Sixteenth Annual Vis East Moot
International Commercial Arbitration Moot
31 March – 7 April 2019

Memorandum for Claimant

NUS
National University of Singapore

On Behalf Of
Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo
(Claimant)

Against
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana
(Respondent)

Counsel

Daniel Fong • Kenneth Lim
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Treaties, Conventions and Rules

Abbreviation	Citation	Paragraphs
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 Entered into force 1 January 1988 1489 UNTS 3	5, 26, 38, 42, 43, 44, 52, 53, 54, 60, 61, 70, 71, 72, 75, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 117
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts 19 March 2015	112
HKIAC 2013 Rules	2013 Hong Kong International Arbitration Centre Administered Arbitration Rules	11, 13
HKIAC 2018 Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules	1, 3, 6, 11, 13, 14
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration Adopted by a resolution of the IBA Council on 29 May 2010	3, 4, 6
ML	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial	9, 22

	Arbitration (with amendments as adopted in 2006) 7 July 2006	
PICC	UNIDROIT Principles of International Commercial Contracts 2016 9 May 2017	10, 44, 76, 104, 107, 108, 109, 112, 113

Travaux Préparatoire

Abbreviation	**Citation**	**Paragraphs**
A/CN.9/WG.II/ WP.44	Model law on international commercial arbitration: revised draft articles A to G: note by secretariat UN Doc. *A/CN.9/WG.II/WP.44*	37
A/CN.9/207	Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration UN Doc. *A/CN.9/207*	9
A/CN.9/396/Add.1	Report of the Secretary-General: Draft Guidelines for Preparatory Conferences in Arbitral Proceedings UN Doc. *A/CN.9/396/Add.1*	4
A/32/17	Report of the United Nations Commission on International Trade Law on the work of its tenth session (Vienna, 23 May – 17 June 1977)	88, 90

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Azeredo	Azeredo Da Silveira, Mercédeh *Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation* The Netherlands: Kluwer Law International (2014)	87, 89, 90, 99, 103, 104, 105, 106, 109
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Carlsen	Carlsen, Anja "Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG Is the Governing Law?" https://www.cisg.law.pace.edu/cisg/biblio/carlsen.html (1998)	88

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Felemagas	Felemegas, John "The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation" In Pace University International Law Review *Review of the Convention on Contracts for the International Sale of Goods (2000-2001)* The Netherlands: Kluwer Law International (2001)	104, 107
Flechtner	Flechtner, Harry M. "Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More" 18 Journal of Law and Commerce 191 (1999)	89, 105
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	The Hague: Kluwer Law International (1999)	
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Abbreviation	Citation	Paragraphs
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Scafom	*Scafom International BV v. Lorraine Tubes S.A.S.* Case Reference No. C.07.0289.N 19 June 2009	89, 99, 107, 108
United Kingdom		
Ali Shipping	*Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054 UK Court of Appeal 19 December 1997	12
Sulamerica	*Sulamérica Cia Nacional De Seguros S.A. and others v. Enesa Engenharia S.A. and others* [2012] EWCA Civ 638 UK Court of Appeal (Civil Division) 16 May 2012	22, 26
International Centre for Settlement of Investment Disputes		
Caratube	*Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan* Award of 27 September 2017 ICSID Case No. ARB/13/13	17
Methanex	*Methanex Corporation and United States of America* Final Award of the Tribunal on Jurisdiction and Merits	16

Yukos	*Yukos Universal Limited (Isle of Man) and The Russian Federation* Final Award of 18 July 2014 PCA Case No. AA 227	17

International Chamber of Commerce

ICC Case No. 5730	ICC Award No. 5730 (1990) Clunet (1990), p. 1033	22
ICC Case No. 6515	ICC Award No. 6515 (1999) XXIVz Y.B. Comm. Arb, p. 80	111

Singapore

BCY v BCZ	*BCY v BCZ* [2016] SGHC 249 Originating Summons No. 502 of 2016	24

Stockholm Chamber of Commerce

SCC 117/1999	SCC Case 117/1999 (1999) SCC Arbitral Awards (1999-2003)	30

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Abbreviation	Expansion
Answer	Answer to the Notice of Arbitration (24 August 2018)
Arbitration Agreement	Clause 15, Frozen Semen Sales Agreement
Art. / Arts.	Article / Articles
Cl. Ex.	CLAIMANT's Exhibit
DAL	Danubian Arbitration Law, as adapted from the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
Equatorianian Tariffs	30% import tariffs on selected products from Mediterraneo, including animal semen, imposed by the Equatorianian government
HKIAC 2013 Rules	2013 Hong Kong International Arbitration Centre Administered Arbitration Rules
HKIAC 2018 Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
Letter from Langweiler	Letter from Langweiler (2 October 2018)
Letter by Fasttrack	Letter by Fasttrack (3 October 2018)
Mediterranean Tariffs	25% import tariffs on all agricultural goods from Equatoriana, imposed by the Equatorianian government
Notice	Notice of Arbitration (31 July 2018)
PO1	Procedural Order No. 1 (5 October 2018), in the Arbitral Proceedings HKIAC/A18128: Phar Lap Allevamento v. Black Beauty Equestrian
PO2	Procedural Order No. 2 (2 November 2018), in the Arbitral Proceedings HKIAC/A18128: Phar Lap Allevamento v. Black Beauty Equestrian
para./paras.	Paragraph/ Paragraphs
Resp. Ex.	RESPONDENT's Exhibit
Sales Agreement	Frozen Semen Sales Agreement
Third Shipment	Shipment of frozen semen, delivered by CLAIMANT to RESPONDENT on 23 January 2018
Tribunal	The present tribunal constituted to hear the Arbitral Proceedings HKIAC/A18128

STATEMENT OF FACTS

1. **CLAIMANT** operates Mediterraneo's oldest and most renowned stud farm [*Notice* para. 1]. **RESPONDENT** is an Equatorianian company in the equestrian business [*Notice* para. 4].
2. On **21 March 2017**, RESPONDENT first contacted CLAIMANT, seeking to purchase 100 doses of frozen semen from its star racehorse Nijinsky III for artificial insemination [*Cl. Ex.* C1]. On **24 March 2017**, CLAIMANT replied, offering to sell at a price of US$ 99,500 per dose, on the terms of its Standard Frozen Semen Sales Agreement [*Cl. Ex.* C2]. CLAIMANT's terms provided for Mediterraneo law and the exclusive jurisdiction of Mediterraneo courts [*Cl. Ex.* C3]. It also provided for EXW delivery [*PO2* para. 9].
3. On **28 March 2017**, RESPONDENT replied, proposing DDP terms instead of EXW. It cited the urgency of the delivery and CLAIMANT's "greater experience in the shipment of frozen semen" [*Cl. Ex.* C3]. RESPONDENT also wanted CLAIMANT to agree to the exclusive jurisdiction of the Equatoriana courts [*Cl. Ex.* C3].
4. On **31 March 2017**, CLAIMANT informed RESPONDENT that it was unwilling to bear the risks associated with DDP delivery [*Cl. Ex.* C4]. In **2014**, CLAIMANT had nearly become insolvent when it agreed to deliver DDP and supervening events had increased its costs by 40% [*PO2* para. 21]. CLAIMANT told RESPONDENT that it would only agree to DDP terms if critical modifications were made, and if US$ 1,000 more was paid per dose [*Cl. Ex.* C4]. This "critical modification" took the form of a hardship clause [*Cl. Ex.* C4].
5. CLAIMANT also did not agree to dispute resolution by litigation in Equatoriana and counter-proposed arbitration in Mediterraneo. RESPONDENT responded on **10 April 2017** with a draft clause providing for Equatoriana to be the seat of the arbitration and the law governing the Arbitration Agreement [*Resp. Ex.* R1]. On **11 April 2017**, CLAIMANT replied with its own draft clause, removing the reference to the governing law of the arbitration agreement and designating Danubia as the seat of the arbitration [*Resp. Ex.* R2].
6. By this time, the parties had agreed on Clauses 1-5 of the eventual Sales Agreement [*PO2* para. 4]. On **12 April 2017**, CLAIMANT's lawyer and prime negotiator, Ms. Napravnik, met with RESPONDENT's lawyer and prime negotiator Mr. Antley to discuss the dispute resolution clause and the hardship clause [*Cl. Ex.* C8]. Mr. Antley also specifically agreed that this Tribunal should adapt the contract if the parties could not agree [*Cl. Ex.* C8]. Unfortunately, both negotiators were injured, and their replacement negotiators had to take over to finalise Clauses 6-15 of the Sales Agreement. Nonetheless, both replacement negotiators had access to the prior emails [*PO2* para. 5], and Mr. Antley's replacement relied heavily on a note written by Mr. Antley at the last meeting [*Resp, Ex.* R3].

7. In the finalised Sales Agreement, a hardship reference was included in Clause 12. DDP terms were stipulated but Clauses 9, 10 and 13 further allocated risks ordinarily borne by the seller under normal DDP terms to RESPONDENT. In return, CLAIMANT accepted US$ 100,000 per dose, US$ 500 less than what it had asked for. Delivery was to be in three shipments. Parties also agreed to arbitrate disputes on terms largely adopted from the draft proposed by CLAIMANT's Ms. Napravik on **11 April 2017** prior to her injury [*PO2* para. 6].

8. On **15 November 2017**, Mediterranean Tariffs were imposed on Equatoriana [*PO2* para. 23]. In retaliation, on **15 January 2018**, Equatoriana imposed 30% tariffs for agricultural products which included racehorse semen [*PO2* para. 25]. These tariffs increased the cost of delivering the Third Shipment scheduled for delivery on **22 January 2018** by US$ 1,500,000.

9. On **20 January 2018**, CLAIMANT contacted RESPONDENT, seeking to find a solution with RESPONDENT before delivering the Third Shipment [*Cl. Ex.* C7]. However, RESPONDENT needed the Third Shipment by **1 February 2018** [*PO2* para. 11]. Unknown to CLAIMANT at that time, RESPONDENT had on-sold the frozen semen to other breeders [*PO2* para. 11] without CLAIMANT's express written consent, despite agreeing not to do so [*Cl. Ex.* C2].

10. Mr. Shoemaker, who was responsible for the development of RESPONDENT's racehorse breeding programme, called CLAIMANT on **21 January 2018**. His primary concern was to ensure delivery of the Third Shipment [*Resp. Ex.* R4]. When Ms. Napravik, who was back at work post-injury, took the position that RESPONDENT should bear the bulk of the additional costs due to the tariffs [*Cl. Ex.* C8], Mr. Shoemaker said "if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price" [*Resp. Ex.* R4]. Mr Shoemaker knew that CLAIMANT would not deliver the Third Shipment without reassurances about the tariffs [*Resp. Ex.* R4].

11. Relying on RESPONDENT's assurances, CLAIMANT delivered the Third Shipment [*Cl. Ex.* C8]. Subsequently, CLAIMANT initiated a meeting with RESPONDENT on **12 February 2018** to re-negotiate the contract price [*PO2* para. 35]. However, no agreement was reached. RESPONDENT has since refused to re-negotiate [*Cl. Ex.* C8] and claims that the contract does not allow for adaptation of the contract price [*Answer* para. 19]. CLAIMANT thus commenced arbitration proceedings on **31 July 2018**.

