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WILLEM C. VIS (East)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 7 APRIL, 2019

HONG KONG

MEMORANDUM FOR CLAIMANT

On behalf of	**Against**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

CHEN Yuxuan • FAN Rui • FAN Zihao • HE Shijia • LI Qian

LIN Kenian • XIE Yufan • ZHANG Ruimeng • ZHANG Yingxue

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL CITATION
&	And
/	And
answer to NoA	answer to Notice of Arbitration
Art. & Arts.	Article & Articles
CE	CLAIMANT's EXHIBIT
Co.	Company
Corp	Corporation
DDP	Delivered Duty Paid (named place of destination)
et al.	et alia (and others)
ed.	Edition
etc.	etcetera (and so on)
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
id.	idem (the same)

i.e.	id est (that is)
Incoterms	International Chamber of Commerce Terms
LLC	Limited Liability Company
Ltd.	Limited
Mr	Mister
Ms	Miss
No.	Number
NoA	Notice of Arbitration
onus probandi	burden of proof
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RE	RESPONDENT's EXHIBIT
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
USD	United States Dollar

v.	versus
Vol.	Volume

INDEX OF AUTHORITIES

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INDEX OF CASES

CASE LAW

Leibinger v. Stryker Trauma GmbH	Leibinger v. Stryker Trauma GmbH, Queen's Bench Division (Commercial Court), 31 March 2006, [2006] EWHC 690 (Comm)	12
Sonatrach Petroleum v. Ferrell International	Sonatrach Petroleum Corp (BVI) v. Ferrell International Ltd, Queen's Bench Division (Commercial Court), 4 October 2001, [2002] 1 All ER (Comm) 627	12, 20
Sulamérica case	Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA, Court of Appeal (Civil Division), 16 May 2012, [2012] EWCA Civ 638	11, 12, 15, 20
Sumitomo Heavy Industries v. Oil & Natural Gas Commission	Sumitomo Heavy Industries v. Oil and Natural Gas Commission, Queen's Bench Division (Commercial Court), 23 July 1993	12
U.S.A		
Management & Technical Consultants SA v. Parsons-Jurden International Corp.	Management & Technical Consultants SA v. Parsons-Jurden International Corp., Court of Appeals, Ninth Circuit, 8 July 1987	27

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ABBREVIATION	FULL CITATION	CITED IN
ICSID		
ConocoPhilips v. Venezuela	ConocoPhillips Petrozuata *et al*. v. Bolivarian Republic of Venezuela, 3 September 2013, ICSID Case No. ARB/07/30	59
Caratube case	Caratube International Oil Company and Mr Devincci Saleh Hourani v Kazakhstan, 27 September 2017, ICSID Case No. ARB/13/13	59
Enron v. Argentina	Enron Creditors Recovery Corp, Ponderosa Assets LP v. The Argentine Republic, 3 October 2006, ICSID Case No. ARB/02/1	60
ICC		
ICC No. 4131	Dow Chemical France *et al*. v. ISOVER SAINT GOBAIN 23 September 1982， ICC Case No. 4131	53
ICC No. 6363	Licensor v. Licensee 1991 ICC Case No. 6363	53

STATEMENT OF FACTS

Phar Lap Allevamento (*hereinafter* "CLAIMANT") is a company related to all areas of the equestrian sport registered and located in Mediterraneo.

Black Beauty Equestrian (*hereinafter* "RESPONDENT") is a famous broodmare company located in Equatoriana.

On **24 March 2017**, CLAIMANT offered RESPONDENT 100 doses of frozen semen of Nijinsky III, a world-wide famous racehorse, with the price of 99.5 USD per dose.

On **28 March 2017**, RESPONDENT answered to CLAIMANT's offer with objections to the choice of law and the forum selection clause. RESPONDENT also insisted on a delivery DDP.

On **31 March 2017**, CLAIMANT accepted the DDP delivery with the price of 1000 USD per dose and refused to take over further risks, with a proposal to opt for arbitration in Mediterraneo.

On **12 April 2017**, Ms. Napravnik, CLAIMANT's representative, and Mr. Antley, RESPONDENT's representative, had a short meeting before a severe car accident happened to them resulting in their inability to carry on any further discussion on the contract.

On **6 May 2017**, the FROZEN SEMEN SALES AGREEMENT (*hereinafter* "the Sales Agreement") was concluded. CLAIMANT started to fulfill contractual obligations.

On **20 December 2017**, news reported that Mediterraneo President announced 25 per cent tariffs on agricultural products from Equatoriana, leading to a 30 per cent raise of cost.

On **23 January 2018**, CLAIMANT sent the third shipment of 50 doses, paying a 30 per cent increase of cost after Mr. Shoemaker, the representative of RESPONDENT's racehorse breeding program, promising that a solution would be found.

