SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR
31ST MARCH TO 7TH APRIL 2019

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Phar Lap Allevamento Rue Frankel 1 Capital City Mediterraneo	Black Beauty Equestrian 2 Seabiscuit Drive Oceanside Equatoriana
CLAIMANT	RESPONDENT

COUNSEL FOR CLAIMANT:

NEIL ALACHA • WILLIAM BALDWIN • JONATHAN LIEBMAN • LAWRENCE LIU • YOUNGHOON MOON • HABIB OLAPADE • ALLISON RABKIN GOLDEN • MOHAMED SAID • TOMO B. TAKAKI • ALEX ZHANG

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LIST OF ABBREVIATIONS

$	Dollar (USD)
¶	Paragraph
%	Percent
Art(s)	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Ex.	Claimant's Exhibit
DDP	Delivered Duty Paid
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
New York Convention	United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).
No.	Number
p.	Page
PECL	Principles of European Contract Law
PO 1/2	Procedural Order 1/2
Res. Ex.	Respondent's Exhibit
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Law
v.	versus

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BOOKS

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FULLER	Lon L. Fuller, *Morality That Makes Law Possible*, in MORALITY OF LAW: REVISED EDITION 33-94 (Lon L. Fuller, ed., 1969).	63
GLICK & NIRANJAN	Ian Glick and Venkatesan Niranjan, *Choosing the Law Governing the Arbitration Agreement*, in JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION (Neil Kaplan & Michael Moser eds., 2018).	23
HORN	Norbert Horn, *Procedures of Contract Adaptation and Renegotiation in International Commerce*, in Horn (ed.), ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE (Norbert Horn ed., Kluwer Law International, 1985).	43, 47
LEW	Julian D.M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (Albert van den Berg ed., 1999).	26

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SECRETARIAT COMMENTARY	Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, UN DOC. A/CONF/. 97/5 (1978), available at: http://www.cisg-online.ch/index.cfm?pageID=644.	92
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KROLL	STEFAN KROLL, ERGANZUNG UND ANPASSUNG VON VERTRAGEN DURCH SCHIEDSGERICHTE (Heymanns, 1999).	38, 44, 47
REDFERN/HUNTER	NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (Oxford, 5th ed., 2009).	22, 34
SCHLECHTRIEM	PETER SCHLECHTRIEM, UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Recht, Wirtschaft, Aussenhandel 1986).	116
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WHY HKIAC?	"Why HKIAC?" Hong Kong International Arbitration Centre Online, available at: http://www.hkiac.org/arbitration/why-choose-hkiac.	37
THE 2013 HKIAC ADMINISTERED ARBITRATION RULES UNVEILED	"The 2013 HKIAC Administered Arbitration Rules Unveiled," Hong Kong International Arbitration Centre Immediate Press Release, 12 June 2013, available at: http://www.hkiac.org/news/2013-hkiac-administered-arbitration-rules-unveiled.	37

STATEMENT OF FACTS

1. Phar Lap Allevamento [CLAIMANT] is a renowned breeder of horses for racing and other equestrian sports headquartered and registered in Capital City, Mediterraneo. Black Beauty Equestrian [RESPONDENT] is a breeder of show jumpers and dressage horses which recently established a racehorse breeding program in Equatoriana.

2. On **21 March 2017**, RESPONDENT contacted CLAIMANT to express interest in acquiring frozen semen from Nijinsky III, one of CLAIMANT's most valuable breeding stallions. RESPONDENT explained that Equatoriana's ban on the artificial insemination of horses had been lifted, allowing the company to use frozen semen in its breeding program.

3. On **6 May 2017**, the parties signed a contract agreeing to the sale of Nijinsky III's frozen semen [the Contract]. [CL. EX. C5]. The agreement was based on an industry template Frozen Semen Sales Agreement, but the parties negotiated two key changes to the standard contract.

4. The first was the choice of law and dispute resolution procedures for the Contract. RESPONDENT was unwilling to submit the contract to both Mediterranean law and the jurisdiction of Mediterranean courts, and proposed that disputes be governed by Mediterranean law but heard by Equatorianian courts. [CL. EX. C3]. CLAIMANT, however, explained that it could not agree to any contract that submitted disputes to non-Mediterranean law or to the courts in a contractual counterparty's country: such a contract would require special approval by the banks making up CLAIMANT's creditors' committee. [RES. EX. R2] To resolve this impasse, the parties agreed to submit disputes arising out of the Contract to arbitration in Danubia, a neutral third country, which satisfied both parties' concerns.

5. Additionally, RESPONDENT insisted that CLAIMANT ship the frozen semen doses Delivered Duty Paid [DDP]. [CL. EX. C3]. As CLAIMANT noted in its communication with RESPONDENT, this arrangement would expose CLAIMANT to several commercial risks, especially those "*associated with changes in customs regulation or import restrictions.*" [CL. EX. C4].

6. To protect CLAIMANT against these risks, the parties agreed to modify the standard DDP delivery terms as well as to include a hardship clause in the Contract. The hardship clause provided that CLAIMANT would not be responsible for, among other things, costs associated with "*hardship caused by additional health and safety requirements or* comparable unforeseen events *making the contract more onerous.*" [CL. EX. C5 (emphasis added)].

7. The Contract provided that the semen would be delivered in three shipments and the purchase price paid in two installments. The first two shipments were delivered and the first installment was paid without incident.

8. However, on **20 December 2017**, the Equatorianian government shocked political observers and trade experts by imposing a 30% tariff on agricultural imports from Mediterraneo. This tariff was apparently imposed as retaliation for trade measures instituted by the newly elected Mediterranean president. Equatoriana's imposition of retaliatory tariffs is almost totally unprecedented, and news sources reported that "*even . . . informed circles*" were taken by surprise. [CL. EX. C6].

9. Soon afterwards, CLAIMANT was surprised to learn that the frozen horse semen it planned to ship to RESPONDENT was subject to the new customs duties. CLAIMANT was now required to pay a 30% duty on its shipment at the Equatorianian border, wiping out CLAIMANT's profit margin and destroying the commercial basis for the sales price established in the Contract.

10. CLAIMANT's representative, Ms. Julie Napravnik, contacted RESPONDENT on **20 January 2018**, in an effort to amicably negotiate a solution before delivering the last shipment of semen given these unforeseen changes in Equatoriana's customs regulations. [CL. EX. C7]. Ms. Napravnik indicated that CLAIMANT could not deliver the final shipment of semen unless RESPONDENT agreed to reasonably compensate CLAIMANT for the tariff. [*ID.*]. RESPONDENT's representative, Mr. Greg Shoemaker, told Ms. Napravnik that CLAIMANT should deliver as contracted because RESPONDENT urgently needed the doses and the parties could definitely reach a solution about the tariff, especially in light of RESPONDENT's commitment to a long-term commercial relationship with CLAIMANT. Ms. Napravnik relied on Mr. Shoemaker's promise to continue renegotiating the contract price and shipped the doses on schedule on **23 January 2018**. [CL. EX. C8].

11. At roughly the same time, RESPONDENT found itself on the other end of an unforeseen change in customs regulations. RESPONDENT was required to pay an additional 25% tariff on a mare it was shipping to a customer in Mediterraneo. Arguing that this sales contract had to be adapted to account for this unexpected change in their costs, RESPONDENT brought an arbitration against its customer.

12. On **12 February 2018**, CLAIMANT confronted RESPONDENT at a meeting about RESPONDENT breaching the contractual agreement not to resell doses to third parties. RESPONDENT's CEO, Ms. Kayla Espinoza, became angry, terminated negotiations between the parties and refused to pay any amount for the tariffs.

13. CLAIMANT initiated this arbitration on **31 July 2018**.

SUMMARY OF ARGUMENT

14. These dramatic and unforeseen changes to Equatoriana's customs regulations warrant an increase in the remuneration due CLAIMANT. The arbitral tribunal has the power to order this relief because the arbitration agreement is governed by Mediterranean law. In Mediterraneo, a tribunal is implicitly empowered to adapt a contract in light of unforeseen circumstances. The parties expressly chose Mediterranean law to govern the entire Contract. Danubian law is mentioned nowhere, belying RESPONDENT's insistence that the parties chose it to govern the arbitration agreement. [**I.A**].

15. Even if no express choice had been made, the implicit choice of law for the Arbitration Agreement is still that of Mediterraneo. Again, it is the only national body of law mentioned in the Contract. Moreover, the history of the negotiations between the parties makes clear that the parties must have meant to apply Mediterranean law to the Arbitration Agreement. The purpose of arbitration in Danubia was to comply with CLAIMANT's policy preventing it from signing cross-border contracts subject either to foreign law or to a counterparty's national courts. RESPONDENT knew that CLAIMANT could not sign an agreement subject to Danubian or any other foreign law. Though RESPONDENT has now adopted a position to the contrary, the record of the negotiations makes clear that when the Contract was signed the parties implicitly understood that Mediterranean law would govern the Arbitration Agreement. [**I.B**].