12. RESPONDENT has not called Mr. Antley to give evidence and also objects to the admission of the Partial Interim Award of another arbitration where RESPONDENT asserts that adaptation is possible on a materially similar clause. A horseracing intelligence company had promised to sell CLAIMANT this award [*PO2* para. 41].

SUMMARY OF ARGUMENTS

1. **This Tribunal should admit documents and information from the Mediterraneo Arbitration.** Pursuant to Art. 22 HKIAC 2018 Rules, the documents and information sought to be admitted by CLAIMANT are relevant and material as they are likely to clarify RESPONDENT's intentions in agreeing to Clause 12 of the Sales Agreement and the Arbitration Agreement. There is no valid basis for this Tribunal to exercise its discretion to refuse admission of the documents and information, given that CLAIMANT has neither breached any confidentiality obligations nor acted illegally or improperly. The DAL does not impose on CLAIMANT any statutory obligation to refrain from submitting documents and information from the Mediterraneo Arbitration. Any express or implied obligation of confidentiality are only limited to keeping documents and information about the present arbitration confidential. Further, CLAIMANT was not involved in the illegal hack of RESPONDENT's computer system and did not induce the breach of confidentiality agreement by RESPONDENT's ex-employees, either of which may have caused the leak of documents and information from the Mediterraneo Arbitration. It would therefore be unfair to exclude the documents and information and prevent this Tribunal from fully considering all relevant and material evidence in its assessment of the case.

2. **This Tribunal has the power to adapt the contract under the Arbitration Agreement.** The Arbitration Agreement as interpreted under Mediterranean law confers on this Tribunal the power to adapt the contract. Mediterranean law governs the Arbitration Agreement because it is the parties' implied choice. There is a strong presumption that an arbitration agreement contained as a clause within the main contract is governed by the substantive law of the contract, and this presumption is consistent with the intentions expressed by the parties during their negotiations. Even if there was no implied choice by the parties, Mediterranean law governs the Arbitration Agreement because it is the law with the closest connection to the Arbitration Agreement. Applying Mediterranean law to interpret the Arbitration Agreement, the parties' negotiations show that they intended this Tribunal to have the power to adapt the contract in response to hardship. Even if the Arbitration Agreement is governed by Danubian law, the same result should be reached. This is because extrinsic evidence of the parties' negotiations do not contradict or supplement the terms of the Arbitration Agreement itself, but instead only help to interpret the Arbitration Agreement. The only question here is whether this Tribunal has the power to adapt the contract, since it clearly has jurisdiction to hear the case.

3. **This Tribunal should adapt the contract price by an increment of US$ 1,500,000 under Clause 12 of the Sales Agreement.** CLAIMANT incurred an extra cost of US$ 1,500,000 from the Equatorianian Tariffs (30% of the third instalment price of US$ 5,000,000) when it delivered the Third Shipment. However, CLAIMANT's delivery obligations under the Sales Agreement are qualified by Clause 12, which provides that "[CLAIMANT] shall not be responsible… for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". There is hardship whenever there are "additional health and safety requirements or comparable unforeseen events" which have made performance more onerous. Here, the increased cost of delivery due to the Equatorianian Tariffs amount to hardship under Clause 12. The imposition of the Equatorianian Tariffs is a "comparable unforeseen event" to additional health and safety requirements because it is equally unforeseeable. The imposition of the Equatorianian Tariffs is also sufficiently onerous to amount to hardship because it destroyed the commercial basis of the deal. The additional US$ 1,500,000 CLAIMANT seeks from an adaptation of the price is appropriate because Clause 12 allocates the risks of the Equatorianian Tariffs to RESPONDENT.

4. **Alternatively, this Tribunal should adapt the Sales Agreement's contract price by an increment of US$ 1,500,000 through Art. 79(1) CISG.** Art. 79(1) CISG provides relief to parties whose performance is beset by an unforeseen impediment beyond their control. The costs incurred by CLAIMANT from paying the Equatorianian Tariffs amount to an impediment within the meaning of Art. 79(1) CISG because it caused economic hardship to CLAIMANT. Further, the tariffs were not reasonably foreseeable, nor could they have been overcome or avoided by CLAIMANT. Although the remedy for an obligor's hardship is not expressly settled under Art. 79(1) CISG, by applying Art. 7(2) CISG, the remedy of adaptation of the contract price becomes available (i) by analogy with Art. 50 CISG or Art. 6.2.3 PICC as principles on which the CISG is based, or alternatively (ii) Art. 6.2.3 PICC as part of Mediterranean contract law which applies by virtue of the rules of private international law. Considering RESPONDENT assumed the full risk of the Equatorianian Tariffs by virtue of Clause 12 of the Sales Agreement, and that CLAIMANT will be put in severe financial difficulty if no remedy is given, this Tribunal should adapt the Sales Agreement to increase the contract price by US$ 1,500,000.

ARGUMENTS

I. THIS TRIBUNAL SHOULD ADMIT DOCUMENTS AND INFORMATION FROM THE MEDITERRANEO ARBITRATION.

1. CLAIMANT applies to admit documents and information from the Mediterraneo Arbitration, including the Partial Interim Award. Pursuant to Art. 22 HKIAC 2018 Rules, evidence satisfying the threshold of relevance and materiality are ***prima facie*** admissible, subject to this Tribunal's discretion to exclude the evidence [*Moser/Bao* para. 9.162].

2. CLAIMANT's application should be allowed. **(A)** The documents and information from the Mediterraneo Arbitration are relevant to our case and material to its outcome. **(B)** There is no valid basis for this Tribunal to exercise its discretion to refuse the admission of the documents and information, given that CLAIMANT has neither breached any confidentiality obligations, nor acted illegally or improperly.

A. The documents and information from the Mediterraneo Arbitration are relevant to the case and material to its outcome.

3. According to Art. 22.3 HKIAC 2018 Rules, evidence is admissible as long as it is relevant and material. The standard of relevance and materiality under Art. 22.3 HKIAC 2018 Rules is the same as that under Art. 9(2)(a) IBA Rules [*Moser/Bao* para. 9.161, footnote 156]. Relevance and materiality under the IBA Rules need only be proved to a *prima facie* standard, and it is sufficient that the evidence is ***likely*** to be relevant and material [*O'Malley* para. 3.69, footnote 93; *Waincymer* 860].

4. Evidence has been described as relevant under the IBA Rules where it is useful to establish the truth of a factual allegation [*Moser/Bao* para. 9.161; *Raeschke-Kessler* 427; *O'Malley* para. 3.69]. In other words, evidence is relevant where it can be used to support an allegation made by the party seeking to adduce the evidence [*Waincymer* 858], or to undermine the veracity of the other party generally [*Waincymer* 789]. Evidence is material to the outcome where the factual allegation which it supports is necessary for complete consideration of the case [*Moser/Bao* para. 9.161]. "Necessary" in the context of the IBA Rules means ***likely*** to contribute to a clarification of the case [*Waincymer* 859, footnote 122; *A/CN.9/396/Add.1* 17], such that its omission prevents an optimal presentation of the issues in dispute [*Waincymer* 859]. It is noteworthy that "necessary" does not bear the higher standard that the ordinary usage of the word implies.

5. In the present proceedings, RESPONDENT has taken the position that neither the hardship reference in Clause 12 of the Sales Agreement nor the text of the Arbitration Agreement allows this Tribunal to adapt the contract price. However, it has adopted the opposite position in the Mediterraneo Arbitration on materially similar clauses. The contract in the Mediterraneo Arbitration adopts verbatim the ICC Hardship Clause 2003 and the Model HKIAC-Arbitration Clause [*PO2* para. 39], which closely resemble Clauses 12 and 15 of the Sales Agreement respectively. Furthermore, the governing law under both the Sales Agreement and the contract in the Mediterraneo Arbitration is Mediterranean law. Therefore, documents and information from the Mediterraneo Arbitration are relevant insofar as they generally undermine the veracity of RESPONDENT's position on the availability of adaptation as a remedy for CLAIMANT. These documents and information are also material as they would go towards supporting CLAIMANT's argument on the availability of adaption as a remedy, insofar as Art. 8(3) CISG expressly allows the subsequent conduct of the parties to be taken into account in interpreting the intentions underlying their previous statements and conduct. As such, the documents and information are material insofar as they are likely to clarify what RESPONDENT had intended to contract for under the Sales Agreement.

B. There is no valid basis for this Tribunal to exercise its discretion to refuse admission of the documents and information.

6. RESPONDENT has claimed that this Tribunal should exclude the documents and information submitted by CLAIMANT, as the submission would be in breach of CLAIMANT's contractual and statutory obligations of confidentiality [*Letter by Fasttrack*]. RESPONDENT also claims that the documents and information have been obtained by illegal or improper means [*Letter by Fasttrack*]. CLAIMANT acknowledges that even though the documents and information from the Mediterraneo Arbitration are ***prima facie*** admissible, this Tribunal still has the ultimate discretion to exclude evidence under Art. 22.3 HKIAC 2018 Rules [*Moser/Bao* para. 9.162]. That discretion to exclude is wide [*Waincymer* 752], and can encompass factors such as confidentiality, procedural fairness and the parties' duty to arbitrate in good faith [Art. 9(2)(e),(g) IBA Rules; *O'Malley* para. 9.117]. These factors are drawn from the IBA Rules which are "commonly adopted or referred to in HKIAC arbitration" [*Moser/Bao* 9.155].

7. Nonetheless, **(1)** CLAIMANT is not under any contractual or statutory obligation to refrain from submitting the documents and information as evidence. Further, **(2)** CLAMANT was not involved in the illegal hack of RESPONDENT's computer system and did not induce

the breach of confidentiality agreement by RESPONDENT's ex-employees. Therefore, there is no basis for refusing the admission of the documents and information.

1. CLAIMANT is not under any statutory or contractual obligation to refrain from submitting the documents and information as evidence.

8. Contrary to RESPONDENT's assertions [*Letter by Fasttrack*], CLAIMANT is not prevented from submitting documents and information from the Mediterraneo Arbitration as evidence. CLAIMANT does not owe RESPONDENT any statutory or contractual obligation of confidentiality in relation to the Mediterraneo Arbitration. Further, even if CLAIMANT does owe RESPONDENT such an obligation of confidentiality, CLAIMANT will not be in breach of this obligation by submitting the documents and information before this Tribunal.

9. CLAIMANT submits that the ML does not impose any statutory obligation of confidentiality. The ML, which has has been adopted verbatim as both the *lex arbitri* in the Mediterraneo Arbitration and in the current proceedings, is silent on the issue of confidentiality. In fact, the drafters of the ML had expressly considered and rejected proposals to provide for arbitral confidentiality [*Born* 2785; *A/CN.9/207* para. 17]. CLAIMANT is also unaware of any other relevant statutory provision that imposes any confidentiality obligations on itself.

