

SIXTEENTH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL
ARBITRATION MOOT
HONG KONG, 3¹ST MARCH – 07TH APRIL 2019

MEMORANDUM FOR CLAIMANT



**ROYAL INSTITUTE OF COLOMBO
SRI LANKA**

ON BEHALF OF:

CLAIMANT

PHAR LAP ALLEVAMENTO
RUE FRANKEL 1
CAPITAL CITY
MEDITERRANEO

AGAINST:

RESPONDENT

BLACK BEAUTY EQUESTRIAN
2 SEA BISCUIT DRIVE
OCEANSIDE
EQUATORIANA

**CHIRASTHI
SENEVIRATNE**

**HARISH
BALAKRISHNAN**

**IRANTHI
WALGAMA**

**MINUL
MUHANDIRAMGE**

TABLE OF CONTENTS

ABBREVIATIONS V

INDEX OF AUTHORITIES VIII

I. BOOKS..... VIII

II. LEGAL TEXTS AND JOURNAL ARTICLES XII

III. RULES AND GUIDELINES XVII

IV. ONLINE RESOURCES XIX

V. INDEX OF CASES XXI

VI. ARBITRATION AWARDSXXVII

STATEMENT OF FACTS I

ARGUMENTS2

ISSUE 01: THE TRIBUNAL IS ALLOWED TO ADAPT THE CONTRACT 2

A. The law of Mediterraneo allows the Tribunal to adapt the contract..... 2

I. The Law of Mediterraneo governs the AA..... 2

a. The law of the contract also governs the AA 2

b. According to the choice-of-law analysis, Mediterranean law governs the AA ... 2

i. There is no express choice-of-law to govern the AA 3

ii. The implied choice of the parties is for the AA to be governed by
Mediterranean law 3

iii. Alternatively, the closest and most real connection test deems the law of
Mediterraneo to be applicable to the AA 4

II. The Tribunal has the power with jurisdiction to adapt the contact 4

B. Even if the Law of Danubia is to apply, the tribunal can adapt the contract..... 5

- I. The AA expressly confers the tribunal the powers to adapt the contract 6
- II. Alternatively, the tribunal can adapt the contract as per the law governing the seat of arbitration..... 8
- III. Alternatively, the tribunal can adapt the contract based on the modern developments of the law..... 9
- C. Alternatively, the inherent powers of the tribunal allow for contract adaptation..... 10

ISSUE 02: CLAIMANT IS ENTITLED TO RELY ON THE PARTIAL INTERIM AWARD INVOLVING THE RESPONDENT FROM THE OTHER PROCEEDINGS12

- A. The evidence must be admitted and evaluated..... 12
 - I. The evidence is relevant to the current arbitral proceeding 12
 - II. Evidence is material to the outcome of the case..... 13
 - III. The evidence is admissible 14
- B. There has been no breach of confidentiality nor an illegal hack 14
- C. Notwithstanding a breach of confidentiality and illegal hack, the evidence is Admissible..... 14
 - I. Evidence is publicly available and admissible 14
 - II. Evidence should be admissible to pursue a legitimate legal interest 15
 - III. Even if the evidence was obtained through a breach of a confidentiality agreement, it is admissible..... 16
 - IV. The evidence is admissible even though it had been obtained through an illegal hack 18
 - a. CLAIMANT had no connection to the manner in which the evidence was procure..... 18
 - b. There is an overriding interest to admit the evidence 18
 - c. The current trend is to admit such evidence..... 20

ISSUE 03: THE TRIBUNAL SHOULD GRANT THE CLAIMANT A PRICE ADAPTATION OF USD 1,250,000 OR MORE.....20

- A. The Tribunal should grant a price adaptation under Clause 12 of the contract..... 20
 - I. 30% increase in Equatorianian tariffs impose a hardship on the CLAIMANT 20
 - a. Tariffs imposed by Equatoriana are unforeseeable..... 21
 - b. Increase in tariffs made the contractual performance excessively onerous..... 23
 - c. The risk of the tariffs does not fall on the CLAIMANT 24
 - i. Based on the Clause 12 of the contract 24
 - ii. Risk under the DDP Incoterms falls on the RESPONDENT..... 27
- B. The Tribunal should grant a price adaptation under the CISG and UNIDROIT Principles..... 27
 - I. Equatorianian tariffs impose a hardship under Art. 79 CISG 28
 - a. The tariffs are an impediment beyond control..... 28
 - b. Art. 79 should be interpreted based on the principle of good faith 29
 - II. Tariffs imposed by Equatoriana constitute to a hardship under the UNIDROIT Principles..... 31
 - a. The Tariffs constitute to a hardship under Art. 6.2.2..... 31
 - b. CLAIMANT is entitled to a price adaptation under Art. 6.2.3..... 33

PRAYER FOR RELIEF34

ABBREVIATIONS

¶/¶¶	Paragraph/paragraphs
§	Section
AA	Arbitration Agreement
Apr	April
Art./Arts.	Article/Articles
C.	Comment
CISG	United Nations Convention on Contracts for the International Sale of Goods (2010)
CE	CLAIMANT's Exhibit
Cl.	Clause
DDP	Delivery Duty Paid
Feb	February
GATT	The General Agreement on Tariffs and Trade, July 1986

HKIAC Rules

Hong Kong International Arbitration Centre Administered Arbitration Rules

IBA Rules

International Bar Association Rules on The Taking of Evidence in International Arbitration

i.e.

Id est (that is)

Jan

January

Jul

July

Jun

July

Mar

March

No.

Number

NOA

Notice of Arbitration

NY Conv.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

PO1

Procedural Order No. 1

PO2

Procedural Order No. 2

pg.

Page

Q	Question
RE	RESPONDENT's Exhibit
Rec.	Record
RNOA	Response to the Notice of Arbitration
Sep	September
Sales Agreement	Frozen Semen Sales Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT	UNIDROIT Principles of International Commercial Contracts (2016)
WTO	World Trade Organization

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(2010)

STATEMENT OF FACTS

CLAIMANT: Phar Lap Allevamento, referred to hereinafter as “CLAIMANT”, is a renowned stud farm in Mediterraneo, offering frozen semen of its champion stallions for artificial insemination.	
RESPONDENT: Black Beauty Equestrian, referred to hereinafter as “RESPONDENT”, is an equestrian facility in Equatoriana, famous for its broodmare lines producing world champions.	
21 MAR 2017	RESPONDENT contacted CLAIMANT, inquiring of the availability of Nijinsky III’s frozen semen, amidst the temporary lift of Equatoriana’s ban on artificial insemination of racehorses.
24 MAR 2017	CLAIMANT agrees to sell 100 doses of frozen semen, as requested.
28 MAR 2017	RESPONDENT objected to the choice of law, and forum selection clause; suggesting for Mediterranean law to govern the contract and insisted on delivery as per the DDP Incoterms.
31 MAR 2017	CLAIMANT agreed to the DDP Incoterms subjected to certain limitations and requested for the inclusion of a hardship clause.
11 APR 2017	CLAIMANT changed the seat of arbitration from Equatoriana to Danubia.
06 MAY 2017	The contract was finalized. The original negotiators were replaced before the contract was concluded
NOV 2017	Equatoriana imposed tariffs on, <i>inter alia</i> , frozen horse semen from Mediterraneo.
20 JAN 2018	CLAIMANT informed RESPONDENT that the final shipment might be withheld until the parties agreed on a price adjustment due to the increase in the cost of shipping that had arisen due to the tariffs imposed.
23 JAN 2018	The final shipment was sent out by the CLAIMANT on the understanding that the RESPONDENT is agreeable to a price adaptation.
12 FEB 2018	RESPONDENT breached the contract by reselling the frozen semen without the consent of the CLAIMANT, and refused to make additional payment.
31 JUL 2018	CLAIMANT filed the Notice of Arbitration.
24 AUG 2018	RESPONDENT submitted the Response to the Notice of Arbitration.
02 OCT 2018	CLAIMANT informed the tribunal of receiving reliable information regarding RESPONDENT’s request for a price adaptation in a separate arbitration, in which RESPONDENT was affected negatively by the same tariffs imposed by Mediterraneo.

ARGUMENTS

ISSUE I: THE TRIBUNAL IS ALLOWED TO ADAPT THE CONTRACT

A. The law of Mediterraneo allows the Tribunal to adapt the contract

1. The tribunal can adapt the contract as **(I)** the AA is governed by the law of Mediterraneo; and, as **(II)** Mediterranean law provides for a broad interpretation of AAs, the tribunal has the power, with jurisdiction, to adapt the contract.

I. The law of Mediterraneo governs the AA

2. CLAIMANT holds that the AA is governed by the law of Mediterraneo i.e. UNIDROIT. As a question as to the jurisdiction of the arbitrators to decide on a particular issue between the parties will be determined by the law governing the AA [*Dalmia v. NB of Pakistan; Deutsche Schachtbau v. Shell Intl.*], the issue as to the tribunal's authority to adapt the contract will be decided based on Mediterranean law. As Mediterranean law provides for a broad interpretation of AAs, this tribunal has the jurisdiction and power to adapt the contract.
3. The AA, in Cl. 15 of the Sales Agreement [**CE 5**], is governed by the law of Mediterraneo as **(a)** the law of the underlying contract also governs the AA; **(b)** the choice-of-law analysis leads to this conclusion.

a. The law of the contract also governs the AA

4. The Sales Agreement is governed by the law of Mediterraneo [**CE 5, Cl. 14**]; however, the AA itself does not have a specific choice-of-law clause attached to it. Where the substantive contract contains an express choice-of-law, and the agreement to arbitrate does not contain a separate choice-of-law, the "latter agreement will normally be governed by the body of law chosen to govern the substantive contract" [*Sonatrach v. Ferrell Intl.*]. This position is widely accepted in international arbitrations [*Germany No 73; Krauss v. Bristol Myers*] and by commentators [*Collins, pg. 127; Jarvin, pg. 52; Petrochilos, pg. 33*]. Hence, the AA too is governed by the law of the underlying contract i.e. Mediterranean law. Although RESPONDENT may attempt to rely on the presumption of separability extending to the situation at hand, that would fail, as separability is not an issue at all in the case at hand.

b. According to the choice-of-law analysis, Mediterranean law governs the AA

5. Although different forums may apply different conflict of laws rules to conduct the choice-of-law analysis, the conflict of rules of all three countries involved in the facts apply the same rules i.e. the Hague Principles [**PO 2, Q 43**]. Although RESPONDENT may contend that the Hague Principles are not applicable to AAs based on **Art. 1(3)(b)**, the commentary provides that such qualification is only if there is an issue regarding the *material validity* (e.g. fraud, mistake, misrepresentation etc.)

of AAs [**Hague Principles Commentary, ¶1.26,**]; here, there is no such issue – hence, the Hague Principles will apply. **Art. 4** provides that, firstly, the express choice, and secondly, the implied (tacit) choice of the parties must be considered. If these cannot be clearly discerned, then, the law that has the closest and most real connection to the AA must govern it [**Dicey/Morris/Collins, ¶16-016**]. Hence, the law that governs the AA is to be decided through a three-stage inquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection.

i. **There is no express choice-of-law to govern the AA**

6. The Sales Agreement does not expressly subject the AA to any particular law [**CE 5**]; it is silent on the matter. Hence, the next-step of the choice-of-law test must be considered.

ii. **The implied choice of the Parties is for the AA to be governed by Mediterranean law**

7. CLAIMANT, in its email dated 11 April 2017 [**RE 2**] communicated to the RESPONDENT, in response to the RESPONDENT's suggestion that the arbitration agreement be governed by the law of Equatoriana, that as per the CLAIMANT's internal policy, a contract submitted to a foreign law or providing for the dispute to be resolved in the state of the counterparty required the consent of the Creditors' Committee. [**RE 2, ¶1**]. Through this, the RESPONDENT's initial intention to have the arbitration agreement governed by Equatorianian law was invalidated. Despite the fact that the approval of the Creditors' Committee was not required for arbitration clauses [**PO2, Q14**], the RESPONDENT cannot rely on this as there is no realistic possibility of RESPONDENT, an entirely different business entity from a different country, with differing business obligations to its own creditors, having known this. It could not have "been aware" of anything other than the CLAIMANT's intention to not have Equatorianian law apply to the arbitration agreement [**Art. 4.2.1 UNIDROIT**].