16. The Tribunal has both the procedural and substantive authority to adapt the Contract, even absent an explicit adaptation clause. HKIAC institutional rules grant the Tribunal power to rule on its own jurisdiction. Modern developments support a more extensive jurisdiction for arbitral tribunals, and the parties' intentional selection of the HKIAC Rules further favors jurisdiction. Substantively, the general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles, which explicitly allow courts to adapt contracts to provide equitable

remedies. This finding is consistent with other international principles and conventions as well as German, Swiss, American, and Japanese contract law. [**II**].

17. The Tribunal should compel and admit evidence of RESPONDENT's contradictory position in an alternate HKIAC arbitral proceeding. Doing so is within the Tribunal's plenary discretion regarding the admission of evidence, and aligns with the considerations of materiality, availability of evidence, and procedural economy set forth in the IBA Evidence Rules. Potential concerns over the confidentiality of this evidence are misplaced, given that CLAIMANT learned of this alternate proceeding in a public setting. [**III**].

18. CLAIMANT is entitled to the payment of US$ 1.250.000 or any other amount resulting from an adaptation of the price under clause 12 of the Contract and under CISG. CLAIMANT is entitled to adaptation of the contract price pursuant to clause 12 of the Contract, because the institution of the 30% tariff by the government of Mediterraneo constitutes hardship within the meaning of clause 12 and under Mediterranean contract law. In the alternative, CLAIMANT is entitled to adaptation of the contract price pursuant to Article 79 of CISG. Clause 12 of the Contract constitutes neither an exclusion of the CISG nor a specific derogation of Article 79 of the CISG, and the CLAIMANT is entitled to adaptation of the Contract under the impediment article of the CISG. [**IV**].

19. If this Tribunal finds that the price should be adapted, either due to general principles of adaptation within the law governing the Contract or due to the explicit hardship provisions in CISG and UNIDROIT, it should grant CLAIMANT the full $1.250.000 requested. $1.250.000 is a reasonable, fair, and just amount of compensation for CLAIMANT's costs caused by reliance on RESPONDENT's false statements regarding its interest in a long term relationship, commitment not to resell doses per negotiation and standard good faith business practices, and promise to find a solution to compensate for the unexpected tariffs. [**V**].

ARGUMENT

I. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF MEDITERRANEO.

20. The Arbitration Agreement is governed by Mediterranean law because it is both the *only* express choice of law in the Contract as well as the choice of law implied by the parties' negotiations and final contract.

A. The law of Mediterraneo is the express choice of law for the Arbitration Agreement.

21. The law of Mediterraneo is the only law mentioned in the Contract, and there is every reason to believe that the parties intended this law to govern the Arbitration Agreement as well as the rest of the Contract. "*Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.*" [SONATRACH ¶32; *see also* ICC CASE NO. 6850; ICC CASE NO. 6752; ICC CASE NO. 6379; ICC CASE NO. 5294; ICC CASE NO. 3572]. Therefore, because the arbitration agreement is part of the underlying contract, and the underlying contract provides for Mediterranean law, Mediterranean law also applies to the arbitration agreement.

22. The principle of separability of an arbitration clause from the rest of an agreement between two parties does not apply to the present dispute and does not require that the Arbitration Agreement be governed by a law distinct from the law applicable to the rest of the Contract. "*The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality.*" [REDFERN/HUNTER 158]. The idea that an arbitration agreement is separable from its underlying contract means only that it can, when necessary, be taken independently from the underlying contract, not that it must always be. [MAYER 359].

23. The purpose of the separability doctrine is to ensure that an arbitration agreement remains valid even when the existence or validity of the contract as a whole is called into question. [*See, e.g.*, GLICK & NIRANJAN 137]. This ensures that an arbitral tribunal retains jurisdiction even when one party questions the validity of the contract containing an arbitral clause. For example, the UNCITRAL Model Law on International Commercial Arbitration states that "*the arbitral tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.* For that purpose*, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*" [UNCITRAL MODEL LAW ART. 16 (emphasis added)]. There is no reason to treat an arbitration clause as a separate agreement unless and until the validity of the agreement is questioned.

24. Even given the presumption of separability, Mediterranean law applies because "*[a]lthough the arbitration clause is a separate contract, it very often forms part of the underlying contract . . . and any*

choice of law applicable to the underlying agreement is likely to be construed as equally applicable to the arbitration, unless there is an indication to the contrary." [UK LIMITED]. In this case, there is no indication that the parties intended any law other than the law of Mediterraneo to govern the Arbitration Agreement, and so it is the appropriate choice of law.

B. Even if the choice of Mediterranean law had not been made expressly, the Arbitration Agreement is implicitly governed by Mediterranean law.

25. Both the content of the Contract and the conduct of the parties in drafting the Contract make clear that the parties intended the Arbitration Agreement to be governed by Mediterranean law. The Hague Principles on Choice of Law in International Commercial Contracts, which have been adopted by all three of the jurisdictions relevant to this dispute, provide that a choice of law must either "*be made expressly or appear clearly from the provisions of the contract or the circumstances.*" [HAGUE PRINCIPLES ART. 4]. Even if there were no express choice of law made for the Arbitration Agreement, then the tribunal would ask what choice of law is clearly implied by either the surrounding circumstances or the contractual language itself. Both the provisions of the Contract and the circumstances of the Contract's drafting establish an implicit choice of Mediterranean law for the Arbitration Agreement.

1) The provisions of the contract make evident the parties' implicit choice of Mediterranean law.

26. No law other than Mediterraneo's is mentioned in the Contract, much less in the Arbitration Agreement. In light of the "*very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement,*" this fact urges the conclusion that the parties implicitly chose to submit the Arbitration Agreement to Mediterranean law. [LEW 143]. Absent a contrary express selection, agreement as to the law governing the underlying contract can be viewed as an "*implied . . . agreement of the parties as to the law applicable to the arbitration clause.*" [*ID.*].

27. The bare fact that the parties chose Danubia as the seat of arbitration does not defeat this "*very strong presumption.*" [*ID.*]. As the Commentary to the Hague Principles explains, the parties' decision to submit disputes to a particular arbitral tribunal is "*not a sufficient indicator, of itself, of the parties' tacit choice of law.*" [HAGUE PRINCIPLES, COMMENTARY to ART. 4.12]. The Commentary

illustrates this principle by hypothesizing a contract in which the parties agree to submit their disputes "*to arbitration in State X under the rules of the ABC Chamber of Commerce.*" [HAGUE PRINCIPLES, COMMENTARY ILLUSTRATION 4-7]. "*In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise,* this will be insufficient to indicate a tacit choice of the law of State X." [*ID.* (emphasis added)]. Standing alone, the choice of an arbitral seat or a particular tribunal does not imply any choice of law by the parties.

28. The Arbitration Agreement is identical to the one hypothesized by the Hague Principles Commentary, and the result here must be the same. The parties agreed to submit their disputes to HKIAC arbitration in Danubia. No other factors suggest an intent to govern any part of the Contract by Danubian law. Danubian law is never mentioned in the Contract. The Arbitration Agreement remains valid and enforceable under Mediterranean law. In these circumstances, the mere fact that the parties chose to situate arbitration in Danubia "*is insufficient to indicate a tacit choice of the law of*" Danubia." [*ID.*].

2) The choice to apply the law of Mediterraneo appears clearly from the negotiation and drafting history of the Contract.

29. The circumstances under which the Contract was negotiated also make clear that the parties implicitly chose Mediterranean law to govern the Arbitration Agreement. The parties chose to arbitrate in Danubia in order to resolve a particular problem: RESPONDENT was unwilling to sign a contract that was subject to both the law and the courts of Mediterraneo, and CLAIMANT's debt covenants required special approval for any contracts subject to foreign law or to a counterparty's country's courts. Electing to arbitrate in Danubia solved RESPONDENT's problem by taking the contract out of Mediterranean courts and solved CLAIMANT's problem by ensuring the agreement was subject to Mediterranean law and that disputes would be submitted to a neutral forum. As the Commentary to the Hague Principles notes, "*[t]he conduct of the parties and other factors surrounding the conclusion of the contract may be particularly relevant*" in determining what law the parties chose for their agreement. [HAGUE PRINCIPLES, COMMENTARY to ART. 4.13]. In light of the specific reasons the parties opted for arbitration in Danubia, it is clear that they did not also intend to subject the Arbitration Agreement to Danubian law.

