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MEMORANDUM FOR CLAIMANT

HKIAC/A18128

Phar Lap Allevamento v. Black Beauty Equestrian

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

Yiying Tsai・Amiri Kitagawa・Shohei Takahashi・Yuki Hinomiya

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TABLE OF ABBREVIATIONS

Abbreviation:	Explanation:
ANoA	Answer to the Notice of Arbitration
Art(s).	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
e.g.	exempli gratia; for example (Latin)
EXW	Ex Works
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules 2018	HKIAC Administered Arbitration Rules 2018
IBA Rules	International Bar Association Rules
ICC	International Chapter of Commerce
i.e.	id est; that is (Latin)
ibid.	Ibidem; in the same place(Latin)
LbF	Letter by Fattrack
NoA	Notice of Arbitration
No(s).	Number(s)
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Para(s).	Paragraph(s)

PO1	Procedural Order No.1
PO2	Procedural Order No.2
p(p)	page(s)
supra	Above
UK	The United Kingdom
UNCITRAL Model law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
U.S.	The United States
USD	United States Dollar
v.	versus (against)

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United States		

Cape Flattery case	Cape Flattery Ltd v. Titan Maritime LLC United States Court of Appeals for the Ninth Circuit, 647 F.3d 914, Jul 26, 2011	33

SUMMARY OF FACTS

1 Phar Lap Allevamento (hereinafter "**Claimant**") and Black Beauty Equestrian (hereinafter "**Respondent**") are the parties to this arbitration (hereinafter "**Parties**"). The present dispute arises as a result of Respondent's refusal to pay an additional payment in order to compensate Claimant for the tariff imposed by Equatoriana on agricultural products from Mediterraneo.

2 **On 21 March 2017**, Respondent contacted Claimant about the availability of Nijinsky III. **On 24 March 2017**, Claimant agreed to the request of 100 doses of Nijinsky III's frozen semen and suggested a forum choice in Mediterraneo and a choice of Mediterranian law. **From 28 March 2017 to 31 March 2017**, there were negotiations between the Parties on a DDP (Delivery Duty Paid) delivery insisted by Respondent and a hardship clause requested by Claimant. **On 12 April 2017**, the negotiators of both Parties were injured in an accident (hereinafter "**Accident**") and had to be changed just before the final negotiation of the contract. **On 6 May 2017**, a contract (hereinafter "**Sales Agreement**") was concluded with a delivery DDP and hardship clause. They also agreed on arbitration administered by the Hong Kong International Arbitration Centre (hereinafter "**HKIAC**") with the seat in Danubia.

3 **On 19 December 2017**, due to the imposition of 25% tariffs on the products from Equatoriana by the newly elected president of Mediterraneo, the government of Equatoriana announced 30% tariffs on agricultural products (including animal semen) from Mediterraneo. This unexpected change came out just before the third shipment of frozen semen. **On 20 January 2018**, Claimant immediately contacted Respondent when it knew the new tariff rate and requested for an additional amount. **On 23 January 2018**, the rest of 50 doses was delivered upon Respondent's urgent demand. However, Respondent later refused to pay the additional amount. Moreover, Respondent sold those doses a third party with considerable profit and in the breach of the Sales Agreement.

4 **On 31 July 2018**, Claimant initiated this arbitration proceedings administered by the HKIAC before this arbitral tribunal (hereinafter "**Tribunal**").

5

LEGAL EVALUATION

SUMMARY OF ARGUMENTS

6 Since the entire contract was negotiated based on Mediterranean law and also in regard of the fact that there was no agreement exist on governing law of arbitration, it should be Mediterranean law, not Danubian law, to be applied to the arbitration agreement. Hence, the arbitral tribunal does have jurisdiction and power to adapt the contract. Even if the governing law of the arbitration agreement was not Mediterranean law, the hardship clause itself in the sale contract also allowed adaptation by the tribunal. **[I.]**

7 CLAIMANT is entitled to the payment of USD 1,250,000 under clause 12 of the contract. RESPONDENT seeks to escape responsibility for changes in prices due to tariffs. However, both parties included a difficult clause in the contract. **[Ⅲ.]**

8 In addition, CLAIMANT is entitled to payment of USD 1,250,000 under Article 79 of CISG. Things have changed between before and after the deal is signed, and it is difficult for CLAIMANT to assume all of these responsibilities. CAIMANT may assert several articles as the basis for the law to assert it. **[Ⅳ.]**

ARGUMENTS ON THE SPECIFIED ISSUES

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

9 The Tribunal has the competence to rule on its jurisdiction **(A)**. As the Parties have agreed that the Mediterranean law is the law applicable to the Sales Agreement, including the arbitration clause incorporated into the Agreement, the Tribunal has the power to adapt the Sales Agreement, because the Mediterranean law grants such power to the Tribunal **(B)**. Even if the Danubian law is the law applicable to the arbitration clause, as claimed by Respondent, the Tribunal has the power to adapt the Sales Agreement, because its adaptation is allowed by the Agreement itself or substantive law applicable to it **(C)**.

A. The Tribunal has the competence to rule on its jurisdiction over the issue to adapt the Sales Agreement.

10 The Tribunal has the power to rule on its jurisdiction over the issue to adapt the Sales Agreement under Art. 19.1 of HKIAC Administered Arbitration Rules 2018 (hereinafter "**HKIAC Rules 2018**") in compliance with Art. 16 of Danubian Arbitration Law (hereinafter "**DAL**").

11 In Clause 15 of the Sales Agreement, the Parties agreed that "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (hereinafter "HKIAC") under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted" [*C5, p.14*]. As on 1 November 2018 the newest version of HKIAC Administered Arbitration Rules, *i.e.* HKIAC Rules 2018, entered into force, these arbitration proceedings will be conducted on the basis of the HKIAC Rules 2018 [*PO1, p. 52, II*].

12 In addition to the HKIAC Rules 2018, the arbitration clause incorporated into Clause 15 of the Sales Agreement also identifies the seat of arbitration, which is Vindobona, Danubiana [*C5,*

p.14] and therefore these arbitral proceedings must comply with the DAL, which is "a largely verbatim adoption of the UNCITRAL Model Law" on International Commercial Arbitration with the 2006 amendments [*PO1, p. 53, III.4.; and PO2, p. 57, para. 14*].

13 Under Art. 19.1 of HKIAC Rules 2018 in compliance with Art. 16 of DAL, an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement. This provision thus enshrines the so-called doctrine of *compétence-compétence*, which recognizes that an arbitral tribunal itself has the power to rule on its jurisdiction [*Ozlem Susler, p.427*]. Accordingly, the Tribunal has the competence to decide on its as well as deals with the jurisdiction, including its jurisdiction over the issue to adapt the Sales Agreement.

B. The Tribunal has the power to adapt the Sales Agreement under the Mediterranean law

14 In Clause 14 of the Sales Agreement, the Parties agreed that the law of Mediterraneo governs the Agreement, including the arbitration clause incorporated into Clause 15 thereof **(1)**. Even if the scope of the choice-of-law clause is considered to be ambiguous with regard to its application towards the arbitration clause, the Tribunal should conclude that the law of Mediterraneo also applies to the arbitration clause under the contra proferentem principle of interpretation The applicable law to the arbitration clause is the Mediterranean law under Clause 14 of the Sales Agreement.

