SIXTEENTH ANNUAL
WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

CHINA-EU SCHOOL OF LAW

AT THE CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW

On behalf of	Against
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	RESPONDENT

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¶/¶¶	paragraph/paragraphs
%	per cent
ANoA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
cf.	*confer* (see)
Ch.	Chapter
CISG	United Nations Convention on the International Sale of Goods (1980)
Cl. Ex.	CLAIMANT's Exhibit
ed.	edition
e.g.	*exempli gratia* (for example)
et al.	*et alii* (and others)
fn.	footnote
HKIAC	Hong Kong International Arbitration Center
ICC Rules	Rules of Arbitration of International Chamber Of Commerce (2012)
ILA	International Law Association
inter alia	among other things
Letter Fasttrack	Ms. Fasttrack's letter of 3 October 2018
Letter Langweiler	Mr. Langweiler's letter of 2 October 2018
lex arbitri	law of the seat of arbitration
No.	Number/Numbers

NoA	Notice of Arbitration
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts (2010)
PO 1	Procedural Order No. 1 of 5 October 2018
PO 2	Procedural Order No. 2 of 2 November 2018
Resp. Ex.	RESPONDENT's Exhibit
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
UNIDROIT	International Institute for the Unification of Private Law
US$	United States Dollars
v.	*versus* (against)
Vol.	Volume

LEGAL TEXTS

CISG	United Nations Convention on the International Sale of Goods 1980
HKIAC Rules	Hong Kong Arbitration Rules 2018
ICSID Arbitration Rules	ICSID Convention, Regulation and Rules
LCIA Rules	LCIA Arbitration Rules (2014)
PECL	Principles of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts (2010)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments

STATEMENT OF FACTS

1. Phar Lap Allevamento (*hereinafter* **"CLAIMANT**"), located in Mediterraneo, is a company offering frozen semen of its champion stallions for artificial insemination. Black Beauty Equestrian (*hereinafter* **"RESPONDENT"**), incorporated in Equatoriana, is a company famous for its broodmare lines that produce world champions in jumping and dressage. CLAIMANT and RESPONDENT (*together hereinafter* "**Parties**") are involved in these proceedings.

2. On **21 March 2017,** RESPONDENT contacted CLAIMANT with its intention to buy 100 doses of frozen semen of Nijinsky III, a star stallion, from CLAIMANT, since a ban on artificial insemination for race horses had been lifted in Equatoriana.

3. On **24 March 2017,** CLAIMANT replied that it would supply the 100 doses which should be picked up at its premise. The email contained a prohibition on resale of semen without CLAIMANT's express written consent.

4. After RESPONDENT objected to the delivery terms and proposed DDP on **28 March 2017**, CLAIMANT, on **31 March 2017**, stated its unwillingness to take over any further risks associated with such a change in the delivery terms and insisted on the inclusion of a hardship clause at minimum. The inclusion of an arbitration clause was also proposed by CLAIMANT.

5. On **10 April 2017**, RESPONDENT proposed a draft for the arbitration clause through email, which designated Equatoriana as the seat and the law of Equatoriana as the law governing the arbitration clause. In the responding email on **the next following day**, CLAIMANT changed the seat to Danubia and deleted the law governing arbitration clause, while reaffirmed the law applicable to the Sales Agreement was Mediterranean law.

6. During the meeting of **12 April 2017**, CLAIMANT insisted on the hardship clause that would ensure an adaptation of the contract, and the Parties agreed to give the adaptation power to the arbitrators. RESPONDENT promised it would come back with a proposal with express reference. CLAIMANT agreed, while acknowledging that it was not necessary from a legal point of view. However, negotiators on both sides were involved in a car accident and injured.

7. On **6 May 2017,** the Frozen Semen Sales Agreement (*hereinafter* "**Sales Agreement**") was concluded by representatives on both sides who did not further discuss the arbitration and choice of law clauses, without express reference to either arbitration agreement or the hardship clause. The Parties agreed the law of Mediterraneo should govern the Sales Agreement.

8. When preparing the last shipment, in **January 2018**, CLAIMANT was informed about the unexpected 30% tariffs imposed by Equatorianian government on semen used for artificial insemination from Mediterraneo, which made the shipment 30% more expensive.

9. On **20 January 2018,** CLAIMANT informed RESPONDENT about these tariffs and asked for renegotiation. RESPONDENT replied **the following day** that the doses were needed urgently and ensured CLAIMANT that a solution to these additional tariffs would be found through negotiation. Hence, CLAIMANT made the third shipment on **23 January 2018** and paid for the 30% tariffs.

10. On **12 February 2018,** during the renegotiation, CLAIMANT confronted with RESPONDENT about its breach of resale prohibition. RESPONDENT stopped the renegotiation and refused to pay any additional amount for the tariffs.

11. On **31 July 2018,** CLAIMANT submitted its Notice of Arbitration, asking for a payment of US$ 1,250,000 resulting from an adaptation of price.

ARGUMENT

ISSUE A: THE TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

12. Under the Sales Agreement between CLAIMANT and RESPONDENT, there were to be three shipments of frozen horse semen. During negotiations, RESPONDENT requested that CLAIMANT handle shipping, due to its familiarity with the logistics. CLAIMANT agreed to ship DDP on the condition that it would not 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*]. Before the third and last shipment, there was an unexpected imposition of 30% import tariffs where none has existed before. This would result in CLAIMANT paying an additional US$ 1,500,000 and thus losing a substantial amount of money on the transaction. This was discussed with RESPONDENT before the third shipment: RESPONDENT assured CLAIMANT that "a solution would be found through negotiation" and urged shipment as it "needed" the dosages [*Cl. Ex. 8*]. After receiving the shipment, RESPONDENT refused to negotiate, and CLAIMANT has, therefore, turned to this Tribunal to adapt the Sales Agreement.

13. As agreed by the Parties, these arbitral proceedings in the present case are conducted under 2018 HKIAC Administered Arbitration Rules ("HKIAC Rules") [*Cl. Ex. 5, ¶15; PO1, ¶2*]. Art 19(1) HKIAC Rules states, "[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement" [*HKIAC Rules, Art. 19(1)*]. This is consistent with the well-established principle of *Kompetenz-Kompetenz*, by which an arbitral tribunal has the authority to determine its own jurisdiction [*Reisman/Craig/Park/Paulsson, p. 646; Texaco case*].

14. Neither CLAIMANT nor RESPONDENT dispute the existence of a valid and binding arbitration agreement in Clause 15 of the Sales Agreement [*Cl. Ex. 5*]. RESPONDENT, however, challenges the Tribunal's jurisdiction and power to adapt the Sales Agreement on the ground that the arbitration clause in the Sales Agreement did not cover adaptation. CLAIMANT rejects this and asserts that the Tribunal does have the jurisdiction and power to adapt the contract for two reasons: firstly, Mediterranean Law should apply to determine the jurisdiction and power of the Tribunal **(A)**; Secondly, under Mediterranean law, the Tribunal has the *jurisdiction* and *power* to adapt the Sales Agreement **(B)**.

A. MEDITERRANEAN LAW SHOULD APPLY TO DETERMINE THE JURISDICTION AND POWERS OF THE TRIBUNAL.

15. The arbitration agreement is the source of both the jurisdiction and powers of the arbitral tribunal [*Redfern and Hunter, p. 314, 341*], which should be interpreted under the applicable law. The rules of these proceedings, the HKIAC Rules [*Cl. Ex. 5*], do not dictate the law to be applied to the arbitration clause absent an agreement by the parties. It is left to the tribunal to determine it. In this case, in fact, the Parties agreed upon a law applicable to the Sales Agreement and it is CLAIMANT's position that this was intended to also cover the arbitration clause.

16. As a general rule, and one which allows a logical and orderly inquiry into the proper law governing an arbitration agreement, a tribunal should conduct a three-stage enquiry: first, into any express choice by the parties; second, into any implied choice by the parties; and third, into the closest and most real connection. These inquiries ought to be embarked on in that order and separately [*Sulamerica case, ¶25; Firstlink case, ¶11; BCY case, ¶40*]. In this case, the Tribunal needs to inquire into the first stage to determine that Mediterranean law applies **(a)**. Even were there no express choice of law, Mediterranean Law would be the implied choice of law for the arbitration clause **(b)**.

a) Mediterranean Law is the express choice for the arbitration clause construed in the Sales Agreement.