On **31 July 2018**, CLAIMANT submitted the Notice of Arbitration (*hereinafter* "NoA") to Hong Kong International Arbitration Centre (*hereinafter* "HKIAC") requesting outstanding contractual payments.

On **2 October 2018**, CLAIMANT applied to submit the evidence proving that RESPONDENT raised opposite proposition in another arbitration administered also by HKIAC under the Administered Arbitration Rules 2013 of Hong Kong International Arbitration Centre (*hereinafter* "HKIAC Rules 2013").

SUMMARY OF ARGUMENTS

CLAIMANT and RESPONDENT contracted for the sales and delivery of frozen semen and agreed on three shipments. In December 2017, the Equatorianian government announced 30 per cent retaliatory tariff on selected products from Mediterraneo, which took effect several days before the last shipment. Before reaching an agreement on price adaption, CLAIMANT delivered the goods relying on the contractual terms. However, upon receiving goods, RESPONDENT broke off renegotiation and refused to pay any additional amount for the tariff. RESPONDENT challenges the jurisdiction and power of the Arbitral Tribunal (*hereinafter* "the Tribunal") to adapt the contract. However, in their negotiation, both CLAIMANT and REPONDENT (*hereinafter* "the Parties") agreed that the arbitration clause should be governed by the law of Mediterraneo and authorized the Tribunal to adapt the contract if the Parties fail to amend the contract. In order to support its submission, CLAIMANT intends to submit the evidence from the other arbitration proceeding.

The Tribunal has the jurisdiction and power to adapt the contract. Under the law of Mediterraneo, the Tribunal's jurisdiction and power to adapt the contract derives from both the wording and the negotiation of the contract. Additionally, the law of Mediterraneo grants the Tribunal the power to adapt the contract in case of hardship.

CLAIMANT is entitled to submit the evidence from the other arbitration proceedings even though this evidence had been illegally obtained. The evidence is relevant to this case and material to its outcome. Besides, neither the confidentiality obligation nor the illegal source is reason to exclude the evidence. These grounds require the Tribunal to admit the evidence.

CLAIMANT is entitled to the payment of 1,250,000 USD resulting from an adaptation of the price. The Parties included clause 12 into the Sales Agreement, allowing for an adaptation in the event of hardship. The 30 per cent additional tariff has triggered hardship under clause 12 and the price should be increased accordingly. Alternatively, the price should be adapted under the CISG. Cases of hardship are governed by but not settled in the CISG, nonetheless the hardship provision of the UNIDROIT Principles can be applied to fill the gap, which provides a price adaptation as remedy if hardship occurs. CLAIMANT sacrifices its five per cent margin profit, and only requests 25 per cent of the payment. All requirements for such an adaptation are met in this case. Therefore, CLAIMANT is entitled to the payment resulting from an increased price both under the contract and the CISG.

ISSUE A: THE TRIBUNAL HAS JURISDICTION AND POWER TO ADAPT THE CONTRACT WITH THE LAW OF MEDITERRANEO GOVERNING THE ARBITRATION CLAUSE

1. RESPONDENT alleges that the Tribunal has no jurisdiction and power to adapt the contract with the law of Danubia governing the arbitration clause [*answer to NoA*, *p. 31*]. However, as the Parties have agreed, the law of Mediterraneo governs the Sales Agreement, as well as the arbitration clause and its interpretation thereof, for there is such an intention of the Parties, also it is the conclusion which could be drawn following the closest and most real connection principle [**A**]. Given that Mediterraneo is a contracting state of United Nation Convention on International Sales of Goods (*hereinafter* "CISG"), and its general contract law is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (*hereinafter* "UNIDROIT Principles") [*PO1*, *p. 52*], the Tribunal's jurisdiction to adapt the contract is authorized by the Parties in the arbitration clause. Meanwhile, the power of the Tribunal to adapt the contract derives from the Parties' agreement and the law of Mediterraneo. Thus, the Tribunal has both jurisdiction and power to adapt the contract [**B**].

A. The law of Mediterraneo should govern the arbitration clause

2. Contrary to RESPONDENT's allegation, CLAIMANT submits that the law of Mediterraneo shall govern the arbitration clause. The Parties have agreed that the law of Mediterraneo shall govern the Sales Agreement which includes the arbitration clause [**1**]. Even if the Tribunal should decide that the Parties have not agreed on the governing law, the conclusion that the law of Mediterraneo shall be applied could also be drawn according to the main contract assumption doctrine [**2**]. Moreover, under the closest and most real connection principle, the law of Mediterraneo should govern the arbitration clause [**3**].