15 The applicable law towards the arbitration clause is the Mediterranean law under Clause 14 of the Sales Agreement, because therein the Parties agreed on the law applicable to the entire Sales Agreement, including the arbitration clause incorporated into Clause 15 thereof. Clause 15 regulates the jurisdiction of this Tribunal and identifies the seat of arbitration which is Vindobona, Danubia. Nonetheless, it is silent on the applicable law to the arbitration clause itself. It is therefore important to examine the intentions of the Parties in order to determine the

relationship between Clauses 14 and 15 with regard to the applicable law towards the arbitration clause.

16 Although the arbitration clause incorporated into Clause 15 of the Sales Agreement does not expressly provides for which law is applicable thereto, it is clear that the Parties intended to apply the Mediterranean law for several reasons. Although the arbitration clause incorporated into Clause 15 of the Sales Agreement does not expressly provides for which law is applicable thereto, it is clear that the Parties intended to apply the Mediterranean law for several reasons. First, during negotiations CLAIMANT suggested the Mediterranean law as the applicable law [*C2, p. 10*] and Respondent did not reject it at all [*C3, p. 11*]. Moreover, Respondent responded that it had no problem to accept the application of the Mediterranean law, but opposed only the jurisdiction of courts in Mediterraneo in order to prevent possible bias in any future dispute settlement proceedings [*C3, p. 11*]. Therefore, the issue of applicable law to the arbitration clause was not further discussed amongst the Parties after 11 April 2017, when CLAIMANT suggested the place of arbitration in a neutral country under the condition that the applicable law remains the law of Mediterraneo [*R2, p. 34; and C8, p. 17*].

17 Second, when CLAIMANT received the first draft of the arbitration clause from Respondent [*R1, p. 33*], CLAIMANT immediately replied that it was able to accept the seat of arbitration in a neutral country, but clearly expressed the objection against submitting to a foreign law [*R2, p. 34*]. Moreover, CLAIMANT informed Respondent that for such a measure the former would need an approval of its creditors' committee.

18 Lastly, as the Sales Agreement incorporated the choice-of-law clause into its Clause 14, it made no sense to incorporate the same separate choice-of-law clause which would be applicable only to the arbitration clause into Clause 15 thereof. Some authorities adopted an approach of applying the law governing the parties underlying contract to this particular issue. This

approach was particularly influential in cases where the parties included a choice-of -law clause in their underlying contract but without a choice-of-law clause on the arbitration agreement [*Born, p. 515*]. The reason is that the choice-of-law clause applicable to the entire contract usually reflects the parties' intention. In *Sonatrach Petroleum Corp.* (BVI) *v. Ferrell Int'l Ltd* [2002], it was held that, "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 the law expressly chosen to govern the substantive contract."

19 Similarly, in *Arsanovia Ltd v. Cruz City 1 Mauritius* [2012], the governing law of the underlying contract was Indian law but the seat of arbitration in London was chosen. The courts reached a conclusion that the parties had evinced an intention that the arbitration agreement in it was governed by Indian law. The governing law clause was, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there was no contrary indication other than choice of a London seat for arbitration.

20 In the light of these authorities, CLAIMANT and Respondent has not expressly included a separate choice-of-law clause into the arbitration clause because the entire sales agreement, including the arbitration clause, is to be governed by the law of Mediterranean according to Clause 14 thereof.

21 Consequently, based upon supporting evidence and the incorporation of the choice-of-law clause for the entire contract into the Sales Agreement, there is no doubt that the Parties intended that the Mediterranean law is to be the applicable law to the arbitration clause.

22 Third, an unexpectable accident happened before the last formation of the contract that two negotiators were badly injured and became unable to attend the final conclusion of the contract. It was supposed to be impossible for the negotiators to make a decision on that issue according

to R3. However, Ms. Julie stated that she and Mr. Antley had already discussed on the issue of adaptation before and both parties seemed to agree on adaptation by the Arbitral Tribunal, which was probably based on Mediterranean law since Mediterranean law has a wider scope of interpretation and allows adaptation.

1. The law of the seat should not overwhelm the true intention of the parties.

23 Although, as shown in the previous Section, the Parties had the intention to apply the Mediterranean law to the arbitration clause, Respondent claims that the Danubian law should apply instead, because the seat of arbitration is in Danubia [*C5, p. 14*]. Referring to the decision in *Arsanovia*, the choice of a seat in London did not mean that the parties were to have been taken to have impliedly chosen English law as the law applicable to the arbitration agreement and thus the choice-of-law clause contained in the underlying contract was not to be applied to the arbitration agreement. Later in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi As v VSC Steel Company Ltd,* Hamblen J. provided that Although the law of the arbitration seat is important in arbitrational proceedings, it cannot overwhelm the true intention of the parties [*Habas case*].

24 Furthermore, Respondent cannot rely on the doctrine of separability, because it also could not be used to justify preferring the law of the arbitration seat over the law applicable to substantive issues. The doctrine of separability is limited in its application and it goes no further than saying that any challenge of invalidity targeting the underlying contract does not, in itself, affect the validity of the arbitration agreement [*LEONG/TAN, p. 75*]. Therefore, it does not mean that the arbitration agreement is distinct from the main contract for all intents and purposes once the main contract has been formed.

25 Accordingly, the fact that the present arbitration proceedings are conducted in Danubia cannot trump the choice-of-law agreement made by the Parties and incorporated into Clause 14 of the Sales Agreement.

2. Even if no choice of law was made by the Parties, the Mediterranean law should be applied to the arbitration clause as the law with the most significant relationship

26 Even if the choice-of-law clause incorporated into Clause 14 of the Sales Agreement does not apply to the arbitration clause, the Mediterranean law should apply to the arbitration clause, since it is the law of the place which has the most significant relationship to arbitration clause.

27 When no choice-of-law agreement was explicitly or implicitly incorporated into a contract, it is necessary to examine which law has the most significant relationship to the agreement [*Andrea, p. 126*]. This was, for example, expressed in *Sulamerica Cia Nacional de Seguros SA v Ensea Engelharia SA* [2012] *("Sulamerica"),* in which the three-stage enquiry was developed. The enquire starts with seeking whether any expressed choice of law has been made. If not, the focus of enquiry moves to scrutinizing whether any implied choice of law has been made. If no choice at all exists, it is essential to search for the law which has the closest connection with the arbitration agreement.

28 At the present case, Mediterraneo is the place which has the closest connection to the arbitration clause incorporated into Clause 15 of the Sales Agreement. First, it was Respondent who approach CLAIMANT in Mediterraneo to conclude a contract [*C1, p. 9*]. Second, the place where the Sales Agreement was signed is in Mediterraneo [*C5, p.14*]. Third, the sale of frozen semen is governed by Mediterraneo law under Clause 14 of the Sales Agreement [*C5, p. 14*]. Finally, the Sales Agreement is based on the Standard Frozen Semen Sales Agreement taking into account the Mediterraneo Guidelines for Semen Production and Quality [*C2, p. 10; and PO2, p. 55, para. 3*].