17. Mediterranean Law is expressly chosen by the Parties to govern the entire Sales Agreement, which would include the arbitration clause contained therein. This can be seen in Clause 14 of the Sales Agreement, which stipulates that "[t]his **Sales Agreement** shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)" (emphasis added) [*Cl. Ex. 5*].

18. The wording "Sales Agreement" must logically be interpreted to refer to the whole "FROZEN SEMEN SALES AGREEMENT" [*Cl. Ex. 5*], since a capitalized term in a contract has a specific meaning [*PDV case, ¶314; cf. Global case, ¶14; cf. Voser, p. 783 note 1*]. The term "Sales Agreement" in Clause 14 must refer to the title of the agreement, which is "FROZEN SEMEN SALES AGREEMENT", and thus to the whole of the Sales Agreement, substantive and arbitration terms. Therefore, the choice of Mediterranean law in Clause 14 should be read to not only refer to the substantive part, but also to the arbitration clause.

19. RESPONDENT might rely on the doctrine of separability to differentiate the choice of law for the arbitration clause from that for the substantive contract. However, this would misconstrue the doctrine of separability. As the court reasoned in *BCY case* that, "[r]esort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged" [*BCY case, ¶60*]. The doctrine of separability evolved to give effect to the parties' expectation that their arbitration clause remains effective, even if the main contract is alleged or found to be invalid [*Sulamerica case, ¶26; BCY case, ¶60*]. Its "purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes" [*Sulamerica case, ¶26; BCY case, ¶60*].

20. In this case, the validity of the arbitration clause is not under debate [*PO 2, ¶48*], making the separability doctrine of no relevance. Thus, the express choice of law for the Sales Agreement indicates the express intention of the parties for the law governing the arbitration clause.

b) Even were there no express choice of law, Mediterranean law would be the implied choice of law for the arbitration clause.

21. Although it is CLAIMANT's position that the express choice of Mediterranean law applies to the entire Sales Agreement, were the Tribunal not convinced, the Tribunal should move to stage two, which is to determine the implied choice of law of the parties [Sulamerica case, ¶25]. According to Sulamerica case, "[i]n the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate" [Sulamerica case, ¶26]. In this case, Mediterranean Law should apply as the implied choice, because there is an express choice of Mediterranean law to govern the substantive contract (i) and there is no indication to the contrary (ii).

i. There is a presumption that Mediterranean law, as the law governing the substantive contract, also governs the arbitration clause.

22. An express choice of law governing the substantive contract sets the presumption that the same law also governs the arbitration agreement [*Sulamerica case, ¶26; BCY case, ¶49, 65; Piallo case, ¶20; Rals case, ¶76; Sonatrach case, ¶32; Sumitomo case, ¶57*]. This presumption is based on the fact that parties are "likely to intend the whole of the contract, including the agreement to arbitrate, is to be governed by the same system of law"

[*Sulamerica case, ¶15; BCY case, ¶59*]. Only in "exceptional" cases will the law governing the substantive contract and arbitration clause differ [*Channel case, pp. 357-8; Sulamerica case, ¶15; BCY case, ¶59; Born 2014, ¶34; Black case, pp. 455-6; Briggs, para 14.39*]. If the intention is otherwise, parties should specifically point this out [*BCY case, ¶59*].

23. In this case, the Parties expressly stated that their choice of law is Mediterranean law. Even were the Tribunal to conclude this was only a reference to the contract terms, and not to the arbitration terms, it sets the presumption that the same law applies to both, if not otherwise contradicted.

ii. There is no contrary indication that can negate the presumption.

24. Assuming the choice of Mediterranean law as substantive contract law sets the presumption that Mediterranean law also governs the arbitration clause, as argued above, the next issue is whether or not there exist contrary indications to negate such presumption. It is CLAIMANT's position that there is no contrary indication that can negate the presumption, because the choice of seat itself cannot negate the presumption **(1)** and the drafting history of the arbitration clause in fact supports the argument **(2)**.

1. The choice of seat itself cannot negate the presumption.

25. RESPONDENT may argue that the express choice of the seat of arbitration in Danubia, on the ground that arbitration clause, as a dispute resolution clause, only comes into play when commercial relationships break down and parties' desire for neutrality comes to the fore. Therefore, the law of seat, Danubian law, is the parties' implied choice of law governing arbitration clause [*Sulamerica case, ¶29*].

26. Indeed, the law of the seat governs *the procedure* of the arbitration. However, such argument cannot stand because it does not necessarily follow that the seat's substantive law, the contract law, would also be neutral and govern the arbitration clause [*BCY case, ¶62*]. Quite the contrary, when parties agree upon a seat, they are likely to investigate the *procedure* rules, the arbitration law of the seat, but not the substantive law [*Queen Mary Survey 2010, p.17-18*].

27. It follows, therefore, that choosing the seat of arbitration as Danubia is insufficient on its own to negate the presumption that, Mediterranean law - as the law of the substantive contract - also governs the arbitration agreement [*BCY case, ¶55; Arsanovia case, ¶21;*

Habas case, ¶101]. Rather, it is more reasonable to conclude that only when the substantive law invalidates the arbitration agreement, will the presumption be negated [*BCY case, ¶74; Sulamerica case, ¶30*]. Considering that Mediterranean law would not render the arbitration clause invalid, Mediterranean law should be deemed as the implied choice.

2. The drafting history of the arbitration clause cannot negate the presumption.

28. Furthermore, the drafting history of the Sales Agreement does not give a contrary indication either. Rather, the drafting history of the arbitration clause supports the argument that the Parties intended Mediterranean law to apply to the whole of the Sales Agreement. During the negotiation process, the Parties changed the seat from Equatoriana to Danubia. In changing the seat from Equatoriana to Danubia, they also deleted reference to the law of Equatoriana as the choice of law for the arbitration clause and reaffirmed that "the law applicable to the Sales Agreement remains the law of Mediterraneo" [*Resp. Ex. 2*]. This should reasonably be interpreted as reaffirming that "the law applicable to the [whole] Sales Agreement remains the law of Mediterraneo."

29. Importantly, upon the drafting and conclusion of the Sales Agreement, RESPONDENT did not make any objection to this contention – that "the law applicable to the Sales Agreement remains the law of Mediterraneo".

30. Therefore, Mediterranean law, as the express choice of substantive law, is the implied choice of the law governing the arbitration clause.

B. UNDER MEDITERRANEAN LAW, THE TRIBUNAL HAS THE JURISDICTION AND POWERS TO ADAPT THE SALES AGREEMENT.

31. As discussed above, the arbitration agreement is the source of both the jurisdiction and powers of the arbitral tribunal [*Redfern and Hunter, p. 314, 341*]. While the powers of the arbitral tribunal can be limited by applicable law [*Redfern and Hunter, p. 314*]. So, the next questions are whether the arbitration clause, under Mediterranean law as argued above, gives this Tribunal the jurisdiction and power to adapt the contract, and whether the power of the Tribunal is limited by applicable law.

32. It is CLAIMANT's position that the Arbitral Tribunal does have the *jurisdiction* and *power* to adapt the contract. In support of this, CLAIMANT argues, first, as Mediterranean law allows extrinsic evidence, the drafting history shows parties' common intention **(a)**.

Second, even if the Tribunal is not persuaded of a common intention, the wording of the arbitration clause objectively includes the possibility to adapt the contract **(b)**. Third, the applicable law does not restrict the Tribunal's adaptation power **(c)**.

a) The negotiation history of the arbitration clause shows the Parties' intention to include an adaption possibility.

33. Under Mediterranean law, the CISG should be applied to interpret the arbitration clause in sales contracts [*PO 1, III, ¶4*]. Although the wording in Art. 8 CISG indicates that it deals only with the interpretation of individual statements, it is practically undisputed that the provision also regulates the interpretation of contracts [*Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, ¶3; CISG-online 1740; CISG-online 1739*]. According to Art. 8(3) CISG, due consideration should be given to the negotiations between parties to decide the parties' intent.