1. The Parties have agreed that the law of Mediterraneo should govern the Sales Agreement which includes the arbitration clause

3. RESPONDENT alleges that there is no express or implied choice on applying the law of Mediterraneo to the arbitration clause and its interpretation [*answer to NoA*, *p. 31*]. Contrary to RESPONDENT's allegation, CLAIMANT submits that there is a choice for the law of

Mediterraneo governing the Sales Agreement which includes the arbitration clause, because it can be evidenced from both contractual context [***i***] and drafting history [***ii***].

i. The Parties' intention can be evidenced by the wording of the contract

4. By stating "Sales Agreement", CLAIMANT refers to the entire content of the contract, including the arbitration clause. The Parties have agreed that the Sales Agreement shall be governed by the law of Mediterraneo in clause 14 of the final contract [*CE5*, *p. 14*]. Given that the expression of "Sales Agreement" adopted in clause 14 is consistent with the title of the contract, the Parties have intended that the entire contract should be governed by the law of Mediterraneo, which RESPONDENT knew or could not have been unaware of [*CE5*, *p. 13*; *p. 14*]. Thus, based on the agreement of the Parties, the Sales Agreement including the arbitration clause should be governed by the law of Mediterraneo.

ii. The Parties' intention can be evidenced by their drafting history

5. The Parties' negotiation shows their intention to choose the law of Mediterraneo to govern their whole contract including the arbitration clause.

6. Pursuant to Art. 8(3) CISG, surrounding circumstances including contractual negotiation should be taken into account to understand the Parties' real intention on the choice of law [*Lew 2003*, *p. 469*; *Arsanovia Ltd. & Ors v. Cruz City*].

7. In the present case, during the entire negotiation process, CLAIMANT adopted the same expression as the *Sales Agreement* [*EMPHASIS ADDED*] without any variation [*CE2*, *p. 10*; *RE2*, *p. 34*; *CE5*, *p. 14*], never separating arbitration clause from the main contract. RESPONDENT could not have been unaware of CLAIMANT's intention to regard the arbitration clause as part of the contract.

8. Contrary to RESPONDENT's allegation, CLAIMANT could not have been aware of RESPONDENT's intention to adopt the law of the seat of arbitration. The proposal of RESPONDENT states "the seat of arbitration shall be Equatoriana" and "the law of this arbitration clause shall be the law of Equatoriana" [*RE1*, *p. 33*]. RESPONDENT did not expressly state that the law governing the arbitration clause would be the law of the seat of arbitration. As a consequence, when the seat of arbitration was changed to Danubia, it did not

mean that the law governing the arbitration clause would also be changed to the law of Danubia. Thus, CLAIMANT could not have been aware of RESPONDENT's intention to choose the law of the seat of arbitration to govern the arbitration clause.

9. Moreover, RESPONDENT should have been aware of CLAIMANT's intention to adopt the law of Mediterraneo to govern the entire contract. RESPONDENT's choice for the law of Equatoriana [*RE1*, *p. 33*] demonstrates that there is a chance to choose a specific law to govern the arbitration clause. CLAIMANT deleted the provision of governing law for arbitration clause and restated that "the law applicable to the Sales Agreement *remains* [*EMPHASIS ADDED*] the law of Mediterraneo" [*RE2*, *p. 34*]. CLAIMANT reemphasized "…remains…" specially to refer the Sales Agreement as the whole contract including the arbitration clause because RESPONDENT had already agreed to apply the law of Mediterraneo to the main contract [*RE1*, *p. 33*]. There was no need to reemphasize if CLAIMANT was only referring to the main contract. Besides, CLAIMANT told RESPONDENT about its internal policy that special approval is required when applying the law of the seat of arbitration other than Mediterraneo to the contract [*RE2*, *p. 34*]. However, RESPONDENT did not raise any doubt. Thus, RESPONDENT should have been aware of CLAIMANT's intention to adopt the law of Mediterraneo governing the entire contract.

10. Eventually, the formal contract was concluded, adopting CLAIMANT's proposal in the e-mail on 11 April 2017, which indicates the Parties' mutual agreement that the arbitration clause should be governed by the law of Mediterraneo. Therefore, the Parties have agreed through their drafting history that the law of Mediterraneo governs the arbitration clause as a part of the Sales Agreement.