8. In the same letter, in the paragraph following the proposed arbitration clause [**RE 2, ¶4**], the CLAIMANT unequivocally stated that the law applicable to the Sales Agreement will be the law of Mediterraneo. Of note here is that the arbitration agreement too is part of the Sales Agreement [**CE 5, Cl. 14**]. The implied intention of the parties is to be based on the provisions of the contract or the circumstances i.e. the conduct of the parties and other factors surrounding the conclusion of the contract [**Hague Principles Commentary, ¶¶4.7, 4.13,**]. Such a choice of law to govern the contract can be taken as the parties impliedly intending that the AA too is to be governed by the same law – here, in effect, that would mean that the AA is to be governed by the law that governs the Sales Agreement i.e. the Law of Mediterraneo [**supra**].

9. Following this, there was no objection nor request for clarification by RESPONDENT as to the law applicable to the arbitration agreement. The fact that the negotiators had to be replaced or that

the RESPONDENT's replacement negotiator took no further interest in the notes made by Mr. Antley [PO 2, Q 6] is in no way attributable to CLAIMANT, especially since the replacement negotiator for RESPONDENT, Mr. Krone, had access to *all* prior emails exchanged between the replaced negotiators [PO 2, Q5].

10. Even if the Tribunal were to decide that this were not the case, the next step of the three-tier process can be considered.

iii. **Alternatively, the closest and most real connection test deems the law of Mediterraneo to be applicable to the AA**

11. The function of this test is to determine the law that has the “most significant relationship” and “closest connection” to the AA [ICC No. 4367]. In doing so, factors specific to the AA must be taken into account [Fouchard/Gaillard/Goldman, ¶428]. In this case, the subject matter of the contract i.e. frozen semen of Nijinsky III, a world class stallion [CE 1, ¶1] is from Mediterraneo; the frozen semen was offered as per the “Mediterraneo Guidelines for Semen Production and Quality Standards” [CE 2, ¶5, **emphasis added**]; the final negotiations and the signing of the Sales Agreement took place in Mediterraneo [PO2, Q14]; the non-refundable fee payable by RESPONDENT is to the “Mediterraneo State Bank” [CE 5, ¶3, **emphasis added**]. These facts point to the conclusion that the Sales Agreement itself is more closely connected with the law of Mediterraneo than any other law, and, consequently, the AA, which is to govern “any dispute *arising out of this contract*” [CE 5, Cl. 15, **emphasis added**], is thereby more closely connected to the same.

II. The Tribunal has the power with jurisdiction to adapt the contract

12. In considering the tribunal's power to adapt the contract, in order to determine the power of an arbitral tribunal to adapt or supplement a contract in an individual case, one has to refer simultaneously to three different legal sources: the AA, the law applicable to the arbitration, and the law applicable to the substance of the dispute, the *lex causae* [Berger, pg. 7].

13. While the AA provides the basic authority to adapt or supplement a contract, it is the law applicable to the arbitration proceeding which determines whether the arbitrators are procedurally authorized to decide on the contract adaptation or supplementation. The agreement in its combined effect with the law governing the arbitration agreement conveys the necessary authority to the arbitral tribunal [Berger, pg. 10].

14. The order of precedence of applicable laws in this instance is, firstly, the law governing the arbitral proceeding – the HKIAC Rules [CE 5, Cl. 15] The Rules, however, fail to provide for authority for adaptation of the contract by the tribunal. In such an instance, issues beyond those recognized by the law governing the procedural matters are governed by other law applicable to the parties'

arbitration agreement, including the *lex arbitri* [Born, pg. 490] – in this instance, it is the UNCITRAL Model Law.

15. Nevertheless, the UNCITRAL Model Law too fails to address the issue of contract adaptation by the *tribunal*. In cases where the applicable arbitration law remains silent on the arbitrator's authority to fill gaps and adapt contracts, one has to refer back to the competence of the domestic *courts* in that particular jurisdiction, based on the principle of synchronized competences: if the courts have the authority to adapt or supplement the contract, then the arbitral tribunal acting under the arbitration law of that jurisdiction enjoys the same competence [Holtzmann/Neuhaus, pg. 1126, 1131].
16. However, as the procedural law – UNCITRAL Model Law – does not provide a rule for the national courts, as per Berger, one has to go back to the substantive law of that jurisdiction which serves as an indicator for contract adaptation and gap-filling by courts and, accordingly, by arbitral tribunals.
17. In this case, as neither apply, the arbitrators would act as third-party interveners outside the procedural realm of an arbitration, irrespective of the fact that the Parties wanted an 'arbitral tribunal' deciding the case [Peter, pg. 256]. Hence, they have to be judged according to the law applicable to the contract – that, in this instance, is the law of Mediterraneo i.e. the UNIDROIT principles.
18. In the case of *Kuwait v. AMINOIL*, the court held that “there can be no doubt that ... a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations - or to modify a contract - *unless* that right is conferred upon it by law” [emphasis added]. The law governing the Sales Agreement allows for the tribunal to adapt the contract in instances of hardship, and hence albeit the absence of express authority from the parties, it is empowered to order the price payable for the final delivery of frozen semen be adapted.
19. Finally, it is the law applicable to the substance of the dispute which has to be consulted to decide on the validity of the adaptation standards agreed upon by the parties, the canon of interpretation to be applied to such clauses and the methods of adaptation to be applied by the arbitrators if the contract does not contain specific instructions for the tribunal [Briner, pg. 12; ICC No. 6516].

B. Even if the law of Danubia is to apply, the tribunal can adapt the contract

20. CLAIMANT submits that even if the tribunal were to decide that the law of Danubia governs the AA, the tribunal can nonetheless adapt the contract as (I) the AA expressly confers such powers; notwithstanding that, (II) the tribunal has authority to adapt as per the law governing the arbitration at its seat; and also, (III) in accordance with modern developments of the law.

I. The AA expressly confers powers to the tribunal to adapt the contract

21. An arbitral tribunal has the power to change the terms of a contract if the AA contains an express authorization for it to do so [**Redfern/Hunter, ¶¶8-20**]. In the case at hand, the AA provides for “*any dispute arising out of this contract*” to be “referred to and finally *resolved* by arbitration” [**CE 5, Cl. 15, emphasis added**]. The current dispute is regarding the power of the tribunal to adapt the price of the frozen semen, and this amounts to a valid *dispute* which *arises of* the contract between the Parties. Hence, the tribunal has express authorization to *resolve* and decide upon the dispute as per the AA, i.e. adapt the price.
22. The words “dispute arising ... of this contract” encompasses any sort of disagreement that may be asserted in proceedings where the parties take two opposing perspectives or positions and are viewed in contemporary national court decisions in favour of liberal interpretations, consistent with the more general pro-arbitration rule of interpretation [**Born, pg. 1348**]. This interpretation has been adopted and accepted by courts and is considered to be an accepted definition of a dispute [**Guangdong v. Conagra; Tjong v. ANTIG Inv.; Mustill/Boyd, pg. 123**]. Here too such a dispute exists, as the CLAIMANT and RESPONDENT are of two opposing views as to the question of contract adaptation by the tribunal, as the CLAIMANT agrees to such a notion [**NOA, ¶16**], and the RESPONDENT does not [**RNOA, ¶12**].
23. The resolution to the dispute, by the tribunal, is to adapt the price of the frozen semen, as per the CLAIMANT’s contention, as the Parties have expressly empowered the tribunal to do so. The law of Danubia, which is largely a verbatim adoption of the UNCITRAL Model Law [**PO2, Q14**], recognizes the tribunal’s power to adapt a contract provided there is express empowerment, by the parties, for the arbitrators to do so [**RNOA, ¶13**]. This is further evidenced in **Art. 28 (3)** of the Danubian arbitration law, which contains the general standard of ‘express authorization’ in order to confer exceptional powers to the tribunal; these powers include the power to adapt a contract [**PO2, Q36**].
24. RESPONDENT contends that the Parties have not expressly authorized the tribunal with such power of adaptation [**RNOA, ¶13**], and that such possibility has been curtailed, by RESPONDENT, by diminishing the scope of the HKIAC Model Clause through the removal of any words which may lead to such interpretation [**RNOA, ¶13**]. However, contrary to the views of the RESPONDENT, the phrases excluded from the Model Clause by RESPONDENT only amounted to the exclusion of non-contractual claims, which does not bar adaptation of contract [**Berger, pg. 2**]. Further, whilst the law of Danubia requires express conferral of powers, such powers need not be found explicitly in the contract or the AA. In this instance, the ability of the tribunal to resolve a dispute which includes adaptation *is* express conferral of powers.

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25. The Black's Law Dictionary defines the phrase 'express authority' as "authority given...by explicit agreement, either orally *or* in writing". [**Black's Law Dictionary, 11th edition, emphasis added**]. Hence, it is not obligatory for the parties' conferral of express authorization to adapt the contract to be found explicitly in writing.
26. Further, on the notion of 'express authorization', the drafting history and commentary by the UNCITRAL Working Groups on **Art. 28(3)** UNCITRAL Model Law (identical to **Art. 28(3)** Danubian arbitration law, where the general standard is derived from [**PO2, Q36**]), make no indication regarding a form requirement i.e. powers to adapt be explicitly in writing [**Seventh Secretariat Note, Art. 28, pg. 790, ¶8; Third Secretariat Note, ¶11**]. Hence, if such an obligation existed, or was even a matter of discussion, it would have been recorded in any of the *travaux préparatoires* of the UNCITRAL, but that is not the case.
27. In fact, the UNCITRAL Working Group has made it clear that such an agreement or authorization does not have to be made *expressis verbis*, but may also be derived from the significance and purpose of the agreement by the parties [**UNCITRAL Analytical Compilations, ¶15**].
28. In the case at hand, during the initial discussions regarding the adaptation clause between CLAIMANT's negotiator, Ms. Napravnik, and RESPONDENT's negotiator, Mr. Antley, the RESPONDENT conveyed its intention for the arbitral tribunal to adapt the contract should the Parties be unable to do so, explicitly clear. In response to the Ms. Napravnik's suggestion to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment, Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree [**CE 8, ¶4**]. This act amounts to an express conferral of powers to the tribunal to adapt the contract, should the need arise.
29. Further, upon Ms. Napravnik's suggestion to include an express reference in the hardship clause or AA of such power, Mr. Antley agreed to present the next day a proposal for such an amendment to the contract [**CE 8, ¶4**]. Such powers were not included in writing in neither the hardship clause nor the AA due to the failure on the part of the new negotiator for RESPONDENT, Mr. Krone, who, subsequent to observing the note in Mr. Antley's negotiation file and whilst having access to the Parties' previous negotiation, made no attempt to clarify or rectify [**PO2, Q5, 7**]. Hence, it is evident that the RESPONDENT, from the initial stages of the negotiation procedure, intended to provide the tribunal with such power; it is only upon the origin of the dispute, which now puts the RESPONDENT in an unfavourable position, it attempts to deviate from its stance on the conferral of powers to the tribunal.