34. Ms. Napravnik and Mr. Antley, who negotiated most of the contract on CLAIMANT's and RESPONDENT's behalf, had talked about the necessity of an adaption of the contract [*Cl. Ex. 8*]. It was Mr. Antley who, on behalf of RESPONDENT, suggested giving this power to the arbitral tribunal [*Cl. Ex. 8*]. Mr. Antley also had made a connection between the arbitration clause and the hardship clause in his written note that contained points to be added to the final contract [*Resp. Ex. 3*]. The arbitration clause did not change after the replacement of Mr. Antley [*Cl. Ex. 5; Resp. Ex. 2*]. Thus, RESPONDENT, as well as CLAIMANT, indeed, had the intention to include the option of contract adaptation and empowering the Tribunal to adapt the contract has actually always been the Parties' plan.

b) Even if the Tribunal were not convinced of a common intention, the arbitration clause itself includes an adaption possibility.

35. Even if the Tribunal were to find that there is no common intention of the Parties, the arbitration clause itself allows contract adaptation. Firstly, the arbitration clause should be interpreted broadly to include contract adaptation to avoid further disputes regarding jurisdiction **(i)**. Secondly, the wording of the arbitration clause contains contract adaptation **(ii)**.

i. The arbitration clause should be interpreted broadly to include contract adaptation to avoid further disputes regarding jurisdiction of courts.

36. In international arbitration, the arbitration clauses tend to be interpreted broadly to encompass all disputes relating to the parties' contracts [*Larsen case, ¶20*], one of the

reason is to avoid further disputes of jurisdiction [*Born 2014, p. 1343*]. In this case, the Parties expressly chose to settle disputes in international arbitration when they cannot agree upon the jurisdiction of court [*Cl. Ex. 4; Cl. Ex. 5; Resp. Ex. 1*]. The choice of the Parties carries with it a desire for a single and competent dispute resolution mechanism, in order to avoid further jurisdictional disputes. Such desire should be given weight by the Tribunal when the arbitration clause is interpreted.

37. In the case at hand, the Parties chose international commercial arbitration to settle their disputes. There is now a dispute over contract adaptation. Were this tribunal to determine that the arbitration clause did not give it this power, the Parties would necessarily have to resort to state court – which is contrary to their express intention to arbitrate.

38. Therefore, the arbitration clause should be interpreted broadly, compatible with parties' intention of avoiding further jurisdictional disputes, to encompass contract adaptation within their arbitration agreement.

ii. The wording of the arbitration clause contains contract adaptation.

39. Beyond the Parties' logical intention to allow this Tribunal to resolve all disputes, including the dispute over contract adaption, as discussed above, there is also support in the wording of the arbitration clause for adaption. The arbitration clause provides that "[a]ny dispute arising out of this contract, including . . . performance . . . shall be referred to and finally resolved by arbitration . . . ." The arbitration clause includes contract adaptation precisely because the term "performance" is enumerated in the arbitration clause [*Cl. Ex. 5*] and the dispute over contract adaptation arose out of the performance of CLAIMANT.

40. The position that contract adaptation is within the scope of performance could be supported by the PICC and the PECL. In the PICC, contract adaptation is located in Art. 6.2.3(4)(b), which is under Chapter 6 of the PICC with a heading of *Performance* [*PICC, Art. 6.2.3(4)(b)*]. Moreover, Art. 6:111 PECL stipulates that "[i]f, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract . . . and if the parties fail to reach agreement . . . the court may adapt the contract" [*PECL, Art. 6:111*]. According to this article, contract adaptation is within the scope of a dispute over performance.

41. Hence, since this arbitration clause expressly embraces disputes over "performance" of

the Sales Agreement, it gives the Tribunal the jurisdiction and power to adapt the contract.

c) The applicable law does not restrict the Tribunal's adaptation power.

42. The powers of an arbitral tribunal are those conferred upon it by parties within the limits allowed by the applicable law [*Redfern and Hunter, p. 314*]. So far as the Tribunal's powers are concerned, the applicable law is usually the proper law governing the arbitration agreement and the law governing the arbitration [*Redfern and Hunter, p. 314 footnote 4*].

43. The law governing the arbitration regulates the procedural conduct of the arbitral proceedings [*Born 2014, p. 1531*], while the power of adaptation is related to substantive rights of parties [*Szurski, p. 66*]. Therefore, Danubian Arbitration Law, which is the UNICITRAL Model Law [*PO 1, III, ¶4*], does not restrict the Tribunal's power to adapt the contract, since it is procedural and not substantive.

44. For the law governing the arbitration clause, which is Mediterranean law, according to Mediterranean consistent jurisprudence, a standard arbitration agreement is sufficient to grant the arbitral tribunal the power to adapt the contract when there exists hardship [*PO 2, ¶39*]. Clause 15 of the Sales Agreement is an arbitration clause with standard wording and is sufficient to authorize the Tribunal to adapt the Sales Agreement.

45. Therefore, the applicable law does not restrict the Tribunal's adaptation power.

CONCLUSION ON ISSUE A

46. Mediterranean law should apply to the arbitration clause. Under Mediterranean law, drafting history could be relied upon to interpret the arbitration agreement and a standard wording arbitration agreement is sufficient to authorize the Tribunal to adapt the contract. Therefore, in this case the Tribunal has the jurisdiction and powers to adapt the contract.

ISSUE B: THE EVIDENCE CLAIMANT PROFFERS SHOULD BE ADMITTED IN THIS CASE.

47. CLAIMANT seeks an award of US$ 1,250,000 through contract adaptation based on hardship and, thus, carries the burden of proof. As part of its burden, CLAIMANT is required to show RESPONDENT also intended contract adaptation as a remedy. In support of this, CLAIMANT proffers evidence from the other previous HKIAC proceedings in which, at RESPONDENT's request, that tribunal found it has the power to adapt the contract in case of hardship.

48. This is particularly relevant evidence because it was this RESPONDENT that argued for adaptation on strikingly similar facts, although in the role of claimant. Nonetheless, in this case, RESPONDENT objects to the evidence on the basis that it was, allegedly, obtained either through a computer hack or a violation of a confidentiality agreement. CLAIMANT disagrees and seeks a finding by this Tribunal that the proffered evidence is admissible.

49. According to Art. 22.2 HKIAC Rules, the arbitral tribunal "shall determine the admissibility…of the evidence". In this, the tribunal is not bound by any established rules of evidence [*Moser/Bao, ¶9.154*], including those of the seat or other domestic law known to the parties [*Malley, ¶1.17-1.21; Born 2011, p.715*], especially when, as in this case, there are no "specific rules on evidence, in particular, [on] how to deal with evidence in breach of contractual obligations or by illicit means in the arbitration laws of Equatoriana, Mediterraneo [or] Danubia" [*PO 2, ¶46*].

50. However, regard should be given to common principles and rules on evidentiary issues in international arbitration [*Moser/Bao, ¶9.154; Malley, ¶1.07; Pietrowski, p.374; EDF case, ¶47*]. Allegations and counter-allegations relied upon by both CLAIMANT and RESPONDENT on evidentiary issues strike at several principles under international arbitration. Among the principles affected are respect for confidentiality rights and procedural fairness [*Libananco case, ¶79; Methanex case, ¶59; EDF case, ¶47*].

51. Therefore, the starting point in deciding the admissibility of the evidence CLAIMANT proffers should be based upon both the HKIAC Rules and general principles of respect for confidentiality rights and procedural fairness. In this case, the evidence should be admitted both under the HKIAC Rules **(A)** and general principles **(B)**.

A. THE EVIDENCE SHOULD BE ADMITTED UNDER THE HKIAC RULES.

52. Under the HKIAC Rules, generally speaking, all relevant evidence that is material to the outcome of the case is admissible [*Moser/Bao, ¶9.162*]. Indeed, the HKIAC Rules explicitly provide that the arbitral tribunal has the power to exclude evidence [*HKIAC Rules, Art. 22.3*], but fails to list specific grounds. Several guides to the HKIAC Rules are helpful, giving three grounds, all of which concern lack of relevance and lack of materiality [*Moser/Bao, ¶9.163; Ma/Brock, ¶15.086*]. In this case, the evidence is relevant and material to the case, because the threshold under the HKIAC Rules should not be too high **(a)** and the threshold has been met because the evidence could support that RESPONDENT intended a contract adaptation as an available remedy **(b)**.

a) The threshold for relevance and materiality under the HKIAC Rules should not be too high.

53. The term "relevant" suggests that "the document must be useful for the line of evidence [pursued] by the requesting party in order to establish the truth of its factual allegations, on which its legal conclusions are based", and the term "material" suggests that "the arbitral tribunal to must deem it necessary . . . to allow complete consideration as to whether a factual allegation is true or not" [*Moser/Bao, ¶9.161; Raeschke-Kessler, p. 427*].