2. The main contract assumption doctrine should be applied in this case

11. RESPONDENT alleges that the arbitration clause is separate from the main contract pursuant to the separability doctrine stipulated in Art. 16 Danubian Arbitration Law [*answer to NoA*, *p. 31*], which adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*PO1*, *p. 52*]. However, the primary purpose of separability doctrine is "to prevent the invalidity of the matrix contract *ipso facto* to undermine the validity of the arbitration agreement" [*Miles and Goh*, *p. 388*]. For this reason, the doctrine of separability

applies only in the context of challenging the validity of arbitration agreement and not for any other purposes, "including that of choice of law" [*Sulamérica case*; *Arsanovia Ltd. & Ors v. Cruz City*]. However, in the case at hand, the validity of the container contract between the Parties is not involved in the dispute. The separability doctrine cannot apply in this situation.

12. Even if the separability doctrine would be applied in this case, it does not mean that the law applicable to the arbitration clause is necessarily different from that of the main contract [*Born 2014*, *p. 464*; *Redfern/Hunter*, *para. 3.13*]. Where the parties had not made an express choice of law, it was fair to start from the assumption that, in the absence of any contrary indication, the parties intended the whole of their relationship to be governed by the same system of law, for the acceptance for a contract includes the acceptance of every term of it, including its arbitration clause [*Redfern/Hunter*, *para. 3.13*]. As a result, the parties intended that law chosen to govern the substantive contract also to govern the arbitration clause [*Sulamérica case*; *BCY v. BCZ*; *Arsanovia Ltd & Ors v. Cruz City*; *Channel Tunnel v. Balfour Beatty*; *Sonatrach Petroleum v. Ferrell International*; *Sumitomo Heavy Industries v. Oil & Natural Gas Commission*; *Leibinger v. Stryker Trauma GmbH*; *Lew 1999*, *p. 143*].

13. In the present case, the Parties chose the law of Mediterraneo to govern the main contract in clause 14 of the Sales Agreement [*CE5*, *p. 14*]. This express choice of law governing the main contract is a strong indication to show the Parties' intention that the arbitration clause should be governed by the law of Mediterraneo.

14. Besides, there is no contrary indication that the Parties rejected the application of the law of Mediterraneo to govern the contract.

15. There exists a contrary indication when the law of the main contract might lead to the unenforceability or invalidity of the arbitration clause [*Sulamérica case*]. Choice of a neutral arbitral seat may also be a contrary indication [*Sulamérica case*; *BCY v. BCZ*]. However, the choice of a different country as the seat of arbitration may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the main contract [*Arsanovia Ltd & Ors v. Cruz City*; *BCY v. BCZ*; *Habas case*].

16. In the present case, there is no evidence suggesting that under the law of Mediterraneo the arbitration clause would be unenforceable. In fact, the law of Mediterraneo, which is a verbatim

adoption of the UNIDROIT Principles [*PO1*, *p. 53*], provides for a broader interpretation than the law of Danubia [*PO2*, *p. 61*], which would authorize the Tribunal more extensive power. As a result, the law of Mediterraneo would be less likely to lead to the invalidity of arbitration clause. The only contrary indication in this case is the Parties' agreement on Danubia as the neutral arbitral seat [*CE5*, *p. 14*]. However, choosing Danubia as the seat of the arbitration was not a sufficiently contrary intention to the application for the law of Mediterraneo.

17. Therefore, the Parties impliedly intended that the law of Mediterraneo should govern the arbitration clause.

3. The law of Mediterraneo should govern the arbitration clause under the closest and most real connection principle

18. Even if the choice of law concerning the arbitration clause is deemed to be absent in the Sales Agreement, under closest and most real connection principle, the law of Mediterraneo still governs the arbitration clause.

19. The closest and most real connection principle should be applied when there is no choice of law for the arbitration clause. When the parties have not chosen a law to govern the arbitration clause, it is generally considered that arbitration clause should be governed by the legal system with which it has the closest and most real connection [*Collins*; *Sulamérica case*; *Sonatrach Petroleum v. Ferrell*; *Owerri v. Dielle*; *Collision case*; *Tourist Services case*].

20. The closest and most real connection principle has been widely applied to both national courts and arbitral tribunals to the choice of the law governing international arbitration agreements [*id.*]. Hence, the closest and most real connection principle should be applied to the case when the choice of law for the arbitration clause is considered to absent from the Sales Agreement.

21. The closest and most real connection is a factual objective criterion and has to be distinguished from choice of law rules, which means that the connection should be viewed not from the law, but from the facts [*Karrer*, *para. 109*]. Moreover, identifying the law most closely connected to the arbitration clause itself means giving priority to connecting factors which apply specifically to that clause [*Gaillard/Savage*, *p. 223*]. When it comes to the question that which law should be deemed as most closely connected to the arbitration clause, the arbitral tribunal shall look to where under the terms of the contract the performance is to be affected [*Dredging*

Work case]. In the present case, the obligations of storing the frozen semen, preparing the frozen semen as well as shipping the frozen semen were all performed by CLAIMANT, that is, in Mediterraneo. As a result, due to the fact that Mediterraneo is the place of performance of obligations which illustrates the closest and most real connection to the present case, the law of Mediterraneo should govern the arbitration clause even if it lacks a choice of law agreement.