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30. In addition to this, Ms. Napravnik confirmed that in order to provide the tribunal with the power to adapt the contract, no form requirement was necessary. She stated in her witness statement: “I suggested to clarify that issue and to include an express reference into the hardship clause or the arbitration clause to avoid any doubts, irrespective of the fact that *from a legal point of view that was not necessary*” [CE 8, ¶4, **emphasis added**]. She also stated that, regardless of the lack of such a provision in the AA, the Parties had successfully arrived at an agreement regarding the conferral of powers to the tribunal: “I cannot say whether they merely forgot it or considered it not to be necessary in light of *our tentative agreement on the issue*” [CE 8, ¶5, **emphasis added**].
31. In the case of *American Intl. and AIG v. X*, the court analysed the phrase ‘express authorization’ as “[to] openly declare their disregard (of the applicable law), or their intent (to decide on equity, as opposed to the applicable governing law)”. In this instance, the RESPONDENT, has not negated its previous position on conferral of powers of adaptation to the tribunal before the outset of the dispute, and therefore, the only conclusion a reasonable individual in the position of the CLAIMANT could have reached is that the RESPONDENT’s stance, in regard to adaptation by the tribunal, remained unchanged.
32. In *Kuwait v. AMINOIL*, the arbitrators declared: “A tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or *by the express consent of parties*”; this is satisfied in this instance.
33. In *Liberty Reinsurance v. QBE*, the tribunal held, in regard to **Art. 28(3)** UNCITRAL Model Law, that there was no express authority as there was no common intention found in the parties’ two separate arbitration clauses. In the instant case, although the intention of the Parties to confer powers to the tribunal in order to adapt was not recorded in the AA due to the RESPONDENT’s carelessness, the Parties’ intention to allow such power is evident.
34. Moreover, consent can also be granted in the course of the arbitration. Such ad hoc consent may be of practical relevance where both parties are interested in an adaptation of the contract and only disagree on how exactly it should be done [Klausegger/Klein/Kremslehner, pg. 109]. Hence, it would be improper and unreasonable to require *explicit* [**emphasis added**] authorization to adapt, to be found within the contract or the AA.

II. Alternatively, the tribunal can adapt the contract as per the law governing the seat of arbitration

35. Even if the tribunal were to decide that the AA does not provide express empowerment to adapt the contract, the price may still be adapted as per the *lex arbitri* [Brunner, pg. 493]. The *lex arbitri* in the instant case is the law of Danubia [CE 5, ¶15], which is a verbatim adoption of the

UNCITRAL Model Law [PO2, Q45]. The law of Danubia allows for adaptation of contracts by arbitrators provided there is express conferral of such powers by the parties; without prejudice to the previous argument, this is not the case here. Hence, the *lex arbitri* is considered to be silent on the matter.

36. However, based on the doctrine of synchronized competencies, a gap in an arbitration law may be filled by having recourse to rules dealing with the *lex fori* i.e. procedural rules applicable to the state courts, and substantive law rules of the state of the arbitral tribunal's seat. In the case at hand, the Danubian contract law – the UNIDROIT [PO2, Q45] – would be what is used in the courts of Danubia if the *lex arbitri* is silent [Berger, ¶60].
37. Hence, if the *lex fori* recognizes a hardship exemption and the adaptation of the contract as a possible legal consequence as a matter of substantive law, and state courts are given the procedural power to adapt a contract, arbitral tribunals too will have the same powers. Art. 6.2.3(4) UNIDROIT allows for such adaptation of the contract as a result of hardship; hence, as per the doctrine, this privilege exercised by the courts could overreach for the arbitral tribunal, has per the *lex arbitri*, to exercise and adapt the contract [Frick, pg. 194-95].
38. The Swiss Federal Tribunal in the *N.V. Distrigas Case*, where an award was challenged on the grounds that an arbitral tribunal, which had its seat in Switzerland should not, in the absence of an explicit authorization in the AA, be allowed to fill a gap in the disputed contract governed by Belgian law. The court rejected this argument and confirmed that under the Swiss *lex arbitri*, arbitral tribunals have the power to fill gaps, even in the absence of an explicit power to do so in the AA. This decision makes it clear that Swiss arbitration law also confers the power to adapt contracts to meet changed circumstances on arbitral tribunals, since Swiss substantive law provides for the possibility of contract adaptation [Frick, pg. 522]
39. Hence, even if the tribunal does not possess express authorization as per the AA, it can nonetheless express powers of adaptation as per the *lex arbitri*, which, in turn, is empowered by the *lex fori* through the doctrine of synchronized competencies.

III. Alternatively, the tribunal can adapt the contract based on modern developments of the law

40. Another mechanism through which the tribunal may adapt the contract is the modern developments supporting the assumption of a more extensive jurisdiction for arbitral tribunals, including the authorization to adapt contracts [Berger, pg. 1375; Frick, pg. 196].
41. At the sixth session of the UNCITRAL Working Group, where adaptation and supplementation of contracts were discussed, and a draft article was to be included in the Model Law, the Secretariat of the Model Law Drafting Committee held, “In deciding the question of whether an arbitral

tribunal, in its capacity as an arbitral tribunal, may be authorized to adapt a contract, account may be taken of the trend towards a broader concept of arbitration and of the goal of the Model Law to meet the needs of the parties in international trade in decades to come” [UNCITRAL Working Paper 44, ¶ 22].

42. The Secretariat further states that special authorization is not required by the parties or by a Model Law provision for the tribunal to adapt the contract in two instances as it has inherent powers to do so: firstly, if it is a situation of changed circumstances [UNCITRAL Working Paper 44, ¶9]; secondly, if it is regarding a dispute on a claim for a remedy, which depends on a question that is not expressly covered in the contract [Working Paper 44, ¶13]. In this case, the adaptation is requested of the tribunal due to changed circumstances by the imposition of tariffs [NOA, ¶12], and is done so due to the lack of an express adaptation clause in the parties’ contract. Hence, the tribunal should invoke their inherent powers to make such an adaptation.
43. The Secretariat note further states that “the power to be provided by the proposed Article was not to be confused with the powers of arbitrators under the law of many countries to consider changed circumstances or to interpret a contract in the course of deciding a normal dispute regarding contractual obligations,” and that the exercise of these latter powers was an inherent part of deciding the legal dispute, where “no special authorization by the parties was needed and no provision need be included in the Model Law” for this type of adaptation or interpretation of contracts [Third Secretariat Note, ¶¶ 9, 13].
44. Hence, as per modern developments on the notion of adaptation by arbitral tribunals, especially on pursuance to the UNCITRAL Model Law – which the law of Danubia is a near verbatim adaptation of [PO2, Q14] – the tribunal *is* capable of adapting the contract.

C. Alternatively, the inherent powers of the tribunal allow adaptation of the contract

45. CLAIMANT asserts that notwithstanding express power granting the tribunal to adapt the price, the tribunal possesses inherent powers to do so. Inherent powers are “limited powers that can only be exercised in circumstances so compelling that failure to exercise such power would risk subverting the integrity of the tribunal or the arbitral process or endangering the enforceability of the award” [ILA Report, pg. 14]. The *Iran-US Claims Tribunal* further held that “[they are] powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties’ fundamental intent to create an institution with a judicial nature” [Iran-US Claims Tribunal].
46. The source of this inherent power is the basic requirement that a tribunal must fulfil its adjudicatory function. A tribunal is responsible to settle disputes between the parties in a manner *that is fair and*

just; therefore, it must have the power to take steps necessary to carry out its mandate in an *equitable and efficient manner* [Brown, pg. 230, emphasis added].

47. The decision in *Rompetrol v. Romania* is a touchstone for how tribunals will determine whether to call upon their inherent powers to make a decision where there is no express authority i.e. in “circumstances which genuinely *touch on the integrity of the arbitral process* as assessed by the Tribunal itself” [emphasis added]. Therefore, inherent powers are used in compelling situations to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy [Moses, pg. 8].
48. In the instant case, the tribunal must conclude that it possesses such inherent powers to adapt the price, as it has been appointed in order to fulfill its judicial adjudicatory function [supra] and settle the dispute between the Parties, in which the CLAIMANT has been denied the increase in price by the RESPONDENT in an inequitable and unjust manner, following being given the impression of payment in order to persuade the frozen semen to be delivered to the RESPONDENT. Hence, it is the duty of this tribunal to ensure fairness and justice to both Parties, and invoke its inherent power to order adaptation of the price in order for the integrity and legitimacy of the arbitral proceeding, as well as those of the tribunal, to be upheld.
49. Further, the ICSID tribunal in *Siag and Vecchi v. Egypt* held that the inherent power to exist “independently of any statutory or contractual reference” and to be a broader expression of the tribunal’s “inherent power to take measures to preserve the integrity of the proceedings”.
50. Hence, the RESPONDENT cannot argue that the silence of the contract, in regard to the tribunal’s inherent powers, is a reflection of its inapplicability, as when there is silence regarding an arbitrator’s power to deal with a certain issue, the implication is not that there is no authority to act, but rather that there is no prohibition on acting in ways that are called for in the circumstances, as *it is an inherent power that need not be granted* [Abaclat v. Argentine Republic, emphasis added]. In deciding to arbitrate, parties consent to a legal process involving certain minimum standards of due process and fairness upon which they should not be able, consistent with that agreement, to renege, and arbitrators should be seen as having the authority to enforce these standards [Allsop, ¶54].
51. If the RESPONDENT so wished to place a limitation on the power of the arbitrator, they must make such limitation very clear. In *Relia Star v. EMC*, the parties had included a provision in their arbitration clause that limited the arbitrators’ ability to allocate costs. Because one party did not act in good faith, the tribunal, had inherent authority to sanction that party by an award of attorney’s fees. However, in the instant case not only is no such expression of exclusion been made, has not

acted as per the doctrine of good faith, and therefore, in order to uphold the integrity of the arbitral proceeding, the tribunal must invoke its inherent powers and allow for adaptation of price.

CONCLUSION FOR ISSUE 01: The tribunal is allowed to adapt the contract as the AA is governed by the law of Mediterraneo; even if Danubian law were to apply to the AA, the tribunal can still adapt the contract; the tribunal's inherent powers too allow for this.

ISSUE 02: CLAIMANT IS ENTITLED TO RELY ON THE PARTIAL INTERIM AWARD INVOLVING THE RESPONDENT FROM THE OTHER PROCEEDINGS

A. The evidence must be admitted and evaluated

54. In international commercial arbitration, the parties are free to submit *any* evidence in order to prove facts necessary to establish their cases [Pietrowski, pg. 373; *Interhandel Case*; *Niagara Falls Case*]. This is in line with the principle of general admissibility of evidence in arbitration i.e. all evidence is presumed to be admissible if the basic prerequisites of admissibility – relevance and materiality – are satisfied [Pilkov, pg. 154]. In a general context, in evaluating these prerequisites, the arbitral tribunal possess “broad discretionary rights” [Waincymer, pg. 792]. The HKIAC Rules, which govern this arbitration [CE 5, Cl. 15] also provide for the same [Art. 22.2].
55. CLAIMANT holds that the Partial Interim Award from the other arbitration involving RESPONDENT is both (I) relevant, and (II) material to this proceeding; therefore, (III) it is admissible and must be evaluated.

