 5% loss. This is the best way to achieve the equilibrium between parties.

68. Therefore, CLAIMANT asks the Tribunal to award the payment of US$ 1,250,000 or any other amount resulting from an adaption of the price.

II. CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under the CISG.

69. There are three reasons supporting CLAIMANT's claim: (A) CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price based on article 7(2) of CISG; (B) alternatively, if the Tribunal does not find a gap in CISG, CLAIMANT is entitled to the payment under article 79 of the CISG; (C) additionally, CLAIMANT is entitled to the payment based on the underlying good faith principle in CISG.

A. CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price based on article 7(2) of CISG

70. Pursuant to Art. 7(2), there are three arguments: (i) a gap concerning the issue of hardship without non-performance exists in the CISG; (ii) general principles on which CISG is based can be used to fill the gap in which the UNIDROIT Principles is included; and (iii) under Art. 6.2.2 and Art. 6.2.3 of the UNIDROIT Principles, CLAIMANT is entitled to the payment of

US$ 1,250,000 or any other amount resulting from an adaptation of the price.

(i) a gap concerning the issue of hardship without non-performance exists in the CISG

71. Art. 4 of the CISG provides that the Convention governs the rights and obligations of the seller and the buyer. Since hardship is an important issue concerning the rights of the seller, it falls within the scope of CISG. However, the wording "hardship" never appears in the CISG. Besides, the relevant clause, Art. 79, in essence settles different issues. It is because Art. 79 only deals with exemptions for non-performance while hardship does not necessarily require failure of performance. Therefore, a gap concerning the issue of hardship exists in the CISG.

72. This idea has been supported by courts in practice. In the case of *Scafom International BV v. Lorraine Tubes S.A.S.*, the Supreme Court of Belgium found that economic hardship was not dealt with by the CISG and held that the gap in the CISG is to be filled by general principles of international trade. [*Scafom International*]

(ii) pursuant to article 7(2) of CISG, the UNIDROIT Principles can be used to fill the gap.

73. Art. 7(2) of the CISG provides that general principles on which CISG is based can be used to fill any gaps in CISG. The principle of equity enshrined in Art.79 can be applied as a general principle. [*Schlechtriem & Schwenzer, p.135*] As the UNIDROIT Principles are well recognized as an interpretative authority and the hardship section it contains elaborates the principle of equity, it can assist the Tribunal to apply this principle and fill this gap in CISG.

(iii) under Art. 6.2.2 and Art. 6.2.3 of the UNIDROIT Principles, CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price.

74. Art. 6.2.2 of the UNIDROIT Principle provides that hardship occurs when: (a) the occurrence of events fundamentally alters the equilibrium of the contract; (b) the events occur or become known to the disadvantaged party after the conclusion of the contract; (c) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (d) the events are beyond the control of the disadvantaged party; and

(e) the risk of the events was not assumed by the disadvantaged party. In the present case, all five requirements are fulfilled, and hardship exists. Pursuant to Art. 6.2.3 of the UNIDROIT Principles, after the failure of the negotiation, CLAIMANT can ask the tribunal to adapt the contract with a view to restoring its equilibrium. In this sense, CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price.

(a) The sudden imposed tariff fundamentally alters the equilibrium of the sales contract

75. Whether the occurrence of an event has fundamentally altered the equilibrium of the contract is decided case by case. To understand the requirement of "fundamental" in Art. 6.2.2, it is useful to draw an analogy with Art. 3.2.7 of the UNIDROIT Principle which deals with "gross disparity" at the time of the conclusion of the contract. [*Vogenauer & Kleinheisterkamp, p. 719, n. 8 ad Art. 6.2.2*] Art. 3.2.7 provides that several factors should be taken into account to determine whether the contract or term unjustifiably gives the other party an excessive advantage, including the fact that the other party has taken unfair advantage of the first party's dependence or economic distress and the nature and purpose of the contract. As the commentary points out, what the term "excessive" is required is that the disequilibrium is in the circumstances so great as to shock the conscience of a reasonable person, which is comparable to the amount of "fundamental" [*Art. 3.2.7 of the UNIDROIT Principles, Official Comment n. 1*]. Thus, it can be concluded that the standard for "fundamental" is variable taking account of economic status of parties involved as well as the nature of the contract. A similar approach was adopted by the court in *Islamic Republic of Iran v. Cubic Defense Systems*, where the tribunal put the cost for CLAIMANT and the profit for RESPONDENT together to determine whether parties have the right to terminate the contract.