30. RESPONDENT argues that the drafting history of the Contract makes clear that the choice of law for the Arbitration Agreement was intended to be set forth as the law of the arbitral seat, in this case Danubia. RESPONDENT's argument is based upon the initial contract language suggested

by RESPONDENT, which proposed that the seat of arbitration be Equatoriana and the law governing the Arbitration Agreement be the law of Equatoriana [RES. EX. R1]. Because the choice of law in RESPONDENT's initial proposal was the law of the proposed arbitral seat, RESPONDENT argues that the same was meant to be the case in the final contract. The facts do not support this conclusion.

31. RESPONDENT initially proposed that the seat of arbitration be Equatoriana and the law governing the Arbitration Agreement be the law of Equatoriana. [RES. EX. R1]. CLAIMANT rejected RESPONDENT's initial proposal, informing RESPONDENT that CLAIMANT could not "*consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterpart*" without obtaining special approval from its creditors' committee. [Res. Ex. R2] CLAIMANT then proposed the alternative language ultimately used in the Arbitration Agreement, which provided for Danubia as the seat of arbitration, "*on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo.*" [RES. EX. R2].

32. Given the constraints CLAIMANT explained to RESPONDENT, it must have been clear to both parties that only Mediterranean law could apply to the Contract. A Danubian forum and Danubian law would be consistent with only one of CLAIMANT's restrictions, its inability to submit to dispute resolution in Equatoriana. CLAIMANT would still have run afoul of the requirement that it not sign agreements subject to foreign law.

33. In light of these circumstances, there is no question that the parties chose Mediterranean law to govern the Arbitration Agreement. The purpose of situating arbitration in Danubia was clearly explained to RESPONDENT: it ensured that the Contract was consistent with the requirements imposed by CLAIMANT's creditors' committee. Submitting the Arbitration Agreement to Danubian law would have been inconsistent with these requirements. This is why neither the Contract or the correspondence between the parties ever mentions Danubian law. The idea that Danubian law would apply to the Arbitration Agreement emerged only after arbitration commenced. The course of the negotiations over the Arbitration Agreement makes clear an implied choice of Mediterranean law, under which this Tribunal unquestionably has the power to adapt the Contract.

II. THE TRIBUNAL HAS THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT TO MEET CLAIMS FOR ADDITIONAL REMUNERATION.

34. Generally, there are four reasons why a tribunal might be asked to adapt a contract made by the parties: (1) to fill a perceived gap in the contract; (2) to change the contract to meet changed circumstances; (3) to ameliorate a hardship faced by a party, or (4) to correct the equilibrium of the contract. [REDFERN/HUNTER 535-536]. While an arbitral tribunal generally does not have the power to create or write a contract between parties, it has implied consent to fill gaps by making a determination as to the presumed intention of the parties in order to make a contract operable. [REDFERN/HUNTER 524-525].

35. The Tribunal has the authority to adapt the Contract, even absent an explicit adaptation clause. In order to adapt a contract, the Tribunal must have the procedural power and the substantive power to adapt the contract. Procedural power refers to whether or not the Tribunal has jurisdiction to reach the adaptation question. After establishing jurisdiction, substantive power refers to the substantive remedies a Tribunal is allowed to provide when adapting a contract according to its choice of applied law and customs. The Tribunal here has both powers and should affirm its jurisdiction to adapt the contract in dispute.

A. The Tribunal has jurisdiction to determine whether or not it can adapt the Contract.

36. First, the Tribunal has the procedural power to adapt the Contract. The parties have agreed that HKIAC Rules should govern the arbitral proceeding. HKIAC Rules Article 19.1 grants the Tribunal the power to rule on its own jurisdiction. [HKIAC RULES ART. 19.1]. This deference to the Tribunal to determine its own jurisdiction is consistent with the widely-accepted "*kompetenz-kompetenz*" doctrine, which states that arbitrators have the power to consider and decide the existence and extent of their own jurisdiction. [BORN 1048].

37. The parties' intentional selection of the HKIAC Rules further favors jurisdiction over the adaptation question. HKIAC has long prided itself on being an innovative source of arbitration dispute resolution and on its ability to address changing dynamics in arbitration. HKIAC describes its rules as "*state of the art and a leader in the field in meeting the needs of users*," and HKIAC has won numerous Global Arbitration Review awards for innovation. [THE 2013 HKIAC ADMINISTERED ARBITRATION RULES UNVEILED; WHY HKIAC?]. HKIAC Rules may not explicitly

grant the power to adapt, but the flexibility of the rules and HKIAC's ongoing commitment to "*play[ing] a leading role in developing innovative arbitration practices*" suggest that HKIAC Tribunals would be on the forefront of, and certainly would not lag behind, international norms. [WHY HKIAC?]. This dynamism is arguably one of the reasons both parties agreed to arbitrate under the newest version of the HKIAC Rules in the first place. Given these considerations, the tribunal should be willing to extend jurisdiction to questions of adaptation.

38. Additionally, courts and tribunals have increasingly granted arbitrators the power to adapt contracts in light of modern developments supporting a more extensive jurisdiction for arbitral tribunals. [BRUNNER 496; BERGER II 1375-1378]. Various states have passed arbitration-friendly statutes and increasingly treat adjudication by arbitral tribunals and national courts equally. [KROLL 63].

39. For example, English law (which traditionally rejected adaptation) now authorizes arbitrators to approve contract modifications under the English Arbitration Act of 1996. [SCHMITTHOFF 82; BERGER II 1376]. Moreover, both the Permanent Court of International Justice and the International Court of Justice have concluded that the broad meaning assigned to the term 'dispute' in international case law favors a liberal extension of jurisdiction for arbitral tribunals in arbitration proceedings. [MAVROMMATIS JERUSALEM CONCESSIONS; CASE CONCERNING THE CONTINENTAL SHELF].

40. International tribunals have also demonstrated a willingness to exercise jurisdiction over adaptation questions, even when they ultimately decide not to adapt the contract. For example, in *Switzerland v. Kosovo*, *Cessna Finance Corporation v. Gulf Jet LLC*, and *Enron Nigeria Power Holding v. Lagos State Government,* arbitral tribunals entertained questions about the interpretation and application of contractual hardship provisions. [ICC CASE NO. 16369; ICC CASE NO. 18769; ICC CASE NO. 14417]. While the tribunals decided not to adapt the contract for hardship in these cases, they still extended arbitral jurisdiction to the adaptation question.

41. Furthermore, the New York Convention requires that the arbitration clause be construed to include claims for contractual adaptation regardless of whether the panel applies Danubian, Mediterranean, or any other national law to the interpretation of the agreement. Article II of the New York Convention—to which all nations relevant to the present dispute are parties—"*mandates an international rule of construction of arbitration agreements*" according to which they must be interpreted *"expansively, not restrictively, and as resolving all doubts in favor of*

encompassing disputes within the parties' agreement to arbitrate." [BORN 1399]. This "*uniform rule applies without regard to the substantive law otherwise applicable to the interpretation of the arbitration agreement.*" [*ID.*]

42. Article II of the New York Convention calls for the recognition of agreements "*under which the parties undertake to submit to arbitration all or any differences . . . concerning a subject matter capable of arbitration*." [NEW YORK CONVENTION ART. 2]. Because claims for adaptation *can* be arbitrated, they are clearly encompassed by the arbitration agreement's commitment of *all* contractual disputes to arbitration. There is no question that claims for adaptation are capable of arbitration under Danubian or any other relevant national law. RESPONDENT simply asserts that, under Danubian law, such claims should not be submitted to arbitration unless they are expressly included in the arbitration agreement. But the New York Convention "mandates" that international arbitration clauses be read "*expansively, not restrictively*," giving effect to the clause's intent to submit to arbitration "*any dispute arising out of this contract*" that is capable of arbitration. [CL. EX. C5]. Even if Danubian law governs the interpretation of the arbitration agreement, this pro-arbitration international rule of construction should supersede its restrictive doctrines on adaptation. To read the clause otherwise is to defy Article II's command to recognize and give effect to such agreements.

B. Under Mediterranean Law, the Tribunal has the substantive power to adapt the Contract to provide equitable remedies.

43. The Tribunal has the substantive power to adapt the Contract. The existence of this power turns on the substantive law which is to be applied to the contract. [BERGER I 3; HORN 181]. A lack of prior express or implied authorization to adapt the contract means that the Tribunal must look to the applicable law for an answer. [BERGER I 5]. Article 35 of the HKIAC indicates that absent an express provision, the tribunal has the discretion to apply the rules it considers appropriate. [HKIAC RULES ART. 35].

44. As discussed, the Arbitration Agreement and its interpretation are governed by the law of Mediterraneo. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. [PO 1, P. 52, PARA. 4]. The UNIDROIT Principles explicitly allow courts to adapt contracts and provide equitable

remedies in a number of circumstances. [MAREK 2018-2019; *see, e.g.*, UNIDROIT PRINCIPLES ARTS. 6.2.1-6.2.3, 7.1.7]. Adaptation is also consistent with the spirit of the UNIDROIT Principles; the drafters considered adaptation a better solution than continuing on the original terms or terminating the contract. [KROLL 457].