10. CLAIMANT is also not under any contractual obligation of confidentiality to refrain from submitting documents and information from the Mediterraneo Arbitration as evidence. Insofar as the contract between CLAIMANT and RESPONDENT is concerned, Mediterranean contract law, a verbatim adoption of the PICC, only imposes on the parties a duty of confidentiality in relation to confidential information disclosed during negotiations [Art. 2.1.16 PICC]. This is irrelevant here because RESPONDENT did not disclose documents and information about the Mediterraneo Arbitration to CLAIMANT in its negotiations of the Sales Agreement.

11. RESPONDENT has also sought to rely on Art. 42 HKIAC 2013 Rules, which contains an express provision of confidentiality, to assert that CLAIMANT owes it such an obligation [*Letter by Fasttrack*]. However, as it was the arbitration agreement between RESPONDENT and the buyer in the Mediterraneo Arbitration that adopted the HKIAC 2013 Rules, and not the Arbitration Agreement between RESPONDENT and CLAIMANT, those rules cannot be unilaterally imposed on CLAIMANT. Moreover, while Art. 45 HKIAC 2018 Rules as chosen by the parties to govern the present proceedings do contain a confidentiality provision, its scope is limited to preventing CLAIMANT from publishing, disclosing or communicating information about the present arbitration. It does not prevent documents

and information from other arbitration proceedings from being disclosed before this Tribunal.

12. CLAIMANT is aware that several jurisdictions have recognised an implied duty of confidentiality stemming from either a mere agreement to arbitrate or the expectations of arbitrating parties [*Born* 2792; *Redfern/Hunter* para. 2.165]. It is not clear if Danubia, as the seat of arbitration, is one of those jurisdictions. However, even if assuming that were so, the obligation should be limited to keeping "material generated in the course of the arbitration within the four walls of the arbitration" [*Ali Shipping* para. 42], rather than to prevent information about other arbitration proceedings which the parties are involved in from being disclosed to the tribunal. Arbitral confidentiality is simply meant to facilitate objective and efficient dispute resolution in a centralised forum [*Waincymer* 2782], and should not be wielded to prevent adverse facts from being brought to light. Unless further evidence shows that the DAL requires otherwise, CLAIMANT's implied duty should not extend beyond the obligation to keep documents and information about the present arbitration confidential.

13. CLAIMANT has shown that it owes no duty of confidentiality to RESPONDENT. However, CLAIMANT will go one step further to assert that even if it was indeed bound by an obligation of confidentiality, there would be no breach by submitting the documents and information before this Tribunal. Under Art. 42.3(a)(i) HKIAC 2013 Rules and Art. 45.3(a)(i) HKIAC 2018 Rules, disclosure may occur when it is needed to protect or pursue a legal right or interest of the party. In the present case, disclosure is needed to pursue CLAIMANT's legal right to adaptation.

14. Furthermore, CLAIMANT's submission does not result in disclosure to third parties not already in possession of the documents and information. The only other parties who would receive the material submitted by CLAIMANT here are RESPONDENT, RESPONDENT's counsel, and this Tribunal [*PO2* para. 37, 38]. Both RESPONDENT and its counsel are already privy to documents and information from the Mediterraneo Arbitration [*PO2* para. 38]. Confidentiality obligations do not prevent evidence in one proceeding from being adduced in another even if the tribunal members are different, so long as it does not result in disclosure to other persons who previously had no access the confidential information. For example, where the parties are identical, confidential information from one proceeding can be disclosed in another proceeding even where the tribunal members are different [*Waincymer* 798; *O'Malley* para. 3.158]. This is because tribunals are themselves bound by a duty of confidentiality [see e.g. Art. 45.2 HKIAC 2018 Rules]. Therefore, the fact that this Tribunal is different from the tribunal in the Mediterraneo

Arbitration [*PO2* para. 37] should not affect the admission of evidence. In light of the above, this Tribunal should not exclude the evidence as CLAIMANT has not breached any obligation of confidentiality.

2. Further, CLAIMANT was not involved in the illegality and did not improperly induce the breach of confidentiality agreement.

15. It is not clear whether documents and information from the Mediterraneo Arbitration were obtained through an illegal hack of RESPONDENT's computer system or the breach of confidentiality agreement by RESPONDENT's ex-employees, but in both cases, there is no justification for exclusion.

16. Tribunals have only excluded illegally or improperly obtained evidence when the party was itself involved in the illegality [*Waincymer* 797; *O'Malley* para. 9.119; *Methanex*]. In *Methanex,* Methanex had committed illegal trespass to obtain certain documents which it sought to adduce as evidence in arbitration. The tribunal refused to admit the documents as evidence because Methanex had unlawfully procured the documents in violation of its duty to arbitrate in good faith and the basic principles of justice and fairness required of parties. Methanex had demonstrated reckless indifference as to whether its "successive and multiple acts of trespass… over five and a half months" was illegal [*Methanex* para. 59].

17. In contrast, where a party seeking to adduce illegally obtained evidence was not involved in the illegality, tribunals have exercised discretion to admit the evidence [*Sicard-Mirabal/Derains* 208; *Caratube*]. For example, the tribunal in *Caratube* admitted certain documents adduced by Caratube even though they had been hacked from the Kazakhstan government's computer systems. In this case Caratube was not involved in the illegal conduct, but had obtained the documents from a publicly available website 'KazakhLeaks' [*Caratube* paras. 150, 156]. In another case the tribunal went even further, relying extensively on Wikileaks cables adduced by a party in rendering its award, without considering if the evidence should be excluded for having been illegally obtained [*Yukos* para. 1189].

18. This line of jurisprudence suggests that tribunals will not exclude illegally obtained evidence as long as the party adducing the evidence was uninvolved in the illegality. Instances of evidence having been illegally or improperly obtained typically arise in investment arbitration, but the same principles apply to commercial arbitration. Admissibility should in all cases depend on a balance between fairness and efficiency of the arbitral process [*Waincymer* 744]. To exclude evidence in situations like the present would serve no practical purpose. Instead,

it would be unfair as against the party seeking to adduce it, and prevent tribunals from fully considering all relevant and material evidence in its assessment of the case.

19. In this case, CLAIMANT was not involved in the illegal hack of RESPONDENT's computer system. Neither did it induce the breach of confidentiality agreement by RESPONDENT's ex-employees. The Partial Interim Award had either been obtained by the horseracing intelligence company via the illegal hack three weeks before CLAIMANT became aware of the Mediterraneo Arbitration [*Letter by Fasttrack*], or provided to the intelligence company on RESPONDENT's ex-employees own accord [*PO2* para. 41]. CLAIMANT had made lawful arrangements to purchase the Partial Interim Award from the intelligence company, against payment of US$ 1,000 [*PO2* para. 41]. All other information on the Mediterraneo Arbitration was provided to CLAIMANT by Mr. Kieron Velazquez at the annual breeder conference [*Letter by Langweiler; PO2* para. 40]. As none of these are illegal actions or improper conduct, there is no basis to deny the admission of the evidence. Short of conclusive proof that the documents and information were obtained illegally or improperly by CLAIMANT, mere allegations are insufficient to justify exclusion of the evidence [*O'Malley* 9.119]. This Tribunal should therefore allow CLAIMANT's application.

II. THIS TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT PRICE UNDER THE ARBITRATION AGREEMENT.

20. **(A)** The Arbitration Agreement is governed by Mediterranean law and confers this Tribunal the power to adapt the contract. **(B)** Even if, as RESPONDENT alleges, the Arbitration Agreement is governed by Danubian law, it should still be interpreted to confer this Tribunal the power to adapt the contract.

A. The Arbitration Agreement as interpreted under Mediterranean law confers this Tribunal the power to adapt the contract price.

1. Mediterranean law governs the Arbitration Agreement.

21. Due to the differences in the contract law of the jurisdictions, there is a "high likelihood" that the Arbitration Agreement would not be interpreted as authorising a contract adaptation were Danubian law to apply [*PO1* para. II]. It is unsurprising, therefore, that RESPONDENT asserts Danubian law governs the Arbitration Agreement. CLAIMANT submits, however, that it is Mediterranean and not Danubian law that governs the Arbitration Agreement.

22. It is trite that under the ML, which was enacted verbatim as the DAL, the parties' choice of law should prevail [*PO1* para. III.4; *Born* 568; ML Arts. 34(2)(a)(i), 36(1)(a)(i)]. However, where the parties do not expressly stipulate a choice of law to govern their arbitration agreement, either the substantive law of the main contract containing the arbitration clause or the law of the seat of the arbitration will typically be applied as the parties' implied choice [*Redfern/Hunter* para. 2.84]. Alternatively, several jurisdictions have applied the law with the "closest connection" to the arbitration agreement [*Born* 505; *Fouchard* 425; *Sulamerica*; *ICC Case No. 5730*].

23. In the present case, the parties have designated Mediterranean law as the substantive law of the Sales Agreement and Danubia as the arbitral seat [*Cl. Ex.* C5]. However, there is no express stipulation for the choice of law to govern the Arbitration Agreement [*Cl. Ex.* C4]. Nonetheless, CLAIMANT submits that **(a)** it was the parties' implied choice to apply the law of the main contract rather than the law of the seat to the arbitration agreement, and **(b)** the same conclusion is reached when the closest connection test is applied.

a) Mediterranean law is the parties' implied choice.

24. The central tension between the law of the contract and the law of the seat is one of efficiency as opposed to neutrality. On one hand, by agreeing to the substantive law of the contract,

the parties will generally have intended it to apply to the arbitration agreement as well, unless consideration of the separability presumption can be inferred from their negotiations [*Born* 591-592; *Redfern/Hunter* para. 3.12; *BCY v BCZ*]. On the other hand, it is true that where the parties expressly designate a neutral arbitral seat, it is possible to infer that the parties intend for the law of that seat to provide a neutral framework to facilitate the arbitration, and rely on its domestic courts to provide remedies to facilitate the arbitration [*Born* 2057].

25. Where the law of the seat and the law of the main contract differ, the choice of law issue should be resolved in a manner which best gives effect to the parties' expectations underlying the commercial relationship, prioritising the parties' intentions [*Born* 543]. In the present case, the commercial context best supports that both parties intended the substantive law of the Sales Agreement to govern the Arbitration Agreement.

26. First, CLAIMANT's first negotiator, Ms. Napravnik, who proposed the draft clause that this Arbitration Agreement is based on [*Resp. Ex.* R2; *PO2* para. 6], was unfamiliar with Danubian law [*PO2* para. 14]. It is therefore unlikely that she would intended for this law to apply, especially since she is legally trained [*Cl. Ex.* C8] and would likely be aware that selecting a different law to govern the Arbitration Agreement could create complexities that lead to additional costs of arbitration [*Born* 590; *Sulamerica* para. 11]. Further, as a Mediterranean lawyer, there was no reason to believe that Ms. Napravnik would want to deviate from the consistent jurisprudence in Mediterraneo that arbitration agreements are governed by the law of the contract whenever sales agreements involve the CISG, unless she had signalled that intention [*PO1* para. III. 4]. In the absence of communication to the contrary, RESPONDENT has no reasonable basis for believing that in the final draft Ms. Napravik proposed prior to the accident, she had a change of heart, when her earlier drafts demonstrate a preference for systems that she was familiar with, namely Mediterraneo courts and arbitration in Mediterraneo [*Cl. Ex.* C3*; Cl. Ex.* C4].