54. International tribunals are usually not bound by restrictive evidentiary rules applied in municipal courts, and tribunals generally admit all evidences submitted by parties [*Pietrowski, p.373-374*]. And, importantly, the relevance and materiality standard usually will not come into play when the evidence is voluntarily provided by a party. On the contrary, relevance and materiality tend to come into play when there is a request for evidence *disclosure*, in which case a tribunal may deny such request relying on lack of relevance or materiality [*see Glamis Gold case, ¶15; ABB case, ¶85; Rückversicherung case, p. 528; El Paso case, p. 4*]. Therefore, tribunals are generally reluctant to exclude evidence provided by parties voluntarily, unless it is obviously irrelevant [*Pietrowski*, *p. 378*]. As such, the relevance and materiality threshold should not be too high.

b) The threshold has been met because the evidence could support that RESPONDENT, indeed, intended a contract adaptation as an available remedy for a hardship situation.

55. A decisive issue in this case is whether contract adaptation is an available remedy [*PO1, ¶3*]. CLAIMANT argues that adaptation is an available remedy as a matter of law [*see Issue C, infra*], but, alternatively, the evidence could help establish that not only CLAIMANT, but also RESPONDENT, intended contract adaptation as a remedy, when they were negotiating, despite the fact that they did not expressly specify adaptation in their Sales Agreement. As agreed by the Parties, the Sales Agreement is governed by Mediterranean law [*Cl. Ex. 5*], which includes the CISG. The CISG allows the tribunal to consider the parties' intent when contracting [*CISG, Art. 8*].

56. Such process of inquiring into the parties' intent could benefit from evidence about RESPONDENT's prior conduct in a similar situation reflected in the Partial Interim Award. According to statements of facts in the "Partial Interim Award", RESPONDENT had a dispute concerned the sale of a mare with its contracting partner [*PO2, ¶39*]. Their contract is parallel to the current one in three aspects: firstly, they are both negotiated by Mr. Antley

on behalf of RESPONDENT [*PO2, ¶39; Resp. Ex. 3*]; secondly, they are both governed by Mediterranean law [*PO2, ¶39; Cl. Ex. 5*]; thirdly, they both include a hardship clause and an arbitration clause but fail to expressly providing adaptation as a remedy in case of hardship [*PO2, ¶39; Cl. Ex. 5*].

57. RESPONDENT argued in the other case, based on tariffs similar in this case, that contract adaptation should be available, and that tribunal decided adaptation is an available remedy [*PO2, ¶39*]. In other words, that tribunal had confirmed Mr. Antley's intention to include adaptation as an available remedy under situation similar with this case. Therefore, such intention should also be recognized by this Tribunal. Even though Mr. Antley was replaced during negotiation process due to the car accident, the latter negotiator of RESPONDENT, Mr. Krone did not change such intention because he did not further discuss this issue [*PO2, ¶6*]. Hence, RESPONDENT's intention for providing adaptation as a remedy for hardship could be established, largely based on the "Partial Interim Award".

58. In conclusion, the evidence is relevant to the case and material to its outcome and, thus, admissible under the HKIAC Rules.

B. THE EVIDENCE SHOULD ALSO BE RECEIVED UNDER COMMON PRINCIPLES CONCERNING EVIDENTIARY ISSUES.

59. RESPONDENT objects to the evidence on two bases [*Letter Fasttrack, ¶¶1-3*]. Firstly, RESPONDENT claims a right to keep its prior arbitration confidential and, thus, unavailable to this Tribunal [*Letter Fasttrack, ¶¶1-2*] and, secondly, on the basis that the source of evidence is doubtful [*Letter Fasttrack, ¶3*]. However, neither of these two allegations, even if proven true, have legal basis under principles of procedural fairness or of protecting confidentiality rights. Thus, neither could bar such evidence because: the tribunal should pay due attention to the liberal admissibility standards developed by international arbitral tribunals **(a)**, admitting the evidence does not infringe RESPONDENT's confidentiality rights **(b)** and CLAIMANT has clean hands concerning the evidence **(c)**.

a) The tribunal should pay due attention to the liberal admissibility standards developed by international arbitral tribunals.

60. The Tribunal should not apply strict evidence rules in this case regarding the admissibility, since the most common sets of rules used in international arbitration allow, and international tribunals tend to apply, broad admissibility standards [*UNCITRAL Model*

Law, Art. 19; Alford, p. 81; Sandifer, p. 189-190; Moser/Bao, ¶9.150; Ma/Brock, ¶¶15.081-15.109; Malley, ¶1.02; Born 1994, p. 2310; EDF case, ¶47]. International tribunals focus on the questions of weight of the submitted evidence, rather than spending their time and efforts ruling on admissibility [*Waincymer, ¶10.16*]. Different from municipal jurisprudence, especially the trial-by-jury system in Anglo-America, international tribunals have employed a liberal evidentiary standard, since adjudicators of international tribunals, unlike lay members of the jury, do not call for protection of rule of admissibility from unreliable evidence [*Sandifer, p. 182; Saleh, p. 142*]. Therefore, evidence should be generally accepted in international arbitration.

b) Admitting the evidence does not infringe RESPONDENT's confidentiality rights.

61. Admitting the evidence does not infringe RESPONDENT's confidentiality rights because CLAIMANT and this Tribunal do not have any confidentiality obligations toward the evidence from the other arbitration proceedings **(i)**. Should the confidentiality be of any concern here, CLAIMANT wishes to stress that the present arbitral proceeding is also confidential **(ii)**.

i. CLAIMANT and this Tribunal do not have any confidentiality obligations toward the evidence from the other arbitration proceedings.

62. Since there is no general principle nor implied duty of confidentiality in international commercial arbitration, confidentiality is never an essential attribute of arbitration, even though it is one of the attractive advantages [*Esso case, ¶35; Panhandle case, p. 350; Bulbank case*]. The confidentiality of arbitration emerges only when the parties agree on it [*Esso case, ¶33*], or the arbitration rules that the parties choose to provide for it [*HKIAC Rules, Art. 45*]. Indeed, the HKIAC Rules are equipped with a confidentiality provision, however, the confidentiality obligations are only imposed on parties, party representatives, and "the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC" [*HKIAC Rules, Art. 45*].

63. The evidence that CLAIMANT herein proffers is an arbitration award from those arbitration proceedings between RESPONDENT and its then opponent [*Letter Langweiler, ¶¶2-3*]. Since it is RESPONDENT and its opponent who consented to the confidential obligation by adopting the HKIAC Rules in the other proceedings, it is RESPONDENT, its opponent and that tribunal who are bound by the confidential rules they adopted. If one of those parties violated the obligation, the remedy is a lawsuit for damages. The law –

and the rules – do not extend the obligation of confidentiality to third parties-persons, such as CLAIMANT and this Tribunal in these proceedings. Hence, the confidentiality obligation does not apply to CLAIMANT and this Tribunal when CLAIMANT intends to submit and this Tribunal intends to admit the evidence in issue in our case as third persons.

64. Therefore, admitting the evidence does not infringe any right of RESPONDENT to confidentiality, because CLAIMANT and this Tribunal do not have any confidentiality obligations toward the evidence from the other arbitration proceeding.

ii. Should the confidentiality be of any concern here, CLAIMANT wishes to stress that the present arbitral proceeding is also confidential.

65. A former arbitration award is allowed as evidence when the latter arbitration will be kept private and confidential [*Associated Electric case, ¶8*]. This is supported by the *Associated Electric case*, in which it was decided that an award made in one arbitration could be referred to in a second arbitration and would not infringe the confidentiality of the parties, when the parties of the two arbitrations were the same, despite an express confidentiality agreement preventing disclosure of the award, because the second arbitration was also private and confidential [*Associated Electric case, ¶8*].

66. The situation of the current case is similar with the situation of the *Associated Electric case*. RESPONDENT is a party to both arbitration proceedings [*Letter Langweiler, ¶2*]. Although CLAIMANT was not a party to the earlier arbitration proceedings [*Letter Langweiler, ¶2*], it should be noted that these arbitration proceedings are also private and confidential, since CLAIMANT and RESPONDENT agreed on the application of the HKIAC Rules [*Cl. Ex. 6; HKIAC Rules, Art. 45*].

67. Therefore, CLAIMANT is entitled to submit the evidence, even if the evidence is from another arbitration.

c) CLAIMANT has clean hands concerning the evidence.