76. Here, CLAIMANT initially has a profit of 5% [*PO2, 59, Para.31*]. After paying for the 30% tariff for the third shipment, CLAIMANT suffered a 25% loss on the third shipment. Considering CLAIMANT's impending bankruptcy, the figure reaches the threshold of the standard of "fundamental". In addition, RESPONDENT gained a 20% profit after the tariff was imposed. There exists a resale prohibition which is reflected in the sales agreement by an express

information requirement defining the mares. [*Cl. Ex.5, 13*] It is further proved by the fact that the resale requires an "express written consent". [*PO2, 57, Para.16*] By urging CLAIMANT's delivery, RESPONDENT is able to make a 20% profit from the resale of 15 doses of the semen regardless of the resale prohibition [*Cl. Ex.8, 17; PO2, 57, Para.20*].

77. Thus, the sudden imposition of the tariff fundamentally altered the equilibrium of the sales contract.

(b) The tariff was imposed after the conclusion of the contract

78. The contract was concluded on 6 May 2017 [*PO2, 56, Para.13*]. The tariff was imposed on 19 December 2017. [*Cl. Ex.6, 15, Para.2*] Therefore, the tariff was imposed after the conclusion of the contract.

(c) The tariff could not reasonably have been taken into account by CLAIMANT at the time of the conclusion of the contract

79. As Equatoriana has always supported free trade and has only once imposed comparable tariff, CLAIMANT could not reasonably have taken the tariff into consideration at the conclusion of the contract [*Cl. Ex. 6, 15, Para. 2; PO2, Para.26*].

(d) The tariff was beyond the control of CLAIMANT

80. The tariff was imposed by the government of Equatoriana, which was beyond the control of CLAIMANT.

(e) The risk of the tariff was not assumed by CLAIMANT

81. Despite its acceptance of DDP, CLAIMANT has made it clear in its email to RESPONDENT that it is "not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions" [*Cl. Ex.4, 13, Para.4*]. It was agreed by RESPONDENT [*PO2, 56, Para.8*]. Since the sudden imposed tariff falls into the category of "customs regulation or import restrictions", the risk of the tariff was not assumed by CLAIMANT.

B. Alternatively, if the Tribunal does not find a gap in CISG, CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Art. 79 of the CISG

82. CLAIMANT recognizes that on the face of Art. 79, it is not applicable. However, arguments can be made regarding (i) the scope of "impediment"; (ii) Art. 79(5); and (iii) non-performance.

(i) Art. 79 of the CISG regulates hardship

83. AC Opinion No.*7* provides that a party that finds itself in a situation of hardship, may invoke hardship as an exemption from liability under Art. 79. This idea has been adopted by courts in various jurisdictions. In a 2001 Dutch case, the court held that even though hardship was not a means to an excuse under Art. 79 it still was within the scope of Art. 79 [*D21 Case*]. In the *2009 Scafom International case*, the Belgium Supreme Court dealt with the issue of hardship when applying the CISG. The court structured an argument that the general principles of Art. 7 CISG, especially the duty of good faith supported the inclusion of hardship within the scope of Art. 79.

(ii) CLAIMANT can seek for remedies under Art. 79(5) of the CISG which includes contract adaptation

84. Art. 79(5) of the CISG states that, "nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". Art. 3.2 of CISG Advisory Council Opinion No.7 provides that in a situation of hardship under Art. 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based. Pursuant to (a) the main goal of the CISG, and (b) the implication in CISG, contract adaptation is a remedy provided for under Art. 79(5). Thus, CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Art. 79 of the CISG.

(a) Adaptation of contract is consistent with the main goal of the CISG.