I. The evidence is relevant to the current arbitral proceeding

56. The HKIAC Rules provide that the tribunal shall determine whether any evidence is to be deemed relevant [Art. 22.2], but the Rules themselves do not define the term ‘relevance’. Relevance of evidence in international commercial arbitration has been defined as having a logical connection with what the evidence purports to prove in the case [Pilkov, pg. 148]; in other words, the evidence is relevant if it can be used to present the case [Marghitola, pg. 49]. Even evidence of “questionable relevance” is allowed to be presented by arbitrators [Mehren/Salomon, pg. 290]. Here, the relevance of the evidence is anything but questionable, and hence *must* be admitted. CLAIMANT holds that the evidence is indeed relevant as it has a logical connection with the present proceedings and CLAIMANT's prayer for relief – that this tribunal must adapt the contract. The logical connection flows from the striking similarity of the facts of the two arbitral proceedings.
57. Both proceedings involve disputes that arose of dealings on horse breeding [NOA ¶7; PO2, Q39]; in both, the negotiator of the disputed contract on behalf of RESPONDENT was Mr. Antley [PO2, Q39]. Also, the elements of both contacts are matching: both provided for delivery DDP

[CE 5, Cl. 8; PO2, Q39], Mediterranean law governs both contracts [CE 5, Cl. 14; PO 2, Q39], and both contain a hardship clause of similar bases [RE 2, ¶5; PO2, Q39]; also, the AA itself is of the same base in both contracts [RE 1, ¶1; PO2, Q39]. Moreover, both AAs are governed by the HKIAC Rules – although two different versions, there is no variance that is of relevance to this case – and provide for arbitration by three arbitrators [CE 5, Cl. 15; PO2, Q39]; also, the AAs are governed by the same law [supra; PO2, Q39].

58. Further, in both instances, the dispute between parties arose out of the imposition of tariffs [CE 7, ¶1; PO2, Q39], and a renegotiation of price was requested by the affected party; of note too is that in both cases the RESPONDENT is represented by the same counsel [PO2, Q38].
59. Hence, as the facts of both proceedings are similar, based on the interests of uniformity, espoused in the NY Conv. [UN Conf. 1958, ¶5], the Partial Interim Award rendered by the other tribunal is relevant. This is especially so, since, although the facts giving rise to both proceedings are alike, RESPONDENT's behavior and approach have been entirely different. Further, the evidence is of sufficient weight: it mirrors the factual and legal perspectives of this proceeding, and reflects on the irreconcilable conduct of RESPONDENT.
60. In the *Insurance Co. v. Lloyd's*, Colman J held that information about an arbitral award can be used in another arbitration as evidence to pursue a legal right of a stranger to the arbitration agreement. It has also been stated that evidence from other proceedings might also be used to show that the opposing party made contradictory assertions in different instances [Waincymer, pg. 789]. Therefore, the CLAIMANT is allowed to submit this evidence to establish that the RESPONDENT has acted in a contradictory manner.

II. The evidence is material to the outcome of the case

61. Similar to relevance, although the HKIAC Rules provide that it is within the tribunal's discretion to deem evidence to be 'material' [Art. 22.2], they provide no further definition. Materiality is based on whether the evidence in question is needed to allow the tribunal to complete consideration of the legal issues presented to it [Kaufmann-Kohler/Bärtsch, pg. 18].
62. Here, the Partial Interim Award from the other proceedings is material as it gives a better understanding of RESPONDENT's practices – it shows that RESPONDENT, which in the current proceedings vehemently denies any need for adaptation [RNOA, ¶18], has itself requested for the adaptation in similar circumstances, when the RESPONDENT itself was the party that was affected by tariffs [PO2, Q39]. This is so despite that the fact that the contract in both cases was negotiated on behalf of RESPONDENT by the same person, included similar AAs and hardship clauses, and gave rise to similar disputes, in which RESPONDENT is represented by the same counsel [supra].

63. The Partial Interim Award from the other proceedings further shows that the other tribunal has asserted its power adaptation of the contract, in circumstances almost identical to the present, [PO2, Q39]. Hence, the evidence is material as it provides insight into the meritless and contradictory nature of RESPONDENT's counter-claim and resistance to adapting the contract.

III. The evidence is admissible

64. As the prerequisites for admission of the evidence – relevance and materiality – are satisfied, it must be admitted. Further, there is no reason for the evidence to not be admitted, as the RESPONDENT has not substantiated, in any way, its unfounded claims that the evidence has been obtained by improper means. Of note is that the burden of proof is on the RESPONDENT to prove what it has claimed [Art 22.1, HKIAC Rules; Sandifer, pg.189-90.], and it has done nothing to so prove it.

B. There has been no breach of confidentiality nor an illegal hack

66. As per the HKIAC Rules, the burden of proving the allegations is on the RESPONDENT [Art. 22.1]. The RESPONDENT has not substantiated, in any way, its unfounded claims that the evidence has been obtained by improper means.

67. Moreover, for there to be an illegal hack, the standard of proof the RESPONDENT must meet is beyond doubt [ICC No. 5622]. In ICC No. 6401, the arbitral tribunal held that with respect to allegations of a criminal nature such as corruption, a higher standard than the principle of 'preponderance of the evidence' would apply. The Iran-US tribunal went so far as to say that in the context of an allegation of bribery, "if reasonable doubts remain, such an allegation cannot be deemed to be established" [ICC No. 6401]. RESPONDENT must therefore prove the hack on its computer system was an illegal act on a standard higher than the preponderance of evidence.zt it has failed to do so.

C. Notwithstanding a breach of confidentiality and illegal hack, the evidence is admissible

I. The evidence is publicly available and admissible

68. Even if the partial award was acquired through a breach of confidentiality, CLAIMANT submits that it is admissible as evidence, as the award is of public domain. In the instant case, the information regarding the partial award is to be provided to the CLAIMANT by a company which provides intelligence on the horse racing industry [PO2, Q41], and therefore is obtainable by any of the public who so requests such information from it.

69. A tribunal will be willing to admit any documents available in the public domain, since ignoring them would lead to an unreasonable conclusion, which could make the award subject to challenge [John, ¶6]. Confidentiality in arbitration ends where the public domain begins. Information in the

public domain, even if used in arbitral proceedings, does not and cannot acquire through such use a confidential status. Information in the public domain is that which is openly accessible information that the parties acknowledge is from external sources, before or in the course of the proceedings, even if it relates to the opposing party [**Smeureanu, pg. 111**] ¶. Hence, the RESPONDENT cannot argue that such evidence would be classified as inadmissible, as inadmissibility would lead to procedural unfairness on one of the Parties.

70. A party which relies on illegally obtained evidence found in the public domain (e.g. through WikiLeaks), may find the evidence admissible [**Valcke, ¶4**]. In *Caratube Intl. v. Kazakhstan*, the tribunal accepted leaked information as evidence on the basis that his information is now public. The company was not involved in the other arbitration proceedings and nor were they privy to the contract between RESPONDENT and the Mediterranean buyer. Therefore, the company becomes an outsider i.e. the public. The company already has possession of the Partial Interim Award; therefore, the evidence has already entered the public domain [**PO2, Q41**]. The partial interim award is available for *anyone* to purchase. CLAIMANT would therefore not be acting illegally in acquiring the evidence, as it is purchasing it from a company which is part of the public. Hence, the evidence is admissible and can be relied upon.

71. In *Ahongalu Fusimalohi v. FIFA*, it was considered whether there were court findings that the evidence was illegally obtained. However, in the present case, there are no such findings by the court which bar the tribunal from using the evidence, and the RESPONDENT has not taken steps to obtain such an findings or an injunction from courts.

72. In *Ready Bake Inc. v. UFCW*, it was held that the manner in which the evidence was obtained was of no concern as the action of the person committing the illegal act could be pursued criminally or pursued civilly and hence the evidence, regardless of the manner it was obtained, is admissible. In the same manner, although RESPONDENT may pursue legal action against the relevant parties based on the manner in which the evidence was obtained, that does not, however, bar the evidence from being admissible.

II. Evidence should be admissible to pursue a legitimate legal interest

73. Even though the evidence could have been obtained in an illegal manner, it is still admissible in order to pursue a party's legitimate interest [**Prestressed Systems Inc.**]; in the present case, the legitimate interest of the CLAIMANT is to present its case. It is unjust to not to allow the CLAIMANT rely on the evidence that is freely available, and that which is material and relevant to the case, even if it might have been obtained illegally by a third party – to not to do so would be a violation of *audi alteram partem* [**Université du Québec v. Trois**]. If the evidence is not admitted,

it may give rise to concerns over due process [Mehren/Salomon, pg. 290], as a party must be able to present its case [NY Conv. Art. V(1)(b)].

74. In *Ali Shipping v. Trogir*, the court held that a party is allowed to submit a previous arbitral award, regardless of confidentiality, when the issues are closely linked and involve similar parties, by allowing that claimant to submit evidence from a previous arbitration between that claimant and another party. Furthermore, the tribunal in *Ali Shipping* tribunal referred to the judgement of *Hassneh Insurance Co. v. Stewart*, where the court held that an arbitral award should be disclosed regardless of the confidentiality clauses to pursue a legitimate legal interest of a “stranger to the contract”. Similarly, in the present case, CLAIMANT must be allowed to rely on the previous award as it enables the CLAIMANT to pursue its legitimate interest of presenting the case and to establish the contradictory nature of RESPONDENT’s actions.

III. Even if the evidence was obtained through a breach of a confidentiality agreement, it is admissible

75. The CLAIMANT submits, contrary to the RESPONDENT’s contention that the admittance of the Partial Interim Award as evidence would not amount to a violation of neither contractual nor statutory obligations. While the CLAIMANT requests the Partial Interim Award to be admitted as evidence in the proceedings to substantiate its position on adaptation, the CLAIMANT did not provide the information regarding the Partial Interim Award to the intelligence company. The award was provided to the company by either a hacker or by one of two former employees of RESPONDENT [Rec. pg. 50, ¶3]; neither have any connections to the CLAIMANT. At most, both potential sources are connected only to the RESPONDENT, as they had been the RESPONDENT’s employees, and the hacker could have only penetrated the RESPONDENT’s computer systems due to their outdated firewall [PO2, Q41]. The two former employees of RESPONDENT were under a confidentiality obligation when they provided the information as they were fired on 6 July 2018 [PO2, Q41], whilst the award was rendered on 29 June 2018 [PO2, Q39]; therefore if they indeed were the source of the leak, it is not the CLAIMANT but the RESPONDENT’s own employees who breached the standards that the RESPONDENT now accuses CLAIMANT of breaching.

76. Furthermore, the admittance does not amount to a violation of a contractual obligation on confidentiality by the CLAIMANT. Although the RESPONDENT relies on the contract between itself and the other Mediterranean buyer, which is governed by the 2012 HKIAC Rules and imposes an obligation on *those* parties to keep proceedings confidential [Rec. pg. 50, ¶1], the CLAIMANT is *not privy* to that contract – the CLAIMANT has no obligation as to confidentiality neither

contractually nor statutorily; this is nothing but an allegation by the RESPONDENT that has not been substantiated at all.