27. Second, CLAIMANT had highlighted to RESPONDENT that it was averse to taking on commercial risks and unnecessary costs when RESPONDENT proposed switching from EXW to DDP delivery terms. At the time of contract, CLAIMANT was already in deep financial difficulties [*PO2* para. 21]. This was known to RESPONDENT [*PO2* para. 22]. In those circumstances, it was reasonable for RESPONDENT to understand that CLAIMANT would prefer applying a law it was familiar with, rather than incur costs that applying a law of a foreign jurisdiction would entail, such as seeking foreign legal advice.

28. Third, CLAIMANT had conveyed to RESPONDENT that CLAIMANT would have required approval from its creditors' committee to subject any contract to a foreign law [*Resp. Ex.* R2]. Admittedly, it is not clear whether an arbitration agreement governed by Danubian law is a contract requiring creditors' committee approval [*PO2* para. 14]. However, it is unreasonable to expect that CLAIMANT would have switched from Mediterranean law to Danubian law, which it was unfamiliar with and potentially required an approval process, without any prior mention or discussion.

29. CLAIMANT recognises that Ms. Napravnik's proposal for Danubia to be the forum of arbitration, and the parties' eventual removal of any choice of law provision [*Resp. Ex.* R3]., may lend itself to the inference that the parties eventually compromised their differences over the dispute resolution mechanism, by choosing Danubian law as a neutral law. However, considering the negotiating history, it is submitted that this inference should be resisted.

30. First, while Ms. Napravnik proposed Danubia as a neutral ***country*** for arbitration following discussions between the parties on the suitability of Mediterraneo and Equatoriana as fora for dispute resolution [*Resp. Ex.* R2], there was no discussion about choosing a neutral ***law***. To the contrary, even Mr. Antley for RESPONDENT used in his note the phrase "neutral **venue** [emphasis added]" [*Resp. Ex.* R3]. It is worth emphasising that CLAIMANT had indicated that it would need approval from its creditors' committee to subject contracts to a foreign law. Moreover, it is trite that the seat "may be chosen because of its geographical convenience to the parties; or because it is a suitably neutral venue; or because of the high reputation of the arbitration services there; or for some other, equally valid reason", reasons which have nothing to do with its suitability as the choice of law of an arbitration agreement [*Redfern/Hunter* para. 3.206; *SCC 117/1999*].

31. Second, the Arbitration Agreement is contained within Clause 15 of the Sales Agreement. Where the arbitration agreement is a clause within a contract, there is a "very strong presumption" that the parties agreed for the substantive law of the contract to apply to the whole contract, including the arbitration agreement [*Lew* 143]. This is especially considering that applying two different laws to the main agreement and the arbitration agreement "will require characterising different issues and demarcating the border between them", which may lead to inefficiencies and delays in the arbitration [*Born* 590]. Thus, the substantive law of the contract should be applied to an arbitration clause contained within the contract "***unless there is agreement to the contrary*** [emphasis added]" [*Lew/Mistelis/Kröll* paras. *6-24*].

32. Third, RESPONDENT had consistently indicated its preference for Equatorianian law and Equatoriana courts [*Cl. Ex.* C3*; Resp. Ex.* R1]. Considering that Mediterranean and Equatorianian contract laws are identical [*PO1* para. III. 4], it is more reasonable to conclude that as between Mediterranean law and Danubian law, Mediterranean law would be preferred even though Danubia is neutral. RESPONDENT's Mr. Krone has asserted that he would have included an express choice of law in the Arbitration Agreement if he correctly understood Mr. Antley's note, which stated to "clarify ***in arbitration clause***… applicable law [emphasis added]" [*Resp. Ex.* R3]. However, it has also been conceded that Mr. Krone simply combined the previous emails chains without inserting a choice of law clause to reach the final agreement [*PO2* para. 6]. In those circumstances, Mr. Antley's intentions should be given weight, and his preference for Equatoriana, whose contract law is identical to Mediterranean law, is significant.

33. Finally, the *contra proferentum* rule cannot be applied against CLAIMANT. Even though there was no choice of law clause in the Arbitration Agreement, it is not true that the Sales Agreement is silent on the matter. Ms. Napravnik ***removed*** Mr. Antley's original choice of law clause [*Resp. Ex.* R2], and as explained above, the presumption in favour of the law of the contract should apply. *Contra proferentum* does not apply when the intent of the parties is discernible [*Schwenzer/Schlechtriem* 168]. Thus, Mediterranean law is the parties' implied choice to govern the Arbitration Agreement.

b) Mediterranean law is the law with the closest connection to the Arbitration Agreement.

34. In the unlikely event that the parties' implied choice of law cannot be discerned, Mediterranean law should still govern the Arbitration Agreement because it is the law with the closest connection. The test of closest connection is premised on the inference that the parties are rational and would prefer the law with the most significant relationship to govern the arbitral agreement [*Born* 517]. Various factors are considered, such as where the contract was concluded, where the parties have their place of business, where the seat of the arbitration is, and which law has the closest connection to the contract [*Fouchard* 425]. In the present case, as RESPONDENT has not suggested that Equatorianian law might apply, it only falls to be considered whether Mediterranean law or Danubian law is more closely connected to the Arbitration Agreement.

35. The seller's place of business is Mediterraneo [*Notice* para. 1], the goods are from Mediterraneo [*Cl. Ex.* C1], and the Sales Agreement is governed by Mediterranean law [*PO1* para. III. 4]. For that matter, Mediterranean and Equatorianian contract laws, the laws of the

seller and buyer, are identical [*PO1* para. III. 4]. The only connection that Danubian law has with the proceedings is that it was chosen as the seat of the arbitration. Weighing the two, Mediterranean law has the closest connection to the Arbitration Agreement.

2. Properly interpreted under Mediterranean law the Arbitration Agreement confers on this Tribunal the power to adapt the contract.

36. In the Arbitration Agreement, the parties agreed that "[a]ny disputes arising out of the contract… shall be… resolved by arbitration" [*Cl. Ex.* C4]. CLAIMANT submits that on proper interpretation of the Arbitration Agreement, adaption of the contract is one of the ways in which disputes can be "resolved".

37. Preliminarily, an arbitration agreement should generally be interpreted to empower this Tribunal to carry out adaptation, when adaptation is for ***the purpose of remedying hardship***. The concept of hardship refers to an unforeseen change of circumstances which makes performance of contractual obligations more onerous but not impossible, fundamentally altering the contractual equilibrium between the parties [*Frick* 178; *Berger* 84]. Insofar as adaptation is contemplated as contractual relief for hardship, especially when there is a hardship clause within the contract [*Berger* 84], the arbitral tribunal can adapt the contract under the general authority granted to it by the arbitration agreement [*Berger/Fletcher* para. 19-013; *A/CN.9/WG.II/WP.44* para. 9]. To this end, CLAIMANT's success in arguing that Clause 12 was a hardship clause which contemplates the remedy of adaptation [below paras. 48-84] would also go towards showing that the parties intended for this Tribunal to have the power to award such remedy.

38. This position is supported by parties' intentions as expressed during negotiations. In the present case, the provisions relevant to interpretation are Arts. 8(1)-(3) CISG, as under Mediterranean contract law, there is consistent jurisprudence that the CISG can govern arbitration agreements in contracts which stipulate CISG as the substantive law [*PO1* para. III.4]. Art. 8(1) CISG mandates that statements be interpreted in accordance with the intent of the person who made that statement where the other party knew or could not have been unaware of his intent.

39. The Arbitration Agreement was taken from Ms. Napravnik's draft on 11 April 2017 save for minor changes regarding the number of arbitrators and language of arbitrators added by RESPONDENT's replacement negotiator Mr. Krone [*PO2* para. 6]. On 12 April 2017, Ms Napravnik expressly communicated her intention that the statements in the Arbitration Agreement meant that this Tribunal could, amongst other things, adapt the contract [*Cl. Ex.*

C8]. Her intentions were acknowledged by RESPONDENT's Mr. Antley, who himself believed that it should be the task of the arbitrators to adapt the contract should the parties not agree [*Cl. Ex.* C8]. While Mr. Antley had suggested that he return with a proposal to include an express reference to clarify the situation [*Cl. Ex.* C8], this should not be taken to mean that the parties believed that the words of the draft Arbitration Agreement as it stood at that time were insufficient to include adaptation as a measure this Tribunal could grant. This is because Ms. Napravnik stated that an express reference to this Tribunal's power to adapt would merely ***clarify*** the situation "irrespective of the fact that from a legal point of view that was not necessary" [*Cl. Ex.* C8].

40. Ms. Napravnik's version of events is supported by Mr. Antley's note written after their discussion on 12 April 2018. His note states "connection of the hardship clause with arbitration clause" [*Resp. Ex. R3*]. Since connecting the hardship clause with the arbitration clause is generally a means of expressly authorising tribunals to adapt a contract [*Berger/Fletcher* para. 19-017], Mr. Antley likely considered that this Tribunal should have the power to adapt the Sales Agreement. Given that this is completely consistent with Ms. Napravnik's testimony, there is no reason to doubt that Mr. Antley wanted to enact an express reference to affirm that this Tribunal could adapt the contract in circumstances of hardship.

41. RESPONDENT contends that it suggested the arbitration clause, not CLAIMANT, and when it did so, it deleted any reference from the Model HKIAC-Arbitration Clause which could be interpreted as authorising contract adaptation [*Answer* para. 13]. Comparing the two, RESPONDENT changed "[a]ny dispute, controversy, difference or claim arising out or relating to this contract" to "[a]ny dispute arising out of this contract" and removed the phrase "any dispute regarding non-contractual obligations". However, the minor differences between the Model HKIAC-Arbitration Clause and the Arbitration Agreement do not have any bearing here. The deletions relate to what kinds of disputes may be referred to arbitration, as opposed to the scope of the remedies that the Tribunal has the powers to order thereupon. There is no issue here since this Tribunal would be adapting the contract in response to a contractual dispute within the scope of Clause 12.

42. Mr. Krone, the replacement negotiator for RESPONDENT, has asserted that he would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion [*Resp. Ex. R3*]. However, his intentions are not relevant when interpreting the Arbitration Agreement. Mr. Krone had not been involved in drafting the Arbitration Agreement save for joining the drafts discussed by Ms. Napravnik and Mr. Antley together [*PO2* para. 6], and

thus, under Art. 8(1) CISG, his intentions cannot be considered when interpreting the Arbitration Agreement. Further, he had not made such intentions known to CLAIMANT who had every reason to understand, in the absence of communications to the contrary, that Mr. Antley's representations that the Tribunal should have the power to adapt the contract still held sway.