68. RESPONDENT alleges that the evidence should not be admitted in the arbitration because the evidence was obtained by illegal means [*Letter Fasttrack, ¶3*]. However, the Tribunal needs to considerer one important factor relating to (allegedly) illegally obtained evidence: who obtained it illegally [*Persia case, ¶95, Waincymer, p. 797*]. If the party seeking to benefit from unlawfully obtained evidence comes with clean hands, the evidence may be admitted [*Caratube case, ¶150; Persia case, ¶95; Blair/Gojković, p. 24*]. In the *Persia*

case, the European Court of Justice admitted the diplomatic cables that had been obtained through WikiLeaks and emphasized the importance of the fact that the party seeking to rely on the evidence had clean hands [*Persia case, ¶95*]. In the *Caratube case*, the party obtained the evidence from the WikiLeaks and had not participated in the illegal hacking; the tribunal allowed the admission of the evidence [*Caratube case, ¶150*].

69. In the present case, the alleged illegality is that the initial source of the evidence is either from former employees of RESPONDENT who breached their confidentiality agreement, or from a hack of RESPONDENT's computer system [*Letter Fasttrack, ¶3*]. However, neither of these two actions was participated by CLAIMANT. Therefore, CLAIMANT has clean hands concerning the evidence.

70. As an additional note, resembling the *Caratube case* and the *Persia case*, wherein the documents were made public on WikiLeaks [*Caratube case, ¶150; Persia case, ¶95*], the evidence here has also been made publicly available, because anyone who wants to obtain the arbitration award can buy it from the company offering it [*PO 2, ¶41*].

CONCLUSION ON ISSUE B

71. The proffered evidence is relevant and material to the case. Admitting the evidence will not infringe RESPONDENT's confidentiality rights. Moreover, although the evidence may have been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system, CLAIMANT has clean hands concerning the evidence. Thus, this Tribunal should admit the evidence.

ISSUE C: CLAIMANT IS ENTITLED TO US$ 1,250,000 RESULTING FROM THE ADAPTATION OF THE CONTRACT PRICE EITHER UNDER CLAUSE 12 OF THE SALES AGREEMENT OR UNDER THE CISG.

72. The Sales Agreement called for three shipments of frozen horse semen. Shortly before the third was due to be shipped, the importing country of Equatoriana unexpectedly imposed a 30% tariff on agricultural products, which – also unexpectedly – now covered frozen horse semen, resulting in an additional cost of US$ 1,250,000. CLAIMANT's profit margin was only 5%, so the tariff would result in CLAIMANT incurring a substantial loss instead of a marginal profit. CLAIMANT raised this issue in a telephone conversation with RESPONDENT before dispatching the third shipment and was told "that a solution would be found through negotiation given the good relationship between the Parties and their interest in further business" [*Cl. Ex. 8*]. RESPONDENT also urged CLAIMANT "to

authorize the shipment as planned since Black Beauty needed the doses . . .” [*Cl. Ex. 8*]. However, RESPONDENT thereafter refused to negotiate, giving CLAIMANT no choice but to turn to this Tribunal for the adaptation of the Sales Agreement, as adaptation is available to restore the equilibrium of the contract in case of a change of circumstances [*PICC, Art. 6.2.3; PECL, Art. 6:111(3); Brunner, p. 392; Silveira, p. 344*].

73. Assuming for the moment that the Tribunal finds it has the jurisdiction and power to consider the issue of adaptation [*see Issue A, supra*], it is CLAIMANT’s position that it is entitled to the adaptation of the price under Clause 12, the hardship clause, of the Sales Agreement **(A)**. Alternatively, were the Tribunal to find that Clause 12 does not cover the 30% tariffs imposed by Equatoriana, it should nonetheless find that CLAIMANT is entitled to the adaptation of the price under the CISG **(B)**. In either case, the payment of US$ 1,250,000 should be granted to CLAIMANT in order to restore the contractual equilibrium **(C)**.

A. CLAIMANT IS ENTITLED TO THE ADAPTATION OF THE PRICE UNDER CLAUSE 12, THE HARDSHIP CLAUSE OF THE SALES AGREEMENT.

74. It is CLAIMANT’s position that it is entitled to an additional payment resulting from the adaptation of the price under Clause 12 of the Sales Agreement for the reasons that the 30% tariffs imposed on frozen semen by Equatoriana meet the requirements of hardship in Clause 12 **(a)**, and Clause 12 provides adaptation as a remedy in case of hardship **(b)**.

a) The 30% tariffs imposed on frozen semen by Equatoriana meet the requirements of hardship in Clause 12.

75. Clause 12 of the Sales Agreement reads that CLAIMANT “shall not be responsible for . . . *hardship, caused by additional health and safety requirements and comparable unforeseen events making the contract more onerous*” (emphasis in original) [*Cl. Ex. 5*]. For those circumstances that are not “health and safety requirements”, Clause 12 sets out three requirements for the existence of a hardship: the circumstances must be *comparable* to health and safety requirements, *unforeseen*, and make the contract *more onerous* [emphasis added]. It is CLAIMANT’s position that the 30% tariffs imposed on frozen racehorse semen by Equatoriana after the conclusion of the Sales Agreement were comparable to additional health and safety requirements **(i)**, were an unforeseen event **(ii)** and made the Sales Agreement more onerous **(iii)**, thus constituting a hardship under Clause 12.

i. The 30% tariffs imposed on frozen racehorse semen by Equatoriana were comparable to additional health and safety requirements.

76. Pursuant to Art. 8(1) CISG, a contract shall first be interpreted according to the parties' subjective intent [*CISG, Art. 8(1)*]. Due regard must be given to the negotiation of the contract [*CISG, Art. 8(3)*]. Although the 30% tariffs are not technically "health and safety" requirement, they are comparable to the requirement.

77. During the negotiation of the Sales Agreement, RESPONDENT argued that CLAIMANT was more experienced in shipment than RESPONDENT and, thus, that the delivery terms should be changed from EXW to DDP. CLAIMANT agreed, but only on the condition that CLAIMANT "not . . . [took] 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," such as "additional health and safety requirements" [*Cl. Ex. 4*] and tariffs as a form of customs regulation.

78. Moreover, RESPONDENT agreed with this allocation of risks that differ from the standard Incoterms 2010 DDP term, which can be inferred from the record. On one hand, Clause 12 was suggested by RESPONDENT "*with reference to* the risks mentioned by Ms. Napravnik in her email of 31 March 2017" (emphasis added) [*PO 2, p. 56, ¶12*]. Namely, the wording of Clause 12 refers to the risks "associated with changes in customs regulation or import restrictions" [*Cl. Ex. 4*]. On the other hand, RESPONDENT indicated its consent by negotiating a lower contract price. Removal of some risk associated with the delivery term DDP is generally used as an argument to lower the overall price [*PO 2, ¶8*]. In detail, CLAIMANT proposed to increase the price by US$ 1000 per dose as one of the conditions to accept delivery term DDP. However, the final price only increased by US$ 500 per dose, lowered by US$ 500 per dose from US$ 1000 suggested by CLAIMANT. It can be concluded from the lowered price that RESPONDENT agreed to remove some risks normally covered by delivery term DDP from CLAIMANT to it. These risks include "additional health and safety requirements" and tariffs as "changes in customs regulation" [*Cl. Ex. 4*].

79. Therefore, the 30% tariffs imposed on frozen semen by Equatoriana meet the first requirement of "comparable to additional health and safety requirements".

ii. The 30% tariffs imposed on frozen racehorse semen by Equatoriana are an unforeseen event.

80. The 30% tariffs imposed on frozen racehorse semen by Equatoriana meet the second requirement of an "unforeseen event" from three aspects.

81. Firstly, the Equatorianian government had always been an ardent supporter of free trade [*Cl. Ex. 6*]. Consequently, the Equatorianian government had always tried to resolve trade disputes amicably and historically had not relied on retaliatory measures against trade restrictions by other countries [*Cl. Ex. 6*]. It came, therefore, as a surprise that Equatoriana reacted with a retaliation measure after Mediterraneo imposed tariffs.