45. One of the circumstances under which adaptation is allowed is hardship, as in the present dispute. If hardship is established, Article 6.2.3 of the UNIDROIT Principles indicates that "*the disadvantaged party is entitled to request renegotiations*" and that a court may reasonably "*adapt the contract with a view to restoring its equilibrium*." Tribunals can adapt contracts to restore its equilibrium by (a) increasing or reducing the price or the extent of a performance obligation of a party, (b) adjusting a particular means or method of performance, or (c) ordering a compensatory payment or monetary adjustment appropriate to adequately allow for the hardship event. [BRUNNER 501].

C. In accordance with general international principles and practice, the Tribunal has the substantive power to adapt the Contract and provide equitable remedies.

46. In addition to UNIDROIT, other international principles and conventions also empower arbitral tribunals to substantively adapt contracts in the case of hardship or changed circumstances. For example, Article 6:111 of the PECL and Principle VIII.1(b) of the Transnational Legal Database defined hardship clauses that are essentially identical to Article 6.2 of the UNIDROIT Principles. [BRUNNER 479]. In particular, when performance of the contract becomes excessively onerous for one party because of a change of circumstances, PECL provides that tribunals "*may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing*." [PECL ART. 6.111].

47. National law in multiple jurisdictions also empowers courts and arbitral tribunals to adapt contracts and provide equitable remedies. In Germany, for example, "*Wegfall der Geschäftsgrundlage*" provides that if a set of prevailing conditions that the parties contemplated failed to materialize at the time of performance, performance will not be ordered. Under "*Wegfall der Geschäftsgrundlage*," German federal courts have been willing to change prices, rents, and pensions in contracts. [HORN 182]. Section 319 of the German Civil Code empowers arbitral tribunals to adapt contracts where the parties cannot agree. [KROLL 457]. The Swiss

Supreme Court in 2001 held that arbitral tribunals can fill gaps arising out of parties' failure to agree to renegotiate unless the arbitration clause explicitly limits that power. Otherwise, arbitrators can fill contractual gaps with an eye towards the hypothetical will of the parties. [KROLL 457]. Similarly, Japan allows courts to adapt contracts in equity and good faith when there has been a substantial and foreseeable change between formation and the lawsuit [IGARASHI 147-148; NAKAI 71].

48. In the United States, the Uniform Commercial Code allows courts to adjust contracts under necessary circumstances. UCC §2-615 recognizes that contracts may need to be adjusted when sellers face situations of impracticability [UCC §2-615, COMMENT NO. 6]. Such situations include when circumstances "*cause[] a marked increase in cost… [and are] within the contemplation of this section*." [UCC §2-615, COMMENT NO. 4].

49. The tribunal, then, is authorized to adapt the Contract both under the increasing international consensus favoring adaptation as well as under the substantive law governing the Contract. Not only does Mediterranean law, which governs the Arbitration Agreement, authorizes adaptation in cases of hardship, arbitral tribunals have increasingly recognized that adapting a contract to new commercial realities is preferable to forcing the transaction to go forward on unreasonable terms the parties never contemplated.

III. THE TRIBUNAL SHOULD COMPEL AND ADMIT EVIDENCE OF RESPONDENT'S CONTRADICTORY STANCE IN ANOTHER ARBITRATION PROCEEDING.

50. As counsel for the CLAIMANT indicated to the Tribunal in its email dated **2 October 2018**, the CLAIMANT received reliable information at the annual breeder conference about a parallel arbitration under the HKIAC Rules, between RESPONDENT and one of its customers. [LANGWEILER LETTER, PO 2 P. 49]. CLAIMANT understands that in that proceeding, RESPONDENT has argued that it should receive an adapted price due to the unforeseen change in circumstance posed by Mediterraneo's 25% tariff. CLAIMANT has been promised a copy of the award and submission in this proceeding, and would like to submit it to the Tribunal as soon as it is available. In its email response dated **3 October 2018**, however, RESPONDENT alleged that submission of this evidence would violate the confidentiality of the alternate arbitral proceeding, as governed by HKIAC Rules Article 42. [FASTTRACK LETTER, PO 2 P. 50].

RESPONDENT further alleged that CLAIMANT's information was taken out of context. CLAIMANT thus requests that the Tribunal compel RESPONDENT to release its submission from these proceedings, or allow CLAIMANT to present the submission and award to the Tribunal once received.

51. The Tribunal should compel RESPONDENT to present its submission in the alternate arbitral proceeding, or failing that, allow CLAIMANT to admit this evidence once it has been acquired. Doing so is within the Tribunal's plenary discretion and aligns with the considerations of probative value, availability of evidence, and procedural economy set forth in the IBA Rules on the Taking of Evidence in International Arbitration.

A. The Tribunal has full authority to compel and admit the evidence.

52. Arbitral tribunals have broad discretion to compel and admit evidence. Both the HKIAC 2018 Rules and the IBA Rules on the Taking of Evidence state that "*the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence.*" [HKIAC RULES ART. 22.2; IBA EVIDENCE RULES ART. 9(1)]. HKIAC Rules further stipulate that "*[a]t any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence.*" [HKIAC RULES ART. 22.3]. Therefore, the Tribunal is fully empowered to compel the production of material evidence, and then to admit that evidence for consideration in these proceedings.

53. The Tribunal is empowered to admit even evidence that it believes may implicate a legal impediment or privilege. When evidence may have been obtained illegally, tribunals balance confidentiality concerns, including the expectations of the parties "*at the time the legal impediment or privilege is said to have arisen*" and "*any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise*" against "*the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.*" [IBA EVIDENCE RULES ART. 9(3)].

54. The language of the IBA Evidence Rules herein presented presume a default in favor of the inclusion of evidence once it is deemed relevant and available, only giving guidance as to what

a tribunal may exclude. Given that the relevance of evidence from RESPONDENT's alternate arbitral proceeding is not in dispute, RESPONDENT bears the burden of proof in the affirmative argument that this evidence should be excluded. When considering challenges to the admission of evidence, arbitral tribunals typically rely on the following factors: (1) relevance or materiality to outcome; (2) availability of the evidence, including concerns of commercial or technical confidentiality that the Tribunal deems to be compelling; and 3) procedural economy and fairness. [IBA EVIDENCE RULES ART. 9(2)].

55. Even if the relevant evidence were procured illegally—though it is worth noting that the origin of the evidence has not been established and CLAIMANT has not engaged in any illegal conduct—it remains within the tribunal's discretion to admit the evidence. Tribunals tend to lean more heavily on excluding the evidence in cases in which the party seeking to introduce it had a role in the unlawful activity that led to its disclosure. [BLAIR AND GOJKOVIĆ 256; HAVALIC AND BOYKIN 7, 33-34]. In the instant proceeding, that consideration is not present.

56. As outlined in the proceeding sections, these factors militate in favor of compelling and admitting evidence of RESPONDENT's inconsistency with respect to the other arbitration proceeding.

B. <u>All considerations turn in favor of compelling and admitting evidence regarding the RESPONDENT's prior arbitration proceeding.</u>

1) The evidence is material and relevant to the outcome.

57. The evidence is highly probative and material. Disclosure of RESPONDENT's double-dealing is necessary to meet CLAIMANT's legitimate interests. RESPONDENT's arguments against the inclusion of this evidence hinge on its purportedly extraneous nature. However, if RESPONDENT has elsewhere argued for a contract adaptation due to the unforeseeability of a tariff, this is not extraneous at all; rather, it is directly related to the substance of these proceedings. RESPONDENT's contradicting positions expose the truth that its arguments are grounded not in principle but in opportunism.

58. Evidence that RESPONDENT has adopted mutually contradictory positions in substantially similar cases should weigh heavily on the proceedings in this case. As Professor Waincmyer notes, evidence from outside proceedings may be introduced to "*show that the opposing party has*

made contradictory assertions in different fora or has been selective in evidence submission in one or both." [WAINCYMER 789]. Further, despite RESPONDENT's claim that the allegations "*do not reflect reality*," the available evidence strongly suggests that the cases involve substantially similar issues and claims as the present. [FASTTRACK LETTER, PO 2 P. 50].

2) Admission of the evidence does not implicate confidentiality concerns.

59. Before CLAIMANT learned of it, knowledge of RESPONDENT's parallel arbitration was already spreading throughout the equestrian industry. CLAIMANT learned about the potential existence of this evidence at the annual horse breeder conference, an event of much publicity and fanfare in the industry. [LANGWEILER LETTER, PO 2 P. 49]. CLAIMANT is disheartened by RESPONDENT's suggestion that it acquired this information through illegal means such as undertaking a breach of RESPONDENT's data systems or through surreptitiously interviewing disgruntled former employees. CLAIMANT did not undertake any illegal action in order to learn of the evidence. Moreover, given the high profile of the annual breeder conference where CLAIMANT learned of RESPONDENT's alternate arbitral proceeding and its contrary stance therein, RESPONDENT cannot credibly maintain that those proceedings are so confidential that one part of their contents cannot serve as evidence here.