43. On the contrary, evidence has now emerged that RESPONDENT may have had the subjective intention for this Tribunal to be able to adapt the contract in situations of hardship. In the Mediterraneo Arbitration, RESPONDENT sought adaptation for hardship and thus must have believed that the arbitral tribunal there had the power to adapt the contract. This was in spite of the hardship clause and Arbitration Agreement not having express reference to adaptation. Art 8(3) CISG allows RESPONDENT's subsequent conduct in the Mediterraneo Arbitration to shed light on its subjective intentions underlying the Arbitration Agreement. Given the similarities between the arbitration agreement and hardship clause in the present dispute and the Mediterraneo Arbitration, RESPONDENT's contradictory position in the Mediterraneo Arbitration undermines the credibility and believability of its argument here. If anything, it bolsters CLAIMANT's case that both parties always intended the Arbitration Agreement to authorise contract adaptation by this Tribunal and the Tribunal should rule as such.

B. Even if the Arbitration Agreement is governed by Danubian law the interpretation that it confers the power on this Tribunal to adapt the contract should not change.

44. While the parties have agreed that there is a "high likelihood" that the Arbitration Agreement would not be interpreted as authorising a contract adaptation should Danubian law apply [*PO1* para. II], CLAIMANT submits that the above analysis should not significantly change even if the Arbitration Agreement is governed by Danubian law. The main difference if Danubian law as applied is that its 'four corners' rule stipulates that an agreement in writing cannot be ***contradicted*** or ***supplemented*** by evidence of prior agreement, whereas under Mediterranean law, all relevant circumstances of the case including negotiations and subsequent conduct can be taken into consideration [*PO2* para. 45; Art. 2.1.17. PICC; Art. 8 CISG]. However, even under Danubian law, such statements or agreements may be used to ***interpret*** the writing [Art. 2.1.17. PICC]. As RESPONDENT acknowledges, reliance on the drafting history and preceding communications is only excluded "if the wording is clear" [*Answer* para. 16].

45. Here, the extrinsic evidence clearly does not contradict the terms of the Arbitration Agreement because there is nothing within the wording of the Arbitration Agreement that precludes this Tribunal from having the power to adapt the contract. Neither does any extrinsic evidence of the parties' negotiations supplement anything in the Arbitration Agreement because it does not add any new terms. Instead, CLAIMANT relies on such evidence to determine whether adaptation of the contract falls within the parties' agreement to have "[a]ny disputes arising out of this contract… ***resolved by arbitration*** [emphasis added]" [*Cl. Ex.* C4]. This is a question of interpreting what are the remedies and reliefs that the arbitral tribunal can order, as part of its power to ***resolve*** disputes arising out of the Sales Agreement. Thus, even if Danubian law governs the Arbitration Agreement, this Tribunal should still be able to take into account the evidence of Ms. Napravnik and Mr. Antley's negotiations, and adapt the contract in response to the hardship faced by CLAIMANT.

46. Finally, CLAIMANT wishes to make clear that it is requesting this Tribunal to exercise its ***power*** to adapt the Sales Agreement. It is trite that an arbitral tribunal's jurisdiction relates to its mandate or competence to hear the dispute, while a tribunal's powers relate to what is conferred upon it to carry out its task properly and effectively [*Redfern/Hunter* paras. 5.06, 5.91]. Although RESPONDENT refers to the present proceedings as concerning this Tribunal's "jurisdiction to adapt the contract" [*PO2* para. 24], properly characterised, the issue of whether the Tribunal can adapt is an issue of power. First, the nature of the adaptation that CLAIMANT is requesting is only a specific ***relief*** to hardship. This can be distinguished from other types of contractual adaptation where the parties give the arbitral tribunal the freestanding jurisdiction to adapt the contract as it sees fit. Second, RESPONDENT's objection does not extend to whether this Tribunal can hear the case but whether this Tribunal can specifically carry out adaptation [*PO2* para. 48]. Accordingly, whether this Tribunal can adapt the Sales Agreement should be characterised as a power since it relates to what it can do to carry out its task properly and effectively.

47. This Tribunal has the jurisdiction to hear the present case, and the power to adapt the contract has been contemplated by the parties in the Arbitration Agreement read in light of Clause 12 of the Sales Agreement. Consequently, this Tribunal should rule that it has the power to grant the remedy of adaptation should it find that the CLAIMANT has suffered hardship in consequence of the Equatoranian Tariffs.

III. THIS TRIBUNAL SHOULD ADAPT THE CONTRACT PRICE AND AWARD CLAIMANT US$ 1,500,000 UNDER CLAUSE 12 OF THE SALES AGREEMENT.

48. Clause 8 of the Sales Agreement stipulates DDP terms. However, CLAIMANT's delivery obligations have been qualified by Clauses 9-13, which expressly reallocated certain risks usually associated with DDP delivery to RESPONDENT. In particular, Clause 12 provides that CLAIMANT "shall not be responsible… *for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*".

49. On a proper construction of Clause 12, this Tribunal should adapt the contract price and award CLAIMANT US$ 1,500,000. This sum is the additional cost that CLAIMANT incurred because the Equatorianian Tariffs were 30% of the second instalment price of US$ 5,000,000 (30% of US$ 5,000,000 = US$ 1,500,000). **(A)** The increased costs of delivery caused by the Equatorianian Tariffs fall within the ambit of "hardship, caused by… comparable unforeseen events" as contemplated in Clause 12. **(B)** The additional US$ 1,500,000 CLAIMANT seeks from an adaptation of the price is appropriate because Clause 12 allocates the risks of the Equatorianian Tariffs to RESPONDENT.

A. The increased cost of delivery due to the Equatorianian Tariffs amount to hardship under Clause 12 of the Sales Agreement.

50. The concept of 'hardship' at law ordinarily refers to an unforeseen change of circumstances which fundamentally alters the contractual equilibrium between the parties [*Frick* 178; *Berger* 84]. However, the parties are free to depart from the general standard of hardship and specify a different standard in their hardship clause [*Brunner* 515].

51. In Clause 12, the parties agreed that there will be hardship whenever there are "additional health and safety requirements or comparable unforeseen events making the contract more onerous". **(1)** The Equatorianian Tariffs are comparable to the imposition of additional health and safety requirements insofar as they are an equally unforeseeable event which has resulted in a substantial increase in costs for CLAIMANT. **(2)** Moreover, the Equatorianian Tariffs make the performance of the Sales Agreement more onerous insofar as they have resulted in CLAIMANT suffering a loss on the sale which places CLAIMANT at risk of insolvency. CLAIMANT's profit margin from the Third Shipment was US$ 250,000, being 5% of the contract price of US$ 5,000,000, but incurred a much higher extra cost of US$ 1,500,000 from the Equatorianian Tariffs. Therefore, CLAIMANT has suffered hardship.

1. The imposition of the Equatorianian Tariffs was a "comparable unforeseen event" to additional health and safety requirements because it was equally unforeseeable.

52. The hardship provision in Clause 12 is only engaged by additional health and safety requirements or "comparable unforeseen events". Determining the scope of a "comparable unforeseen event" is a matter of contractual interpretation to be done by applying Art. 8 CISG [*Schwenzer/Schlechtriem* 145]. Applying Art. 8 CISG to interpret "additional health and safety requirements or comparable unforeseen events", the imposition of the Equatorianian Tariffs fall within the meaning of "comparable unforeseen events".

53. In the context of the hardship provision within Clause 12, RESPONDENT was the party who suggested this wording [*PO2* para. 12]. Here, Art. 8(1) CISG is inapplicable because there is no evidence as to RESPONDENT's intent as to the meaning of "comparable unforeseen events". Even if there was, CLAIMANT would be unaware of such intent because it was not communicated to CLAIMANT. Accordingly, since the common intention of the parties are unascertainable under the subjective test espoused in Art. 8(1) CISG, Art. 8(2) CISG should be applied [*Schwenzer/Schlechtriem* 154].

54. Applying Art. 8(2) CISG, additional health and safety requirements or comparable unforeseen events is to be interpreted according to the understanding that a "reasonable person of the same kind" as CLAIMANT would have. A reasonable person of the same kind as CLAIMANT would have understood "comparable unforeseen event" to mean an event which is comparably unforeseeable to the additional health and safety requirements.

55. A reasonable person of the same kind as CLAIMANT would have this understanding from the drafting of Clause 12, CLAIMANT had communicated to RESPONDENT on 31 March 2017 its unwillingness to bear any additional risks resulting from a change in the delivery terms [*Cl. Ex.* C4]. In particular, CLAIMANT specifically mentioned as an example "***unforeseeable*** health and safety requirements… which can increase the cost by up to 40% [emphasis added]". The eventual wording of Clause 12 was then finally based on the risks mentioned in this email [*PO2 para.* 12], and also made reference to other comparable unforeseen events. A reasonable person of the same kind as CLAIMANT would thus have understood "comparable unforeseen event" to refer to an event which was equally or similarly unforeseeable as the type of health and safety requirements CLAIMANT previously encountered.

56. Here, the requirement of "unforeseen" is satisfied because the parties did not contemplate the possibility of import tariffs ever affecting the frozen semen shipments, similar to how

CLAIMANT did not foresee the additional health and safety requirements. Furthermore, even if tariffs on agricultural products were foreseeable, the parties did not foresee the tariffs affecting the sale of frozen semen [*Cl. Ex.* C8; *Resp. Ex.* C4; *Notice* para. 11]. It is important, in this regard, to note that Equatoriana has always been "one of the biggest supporters of… free trade" and had a history of seeking to solve disputes amicably. The tariffs were a "big surprise" even to "informed circles" [*Cl. Ex.* C6]. This would mean that the tariffs would *a fortiori* be unforeseeable to both CLAIMANT and RESPONDENT.

57. Further, even though the protectionist Mediterranean President had been elected prior to the conclusion of the Sales Agreement, this did not make the Equatorianian Tariffs foreseeable. The Mediterranean Tariffs had not been part of the Mediterranean President's strategy papers nor election manifesto [*Notice* para. 9], and it took most analysts by surprise "as they went beyond the worst expectations" [*Cl. Ex.* C6]. It was also not foreseeable that Equatoriana would retaliate since it had always supported free trade [*Cl. Ex.* C6]. Equatoriana had only retaliated once in history when its Prime Minister was from the National Party which was more critical of free trade. In comparison, the current Prime Minister is from the Progressive Liberals which is supportive of free trade [*Notice* para. 19]. Such a direct retaliatory measure would likely not have been foreseeable for the parties.

58. Even if the tariffs on ***agricultural products*** were foreseeable, CLAIMANT did not foresee that the Equatorianian Tariffs would affect the sale of the ***frozen semen***. Frozen semen is generally not considered to be an agricultural good. In any case, it clearly did not occur to CLAIMANT, or even RESPONDENT itself, that the frozen semen shipments were affected by the Equatorianian Tariffs, even after they had been announced. It was only until CLAIMANT had asked for customs clearance for the Third Shipment that it discovered that the Equatorianian Tariffs applied to the frozen semen [*PO2* para. 26].

59. Therefore, the imposition of the Equatorianian Tariffs fall within the scope of "comparable unforeseen events" in Clause 12.