29 Therefore, the entire Sales Agreement, including the arbitration clause, has the most significant relationship with Mediterraneo and should be applied to the arbitration clause incorporated in Clause 15 of the Sales Agreement.

3. Under the Mediterranean law the Tribunal has the power to adapt the Sales Agreement

30 Respondent alleges that the Tribunal is lack of jurisdiction to adapt the Sales Agreement due to the narrow wording of the arbitration clause [*ANoA, p. 31, para. 16*]. Respondent stresses that the arbitration clause applies only to the disputes which are expressly listed therein [*ANoA, p. 31, para. 13*]. It thus puts forwards that the Tribunal has no jurisdiction to deal with the adaptation of the Sales Agreement.

31 Here, it should be pointed out that arbitration agreements tend to be broadly worded so that they cover various disputes which can occur during the life of an underlying contract. Thus, when parties agree to resolve "any dispute" between them by arbitration, they usually intend to resolve all disputes between them by this method.

32 Similarly, various arbitration institutions recommend model clauses with broad wording by referring to "all" or "any dispute", "all disputes, controversies and differences" or just generally "disputes, controversies, or claims" [*Andera, p. 120*].

33 Arbitration agreements are contracts, and therefore the courts and the arbitral tribunals apply general principles of contractual interpretation to its application. Relying on such interpretation rules, Authorities have usually concluded that the wordings 'all disputes' of any disputes extend to all disputes having any plausible factual or legal relation to the party's agreement or dealings. For instance, in *Fiona Trust* the UK court held that "any dispute under the charter" should be given a broad interpretation due to the intention of businessmen. Similarly, courts in other jurisdictions, *e.g.* Austria or the United States, also prefer an expansive interpretation of the scope of arbitration agreements. Although someone might argue for a more restrictive approach,

such as in the US case *Cape Flattery Ltd v. Titan Maritime LLC*, but it is important to examine all the specific circumstances of particular cases. For instance, the mentioned case was a rare case for the reason that its claim was based on tort and not on contract.

34 At the present case, the wording of arbitration clause incorporated into Clause 15 of the Sales Agreement is also quite broad. It uses the words “any dispute”. Besides, Mediteranean law allows broad interpretation in such cases.

35 To be conclude, the Tribunal has the power to adapt the contract because of the broad wording under Mediterranean law as well as the general principle of interpretation of wording in the contact.

C. Tribunal also has the power to adapt the Sales Agreement under the hardship clause and applicable substantive law

36 Even if the arbitration clause and applicable procedure law do not provide for the ground for adapting the Sales Agreement, the Tribunal has the power to adapt the Sales Agreement, because the Agreement itself in its hardship clause [*Clause 12 of the Sales Agreement*] as well as the substantive law applicable to the Sales Agreement under its Clause 14 allow its adaptation.

37 Mediterraneo applies CISG also to the conclusion and interpretation of the arbitration clause [*PO1, p. 52*]. There has always been antagonism to “a judge rewriting our contract,” and probably there will be similar hostility to adaptation through the “reasonable expectation test.” However, it is the very function of the CISG to interpret and supplement what parties have expressly agreed to. In this sense, a judge applying the CISG always rewrites or supplements a contract. This is all the truer of the provisions with the word “reasonable” in their texts. it would not be a deviation from the language of the Convention for them to adapt the contract based on the “reasonable expectation test” of Art. 79(1), particularly when they deal with an unexpected skyrocketing price beyond once-in-decade increase. It might be their duty to make adaptation

within the realm of interpretation of the CISG under the command of Art. 7(1) "to promote uniformity in its application and the observance of good faith in international trade [*Yasutoshi Ishida, pp379-381*].

38 Accordingly, as the Parties in the present arbitral proceedings dispute whether the Sales Agreement can be adapted under the hardship clause or applicable substantive law, the Tribunal has the power to settle this dispute related to the interpretation of the Sales Agreement and applicable substantive law under the arbitration clause [*Clause 15 of the Sales Agreement*], which provides the Tribunal with the jurisdiction to settle "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof".

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

39 CLAIMANT is entitled to submit evidence from the other arbitration proceedings, because the given evidence is essential for presenting its case **(A)** and should not be declared inadmissible by the Tribunal **(B)**. If the evidence is declared inadmissible, the Tribunal's award can be set aside under Art. 34(2)(ii) of DAL or its recognition in other countries can be refused under Art. V(1)(b) of New York Convention **(C)**.

A. Evidence from the other arbitration proceedings is vital for CLAIMANT in order to present its case

40 Evidence from the other arbitration proceedings, which has been suggested by CLAIMANT in its letter dated on 2 October 2018 [*LbF, p. 50*], is essential for presenting its case by CLAIMANT, because it shows that in other similar cases RESPONDENT was not opposing to

the adaptation of a contract under similar circumstances. Conversely, RESPONDENT even demanded such adaptation.

41 Art. 18 of DAL guarantees equal treatment of parties. In order to achieve such treatment, it is vital for each party to "be given a full opportunity of presenting his case". The Tribunal should admit the suggested evidence, if it is indispensable for CLAIMANT's full opportunity of presenting its case, otherwise CLAIMANT's right guaranteed by Art. 18 of DAL would be violated.

42 The Parties has commenced this arbitration proceedings under the HKIAC Rules pursuant to Clause 15 of the Sales Agreement and one of disputed issues is whether the Parties agreed that the Agreement can be adapted in the case of hardship.

43 In the present case, on 19 January 2018 the government of Equatoriana announced the imposition of 30% tariffs on agricultural goods from Mediterraneo as a retaliation measure to the imposition of 25% tariffs on agricultural products from Equatoriana announced by Mediterraneo's newly elected President, Ian Bouckaert [*C6, p. 15; and PO2, p. 58, para. 25*]. As the retaliation measure adopted by the government of Equatoriana significantly disturbed the equilibrium of the Sales Agreement, was unforeseeable at the moment of signing the Agreement and its negative effects could not have been avoided or overcome by CLAIMANT, CLAIMANT request the Tribunal to adapt the Agreement in order to re-establish its original equilibrium between the Parties. However, RESPONDENT objects that the Sales Agreement can be adapted under the hardship clause [*Clause 12 of the Sales Agreement*] or Art. 79 CISG [*NoA, p. 7*].

44 Here, it should be pointed out that the general contract laws in Mediterraneo as well as Equatoriana allows the adaptation of a contract in hardship cases [*PO1, p. 53, III.4.*]. In addition, the UNIDROIT Principles as representation of rules and customs used in international trade

also provides for the adaptation of a contract under Art. n RESPONDENT's objection is Art. 6.2.3(4)(b). Accordingly, the adaptation of a contract in hardship cases is no sudden surprise for RESPONDENT, and if RESPONDENT had intended not to apply such measure to the Sales Agreement, it should have expressly objected to the applicability of the measure during negotiations, but it failed to do so.

45 Moreover, although RESPONDENT objects to the adaptation of the Sales Agreement, when it was negatively affected as seller under conditions similar to CLAIMANT's position under the Sales Agreement by the same trade dispute between Mediterraneo and Equatoriana, *i.e.* by the 25% tariff imposed by the president of Mediterraneo, RESPONDENT did not object to the adaptation of that contract, but even demanded it by invoking an unforeseeable change of circumstances [*PO2, p. 60, para. 39*]. This is clearly the evidence that RESPONDENT was aware about the possibility of adapting the Sales Agreement in the hardship cases.