82. Secondly, the size of the tariffs, 30%, was unforeseen. Both Mediterraneo and Equatoriana are member states of WTO and, consequently, would be expected to obey WTO rules about binding commitments concerning agricultural goods [*PO 2, p. 61, ¶47*]. According to WTO, all agricultural goods have "bound" tariffs [*WTO, Principles of the trading system*]. It means for member states of WTO, they should not impose tariffs higher than the binding rates provided by WTO on agricultural goods, which are 0% to 5%. The bound tariffs on animal semen are 0% in many countries, such as China, Canada, New Zealand and Iceland; 5% in Russia, and so forth. However, Equatoriana, as a member state of WTO, imposed 30% tariffs on agricultural goods, including the frozen semen, exceeding the bound tariffs and violating its binding commitments. The size was unforeseen even to informed circles [*Cl. Ex. 6*], let alone to CLAIMANT.

83. Thirdly, it was unforeseen that these tariffs on agricultural goods covered frozen racehorse semen. On one hand, in the customs area, racehorse breeding is not considered as livestock. Livestock, which covers animals such as pigs, sheep, or cattle, are generally included in agricultural goods [*HS Code*]. Racehorse breeding is in a separate category, not being a food source. On the other hand, the inclusion of racehorse breeding into the category of agricultural goods even took some time for the authority that imposed these tariffs to figure out whether racehorse semen was covered as "animal product" [*Resp. Ex. 4*].

84. In conclusion, it was unforeseen that the government of Equatoriana imposed 30% tariffs on frozen racehorse semen, thus, meeting the second requirement of "hardship" under Clause 12.

iii. The 30% tariffs imposed on frozen racehorse semen by Equatoriana made the Sales Agreement more onerous.

85. Relying on the literal meaning of Clause 12, "making the contract more onerous" means "the obligations attaching to it counter-balance or exceed the advantage to be derived from" the contract [*Black's Law Dictionary*]. The 30% tariffs exceeded the advantage to be derived from the Sales Agreement for CLAIMANT.

86. The advantage for CLAIMANT from the Sales Agreement was a foreseen profit margin of 5%, or US$ 500,000 [*PO 2, ¶31; Cl. Ex. 8*]. However, the 30% tariff, US$ 1,500,000, was not only more expensive than anticipated, since there were no tariffs before, but also represented a loss six times greater than CLAIMANT's expected profit margin [*PO 2, ¶25; Cl. Ex. 8*]. Therefore, the 30% tariffs meet the third requirement of making the Sales Agreement more onerous.

87. In conclusion, three conditions for the existence of a hardship in Clause 12 are met in the case of these 30% tariffs imposed on frozen racehorse semen.

b) Clause 12 provides adaptation as a remedy in case of hardship.

88. Assuming the facts of the case meet the requirements of "hardship" in Clause 12, as argued above, the next issue is the remedy applicable to the term "shall not be responsible for" [*Cl. Ex. 5*]. CLAIMANT's position is that this term allows the adaptation for the following reasons: adaptation is the remedy for hardship in Clause 12 **(i)**, and, it is the parties' intent that the adaptation should follow the occurrence of hardship in Clause 12 **(ii)**.

i. Adaptation is the remedy following hardship in Clause 12.

89. Clause 12 grants CLAIMANT a right "not to be responsible" for an event of hardship. From the legal perspective, when there is a right, there is a remedy [*Marbury v. Madison, p. 163*]. This was established by William Blackstone and strengthened by Chief Justice Marshall in *Marbury v. Madison case*. In that case, Chief Justice Marshall stated unequivocally that whenever a right is violated, the law must provide a remedy [*Marbury v. Madison, p. 163*].

90. In this case, the right granted to CLAIMANT is to be relieved from paying the tariffs. However, by paying the tariffs under the impression that RESPONDENT would agree to adapt the contract price [*Cl. Ex. 8*], CLAIMANT's right was violated. CLAIMANT thus is entitled to a remedy in the nature of repayment of US$ 1,250,000, whether it is termed

an additional payment or a reimbursement.

91. The repayment should be granted to CLAIMANT through the means of adaptation as a remedy. The mechanism of contract adaptation is generally recognized in international uniform legal rules in case of hardship. For example, Art. 6.2.3 PICC regulates the legal effects of hardship, including the duty to renegotiate and adaptation as remedy in case of failed renegotiation. Another example is the PECL. It also grants the disadvantaged party the right to ask for adaptation as a remedy in case of hardship [*PECL, Art. 6:111(3)*].

92. In conclusion, Clause 12 grants CLAIMANT the right not to bear the burden of the 30% tariffs. Since this right is violated, CLAIMANT is entitled to a remedy. Adaptation is generally accepted as the legal remedy for hardship. Therefore, adaptation shall also be the remedy following hardship in Clause 12.

ii. It is the parties' intent that the adaptation should follow the occurrence of hardship in Clause 12.

93. Adaptation is the logical remedy attached to the hardship clause. Further, it was, in fact, the common intention of both Parties to adapt in case of hardship in Clause 12.

94. Art. 8(1) CISG, the governing law of the Sales Agreement, stipulates that "[f]or the purpose 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" [*Cl. Ex. 5*]. This also applies to the interpretation of the contract [*Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8, ¶3*]. To determine that intent, negotiations should be taken into consideration [*CISG, Art. 8(3)*]. In this case, the record of negotiations indicates that the parties' intent was to adapt the contract in case of hardship.

95. CLAIMANT stated its intention of providing for adaptation in case of hardship. According to Ms. Napravnik, the former negotiator for CLAIMANT, she said to Mr. Antley, the former negotiator for RESPONDENT, that "it was important to have a mechanism in place which would ensure an adaptation of the contract" [*Cl. Ex. 8*]. Mr. Antley responded that, rather than include this specifically in the contract, "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*Cl. Ex. 8*]. After the meeting, Mr. Antley noted there should be a "[c]onnection of hardship clause with arbitration clause" [*Resp. Ex. 3*], acknowledging that it had been discussed and allowing the reasonable inference that it was also RESPONDENT's intention that arbitrators were able to adapt in case of hardship.

96. Furthermore, both CLAIMANT and RESPONDENT knew, or should have known, that the legal effect of hardship is adaptation, since both domestic laws stipulate the same. Namely, both Mediterranean Contract Law and Equatorianian Contract Law are a *verbatim* adoption of the PICC [*PO 1, III, ¶4*]. They both stipulate in Art. 6.2.3 the legal remedies for hardship includes adaptation.

97. In conclusion, the 30% tariffs meet the requirements set out in Clause 12, constituting a hardship. In case of hardship, Clause 12 provides the possibility to adapt the contract, not only resulting from the wording of Clause 12, but also from the perspective of the Parties' intent. Therefore, CLAIMANT is entitled to the additional payment resulting from price adaptation under Clause 12.

B. ALTERNATIVELY, WERE THE TRIBUNAL TO FIND THAT CLAUSE 12 DOES NOT COVER THE 30% TARIFFS, IT SHOULD FIND ADAPTATION OF THE PRICE UNDER THE CISG.

98. Even if the Tribunal were to find, against all expectations, that adaptation is not covered by Clause 12, CLAIMANT is still entitled to the adaptation of the price under the CISG. Noted scholars, such as Schlechtriem and Schwenzer, have argued that Art. 79 CISG should cover hardship, although the technical wording is "impediment" (**a**). Thus, there is a gap in the CISG for such a case, which may be filled through reliance on the PICC as general principles under Art. 7(2) CISG (**b**). The hardship argument under Art. 79 CISG in conjunction with PICC principles, should apply to this situation in which the performance was rendered, because CLAIMANT reserved its claim by raising it with RESPONDENT before shipping the goods (**c**). The PICC's requirements regarding hardships are met here and, hence, Art. 6.2.3 PICC granting a contract adaptation applies (**d**).

a) Art. 79(1) CISG covers hardships.

99. The only provision in the CISG in regard to unforeseen events is Art. 79 CISG. Art. 79 CISG lays out a set of elements: "failure . . . due to an impediment beyond [party] control . . . that [the party] could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" [*CISG, Art. 79*]. CLAIMANT submits that hardships such as the tariffs fall under the requirement of "impediment".

100. The legislative history of Art. 79 "is insufficient to warrant the conclusion that Art. 79

CISG cannot exempt a party from performing its obligations, in whole or in part, when the impediment is represented by a totally unexpected event that makes performance excessively difficult" [*CISG-AC, Op 7, ¶28*]. The choice of "impediment" was made for adopting a unitary exception of exemption because there are different doctrines of hardships in different states. The international trade world would have been in chaos if a word whose interpretation would differ from one state to another was included, which would go against the aim of CISG [*CISG, Preamble*]. Moreover, as an international treaty resulting from years of negotiation among states and signed decades ago, the CISG has limits and boundaries within which extension should be allowed to cover "issues not clearly provided for or not foreseen by drafters" [*Schlechtriem/Flechtner, p. 220*].

