SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 07 APRIL 2019

MEMORANDUM FOR CLAIMANT

NATIONAL LAW UNIVERSITY, DELHI

ON BEHALF OF:	**AGAINST:**
PHAR LAP ALLEVAMENTO	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City, Mediterraneo	Oceanside, Equatoriana
(CLAIMANT)	**(RESPONDENT)**

COUNSEL *for* CLAIMANTS

- ISHA GOEL
- ATHARVA KOTWAL
- AMAN GUPTA

New Delhi • India

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w	And
¶/§	Paragraph
¶¶	Paragraphs
AC	Advisory Council
Art.	Article
CE	CLAIMANT's Exhibit
CISG	United Nations Convention on International Sales of Goods
CLAIMANT	Phar Lap Allevamento
Corp.	Corporation
Ed./Eds.	Editor/Editors
Et Al	Et *alii* [and others]
Ibid.	Ibidem
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
MoC	Memorandum of CLAIMANT
Model Law	UNCITRAL Model Law on International Commercial Arbitration
No.	Number
NoA	Notice of Arbitration
PCA	Permanent Court of Arbitration
PO1	Procedural Order 1
PO2	Procedural Order 2

RE	Respondent's Exhibit
RESPONDENT	Black Beauty Equestrian
Response to NoA	Response to Notice of Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT PICC	UNIDROIT Principles of International Commercial Contracts
USA	United States of America
v./v	Versus/ Against

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STATEMENT OF FACTS

PHAR LAP ALLEVAMENTO ("**CLAIMANT**") is a company registered in Mediterraneo. CLAIMANT is known for its breeding success regarding racehorses, in particular its star stallion, Nijinsky III. The present transaction was the first time CLAIMANT was selling frozen semen of a racehorse stallion.

BLACK BEAUTY EQUESTRIAN ("**RESPONDENT**") is a company registered in Equatoriana. It recently started a new racehorse breeding programme for which it required Nijinsky III's semen.

2014	CLAIMANT sold three mares DDP to buyers in Danubia. Due to an unforeseen event the sale price increased by 40%. This nearly resulted in the CLAIMANT'S insolvency, as was widely reported in the papers. In **2016** CLAIMANT started extensive restructuring in order to stay in business. It has been operating at a loss since 2014.
21 March 2017	Using the temporary lifting of the ban till **December 2018** as a perfect opportunity, RESPONDENT inquired about the availability of Nijinsky III for its newly started breeding programme. It requested an unusual amount of 100 doses.
24 March 2017	CLAIMANT offered 100 doses of Ninjinsky's semen subject to its own terms and conditions. CLAIMANT referred to its past experience in 2014 and said that it would not bear all risks associated with a DDP clause and insisted upon the inclusion of a hardship clause in the contract to account for changed circumstances. CLAIMANT expressly prohibited the reselling of the doses to third parties without express written consent.
6 May 2017	Parties concluded the Frozen Semen Sales Agreement in Mediterraneo. It stipulated that law governing the substantive agreement was the Law of Mediterraneo. As per the Agreement, CLAIMANT delivered first shipment of 25 doses on **20 May 2017** and the second shipment on **3 October 2017.** This semen could be used till **1 July 2019.**
19 December 2017	In retaliation to 25% Tariffs by Mediterraneo, on agricultural products from Equatoriana on **15 November 2017**, an unexpected 30% Tariffs on

	selected products from Mediterraneo, including animal semen, was announced by Equatoriana.
20 January 2018	CLAIMANT comes to know about the Tariffs applicable to the frozen horse semen. This not only destroyed CLAIMANT'S profit margin of 5% but also resulted in 25% loss. CLAIMANT informed the RESPONDENT by mail on the same day. RESPONDENT, stressed on the urgent need for timely delivery and accepted for price adaptation if it was provided in the Sales Agreement. On **23 January 2018,** CLAIMANT delivered the final shipment of 50 doses. RESPONDENT stopped the negotiations and refused to pay the amount of tariff in the meeting organised by CLAIMANT on **12 February 2018** to solve the issue of adaptation.
2 February 2018	CLAIMANT approached by another breeder from Equatoriania. CLAIMANT learnt that RESPONDENT was reselling the doses.
29 June 2018	Partial Interim Award of the Second Arbitration, concerning the sale of a mare by RESPONDENT to a buyer in Mediterraneo under the HKIAC Rules, was rendered. In the other arbitration, the contract included a hardship clause and the arbitration agreement was governed by the law of Mediterraneo. The arbitral tribunal allowed for adaptation of the contract.
31 July 2018	As it became clear that no settlement could be reached, CLAIMANT submitted its Notice of Arbitration and designated Ms. Wantha Davis as the arbitrator.
24 August 2018	RESPONDENT filed its Response to the Notice of Arbitration, and appointed Dr. Francesca Dettorie as the arbitrator.
2 October 2018	CLAIMANT informs the Tribunal about the Partial Interim Award. RESPONDENT contends that the award could have been only obtained by a hack of RESPONDENT'S computer system or by two former employees of RESPONDENT who were witnesses in the other arbitration.
4 October 2018	Case Management Conference was held.

INTRODUCTION

1. CLAIMANT had entered into a contract with RESPONDENT hoping for a stable relationship, however in return was saddled with a ton more of responsibility. When the import tariffs were imposed by Equatoriana, CLAIMANT timely performed the contract in the hope that RESPONDENT would understand its predicament and prefer to resolve the issue of hardship. It was shocking that instead of negotiating a price adjustment, RESPONDENT chose to sever all ties. CLAIMANT had no alternative but to approach this arbitral tribunal to adjudicate the matter.
2. RESPONDENT asserts that the arbitration agreement and its interpretation are governed by the law of Danubia which prohibits the tribunal from adapting the contract in the absence of an express empowerment to that effect. CLAIMANT submits that the law of Mediterraneo governs the arbitration agreement and its interpretation. Furthermore, the tribunal has the jurisdiction as well as the power to adapt the contract to allow its claim for increased remuneration. (**ISSUE 1**)
3. CLAIMANT seeks to admit the Partial Interim Award as evidence. This Award will provide the Tribunal complete factual record and will also highlight the frivolity of RESPONDENT'S stance. RESPONDENT challenges the admissibility of the Award on the ground that it has been illegally obtained. However, CLAIMANT was not involved in unlawfully obtaining it. Further, the Award confirms to the standards of evidence taking. Consequently, a failure to admit this Award would invariably violate CLAIMANT'S due process rights (**ISSUE 2**).
4. CLAIMANT requests the Tribunal to hold that the unforeseeable tariffs which have made the performance of the contract excessively onerous constitute a hardship under Clause 12 of the Sales Agreement. Thus, the Tribunal should entitle CLAIMANT the payment of US$ 1,250,000 through the adaptation of the price under Clause 12. Even if, the Tribunal finds that remedy of adaptation is not available under the Sales Agreement, hardship constitutes an impediment under Article 79 CISG which entitles CLAIMANT to seek price adaptation. (**ISSUE 3**)

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

5. CLAIMANT and RESPONDENT ("Parties") are in dispute whether the Tribunal has the power to adapt the contract under the law governing the arbitration agreement. RESPONDENT alleges that the arbitration agreement and its interpretation are governed by the law of Danubia which provides for a narrow interpretation of the arbitration agreement and prohibits the Tribunal from adapting the contract in the absence of an express empowerment in the arbitration clause [*Answer to NoA ¶¶13-16*].
6. To the contrary, CLAIMANT submits that the law of Mediterraneo governs the arbitration agreement and its interpretation **(A).** Further, the Tribunal has the jurisdiction and the power to adapt the contract **(B).**

A. THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

7. The Parties have submitted their contract to the law of Mediterraneo [*CE5 ¶14*], however, the law governing the arbitration agreement has not been expressly chosen in the arbitration agreement [*ibid. ¶15*].
8. RESPONDENT alleges that law of Mediterraneo is not the law governing the arbitration agreement due to the doctrine of separability [*Answer to NoA ¶14*]. The separability doctrine provides that an arbitration agreement even though included in and related closely to an underlying commercial contract is a separate agreement [*Born 2015 191*; *Dow Chemical Case; ICC Case No 5065*]. However, it does not follow that the law of the main contract and the law of the arbitration agreement should also be different [*Miles/Goh 389*]. Parties usually do not expressly agree upon a distinct law governing the arbitration agreement [*Tweeddale and Tweeddale 217; Lew*]. In such situations, the arbitral tribunal has to decide on the law governing the arbitration agreement [*Lew/Mistelis/Kröll 114*].
9. In the present case, the seat of the arbitration is Danubia [*CE5 ¶15*], a common law country [*PO2 ¶44*]. The proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract [*Dicey/Morris/Collins ¶30.020*]. For determining the law governing any contract, the prevalent common law rules require the Tribunal to recognise and give effect to the Parties' choice of proper law, express or implied, failing which it is necessary to identify the system of law with

which the contract has the closest and most real connection [*ibid.* ¶*16.001*]. These common law rules are also applicable for determining the law governing the arbitration agreement [*Sulamérica v. Enesa; BCY v. BCZ; Klockner Pentaplast Case.*].

10. RESPONDENT contends that the law applicable to the arbitration agreement is not the law of Mediterraneo. CLAIMANT submits that the law applicable to the substantive contract is the implied choice of law for governing the arbitration agreement **(I)**. Alternatively, as per the closest connection test, the law applicable to the arbitration agreement is the law of Mediterraneo **(II)**.

I. Alternatively, the Parties have impliedly chosen the law of Mediterraneo to be the governing law of the arbitration agreement.

11. In the absence of an express choice for the law governing the arbitration agreement, the Parties have impliedly chosen Law of Mediterraneo to be the governing law of arbitration agreement. In the present case, the law applicable to the substantive contract is the law of Mediterraneo [*CE5,* ¶*14*]. RESPONDENT contends that by virtue of doctrine of separability the arbitration agreement is a legally separate agreement from the container contract in which it is included [*Answer to NoA* ¶*14*]. Therefore, the choice of law for the substantive contract cannot be interpreted as an implied choice for the arbitration agreement [*ibid.*].