2. <u>The imposition of the Equatorianian Tariffs was sufficiently onerous as to amount to hardship because it destroyed the commercial basis of the deal.</u>

60. Clause 12 defines "hardship" as being caused by "comparable unforeseen events making the contract more onerous". The standard of onerousness sufficient to constitute hardship as intended by the parties is a matter of contractual interpretation to be done by applying Art. 8 CISG [*Schwenzer/Schlechtriem* 145]. On proper interpretation of Clause 12, the Equatorianian Tariffs amount to hardship.

61. The meaning of "onerous" was not communicated by RESPONDENT who supplied the clause. Nevertheless, applying Art. 8(2) CISG, a reasonable person of the same kind as CLAIMANT would understand that the contract is more onerous under Clause 12 whenever there is an increase in costs associated with DDP delivery, which results in CLAIMANT suffering a loss that puts it at risk of insolvency, thereby "destroy[ing] the commercial basis of the deal" [*Cl. Ex.* C4]. This is for four reasons.

62. First, during the negotiations, CLAIMANT informed RESPONDENT that it was unwilling to agree to pure DDP delivery terms. It would not bear the risks associated with DDP delivery and wanted a hardship clause to protect itself from such risks [*Cl. Ex.* C4]. In fact, CLAIMANT specifically informed RESPONDENT that its concern stemmed from "past experiences" that a change in circumstances had led to an increase in CLAIMANT's costs, "thereby destroy[ing] the commercial basis of the deal" [*Cl. Ex.* C4].

63. In relation to the "commercial basis of the deal" being destroyed, CLAIMANT was referring to its past experience with DDP delivery in 2014, where unforeseeable health and safety requirements had increased its costs and caused it to nearly become insolvent [*PO2* para. 21]. CLAIMANT intended for the hardship clause to protect it from similar risks which it would otherwise have to bear under standard DDP delivery terms. Naturally, a reasonable person of the same kind as CLAIMANT would thus understand the "commercial basis of the deal" to be destroyed when the increase in costs places it at risk of insolvency, similar to its past experience in 2014.

64. Second, that a reasonable person of the same kind as CLAIMANT would have this understanding is further supported by CLAIMANT's financial position. CLAIMANT needed to be profitable in 2017 and 2018 in order to automatically prolong its two main credit lines [*PO2* para. 29]. If CLAIMANT failed to be profitable, it would become insolvent since it was unlikely that CLAIMANT would be able to negotiate a new credit line [*PO2* para. 29]. Therefore, an increase in costs to the extent that CLAIMANT suffers a loss would place CLAIMANT at serious risk of being unprofitable, and hence insolvent. It would thus be a reasonable understanding for the hardship provision to be engaged whenever CLAIMANT suffers a loss putting it at risk of becoming insolvent.

65. Third, a reasonable person of the same kind as CLAIMANT would have had this understanding because of CLAIMANT's low profit margin on this sale. Here, CLAIMANT only had a low profit margin of 5%, whereas the ordinary profit margin for a natural coverage by Nijinsky III was 15%. The extent of the risk assumed by a party can be inferred from its expected profit margin [*Brunner* 434; *Schwenzer* 716]. The lower the profit margin, the less

risks a party would have been reasonably understood to assume. A reasonable understanding would thus be that CLAIMANT did not intend to bear the risk of suffering any losses which would put it at risk of insolvency.

66. Fourth, during the pre-contractual negotiations, RESPONDENT objected to the suggested ICC Hardship Clause 2003 because it was "too broad", and thus the parties chose to regulate "a number of possible risks directly" [*Answer* para. 4; *PO2* para. 12]. In other words, RESPONDENT's only objection was to the scope of the risk it had to bear, but it did not object to the standard of onerousness sufficient to constitute hardship. In light of this, a reasonable person of the same kind as CLAIMANT would have understood the standard of hardship to be the same as what it had intended, namely that it would be met whenever the increase in costs resulting from DDP delivery would result in its insolvency.

67. Therefore, the Sales Agreement should be found to have become more onerous whenever the increase in costs results in CLAIMANT suffering a loss which puts it at risk of insolvency, thereby destroying the commercial basis of the deal.

68. In this case, the costs of the Equatorianian Tariffs has made the Sales Agreement more onerous insofar as it caused CLAIMANT to incur an additional cost of US$ 1,500,000 on the Third Shipment, of which CLAIMANT only had a profit margin of US$ 250,000. In other words, the increase in costs caused by the Equatorianian Tariffs amount to 600% of CLAIMANT's profit margin, and has caused CLAIMANT to suffer a loss of five times what it would have expected to made. This would also result in CLAIMANT being unprofitable in 2018 and at risk of insolvency. Therefore, there is hardship to CLAIMANT.

B. The US$ 1,500,000 increase in price sought is appropriate as Clause 12 allocates the risks of hardship caused by the Equatorianian Tariffs to RESPONDENT.

69. Clause 12 provides that CLAIMANT "shall not be responsible for… hardship". **(1)** The parties intended for this provision to extend to an adaptation of the contract price whenever there is hardship. **(2)** CLAIMANT is consequently entitled to an additional US$ 1,500,000 because RESPONDENT assumed the risks of the Equatorianian Tariffs under Clause 12.

1. The parties impliedly intended the remedy of adaptation to be available to CLAIMANT when they agreed to a hardship provision.

70. The availability of remedies under Clause 12 is a matter of interpretation. Applying Art. 8 CISG to interpret the words "shall not be responsible… for hardship", Clause 12 allows for adaptation of the contract price whenever there is such hardship to CLAIMANT. The

contract should be adapted in a manner that would eliminate hardship because RESPONDENT assumed responsibility for these risks.

71. Here, RESPONDENT was the party who suggested the wording of the hardship reference in Clause 12 [*PO2* para. 12]. However, CLAIMANT submits that RESPONDENT did not intend to exclude the remedy of adaptation under Clause 12. Even if RESPONDENT did so intend, CLAIMANT did not know and could not have been aware of such intention.

72. Under the subjective test of Art. 8(1) CISG, a contractual clause is to be interpreted by its drafter's intent if the other party knew or could not have been aware of that intent. According to Art. 8(3) CISG, the subsequent conduct of the parties are relevant.

73. In this regard, RESPONDENT has relied on the ICC Hardship Clause 2003 in the Mediterraneo Arbitration to argue for contract adaptation [*PO2* para. 39]. However, the clause only provides for re-negotiation and termination in the event of hardship, but not adaptation. This means that RESPONDENT considers a general reference to "hardship" as sufficient to allow for adaptation, even where the clause does not expressly provide for it. Therefore, contrary to its assertions [*Answer* para. 19], RESPONDENT would likely have intended a general reference to "hardship" in Clause 12 as allowing for adaptation.

74. More importantly, even if RESPONDENT did not intend for Clause 12 to confer the remedy of adaptation, CLAIMANT did not know and could not have been aware of such an intention. By Mr. Krone's own admission, he did not communicate any objection at any time to adaptation of the contract price to CLAIMANT [*Resp. Ex.* R3]. In fact, during the meeting on 12 April 2017, RESPONDENT's Mr. Antley agreed with CLAIMANT's Ms. Napravnik that adaptation was available as a remedy [*Cl. Ex.* C8]. In fact, he even promised to "come back with a proposal" when Ms. Napravnik asked for an express mechanism which would authorise such adaptation [*Cl. Ex.* C8]. RESPONDENT's current assertions are entirely at odds with what it represented at the time of negotiations.

75. Since the common intention of the parties is unascertainable under Art. 8(1) CISG, Art. 8(2) CISG should be applied in the interpretation of "shall not be responsible… for hardship". Clause 12 should thus be objectively interpreted according to the understanding of what a reasonable person of the same kind as CLAIMANT would have. Doing so, it is evident that Clause 12 should be construed to allow for adaptation when there is hardship.

76. CLAIMANT is a sophisticated commercial entity with the benefit of legal advice since it has its own legal department [*Resp. Ex.* R3]. CLAIMANT's negotiator, Ms. Napravnik, is also legally trained. Therefore, a reasonable person of the same kind as CLAIMANT would have understood the word "hardship" in light of its legal meaning under Mediterranean law as the

governing law of the Sales Agreement [*PO1* para. III.4]. Since the parties did not expressly state the remedies flowing from a finding of "hardship" under Clause 12, the understanding of a reasonable person as the same kind as CLAIMANT would be that the remedies available would be the same as that under Mediterranean law which is the governing law of the Sales Agreement (i.e. under the PICC). Arts. 6.2.3(3)-(4) PICC allow for an adaptation of the contract price in the event of hardship if the parties fail to reach agreement within a reasonable time. A reasonable understanding of Clause 12 would thus be that it allows for adaptation. In fact, it has been suggested that if not expressly stated, it must be presumed that the parties intended for the contract to be adapted by the court or tribunal if the parties fail to reach an agreement [*Brunner* 515].

77. Further, as mentioned above [para. 39], during the pre-contractual negotiations CLAIMANT's lawyer and negotiator Ms. Napravnik had asked "to have a mechanism in place which would ensure an adaptation of the contract", and RESPONDENT's Mr. Antley agreed that this Tribunal could adapt the contract [*Cl. Ex.* C8]. His replacement negotiator Mr. Krone had also finalised the agreement without evincing any contrary intention. A reasonable person of the same kind as CLAIMANT would thus understand the hardship reference in Clause 12 to allow for an adaptation of the contract when there is hardship.

78. Finally, notwithstanding that the hardship reference was inserted into the force majeure clause in Clause 12 [*PO2* para. 12; *Resp. Ex.* R3], a reasonable person of the same kind as CLAIMANT would not have understood Clause 12 as exclusively entailing a force majeure outcome (i.e. an exemption of liability for non-performance) for hardship. This is because a force majeure clause and a hardship clause result in different legal consequences [*Brunner* 221]. Hardship clauses usually provide for the revision (i.e. adaptation) of the contract (or for termination) when the change of circumstances amount to hardship [*Brunner* 221; *Rimke* 227]. This is a consequence expressly contemplated by the parties as discussed above [at paras. 70-77]. On the other hand, a force majeure clause usually provides for the suspension of obligations and excuses liability for non-performance [*Rimke* 198].

79. Therefore, a reasonable person of the same kind as CLAIMANT would understand the remedy of adaptation to be available whenever there is hardship.

2. <u>The US$ 1,500,000 increase in price corresponds to the risk of the Equatorianian Tariffs which under Clause 12 RESPONDENT agreed to bear.</u>

80. Finally, this Tribunal should adapt the contract price such that CLAIMANT will be entitled to an additional US$ 1,500,000, this being the full cost of the Equatorianian Tariffs. This is

because a reasonable person of the same kind as CLAIMANT would have understood RESPONDENT to have assumed the risk of events causing such hardship.

81. Despite the reference to DDP delivery in the Sales Agreement, CLAIMANT had never intended to bear the extensive risk obligations associated with such terms. CLAIMANT had only agreed to DDP delivery on the basis that critical modifications as to risk allocation were made to the terms [*Cl. Ex. C4*]. In this regard, it is evident that Clauses 9-13 allocate whichever risks not borne by CLAIMANT to RESPONDENT as the buyer. Therefore, notwithstanding that Clause 12 only states that "seller shall not be responsible", a reasonable person of the same kind as CLAIMANT would understand Clause 12 to allocate the risk of events constituting hardship to RESPONDENT. This is also supported by the fact that CLAIMANT had even agreed to a lower price of US$ 500 per dose for DDP delivery because of the removal of certain risks associated with DDP delivery [*PO2* para. 8].