85. One of the main goals of CISG is to promote global free trade. To stabilize and facilitate this international commerce, it is essential to make the best use of contracts, and only a fundamental breach can constitute the termination of the contract. Since contract has set up the equilibrium

of interests between the parties, when the equilibrium of the contract is disturbed, it is the best way to adjust this balance by adapting the contract. This power of adaptation should not be excluded, merely because there is no provision in CISG.

(b) There exists the implied adaptation of contract in CISG.

86. Although there is no provision explicitly stipulating the adaptation of contract, CISG indeed contains an implied power to adapt the contract. According to Art. 46 of CISG, the content of contract could be changed by delivering the substitute goods or by providing repair work. Besides, the adaptation of the price is also available, according to Art. 50 of CISG, the reduction of the price is also available when the seller has supplied goods which do not conform to the requirements of the contract.

(iii) The Tribunal could extend the application of article 79 to this case even though CLAIMANT performed the delivery.

87. CLAIMANT's delivery of the third shipment was based on Mr. Shoemaker's promise to find a solution afterwards and his indication of an increased contract price on which CLAIMANT was entitled to rely. [*R. Ex.4, 36; Cl. Ex.8, 17*] In these circumstances, based on concerns of fairness, the tribunal could interpret the non-performance requirement under Art. 79 broadly and extend it to performance which is based on a clear promise by the other party, for example CLAIMANT's performance in this case.

C. Additionally, CLAIMANT is entitled to the full amount of US$ 1,250,000 based on the underlying good faith principle in CISG

88. The Preamble of CISG emphasizes the importance of equality and mutual benefit. According to No.13 of the Explanatory Note by the UNCITRAL Secretariat, "…arbitral tribunals should promote……the observance of good faith in international trade." In the present case, (i) CLAIMANT demonstrated its good faith throughout the transaction, while (ii) RESPONDENT demonstrated its lack of good faith throughout the transaction. The Tribunal shall take the characters of both parties into consideration and protect CLAIMANT by granting it the full amount of US$ 1,250,000.

(i) CLAIMANT demonstrated its good faith throughout the transaction.

89. To show its kind consideration based on the status quo and good will to keep the business relationship, CLAIMANT only asks for 25% of the price of the third shipment, which means it will make no profits from the third shipment. Besides, because of RESPONDENT's promise to find a solution, CLAIMANT made the third shipment very soon to respond to RESPONDENT's requirement, which fulfilled the contract. What's more, as soon as CLAIMANT knew about the tariff imposition, it made urgent and timely notice to RESPONDENT with its honest will to solve problems through amicable negotiations.

(ii) RESPONDENT demonstrated its lack of good faith throughout the transaction.

90. RESPONDENT made it clear in the telephone conference that it would consider the price adaptation [*R. Ex.4, 36*], but after the third shipment, it totally refused to acknowledge that expression, which shows it took advantage of a party acting in good faith.

91. The resale restriction was clearly stated by CLAIMANT in its first e-mail and reflected in the sales agreement. However, RESPONDENT resold the semen to a third party at a 20% premium regardless of this restriction and refused to acknowledge the effect of its agreement to the restriction, which is an act lacking good faith as well.

92. Despite the onerous situation the CLAIMANT faced, it has showed its good faith throughout the whole transaction. Besides, even though the CLAIMANT knew that it has the choice of legally refusing the third shipment, CLAIMANT still made it because of RESPONDENT's promise and its own good will to keep the transaction going on and protect the contract. Therefore, CLAIMANT's payment of the 30% tariff does not mean it had the duty to pay but means that it paid the sum in advance. Considering all the above, there is no possible reason to charge the 25% price from the CLAIMANT. Therefore, CLAIMANT here has good reason to claim at least for the whole amount of US$ 1,250,000, which is its amicable compromise.

CONCLUSION

For the reasons above, CLAIMANT respectfully submits that:

1. THE TRIBUNAL HAS THE JURISTICTION AND/OR POWER UNDER THE ARBITRATION AGREEMENT, WHICH SHOULD BE GOVERNED BY MEDITERRANEO LAW, TO ADAPT THE CONTRACT.

2. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

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