12. However, the doctrine of separability treats the arbitration agreement as a distinct agreement only in the context of a challenge to its validity and not for other purposes including that for choice of law [*Kaplan/Moser 135*]. Thus, the purpose of the doctrine of separability is limited to prevent the effect of the invalidation of the main contract automatically on the arbitration agreement [*Lew/Mistelis/Kröll* ¶*6-9*]. The separability doctrine should therefore be interpreted in light of the limited purpose for which it is evolved and should not be extended to the application of laws [*Model Law Art. 16(1); Born 335*]. Though the Danubian Arbitration Law ("DAL") recognises the doctrine of separability, it does not extend its applicability to the law governing the arbitration agreement.

13. The arbitration agreement is in fact not regarded as distinct from the contract for all purposes [*Ronly Holdings Case; Global Motors v. Electric Steering*]. Parties to a contract usually intend the entirety of their relationship to be governed by the same body of laws [*Channel Tunnel Case*]. Only in exceptional cases, when the application of the law of the contract adversely affects the validity of the arbitration agreement, would the law governing the arbitration agreement be assumed to be different [*Sonatrach v Ferrell International; NTPC v. Singer Company; Black Clawson v. Papierwerke; Sumitomo v ONGC*].

14. An express choice of law with respect to the substantive contract must be taken as an indication of the Parties' intention in relation to the agreement to arbitrate [*Born 432; Lew/Mistelis/Kröll 142*]. Accordingly, in the absence of an express choice of law for the arbitration agreement, the law applicable to the substantive contract will be the implied choice of law for it [*Francis Russell ¶2-094*]. This view has also been supported by Courts in Germany [*Case No. 11 Sch 06/01*], India [*NTPC v. Singer Company.; Sumitomo v ONGC*], Singapore [*BCY v. BCZ*], England [*Sulamérica v. Enesa; Peterson Farms v. C&M Farming*] and Egypt [*Arsanovia v. Cruz City*; *Egyptian Company Case*].
15. Therefore, the Parties have impliedly chosen Mediterranean law as the law governing the arbitration agreement.

II. In any event, as per the closest connection test, the law applicable to the arbitration agreement is the law of Mediterraneo

16. In the absence of an express or implied choice of law by the Parties, the Tribunal is required to identify the system of law with which the arbitration agreement has its closest and most real connection [*Sulamérica v. Enesa ¶32*]. In the present case, the law of Mediterraneo has the closest and most real connection with the arbitration agreement.
17. According to the closest connection test to determine the law governing the arbitration agreement, the principal factors to be taken into account include the place of contracting, the place of performance**,** the places of residence or business of the Parties respectively, the law of the seat of arbitration and the nature of the subject matter of the contract [*Re United Railways Case*].
18. In the present case, while neither of the Parties have their place of residence or business in Danubia, CLAIMANT is incorporated and located in Mediterraneo [*NoA ¶1*]. Further, the final negotiations and the signing of the Frozen Semen Sales Agreement ("Sales Agreement") took place in Mediterraneo [*PO2 ¶13*]. Also, the Sales Agreement, of which the arbitration agreement forms a part, is governed by the law of Mediterraneo [*CE5 ¶14*].
19. The sole connection of the arbitration agreement with Danubia is that it is the seat of the arbitration [*CE5 ¶15*]. However, the seat of the arbitration may be chosen because of its geographical convenience to the Parties; suitability as a neutral venue; or for some other, equally valid reason, none of which have anything to do with the arbitration agreement *per se.* [*Redfern/Hunter ¶120-2; Bermann 1019*].
20. In the present case, Danubia was chosen as the seat of arbitration due to its suitability as a neutral venue to the Parties [*RE2 34*] and not because it was in any manner closely connected

to the arbitration agreement. This understanding is reflected in Respondent's acceptance to Danubia as the seat of arbitration [Answer *to NoA*¶*17; RE 3 34*]. Accordingly, this alone is insufficient to conclude that the arbitration agreement has its closest and most real connection to Danubia. Therefore, CLAIMANT submits that the arbitration agreement has its closest and most real connection to Mediterraneo and is thereby governed by the law of Mediterraneo.

B. THE TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT

21. RESPONDENT contends that the Tribunal lacks jurisdiction and power to decide on the adaptation of the contract as the claim is not restricted to the interpretation of the contract but extends to the non-contractual claim of adaptation [*Answer to NoA* ¶*12, 13*]. To the contrary, CLAIMANT submits that the Tribunal has the jurisdiction to adapt the contract **(I)** as well as the power to adapt the contract **(II)**.

I. The Tribunal has the jurisdiction to adapt the contract

22. The jurisdiction of the Tribunal depends on the scope of the arbitration agreement, particularly on the language of the Parties' agreement and whether it extends to a non-contractual claim of adaptation of the contract [*Born* 1318*; Nejapa Power v. CEL*]. Accordingly, CLAIMANT submits that the arbitration clause provides for an expansive interpretation of the Tribunal's jurisdiction, extending to a claim for adaptation **(i)** and the reduction in the wording of the Hong Kong International Arbitration Centre ("HKIAC") Administered Arbitration Model Clause does not impact the Tribunal's jurisdiction to adapt the contract **(ii)**.

i. The arbitration agreement provides for an expansive interpretation of the Tribunal's jurisdiction, extending to a claim for adaptation

23. The arbitration agreement refers to *"any dispute arising out of this contract"* [*CE5* ¶*15*]. CLAIMANT submits that this phrase must be subjected to a liberal construction by the Tribunal to uphold the commercial purpose of the arbitration agreement [*Fiona Trust v Privalov; Born 1067-1076*, *Mitsubishi v. Soler*]. Giving effect to this commercial purpose would require the Tribunal to interpret arbitration agreement as covering all disputes arising out of the contract.
24. In order to safeguard this commercial purpose the arbitral tribunals across the world have developed liberal rules of construction of the arbitration agreements [*AT&T v. Commercial Workers; Sonatrach v. K.C.A Drilling; Judgment of 4 October 2001 (German Bundesgerichtshof)*]. The UNCITRAL Model on International Commercial Arbitration ("UNCITRAL Model Law"),

also speaks in favour of a liberal approach to the interpretation of arbitration agreements to ensure the efficiency and efficacy of the arbitral process [*Model Law Art. 8; Born ¶1320*].

25. The phrase "*any dispute*" when used without any exceptions, includes not only the dispute, but also all the consequences naturally flowing from it [*Tech. Consultants SA v. Parsons; Case No. 252 ICAC 2010; (Austrian Oberster Gerichtshof) 26 August 2008*]. Similarly, the phrase "arising out of" must be interpreted liberally [*Tweeddale and Tweeddale, 166*]. "Arising out of" is held to be a broader formulation than other phrases such as "arising under" [*Sweet Dreams v Dial-a-Mattress; HE Daniels v. Carmel; Mustill/Boyd 120; Redfern/Hunter 108*] and extends to non-contractual claims which relate to the Parties' contractual obligations [*The Eschersheim; Fahem v. Mareb Yemen; Greek Petroleum Company Case*], such as the claim for adaptation in the present case. Thus, CLAIMANT submits that this includes a claim for increased remuneration through adaptation of the contract [*The Damianos*].

26. Further, it is desirable that the same Tribunal should deal with all disputes as there is a strong presumption in favour of the centralised one-stop dispute resolution, as mandated by Parties' intention [*David 409; Fouchard/Gaillard/Goldman 40*]. CLAIMANT submits that such intention was clearly demonstrated during the course of negotiations between the Parties. The prime negotiators of the contract, Ms. Napravnik and Mr. Antley for CLAIMANT and RESPONDENT respectively, had come to an agreement on the fact that it should be the task of the Tribunal to adapt the contract in case the Parties fail to agree on an amendment [*CE8 17*], thereby clearly demonstrating a preference for such one-stop dispute resolution.

27. Thus, the arbitration agreement provides for an interpretation of the Tribunal's jurisdiction, extending to the claim for adaptation.

ii. *The reduction in the wording of the HKIAC Model Clause does not impact the Tribunal's jurisdiction to adapt the contract*

28. In the present case, the arbitration agreement adopted by the Parties does not expressly refer to "disputes regarding non-contractual obligations" [*CE5 ¶15*]. Accordingly, the RESPONDENT alleges that the Parties have deleted any reference which could be interpreted as empowering the Tribunal to adapt the contract [*Answer to NoA ¶13*]. However, despite such modifications the Tribunal is empowered to provide adaptation.

29. CLAIMANT submits that arbitral tribunal is nonetheless empowered to provide the non-contractual remedy of adaptation as the phrase "*any dispute arising out of this contract*" is ordinarily broad enough to include this remedy and an express reference to non-contractual obligations is not necessary for the same [*Ferrario 187*].

30. The breadth or the limits of the Tribunal's jurisdiction ought to be determined by interpreting what is contained in the clause as opposed to what is not [*Mustill/Boyd 120; Redfern/Hunter 110*]. Similar to the arbitration agreement adopted in the present case, the ICC Arbitration Model Clause contains no reference to non-contractual claims and does not expressly empower the Tribunal to adapt the contract [*Webster/Buhler 45*]. Despite this fact, the clause has been interpreted as having a wide scope and giving the Tribunal the jurisdiction to adapt the contract in certain circumstances [*ICC Case No. 8195; Webster/Buhler 123*].
31. Therefore, the reduction in the wording of the HKIAC Model Clause does not impact the jurisdiction of the Tribunal to adapt the contract.