22. Therefore, closest and most real connection principle should be applied when there is neither express nor implied choice of law concerning the arbitration clause, and according to such principle, the law of Mediterraneo should govern the arbitration clause.

B. With the law of Mediterraneo governing the arbitration clause, the Tribunal has the jurisdiction and power to adapt the contract

23. Jurisdiction means an arbitral tribunal may validly resolve only those disputes that the parties have agreed that it should resolve. The tribunal can have the jurisdiction only when the dispute referred to the arbitration falls within the scope of the arbitration agreement [*Redfern/Hunter*, *paras*. *5.91 & 5.92*]. As for this case, jurisdiction means whether the Tribunal can decide the dispute about contract adaptation. The powers of an arbitral tribunal are those conferred upon it by the parties and the operation of applicable law [*Redfern/Hunter*, *para*. *5.06*]. As for this case, power means whether the Tribunal can adapt the contract.

24. Contrary to RESPONDENT's allegation, CLAIMANT submits that the Tribunal has both jurisdiction and power to adapt the contract. The Tribunal's jurisdiction to adapt the contract is authorized by the Parties in the arbitration clause [**1**]. Meanwhile, based on the Parties' agreement and the general contract law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles, the Tribunal has the power to adapt the contract [**2**].

1. The Tribunal has the jurisdiction to adapt the contract according to the arbitration clause

25. The arbitration clause agreed by the Parties can confirm the Tribunal's jurisdiction to adapt the contract. Clause 15 of the Sales Agreement stipulates that:

> *"Any dispute arising out of this contract, including … interpretation … shall be referred to and finally resolved by arbitration…"* [*CE5*, *p. 14*].

26. The dispute is about whether the Tribunal can adapt the contract. The determination of whether the Parties have conferred upon the Tribunal the power to adapt the contract is an issue of contract interpretation [*Fouchard*, *para*. *41*]. Accordingly, the Parties' dispute over interpretation of clause 15 and clause 12 of the Sales Agreement should be *referred to* [*EMPHASIS ADDED*] the Tribunal [*CE5*, *p. 14*].

27. If the Tribunal were to find the dispute is not about interpretation of contract, the Tribunal still have jurisdiction to adapt the contract because the arbitration clause provides that *any disputes* [*EMPHASIS ADDED*] arising out of the contract shall be referred to the Tribunal and resolved by arbitration [*CE5*, *p. 14*]. The law of Mediterraneo provides for a broad interpretation of arbitration clause, which is also in line with the tendency in international arbitration [*Brunner*, *p*. *496*; *Berger 2001*, *p*. *1373*]. Broad interpretation means "any disputes" should extend to all disputes having any plausible factual or legal relation to the Parties' agreement or dealings [*Born 2014*, *p*. *1347*; *Management & Technical Consultants SA v. Parsons-Jurden International Corp.*]. As for this case, CLAIMANT's request for contract adaptation is based on the unforeseen tariff and the disequilibrium of the current contractual relationship. Thus, "any dispute" encompasses contract adaptation and thereby authorizes the Tribunal to decide whether it can adapt the contract.

28. Therefore, the Tribunal has the jurisdiction to adapt the contract under the arbitration clause.

2. The Tribunal has the power to adapt the contract based on the Parties' agreement and the law of Mediterraneo

29. CLAIMANT submits that power to adapt the contract is conferred upon the Tribunal. When considering the powers of an arbitral tribunal, the arbitration clause should be referred to primarily and the arbitrator's powers are primarily derived from the parties' agreement [*Redfern/Hunter*, *para*. *5.14*; *Beisteine*, *p*. *97*]. It is not sufficient to only refer to the arbitration clause, any relevant mandatory provisions of the law governing the arbitration clause must also be taken into account [*Redfern/Hunter*, *para*. *5.13*]. As for the case at hand, the power of the Tribunal derives from the Parties' agreement and authorization [***i***]. The general contract law of Mediterraneo also grants the Tribunal the power to adapt the contract [***ii***].

i. The power of the Tribunal derives from the Parties' agreement and authorization

30. The Parties expressly authorized the Tribunal the power to adapt the contract in the arbitration clause. As the basic source of arbitrator's power [*Berger 2001*, *p. 8*], the arbitration clause stipulates that any dispute arising out of this contract including contract adaptation mentioned above, shall be finally *resolved* [*EMPHASIS ADDED*] by the Tribunal, thereby granting the power for the Tribunal to adapt the contract.