101. Notwithstanding that it seems the CISG could strictly apply the principle of *pacta sunt servanda*, flexibility should be allowed as the majority of legal commentators agree that "a fair legal system should admit some flexibility within the general principle of *pacta sunt servanda* to account for a genuine situation of hardship" [*CISG-AC, Op 7, ¶32*]. In other words, flexibility should be allowed when interpreting rules of the CISG, especially in a certain case where the exemption of contractual obligations in case of hardship is in dispute.

102. Further, courts have relied on Art. 79 CISG in cases of hardship, for example the Belgian Supreme Court in the *Scafom International case*, in which a seller of processed steel, when confronted with a price increase, refused to deliver the steel, and instead sued the buyer for re-negotiations. The Belgian Supreme Court granted this request [*Scafom International case*]. The French Cour de Cassation in the *Dupiré Invicta industrie case* has further confirmed that hardships fall within the scope of the CISG [*Dupiré Invicta industrie case*].

103. Thus, the CISG generally recognizes hardships under Art. 79(1).

b) There is a gap in the CISG in regard to the remedy for hardship and the PICC acts as a gap filler.

104. As discussed immediately above, Art. 79(1) CISG does not expressly state "hardship", but rather covers impediments making performance impossible. The remedy it provides is exemption from liability during the period of impediment [*Schlechtriehm/Schwenzer/Schwenzer, Art. 79, ¶1*]. Assuming for the moment that the Tribunal is persuaded to adopt the position of the scholars arguing that Art. 79 CISG should cover hardship, there is a gap with regard to the remedy.

105. Questions concerning matters which are governed, but not directly mentioned, by the CISG, are to be settled in conformity with its principles [*CISG, Art. 7(2)*]. As mentioned, Art. 79 CISG leaves a gap in regard to the exact requirements of hardship and its remedy. In order to resolve this gap, CLAIMANT can rely on the PICC as general principles.

106. Art. 7(2) CISG recognizes that general principles can fill the gaps in the CISG. The PICC is generally accepted as such principles in international arbitration. For example, in the *Chemical fertilizer case*, the interest rate claimed by the buyer was not covered by the CISG, so arbitrators in ICC considered it justified to apply identical rules contained in the PICC as general principles in the sense of Art. 7(2) CISG [*ICC case 8128/1995*]. Another ICC case was also settled by applying the PICC as general principles in line with Art. 7(2) CISG, as they "promote the uniformity of law", an aim of the CISG laid out in Art. 7(1) CISG [*ICC case 11638/2002*]. The International Court of Arbitration has also stated that the general principles of the CISG are now contained in the PICC [*ICC case 8817/1997*].

107. Furthermore, Art. 6.2.2 and 6.2.3 PICC address our situation at hand. Art. 6.2.2 PICC establishes the elements that constitute a hardship, while Art. 6.2.3 PICC states the remedies available. CLAIMANT therefore submits the Tribunal may rely on the PICC for price adaptation.

c) CLAIMANT can rely on hardship to ask for price adaptation even if it has shipped the goods.

108. Should RESPONDENT rely on the argument that such a price adaptation may only be available where the disadvantaged party has not acted, it is CLAIMANT's position that the performance was only preliminary and was never intended to be the final outcome. A party might be barred from relying upon a hardship, if it has not raised this hardship to the other party as soon as it knew of it [*Brunner, p. 400*]. However, the opposite is the case here: Ms. Napravnik, on behalf of CLAIMANT, contacted RESPONDENT immediately and expressed in her email to, and in her phone call with, RESPONDENT's Mr. Shoemaker that re-negotiations were necessary because of the tariffs [*Cl. Ex. 7; Cl. Ex. 8*]. Mr. Shoemaker, on behalf of RESPONDENT, has admitted that he "knew that CLAIMANT would not deliver if [RESPONDENT] were to reject their request [to re-negotiate the price] outright." [*Resp. Ex. 4*]. CLAIMANT thus submits that the performance in the case at hand was conditional.

d) The requirements of Art. 6.2.2 PICC are met, therefore, Art. 6.2.3 PICC applies, which grants a contract adaptation.

109. It is CLAIMANT's position that Art. 6.2.2 PICC requirements for a hardship are met here **(i)** and price adaptation is a remedy available under Art. 6.2.3 PICC **(ii)**.

i. The requirements of Art. 6.2.2 PICC are met, therefore the tariffs constitute hardship.

110. Art. 6.2.2 PICC stipulates:

> "*There is hardship where the occurrence of events* ***fundamentally alters the equilibrium*** *of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*
> *a) the events occur or become known to the disadvantaged party after the conclusion of the contract;*
> *b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;*
> *c) the events are beyond the control of the disadvantaged party; and*
> d) *the risk of the events was not assumed by the disadvantaged party*." [Emphasis added.]

111. CLAIMANT submits that all of these requirements are met here: First, the imposed tariffs have fundamentally altered the equilibrium of the Sales Agreement insofar as they have made the performance for CLAIMANT excessively onerous (**1**). Further, all the other requirements of Art. 6.2.2 are met as well (**2**).

1. The tariffs fundamentally altered the equilibrium of the Sales Agreement.

112. It is CLAIMANT's position that the newly imposed tariffs, along with the resulting unreasonable, burdensome performance, alter the contractual equilibrium fundamentally, and as such fall under Art. 6.2.2 PICC.

113. Such a change to the contractual equilibrium may be "characterized by a substantial increase in the cost for one party of performing its obligation" [*UNIDROIT Principles Commentary, p. 219*]. In this sense, a hardship that fundamentally alters contractual equilibrium is the one that causes "unreasonable costs in relation to contract price" [*Schlechtriem/Schwenzer/Schwenzer, Art. 79, ¶30*]. Art. 6.2.2 PICC does not contain a concrete threshold as to when the balance has been fundamentally disturbed [*Vogenauer/Kleinheisterkamp/McKendrick, p. 719 ¶8*]. The facts of the case must therefore be considered.

114. The change of tariffs constitutes a burdensome hardship, not only causing exceptional

onerousness for CLAIMANT, but also disturbing the contractual equilibrium. The Equatorianian government imposed 30% tariffs on animal semen, which made the shipment 30% more expensive than anticipated at the time of the conclusion of the Sales Agreement [*Cl. Ex. 8*]. This must be seen in regard to the fact that CLAIMANT only made a profit of 5% with each sold dose [*PO 2, ¶ 31*], as profit margins are one factor to be considered when determining a hardship [*Schwenzer, p. 716*]. This means the tariffs resulted in a los six times higher than the anticipated profit margin.

115. Further, CLAIMANT has been in financial difficulties during the past two years, so these additional 30% tariffs caused more costs than CLAIMANT could afford and endanger its restructuring plan [*PO 2, ¶29*]. According to the *ICC case 9994/2001*, in hardship situations both parties must keep good faith, which "imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution, in order to ensure that its performance does not cause . . . the ruin of one of the parties" [*ICC case 9994/2001*].

116. Additionally, the costs were unreasonable and disproportionate in relation to the contract price: The contract price was US$ 100,000 per dose [*Cl. Ex. 5*]. With the additional tariffs, the price for one dose rose by 30%, unreasonably exceeding the contract price. The 30% tariffs caused a great loss of profit for CLAIMANT, destroying the contractual equilibrium. Had the Sales Agreement been fulfilled without any additional tariffs, CLAIMANT could have made a profit of US$ 500,000. Instead, if CLAIMANT has to shoulder the tariffs, it loses US$ 1,500,000, three times of what it once hoped to earn.

117. Besides, the fact that RESPONDENT has resold 15 doses of horse semen further disturbs the contractual balance. Not only was RESPONDENT not allowed to resell the doses, as CLAIMANT had informed it in an email of this prohibition [*Cl. Ex. 2*] and the Sales Agreement contains a clause which stipulates only mares known to CLAIMANT may be inseminated with the semen [*Cl. Ex. 5*], but RESPONDENT also made a profit through this reselling, all while knowing that CLAIMANT was suffering a loss because of the tariffs. In fact, RESPONDENT urged CLAIMANT to deliver the last 50 doses despite the tariffs because it needed them for reselling purposes [*PO 2, ¶33*]. Through the reselling of 15 does, RESPONDENT made a profit of US$ 300,000.