60. RESPONDENT learned of the existence of the other arbitration through entirely innocent and legal means, via a chance conversation with Mr. Kieron Velazquez at the international horse breeder conference in 2018. [PO 2, P. 60]. Mr. Velazquez was a former employee of the Mediterranean buyer party to the other arbitral proceeding but was not involved in the arbitration. It is not alleged that Mr. Velazquez's sharing of this information violated any duties of good faith or confidentiality. Accordingly, CLAIMANT's request that full information about this other arbitral proceeding be disclosed and admitted does not implicate any concerns about illegality. Indeed, compelling admission of the evidence is the only way for the Tribunal to obtain accurate and complete information in a manner that respects all parties' rights.

61. Even if evidence of RESPONDENT's alternate arbitral proceedings was illegally obtained by Mr. Velazquez, the information was publicly available for CLAIMANT's purposes. CLAIMANT learned of the information casually, not deliberately or through duplicitous or unscrupulous means, and had no role in any illegality that might have occurred. Further, given the prior semi-public dissemination of this evidence at the horse breeder conference, it would neither unfairly prejudice RESPONDENT nor provide negative incentives for future actors to compel such

evidence. This position is confirmed as a matter of recent precedent by international tribunals' admission of evidence obtained via Wikileaks, as in the *Yukos Majority Awards* cases. [HULLEY ENTERPRISES; YUKOS UNIVERSAL; VETERAN PETROLEUM]. The Tribunal should have little hesitation in admitting such evidence for consideration in the instant case, particularly given that these proceedings are themselves confidential to third parties.

62. If the Tribunal does believe that the inclusion of evidence and claims from another arbitral proceeding would offend the principle of confidentiality, CLAIMANT offers an elegant solution: to merge the two proceedings. If both proceedings turn on the question of how Mediterraneo's and Equatoriana's new tariffs affect the contracted price for imported horse semen, merging the two proceedings would not prejudice any party. Rather, given that both proceedings take place under HKIAC Rules, it would serve the aim of administrative economy and procedural fairness by ensuring that the issue is decided uniformly. The arbitral tribunal could then "*make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection*," ensuring that each Party's interest in confidentiality is retained. [IBA EVIDENCE RULES ART. 9(4)].

3) Procedural and substantive justice favor admitting the evidence.

63. The principles undergirding confidentiality in arbitral proceedings, such as procedural fairness and the equality of parties, turn towards admitting this evidence. Procedural fairness reflects a concern for the baseline precepts of the rule of law—consistency, systematicity, and congruence—each of which generate the fundamental rule that like cases should be treated alike. [WALDRON 1-61; FULLER 33-94].

64. Therefore, RESPONDENT should be estopped from taking a position in these proceedings that is contrary to its position in a prior arbitration. [HWANG AND CHUNG 620]. In *Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Company of Zurich*, the Judicial Committee of the United Kingdom's Privy Council held that it could rely on otherwise confidential determinations of previous arbitral proceedings if they implicate the principle of issue estoppel. [AEGIS V. EUROPEAN REINSURANCE COMPANY PARA. 15].

65. Generally, issue estoppel refers to final outcomes from alternate arbitral or court decisions. Because RESPONDENT refuses to cede information about the alternate arbitral proceeding at issue, we do not know what stage that proceeding has reached. Even if no decision has been

rendered in that case, however, RESPONDENT should be estopped from taking a position in the present proceedings that is contrary from its position as a CLAIMANT in alternate proceedings. The principle of issue estoppel is designed to further the interest of justice. [HWANG AND CHUNG 625]. Admitting evidence of RESPONDENT's prior arbitration would further this interest, as it would best allow the Tribunal to make a fully informed decision that respects and fully appreciates the relative positions of the parties. Moreover, arbitral tribunals deciding in such a manner would further the public interest more broadly, as it would help enforce consistency in international commercial transactions.

66. By its own admission, compelling production of the evidence would not unfairly prejudice proceedings against RESPONDENT. RESPONDENT asserts that CLAIMANT's understanding of its other proceeding is uncontextualized and inaccurate. [FASTTRACK LETTER, PO 2 P. 50]. If this is true, then compelling and admitting the evidence would only serve to vindicate RESPONDENT's claims and buttress its integrity.

67. Thus, in no circumstance would admitting the evidence unfairly prejudice RESPONDENT, but denying the evidence if it is indeed material and probative would substantially damage CLAIMANT—an asymmetry that favors admission. If RESPONDENT does not believe this evidence will reflect badly on its behavior, then it should agree to admit the evidence. RESPONDENT is only incentivized to contest admission if it has taken inconsistent positions in the two arbitral proceedings.

C. The Tribunal should allow CLAIMANT to submit the evidence, even in the absence of its compulsion.

68. CLAIMANT has not engaged in any wrongdoing or illegal activity in working to procure the award from the other arbitration, and there is no evidence that information has been illegally obtained from RESPONDENT. Recent arbitral decisions, such as the uncontested admission of evidence from Wikileaks in the three "Yukos Majority Awards" demonstrate that relevant evidence is admissible even if its provenance was less than fully legal. [HULLEY ENTERPRISES; YUKOS UNIVERSAL; VETERAN PETROLEUM]. Seminal precedent in international law further makes clear that illegality is not dispositive even if a disputing party acts illegally to obtain the evidence from the other party. In the famous *Corfu Channel Case* (1949), the ICJ allowed the

submission of evidence from the U.K. in a dispute with Albania, despite the fact that this evidence was obtained by way of illegal violation of Albanian sovereignty. [CORFU CHANNEL CASE].

69. International legal practice, since its modern origins, has thus taken a permissive view regarding the admission of illegally sourced evidence, even when a party to the dispute illegally obtained that evidence at the expense of the other party. The case for admission is stronger when the party seeking to introduce the evidence has not acted illegally in obtaining it and when it is not clear that the evidence was taken from a party to the dispute. Such conditions are met here. Even if the "Partial Interim Award" was illegally leaked or procured by a third party, there is no proof that it was unlawfully obtained from RESPONDENT instead from the opposing party in RESPONDENT's other arbitration.

IV. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1.250.000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT AND UNDER CISG.

70. Two independent but related grounds provide the basis for CLAIMANT's entitlement to adapt the Sales Agreement: (1) clause 12 of the Sale Agreement and (2) the CISG.

71. CLAIMANT is entitled to adaptation of the contract price pursuant to clause 12 of the Contract, because the institution of the 30% tariff by the government of Mediterraneo constitutes hardship within the meaning of clause 12 and under Mediterranean contract law.

72. In the alternative, CLAIMANT is entitled to adaptation of the contract price pursuant to Article 79 of CISG. Clause 12 of the Contract constitutes neither an exclusion of the CISG nor a specific derogation of Article 79 of the CISG, which means the CLAIMANT is entitled to adaptation of the Contract under the impediment article of the CISG.

A. Clause 12 of the Contract entitles CLAIMANT to adaptation of the Contract under the law of Mediterraneo.

1) The tariff imposed by Equatoriana constitutes a fundamental alteration of the equilibrium of the Contract.

73. The tariff imposed by Equatoriana falls under the hardship article of the UNIDROIT Principles, which Mediterraneo adopted verbatim as its contract law. [PO 1, PARA. 4]. The hardship article thus provides a default rule in light of which the express terms of the Contract, including clause 12, should be interpreted. Article 6.2.2 of the UNIDROIT Principles characterizes hardship as the "*occurrence of events [that] fundamentally alters the equilibrium of the contract.*" [UNIDROIT PRINCIPLES ART. 6.2.2]. The same article recognizes increases in the cost of performance as one form of hardship. The determination of what events qualify as a "*fundamental*" alteration depends on the facts and circumstances of the particular case. [VOGENHAUER 815]. It is notable that UNIDROIT has moved away from a percent threshold determination of when an increased cost of performance constitutes hardship. While UNIDROIT suggested a 50% threshold as an appropriate measure in the Official Comment to the 1994 edition of the Principles, it notably dropped any mention of a percent threshold in the 2004 and 2010 versions of the Official Comment.

74. Here, the tariff imposed by Equatoriana fundamentally altered the equilibrium of the Contract. CLAIMANT had a profit margin of 5% for the transaction prior to the institution of the 30% tariff by the government of Equatoriana. Equatoriana's protectionist measure has fundamentally changed CLAIMANT's position. Now, if CLAIMANT remains uncompensated for the final installment of semen, under the original terms of the Contract, CLAIMANT suffers a loss of 25% By not merely reducing the profit margin, but turning a net gain into a net loss, Equatoriana's tariff fundamentally changed the equilibrium of the contract.