46 Accordingly, the evidence, which was suggested by CLAIMANT and which originates from another arbitration, is indispensable for the opportunity of CLAIMANT to present its case in this arbitration proceedings.

B. The Tribunal should not declare the evidence suggested by CLAIMANT as inadmissible

47 The Tribunal should not declare the evidence suggested by CLAIMANT as inadmissible, because they do not satisfy the requirement for inadmissibility of evidence. The Tribunal has the power to determine its procedural rules on admissibility of evidence under Art. 22.2 of HKIAC Rules and Art. 19(2) of DAL **(1)**. The Tribunal should decide in compliance with the prevailing principles of transparency **(2)**. Even if the Tribunal adopts the IBA Rules on the Taking of Evidence in International Arbitration (*hereinafter "**IBA Rules**"*) as international standard for taking evidence in arbitration proceedings, the suggested evidence does not satisfy the requirements for declaring it inadmissible under Art. 9.2(b) of IBA Rules **(3)**.

1. The Tribunal has the power to determine its procedural rules on admissibility of evidence

48 The Tribunal has the power to determine its procedural rules on admissibility of evidence under Art. 22.2 of HKIAC Rules as well as Art. 19(2) of DAL. In the present case, the Parties agreed that this arbitration proceedings will be conducted under the HKIAC Rules [*Clause 15 of the Sales Agreement*]. Although the HKIAC Rules do not expressly regulate the conditions under which a particular evidence can be admitted or declared inadmissible by the Tribunal, Art. 22.2 thereof clearly provides for that the Tribunal can decide on inadmissibility of evidence.

49 For doing so, the Tribunal has the power to determine its procedural rules on admissibility of evidence, if the Parties has agreed on such rules. This is in line with Art. 19(2) of DAL which expressly grants to arbitral tribunals such power, *i.e.* the power to "conduct the arbitration in such manner as it considers appropriate". It includes the tribunal's "power to determine the admissibility, relevance, materiality and weight of any evidence".

50 Accordingly, as the Parties has not agreed on the procedural rules on admissibility of evidence, the Tribunal has the power to determine its procedural rules in this regard under Art. 22.2 of HKIAC Rules and Art. 19(2) of DAL.

2. The Tribunal should decide in compliance with the prevailing principles of transparency

51 The Tribunal should decide on admissibility of evidence in compliance with the prevailing principles of transparency. Transparency is considered an important virtue for any decision making, certainly including the arbitration. The principle of transparency in arbitration is one of the most important principles that should be followed. This is also reflected in UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014. Although the Rules are designed for investor-state arbitrations, their application to other types of international commercial arbitration is not excluded, especially since the main principle in international commercial arbitration is also fairness in decision making and balance of parties' interests.

52 If the need of transparency is entirely ignored, one party in a commercial arbitration will be in an unfair advantage against another party [*ROGER, p. 1326*]. Therefore, balancing of both parties' interests in confidentiality and transparency is essential to strike a fair and appropriate balance between both affected parties. The need to balance the interests of both parties is also reflected in the mentioned UNCITRAL Rules and is the key principle in any international commercial arbitration.

53 In the present case, if Claimant is not allowed to present the evidence which proves the inconsistency of arguments in two separate proceedings by Respondent, it will very likely cause a significant unbalance between the Parties. The Claimant is not interested in learning any trade secret of Respondent. It is only interested in presenting that Respondent under circumstances similar to Claimant's position in the present case did not object against the adaptation of a contract, but even demanded it. This fact as such will not have any negative impact on trade secret of Respondent. The Tribunal should take this into consideration and should rule that the requested evidence is admissible, since a fair and adequate balance between the interests of both Parties will be achieved.

3. The evidence from the other arbitration does not satisfy the requirements for declaring it inadmissible under Art. 9.2(b) of IBA Rules

54 Even if the Tribunal adopts the IBA Rules as international standard for taking evidence in arbitration proceedings, the suggested evidence from the other arbitration proceedings does not satisfy the requirements for declaring it inadmissible under Art. 9.2(b) of IBA Rules and thus the Tribunal should not exclude it as inadmissible thereunder.

55 Art. 9.2(b) of IBA Rules allows the arbitral tribunal to declare evidence inadmissible for the reason of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable". Although HKIAC Rules provides for that arbitration is

confidential, it does not mean that this privilege will trump all the legitimate interests of other parties.

56 Although the IBA Rules are intended to present an international standard adopted by the International Bar Association (*hereinafter "**IBA**"*) and to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions, because they reflect procedures in use in many legal systems, the Parties have to agree on their applicability under Art. 1.1 of IBA Rules and this has not happened in the present case.

57 Moreover, even if the Tribunal decides to apply the IBA Rules to this arbitration proceedings, in the case of a conflict between any provisions of the IBA Rules and arbitration rules, *i.e.* HKIAC Rules in the present case, the Tribunal must apply the IBA Rules under Art. 1.3 thereof in the manner that it determines best in order to accomplish the purposes of both the HKIAC Rules and the IBA Rules, unless the Parties agree to the contrary, what is not the case in this proceedings.

58 Art. 9.2(b) of IBA Rules allows the arbitral tribunal to declare evidence inadmissible for the reason of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable". Although HKIAC Rules provides for that arbitration is confidential, it does not mean that this privilege will trump all the legitimate interests of other parties.

59 Here, it should be pointed out that the use of suggested evidence will affect any trade secret of RESPONDENT. CLAIMANT is not interested into details of that transaction or trade secret, if any. It is only interested in the issue whether RESPONDENT demanded the adaptation of a contract under conditions similar to the present case. The Tribunal can even request RESPONDENT to provide it with such information under Art. 22.3 of HKIAC Rules.

60 Moreover, although RESPONDENT claims that the only source of information in question could be either two former employees of RESPONDENT, the contrasts of which were terminated three month ago for cause with immediate effect, or a hack of RESPONDENT's computer system which occurred three weeks ago and where the hackers managed to retrieve a considerable amount of data [*LbF, p. 50*], CLAIMANT did not obtained information on this evidence through committing any illegal acts. It did not hack into RESPONDENT's computer system. Neither bribed it any former employees of RESPONDENT to obtain the evidence. CLAIMANT heard about this evidence from a third party at the annual breeder conference [*PO2, p. 60, para. 40*].

61 Consequently, there is no ground for declaring the requested evidence from the other arbitration proceedings to be declared inadmissible even under the IBA Rules, because the requirements for declaring it inadmissible has not be satisfied in the present case.

C. If the evidence is declared inadmissible, the Tribunal's award can be set aside or its recognition in other countries can be refused

62 If the evidence is declared inadmissible, it can cause that the Tribunal's award can be set aside or its recognition in other countries can be refused. According to Art. 34(2)(ii) of DAL, an arbitral award may be set aside by Danubian courts if the party making the application was "unable to present his case". Similarly, the courts in Mediterraneo or Equatoriana can refused to recognize or enforce it for the same reason.