II. The arbitral tribunal has the power to adapt the contract

32. The Tribunal has the power to adapt the contract on the basis of the contractual terms and the applicable law [*Berger 1350*; *Ferrario 75*]. In the changing nature of commercial law, the all or nothing rule of the sanctity of contracts is gradually being replaced by a more flexible and pragmatic approach [*Berger* 16]. This principle of *pacta sunt servanda* is subject to certain limitations like the principle of *rebus sic stantibus* which has reduced its scope by allowing for an alteration of the contract under changed circumstances [*Bordachahr 68*].
33. RESPONDENT contends that the Tribunal does not have the power to adapt the contract as no empowerment has been made in the Sales Agreement [*Answer to NoA ¶13*]. To the contrary, CLAIMANT submits that the interpretation of the arbitration agreement empowers the Tribunal to adapt the contract **(i)**. The hardship or *force majeure* Clause empowers the Tribunal to adapt the contract **(ii)**.

i. The interpretation of the arbitration agreement empowers the Tribunal to adapt the contract

34. As aforementioned, the law governing the arbitration agreement is the Law of Mediterraneo. According to the consistent jurisprudence in Mediterraneo, United Nations Convention on Contracts for the International Sale of Goods ("CISG") applies to the conclusion and the interpretation of the arbitration agreement [*PO1 ¶4*]. Thus, CISG applies to the interpretation of the arbitration agreement. Therefore, the Tribunal must interpret the arbitration agreement in accordance with CISG.
35. The interpretation of statements and conduct of the Parties is governed by Art. 8 CISG [*Schmidt-Kessel Art. 8¶1*]. CLAIMANT submits that the Tribunal has the power to adapt the contract based on the interpretative tools under Art 8 CISG An interpretation of the

arbitration agreement under Article 8 CISG confers power on the Tribunal to adapt the contract.

36. Article 8 CISG provides a comprehensive mechanism for the interpretation of all contractual terms including the arbitration agreement [*CISG-AC Opinion 3; Redfern/Hunter 3.12*]. To that effect, one should first assess the subjective intent of the Parties under Article 8(1) CISG [Schlechtriem/Schwenzer, Art. 8]. Subsequently, should the Parties' intent not be clearly determinable, the Parties' statements and conduct should be interpreted following an objective test as per Article 8(2) CISG [*Ibid.*].

37. CLAIMANT submits that the interpretation of the arbitration agreement under Article 8(1) CISG confers power on the Tribunal to adapt the contract **(a).** In any event, the Tribunal has the power to adapt the contract pursuant to Article 8(2) CISG **(b).**

a. <u>An interpretation of the arbitration agreement in accordance with Article 8 CISG confers on Tribunal the power to adapt the contract</u>

38. As per Article 8(1) CISG, interpretation shall proceed according to a party's subjective intent where the other party knew or could not have been unaware of such intent [*Schmidt-Kessel Art. 8* ¶13]. In determining the intent of the party, Article 8(3) CISG states that consideration must be given to all relevant circumstances including the negotiations between the Parties [*Schmidt-Kessel Art. 8* ¶13].

39. The Parties' intent to empower the Tribunal the power to adapt the contract was made clear in the course of Parties' negotiations between Ms. Napravnik, CLAIMANT'S representative in the Sales Agreement and Mr. Antley, RESPONDENT'S representative in the Sales Agreement [*CE5 13*]. During the negotiations, Mr. Antley expressly stated *"(…) it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree (…)*". Conferring such powers on the Tribunal had also been the preference and the understanding of Ms. Napranvik [*CE8 17*]. Thus, the Parties had the common intention to empower the Tribunal to adapt the contract in case the Parties could not agree.

40. Mr. Antley's agreement, and his being on the same page as CLAIMANT, is also evident from his hand-written note prepared after the meeting with Ms. Napranvik [*RE3 35*]. In the same note, Mr. Antley does not express any concern regarding the power of the Tribunal to grant adaptation as a remedy. This was due to the fact that he had already agreed on such power residing with the Tribunal. What he did mention as an issue to be addressed in the next meeting was the connection between the hardship and arbitration agreement, that is, the logistics of how this power to grant adaptation would operate.

41. Therefore, the Parties had the common intention to provide the Tribunal with the power to adapt the contract in case they could not agree on an amendment.

b. In any event, the Tribunal has the power to adapt the contract pursuant to Article 8(2) CISG

42. Under Article 8(2) CISG, statements and other conduct of a party are to be interpreted according to the understanding of a reasonable third person of the same kind and in the same circumstances as the other party [*Farnsworth Art. 8 ¶2.4*]. In determining the understanding of such a reasonable person, reliance must be placed on all relevant circumstances, as provided under Article 8(3) CISG [*Schmidt-Kessel Art. 8 ¶21*].

43. The arbitral tribunal's power to adapt the contract is determined on the basis of the hardship or *force majeure* clause in the contract, and a subsequent submission to arbitration by the Parties [*Horn 180*]. The Parties have expressly included such a clause in their Sales Agreement [*CE5 14*]. When the parties to a contract include contractual provisions which foresee adjustments in the future, try to renegotiate the contract themselves and finally submit their dispute to arbitration, it can be reasonably presumed that they wished to confer the power of adaptation on the arbitral tribunal [*Horn 180*].

44. In the present case, the Parties intended to enter into a long-term mutually beneficial relationship [*CE2 10*] going beyond a single purchase [*CE3 11*]. Foreseeing contractual adjustments in the future the Parties inserted a hardship or *force majeure* Clause in the Sales Agreement. Additionally, in light of the increased tariffs the Parties have tried to renegotiate the contract [*PO2 ¶45*] and on failing to do so, have submitted the dispute to arbitration. Accordingly, a reasonable third person would understand that the Parties intended to provide the Tribunal the power to adapt the contract.

45. Further, RESPONDENT'S primary objection to the Tribunal having the power to adapt the contract rests on its misplaced understanding that the law governing the arbitration agreement is that of Danubia [*Answer to NoA ¶13*]. However, since the law governing the arbitration agreement is that of Mediterraneo, RESPONDENT does not have any concern or objection to the Tribunal's power to adapt

ii. The hardship or force majeure clause empowers the Tribunal to adapt the contract

46. CLAIMANT submits that the arbitration agreement must be interpreted according to the general rules of contract interpretation [*Hober 102; ICC Case No. 10623; ICC Case No. 7920; ICC case No 2321; Amco Asia v Indonesia*]. Notwithstanding the separability presumption, the

arbitration agreement must be interpreted in order to give effect to all other provisions of the contract and to render them consistent with each other [*Born 1323*; *ICC Award No. 6515; Craig/Park/Paulsson 90*].

47. The arbitration agreement is interpreted to be covering the adaptation of the contract if the contract provides for provisions which require adjustments over a period of that contract [*ICC Case No. 5754*]. The Tribunal's power to adapt is ultimately derived from the evaluation of the wording, the nature of the contract and the purpose of the Parties who have pursued that contract [*Horn 17-28; Draette/Lake/Nandra 204*].

48. In the present case, the Parties inserted a hardship or *force majeure* clause in the Sales Agreement [*CE5 14*] to deal with the unforeseen events and to adjust the contract accordingly. Such a provision is likely to be left redundant if the Tribunal determines that the Parties did not envisage a corresponding power to adapt the contract in case of changed circumstances. Hence, the Tribunal's power to adapt naturally flows from the inclusion of a hardship or *force majeure* clause.

49. Further, CLAIMANT submits that the principle of good faith and fair dealing in international commercial arbitration empowers the arbitral tribunal the power to adapt the contract. In contracts without an explicit adaptation clause, this principle provides the arbitrators the power to adapt the contract, in the event, Parties fail to renegotiate the contract, [*ICC Case No 9994/2001 ¶79; Cosarma v Agip; Maritime Belge v Distrigas; Electricitè v Shell; Novacarb v Soco*]. In the present case, the Parties have failed to renegotiate on the adaptation of contract after the imposition of tariffs [*CE6 18*]. Thus, the denial of the Tribunal's power to adapt will leave CLAIMANT remediless as it has in good faith performed the contract.

CONCLUSION- RESPONDENT had asserted that the arbitration agreement and its interpretation are governed by the law of Danubia which provides for a narrow interpretation of the agreement and prohibits the tribunal from adapting the contract in the absence of an express empowerment to that effect. CLAIMANT submits that the law governing the arbitration agreement and its interpretation is the law of Mediterraneo. Furthermore, the tribunal has the jurisdiction as well as the power to adapt the contract even in the absence of an express clause in their contract providing for the same.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION

50. CLAIMANT submits its procedural request to the Tribunal to admit the Partial Interim Award ("Interim Award") as evidence in the current arbitration proceedings [*Letter by Langweiler 50*]. RESPONDENT alleges that the Interim Award, is illegally obtained evidence [*Letter by Fasttrack 51*] and should not be admitted in the arbitration. To the contrary, CLAIMANT submits that the Tribunal has wide evidentiary powers to allow the admissibility of the Interim Award as evidence **(A)**. The Interim Award should be admitted as evidence **(B)**. The Tribunal should admit Interim Award as it confirms to evidentiary standards. **(C)**. and its exclusion would violate CLAIMANT'S Due Process Rights **(D)**.

A. THE TRIBUNAL HAS WIDE EVIDENTIARY POWERS TO ADMIT THE PARTIAL INTERIM AWARD AS EVIDENCE

51. The Tribunal's power to decide on the admissibility of evidence is subject to its broad discretionary rights [*Born 2307*]. It is for the arbitrators to decide on admissibility, relevance, materiality and weight of any evidence [*Arb App No 3/2011; Case No. R06/005HR (Dutch Hoge Raartad)*]. There is wide recognition of the arbitral tribunals' discretion to admit any evidence they deem to have probative value. [*Waincymer 792*].

52. An arbitral tribunal derives its powers to decide on the admissibility of evidence from the arbitration agreement, the designated institutional rules and the *lex arbitri* [*Bockstiegel 2; Marghitola 20*]. In the present case, the Parties have agreed that the proceedings shall be in accordance with the HKIAC Rules [*CE 5 ¶15*]. CLAIMANT submits that the HKIAC Rules empower the Tribunal to admit any evidence it considers necessary for the adjudication of the dispute **(I)**. Moreover, the *lex arbitri* empowers the Tribunal to admit any such evidence **(II)**.