31. The Parties have agreed to confer the power upon the Tribunal to adapt the contract. RESPONDENT's intention to authorize the Tribunal to adapt the contract can be determined in the negotiation of the Parties according to Art.8(3) CISG. When Ms. Napravnik, the negotiator of CLAIMANT suggested including an adaptation clause into the contract, Mr. Antley, the exclusive negotiator of RESPONDENT, expressly stated that it should be the task of the arbitrators to adapt the contract if the Parties could not agree [*CE8*, *p. 18*], which was in consistence with CLAIMANT's preference. Mr. Antley also promised to make a proposal as it can be evidenced from his note that the Parties want to connect the hardship clause with the arbitration clause [*RE3*, *p. 35*]. This clear mutual consent to authorize the Tribunal to adapt the contract was perceived by CLAIMANT and firmly established since no representation suggesting otherwise was given by RESPONDENT. A mutual authorization by the Parties can be evidenced although it was not added in the arbitration clause. Therefore, the Tribunal has the power to adapt the contract with the Parties' agreement.

ii. The law of Mediterraneo grants the Tribunal the power to adapt the contract

32. The law of Mediterraneo, governing the arbitration clause, also confers the power upon the Tribunal to adapt the contract. The contract law in Mediterraneo is a verbatim adoption of the UNIDROIT Principles. Under Art. 6.2.3 and Art. 1.11 of the UNIDROIT Principles, the court, including an arbitral tribunal, may adapt the contract when hardship is constituted. Therefore, in the present case, the Tribunal also has the power to adapt the contract under the law governing arbitration clause.

33. RESPONDENT alleges the Tribunal is unauthorized for lacking an express conferral of powers in the contract [*answer to NoA*, *p. 31*]. Nevertheless, with the law of Mediterraneo governing

the arbitration clause, the express conferral of powers is not required. Moreover, modern development in international arbitration supports a more extensive jurisdiction for arbitral tribunals including the adaptation of contract. Therefore, an express clause should not be necessary, as the intention and purpose of the parties should also be taken into consideration [*Brunner*, *p. 496*; *Berger*, *p. 1375*; *Beisteine*, *p. 108*].

34. In conclusion, with the authorization of the Parties and the application of the law of Mediterraneo, the Tribunal has the jurisdiction and power to adapt the contract.

35. **CONCLUSION OF ISSUE A**: The Parties have agreed that the Sales Agreement which includes the arbitration clause should be governed by the law of Mediterraneo in the contractual context and drafting history, Also, the main contract assumption will be applied in the present case. Even if the Tribunal decide that there is no agreement on the governing law for arbitration clause, the closest connection and most real principle will also lead to the same conclusion. Thus, the arbitration clause should be governed by the law of Mediterraneo. With the law of Mediterraneo governing the arbitration clause and its interpretation, the Tribunal's jurisdiction to adapt the contract is authorized by the Parties in the arbitration clause. Meanwhile, the Parties' agreement and the law of Mediterraneo confer the power upon the Tribunal to adapt the contract.

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

36. CLAIMANT is entitled to submit the evidence from the other arbitration proceedings, even though the evidence is obtained either through breaching the confidentiality agreement or illegal hack. At the annual breeder conference, CLAIMANT received reliable information concerning another arbitration conducted under HKIAC Rules, in which RESPONDENT asked for an adaptation for the contract. CLAIMANT has been promised a copy of the award [*PO2*, *p. 61*]. This evidence can be used by CLAIMANT to substantiate its claim. Contrary to RESPONENDET's allegation, CLAIMANT is entitled to submit such evidence since the evidence is relevant to the case and material to its outcome [**A**], the Tribunal can admit evidence obtained from another arbitration proceeding [**B**], even under the assumption that it was obtained illegally [**C**].

A. CLAIMANT is entitled to submit such evidence since the evidence is relevant to the case and material to its outcome

37. CLAIMANT is entitled to submit the evidence since it has relevance to the case and has materiality to the outcome of the case. Pursuant to Art. 22.3 HKIAC Rules 2018, the arbitral tribunal may allow a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. As for the case at hand, the evidence, which CLAIMANT intends to submit, is relevant to the case [**1**]. Besides, the evidence is also material to the outcome [**2**].

1. The evidence from the other arbitration proceedings is relevant to the case

38. The evidence is relevant to the present case. The relevance, from the parties' perspectives, requires that the evidence can be used by the party to present its case [*Marghitola*, *p. 49*]. In addition, documents and other evidence only need to be *prima facie* relevant [*Born 2014*, *p. 2363*].