77. The evidence is admissible as the Partial Interim Award does not amount to privileged information. Evidence can only be withheld from admittance when such evidence is protected by privilege and/or is in contravention with public policy [**Pilkov, pg. 150**]. In the instant case, the evidence that CLAIMANT seeks to submit is not information of privilege nor public policy. ‘Privilege’ is a right to withhold certain documentary or testimonial evidence from a legal proceeding, is a legally recognized right, and includes the right to prevent another from disclosing such information [**Mosk/Ginsburg, pg. 345**]. While confidentiality is an essential precondition of privilege, the two are not synonymous – evidence can be considered confidential but not be protected by privilege [**Prudential Assurance v. Fountain Page**]. Here, the information is neither privileged nor confidential and so does not proscribe the CLAIMANT from admitting such evidence for the tribunal’s consideration.
78. There exist various forms of evidentiary privileges that parties may rely on, such as attorney-client privilege, professional privilege and trade privilege; however, the only form of privilege that opposing parties in a dispute can claim is that of ‘settlement privilege’, and is the only exception to the general rule that there cannot be any privilege between such parties in dispute [**Gonzalez-Bueno, pg. 305**]. Here, there is no settlement privilege; therefore, the Partial Interim Award cannot be considered privileged information – it must be admitted.
79. RESPONDENT cannot argue that the award falls within the ambit of attorney-client privilege and therefore to be inadmissible. The House of Lords in *Three Rivers v. The Bank of England* considered, attorney-client privilege to be legal advice and communications which are sought from a lawyer in his professional capacity, and communications relating to that purpose, made in confidence by the client. However, in this instance, the award cannot be considered confidential as a third party i.e. the intelligence company has acquired which.
80. Further, while it is generally accepted that evidentiary privileges should be available in arbitrations, that is so only by virtue of important public policy objectives, which are an essential requirement for information to be classified as privileged [**Sindler/Wüstemann, pg. 618**]. In *R v. Snider* the court held: “[the privilege against disclosure] requires as its essential condition that there be a *public interest* recognized as overriding the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions” [**emphasis added**]. Here, the admittance of evidence regarding the Partial Interim Award would not affect public policy as its disclosure would affect none other than the RESPONDENT and the CLAIMANT – so, this information is not privileged. Hence, the tribunal can admit evidence for consideration.

81. Further, the RESPONDENT cannot rely on **Art. 9(2)(b)** of the IBA Rules on Evidence, as the Parties have not agreed to the Rules' applicability; therefore, they are not binding on the parties or the tribunal; regardless, it is a meritless claim as the partial award nonetheless does not amount to privileged information [*supra*].

IV. The evidence is admissible even though it had been obtained through an illegal hack

a. The CLAIMANT had no part to play in illegally procuring such evidence - this was done by third-parties

82. In international commercial arbitration, it is within the discretion of the tribunal to decide on matters regarding the admission of illegally obtained evidence [*Methanex v. US; supra*], and specific consideration is to be given to *who* obtained the information illegally [*Waincymer*, pg. 797; *Valcke*, ¶2; **emphasis added**]]. In obtaining the information, if the illegal act was not committed by the party relying on it, or had no part to do with the manner in which the information was obtained (for instance, has not hired a third party to retrieve the information), that evidence is admissible even if it was obtained in an illegal manner [*Rose v. The King*]. Here, CLAIMANT has no connection with how the information was obtained; CLAIMANT only agreed to purchase the Partial Interim Award from a company providing intelligence on the horseracing industry [PO2, Q41].

83. Furthermore, the illegal hack was not committed by CLAIMANT or any of its employees. The computer system was hacked by an undisclosed source [PO2, Q41]. In *Vander v. US*, the Court placed heavy emphasis on the fact that the seizing officials and the agency seeking to use the evidence were agents of different sovereign; here, neither the intelligence company nor the employees of the RESPONDENT nor the hackers are agents of the CLAIMANT – they are agents of different sovereigns. In tribunal held that the evidence obtained by a news reporter acquired by the parties is admissible as the reporter was the one who violated the privacy of the party concerned if at all [*Vander v. US*].

b. There is an overriding interest to admit the evidence

84. Swiss arbitration rules provide the arbitrators the discretion to admit illegally procured evidence into proceedings and to take such evidence into account for the final award [*Berger/Kellerhals*, pg. 343]. As the HKIAC Rules, in a similar manner to the Swiss arbitration rules, give the tribunal the discretion to admit evidence that has been illegally obtained, the tribunal *can* admit evidence obtained illegally when there is an overriding interest to pursue the truth [*von Segesser*, ¶14].

85. CLAIMANT submits that the tribunal should hold the evidence to be admissible, as there is a need to '*pursue the truth*' [*von Segesser*, ¶14, **emphasis added**] on the RESPONDENT's unfounded allegations, that the contract does not allow for price adaptation as the "narrowly worded clause is

not applicable to the present impediment and does not provide for the requested remedy i.e. adaptation by the Arbitral Tribunal” and that the “RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators” [RNOA, ¶14]. Which are the two core issues in the present case, when RESPONDENT held to the contrary in a previous case which is similar to the facts of the present case. RESPONDENT did in fact enter in to a contract that depends on the discretion of the arbitrators to adapt the price and the impediment in question was governed by the hardship clause as the two hardship clauses as based on the same ICC hardship clause, i.e. One is an adaptation of the ICC hardship clause and the other is a narrow interpretation of it, which was drafted with the similar concerns [PO2, Q39; RE 2].

86. Assessing the truth is generally undertaken by balancing the interest in finding the truth against the legal interests which were harmed when the evidence was obtained. The following criteria is important in establishing the value for pursuing the truth [von Segesser, pg. 1]: (a) Firstly, the amount in dispute and the penalties at stake can contribute to the determination of the importance of finding the truth [von Segesser, pg. 1]. The higher the amount in dispute, the more is at stake and the more important the pursuit of the truth. In the present case, the amount in dispute is more than USD 1,250,00, which is a *substantial amount* and if the price is not adapted to reflect that amount it will lead to the financial ruin of the CLAIMANT. Hence this evidence is admissible. (b) Secondly, whether the interested party has evidentiary difficulties i.e. whether the evidence in question is the only and crucial piece of evidence for the party carrying the burden of proof with regard to their claim. In the present case, evidence of the RESPONDENT’s attempt to adapting the contract in the previous arbitration, while denying any possibility of adaptation in the present case is of *substantial importance* in establishing the false nature of the RESPONDENT’s allegations, and this contrary behavior of the RESPONDENT, which is of crucial importance and cannot be established without the admissibility of this evidence. In *United States v. Janis*, it was held that illegally obtained evidence may be submitted to courts in civil proceedings, as relevant and reliable evidence needed to establish the truth would be made unavailable if not. In the same manner, if the CLAIMANT was unable to rely on the previous arbitration, then the CLAIMANT will be unable to present evidence which shows that the RESPONDENT did in fact want to adapt the price when RESPONDENT was being affected by tariffs and now pleads otherwise. It is highly contradictory that in such case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable retaliatory tariff of 30% allegedly does not justify an adaptation when it is to RESPONDENT’s detriment.

87. Based on the ‘balance of interest’s test’ developed in *US v. Calandra*, if this evidence is not admitted, then there is a possibility for CLAIMANT will face bankruptcy [PO2, Q29]. This interest should be balanced against the interest of the RESPONDENT in ensuring that illegally obtained evidence will not be used in the arbitration. In *Adamu Award*, the tribunal held that evidence obtained in an illicit manner is admissible when there is an overriding public interest. Bankruptcy is considered as such a public interest [Veach, pg. 1214-1227], particularly, as CLAIMANT is one of the most prominent horse breeders in Mediterraneo and Nijinsky III, which is owned by CLAIMANT, is one of the most sought-after stallions for horse-breeding [NOA, ¶3]. Therefore, the imminent bankruptcy of the CLAIMANT, which is of a public interest to Mediterraneo, should be considered in holding that the evidence is admissible.

c. The current trend is to allow such evidence

88. After the leak of WikiLeaks diplomatic cables in 2010, there is a tendency to allow parties to introduce otherwise confidential information in arbitral proceedings [O’Sullivan, ¶¶1, 8]. For instance, in *Caratube Intl v. Kazakhstan*, leaked documents were deemed admissible, regardless of how they were obtained.

CONCLUSION FOR ISSUE 02: The Partial Interim Award from the other proceedings must be admitted and evaluated; this is so even if it were obtained through a breach of a confidentiality agreement or an illegal hack.

ISSUE 03: THE TRIBUNAL SHOULD GRANT THE CLAIMANT A PRICE ADAPTATION OF USD 1,250,000 OR MORE

C. The tribunal should grant a price adaptation under Clause 12 of the contract

89. CLAIMANT is entitled to the payment resulting from the adaptation of the price as (I) the 30% increase in Equatorianian tariffs impose a hardship on the CLAIMANT; and, (II) CLAIMANT does not bear the risk of tariffs which made the performance of the contract excessively onerous.

I. 30% Increase in Equatorianian tariffs impose a hardship on the CLAIMANT

90. The contract is a law for the parties [Maskow, pg 657]. Therefore, it is up to the parties to stipulate adjustment clauses. If the performance of the contract becomes excessively onerous because of a change of circumstances, the parties accept that the hardship clause is duly binding [*Canal de Craponne Case*]. Cl. 12 of the Sales Agreement [CE 5, Cl. 12] is a hardship clause that limits the liability of the CLAIMANT for unforeseen hardships which make the contract performance more onerous.

91. Hardship clause is a clause by which the parties will be able to request a rearrangement of the contract that binds them, if an intervening change in the initial basis on which they obligated

themselves, modifies the equilibrium of the contract to the point that one of the parties sustains a hardship [Ullman, pg. 82]. In the present case, the Parties have drafted a hardship clause which states 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” [CE 5, Cl. 12; **emphasis added**]. Therefore, the hardship clause in the current case requires the contract to be adapted based on the hardship occurred, to place the liability or the burden of risk on the ‘buyer’ i.e. RESPONDENT.

92. To establish the existence of hardship, criteria has been set as follows: **a)** the general situation on the date on which this agreement is based, has substantially changed so that either party suffers severe and unforeseeable circumstances, and the change of circumstances occurs after the time of conclusion of the contract **b)** performance of the contract has become excessively onerous; and, **c)** the burden of risk for changed circumstances should not be borne by the party affected by it [Delebecque, ¶9; *Argentina v. CMS; Speidel*, pg. 271; *Perillo I*, pg. 24].

a. Tariffs imposed by Equatoriana are unforeseeable

93. For circumstances to be considered as unforeseen, the event has to be external to the parties, exceed all reasonable expectations and result in a profound unbalancing of the contract. [Fucci, pg. 4; *Gaz de Bordeaux Case*]. Equatoriana, which has been a “strong advocate of free trade” [CE 6, **emphasis added**], has imposed a retaliatory tariff of 30% on all agricultural goods. Both the size and the coverage of the tariff not only changed the general situation in which the Parties contracted under, but it came as an immense surprise to the Parties [CE 6, ¶2]. Equatoriana has generally invoked the WTO dispute resolution mechanisms to solve disputes amicably [CE 6, ¶2], but in the present case, it imposed retaliatory tariffs which severely affected the circumstances under which the Parties contracted, which is a fundamental change to the approach it used to follow.