I. The HKIAC Rules empower the Tribunal to admit any evidence it considers necessary for the adjudication of the dispute

53. Article 22 HKIAC Rules provides a framework for handling evidentiary issues arising out of the arbitral process [*Moser/Bao ¶9.150; HKIAC Rules Art. 22*]. This Article provides a high degree of flexibility for the Parties and the arbitral tribunal to deal with evidentiary matters while establishing the requirements to safeguard the due process rights of the Parties [*ibid.*].

54. Article 22.2 HKIAC Rules allows the Tribunal to *sue motu* determine "the admissibility, relevance, materiality and weight of the evidence including whether to apply strict rules of

evidence". The rules provide for a liberal approach on admissibility of evidence and the Tribunal need not apply the strict rules of evidence. [*Moser/Bao ¶9.152*]. CLAIMANT submits that as per the HKIAC Rules the Parties have opted for a wide evidentiary framework that enables the Tribunal to admit "any" evidence presented by the Parties. Hence, the Tribunal may exercise its discretion and admit the Interim Award to fairly adjudicate on the dispute.

II. The *lex arbitri* empowers the Tribunal to admit any evidence

55. CLAIMANT submits that the admissibility of evidence as an element of arbitral procedure is largely governed by the law of the seat of arbitration [*Born 2310; Redfern & Hunter 375*]. As the Parties have chosen Vindobona, Danubia as the seat of arbitration [*CE5 ¶15*] the DAL which is the verbatim adoption of the UNCITRAL Model Law incorporating 2006 amendments is the *lex arbitri* applicable to the proceedings.

56. Article 19(2) DAL provides that "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and the weight of any evidence". Accordingly, evaluating the admissibility of the evidence falls within the discretion of the Tribunal.

57. There is consensus that the Tribunal's power to admit any evidence arises from the basic premise that the Tribunal has control over evidentiary procedure in an international arbitration [*Fouchard/Gaillard/Goldman 951; O'Malley ¶9.02; Italian-Venezuelan MCC 1903*]. CLAIMANT submits that even the *lex arbitri* confers wide discretionary powers on the Tribunal to admit and adjudicate on any evidence.

B. THE INTERIM AWARD SHOULD BE ADMITTED AS EVIDENCE

58. RESPONDENT alleges that the Interim Award should not be admitted as it is an illegally obtained evidence. To the contrary, CLAIMANT submits that the Interim Award procured by CLAIMANT through an intelligence company is not an illegally obtained evidence **(I)**. In any event, the Interim Award should be admitted as evidence in the interests of justice as well as in light of public interest **(II)**.

I. The Interim Award procured by CLAIMANT through the intelligence company is not an illegally obtained evidence

59. The arbitral tribunal while deciding the admissibility of illegally obtained evidence should looks into whether the party who obtained it acted in good faith [*Waincymer ¶10.16; Glencore Finance Case v Bolivia; Ahongalu v FIFA*]. Accordingly, CLAIMANT submits that evidence should

be admitted as it is not an illegally obtained evidence even if it is assumed to have been obtained either through breach of a confidentiality agreement **(i)** or through an illegal hack of the RESPONDENT'S computer system **(ii)**.

i. *The Interim Award is not illegally obtained evidence even if it was obtained through a breach of confidentiality agreement*

60. The preliminary consideration before the arbitral tribunal while deciding the admissibility of evidence on grounds of alleged illegality is whether the party seeking to rely on the evidence was itself involved in unlawfully obtaining it [*Yukos case 2014; Caratube v. Kazakhstan; Ahongalu v FIFA; Amos Adamu v. FIFA*]. CLAIMANT submits that the Interim Award, even if provided to the intelligence company by two former employees of RESPONDENT [*PO2 ¶41*], is not illegally obtained evidence.

61. The law applicable to the arbitration proceedings and the *lex arbitri* provide the scope on actors who are bound by the duty to maintain confidentiality [*Smeureanu 133*]. In essence, the Parties, the representatives of the Parties, the arbitral tribunal, the arbitral institutions and third parties participating in the proceedings are bound to maintain confidentiality [*ibid.*]. CLAIMANT was under no duty to maintain confidentiality of the award, thus, there was no breach of confidentiality by CLAIMANT. Further, only the two former employees of RESPONDENT were under a contractual obligation to keep information related to the arbitration proceedings confidential [*PO2 ¶41*] and this duty did not extend to CLAIMANT. Also, a breach of confidentiality by the witnesses does not affect the admissibility of a claim [*Enron Creditors Recovery Case*].

62. The Interim Award in the other arbitration was rendered on 29 June 2018 [*PO2 ¶39*]. The two employees were fired by RESPONDENT on 6 July 2018 [*ibid.*]. The copy of the Interim Award could only have been reasonably obtained by the employees during this time frame, that is, from 29 June 2018 to 6 July 2018. CLAIMANT was made aware of the existence of such an award only at the annual breeder conference [*Letter by Langweiler 50*], which is after the possible breach of confidentiality by the employees. Hence, CLAIMANT could not have taken part in this leak of information or solicit the former employees' breach of confidentiality.

ii. *The award obtained through illegal hacks is not an illegally obtained evidence*

63. CLAIMANT submits that the arbitral award obtained through the illegal hack of RESPONDENT'S computer system, should be admitted as evidence. CLAIMANT argues that post the WikiLeaks data cable hacks there is a general trend in arbitral proceedings to accept hacked

evidence if the Parties did nothing illegal themselves but simply relied on the product of a third party's illegal activity [*Caratube v. Kazakhstan; Yukos Case 2014; Conocophillips v. Venezuela; Blair-Gojkovic 239*].

64. RESPONDENT'S computer system which was protected by an out-dated firewall susceptible to hacking [*PO2, ¶42*] was hacked in September 2018 [*Letter by Fasttrack 51*]. Even if the information regarding the Interim Award was leaked by this hack [*PO2 ¶41*], CLAIMANT was made aware of this award only at the annual breeder conference [*Letter by Langweiler 50*]. Hence, it can be reasonably assumed that CLAIMANT was not involved in the hacking of RESPONDENT'S computer system. In any event, it is not CLAIMANT'S burden to prove lack of participation in the alleged illegal hack rather it is for RESPONDENT to prove that CLAIMANT had obtained the evidence through the hack.

65. RESPONDENT may contend that the hack did not result in the information regarding the Interim Award being public information to be used as evidence. However, CLAIMANT argues that the information about the other arbitral proceedings was already in the public domain as CLAIMANT himself was informed about the award in the annual breeder conference [*Letter by Langweiler 50*].

66. Thus, CLAIMANT submits that the award promised to CLAIMANT by the intelligence company should be admitted as an evidence.

II. Alternatively, the evidence should be admitted in the interests of justice as well as in light of public interest

67. The tribunal can admit any evidence in the interests of justice and in light of public interest [*Emmott v. Michael Wilson; Esso Plowman; City of Moscow case; Glidepath v. John Thomson; Dolling Baker v. Merit; Ali Shipping Case*]. Claimant submits that even if, the Interim Award has been illegally obtained it may be admitted in the interests of justice **(i)** and pursuant to the prevailing principles of transparency in light of public interest **(ii)**.

i. The evidence can be admitted in the interests of justice.

68. Evidence can be admitted in the interests of justice to enable the arbitral tribunal to make a fair determination of the case and to protect the legitimate interests of the arbitrating Parties [*Smeureanu 122; Myamma Yaung Case*]. CLAIMANT submits that the Interim Award is reasonably necessary to support its claims and to prohibit the abuse of process by RESPONDENT.

69. The evidence should be reasonably necessary for the fair determination of the proceedings and to protect the legitimate interests of the arbitrating Parties [*Insurance v. Lloyd Syndicate; Ali*

Shipping Case; Aegis v. European Re]. If a party has expressed itself in a materially different sense in two separate arbitrations it is clear that the interests of justice would require disclosure of arbitration documents in spite of any obligation of confidentiality to protect the interests of the arbitrating parties [*London & Leeds Case*].

70. CLAIMANT submits that the Interim Award should be admitted to show the tribunal's power to grant adaptation under the Mediterranean law and to highlight that tariffs amount to hardship as is admitted by RESPONDENT in the other arbitration [*PO2 ¶39*]. Further, the Interim Award would also reveal the frivolity of Respondent's stance before this Tribunal. The Interim Award will clarify that Respondent's position in this arbitration is a convenient afterthought that lacks both merit and bona fides. This will assist the Tribunal in determining that the imposition of Tariffs does constitute an event of hardship, and any submissions to the contrary by the RESPONDENT ought to be disregarded. Hence, the Interim Award is critical for a fair determination of the dispute.

ii. *The evidence can be admitted under the prevailing principles of transparency in light of public interest*

71. RESPONDENT asserts that the express obligation to keep the arbitral proceedings confidential should exclude the Interim Award [*Letter by Fasttrack 51*]. To the contrary, CLAIMANT submits that the prevailing principles of transparency in light of Public Interest should override this express obligation.

72. The principles of transparency indicate a trend towards ensuring effective arbitral proceedings and promote accountability, predictability and the rule of law [*UN Doc A/66/749*]. Principles of transparency accommodate public interest in the publication of arbitral awards to create an objective yardstick for the evaluation of arbitral proceeding [*Bhatia/Candlin/Sharma 11; Rogers 1302; Buys 138*].

73. These principles of transparency have been crystallised by the UNCITRAL Rules on Transparency 2014 which promote disclosure of awards and other related material based on public interest [*Gehring/Euler/*Scherer *9*]. CLAIMANT argues that although these rules are not applicable to the current proceedings, they reflect best practices [*ibid. 322*] on transparency in international arbitration in light of public interest.

74. The Interim Award should be admitted in light of public interest [*Hassneh Insuranc Case; Ali Shipping Case*]. Absolute confidentiality in the international commercial arbitration hinders the development of arbitral jurisprudence, thus, transparency is needed to safeguard the public interest of uniformity, consistency and predictability in the arbitral process [*Brown 969*].