118. Lastly, the reselling may have negatively influenced CLAIMANT's standing on the racehorse market. CLAIMANT has a strong interest in only fathering offspring with

excellent and known mares to keep its high reputation [*PO 2, ¶19; Cl. Ex. 2*]. Without knowing the brood mares, CLAIMANT can no longer control who Nijinsky III's offspring are. In racehorse sports, a horse's bloodline is of uttermost importance for its value, especially through the stud's lineage, and successful offspring can further improve a stud's outstanding reputation [*The Guardian, "How genetics can create the next superstar racehorse", ¶5; Timeform "The Importance of Pedigrees", ¶¶4, 7*]. If some of Nijinsky III's foals, due to a mediocre brood mare, only receive mediocre race results, Nijinsky III could lose his outstanding reputation, which in turn would negatively influence its semen's price.

119. Hence, in regard to the equilibrium of the Sales Agreement at hand, there is a seller on the one side, who not only delivered the goods as obliged, but also suffered a loss because of tariffs and has no control over the use of its stallions semen, while on the other side, the buyer of the product does not have to shoulder this loss, on the contrary, still profits from the Sales Agreement financially.

120. The 30% tariffs thus constitute a fundamental change to the equilibrium of the Sales Agreement. The first element of hardship under the PICC is fulfilled.

2. CLAIMANT fulfills other elements contained in Art. 6.2.2 PICC.

121. CLAIMANT also fulfills the other elements laid out in the PICC: first, the tariffs occurred after the conclusion of the contract; second, the tariffs could not reasonably foreseen at the time of the conclusion; third, the tariffs were beyond the control of the disadvantaged party; fourth, the risk of the tariffs was not assumed by the disadvantaged party [*PICC, Art. 6.2.2*].

122. First, the tariffs were announced on 19 December 2017 and entered into force on 15 January 2018 [*PO 2, ¶25*]. They were thus imposed seven months after the conclusion of the Sales Agreement, which was on 6 May 2018 [*Cl. Ex. 5*].

123. Further, the tariffs were unforeseen at the time when the Sales Agreement was signed. Neither CLAIMANT nor RESPONDENT expected a trade war and retaliation tariffs to happen [*PO 2, ¶26*]. Even if Mediterraneo had a more nationalist-protectionist government, the current government of Equatoriana had always been a defender of free trade before [*Cl. Ex. 6*]. Additionally, not only the imposition of tariffs itself was surprising, but also the fact that the tariffs, imposed on "agricultural products" [*Cl. Ex. 7*], did also apply to racehorse semen. This is evidenced by the fact that even ministry officials were not certain at first whether the tariffs were applicable here and had to inquire internally [*Resp. Ex. 4*].

124. Third, CLAIMANT could not control the tariffs because it was the Equatorianian government who decided the tariffs. It was impossible for CLAIMANT to control a state's customs policy.

125. Fourth, the risk of tariffs change was not assumed by CLAIMANT who had made it clear that it was unwilling to take over any further risk associated with the change in delivery term and in particular changes in customs which included tariffs [*Cl. Ex. 4*]. Furthermore, CLAIMANT had expressly objected to paying for the changed tariffs before the last shipment [*Cl. Ex. 7*].

126. Therefore, all requirements of Art. 6.2.2 PICC are met, so it applies.

ii. Art. 6.2.3 PICC grants contract adaptation as a remedy.

127. The first step mentioned by Art. 6.2.3 PICC when a hardship occurs is re-negotiation. Only if this was unsuccessful may a party rely on contract adaptation [*PICC, Art. 6.2.3 (3), (4)(b)*]. CLAIMANT asked for re-negotiation which, however, failed as RESPONDENT's CEO stopped them [*Cl. Ex. 7; Cl. Ex. 8*]. CLAIMANT is thus entitled not only to bringing this issue before the Tribunal in accordance with Art. 6.2.3 (3) PICC, but also to ask for an adaptation of the price by the Tribunal. Insofar as the PICC mentions a court's power to adapt, according to Art. 1.11 PICC, the same power may be granted to an arbitration tribunal [*PICC, Art. 1.11*].

C. THE PAYMENT OF US$ 1,250,000 SHOULD BE GRANTED TO CLAIMANT IN ORDER TO RESTORE THE CONTRACTUAL EQUILIBRIUM.

128. In regard to the amount of adaptation, CLAIMANT is entitled to the payment of US$ 1,250,000 with the aim to restore the contractual equilibrium.

129. When determining the amount of price adaptation, the Tribunal shall adopt the means of hypothetical intention of the parties as a primary reference [*Brunner, p. 500*]. In other words, the Tribunal shall consider what the parties would have agreed to if they had considered the hardship when concluding the contract. In this case, by exploring the hypothetical intention, it can be inferred from the records that the parties would have agreed that RESPONDENT should shoulder the additional tariffs [*Cl. Ex. 2; Cl. Ex. 3; Cl. Ex. 7; PO 2, ¶¶25, 29*]. This is in line with the usual custom that the buyer of a product is the one who has to shoulder tariffs [*Forbes Article*].

130. On one hand, CLAIMANT has always been reluctant to pay for tariffs during the

transaction. Firstly, CLAIMANT intended to gain profit from this transaction. CLAIMANT promised to its creditors to gain profit from 2017, otherwise the restructuring plan would fail, and consequently CLAIMANT would be financially endangered [*PO 2, ¶29*]. It caused CLAIMANT a loss to shoulder these tariffs. Secondly, during the negotiation CLAIMANT informed RESPONDENT that it was not willing to take over the risk of the change in customs regulations which include tariffs [*Cl. Ex. 2*]. Furthermore, hypothetical intention analysis requires the consideration of declarations made after the conclusion of the contract [*Brunner, p. 500*]. After being informed about the tariffs, CLAIMANT sent the e-mail to RESPONDENT about its unwillingness to pay for tariffs [*Cl. Ex. 7*]. Therefore, it can be concluded that if CLAIMANT had considered the tariffs when concluding the Sales Agreement, it would not agree to pay for these tariffs.

131. On the other hand, RESPONDENT would have still entered into the contract to bear the risks of tariffs if it considered the tariffs when signing the Sales Agreement. The reason behind the change of delivery terms is that RESPONDENT intended to take advantage of CLAIMANT's experience in shipment of frozen semen including the necessary documentation [*Cl. Ex. 3*]. Neither shipment nor documentation refer to tariffs. Moreover, CLAIMANT does not have experience in tariffs since there had been no tariffs imposed on frozen horse semen in either Equatoriana or Mediterraneo [*PO 2, ¶25*]. Therefore, it can be inferred that RESPONDENT did not intend to transfer the risks of tariffs to CLAIMANT.

132. In conclusion, it would have been RESPONDENT that paid for these tariffs if both parties had considered tariffs when concluding the Sales Agreement. Thus, the payment of US$ 1,250,000, which is the amount of the tariffs minus CLAIMANT's profit margin, should be granted to CLAIMANT through adaptation to restore the contractual equilibrium.

CONCLUSION ON ISSUE C

133. In conclusion, CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under Clause 12 of the Sales Agreement. Even if the Tribunal should, against all expectations, come to the conclusion that Clause 12 does not entitle CLAIMANT to adapting the price, the price should still be increased under CISG.

REQUEST FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Tribunal to find that:

a) The Tribunal has the jurisdiction and the powers under the arbitration clause to adapt the contract;

b) CLAIMANT should be entitled to submit the evidence in issue;

c) CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from the adaptation of the price:

i) Under Clause 12 of the Sales Agreement;

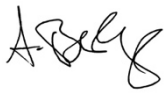
ii) Alternatively, under the CISG.

CERTIFICATE

China - EU School of Law, December 6, 2018.

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Anne Berlips



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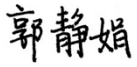

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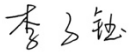

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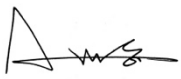
WANG Chengyue



WANG Lulu

Certificate and Choice of Forum
To be attached to each Memorandum

I 王成岳 WANG Chengyue, on behalf of the Team for (name of School)

China-EU School of Law at the China University of Political Science and Law

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

Check off the boxes as appropriate:

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

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

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

Or

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

☐ Vis East Moot in Hong Kong, or
☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) China-EU School of Law at the China University of Political Science and Law

Name 王成岳 WANG Chengyue

Signature