63 Therefore, if the Claimant is not permitted to present the evidence which is crucial to present its case, it can cause that the Tribunal's award can be set aside in Danubia or its recognition in other countries can be refused.

III. CLAIMANT IS ENTITLED TO THE ADDITIONAL PAYMENT OF USD1,250,000 UNDER CLAUSE 12 OF THE SALES AGREEMENT

64 The Tribunal should find that CLAIMANT is entitled to the additional payment of USD1,250,000, because CLAIMANT did not assume all the risks for any change in tariffs under Clause 8 of the Sales Agreement **(A)**. Furthermore, the imposition of 30% tariffs by Equatoriana amounts to the hardship under Clause 12 of the Sales Agreement **(B)**, and therefore RESPONDENT is obliged to bear the costs associated with those tariffs thereunder **(C)**.

A. CLAIMANT did not assume the risk of imposing tariffs by Equatoriana under Clause 8 of the Sales Agreement

65 In Clause 8 of the Sales Agreement the Parties agreed on the conditions of delivery in the form of the term DDP. CLAIMANT's conditions of delivery are normally in the form of EXW Capital City, but CLAIMANT regularly offers to assist its customers with the delivery of frozen semen [*PO2, p. 56, para. 9*]. This was also the reason of why CLAIMANT agreed on the DDP delivery in the present case.

66 Accordingly, the Parties' intention in agreeing on the DDP delivery was not to impose all the responsibility and burden upon CLAIMANT in the case of occurring any changes in custom and health regulations. Conversely, their intentions were twofold. First, the Parties wanted to utilize CLAIMANT's experience with custom and import procedures in the case of delivering the shipments of frozen semen cross national borders and thus to guarantee the smoothness of the entire transaction [*C3, p. 11; and C4, p. 12*]. Second, both Parties wanted to build a long-term relationship [*C3, p. 11; and C4, p. 12*].

67 This can be observed upon RESPONDENT's insistence for this Sales Agreement on the DDP delivery, since CLAIMANT had "much greater experience in the shipment of frozen semen including the necessary export and import documentation" than RESPONDENT [*C3, p. 11*].

Similarly, taking into account the opportunity to increase Nijinsky's breeding potential, the size of the order and CLAIMANT's interest in a long-term relationship, CLAIMANT agreed with this form of delivery and the purchase price reflected the costs of DDP delivery at the time of concluding the Sales Agreement [*C4, p. 12; and PO2, p. 26, para. 8*].

68 In addition to the lower risk for damages to the semen, a greater likelihood of a speedy and non-problematic compliance with export and import formalities and the required paperwork, CLAIMANT was also able to make the transportation commercially under much more favorable terms than RESPONDENT [*NoA, p. 7, para. 18*].

69 Although none of the Parties could reasonably foresee any change in custom and import regulations at the time of negotiating and signing the Sales Agreement, CLAIMANT clearly expressed to RESPONDENT that the former was "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" [*C4, p. 12*].

70 Furthermore, CLAIMANT demanded the inclusion of a hardship clause into the Sales Agreement "to address such subsequent changes" [*C4, p. 12*] and therefore the hardship clause was incorporated into Clause 12 of the Sales Agreement. Accordingly, the Parties agreed on the DDP delivery under the conditions at the time of singing the Sales Agreement on 6 May 2017 and, by doing so, CLAIMANT did not assume all the risk for any subsequent changes in custom and import regulations. This interpretation is also supported by authorities, which confirm that when any fundamental change in circumstances occurs, parties are to renegotiate contents of their contract [*Luigi, p. 81; and Pascale, p. 54*].

71 On 19 December 2017 the government of Equatoriana announced the imposition of the tariffs on agricultural goods imported from Mediteraneo as a retaliatory measure which entered into force on 15 January 2018 [*C6, p.15; and PO2, p. 58, para. 25*]. The retaliatory tariffs in the

amount of 30% thus affected the third and last shipment of 50 doses of frozen semen, causing an extra burden of USD1,500,000 for CLAIMANT. As CLAIMANT's profit margin was in the amount of 5%, CLAIMANT suffered a loss of 25%, *i.e.* USD 1,250,000, on the third shipment.

72 Although the Parties agreed on the DDP delivery, as explained above, CLAIMANT did not assume all the risk for changes in tariffs under Clause 8 of the Sales Agreement and therefore should not bear the burden caused by the imposition of 30% tariffs by Equatoriana on all the agricultural products, including frozen semen, which affected the third shipment of frozen semen.

B. Imposition of 30% tariff by Equatoriana amounts to hardship under Clause 12 of the Sales Agreement

73 Imposition of 30% tariff by Equatoriana amounts to hardship under Clause 12 of the Sales Agreement, because it is an event which makes the Sales Agreement more onerous **(1)**, occurred out of control of CLAIMANT **(2)** and was "unforeseen" by CLAIMANT at the moment of concluding the Sales Agreement **(3)**.

1. The imposed tariff is onerous to CLAIMANT

74 The 30% tariff imposed by Equatoriana on the third shipment of frozen semen is onerous to CLAIMANT. The Parties agreed on the hardship clause, which was incorporated into Clause 12 of the Sales Agreement, for the cases of "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous".

75 The reason of why the imposed tariff is onerous to CLAIMANT is that it has caused a considerable impediment to CLAIMANT. As presented above [*supra III.A*], the purchase price took into account only the costs of DDP delivery without any tariff imposed on shipments [*PO2, p. 56, para. 8*]. As CLAIMANT's profit margin was 5% of purchase price [*PO2, p. 59, para.*

31], its loss only for the third shipment amounts to 25% of the second instalment of purchase price. CLAIMANT had thus no profit from the third shipment and suffered a considerable loss in the amount of USD1,250,000.

76 Moreover, this loss significantly worsened CLAMANT's financial situation. Due to significant losses caused by the high interest payments for the loan taken on to finance the new stables in 2013, CLAIMANT had to agree to a restructuring plan with its creditors in 2014 [*PO2, p. 59, para. 29*]. The main condition of its restructuring plan was that CLAIMANT would be profitable again from 2017 onwards. CLAIMANT therefore had the obligation to turn a profit from 2017. It made profit in 2017 and also expected to comply with this obligation in the year of 2018 [*PO2, p. 59, para. 29*]. The sales of frozen semen were supposed to be the additional revenues to achieve that goal [*ibid.*]. However, that plan would be endangered if CLAIMANT had to bear the cost in the amount of USD 1,250,000 [*ibid.*].

77 Moreover, the automatic prolongation of its two main credit lines depended on being profitable in 2017 and 2018 [*ibid.*]. Failing to make profit in 2018 will cause that it will most likely be very difficult for CLAIMANT to establish negotiations of a new credit line, because one of the major creditors is the house bank of CLAIMANT's largest competitor who is interested in buying the dressage part of CLAIMANT [*ibid.*]. That bank can thus make such a sale as precondition for the entry into a new credit.

78 Therefore, the retaliatory tariffs imposed by Equatoriana, which affected the third shipment of frozen semen, are significantly onerous to CLAIMANT, not only since the entire transaction will bring the lost for CLAIMANT, but also CLAIMANT's entire economic situation will be considerably worsened.