94. Following circumstances do not meet the criterion of unforeseeability: dramatic changes in market prices for products; unfavorable general economic circumstances in a country; currency fluctuations - severe failure of a central bank to grant authorization to pay in foreign currency when foreign exchange control regulations were in place at the time of contracting; and, hostilities between countries with a history of antagonism [ICC No. 2216; *CMS Gas v. Argentina; Himpurna v. Persero; Fucci*, pg. 18]. The facts of the present case does not fall under any of these criteria. Furthermore, “it is impossible to predict specific types of trade embargoes for particular products” [Kokorin/Weide, pg. 53]. Tariffs act in a similar manner as embargoes, as it is a restriction on trade imposed by a government of a country

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95. General principles of law state that the *pacta sunt servanda* (sanctity of the contract) [Liu, ¶1] is the basis of every contractual relationship [LIAMCO v. Libya; Sapphire Intl. v. Iranian Oil Company]. However, in the current case, the imposition of tariffs by the government of Equatoria on frozen horse semen affected the sanctity of the contract of the parties as an unforeseeable event and has made the performance of the contract by the CLAIMANT excessively onerous. In civil and common law, it is held that if performance was still possible, but a fundamental change in the circumstances surrounding the contract has rendered performance much more burdensome in a manner that continued, contractual liability appears as an unfair hardship for the debtor i.e. CLAIMANT [Zaccaria, pg. 136]. The debtor could then invoke the principle of *clausula rebus sic stantibus* (a contract is binding only as long and as far as matters remain the same as they were at the time of conclusion of the contract) [Horn, pg. 17].
96. CLAIMANT was already experiencing difficulties from financial hardship due to an unexpected increase in costs in a previous contract [CE 4, ¶4]. Therefore, the CLAIMANT was not willing to bear any further risks arising out of delivery of frozen horse semen [CE 4, ¶4, emphasis added] and RESPONDENT knew that the CLAIMANT would not have delivered the goods if RESPONDENT did not lead the CLAIMANT to believe that it would bear the burden of the tariffs [CE 8, ¶8; RE 4, ¶4], which shows that there was an implied understanding under the doctrine of *clausula rebus sic stantibus* that the CLAIMANT will only supply the goods if there are no unforeseeable hardships which would make the performance more onerous, or if the RESPONDENT bears such risks/cost associated with delivery under such circumstances
97. Cl. 12 of the contract should be interpreted to give meaning to the common intention of the Parties [Art. 4.1.1 UNIDROIT; Art. 8(1) CISG] which is to exempt the seller from liability in case of hardship. However, RESPONDENT contends the existence of such a common intention.
98. Hence, Objective intention of the parties have to be looked in the circumstances that the contract was made in. As a reasonable third party in the same circumstances would interpret [Art. 4.1.2 UNIDROIT; Art. 8(2) CISG] the terms ‘additional health and safety requirements or comparable unforeseen events’ to include ‘tariffs’ as a ‘comparable’ hardship to ‘additional health and safety requirements’ [CE 5, Cl. 12, emphasis added] and as the CLAIMANT has raised concerns about health and safety requirements and ‘import restrictions’ in the same e-mail [CE 4, 4¶] and the comparable unforeseen events should be interpreted to include ‘import restrictions’.
99. As both parties are members of the WTO [PO2, Q47], Tariffs should be interpreted as an ‘import restriction’ [ANNEX I Ad Arts. XI, XII, XIII, XIV and XVIII GATT] which the CLAIMANT considered as an unforeseen event when drafting the contract [CE 4, ¶4]. Therefore, Cl. 12 should be interpreted to incorporate tariffs in to the meaning of “comparable unforeseen circumstances”

[CE 5, Cl. 12], as pre-contractual negotiations can be used to interpret the contract [CISG-AC ON 3; Investors Compensation Scheme; Art. 4.3 UNIDROIT; Art. 8(3) CISG].

100. In considering the pre-contractual negotiations [Art. 4.3 UNIDROIT], the ICC hardship clause should be taken in to consideration, as Cl. 12 is a narrow adaptation of the ICC hardship clause [RE 2, ¶4; RE 3, ¶4]. Cl. 12 was narrowed in a manner to address the issues that were raised by Ms. Napravnik in her email of 31st March 2017 [PO2, Q12], which were based on ‘import restrictions’ which would affect the ‘commercial basis of the contract’. Therefore, tariffs fall within this narrow interpretation of ‘comparable unforeseen circumstances’ stated in Cl. 12 ensuring that the CLAIMANT should not be held responsible as the contractual performance has become more onerous due to the imposition of the tariffs by Equatoriana.

b. Increase in tariffs made the contractual performance excessively onerous

101. The concept of the hardship being ‘excessively onerous’ should be judged on a case by case basis [Girsberger/Zapolski, pg. 122; Schwenger, pg. 716]. Following elements can be considered: whether the fundamental equilibrium of the contract has changed, the magnitude of the price increase, whether the change in circumstances led to the financial ruin of the other party [Schwenger, pg. 716; Fucci, pg. 23; Delvolvé], changed circumstances resulted in other party receiving no gain in return in exchange for performance by the other [Lesguillons] and it must be unjust to hold the parties bound to the contract in the changed circumstances *Ocean Tramp Tankers v. V/O Sorfracht*.
102. In *British Movietone v. London and District Cinemas*, it was held that in considering the “terms of the contract in light of the circumstances existing when it was made, where the parties never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point”. Cl. 12 has explicitly stated that the CLAIMANT will not be responsible for ‘*comparable unforeseen events*’ and this statement was made in light of ensuring that the ‘*commercial basis*’ will not be destroyed due to unforeseen hardships [CE 4, ¶4]. Equatorianian tariffs, which has ‘unexpectedly emerged’ amounts to circumstance which has fundamentally changed what the parties agreed to perform as it destroys the commercial basis of the contract [ALCOA v. Essex Group]. Therefore, the CLAIMANT is entitled to non-perform the contract, however as the contract was performed in the present case damages, should be awarded though price adaptation to compensate for the hardship under the Cl. 12 of the contract.
103. In the *Icori Estero v. Kuwait Foreign Trading* the ad hoc tribunal held that the depreciation in the value of the USD with respect to the Italian Lire of about 35%, as a changed circumstance, justifying compensation as the contract performance had become excessively onerous. It should be noted that, CLAIMANT referred to a 40% increase in price in a previous case as a hardship

which made the contractual performance onerous [CE 4, ¶4], which the RESPONDENT impliedly agreed to [PO2, Q12], and the hardship in the present case is closer to the rate referred to by the CLAIMANT. Therefore, as in the above case the Parties have impliedly agreed on a lower threshold.

104. Contractual performance has become excessively onerous as it would lead to the financial ruin of the CLAIMANT, if the price is not adapted through the contract [PO2, Q28]. This clearly shows that the performance has become excessively onerous to the CLAIMANT due to the imminent financial ruin [Schwenzer, pg. 716; Fucci, pg 23; Delvolvé, pg.]. It should be noted that the reason for selling more than 10 doses was also due to the need to make revenue to remedy the financial situation of the CLAIMANT [PO2, Q15], and if the CLAIMANT did not agree to the 100 doses which the RESPONDENT insisted on in order to lift the ban on frozen horse semen, then the hardship would not have been *as* excessive on the CLAIMANT. The only reason CLAIMANT agreed to the massive quantity is on the basis that RESPONDENT will bear the majority of the risks and the RESPONDENT was aware of this [PO2, Q8, 12, 15; Cl. 12].
105. CLAIMANT has not received a positive benefit nor performance by the RESPONDENT [Lesguillons, Art. 398] at all as the 30% price increase not only affects the 5% profit margin but leads to a loss of USD 1,250,000. Therefore, the contractual performance has become excessively onerous to the CLAIMANT.

c. Risk of the tariffs does not fall on the CLAIMANT

i. Based on Cl. 12 of the Contract

106. It is up to the parties to define their respective spheres of risk in the contract [*Bulgarian Chamber of Commerce and Industry; Brunner, pg. 117*]. This determination is done through interpreting the contract [Schwenzer, pg. 715], and through taking into account all relevant circumstances [Girsberger/Zapolski, pg. 128].
107. Parties agreed that the majority of the risks associated with the delivery should be borne by the RESPONDENT, where the Parties agree that the buyer should bear the risk of ‘insurance, tank rental and handling fees, missed flights, weather delays and failure of third-party service etc.’ [CE 5, Cl. 9, 10, 12, 13]. Therefore, a reasonable interpretation of the contract as a whole would clearly show the common intention of the Parties to allocate majority of the risks associated with the delivery to the RESPONDENT [UNIDROIT 4.1(1); CISG Art. 8(1)].
108. Parties specifically agreed that the ‘seller’, i.e. CLAIMANT is not responsible for force majeure and hardships which makes the contractual performance more onerous. Therefore, the risk of tariffs which has made the contractual performance more onerous falls on the RESPONDENT, and the price should be adapted under Cl. 12 to allocate the risks in the manner agreed by the Parties.

109. Contractual language alone does not express the true intention of the parties; therefore, courts are required to look at the relevant circumstances [**MCC-Marble case; Ullman, pg 89**]. The CLAIMANT made known to the RESPONDENT that the intention of the hardship clause was to ensure that the commercial basis of the contract will not be destroyed [**CE 4, ¶4**]. Pursuant to **Art. 8(1)** of the CISG, it is clear that the RESPONDENT could not have been unaware of the intention of the CLAIMANT to allocate majority of the risks to the RESPONDENT. Furthermore, pursuant to **Art. 8(2)** taking an objective perspective, and pursuant to **Art. 8(3)** considering all relevant circumstances, it is clear that the CLAIMANT intended to make “import restrictions’ part of the hardship clause [**CE 4, ¶4; Ziegel, ¶3**].
110. In the *Gaz de Bordeaux Case*, the court held that “just as the company cannot not argue that it should not be required to bear any increase in the price, it would be totally excessive if it is admitted that such increases are to be considered a normal business risk; on the contrary, it is necessary to find a solution that puts an end to temporary difficulties, taking into account both the general interest and the special conditions that do not allow the contract to operate normally; to this end it is necessary to decide, it must bear only that part of the adverse consequences that a reasonable interpretation of the contract allows.” Based on which it is clear that CLAIMANT’s hardship clause should be interpreted in the manner it was reasonably intended to apply [**supra**] which is for the RESPONDENT to bear the risks associated with the hardship and hence the price should be adapted to reflect this.
111. In maintaining the equilibrium of the contract [**Corbin/Perillo, pg. 117**], to assign obligations under the hardship clause, the following aspects of the contract should be taken in to consideration [**Houtte, pg. 120**]. Firstly, whether the parties discussed the risks and made provisions to allocate them and whether there was a fundamental reason to re-allocate these risks [**ICC No. 1512**]. The parties may expressly or impliedly allocate the risk for a fundamental change of circumstances or, on the contrary, certain risks may have been expressly or impliedly excluded [**Brunner, pg. 147-148**]. In the instant case, the CLAIMANT made its concerns about import tariffs and customs duties known to the RESPONDENT. Furthermore, the CLAIMANT explicitly made it clear to the RESPONDENT that the reason that CLAIMANT is unwilling to bear the risks is due to its inability to the current financial hardships and due to the bad experiences in the past [**CE 4, ¶4; PO2, Q28**].
112. Secondly, the tribunal should consider the consequences, if the originally agreed terms are performed [**van Houtte, pg. 120**]. Particularly, whether financial ruin of the obligator is imminent should be taken in to consideration [**Schwenzer, pg. 716**]. In the present case, the originally agreed performance has been carried out; if the hardship clause is not interpreted in favor of the

CLAIMANT, as intended by the parties, it will severely affect CLAIMANT's financial stability [PO2, Q29]. The only reason for the CLAIMANT to supply frozen semen even with the tariffs in place was due to the good faith shown by the CLAIMANT in making sure that the RESPONDENT does not miss the operational breeding season and due to the assurance given by Mr. Shoemaker that the parties will be able to negotiate the increase in price [CE 8, ¶7; RE 4, ¶4]. According to **Schwenzer [pg. 724]**, if the buyer in good faith agrees to the adaptation of the price then the tribunal can adapt the price under the contract. However, due to the misleading assurance by Mr. Shoemaker, RESPONDENT has acted in a manner that contradicts the good faith requirement and this should be considered by the tribunal when adapting the price.