75. Moreover, the circumstances of the case warrant a finding of hardship. CLAIMANT is not in a position to bear the entire risk associated with the tariff. The last two years have involved extensive restructuring and reduction of the workforce by CLAIMANT to stay afloat. [CL. EX. C8]. CLAIMANT would have never agreed to a contract that results in a net loss. Requiring CLAIMANT to bear the entire loss exacerbates an already precarious financial situation.

2) The tariff imposed by Equatoriana constitutes hardship under the contract law of Mediterraneo.

76. Additionally, to qualify as hardship, an occurrence that fundamentally disturbs the equilibrium of the contract must satisfy four additional criteria. [UNIDROIT PRINCIPLES ART. 6.2.2(A)-(D)]. First, the events must have occurred or become known to the disadvantaged party after the conclusion of the contract. Second, the disadvantaged party could not have reasonably taken

the events into account at the time of the conclusion of the contract. Third, the events must have been beyond the control of the disadvantaged party. Fourth, the disadvantaged party must not have assumed the risk of the events.

77. Here, the 30% tariff imposed by Equatoriana meets the four requirements of hardship. First, Equatoriana instituted the tariff after CLAIMANT signed the Contract. Equatoriana instituted the tariff on **19 December 2017** by executive order and it took effect from **15 January 2018**, seven and eight months after the parties signed the Contract on **6 May 2017**, respectively. [PO 2, P. 58, PARA. 25].

78. Second, CLAIMANT could not have reasonably taken the 30% tariff by the government of Equatoriana into account at the time the Contract was concluded. The institution of the tariff by the government of Equatoriana on agricultural goods from Mediterraneo "*came as a big surprise even to informed circles,*" as Equatoriana had been a staunch proponent of free trade. [Cl. Ex. C6]. Even if one concedes that CLAIMANT could have reasonably taken into the account the imposition of the tariff by Equatoriana, CLAIMANT could not have foreseen and in fact did not foresee the inclusion of horse semen used for artificial insemination in racehorse breeding under "*agricultural goods.*" [CL. EX. C8].

79. Third, the institution of the tariff was beyond CLAIMANT's control. In **November 2017**, the government of Mediterraneo imposed a tariff of 30% upon all agricultural goods from Equatoriana. The government of Equatoriana responded in kind. Even if one grants that CLAIMANT had leverage over the government of Mediterraneo as a citizen of the state, the acts of the government of Equatoriana, a foreign state, unquestionably lie beyond the CLAIMANT's control.

80. Fourth, CLAIMANT explicitly disavowed the assumption of risks associated with changes in customs regulation or import restrictions. In the email dated **31 March 2017** to RESPONDENT, CLAIMANT made clear, "*we [Phar Lap] are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions.*" [CL. EX. C4]. The 30% tariff imposed by Equatoriana constitutes a change in customs regulations whose risk CLAIMANT explicitly refused to assume.

81. Therefore, the 30% tariff imposed by Equatoriana meets all four requirements of hardship under Mediterranean contract law.

3) Clause 12 of the Contract is consistent with the hardship article of Mediterraneo's contract law.

82. Clause 12 of the Sale Agreement (the hardship clause) does not change the conclusion that the 30% tariff constituted a hardship. While the contract law of Mediterraneo furnishes a default rule of hardship, CLAIMANT and RESPONDENT chose to explicitly include a hardship clause in the Contract.

83. The 30% tariff falls under the hardship clause of the Contract as negotiated by the parties. First, the terms of the hardship clause in the Contract do not exclude the increase in the cost of performance due to the imposition of the tariff. Clause 12 exempts the seller from hardship "*caused by additional health and safety requirements or comparable unforeseen events.*" The negotiating history of the parties strongly suggests that the institution of a tariff counts as a "*comparable unforeseen event.*" The parties drafted the hardship clause in light of CLAIMANT's express statement that it would not assume risk associated with customs regulation and additional health and safety requirements. These two types of occurrences are discussed side by side in CLAIMANT's correspondence. [CL. EX. C4]. Thus, even if the hardship clause of the Sales Agreement is narrower than the hardship article of the contract law of Mediterraneo, this fact is immaterial to the dispute, as a 30% tariff falls under both the hardship clause of the Contract and the hardship article of Mediterraneo's contract law.

4) CLAIMANT is entitled to adaptation of the contract under the contract law of Mediterraneo.

84. CLAIMANT is entitled to the adaptation of the Contract, notwithstanding the fact that the hardship clause of the Contract does not provide for a modification of the contract price by an arbitral tribunal. Both CLAIMANT and RESPONDENT expressed the need to include reference to adaptation of the contract in the hardship clause. [CL. EX. C8]. While a reference to adaptation did not make it into the final draft because of a change in the lawyers representing the parties in the middle of the negotiating process, the contract law of Mediterraneo provides for modification of the contract by a court upon a finding of hardship by default. Under Article 6.2.3 of the UNIDROIT Principles, a disadvantaged party facing hardship is entitled to request negotiations [UNIDROIT ART. 6.2.3.(1)]. The requesting party must make the request without "*undue delay*" and indicate the grounds for renegotiation. If the parties fail to reach an agreement, either party is entitled to resort to the court, which may adapt the contract upon a finding of hardship [UNIDROIT ART. 6.2.3.(2)].

85. Here, CLAIMANT is entitled to adaptation of the Contract by the Tribunal under the contract law of Mediterraneo. Counsel for CLAIMANT contacted RESPONDENT on **20 January 2018** requesting renegotiation soon after she was informed of the newly imposed tariffs. [CL. EX. C7]. When CLAIMANT discovered RESPONDENT's breach of the resale prohibition, relations between the parties deteriorated, bringing a halt to negotiations. Thus, at present the parties are in the universe of Article 6.2.3(3). CLAIMANT is entitled to seek adaptation of the Contract by the Tribunal.

86. The law of Mediterraneo is a verbatim adoption of the UNIDROIT principles. [PO 2, P. 53, PARA. 4]. However, Mediterraneo is also party to the CISG treaty governing international contracts for the sale of goods. Should the Tribunal determine that the CISG rather than UNIDROIT is applicable to the question of adaptation and interpretation of clause 12 of the Contract, CLAIMANT is nevertheless entitled to adaptation of the Contract under the CISG.

B. <u>CISG entitles CLAIMANT to adaptation of the Contract.</u>

1) Mediterraneo's and Equatoriana's tariffs constitute an impediment within the meaning of CISG Article 79.

87. Under CISG Article 79(1), only certain kinds of impediments or events constitute barriers to performance and exempt a party from discharging its contractual obligations. The impediment that entitles a party to exemption has three attributes: (1) the impediment must lie beyond the control of the party; (2) the party could not reasonably be expected to have foreseen the impediment when concluding the contract; and (3) the party could not have reasonably expected to have avoided or overcome the impediment. Equatoriana's tariffs fit all three requirements.

88. Here, the impediment meets the requirements of CISG Article 79(1) and entitles the CLAIMANT to adaptation of the Contract. First, the impediment in this case was an act of government and constitutes an event "*beyond the control of the parties*." [NATIONAL OIL COMPANY]. In **November 2017**, the government of Mediterraneo imposed a tariff of 25% upon all agricultural goods from Equatoriana. The government of Equatoriana responded with a 30% retaliatory tariff. Even if one grants that CLAIMANT had leverage over the government of Mediterraneo as a citizen of the

state, the acts of the government of Equatoriana, a foreign state, unquestionably lies beyond the CLAIMANT's sphere of control.

89. Second, a diligent merchant in CLAIMANT's position could not have foreseen the imposition of the tariff. Foreseeability requires an objective assessment. [SCHLECHTRIEM/SCHWENZER 1068 N. 13]. The inquiry is whether a diligent person acting in similar circumstances as the promisor would have taken the impediment into account when assessing the risks involved in the transaction. The retaliation by the government of Equatoriana came as a "*big surprise even to informed circles*." [CL. EX. C6]. Moreover, the protectionist stance of Mediterraneo's president "*surprised most analysts as they went beyond the worst expectations.*" [CL. EX. C6].

90. Lastly, the CLAIMANT could not reasonably be expected to have overcome or avoided the impediment. The CLAIMANT could not reasonably be expected to have overcome the increase in cost due to the tariff, because it would be "*financially endangered*" if it were required to perform according to the terms of the Contract. [PO 2, P. 59, PARA. 29]. Furthermore, expecting the CLAIMANT to avoid the tariff would be unreasonable, because Equatoriana's tariff applied to all producers of agricultural products including racehorse semen. Avoiding the impediment by persuading import authorities to exclude racehorse semen from the schedule of products that fall under the new tariffs regime would have far exceeded the ability of a single firm located out-of-state with no political experience in the state whatsoever and required out-of-pocket expenses. Therefore, tariffs qualify as legal impediments to performance within the meaning of Article 79(1) CISG.