39. The evidence, which CLAIMANT intends to submit, is an award rendered in an arbitration involving RESPONDENT [*PO 1*, *p. 50*]. The transaction was affected by the same unexpected imposition of tariff in this case. These two cases share identical background, and were both

negotiated by Mr. Antley and conducted under HKIAC Rules 2013 [*PO2*, *p. 60*]. The content of this award enables CLAIMANT to present this case, revealing its factual background, especially the impact of the tariff on affected business.

40. Consequently, the evidence from the other proceedings is relevant to the present case.

2. The award from the other arbitration proceedings is material to the outcome of the case

41. Besides the relevance, the evidence from the other arbitration proceedings is also material to the outcome. Materiality emphasizes the relation to the outcome of the case, which suggests a focus on how the evidence fits into the resolution of the dispute [*Davies*, *p. 178*]. A material document has also been described as one which "would have a tendency to influence the tribunal's determination of issues in dispute" [*Brower/Sharpe*, *p. 319*]. It means that the document is likely to contribute to the clarification of the case [*UNCITRAL Draft Guidelines*, *p. 17*].

42. In that arbitration, due to the imposition of the tariff on agricultural products, as the seller, RESPONDENT asked for an adaptation of the price. In the *Partial Interim Award* rendered in that arbitration, the tribunal had confirmed its power to adapt the contract under Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles) [*PO2*, *p. 60*]. The decision of that arbitration would help the Tribunal to understand the influence of the new tariff on the equilibrium of contracts. As a result, the evidence from the other arbitration proceedings can serve as a clarification to the present case, which can influence the Tribunal's determination of issues in dispute.

43. Therefore, the evidence from the other arbitration proceeding is material to the outcome of the case.

B. The Tribunal can admit evidence obtained from another arbitration proceeding

44. The Tribunal could admit evidence from another arbitration because confidentiality obligation imposed by HKIAC Rules could not restrict CLAIMANT's submission of the evidence [**1**]. Admission of evidence from the other arbitration is in line with the prevailing principles of transparency, which is beneficial to the arbitration proceedings [**2**].

1. Confidentiality obligation imposed by HKIAC Rules cannot restrict CLAIMANT's submission of the evidence

45. CLAIMANT is not bound by any confidentiality obligation because it was not involved in that other arbitration [***i***]. And CLAIMANT is justified to submit the evidence to support its legal interest [***ii***].

i. CLAIMANT who is not a party to the other arbitration is not bound by the confidentiality obligation of that arbitration

46. CLAIMANT submits that, CLAIMANT is not bound by the confidentiality obligation of another arbitration to which CLAIMANT is not a party. Art. 45.1 HKIAC Rules 2018 imposes a confidentiality obligation on the parties in the arbitration. However, any confidentiality provisions in the parties' arbitration agreement are only binding the parties themselves, not on third parties [*Esso Australia cas*e; *Misra*/*Jordans*, *p*. *42*; *Trakman*. *p*. *8*]. Third parties would generally be free to disclose materials from arbitral proceedings that were provided to them without separate confidentiality restrictions [*Born 2014*, *p*. *2789*].

47. In the present case, CLAIMANT is provided with the award by a company which provides intelligence on the horseracing industry [*PO2*, *p*. *61*]. Since there are no separate confidentiality restrictions, CLAIMANT, who is not a party to the other arbitration, would be free to submit these materials provided to it from the other arbitration proceedings.

48. Therefore, the confidentiality obligations pursuant to Art. 45.1 HKIAC Rules 2018 in another arbitration shall not restrict CLAIMANT's submission of evidence in this arbitration.

ii. CLAIMANT is entitled to submit the evidence to pursue its legal interest

49. CLAIMENT respectfully asks this Tribunal to weigh the legal interest of CLAIMANT's in this case against RESPONDENT's interest in keeping its former arbitration confidential. Art. 45.3(a)(i) HKIAC Rules 2018 justifies the disclosure of information from arbitral proceedings to protect or pursue a legal interest in legal proceedings. Although private arbitration enjoys the privilege of confidentiality, such privilege is not absolute [*Smeureanu*, *p*. *108*]. Exception for reasonably necessary disclosure of confidential documents or award in an arbitration could be allowed in the protection of legitimate interests or establishment of legal rights of a party or

non-party of that arbitration [*Ali Shipping case*; *Hassneh case*; *Glidepath B.V. v. Thompson*].

50. In the present case, CLAIMANT seeks to establish its legal interest in this arbitration, that is to be compensated by RESPONDENT the increased cost due to the unforeseen tariff imposed by Mediterraneo [*PO1*, *p. 53*]. The other arbitration concerns similar issues arising out of the same circumstance and also involves RESPONDENT [*PO2*, *p. 60*]. Since the tariff influencing both the present case and the prior case was newly imposed [*CE 6*, *p. 15*], it is the only similar case which is known to CLAIMANT. The award of the other arbitration in which that tribunal grants RESPONDENT an adaptation of the price is a strong evidence for CLAIMANT to support its submission in this case. Therefore, the evidence is necessary for CLAIMANT to pursue its legal interests.