2. The hardship caused by the imposed tariff occurred out of CLAIMANT's control

79 The imposition of 30% tariff by Equatoriana, which affected the third shipment of frozen semen, was out of CLAIMANT's control. The hardship clause incorporated into Clause 12 of the Sales Agreement enumerates several examples of "events making the contract more onerous", such as "additional health and safety requirements" and "comparable unforeseen events". As any health and safety requirements are imposed by a government or third party, they tend to occur out of CLAIMANT's control. Similarly, "comparable unforeseen events" implies that they are outside of CLAIMANT's control, since they are comparable to any health and safety requirements imposed by a government or third party. This interpretation is also supported by authorities [*Doudko, p. 484; and Fulda, p. 793*].

80 In addition to hardship case, Clause 12 of the Sales Agreement deals with other cases which are not within the control of CLAIMANT, such as "lost semen shipments", "delays in delivery" due to "missed flight", "weather delays" and "failure of third party service", and "acts of God" which present various natural disasters, including earthquake, tsunami or typhoon. The common feature of all these events is also that they are "not within the control of" CLAIMANT. Accordingly, Clause 12 of the Sales Agreement covers the cases, including hardship cases, which are outside of CLAIMANT's control.

81 In the present case, the imposition of retaliatory tariffs by Equatoriana was not clearly within the control of CLAIMANT. The tariffs were imposed by the government of Equatoriana, over which activity CLAIMANT had no control. Although the imposition of those tariffs was a response to similar tariffs imposed by Mediterraneo on agricultural products imported from Equatoriana, none of those tariffs was imposed as a reaction to, or in relation to, any activity of CLAIMANT.

82 Moreover, CLAIMANT could not adopt any measure to prevent or reduce the impact of tariffs imposed by Equatoriana. Although both Parties knew about the imposition of tariffs by Equatoriana [*PO2, p. 58, para. 26*], it was impossible for them to prevent this situation or return it to its original state by their mutual action, because they did not consider the frozen semen as "agricultural good" and thus thought that the tariffs would not apply to it. Claimant only found out that the frozen semen is considered to belong to "agricultural products", when the customs authorities informed it on 20 January 2018 for the first time [*C7, p. 16*].

83 Consequently, the imposition of tariffs by Equatoriana, which affected the third shipment of frozen semen, and the hardship caused by this event was not within the control of CLAIMANT.

3. The imposition of tariff by Equatoriana was unforeseeable by CLAIMANT at the moment of concluding the Sales Agreement

84 The last requirement for an event to amount to hardship is that it has to be unforeseeable by CLAIMANT at the moment of concluding the Sales Agreement. The Sales Agreement was signed on 6 May 2017 and the imposition of retaliatory tariffs by Equatoriana was announced more than 7 months later, *i.e.* on 19 December 2017 [*PO2, p. 58, para. 25*].

85 Although during the election, Mediteraneo's future president talked about imposing the tariffs against third countries [*C6, p. 15*], during negotiations and at the moment of signing the Sales Agreement it was hard to foresee that any tariffs will be imposed by Mediteraneo at the end, and it was even harder to expect that any possible countermeasures would be adopted by other countries, and especially by Equatoriana.

86 Equatoriana has always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries [*NoA, p. 6, para. 10; and C6, p. 15*]. The government of Equatoriana has usually been a fervent supporter of free trade [*NoA, p. 6, para. 10; and C6, p. 15*].

87 Moreover, the adopted measure was highly surprising, since it was made in the time when the Prime Minister of Equatoriana came from the Progressive Liberals [*NoA, p. 7, para. 19*]. In the past, the Equatorianan Government took retaliatory measures against trade restrictions imposed by a third state only once and it happened under a Prime Minister from the National Party, which is more critical to free trade [*ibid.*].

88 Consequently, the adoption of a retaliatory measure, such as the one in the present case, was hardly foreseeable by CLAIMANT at the moment of concluding the Sales Agreements.

89 To sum up, the imposition of tariffs by Equatoriana, which significantly affected the third shipment, amounted to hardship, because it was an event which made the Sales Agreement more onerous for CLAIMANT, occurred out of control of CLAIMANT and was "unforeseen" by CLAIMANT at the moment of concluding the Sales Agreement [*Scafom International BV v. Lorraine Tubes S.A.S.*].

C. RESPONDENT is obliged to bear the costs of the imposition of 30% tariff by Clause 12 of the Sales Agreement

90 RESPONDENT is obliged to bear the costs of the imposition of 30% tariff, because in Clause 12 of the Sales Agreement the Parties agreed that CLAIMAINT is not responsible for events of hardship, which are defined therein. As stated above [*supra III.A*], the Parties agreed on the purchase price, which took into account the costs of DDP delivery at the time of the conclusion of the Sales Agreement. This is supported by the fact that CLAIMANT clearly express its objection to bear the cost of unforeseeable changes in customs and health regulations [*C4, p. 12*] and demanded the incorporation of a hardship clause in the Sales Agreement in order to allow the adaptation of the Sales Agreement in hardship cases [*C8, p. 17*].

91 As Clause 12 of the Sales Agreement expressly states that CLAIMANT is not "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", it means the hardship clause limits the scope of CLAIMANT's liability under the DDP delivery and thus RESPONDENT is obliged to bear the costs of tariffs imposed by Equatoriana.

92 Therefore, under Clause 12 of the Sales Agreement, RESPONDENT is obliged to pay the additional payment of USD1,250,000 in order to compensate CLAIMANT for the loss generated by the payment of customs duty.

IV. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 UNDER ART. 79 OF CISG

93 CLAIMANT is entitled to the payment of USD 1,250,000 under Art. 79 of CISG, because the Parties did not derogate under Art. 6 of CISG from the provisions of Art. 79 of CISG by the incorporation of the hardship clause into the Sales Agreement **(A)**, and pursuant to Art. 79 of CISG the tariff, which was imposed by Equatoriana and affected the third shipment of frozen semen, amounts to the hardship **(B)** and the Tribunal is empowered to adapt the Sales Agreement **(C)**.

A. Parties did not derogate under Art. 6 of CISG from the provisions of Art. 79 of CISG

94 Art. 6 of CISG allows contracting parties "to derogate from or vary the effect of any of CISG provisions". The question here is thus whether by incorporating the hardship clause [*Clause 12 of the Sales of Agreement*] into the Sales Agreement the Parties excluded the application of provisions contained in Art. 79 of CISG to the Agreement. CLAIMANT puts forward that the

hardship clause does not derogate the provisions of Art. 79 of CISG, but it only clarifies specific cases to which Art. 79 of CISG applies.

95 The inclusion of a hardship clause into a sales contract does not automatic leads to the derogation from the provisions of Art. 79 of CISG [*Lookofsky1*]. This is justified by the fact that Art. 6 of CISG does not deal only with the cases of derogation, but also with the ones of modification. By identifying specific cases in a hardship clause, the parties may confirm their intention that those cases amount to the hardship and thus Art.79 of CISG should apply in those cases. As it is often difficult to apply Art. 79 of CISG in hardship cases, commentators even recommend inserting a hardship clause in the contract so that it will be less complicated to rely on Art. 79 of CISG in such cases of hardship [*Honnold*]. This way of interpreting the relationship between contractual hardship clauses and the provisions of Art. 79 of CISG has been confirmed by courts and arbitral tribunals in several cases [*e.g. Rechtbank Van Koophandel*].