2) Clause 12 of the Contract constitutes neither an exclusion of CISG nor a specific derogation of Article 79 of the CISG.

91. Article 6 of the CISG states that "*[t]he parties may exclude the application of this Convention or … derogate from or vary the effect of any of its provisions.*" [CISG ART. 6]. The Sales Agreement does not exclude the CISG, since clause 14 of the Contract explicitly asserts that the CISG, along with the law of Mediterraneo that incorporates it, should govern the contract. Moreover, clause 12 of the Contract does not constitute a derogation of Article 79 of the CISG because it is not contrary to or substantially different from the provision of CISG.

92. Although parties may "*derogate from or vary the effect of any of [CISG's] provisions,*" derogation only occurs when parties "*adopt provisions in their contract providing solutions different from those*

in the convention." [SECRETARIAT COMMENTARY, ART. 5]. In other words, only those contractual provisions that are contrary to or substantially different from CISG provisions can constitute derogations of CISG provisions.

93. Case law has generally adopted this standard, only recognizing derogation of specific provisions of CISG when contractual terms are contrary to or substantially different from CISG provisions. For example, the Court of Arbitration of the International Chamber of Commerce has stated that "*[w]hen a contractual clause governing a particular matter is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular question.*" [ICC CASE NO. 11333]. The arbitral tribunal ruled that the parties can derogate the CISG's provision on warranty and enter into binding agreement that the seller guarantees only 12 months of warranty (as opposed to 24 months under CISG Article 39). [ICC CASE NO. 11333]. In another case, a Netherlands court ruled that a contractual clause constitutes a derogation of Articles 38 and 39 of the CISG, when the clause modifies the reasonable time standard under Article 39 of the CISG, instead specifying "*five working days from the date of delivery.*" [RECHTBANK ARNHEM].

94. Clause 12 of the Sales Agreement is not directly contrary to CISG Article 79. Nor is it so substantially different from CISG Article 79 that the application of Article 79 would be incompatible with the application of the contractual provision.

95. Clause 12 states in relevant part that the seller shall not be responsible for "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*" [CL. EX. 5, P. 14, PARA. 12]. In highly similar language, Article 79(1) of the CISG states that "*[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*" [CISG ART. 79(1)].

96. Both the contractual provision and Article 79 of the CISG use substantially similar standards in determining what constitutes hardship. The clause 12 standard (comparable unforeseen events) clearly does not contradict or substantially modify the CISG standard (not reasonably expected events), in a way that a clause providing for a 12-month warranty contradicts and substantially modifies a requirement of 24-month warranties. Therefore, clause 12 of the Contract does not

constitute a derogation of Article 79 of the CISG because clause 12 is neither contrary to nor substantially different from Article 79.

97. The only specific difference between Article 79 of the CISG and clause 12 is that the latter specifies that "*additional health and safety requirements*" meet the hardship requirement. [CL. EX. 5, P. 14, PARA. 12]. But the language of clause 12 is not restrictive; instead, it explicitly adds that "*comparable unforeseen events*" also meet the hardship requirement. [ID.].

3) The parties did not intend to derogate from CISG provisions.

98. Extrinsic evidence from contract formation may be introduced to clarify the intent of the parties. CISG Article 8 states that "*[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*" [CISG ART. 8]. Therefore, the tribunal should consider the totality of the circumstances of negotiation to give meaning to the contract.

99. The circumstances of negotiation and formation of the contract indicate that the CLAIMANT did not intend to exclude unforeseen changes in trade regulations from the hardship clause. On **31 March 2017**, just one month prior to the execution of the contractual document, CLAIMANT explicitly communicated to the RESPONDENT that it was "*not willing to take over further risks associated with such a change in the delivery terms, in particular not those associated with changes in* customs regulation or import restrictions" [CL. EX. 4 (emphasis added)]. Although the actual tariffs were not foreseeable, the CLAIMANT expressly limited its customs risks during the formation of the Contract. CLAIMANT has also suffered from financial difficulties and was recently restructured; it would be unreasonable to suggest that a company facing potential financial distress would take on additional customs risks in this contract. [PO 1, PARA. 29]. Clearly, the CLAIMANT agreed to the broad language of clause 12 to include all other "*unforeseen events*" in the hardship clause, exactly in conformity with the broad hardship provision of Article 79 of the CISG. [CL. EX. 5, P. 14, PARA. 12].

4) The CISG entitles the disadvantaged party to adaptation of a contract when the cost of performance is increased by a tariff under Article 7(2).

100. RESPONDENT may argue that Article 79 of the CISG does not explicitly authorize a party facing a dramatic increase in the costs of performance to seek a court-ordered adaptation of the

contract. However, CISG's silence on contract adaptation does not present an issue. Article 7(2) of the CISG plays a gap-filling function and states that "*questions concerning matters governed by this Convention which are not expressly in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*" [CISG ART. 7(2)]. In this case, UNDROIT can supply the principles to fill the CISG's internal gap regarding contract adaptation. [SCAFOM INTERNATIONAL BV].

101. Article 6.2.3 of UNIDROIT provides the principles that fill the gap in the CISG regarding contract adaptation. As discussed earlier, Article 6.2.3 states that in case of hardship the disadvantaged party is entitled to request renegotiation and, upon failure to reach agreement within a reasonable time, either party request the tribunal to adapt the contract.

102. The definition of hardship in Article 6.2.2 of UNIDROIT dovetails with the conception of impediments found in Article 79 of the CISG. Like impediments that meet the requirements of Article 79(1) of the CISG, hardship is an occurrence that could not reasonably have been taken into account by the disadvantaged party and that are beyond the control of the disadvantaged party [UNIDROIT ARTICLE 6.2.2(B)]. Moreover, Article 6.2.2 explicitly states that increase in the cost of a party's performance can be an example of an occurrence of an event that fundamentally alters the equilibrium of the contract, a quality essential to hardship. The concern for insurmountable nature of the hardship found in CISG is, therefore, found in UNIDROIT's definition of hardship as well. Therefore, notwithstanding the silence of CISG on contract adaptation, CISG entitles a party to contract adaptation when the disadvantaged party's cost of performance increases due to a tariff regime.

V. THE AMOUNT OF $1.250.000 IS REASONABLE COMPENSATION FOR THE CLAIMANT'S HARDSHIP.

103. If this Arbitral Tribunal finds that the price should be adapted, either due to general principles of adaptation within the law governing the Contract or due to the explicit hardship provisions in CISG and UNIDROIT, it should grant CLAIMANT the full $1.250.000 requested. $1.250.000 is a reasonable, fair, and just amount of compensation for CLAIMANT's costs caused by reliance on RESPONDENT's false statements regarding its interest in a long-term relationship, commitment

not to resell doses per negotiation and standard practice, and promise to find a solution to compensate for the unexpected tariffs.

A. The price adaptation reflects a reasonable and concrete calculation of the excessively onerous costs endured by CLAIMANT.

104. Reasonable and concrete calculations of the excessively onerous costs endured by the injured party are traditionally considered in arbitration to determine price adaptations. In this case, they weigh heavily towards granting the full $1.250.000 requested by CLAIMANT.

105. The parties explicitly recalculated the costs of adopting DDP as $1.000 extra per dose. [CL. EX. 4]. This amount included the forecasted difference in the costs of $200 per dose that CLAIMANT would incur with DDP delivery, along with any additional profit overhead. [PO 2, P. 56, PARA. 8]. CLAIMANT's communications demonstrate an explicit unwillingness to take on extra risks of a cost increase from changes in customs regulation or import restrictions. [CL. EX. C4]. Thus, the $50.000 DDP offset ($1.000 multiplied by the 50 doses) represents the outer bounds of the risks the parties intended CLAIMANT to take on as a result of adopting DDP delivery with certain risks removed. It beggars belief to presume that CLAIMANT's agreement to a DDP delivery means that it reasonably would have intended to incur costs 30 times that of what ultimately was decided ($1.500.000 tariff, compared to the actual $50.000 agreed upon). In its request for price adaptation, CLAIMANT has conceded it will absorb $250.000 of the tariff costs, much more than the $50.000 that it gained in exchange for its increased costs and risks of DDP delivery. Thus, concepts of justice and fairness support a price increase of $1.250.000 imposed on RESPONDENT.

106. UNIDROIT Article 6.2.1 explicitly recognizes that in circumstances short of hardship conditions, some reasonable costs must be borne by the disadvantaged party. However, once completion of the agreement would become excessively costly due to unforeseeable circumstances, one party can claim a price increase covering all the unbearable and excessive costs. [BRUNNER 492-502]. Other arbitrations relying on the CISG in similar situations involving hardship have used the price difference to establish the amount of indemnifiable damages. [ICC CASE NO. 8574]. Arbitrators using the CISG have generally preferred to use concrete calculation of damages based on the actual circumstances and conduct. [SAIDOV 205-206].