82. Furthermore, as mentioned above [at para. 66], during the pre-contractual negotiations RESPONDENT's only objection to the suggested ICC Hardship Clause 2003 by CLAIMANT was to the scope of the risks it had to bear under the clause, and not that it had to bear risks at all. Therefore, a reasonable person of the same kind as CLAIMANT would have understood that if an event were to fall within the scope of hardship as defined in Clause 12, as the Equatorianian Tariffs did, then the responsibility to bear the tariffs would still be on RESPONDENT.

83. The post-contractual conduct also show CLAIMANT's understanding. Upon discovering that the Equatorianian Tariffs applied to the Third Shipment, CLAIMANT immediately informed RESPONDENT that it was to "bear the bulk of the additional costs due to the tariffs" [*Cl. Ex.* C8]. Furthermore, CLAIMANT only delivered the Third Shipment after being assured by RESPONDENT that it would do so [*Cl. Ex.* C8].

84. Therefore, applying Art. 8(2) CISG to the interpretation of "[seller] shall not be responsible… for hardship", RESPONDENT has assumed the risk of the Equatorianian Tariffs. In light of the above, the contract should be adapted to increase the price by US$ 1,500,000, this being the cost of the Equatorianian Tariffs.

IV. ALTERNATIVELY, THIS TRIBUNAL SHOULD ADAPT THE CONTRACT PRICE AND AWARD CLAIMANT US$ 1,500,000 UNDER ART. 79(1) CISG.

85. Pursuant to Art. 79(1) CISG, this Tribunal should adapt the Sales Agreement to increase the contract price by US$ 1,500,000. **(A)** The Equatorianian Tariffs amount to a hardship impediment within the meaning of Art. 79(1) CISG that CLAIMANT could not foresee or control. **(B)** Adaptation should be allowed to remedy hardship impediments under Art. 79(1) CISG. **(C)** Adapting the price of the Sales Agreement upwards by US$ 1,500,000 is needed to restore contractual equilibrium between the parties under the Sales Agreement.

A. The Equatorianian Tariffs caused hardship amounting to an impediment within the meaning of Art. 79(1) CISG that CLAIMANT could not foresee or control.

86. Art. 79(1) CISG provides relief to the parties in the event of unforeseeable impediments beyond the control of the obligor which could not have been avoided or overcome. The present circumstances fall within its ambit. **(1)** The Equatorianian Tariffs increased CLAIMANT's cost of delivery so substantially that it could not reasonably be expected to continue performance. **(2)** The Equatorianian Tariffs were not reasonably foreseeable and could not have been avoided or overcome by CLAIMANT.

1. The Equatorianian Tariffs increased CLAIMANT's cost of delivery so substantially that it could not reasonably be expected to continue performance.

87. An impediment within the meaning of Art. 79(1) CISG refers to "any occurrence that makes performance either impossible or so difficult to carry out that it may no longer reasonably expected from the obligor" [*Azeredo* 315]. The Equatorianian Tariffs constitute an impediment resulting in such a substantial increase in the cost of delivery that CLAIMANT could not have been reasonably expected to perform. To put things in perspective, the price of the Third Shipment under the current contract is US$ 5,000,000, yielding CLAIMANT a net profit of US$ 250,000. However, the increase in delivery costs alone, without factoring in CLAIMANT's existing costs, is US$ 1,500,000, corresponding to six times of CLAIMANT's expected profit.

88. CLAIMANT acknowledges that the present circumstances are typically characterised as hardship rather than ab impediment amounting to force majeure. CLAIMANT is also aware that some commentators do not view Art. 79(1) CISG as applicable to hardship impediments [*Tallon* 594; *Carlsen* IV. D.]. This view is based on the rejection by the Committee of the Whole I of a proposed hardship article during its tenth session [*A/32/17*] as well as the rejection of a Norwegian proposal to exempt the buyer when a radical change of

circumstances occurs that makes it unreasonable for the buyer to perform his obligations occurs [*Honnold* 603]. CLAIMANT submits, however, that on a proper interpretation, Art. 79(1) CISG should extend to cover hardship.

89. First, hardship refers to an unforeseen change of circumstances which makes performance of contractual obligations more onerous but not impossible [*Frick* 178; *Berger* 84]. This definition is consistent with the meaning of impediment under Art. 79(1) CISG, which refers to any occurrence that makes performance either impossible or so difficult to carry out that it may no longer be reasonably expected from the obligor [*Azeredo* 315]. On a plain reading of Art. 79(1) CISG, there is nothing to suggest that the provision was intended to limit the scope of the word "impediment" to only instances of force majeure. Instead, it "leaves room for economic changes in circumstances comparable to non-economic barriers that excuse failure to performance" [*Honnold/Flechtner* 627]. Consequently, the prevailing view is that hardship arising from an economic change of circumstances can amount to an impediment within the meaning of Art. 79(1) CISG [*Schwenzer/Schlechtriem* 1142; *Brunner* 222; *Scafom*]. Indeed, this was the very finding of the seminal case of *Scafom* where the Belgian Supreme Court held that unforeseen changed circumstances which disproportionately increased a party's burden of performance could constitute an impediment within the meaning of Art. 79(1) CISG.

90. Second, no reasons were provided by the Committee of the Whole I as to why the hardship article was rejected [*Azeredo* 332; *A/32/17*]. As for the Norwegian proposal, that was never actually discussed in the context of hardship and had in fact been rejected because of the unwillingness of the members to introduce the French doctrine of *imprévision* [*Honnold* 603; *Garro* 245]. Consequently, most commentators rightly view the *travaux préparatoire* as being inconclusive of an intent to exclude hardship impediments from relief under Art. 79 CISG [*Azeredo* 334; *Schwenzer/Schlechtriem* 1142; *Advisory Opinion No. 7* para. 34; *Brunner* 222; *Garro* 245].

91. There is good reason to recognise hardship as an impediment under Art. 79(1) CISG as opposed to limiting the provision to force majeure circumstances. Given that obligors are already excused where an impediment can only be overcome at excessive cost, it would be unfair not to grant relief to the parties whose costs of performance have risen excessively [*Brunner* 215; *Schwenzer* 1136].

92. CLAIMANT's circumstances justify a finding of a hardship impediment under Art. 79(1) CISG. The Equatorianian Tariffs have significantly changed the economic circumstances underlying the Sales Agreement. As commentators have observed, in circumstances where

the consequences of the economic change in circumstances exceeds the obligor's assumption of risk, a finding of hardship will be justified [*Brunner* at 432]. As discussed above, by agreeing to Clause 12, CLAIMANT did not assume the risk of hardship from the Equatorianian Tariffs [above para. 80-84]. The Equatorianian Tariffs not just eliminated any chance of profit on the Sales Agreement but have also caused CLAIMANT to suffer a loss of US$ 1,250,000. This loss fundamentally exceeded the extent of risk assumed by CLAIMANT such that it could not be reasonably expected to have performed under those circumstances.

93. Separately, commentators such as Schwenzer have observed that the threshold for finding hardship may be lowered where the consequence of the impediment faced is the obligor's financial ruin [*Brunner* 435; *Schwenzer* 716]. This is understandable given that it cannot by any stretch of imagination be thought that an obligor would voluntarily agree to assume the risk of financial ruin in a contract for sale. As mentioned earlier, the costs from the Equatorianian Tariffs will cause financial ruin to CLAIMANT because it will likely result in CLAIMANT's insolvency [above para. 64]. Therefore, this Tribunal should also find that there was hardship on this basis.

94. RESPONDENT has taken the position that the parties have derogated from Art. 79(1) CISG by virtue of Clause 12 [*Answer* para. 20]. This is untenable. The inclusion of a force majeure clause does not automatically mean that the parties intended to derogate from the application of Art. 79(1) CISG [*Djakhongir* para. 5.11]. For example, in *Case No. 277,* the tribunal applied Art. 79 CISG even though there was a force majeure clause. Whether there was derogation from the CISG should instead depend on a proper interpretation of the contract [*Djakhongir* para. 5.11]. Here, there is nothing to suggest that the parties had the intention to exclude the applicable remedies for hardship under the CISG. Discussions during negotiations had centred on whether to insert a hardship clause into the Sales Agreement and not whether to limit the breadth of the parties' recourse to remedies that would otherwise be available under general law. Therefore, even in the event that this Tribunal finds that the parties had intended to insert a hardship provision in Clause 12 but had not intended for that clause to result in the availability of an adaptation remedy, it should not as a consequence make the finding that Art. 79(1) CISG was intended to be derogated from without evidence of such intention.

95. In light of the above, this Tribunal should find that Art. 79(1) CISG has not been derogated from and that there was hardship impediment within the meaning of that provision.

2. The Equatorianian Tariffs were not reasonably foreseeable and could not have been avoided or overcome by CLAIMANT.

96. Art. 79(1) CISG excuses performance when the impediment is one that would not have been taken into account by a reasonable person in the obligor's position at the conclusion of the contract and is beyond the obligor's control. If the impediment was reasonably foreseeable at the time of the contract's conclusion, the obligor is taken to have assumed the risk of the said impediment [*Schwenzer/Schlechtriem* 1135]. As elaborated earlier, the Equatorianian Tariffs were unforeseeable because neither the possibility nor scope of the tariffs could reasonably have been anticipated when the Sales Agreement was concluded [above para. 56-58].

97. Whether the impediment was beyond the obligor's control turns on whether the obligor had alternative performance methods or could reasonably been able to overcome the said impediment [*Kröll/Mistelis/Viscasillas*1060]. The Equatorianian tariffs formed an impediment beyond CLAIMANT's control as CLAIMANT could not have been exempted from or obtained a reduction in the Equatorianian Tariffs [*PO2* para. 27]. Furthermore, CLAIMANT's only way of overcoming the tariffs was to pay them, which cannot be reasonable because it not only means that CLAIMANT would be paying far more than it could hope to earn on the Sales Agreement but would also face financial ruin.

B. Adaptation should be allowed to remedy hardship impediments under Art. 79(1) CISG.

98. Contrary to RESPONDENT's claim [*Answer* para. 21], adaptation is available for hardship impediments under Art. 79(1) CISG. **(1)** The CISG has a gap insofar as Art. 79 CISG does not provide a remedy for impediments arising from hardship. **(2)** The gap can be filled with the remedy of adaptation through Art. 7(2) CISG using CISG principles or Mediterranean law.

1. While hardship can amount to an impediment under Art. 79(1) CISG there is a gap insofar as Art. 79 CISG contains no remedy for impediments arising from hardship.

99. Under Art. 79 CISG, the remedy provided to an obligor is exemption from performance and immunity from damages claim by the obligee. However, if this Tribunal accepts that Art. 79 CISG extends to cover hardship cases, then there is a gap "governed but not expressly settled" by the CISG insofar as the exemption provided for in Art. 79(1) CISG does nothing to alleviate an obligor facing hardship [*Art 7(2)* CISG]. Indeed, this gap has been observed by a number of commentators [*Schwenzer* 1151; *Garro* 246; *Azeredo* 342; *Ishida* 379], as well as in

the *Scafom* case, where the Belgian Supreme Court held that an adaptation remedy was available for hardship impediments under Art. 79 CISG.