75. There is a clear public interest in admitting the Interim Award in the current arbitral proceedings as the Tribunal in the other arbitration adjudicated upon similar questions of law arising out of similar facts [*PO2 ¶39*]. CLAIMANT submits that the Tribunal in this case should admit and consult the Interim Award to achieve continuity, predictability and rationality in international commercial arbitration.

C. THE TRIBUNAL SHOULD ADMIT PARTIAL INTERIM AWARD AS IT CONFORMS TO EVIDENTIARY STANDARDS

76. Article 22.2 HKIAC Rules provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence including whether to apply strict rules of evidence. This Article is in line with 19(2) UNCITRAL Model Law and Article 9(1) IBA Rules on Taking of Evidence in International Arbitration [*UNCITRAL Art. 19(2); IBA Rules on Taking of Evidence, Art. 9(1)*]. CLAIMANT submits that the Interim Award is admissible considering its relevance to the proceedings and its materiality to the outcome of the arbitral proceedings.

77. The standard relevant to the case requires measuring the probative value of certain evidence as it relates to a party's burden of proof [*O'Malley ¶9.09; Ashford 158; BNP Paribas Case*]. The commentary on the HKIAC Rules considers a document relevant if it is "*useful for the line of evidence by requesting party in order to establish the truth of its factual allegations on which its legal conclusions are based*" [*Moser/Bao ¶9.161*]. Further, the materiality standard implies that the requested evidence be necessary for the "*considerations of the factual issues from which legal conclusions are drawn*" [*Waincymer 858; Marghitola 53*]. An evidence is considered material if "*the arbitral tribunal deems it necessary as an element to allow complete consideration as to whether a factual allegation is true or not*" [*Moser/Bao ¶9.161*].

78. Through the Interim Award, CLAIMANT intends to demonstrate that in another proceeding governed by 2013 edition of HKIAC Rules, RESPONDENT asked for adaptation of the contract when faced with hardship caused by the imposition of tariffs [*PO2 ¶39*]. Further, the other arbitration was also governed by the law of Mediterraneo [*ibid.*]. In that proceeding the arbitral tribunal affirmed its power to adapt the contract and held that a standard arbitration agreement is sufficient to grant an arbitral tribunal the same powers as a court has under the provision [*ibid.*]. Thus, the Interim Award would enable the Tribunal to determine the outcome of the dispute as it highlights the inconsistent demands of RESPONDENT lacking bonafide assertions.

79. CLAIMANT submits that the Interim Award is relevant to the arbitral proceedings and material to its outcome for ascertaining its claims against RESPONDENT.

D. EXCLUSION OF THE INTERIM AWARD WOULD RESULT IN VIOLATION OF THE DUE PROCESS RIGHTS OF CLAIMANT

80. CLAIMANT submits that non-admission of Interim Award as evidence amounts to the violation of CLAIMANT'S right to be heard and to present its case.

81. The right to be heard is considered to be a fundamental principle of fair proceedings and is a procedural safeguard [*Baldwin 233; Born; Redfern & Hunter*]. It provides the possibility for each party to present the relevant facts and views including evidence [*Gbangbola Lewis v. Smith Sheriff; O'Malley* ¶*9.115*]. The principle of fair treatment dictates that each party must have an appropriate opportunity to present its case without a significant disadvantage to the other party [*Dombo Beheer v. the Netherlands*].

82. Article 18 DAL requires that each party must be given a full opportunity to present its case [*Fairmount Development Case; Noble China v. Lei Kat Cheong*]. This right in addition to being mandatory is considered to be a part of the larger due process framework governing international arbitration [*Methanex v. USA*]

83. The arbitral tribunal has a duty to always endeavor to render an enforceable award [*Horvarth 135, Redfern/Hunter* ¶*10.06*]. It is advisable for the tribunal to ensure that both the Parties are given a fair hearing. Consequently, a violation of right to be heard has often led to subsequent annulment of the award by the national courts [*Paklito Investments v. Klockner East Asia; Frankfurt Airport Services Worldwide v The Philippines*].

84. Thus, CLAIMANT submits that the admission of Interim Award is integral to its claims and the non-admissibility of this evidence violates CLAIMANT'S due process rights, i.e. the right to be heard and the right to present its case.

CONCLUSION- CLAIMANT requests the Tribunal to admit the Interim Award as evidence, exercising its wide discretionary powers. RESPONDENT had challenged the admissibility of the Award on the ground that it has been illegally obtained. However, CLAIMANT was not involved in unlawfully obtaining it. In any event, the award should be admitted in light of interests of justice and the public interest. Furthermore, the Tribunal should admit the award as it is in the accordance with standards of evidence taking. Consequently, a failure to do so would invariably CLAIMANT'S due process rights.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 THROUGH THE ADAPTATION OF THE PRICE

85. When CLAIMANT was preparing for the last shipment of fifty doses of frozen semen, the unexpected imposition of 30% tariffs on agricultural products by the Equatorian government came as a complete surprise [*NoA ¶9*]. This was reportedly in retaliation to the tariffs imposed by Mediterraneo in November 2017 [*CE6 15*].

86. Despite the economic unreasonability of performing the contract, CLAIMANT delivered the remaining fifty doses on the scheduled date, 23 January 2018 [*NoA, ¶13*]. This was pursuant to RESPONDENT'S stated need for a timely delivery and based on the assurance given by Mr. Shoemaker, representative of RESPONDENT, that "*if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price*" [*RE4 36*]. However, on 12 February 2018, when CLAIMANT organised a meeting to resolve the issue of adaptation [*PO2 ¶35*], RESPONDENT stopped all negotiations and refused to pay the amount of tariffs. [*CE8 18*].

87. Thus, as the Parties have failed to renegotiate on the adaptation of the contract and CLAIMANT has performed the contract in good faith, CLAIMANT submits that it is entitled to recover the payment of US$ 1,250,000 through the adaptation of the price by this Tribunal under Clause 12 of the contract **(A)** or under the applicable substantive law **(B)**.

A. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 THROUGH THE ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT

88. Clause 12 of the Sales Agreement excuses the seller in case of changed circumstances. It states "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*CE5 ¶12*].

89. RESPONDENT contends that Clause 12 of the Sales Agreement neither applies to the tariffs imposed by Equatoriana nor provides for the remedy of adaptation of the contract [*Answer to NoA ¶19*]. These assertions are untenable as the import tariffs constitute a hardship under Clause 12 of the Sales Agreement **(I)**. Consequently, Clause 12 allows for the remedy of adaptation in case of hardship **(II)**.

I. The import tariffs constitute a hardship under Clause 12 of the Sales Agreement

90. CLAIMANT submits that the Parties intended for a hardship clause to be included in the Sales Agreement **(i)**. Further, the tariffs imposed by Equatoriana constitute hardship under Clause 12 **(ii)**.

i. The Parties intended for a hardship clause to be included in the Sales Agreement

91. CLAIMANT submits that the Parties in the initial negotiations and the subsequently executed Sales Agreement intended to include a hardship clause in Clause 12 of the Sales Agreement. Further, it is the reasonable understanding of both Parties that Clause 12 is a hardship clause which not only contains the term "hardship" but also terms, in general, in the nature of a hardship clause. Special weight is attached to the language employed in the contract [*Schwenzer/Hachem/Kee ¶26.16*].

92. In the present case, Clause 12 of the Sales Agreement reads, "*Seller shall not be responsible (...) neither for hardship, caused by (...) making the contract more onerous*" [*CE5 ¶12*]. When RESPONDENT insisted for a DDP delivery under the contract [*CE3 11*], CLAIMANT had made it clear that at minimum, a hardship clause should be included in the contract to safeguard the commercial basis of the contract [*CE4 12*]. RESPONDENT did not object to CLAIMANT'S request of the inclusion of a hardship clause [*RE3 35*], but only objected to the adoption of the ICC Hardship Clause [*Answer to NoA ¶4*]. Also, the notes left by Mr. Antley, representative of RESPONDENT indicates that both Parties had agreed that the nature of Clause 12 would be a hardship clause [*RE3 35*]. The only disputed matter was about the breadth of the agreement, its link to the arbitration clause, and not its characterization [*ibid.*].

93. Further, RESPONDENT'S understanding of this clause is mirrored by its claim of excluding the application of Article 79 CISG on the premise that Clause 12 of the agreement is a hardship clause [*Answer to NoA ¶20*]. Thus, Parties intended and included a hardship clause in Clause 12 of the Sales Agreement.

ii. The Tariffs imposed by Equatoriana constitute hardship under Clause 12

94. RESPONDENT asserts that Clause 12 is not applicable to the tariffs imposed by Equatoriana [*Answer to NoA ¶19*]. However, CLAIMANT submits that the given tariffs are covered under the hardship clause.

95. As aforementioned, recourse maybe had to Article 8(2) CISG when subjective intent under Article 8(1) CISG cannot be sufficiently proved [*Farnsworth Art. 8*]. For the determination of the reasonable understanding under this Article, the ordinary meaning of the words used by

the Parties is entitled to considerable weight [*Magnus Art. 9 ¶32; HGer Zurich*]. In light of this, CLAIMANT submits that the tariffs constitute hardship under Clause 12 as the tariffs fall within the ordinary meaning of the term 'hardship' **(a)** and are also a 'comparable unforeseen event' within the meaning of Clause 12. **(b)**.

a. <u>The Tariffs imposed by Equatoriana fall within the ordinary meaning of the term 'hardship'</u>

96. The term 'hardship' refers to a change in economic circumstances due to unforeseen events that fundamentally alters the equilibrium underlying a contract, making it excessively onerous for a party to perform its obligations [*Junge 213; Bruner 201*]. This, aligns with language in Clause 12 which deals with events that are "more onerous", strictly unforeseeable and beyond the control of the seller [*CE5 14*]. CLAIMANT submits that the tariffs imposed by Equatoriana constitute hardship as they are an unforeseen event *(i.)* beyond the control of CLAIMANT *(ii)* which have made the contract excessively onerous for CLAIMANT *(iii)*.