107. Here, the $1.250.000 requested is what the parties would have reasonably expected to have been borne by RESPONDENT. CLAIMANT forecasted a profit of $250.000: 5% of the $5.000.000 total pre-tariff price for the final shipment of 50 horse semen doses. [PO 2, P. 59, PARA. 39]. CLAIMANT's request for a price adaptation concedes that this 5% profit represents the reasonable amount that CLAIMANT would have hypothetically included in its risk calculations; thus, it foregoes this 5% profit.

108. Tribunals use the parties' "*hypothetical intention*" to determine what the parties would have done if the change in circumstances had been foreseen. [BRUNNER 492-502]If there is no evidence of what the parties would have intended, then tribunals should use the objective standard of what a reasonable person would do in the same circumstances. [ID.]. Under such circumstances, there are some indicators of the underlying "*essential economics*" of an agreement which can suggest the parties' hypothetical intent or what a reasonable person would do. [WAINCYMER 1053]. These include, *inter alia*, the parties' mutual risk assumption and the extent to which parties benefit from performance. [UNIDROIT PRINCIPLES, COMMENT TO ARTICLE 6.2.3(4); WAINCYMER 1117]. CLAIMANT would never have hypothetically intended to bear an additional potential 25% excessive cost in these conditions, given its precarious financial state. [PO 2, P. 57-59, PARAS.15, 22, 29]. Given that RESPONDENT benefitted much more from the performance of the agreement, it is much more reasonable for it to pay $1.250.000 of the total $1.500.000 tariff cost. [PO 2, P. 57, PARA. 20].

109. When arbitrators adapt prices, they traditionally have looked at several key factors to determine the "*fair distribution of the losses between the parties*." [COMMENT TO UNIDROIT ARTICLE 6.2.3(4)]. If neither party is proven to be at fault for the loss, then concepts of justice and fairness have been used to impose liability on the parties. [SAIDOV 205]. Because neither party here caused or were able to foresee the tariffs, justice and fairness provide the most optimal balance of cost/benefit in favor of CLAIMANT. The party best placed to bear the bulk of the costs ($1.250.000 of the total $1.500.000 tariff) is RESPONDENT, who is in a comfortable financial state. [PO 2, P. 59, PARA. 30].

B. The price is also reasonable because the initial price given to RESPONDENT for the 100 dose order was deeply discounted compared to standard rates.

110. CLAIMANT offered RESPONDENT a discount due to an understanding that CLAIMANT and RESPONDENT were developing a long-term relationship, and RESPONDENT would not resell any doses.

111. The parties' expectation, explicitly and jointly discussed during negotiation, was that CLAIMANT and RESPONDENT were building an ongoing business relationship (see for example, an email from RESPONDENT stating, "*taking into account . . . our interest in entering into a long-term mutually beneficial relationship we are willing to make an exception from our general approach*"; and an email response from RESPONDENT, stating "*we are highly interested in a long-term cooperation with you, going clearly beyond this single purchase*"). [CL. EX. C2; CL. EX. C3]. However, based on RESPONDENT's disinterest in negotiating a reasonable response to the 30% tariff, it seems that RESPONDENT's statements regarding a long-term business relationship were made in bad faith.

112. The purchase price was also discounted on the condition that the frozen semen doses not be resold. Indeed, CLAIMANT requested in writing during the email negotiation period that RESPONDENT not sell doses to third parties as a condition of their agreement to sell 100 doses, an unusually high number that "*normally*" CLAIMANT would not be willing to sell to a single breeder. [CL. EX. C2]. Specifically, CLAIMANT wrote in an email on **24 March 2017** that the frozen semen "*may not be re-sold to third parties without our express written consent*." RESPONDENT, in an email response on **28 March 2017**, noted that "*[m]ost of the terms of your offer are acceptable to us, including the general applicability of your general terms and conditions*," but that two conditions "*are not acceptable*." [CL. EX. C3]. Neither of the two disputed conditions involved the requirement not to resell doses to third parties. Thus, the terms included in the earlier statement that "*most of the terms in your offer are acceptable to us*" must have included the term that they not resell doses.

113. RESPONDENT's decision to disregard this clear stipulation defies CISG rules. CISG Article 8 reads: "*For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*." [CISG ART. 8]. Given the clear email statements during negotiation, RESPONDENT could not have been unaware that CLAIMANT's intent was for them to use all doses themselves and not sell to third parties. Further, Article 8 also reads: "*In determining the intent of*

a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations. . . ." [ID.] While CLAIMANT's condition that doses not be resold to third parties was not included in the final signed contract, its inclusion in email negotiation and RESPONDENT's acknowledgment of that email's terms allows us to conclude RESPONDENT intended to ignore an agreed upon provision. The Tribunal should give this term discussed during negotiation full weight in determining intent and understanding what a reasonable person would do.

114. Moreover, RESPONDENT was bound by usage terms "*which the parties knew or ought to have known*" and which "*parties to contracts of the type involved in the particular trade concerned*." [CISG ART. 9]. Reselling doses violates standard practices even without CLAIMANT's express condition forbidding such sales, evidenced by CLAIMANT's email on **24 March 2017** in which Ms. Julie Napravnik states that their requirement not to resell doses "*should not come as a surprise to you*" and Mr. Chris Antley of RESPONDENT's reply on **28 March 2017** acknowledging their request is "*extraordinary*" and they appreciate the "*willingness to accommodate [their] request*." [CL. EX. C3].

115. Thus, as the price initially offered was discounted based on two conditions, both of which were disregarded by RESPONDENT once the contract terms had been secured and initial doses began arriving, CLAIMANT's request to be compensated based on this price is reasonable.

C. CLAIMANT fulfilled the last shipment in good faith relying on RESPONDENT's reassurance that it would be compensated for the unexpected tariff.

116. Neither CISG nor UNIDROIT principles require that a modification to a contract follow any particular form. [CISG ART. 11; UNIDROIT ART. 1.9]. No written contract is required unless a "*no oral modification*" clause has been expressly included in the initial contract. [CISG ART. 29]. Further, scholar Peter Schlechtriem notes that "*[c]onduct, however, can preclude reliance on [a] form requirement*." [SCHLECHTRIEM 63]. Thus, the oral agreement over the phone on **21 January 2018** to modify the contract and compensate CLAIMANT for the tariff is enforceable because the CLAIMANT acted in good faith reliance on the RESPONDENT's promise.

117. According to CISG Article 18(2), "*[a]n oral offer must be accepted immediately unless the circumstances indicate otherwise*." While Ms. Napravnik acknowledges the details of the modification were not determined at the time that she authorized the third shipment despite

the imposition of a new tariff, an oral agreement was made on the phone on **21 January 2018** to come up with a solution for how to pay for the tariff, with CLAIMANT temporarily paying the fees so as to not delay its promised delivery to RESPONDENT. According to CISG Article 16(b), "*an offer cannot be revoked . . . if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*" In this case, it was reasonable for CLAIMANT to rely on the offer as being irrevocable given the irreversible and time sensitive nature of paying for tariffs and to pay the 30% tariff in reliance of RESPONDENT's promise to find "*a solution*" that would further the "good relationship between the Parties and their interest in further business." [CL. EX. C8].

118. Both the CISG and UNIDROIT Principles require parties to act in good faith. [CISG ART. 7; UNIDROIT ART. 1.7 & 4.8]. Conduct that creates a reliance according to good faith principles should be considered valid: "*a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.*" [UNIDROIT ART. 2.1.18]. Therefore, CLAIMANT's reliance on RESPONDENT should factor into the Tribunal's calculus.

119. In the present case, while each party disagrees about the exact nature of the phone conversation on **21 January 2018**, both parties agree that RESPONDENT did not directly reject the request for payment to cover the tariff expenses so as to receive their shipment on time. Because CLAIMANT relied upon RESPONDENT's assurances that they hoped to establish a long business relationship and would find a solution—and the only interpretation of this language is that RESPONDENT stood prepared to pay for the tariff increase—principles of good faith and consideration of reliance factors should guide the Tribunal to the clear conclusion that RESPONDENT must shoulder the tariff cost.

REQUEST FOR RELIEF

120. For the above reasons, CLAIMANT respectfully requests the Tribunal to find that:

1. Mediterranean law governs the arbitration agreement.
2. The Tribunal has the power to adapt the arbitration agreement.
3. The Tribunal should compel and admit evidence of RESPONDENT's contradictory position in an alternate HKIAC proceeding.
4. CLAIMANT is entitled to an additional payment from RESPONDENT in the amount of US$ 1.250.000 resulting from an adaptation of the price.