100. The existence of the gap can be demonstrated by the following example. In the event where the seller has delivered the goods to the buyer, but the buyer faces hardship in the form of unforeseen and extensive taxes on overseas fund transfers, it cannot reasonably be said that the buyer should be able to avail himself of the remedy of exemption from performance. It would not have been within the contemplation of the drafters of the CISG that the buyer should get the goods for nothing. At the same time, since the hardship is experienced by the buyer, the seller is not exempted from performance by delivery. Hence, there are evident limitations to exemption from performance as a remedy for hardship impediments.

101. It is important to note that Art. 79(1) CISG does not define the available remedies for impediment exhaustively [*Garro* 246]. Art. 79(5) CISG explicitly states that "nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". This leaves open the availability of other remedies beyond that expressly prescribed in Art. 79(1) CISG. As explained above, this Tribunal should regard the remedy of exemption for non-performance as being unsuitable, and on a proper interpretation of Art. 79 CISG, unintended to apply to hardship cases. There is a distinction to be made between situations concerning impossible performance and hardship. In the first, as performance is impossible, exemption from performance is a suitable remedy. However, the same cannot be said for the latter, which is why in those circumstances the affected party should not be entitled to the remedy of exemption from non-performance but should be entitled to more flexible remedies, such as re-negotiation, termination and adaptation [*Brunner* 479; *Schwenzer* 1151].

102. Given the existence of a gap as to the applicable remedy for impediments, this Tribunal is obliged to fill the gap by reference to Art. 7(2) CISG.

2. <u>The gap can be filled with the remedy of adaptation through Art. 7(2) CISG.</u>

103. Gaps within the CISG are dealt with under Art. 7(2) CISG, which provides that they be filled using general principles on which the CISG is based. This includes principles derived by analogy to other articles or principles extracted from the "substance, structure and spirit" of the CISG [*Schwenzer/Schlechtriem* 134; *Azeredo* para. 512]. If this is not possible, the gap should be filled using the domestic law applicable by rules of private international law [*Schwenzer/Schlechtriem* 132].

a. The gap can be filled with the remedy of adaptation using CISG principles derived by analogy from Art. 50 CISG or Art. 6.2.3 PICC

104. Here, the remedy of adaptation can be filled using principles derived by analogy from Art. 50 CISG, or from Art. 6.2.3(4) of the PICC, which represent "principles on which the CISG is based" [*Basedow* 136; *Magnus* 31; *Felemegas* 163].

105. First, the remedy of adaptation in hardship situations can be derived by analogy from Art. 50 CISG [*Flechtner* 237; *Azeredo* para. 520; *Ishida* 379]. Art. 50 CISG applies when the seller delivers non-conforming goods, thereby altering the contractual equilibrium between the buyer and seller [*Schlechtriem (Workshop)* 238]. Art. 50 CISG allows the buyer to restore equilibrium by reducing the contract's price in proportion to the loss of value from the delivered goods' non-conformity. As Professor Schlechtriem stated, the principle underlying Art. 50 CISG concerns an "adjustment of the contract to reflect [its] disturbed balance" [*Schlechtriem (Workshop)* 238; *Ishida* 378-379].

106. The principle underlying Art. 50 CISG which provides for adaptation where the contractual equilibrium is altered, is analogous to the principle underlying hardship impediments under Art. 79(1) CISG. Similar to the receipt of non-conforming goods, hardship impediments result in the contractual equilibrium being altered because the obligor faces substantially higher costs of performance [*Brunner* 213; *Azeredo* 316]. Therefore, an obligor should similarly be granted the right to adapt the contract price to restore contractual equilibrium.

107. Second, in the alternative, CLAIMANT can rely on the remedy of adaptation from Art. 6.2.3 PICC because the PICC represents principles underlying the CISG [*Basedow* 135-136; *Viscasillas* 20; *Magnus* 31; *Scafom*]. Although the CISG preceded the PICC, the drafters of the CISG drew heavily on earlier work by the UNIDROIT, which the PICC was also based on [*Felemegas* 166]. This has led to a "significant degree of similarity" between articles from the CISG and the PICC [*Felemegas* 166]. Consequently, many courts and tribunals have referred to PICC Articles as principles to fill gaps within the CISG [*Felemegas* 175].

108. In particular, in the case of *Scafom*, the Belgium Supreme Court applied Art. 6.2.3 PICC as "general principles which govern the law of international trade" to fill the gap in Art. 79 CISG concerning the remedies for hardship impediments. There, it was found that the buyer had breached its obligation to re-negotiate pursuant to Art. 6.2.3(1) PICC. As adaptation is provided as a remedy for hardship under Art. 6.2.3(4) PICC, it should equally be applicable to situations concerning hardship impediments under Art. 79(1) CISG.

109. Art. 6.2.3 PICC provides for the adaptation of the contract where hardship is found. Similar to Art. 50 CISG, the adaptation mechanism in Art. 6.2.3 PICC aims to restore contractual

equilibrium between the parties [*Vogenaeur* 724; *Azeredo* 324]. CLAIMANT should be entitled to adapt the contract price under Art. 6.2.3 PICC. The three requirements are that CLAIMANT must have made a request for renegotiations without undue delay [Art. 6.2.3(1) PICC], an agreement has not been reached within a reasonable time [Art. 6.2.3(3) PICC], and this Tribunal finds it reasonable to adapt the contract rather than order its termination [Art. 6.2.3(4) PICC].

110. The first two requirements are met. First, CLAIMANT requested re-negotiations without undue delay. CLAIMANT's request for renegotiations came immediately upon finding out that the import tariffs applied to their transaction with RESPONDENT [*Cl. Ex.* C8]. Second, no agreement between the parties has been reached, and it is evident that an agreement will not be reached within a reasonable time. The only meeting between the parties to re-negotiate was on 12 February 2018. RESPONDENT has since stopped negotiations and stated that there would be no further cooperation with CLAIMANT in the future [*Cl. Ex.* C8].

111. Finally, this Tribunal should find adaptation more reasonable than termination. As both parties have already completed their obligations under the contract, termination would be an empty remedy to CLAIMANT. Significantly, termination would allow RESPONDENT to place the full brunt of the tariffs on CLAIMANT. This is unreasonable because CLAIMANT only delivered the Third Shipment after Mr. Shoemaker's discussion with Ms. Napravnik [*Cl. Ex. C8*]. Mr. Shoemaker urged CLAIMANT to complete the Third Shipment, citing the possibility of future "agreement on the price" and the potential purchase of 50 doses of Frozen Semen from CLAIMANT's other stallion [*Cl. Ex.* C8], neither of which has materialised. Ambiguous statements about future renegotiations that intentionally or unintentionally mislead the seller into performance should be considered to give price adjustments [*ICC Case No. 6515*]. For that matter, Mr Shoemaker's ambiguity was ***intentional*** — he admitted that he was fully aware that CLAIMANT would not deliver the Third Shipment if he rejected their requests outright [*Resp. Ex.* R4]. On these facts, it would be unreasonable for CLAIMANT to bear the full costs of the Equatorianan Tariffs, such that adaptation is more reasonable remedy than termination.

b. Alternatively, the gap can be filled using Art. 6.2.3 of Mediterranean contract law which is the applicable law using rules of private international law.

112. Alternatively, Art. 7(2) CISG provides that, in the absence of relevant CISG principles, recourse can be had to domestic rules determined by the conflict rules of the forum [*Schwenzer/Schlechtriem* 132]. Here, the applicable domestic law would be Mediterranean law

because it is expressly chosen as the governing law of the Sales Agreement [*Cl. Ex.* C5; *Hague Principles* Art. 2, 4]. Therefore, even if the gap cannot be filled by reference to CISG principles, adaptation is still possible under Mediterranean contract law pursuant to Art. 7(2) CISG. Since Mediterranean contract law is a verbatim adoption of the PICC, adaptation will be available under Art. 79 CISG by virtue of Art. 6.2.3(4) PICC for reasons mentioned earlier [above para. 109-111].

C. Adapting the price of the Sales Agreement upwards by US$ 1,500,000 is needed to restore contractual equilibrium between the parties under the Sales Agreement.

113. The remedy of adaptation derived from both Art. 50 CISG and Art. 6.2.3(4) PICC share the aim of restoring contractual equilibrium between the parties. Art. 50 CISG does this by changing the contract's price to reflect the loss of value suffered by the buyer from the seller's delivery of non-conforming goods. Where it is reasonable, Art. 6.2.3(4) PICC more explicitly obliges courts to "adapt the contract with a view to restoring its equilibrium". In restoring the contract's equilibrium, this Tribunal should ensure a "fair distribution of the losses between the parties" [*Official Comment*, Art. 6.2.3 PICC, para. 7]. This entails taking into account the parties' mutual assumption of risk [*Brunner* 499].

114. Here, the parties have allocated the full risk of the Equatorianian Tariffs to RESPONDENT under Clause 12 [above paras. 80-84]. Therefore, adapting the contract price such that CLAIMANT would be entitled to the costs of the Equatorianian Tariffs amounting to US$ 1,500,000 would restore contractual equilibrium at the time of contracting.

115. Furthermore, adapting the contract price by US$ 1,500,000 would be a fair distribution of the losses in two ways. In this regard, factors like the parties' economic background and other surrounding circumstances have to be considered [*Brunner* 501]. First, adapting the contract price by US$ 1,500,000 is fair because CLAIMANT would otherwise be put at risk of insolvency from having to bear the costs of the Equatorianian Tariffs [above paras. 64], when CLAIMANT never assumed the risk of them. Second, RESPONDENT has on-sold 15 doses of the frozen semen (one of which for a price of US$ 120,000) [*PO2* para. 20], despite agreeing not to do so without CLAIMANT's express consent. Awarding CLAIMANT US$ 1,500,000 would thus be fair because CLAMAINT bearing the cost of the Equatorianian Tariffs would otherwise allow RESPONDENT to make a profit by on-selling the frozen semen, which it would not have been allowed to under the Sales Agreement.

116. It would thus be fair and reasonable for the contract price to be adapted to entitle CLAIMANT to an additional US$ 1,500,000.

V. PRAYER FOR RELIEF

117. For the foregoing reasons, CLAIMANT humbly requests this Tribunal to find that:

a. this Tribunal should admit documents and information from the Mediterraneo Arbitration;

b. this Tribunal has the jurisdiction and power to adapt the contract under the Arbitration Agreement;

c. this Tribunal should adapt the contract price and award CLAIMANT US$ 1,500,000 under Clause 12 of the Sales Agreement;

d. alternatively, this Tribunal should adapt the contract price and award CLAIMANT US$ 1,500,000 under Art. 79(1) CISG; and

e. any other relief this Tribunal deems appropriate.

Respectfully signed and submitted by counsel on 6 December 2018.

Daniel Fong

Kenneth Lim

Law May Ning

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