(i) *The Tariffs imposed by Equatoriana are an unforeseeable event*

97. The unforseeability requirement in a hardship clause implies that the aggrieved party could not reasonably be expected to have taken the change in circumstance into account at the time of the conclusion of the contract, and has thereby not assumed its risk [*Brunner 156; Stoll/Gruber Art. 79 ¶22; ICC Case No. 7197/1992*].

98. When the Equatorian government, an ardent supporter of free trade [*CE6 15*] announced a steep 30% tariff on all agricultural goods including 'living animals' [*PO2 ¶24*] imported from Mediterraneo in December 2017, it was a "serious blow" in the global market [*CE6 15*]. Barring one exception, the Government of Equatoriana had never engaged in direct retaliatory measures of such a broad nature previously [*ibid.*]. This retaliatory measure is also arguable as a breach of Equatoriana's commitments under the World Trade Organisation ("WTO") [*PO2 ¶47*] as it undertook a unilateral action instead of resorting to the dispute settlement mechanism under WTO [*Art. 22 DSU*]. Moreover, the retaliatory response should not go beyond the level of the harm caused by the initial tariff [*Art 22.4 DSU*]. In the present case, Equatoriana retaliated to a 25% tariff with a 30% tariff.

99. Further, the breadth of the goods covered was so extensive that even the relevant Ministry and custom authorities were initially unsure of [*RE4 36*], whether the tariffs on 'living animals' covered frozen race horse semen. Thus, the tariffs imposed by Equatoriana were an event so unlikely to occur that the Parties could not have foreseen it at the time of contract conclusion.

For this reason, the Parties had no opportunity to allocate the cumulative risk of occurrence of such hardship. Not only the tariffs but also the extent of the goods covered was unforeseeable [*CE7 16*].

(ii) *The tariffs are a changed circumstance beyond CLAIMANT'S control*

100. A changed circumstance is considered to be beyond the seller's control if it lies outside its contractual sphere of risk [*Vine Wax Case; Stolen Car Case*]. Such impediment should be external to the Parties [*Brunner p 167*] and not 'self-induced' [*Mckendrick in Voganeur ¶24.059*]. An act of public authority affecting the performance of contract is said to be beyond the obligor's control if its issuance was not caused by the obligor's conduct [*Stoll/Gruber; Magnus in Staudinger 10*]. State interventions such as tariffs are accepted as an exonerating circumstance beyond the control of the Parties [*ibid.*].

101. CLAIMANT submits that the 30% tariff imposed by the Equatorian government on agricultural products including living animals, was outside the Parties' control. RESPONDENT may contend that the tariffs are within the contractual risk associated with DDP delivery. Also, the objective of opting of DDP delivery was to only benefit from CLAIMANT'S experience in the transportation of frozen semen and not to burden CLAIMANT with any additional risk [*CE3 11; CE4 12*].

102. Further, the Parties allocated risk of certain obligations to the buyer which are traditionally borne by the seller under DDP incoterm like the cost of transportation and insurance fees [*Ramberg, ICC guide 11; Erauw 205*]. The Sales Agreement provides that the buyer is responsible for tank rental and handling fees associated with the delivery as well as the insurance fees [*CE5 ¶10, 13*]. Hence, the Parties did not intend to allocate all the risks associated with DDP delivery to CLAIMANT but to only benefit from his past experience.

(iii) *The imposition of tariffs made the contract excessively onerous for CLAIMANT*

103. The equilibrium of the contract becomes fundamentally altered when the aggrieved party cannot be reasonably expected to effect performance in accordance with the terms of the contract [*Brunner 422; Schlechtriem-Schwenzer Roth in Munchener Kommentor ¶201*]. If the impediment brings about a gross disproportion between the obligor's effort and the unaffected obligor's interest in receiving specific performance, the contract is said to have become excessively onerous [*Brunner 431*]. CLAIMANT submits that the imposition of the tariffs has made the performance of the contract excessively onerous.

104. To decide on the excessive onerous requirement, it is critical to consider the peculiarities of each case [*Pichonnaz 408-409*], like the increase in cost percentage, the value of the counter performance to be received, the Parties' financial situations including the profit margin [*Bereger 491*] and the specifics of any possible explicit or implicit risk allocation by the Parties [*Bonell in Bianca/Bonell Commentary 7*].

105. CLAIMANT initially had a low profit margin of only 5% [*PO2 ¶31*]. However, after the imposition of 30% tariff by the Equatorian authorities, not only the low profit margin was eroded but CLAIMANT also had to face a loss of 25% [*NoA ¶18*]. There is no definite threshold for increase in cost percentage which is consistently applied and that the impediment need not be extra-ordinary [*Krüger 245; Lindstrom 421; Scafom International Case*]. An adhoc tribunal accepted a 35% increase in cost of performance as a changed circumstance justifying hardship [*Icori Estero v. Kuwait Foreign Trading*]. Moreover, RESPONDENT'S in the other arbitration had argued that a 25% increase in cost due to tariffs imposed by Mediterraneo resulted in hardship [*PO2 ¶39*]. Thus, CLAIMANT submits that a 30% cost increase is sufficient to make the contract excessively onerous.

106. CLAIMANT argues that in any case 30% alteration in the cost of performance is sufficient to constitute a fundamental alteration when the economic existence of the party is threatened [*Brunner 428*]. In cases, where the financial ruin of the party is imminent, the threshold for allowing hardship is lowered [*Brunner 440*]. CLAIMANT has been making losses since 2014 due to the high interest payments for the loan taken to finance the new stables and the restructuring measures [*PO2 ¶29*]. CLAIMANT'S credit line depended on being profitable in 2017 and 2018 [*ibid.*]. However, the 30% increase in costs due to tariffs would seriously endanger CLAIMANT'S financing and would force it to sell his dressage business thereby leading to financial ruin [*ibid.*]. Also, RESPONDENT who is in a much more financially stable position [*PO2 ¶30*] was aware of CLAIMANT'S financial difficulties [*PO2 ¶28*]. Thus, the tribunal's legal findings must resonate with the commercial realities, which only lead to one conclusion that the performance became excessively onerous after the imposition of 30% tariff.

b. <u>The tariffs imposed by Equatoriana are a 'comparable unforeseen event' within the meaning of Clause 12</u>

107. CLAIMANT submits that the term 'comparable unforeseen events' should be interpreted in a manner consistent with the understanding between the Parties. In the initial negotiations, CLAIMANT had informed RESPONDENT [CE4 *12*] about its past experience with unforeseen

events like health and safety requirements that had destroyed the commercial basis of the contract [*PO2 ¶21*].

108. Thus, by expressly stating health related restrictions, the Parties intended to include even indirect forms of price increase. In the present case, the steep tariffs which have altered the equilibrium of the contract [*CE7 16*] are a government instituted import related measure similar to the health and safety requirements that have directly increased the cost of production. Health & Safety restrictions were only an example from past experience intended to inform the meaning of the hardship clause. Therefore, CLAIMANT submits that tariffs are a 'comparable unforeseen event' within the meaning of Clause 12 of the Sales Agreement.

109. Alternatively, RESPONDENT could contend that the events under the term 'comparable unforeseen events' should be limited to the health and safety requirements using the *ejusdem generis* rule of construction which provides that the general words are to be given the same meaning as those specifically mentioned in the clause [*Black Law Dictionary*]. However, Ejusdem generis rule is at best a very secondary guide to the meaning of a statute and is not used for contractual interpretation [*Quazi v. Quazi; Mckendrick in Voganeur 92*]. In contractual arbitration, a broader understanding is adopted, which is not confined to *ejusdem generis* interpretation [*Chitty 127; Nehf ¶74.19*]. If a hardship clause includes a list of hardship events such a list is usually meant to be non-exhaustive and aimed at illustrating general definition of the clause [*Brunner 385*]. CLAIMANT submits that 'comparable unforeseeable events' should be interpreted to include health and safety requirements, but not be limited to the same only.

II. Clause 12 entitles CLAIMANT to the remedy of adaptation of price

110. RESPONDENT alleges that the claim for additional remuneration on the basis of adaptation of the contract is not justified as Clause 12 does not provide for requested remedy [*Answer to NoA ¶9*]. To the contrary, CLAIMANT submits that the Parties intended for adaptation to be available as a remedy in case of hardship under Clause 12 of the Sales Agreement **(i)**. In any event, a reasonable person in RESPONDENT'S position would have understood that CLAIMANT intended for adaptation as a remedy under Clause 12 **(ii)**.

i. The Parties intended for adaptation to be available as a remedy in case of hardship under Clause 12 of the Sales Agreement

111. As aforementioned, Article 8(1) CISG gives priority to the subjective intent of the party where the other party knew or could not have been unaware of the party's intention. CLAIMANT 'S intention was to seek adaptation as a remedy in case of hardship under Clause 12.

112. CLAIMANT 'S intent vis-à-vis adaptation was made clear in the course of the Parties' negotiations, initiated between Ms. Napravnik, CLAIMANT 'S representative in the Sales Agreement and Mr. Antley, RESPONDENT'S representative in the Sales Agreement [*CE5 13*]. Ms. Napranvik mentioned the need for an express reference to adaptation if the Parties could not agree on an amendment in case of hardship [*CE8 17*]. Mr. Antley had agreed to this proposition, [*ibid.*] even the note left by him indicates that Respondent had accepted the possibility of adaptation as a remedy, but was just unclear about the exact logistics of its operation [*RE3 35*].

113. In the course of negotiations, if one party clearly expresses its intent and the other party does not object, the Tribunal will presume agreement [*Packaging Machines Case; Clothes Case; Caito v. Société; Schmidt-Kessel in Schlechtriem/Schwenzer 118-9*]. Even though the final contract was signed by two different negotiators of the Parties, the intention of the Parties to provide for adaptation does not get repudiated as there were no further negotiations between the Parties regarding adaptation [*RE3 35*]. Thus, RESPONDENT knew or could not have been aware of CLAIMANT 'S intention to seek adaptation as a remedy under Clause 12.

ii. *A reasonable person in RESPONDENT'S position would have understood that CLAIMANT intended adaptation as a remedy under the hardship clause*

114. Should the Tribunal find that RESPONDENT was not aware of CLAIMANT 'S intention to provide for adaptation as a remedy under the hardship clause, an objective interpretation of the contract under Article 8(2) CISG yields the same result. CLAIMANT 'S intention should prevail as it confirms to the understanding that a reasonable business person in the same industry and position as RESPONDENT would have had [*Farnsworth in Bianca/Bonell 98; Schmidt-Kessel in Schlechtriem/Schwenzer 119-121; Zuppi 65; LG Feb 1996*].