113. Thirdly, hardship unjustly enriches the RESPONDENT as held in *S.E.E.E. v. Yugoslavia* as grounds for establishing unfair equilibrium. This is due to the re-sale of the 15 doses of frozen horse semen by the RESPONDENT with a 20% profit margin [PO2, Q20; CE 8, ¶11]. The RESPONDENT unjustly profits from violating the good faith, as the CLAIMANT explicitly required the RESPONDENT to obtain the explicit written consent of the CLAIMANT if the frozen horse semen is to be resold [CE 2, ¶3; PO 2, Q16]. If the price is not adjusted in light of the tariffs, the RESPONDENT has not only become a competitor in the market by selling frozen semen of Nijinsky III, but the CLAIMANT will effectively be removed from the market due to the financial ruin which will be faced by the CLAIMANT [PO 2, Q29].
114. Hardship clause can define what should be done in a situation where the clause is invoked [Eurojuris, pg. 2; Fucci, at (F)]. Contract can be adjusted to "eliminate the cause of the hardship" (based on a contractual clause containing those terms) [Fucci, at (F)]. In the present case, contractual term states that "*seller is not responsible...for hardship*", therefore, the contract should be adjusted to reflect the entire price increase caused by the imposition of the Equatorianian tariffs [CE 5, Cl. 12, emphasis added].
115. When a hardship clause is invoked, the obligator is relieved from its obligation to pay damages [Schlechtriem/Schwenzer, Art. 79, ¶43]. In the current case, the CLAIMANT should have been relieved from paying the tariffs, as the CLAIMANT has already paid the tariffs in good faith in order to perform the contract, price should be adjusted to reimburse the cost of tariffs to the CLAIMANT. In *E.D.F. v. Shell Française*, on the sale of fuel, the court held that the parties had to substitute a price formula that would grant a reduced purchase price, while allowing a "sufficient profit margin" to the seller, due to a hardship where the price of the fuel increased by a substantial amount, which affected the commercial basis of the contract. Therefore, based on the above, it is just and reasonable for the RESPONDENT, in the circumstances of the given case, to accept the price adaptation.

116. Lastly, the *Arbitration Court of Japan Shipping Exchange* held that mere presence of a hardship clause does not exclude other circumstances as it would be cumbersome if the parties were obliged to negotiate and draft hardships covering all possible events which may affect the performance of the contract. Therefore, even if the hardship clause of the CLAIMANT does not explicitly cover tariffs imposed by the government of Equatoriana which lead to the change in circumstances allows the CLAIMANT to adapt the price under the Cl. 12 of the contract.

ii. Risk under the DDP Incoterms falls on the RESPONDENT

117. Parties in the present case have incorporated the DDP Incoterms into their sales agreement [CE 5, Cl. 8]. DDP Incoterms were modified by reducing certain risks normally associated with DDP incoterms [PO2, Q8], this was further emphasised by inclusion of the hardship clause which states that the “seller is not liable for, delays in delivery due to missed flights and weather delays” which are generally covered under DDP incoterms. CLAIMANT communicated to the RESPONDENT that it has no intention to bear further risks associated with the use of DDP Incoterms [CE 4, ¶4], where the CLAIMANT refused to accept the risks associated with the change in delivery terms such as ‘customs regulations and import restrictions’. This is a clear variation from the DDP Incoterms as allowed through the S A6 of the Incoterms [DDP Incoterms]. Taking a subjective perspective pursuant to Art. 8 (1) of the CISG, the RESPONDENT insisted on a delivery on the basis of DDP, only to profit from the CLAIMANT’s experience in transporting frozen horse semen [CE 3, ¶3; CE 8, ¶7]. This is evinced by the RESPONDENT stating that they do not insist on a DDP delivery for possible future contracts concerning natural coverage [CE 3, ¶3].

118. Incoterms are not designed to replace the entire contract for sale, they merely supplement it and courts determine the party’s intent in incorporating the Incoterms based on all relevant circumstances, and this intention prevails over the objective intent expressed through the term [BP Oil v. Empresa; Johnson pg. 381]. Particularly, as the reallocation of the risks through the Cls. 9, 10, 12, 13 [CE 5] and the CLAIMANTS refusal to bear the risk of ‘import restrictions’ overrides standard DDP Incoterm as the negotiated terms override the standard terms that apply [CISG-AC ON 13, ¶8] Therefore, Cl. 12 of the Sales Agreement, in light of the intention of parties in incorporating the DDP Incoterms in to the contract, excludes the liability for the CLAIMANT change in circumstances and places that liability on the RESPONDENT.

B. The Tribunal should grant a price adaptation under the CISG and UNIDROIT Principles

119. The CISG governs the Sales Agreement between the parties [CE 5, Cl. 14]. CLAIMANT is entitled to a price adaptation of USD 1,250,000 or more, on the grounds that: tariffs imposed by

Equatoriana constitute to a hardship **(I)** under **Art. 79** of the CISG; and **(II)** under the UNIDROIT Principles.

I. Equatorianian tariffs impose a hardship under Art. 79 CISG

120. Claimant is entitled to a price adaptation under **Art. 79**, on the grounds that **(a)** the tariffs are an impediment beyond control, and **(b)** **Art. 79** should be interpreted based on the principle of good faith.

a. The tariffs are an impediment beyond control

121. **Art. 79** CISG does not mention either force majeure or hardship explicitly, it provides relief to a party where the breach of contract was due to an *impediment beyond its control*. It has been accepted in both case law and in scholarly writing that **Art. 79** does cover issues relating to hardship [**Cour d'Appel de Colmar; Schwenger, pg. 713**]. The **CISG-AC ON 7, C3.1** provides that a change of circumstances that could not be reasonably expected to have been taken into account, rendering performance excessively onerous (“hardship”), may qualify as an “impediment”, thereby allowing a party to invoke hardship as an exemption from liability under **Art. 79** CISG.
122. Hardship can be considered as a special group of cases under the general force majeure provisions; all that is added to the force majeure provisions on the level of prerequisites is a clarification of the term *impediment* in cases where performance in the strict sense is possible, but too onerous [**Schwenger, pg. 715**].
123. Changed circumstances that increase the burden of performance of the contract in a disproportionate manner which were not reasonably foreseeable at the time of the conclusion of the contract, can form an *impediment* [**Scafom International BV v. Lorraine Tubes eJ**].
124. The parties should determine “what changes of circumstances will suffice to trigger the right to invoke hardship” [**Brunner, pg. 514**]. In the case of a contract governed by the CISG, the parties should be careful to determine what circumstances or ‘impediment beyond control’ will be severe enough to invoke hardship [**Arroyo, pg. 42**]. The parties can therefore define what amounts to a ‘fundamental alteration’ of the contractual balance – the determination of a percentage of the cost or the value of performance that is likely to amount to a fundamental alteration of the equilibrium of the contract [**Brunner, pg. 426**].
125. Extrinsic evidence can be used to interpret the contract [**CISG-AC ON 3**], and can therefore be taken into account when determining what the parties agreed to as the percentage of the cost of performance that would give rise to hardship. The parties agreed that an increase of cost by 40% would not bind the CLAIMANT and therefore would be covered by a hardship clause [**CE 4, ¶4**]. The parties have therefore lowered the threshold for hardship under **Art. 79**. The imposition of

the Equatorianian tariffs, in this instance, has caused a hardship due to an impediment beyond the control of the CLAIMANT, meeting the standard of **Art. 79** that the parties have agreed to.

126. The impediment must have been unforeseeable, unavoidable and fallen outside the sphere of risk of the aggrieved party [**Schwenzer, pg. 715**]. It is consistent with the idea that if the event causing the impediment was foreseeable, the defaulting party should be considered as having assumed the risk of it [**Tallon, pg. 580**]. The application of **Art. 79** focuses on assessing the risks that a party claiming exemption assumed when it concluded the contract i.e. it must be determined whether the party claiming an exemption assumed the risk of the event that caused the party to fail to perform [**Chinese Goods case**].
127. As stated above [**supra**], the CLAIMANT did not assume the risk of import restrictions i.e. tariffs [**CE 4, ¶4; CE 5, Cl. 12**]. Therefore, CLAIMANT's non assumption of the risk of tariffs makes it evident that CLAIMANT did not reasonably foresee the impediment caused by the increase in tariffs.
128. Furthermore, the imposition of tariffs on agricultural goods from Mediterraneo and its size came as a surprise [**CE 6, ¶2**]. Both the imposition of tariffs by the government of Mediterraneo and retaliatory tariffs imposed by the government of Equatoriana was therefore unforeseeable in nature.
129. The failure to perform must be due to an impediment that the party could not reasonably be expected to have avoided [**CISG Digest, Art. 79, ¶17**]. The retaliatory tariffs concerned the two governments and is not within the control of CLAIMANT. CLAIMANT could not have therefore avoided the impediment caused.

b. Art. 79 should be interpreted based on the principle of good faith

131. In *Scafom International BV v. Lorraine Tubes* held that **Art. 79** can govern hardship relying on general principles which govern the law of international trade pursuant to **Art. 7(1)** and **7(2)** of the CISG. **Art. 7(1)** of the CISG requires that the Convention be interpreted in a manner that promotes the observance of good faith in international trade [**CISG Digest, ¶20**]. The good faith principle under the CISG also applies to the interpretation of the individual contract and to the parties' contractual relationship [**Magnus, pg. 576**]. In legal systems where hardship is recognized, once a party claims it is disadvantaged, the other party cannot simply dismiss the claim. It should be understood to have a duty to negotiate in good faith [**Fucci, at (E)**]. Therefore, the party who invokes the doctrine of hardship under the CISG is entitled for renegotiation of the contract [*Scafom International BV v. Lorraine Tubes*].
132. According to **Corbin**, in order to prevent the disappointment of expectations of one party, as the other had reason to know, the courts find and enforce promises that were not put into words, by

interpretation when they can and by implication and construction when they must. When unforeseen contingencies not provided for in the contract occur, the courts require performance as ‘men who deal fairly and in good faith’ with each other, who would perform without a lawsuit [**Corbin/Perillo, pg. 117**]. Therefore, that unanticipated risks are fairly distributed and a party is prevented from making unreasonable gains at the expense of the other.