96 At the present case, the Parties incorporated the hardship clause into Clause 12 of the Sales Agreement in order to clearly identify the cases of hardship and limit CLAIMANT's liability in such cases. By agreeing on the hardship clause, the Parties did not intend to exclude the application of Art. 79 of CISG. Nothing in evidence suggest explicitly or implicitly such intent. Conversely, the Parties, and especially CLAIMANT, wanted to be sure that the hardship regime will be triggered in the cases specified in the hardship clause [*C4, p. 12*]. Art. 79 of CISG specifies certain legal responses to hardship cases and the Parties had no intend to eliminated them.

97 Accordingly, the Parties did not derogate from the provisions of Art. 79 of CISG by incorporating the hardship clause into the Sales Agreement, but they only aimed to clearly

indicate which types of hardship should lead to the application of special hardship regimes, including the one regulated by Art. 79 of CISG.

B. The tariff imposed by Equatoriana satisfies the requirements of hardship under Art. 79 of CISG

98 CLAIMANT is entitled to the payment of USD 1,250,000 under Art. 79 of CISG, because the tariff, which was imposed by Equatoriana and affected the third shipment of frozen semen, amounts to the impediment **(a)**, which is beyond CLAIMANT's control **(b)**, and CLAIMANT could not reasonably be expected to foresee the imposition of the tariff by Equatoriana at the conclusion of the Sales Agreement **(c)** and CLAIMANT could not avoid or overcome the imposition of the tariff or its consequences **(d)**.

a. The tariff imposed by Equatoriana presents the impediment

99 The tariff imposed by Equatoriana amounts to the impediment to CLAIMANT, because it caused that without any adaptation of the Sales Agreement in order to reestablish the original equilibrium of the contract CLAIMANT will have to bear a significant loss and CLAIMANT's actual financial situation will be considerably worsened.

100 Art. 79 of CISG exempts an obliged party from liability "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." In the present case, CLAIMANT under original equilibrium of the contract expected a 5% profit margin on this deal. However, the 30% tariff, which was imposed by Equatoriana and affected the third shipment of frozen semen, resulted in a 25% loss for the third shipment of frozen semen and even the entire transaction will present a significant lass for CLAIMANT.

101 Furthermore, CLAIMANT's financial situation will be considerably worsened due to the negative effect of that tariff on the entire transaction under the Sales Agreement. The past two years have been financially difficult for CLAIMANT who had to undergo a massive restructuring in order to revive its finances. The difficulty of its financial situation was several times clearly disclosed by CLAIMANT to RESPONDENT during their negotiations [*C8, p. 17*] and RESPONDENT was fully aware of it. The essential condition of CLAIMANT's restructuring was to make a profit in the year of 2018 [*PO2, p. 58 , para22*] and will not be achieved, if CLAIMANT has to bear the negative consequences of the imposed tariffs [*C8, p. 17*].

102 Consequently, the imposition of tariff by Equatoriana, which affected the third shipment of frozen semen, amounts to a significant impediment to CLAIMANT.

b. The imposition of the tariff by Equatoriana was beyond CLAIMANT's control

103 Art. 79 of CISG requires that the impediment, which justifies the exemption of an obliged party from liability, must be "beyond his control". In the present case, the tariff imposed by Equatoriana was clearly beyond the control of CLAIMANT. The tariff was imposed by the government of Equatoriana, over which activities CLAIMANT has no control.

104 Moreover, the imposition of tariff was completely unrelated to CLAIMANT's activities. The tariff was introduced as a retaliation measure for the introduction of similar tariffs on agricultural products from Equatoriana by Mediterraneo. Even the introduction of tariffs by Mediterraneo was not triggered by any activity of CLAIMANT.

105 Therefore, the imposition of the tariff by Equatoriana was not caused by any activity of CLAIMANT and was beyond its control.

c. CLAIMANT could not reasonably be expected to have foreseen the imposition of the tariff by Equatoriana at the conclusion of the Sales Agreement

106 Another condition set up by Art. 79 of CISG is that the affected party "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract". In the present case, the imposition of tariffs by Equatoriana was announced only on 19 December 2017 [*C6, p. 15; and PO2, p. 58, para. 25*], *i.e.* more than 7 months after the Sales Agreement was signed on 6 May 2017 [*C5, p. 14*]. It was thus difficult for CLAIMANT to foresee any changes in tariffs when the Sales Agreement was concluded.

107 Moreover, during negotiation and conclusion of the Sales Agreement no reasonable person could have foreseen the adoption of such a retaliation measure by Equatoriana, although there were hints that Mediterraneo could adopt protective measures against Equatoriana. The newly elected president of Mediterraneo several times clearly expressed his intent to protect the Mediterranean agriculture during negotiation of the Sales Agreement between the Parties [*C6, p. 15*]. It might thus have been foreseen at the time of concluding the Agreement that custom duties might be imposed on imports from Mediterraneo to the Mediterranean. Nevertheless, until now the government of Equatorianana has only once retaliated against trade restrictions imposed by the third countries, but it has not happened under the leadership of the Progressive Liberals, which are strong supporters of free trade [*NoA, p. 7, para. 19*].

108 Hence, even so, it was impossible for CLAIMANT to foresee retaliatory tariffs because the government of Equatoriana always tried to resolve trade disputes smoothly and did not rely on retaliatory measures against other countries' trade restrictions.

d. CLAIMANT could not reasonably be expected to have avoided or overcome the imposition of the tariff or its consequences

109 Although CLAIMANT knew about the imposition of tariffs by Equatoriana before they entered into force on 15 January 2018 [*PO2, p. 58, paras. 25 and 26*], it did not know that they also apply to frozen semen until 20 January 2018 [*PO2, p. 58, paras. 25 and 26*]. Neither was RESPONDENT aware of it before CLAIMANT informed RESPONDENT on it [*PO2, p. 58, para. 26*]. As the date of the delivery for the third shipment was agreed in the Sales Agreement and was set to 23 January 2018, the CLAIMANT could have avoided or overcome the imposition of the tariff by an early delivery without cooperation with RESPONDENT.

110 Accordingly, as the goods and their delivery were specified in detail in the Sales Agreement, there has been no measures available for CLAIMANT to avoid or overcome the imposition of the tariff and its consequences.

C. The Tribunal should adapt the Sales Agreement under Art. 79 of CISG so that CLAIMANT becomes entitled to the payment of USD 1,250,000

111 The Tribunal should adapt the Sales Agreement so that Claimant becomes entitled to the payment of USD 1,250,000, because Art. 79(5) of CISG does not exclude other possible remedies, including adaptation of a contract, in the cases of hardship **(1),** and the Tribunal should reestablish the original equilibrium of the contract under Art. 79 of CISG in the observance of good faith in international trade under Art. 7(1) of CISG **(2)**, or in conformity with the applicable law Art. 7(2) of CISG **(3)** or the usage in international trade under Art. 9(2) of CISG **(4)**.