115. It is a reasonable understanding that the insertion of the hardship clause entitles the aggrieved party to request renegotiation with a view of adapting the contract after a failure to reach an agreement within a reasonable time [*Brunner 479; Silveira 323; Landoh/Beale 327;*]. A hardship clause is constructed with the objective criteria of restoring the underlying equilibrium of the contract [*Brunner 510; Zaccaria 50*]. This understanding is based on the principles of good faith and equity, and on the premise that once the equilibrium of the contract has been affected effort shall be made to restore it [*Brunner 393; Bernini 195*]. In this regard, a reasonable person in the position of RESPONDENT would have understood that Clause 12 provides for adaptation as a remedy.

116. Further, if the interpretation of a hardship clause is limited to recognising the hardship events, the aggrieved party would be left remediless and the hardship clause redundant [*Superior Overseas v. British Gas; Aluminium Company Case*]. In the present case, adaptation is a natural remedy under Clause 12 as any other remedy like termination of the contract would be in conflict with the Parties' intention of a long term mutually beneficial relationship [*CE2 10; CE3 11*]. Thus, it is a reasonable understanding that the remedy of adaptation would flow naturally by the inclusion of the hardship clause.

117. In conclusion, the import tariffs imposed by Equatoriana constitute a hardship under Clause 12 of the Sales Agreement and entitle CLAIMANT to the remedy of adaptation under Clause 12.

B. ALTERNATIVELY, CLAIMANT IS ENTITLED TO PAYMENT OF US$ 1,250,000 UNDER THE APPLICABLE SUBSTANTIVE LAW

118. In the event, CLAIMANT is not entitled to the payment resulting from adaptation of the price under Clause 12, recourse must be made to the applicable substantive law. Clause 14 of the Sales Agreement, provides for the Law of Mediterraneo including the CISG to be applicable to the Sales Agreement [*CE5 ¶14*] as the Parties to the dispute are members of the CISG contracting states.

119. CLAIMANT submits that the tariffs imposed by Equatoriana constitute a hardship under the applicable substantive law **(I)**. Consequently, CLAIMANT is entitled to the remedy of adaptation under the law **(II)**.

I. The tariffs imposed by Equatoriana constitute a hardship under the applicable substantive law

120. The Tariffs imposed by Equatoriana constitute a hardship under the applicable substantive law, that is, the law of Mediterraneo including the CISG. CLAIMANT submits that hardship is subsumed under Article 79 CISG **(i)**. Alternatively, hardship is an internal gap in CISG, to be filled by the general principles underlying the convention **(ii)**.

i. Hardship is subsumed under Article 79 CISG

121. RESPONDENT alleges that the Article 79 CISG is not applicable in the present case [*Answer to NoA ¶20*] and Article 79 CISG does not regulate hardship [*ibid. ¶21*]. To the contrary, CLAIMANT submits that Clause 12 does not preclude the application of Article 79 **(a)**. Further, hardship qualifies as an impediment under Article 79 CISG **(b)**.

a. Clause 12 does not preclude the application of Article 79 CISG

122. RESPONDENT contends that reliance cannot be placed on Article 79 CISG as by including a force majeure and hardship clause into the Sales Agreement the Parties have excluded the application of Article 79 CISG to deal with changed circumstances [*Answer to NoA* ¶*20*]. To the contrary, CLAIMANT submits that Clause 12 does not preclude the application of Article 79 CISG.

123. Pursuant to the principle of party autonomy enshrined in Article 6 CISG Parties may derogate from the provisions of the *CISG* in whole or part [*Schlechtriem/Schwenzer Art 6 244*]. However, the party alleging exclusion or derogation has the burden of proving an agreement to that effect [*Cables Case*]. In case of any ambiguity, the presumption should be made in favour of the applicability of the CISG [*Ziegler 3*]. Thus, the burden is on RESPONDENT to prove that Article 79 CISG is inapplicable.

124. Further, any contractual provision narrower than the default applicable law cannot oust its effect [*Davies/Snyder 326; UCC Official Comment 8*]. The Sales Agreement itself does not contain express language to indicate opting out or derogating from the CISG in any way [*CE5* ¶*14*]. Article 79 CISG has been considered to exist alongside force majeure clause in contracts [*Iron Molybdenum Case*]. In the present case, the existence of Clause 12 does not preclude the application of Article 79 *CISG* since it is not broader in operation than Article 79 CISG. If the parties intend for the force majeure clause to be broader than Art 79 of the CISG, then the clause must explicitly state their intention [*Bund* 57]. There was no such express intention in the present case. Moreover, the comparability requirement of Clause 12 of Sales Agreement makes the clause narrower than Article 79 since unforeseeable, unavoidable and uncontrollable impediments that cannot be compared to "health and safety requirement" are outside its purview [*CE5* ¶*12*]. Thus, if CLAIMANT is not allowed to invoke a hardship defence for the tariffs pursuant to an event delineated in the hardship clause, it can still resort to Article 79 [*Bund 59*].

b. The term impediment under Art. 79 CISG should be interpreted to include situations of hardship

125. CLAIMANT submits that hardship is an impediment under Article 79 CISG. This follows from the ordinary meaning and purpose of the terms in Article 79 CISG [*Honnold 69; Lindström 118; Kessedjian 419; Kritzer 115]*, drafting history of Article 79 CISG, the principle of good faith and reasonable interpretation of contracts which presupposes that there is a limit of sacrifice when

the performance of an obligation is made extremely onerous for one of the Parties [*Schlechtriem 1825; Zaccaria 165*].

126. The terms 'impediment' and "failure to perform" under Article 79(1) CISG does not only suggest impossibility of performance but also includes "*events which make accomplishment of certain results merely more difficult*" [*Klepac 18; Rimke 222; Kofod 81*]. Further, the phrase "*could not reasonably be expected (…) to avoid or overcome its consequences*" is understood to include what is reasonable to expect the promisor to perform [*Schlechtriem/Schwenzer 1109*].

127. The economic change of circumstances which alter the fundamental equilibrium of the contract to such an extent that it would be unreasonable to enforce it constitute an impediment [*Bonell 74; Dimatteo 26*]. Thus, the text of Article 79 which provides that the impediment must be unavoidable is not limited to force majeure but also extends to economic hardship where it is unreasonable to expect the promisor to comply with the original terms of the contract [*Atamer 109; Ishida 23*].

128. Further, CLAIMANT submits that hardship as an impediment also serves the purpose of the Convention to promote uniformity in international sales law [*CISG Art. 7(1)*] Hardship is not only a civil law doctrine [*Art 1467 Italian Code; Art 478-480 Brazilian Code; Art 1198 Argentina Code; Art 6:258 Dutch Code; Art 451 Russian Code*] but has also been recognised in common law jurisdictions like United States and England through the principle of commercial impracticability and frustration of purpose, respectively [*Treitel 821; Brunner 256*]. The development of hardship as a general principle of contract law is also evident from soft law instruments [*PICC; PECL; DCFR*], international law [*Kolo Walde; Gabcikovo-Nagymaros Case; France v Switzerland; Fisheries Jurisdiction Case*] and arbitral case law [*Iran United States Claims Tribunal; ICC Case Number 7365; ICC Case No 1512; Almeida Prado ¶325*].]. Thus, hardship as an impediment under Article 79 CISG prevents the homeward trend and allows for uniformity [*Schlechtriem 102*].

129. RESPONDENT may contend that the *travaux preparatoires* of Article 79 CISG indicates that hardship has been excluded from the application of the Article as the proposal to consider a radical change of circumstances as a reason for exemption under Article 79(3) CISG was rejected and the terminology was changed from 'circumstances' to 'impediments' [*Petsche 53*]. However, the rejection of this proposal has been interpreted to mean that Article 79 CISG covers instances of genuine hardship [*Garro 21, Honnold 110*]. Further, the use of the term 'impediment' and not 'impossibility' demonstrates that there was no need of express inclusion of hardship within the Article [*ibid.*]. Moreover, the role of such drafting history in interpretation of the Convention is subservient to the need for the Convention to adapt to

changes in international trade [*Schwenzer 113*]. Convention should not be frozen in time and should take into account the evolving circumstances. [*Kroll 1109, Sekolec*].

130. Thereby hardship qualifies for an impediment under Article 79 CISG. As aforementioned, the tariffs imposed by Equatoriana have fundamentally altered the equilibrium of the contract. CLAIMANT could not reasonably have been expected to take into account the tariffs, at the time of conclusion of the contract or overcome its consequences. Thus, the imposition of tariffs constitutes a hardship within the meaning of Article 79 CISG.

ii. *Alternatively, hardship is an internal gap in CISG, to be filled by the general principles underlying the Convention*

131. Article 7(2) CISG calls for the resolution of ambiguities that are governed but not settled by the Convention in conformity with the general principles on which the CISG is based [*Magnus ¶4(b)*].

132. Hardship is not expressly mentioned in any provision of the CISG. Article 4 CISG explicitly includes "*the rights and obligations of the seller and the buyer*" within the scope of the Convention. The bar of Article 4(a) CISG does not apply since hardship is not a question of validity [*Garro 2005*]. Article 79 CISG governs a disturbance in the performance of the contract due to a change of circumstances, [*Art. 79 CISG; CISG AC Opinion No 7; Lindstrom 120*] however, it does not incorporate all the conditions of hardship and its inclusion within Article 79 CISG remains contested [*ibid.*]. Thus, hardship is governed but not settled by the Convention.