133. RESPONDENT, in the present case, has violated the good faith principle. CLAIMANT contacted the RESPONDENT to discuss a price adaptation for the Parties to come to an agreement [**CE 7**]. The final shipment was delivered relying on Mr. Shoemaker’s promise that an agreement will be made between the Parties [**CE 8, ¶8**]. CLAIMANT submits that RESPONDENT has therefore violated the good faith by initially agreeing to a price adaptation and making an assurance, leading the CLAIMANT to believe that an agreement will be made and subsequently refusing to come to a solution [**CE 8, ¶¶7, 9**].
134. The CLAIMANT took safeguards to prevent the resale of doses of frozen horse semen. Pursuant to **Art. 8(1)** of the CISG, the parties have contractually agreed for RESPONDENT to inform the CLAIMANT of any future resale. The Sales Agreement itself included an express information requirement. It names the mares that the semen is to be used for and in italics states, “*and others after information of the Seller*”. This was also attached to the email of 24 March 2017 [**PO2, Q16**].
135. Courts have held that the general principle of good faith require the parties to cooperate with each other and to exchange information relevant for the performance of their respective obligations [**CISG Digest, Art. 7, ¶14; Takap v. Europlay**]. RESPONDENT has breached its contractual requirements by reselling the frozen horse semen to other buyers without the consent of the CLAIMANT; when CLAIMANT made its intention clear to the RESPONDENT in its email of 24 March 2017 that resale to third parties is dependent upon an “express written consent” [**PO2, Q16**]. RESPONDENT in its reply on 28 March 2017 agreed to such a condition. RESPONDENT only disagreed to the price and delivery terms and the applicable law and dispute resolution [**CE 3, ¶¶2, 3**]. Taking an objective perspective pursuant to **Art. 8(2)** the parties have agreed that the RESPONDENT must inform the CLAIMANT and obtain its “express written consent” in order to resell the frozen semen.
136. Therefore, not only has the RESPONDENT not cooperated with the CLAIMANT, it has also violated the good faith between the parties, by breaching its contractual obligation to the CLAIMANT by selling 15 doses of the frozen semen to 10 different breeders at 120,000 USD, for a 20 percent higher price than what they bought from the CLAIMANT [**PO2, Q20**], without the CLAIMANT’s consent.

137. CLAIMANT submits that it has taken all reasonable measures, to uphold the good faith between the parties. CLAIMANT delivered the final shipment relying on RESPONDENT's promise to adapt the price. Therefore, CLAIMANT has the right to claim exemption under **Art. 79** to the absence of bad faith on the CLAIMANT's part [*Flippe v. Douet*]. Although the CISG does not contain any explicit duty to renegotiate, there is a duty to mitigate damages under **Art. 77** CISG [**Schwenzer, pg. 725**].
138. This duty to mitigate will require the aggrieved party to strike a deal even with a contract breaching party and, a fortiori, in cases where unforeseen circumstances make performance excessively onerous for one party [**Schwenzer, pg. 725**]. Pursuant to **Art. 74**, dealing with damages, the cost of taking reasonable steps to mitigate damages may be claimed as part of the aggrieved party's damages claim [*Sizing Machine Case*].

II. Tariffs imposed by Equatoriana constitute to a hardship under the UNIDROIT Principles

140. The CISG does not explicitly deal with the question of hardship and therefore UNIDROIT can be used to supplement the Convention – to bridge the gap in the CISG on hardship [**Perillo II, pg. 113; Scafom BV v. Lorraine Tubes**]. The law that governs the Sales Agreement is the law of Mediterraneo i.e. a verbatim adoption of UNIDROIT [**CE 5, Cl. 12; PO1, Q4**]. Therefore, the imposition of tariffs constituted to a hardship: **a)** under **Art. 6.2.2**; and **b)** CLAIMANT is entitled to a price adaptation amounting to USD 1,250,000 or more, under **Art. 6.2.3**
- a. The Tariffs constitute to a hardship under Art. 6.2.2**
141. UNIDROIT provides that where “the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations...” [**Art. 6.2.1**]. Under **Art. 6.2.2**, “there is hardship where the occurrence of events *fundamentally alters the equilibrium of the contract*” [**emphasis added**], wherein a set of conditions are laid down. Since the general principle is that a change in circumstances does not affect the obligation to perform [**Art. 6.2.1**] the standard to be met for there to be hardship is a ‘fundamental alteration of the equilibrium of the contract’ [**Art. 6.2.2 UNIDROIT**].
142. The equilibrium of the contract is fundamentally altered when there is a substantial increase in the cost for one party when performing its obligation. The commentary to **Art. 6.2.2** states that a substantial increase in price may be due to a dramatic rise in the price for the rendering of services, and the party which will normally undergo such a hardship is the one which is to perform the non-monetary obligation [**C. 2(a) UNIDROIT**]. In the case of changed circumstances, it is the event that creates the factual basis for hardship to arise that brings forth a disequilibrium in the contract; therefore, the disadvantaged party must provide relevant evidence to demonstrate how the changed

circumstances influenced its ability to perform the contract [**Girsberger/Zapolskis, pg. 123**]. Whether a disequilibrium may be considered as ‘fundamental’ or ‘excessively onerous’ will depend on the facts of each particular case

143. The UNIDROIT has adopted an objective approach to hardship [**Maskow, pg. 662**]. In the present case, the imposition of a 30% increase in Equatorianian tariffs on frozen horse semen has led to a hardship. The final shipment has become 30% more expensive due to the tariffs [**CE 7, ¶1**], and has therefore caused a hardship to the CLAIMANT in performing the contract. The CLAIMANT only had a profit margin of 5% in the transaction between the parties [**CE 8, ¶6**]; hence, bearing the additional cost would result in the CLAIMANT suffering a loss of USD 1,250,000, and therefore not making a profit from this transaction. Furthermore, the CLAIMANT’s financial difficulties have resulted in it being impossible to shoulder the weight of USD 1,250,000 [**CE 8, ¶6**]. The CLAIMANT made an exception from its general approach and agreed to the sale of 100 doses of frozen horse semen [**CE 2, ¶3, emphasis added**], intending to once again become profitable is seriously endangered by the tariffs that have been imposed by Equatoriana [**PO2, Q29**]. The imposition of the said tariffs will therefore cause a detriment to the CLAIMANT if it were to bear the additional cost. Hence the tariffs have fundamentally altered the equilibrium of the contract leaving CLAIMANT at a disadvantage as the costs of the CLAIMANT has increased and the performance the CLAIMANT is entitled to receive has lost its value, since the aim of that performance can no more be achieved [**Maskow, pg. 662**].
144. The criteria for a hardship under UNIDROIT are laid down in **Art. 6.2.2**; not have been reasonably taken into account at the time of concluding the contract, where they are beyond the control of that party and where the risk of the events was not assumed by the disadvantaged party [**Art. 6.2.2 UNIDROIT**]. Under UNIDROIT, the criteria to invoke hardship is laid down in **Art. 6.2.2**; the events giving rise to hardship occurred or the disadvantaged party became aware of it after the conclusion of the contract, where such events could not have reasonably been taken into account at the time of concluding the contract, where they are beyond the control of that party and the risk was not assumed by the that party, there is hardship.
145. Furthermore, even though the contractual performance was made onerous through the tariffs, the reason why the CLAIMANT had to bear the consequences was due to the urgency created by the RESPONDENT to deliver the final shipment in order to deliver 6 doses of frozen horse semen to other buyers [**PO 2, Q 33**]. This was never meant to be a part of the contract, in fact it is a breach of contract [**supra**]. If it had not been for RESPONDENT urging CLAIMANT to deliver the final shipment, and assuring the price would be adapted, CLAIMANT would not have proceeded with the delivery before coming to an agreement about the new price [**CE 8, ¶¶7, 8,**

9]. Had there not been a need for the frozen horse semen to be resold to other buyers, CLAIMANT would not have had to send the doses of frozen horse semen and would not have experienced a hardship.

146. The increase in tariffs on agricultural products imposed by Equatoriana was not reasonably foreseeable as the 30% increase in the tariffs was imposed in December 2017, subsequent to the conclusion of the contract [CE 6, ¶1]; The tariffs being imposed and its size came as a surprise even to the informed circles [CE 6, ¶2]. Equatoriana having always been a supporter of free trade, generally did not retaliate to restrictions affecting imports, previously imposed by other countries [CE 6, ¶2]. However, the 30% increase in tariffs by the Equatorianian government on agricultural goods from Mediterraneo was in retaliation to the 25% tariffs imposed by the Mediterranean government, on agricultural goods from Equatoriana [CE 6]. Therefore, not only was it beyond the control of the CLAIMANT, it could not reasonably have been foreseen at the time of conclusion of the contract as it lies far beyond the normal path of economic development and hits one party by chance, this amounts to a fundamental change [Maskow, pg. 662]. Therefore pursuant to Art. 6.2.2 there is a hardship that befalls on the CLAIMANT and it falls within the exception of Art. 6.2.1.

b. CLAIMANT is entitled to a price adaptation under Art. 6.2.3

147. Under Art. 6.2.3, the CLAIMANT is entitled to enter into renegotiations and adapt the price. Where the hardship clause has not been drafted in the intended manner, the contract should be considered as having an omitted term and the gap should be filled with the assistance of UNIDROIT [Garro, pg. 13; Perillo II pg. 113]. Therefore, even though the adaptation of the contract that CLAIMANT said it wanted in the process of pre contractual negotiations, were not included in Cl. 12 of the Sales Agreement [CE 8, ¶¶4,5], Art. 6.2.3 UNIDROIT will provide for an adaptation of the price by filling in the gap.
148. Under Art. 6.2.3 of UNIDROIT, the parties have a duty to seek out an adaptation of their agreement to the new circumstances occurred after its execution. This is to ensure that its performance does not cause the ruin of one of the parties [ICC No. 9994]. Renegotiation is allowed if "the equilibrium of the contract" is 'fundamentally altered' by events that occur or become known after contracting, the events could not reasonably be taken into account, the events are not within the party's control and the risk was not assumed [Perillo II]. The CLAIMANT is already in a financially unstable position [CE 8, ¶6; PO2, Q29], the balance of risks in the contract is therefore of critical importance to the CLAIMANT. To restore this balance in the contract, the price needs to be adapted in a favorable manner to the CLAIMANT [Art 6.2.3(4) UNIDROIT].

149. Furthermore, the RESPONDENT was informed of the impact the 30% tariff had on the CLAIMANT's financial status [PO2, Q28], and the RESPONDENT would not be in any financial danger if it bore the payment of USD 1,250,000 [PO2, Q30]. Therefore the CLAIMANT is entitled to request renegotiations for the price of the final shipment to be adapted to USD 1,250,000 or more pursuant to **Art. 6.2.3**.

CONCLUSION FOR ISSUE 3: CLAIMANT has faced a hardship due to the imposition of Equatorianian tariffs and is therefore entitled to a price adaptation of USD 1,250,000 or more under Cl. 12 of the contract and the applicable law of the contract: the CISG and UNIDROIT.

Prayer for Relief

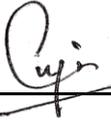
The CLAIMANT respectfully requests the tribunal to grant the following relief:

1. Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US\$ 1,250,000 or more which is 30% of the price for the third delivery of semen;
2. Black Beauty Equestrian bears the costs of the Arbitration.

CERTIFICATION

06.12.2018
Colombo, Sri Lanka

We hereby confirm that this memorandum was written by the undersigned.

 Chirasthi Seneviratne	 Harish Balakrishnan	 Iranthi Walgama	 Minul Muhandiramge
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