1. Adaptation of the Sales Agreement is not excluded as remedy under Art. 79(5) of CISG

112 Art. 79 of CISG expressly stipulates that the contractor is exempt from liability for damages if the obligation cannot be fulfilled according to the contract due to unforeseeable obstruction outside the control of the contractor [*SCHWENZER*]. At the same time, Art. 79(5) of CISG clearly provides for that "nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". Several commentators interpret this provision as allowing other types of remedies, including adaptation of a contract [*Schlechtriem*]. This line of interpretation has also been approved by CISG Advisory Council in its Opinion No. 7. Accordingly, the adaptation of the Sales Agreement is not excluded as remedy under Art. 79(5) of CISG.

2. The Tribunal has the power to adapt the Sales Agreement under Art. 79 of CISG in the observance of good faith in international trade under Art. 7(1) of CISG

113 Art. 7(1) of CISG provides for that "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." The observance of good faith in international trade requires that there must be a limit to any sacrifice, beyond which the performance of the contract by the disadvantaged party could not be expected to be carried out in view of the substantial economic unbalance that has developed [*Ishida*]. In extreme cases, in which an unreasonable increase in costs of performance has occurred, the disadvantaged party should be entitled to ask to be released from the obligations incurred by the contract or to ask for its renegotiation to adapt to the changed circumstances [*Tallon*]. If such renegotiation fails, the observance of good faith in international trade requires that the affected party should be entitled to ask a court or arbitral tribunal to adjust the contract so that the original equilibrium of the contract is reinstalled [*Tallon*].

114 As shown above (*supra* IV.B.), the tariff which was imposed by Equatoriana and affected the third shipment of frozen semen, amounts to the hardship which cause substantial economic unbalance between the Parties and the Tribunal should adjust the Sales Agreement under Art. 79 CISG in the observance of good faith in international trade under Art. 7(1) of CISG so that CLAIMANT will be entitled to the payment of USD 1,250,000 which equals to 25% of the price installment for the third shipment of frozen semen, *i.e.* the 30% tariff imposed by Equatoriana after deducted 5% for profit margin.

3. The Tribunal has the power to adapt the Sales Agreement under Art. 79 of CISG in conformity with Art. 7(2) of CISG

115 Even if there is no good faith in international trade under Art.7(1) of CISG which would require the adaptation of the Sales Agreement, the Tribunal should adapt the Sales Agreement in order to reestablish the original equilibrium of the contract between the Parties pursuant to Art(2) of CISG, which allows "questions concerning matters governed by this Convention which are not expressly settled in it … to be settled in conformity with the general principles on which it is based" **(a)** and "in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law" **(b)**.

a. General principles on which the CISG is based allow adaptation of the Sales Agreement

116 Under Art. 7(2) of CISG courts or arbitral tribunals can rely on the general principles, upon which the CISG is based, in order to fill the gaps within the CISG. Many provisions of the CISG deals with preserving the equilibrium of the contract between the Parties. Commentators recognize this principle as the principle in the sense of Art. 7(2) of CISG [*Lookofsky2*]. Therefore, pursuant to the general principles underlying the CISG under Art. 7(2) of CISG, in the event of a significant change in the circumstances existing at the time of entering into a

contract, both parties may demand to adopt the contract in order to maintain the original balance of the contract.

117 As the general principles upon, which the CISG is based, are further developed in the UNIDROIT Principles, the UNIDROIT Principles can be used for supporting the interpretation and filling the gaps in the CISG under Art. 7(2) of the CISG. This was recognized by the UNCITRAL, which is the core legal body of the United Nations system in the field of international trade law and administers the CISG [*reference – UNCITRAL document*]. The same conclusion was made by a Dutch arbitral tribunal, which found that the UNIDROIT "Principles are principles in the sense of Art. 7(2) CISG" [*Netherlands Arbitration Institute*]. Accordingly, the CISG's interpretation requiring the adaptation of a contract in hardship cases in conformity with the general principles, upon which the CISG is based, is supported by the fact that in the hardship cases the UNIDROIT Principles expressly allow, "if reasonable", to "adapt the contract with a view to restoring its equilibrium" in Art. 6.2.3(4)(b).

118 As shown above [*supra IV.B.*], the tariff which was imposed by Equatoriana and affected the third shipment of frozen semen, amounts to the hardship which cause substantial economic unbalance between the Parties and therefore the Tribunal should adjust the Sales Agreement under Art. 79 CISG in conformity with the general principles, upon which the CISG is based, so that CLAIMANT will be entitled to the payment of USD 1,250,000, which equals to 25% of the price installment for the third shipment of frozen semen, *i.e.* the 30% tariff imposed by Equatoriana after deducted 5% for profit margin.

b. Applicable law allows the adaptation of the Sales Agreement

119 In the case where there is no general principles upon which the CISG is based and which would deal with the issue of contract adaptation, the issue should be settled in conformity with the law applicable to the Sales Agreement under Art. 7(2) of the CISG.

120 In the present case, the Parties agreed upon the applicable law to the Sales Agreement. The choice-of-law clause [*Clause 14 of the Sales Agreement*] provides for the application of the Mediterranean law. As the general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 53, III.4.*], it expressly allows in the hardship cases, "if reasonable", to "adapt the contract with a view to restoring its equilibrium"

121 As shown above [*supra IV.B.*], the tariff which was imposed by Equatoriana and affected the third shipment of frozen semen, amounts to the hardship which cause substantial economic unbalance between the Parties and thus the Tribunal should adjust the Sales Agreement under Art. 79 CISG in conformity with the Mediterranean contract law so that CLAIMANT will be entitled to the payment of USD 1,250,000, which equals to 25% of the price installment for the third shipment of frozen semen, *i.e.* the 30% tariff imposed by Equatoriana after deducted 5% for profit margin.

REQUEST

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

1) the Tribunal has the jurisdiction and the power to adapt the Sales Agreement under Clause 15 thereunder;

2) CLAIMANT is entitled to submit evidence from the other arbitration proceedings even on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system by a third party;

3) CLAIMANT is entitled to the payment of USD 1,250,000 resulting from an adaptation of the price

a. under Clause 12 of the Sales Agreement;

b. alternatively, under the CISG.

CLAIMANT reserves the right to amend its prayer for relief as may be required.

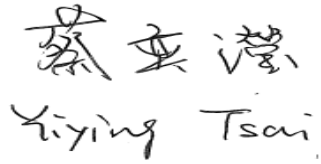
ALL OF WHICH IS RESPECTFULLY SUBMITTED ON 6 DECEMBER 2018.

CERTIFICATE

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

Sapporo, Japan

6 December 2018



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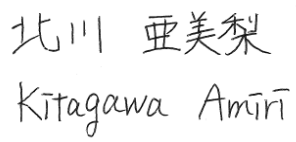

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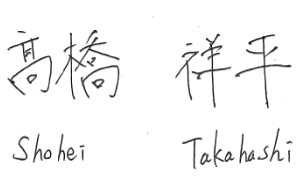

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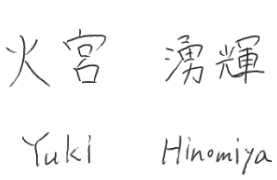

YUKI HINOMIYA