133. The internal gaps are filled by first applying the general principles either directly or through analogy and then recourse can be taken to the rules of private international law in the absences of such principles [*Lucia Carvalhal Sica ¶1.2*]. Recourse is taken to the principles of *favour contractus* [*Honnold ¶1.3.1*], good faith [*Donald J. Smythe 5*] and fair dealing; reasonableness [*ibid. 3*]. These principles set forth general rules for international commercial contracts and have also been invoked by the CISG Advisory Council and various other commentators in the specific context of the Convention, primarily to invoke changed circumstances as an excuse for non-performance under Article 79 CISG [*CISG AC Opinion No 7; Kroll*]. Further, these principles are also reflected in Article 6.2.2 PICC [Preamble PICC; *Mckendrick in Vogenauer 786; Felgelmas 21*] and Article 6:111 PECL [*Jenkins 2019*] which are specific hardship provisions.

134. These codifications of transnational commercial law can be used to interpret and supplement the Convention insofar as the principles being invoked are consistent with the CISG [*Schlechtriem/Butler 54; Huber/Mullis 36; Kroll/Mistelis/Viscasillas ¶7-6; Bridge ¶10.49*]. The

terminology of Article 6.2.2 PICC is neutral and the concept of hardship in PICC originates from the terms of international commercial contracts not peculiar to any particular domestic system [*Mckendrick in Vogenaeur 711*]. Under Article 6.2.2 PICC, hardship is an unforeseeable event, which fundamentally alters the equilibrium of the contract and is beyond the aggrieved party's control and sphere of risk [*Art. 6.2.2 PICC*]. Thus, CLAIMANT submits that hardship is an internal gap in CISG, and the tariffs imposed by Equatoriana constitute a hardship as provided in the general principles underlying the Convention.

135. Further, Article 7(2) CISG allows for reliance on the domestic law when there are no general principles that can be used to fill the internal gap in the Convention [*PO1 ¶4*]. The domestic law of the Parties is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("PICC") [*PO1 ¶4*]. Further, in the present case the use of domestic law does not hinder the uniformity and international character of CISG as PICC is unquestionably regarded as laying down general principles of contract law for international contracts [*Felgelmas 2; Mckendrick in Vogenauer 786*].

II. CLAIMANT is entitled to the remedy of adaptation under the applicable substantive law

136. CLAIMANT is entitled to the payment of US$ 1,250,000 through adaptation under the applicable substantive law. Adaptation is a remedy under Article 79(5) CISG **(i)**. Alternatively, general principles of the Convention under Article 7(2) CISG allow for adaptation as a remedy **(ii)**.

i. Adaptation is a remedy under Article 79(5) CISG

137. CLAIMANT submits that adaptation as a remedy should be read as reasonable and well within the scope of remedies envisaged under Article 79(5) CISG [*CISG AC Opinion 7*]. Article 79(5) CISG provides for the legal consequences in situations of force majeure and hardship established under Article 79(1) CISG [*Bruner 365*].

138. Also, interpretation of Article 79(5) CISG by an analogical extension to price reduction under Article 50 CISG allows to read adaptation as a remedy under Article 79(5) CISG [*Schlectriem 191, 238*]. The underlying principle of Article 50 CISG can be used as a "*springboard to develop a general rule of adjustment in hardship cases*" [*Schlectriem 379*] and the remedy can be read into Article 79(5) CISG. Price reduction having a similar object and purpose as adaptation has been recognised as a remedy under Article 79(5) CISG [*CISG Art.50; Christianv v Sarl; Shin*

349, Liu 65]. Thus, adaptation should also be available as a remedy under the Article, which restores the equilibrium after an alteration in the balance due to changed circumstances.

139. Further, Article 79 CISG allows Parties to claim any remedy other than the remedy of damages. [*Honnold ¶435.5; Silveria 212*]. Under Article 79(5) CISG, the other available remedies like the right of avoidance [*Art. 49, 64 CISG; Hilaturas Miel v Iraq*] and the right to specific performance [*Art. 46, 62 CISG; Electronic hearing aid case*] are not applicable in the present case as CLAIMANT, acting in good faith, has already performed the contract by delivering the remaining doses on the scheduled date, 23 January 2018 [*NoA ¶13*]. Since the impediment has increased the cost of performance by 30% [*CE7 16*], price reduction is also not a viable remedy. Further, the renegotiations between the Parties have reached an impasse. In such situations, adaptation is the most common and acceptable remedy [*Brunner 289*]. Thus, even though the Convention does not expressly mention adaptation as a remedy, allowing it under such circumstances does not amount to a deviation from its language or its purpose.

140. In determining the appropriate remedy, the reasonable expectation test should be considered under Article 79(5) CISG [*Art. 79 CISG; Art. 8 CISG; Ishida 360*]. Contrary to what RESPONDENT may allege, adaptation in the present case aligns with the reasonable expectations of the Parties while entering into the contract. CLAIMANT entered into the contract with the intention of making profit to meet the conditions imposed by its creditors [*PO2 ¶21*]. RESPONDENT knew about the poor financial health of CLAIMANT through the rumours [*PO2 22*] or could have been aware through the newspaper reports about the near insolvency of CLAIMANT in 2014 [PO2 ¶21]. Moreover, both the Parties intended to enter into a long term 'mutually beneficial' relationship [*CE2 10; CE3 11*]. The tariffs imposed by Equatoriana have disproportionately and adversely impacted CLAIMANT. Thus, CLAIMANT submits that it was the reasonable expectation of the Parties at the time of entering into the contract, to subject it to adaptation in case of a hardship.

141. In the present case, a denial of adaptation of the price would leave CLAIMANT remediless under CISG as CLAIMANT has already performed the contract in utmost good faith by giving up its 5% profit margin [*CE8 17*] and has also shouldered the 25% tariff despite the considerable losses it has been making since 2014 [*PO2 ¶29*]. Hence, in the present case, it is essential that the Tribunal allows for the appropriate remedy of adaptation under Article 79(5) CISG.

ii. *Alternatively, general principles of the Convention under Article 7(2) CISG allow for adaptation as a remedy*

142. If the question of adaptation as a remedy under the CISG, is not expressly settled by the Convention, CLAIMANT submits that adaptation is an internal gap. Article 79(5) CISG allows for any remedy except that of damages. Adaptation is the most appropriate and commonly accepted remedy for hardship, [*Brunner 305*] hence is within the 'matters governed' [*Art. 7(2) CISG*] by the CISG. However, it remains unsettled due to the ambiguity with respect to the type of remedies that can be allowed under Article 79(5) CISG. Thus, the remedy of adaptation is an internal gap in the convention.

143. RESPONDENT may contend that adaptation is not within the scope of the CISG as the proposal to expressly include it, was rejected at the time of drafting of the Convention [*Flechtner 84*]. However, there exists no conclusive evidence as to the intention of the drafters for such rejection, this could be due to the wide scope of Article 79(5) CISG which possibly includes adaptation as a remedy [*ibid. 221*]. Thus, the drafting history has limited application and cannot be relied upon to exclude adaptation as a remedy under Article 79(5) CISG. The Belgium Supreme Court also affirmed this position that in the event of hardship, the duty to renegotiate or adapt the terms is a gap in the Convention and recourse should be taken to Article 7(2) CISG [*Scamfom International case*.].

144. As aforementioned, the internal gap are filled by taking recourse to the principles of *favour contractus* [*Honnold ¶1.3.1*], good faith [*Donald J. Smythe 5*] and fair dealing; reasonableness [*ibid. 3*] and the international law instruments like the PECL and the PICC [*Bonell*].

145. The principle of *favor contractus* demands cooperation between the Parties for a favourable interpretation of the contract that may even call for an adaptation to ensure its valid existence as opposed to a premature termination [*Honnold ¶1.3.1*]. In the present case, the contract cannot be terminated as CLAIMANT has already performed the contract and the Parties intended for a long term mutually beneficial relationship.

146. Further, the remedy of adaptation also arises from the principle of good faith and fair dealing as the equilibrium of the contract has been fundamentally altered which has adversely affected CLAIMANT. CLAIMANT in good faith has performed the contract despite the imposition of 30% tariff thus, it is expected that the contract would be adapted. Further, RESPONDENT has not acted in good faith and fair dealing by reselling the doses to other buyers at a 20% profit [*PO2 ¶19*] despite a prohibition on reselling of the doses without the permission of CLAIMANT [*CE5 13; CE8 18*]. Hence, the contract should be adapted in light of the principles of *favor contractus,* good faith and fair dealing.

147. PICC is viewed as setting forth general principles of international contract law upon which the Convention is based [*Bonell 12*]. Hence, PICC can be used to interpret and supplement the Convention insofar as the principles being invoked are consistent with the CISG [*Schlechtriem/Butler 54; Huber/Mullis 36; Kroll/Mistelis/Viscasillas ¶7-61; Bridge ¶10.49*]. The provisions of 6.2.3 PICC and Article 79(5) CISG are similar [*John Y. Gotanda 15*]. Thus, recourse can be taken to 6.2.3 of the PICC to supplement Article 79(5) CISG since the underlying principle of both the provisions is to re-establish the disrupted equilibrium. Thus, CLAIMANT submits that the general principles of the Convention under Article 7(2) CISG allow for adaptation as a remedy under Article 79(5) CISG.
148. In conclusion, CLAIMANT is entitled to the payment of US$ 1,250,000 by adaptation of the price under the applicable substantive law.

CONCLUSION- CLAIMANT requests the Tribunal to allow the payment of US$ 1,250,000 through the adaptation of the price as the tariffs imposed by Equatoriana constitute a hardship under Clause 12 of the Sales Agreement. In any event, the tariff constitute hardship under CISG and consequently, CLAIMANT is entitled to the remedy of adaptation under the same.

REQUEST FOR RELIEF

For the above reasons, counsels for CLAIMANT respectfully request the Tribunal to:

(1) Find that the Tribunal has the power to adapt the contract;
(2) Admit the Partial Interim Award as evidence;
(3) Find that CLAIMANT is entitled to US$ 1,250,000 or any other amount resulting from adaptation of the price.

Capital City, Mediterraneo: 6 December 2018



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