51. Hence, by submitting the evidence CLAIMANT would not breach confidentiality obligation since it does not bind CLAIMANT as a non-party to that arbitration. The Tribunal should prioritize the protection of CLAIMANT's legal interest over RESPONDENT's request of unlimited confidentiality privilege.

2. Admission of evidence from the other arbitration proceedings is in line with the prevailing principles of transparency

52. Admission of evidence from another arbitration accords with the current trend to increase transparency in international commercial arbitration, which is beneficial to the present arbitration proceedings.

53. There has been considerable development in the past decades increasing the "transparency" of international commercial arbitration such as increasing publication of decisions and awards by arbitral institutions [*Rogers*, *pp. 1301*, *1312-1325*; *Born 2014*, *p. 2821*]. The benefit of publishing arbitral awards is evident in improving the efficiency, consistency of results and predictability of arbitration proceedings [*Born 2014*, *p. 2822*]. Although prior awards are not binding, previous decisions could be highly persuasive and provide guidance to subsequent tribunals [*Berger 1998*, *p. 149*; *Tetley*, *p. 719*; *Hanotiau*, *para. 551*; *ICC No. 6363*]. Specifically, awards have articulated principles with regard to issues such as obligations of good faith and force majeure, that are cited and given effect in other arbitrations [*Carbonneau*, *p. 589*; *Cremades*, *p. 526*; *ICC No. 4131*].

54. In the case at hand, CLAIMANT intends to disclose the award of an arbitration conducted also under the HKIAC Rules which had similar merits and background as the present case [*PO2*, *p. 60*]. Admission of such evidence is in line with the current trend to increase transparency in international commercial arbitration. Previous decisions in similar case would provide guidance to the Tribunal in the present case with regard to obligations of hardship, which helps the Tribunal make more reasonable and enforceable decisions.

55. Therefore, admission of evidence from the other arbitration in line with the prevailing principles of transparency is beneficial to the present arbitration proceedings.

C. The Tribunal could admit evidence obtained through illegal means

56. The method that CLAIMANT acquires the evidence does not hinder the admissibility of the evidence. There are no specific grounds for excluding this evidence under HKIAC Rules [**1**]. The illegal hack could not be the ground for excluding the evidence [**2**]. RESPONDENT's former employees' breach of confidentiality agreement does not preclude the admissibility of the evidence [**3**].

1. There are no specific grounds for excluding this evidence under HKIAC Rules

57. This evidence is on the basis of the assumption that it had been obtained either through a breach of a confidentiality agreement or through the illegal hack of RESPONDENT's computer system [*PO1*, *p. 52*]. The Tribunal may exclude evidence under the following three circumstances. Firstly, in the situation that what the evidence intended to prove is already established by other evidence. Secondly, in the situation that the amount of the evidence is excessive. Thirdly, in the situation that the disputes concern numerous but similar factual issues [*Moser*/*Bao*, *p. 275*]. Illegal means of obtaining evidence is not included in any of the three situations. Therefore, neither the breach of a confidentiality agreement nor the illegal hack is ground for excluding the evidence under HKIAC Rules.

2. CLAIMANT's method of acquiring the evidence is lawful so the evidence should be admitted

58. RESPONDENT alleges that the evidence was obtained through illegal hack so that the evidence shall be excluded by the Tribunal. Contrary to RESPONDENT's allegation, CLAIMANT

acquired the evidence without breaking relevant law and regulation [*PO2*, *p. 60*]. The Tribunal's consideration of evidence requires the evidence to have been gathered in a lawful evidence procedure [*Müller-Chen*, *p. 204*]. Where international arbitration is concerned, it is likely to be a discretionary matter for a tribunal and may depend on the circumstances, in particular, who obtained it illegally [*Waincymer*, *p. 797*]. The Tribunal should take it into consideration that it was a third party but not the CLAIMANT that conducted an illegal hack.

59. Moreover, evidence which was obtained through WikiLeaks was admitted by the ICSID tribunal [*Caratube case*]. The ICSID tribunal held that the evidence was relevant and material so that it shall be admitted. Also, an illegal obtained evidence was admitted by the tribunal [*Corfu Channel case*]. In ConocoPhilips v. Venezuela, Prof. Georges Abi-Saab, one of the arbitrators published a strong dissent, wherein he stated that ignoring the evidence's relevance would lead to a travesty of justice [*ConocoPhilips v. Venezuela*]. Thus, the evidence obtained by illegal hack shall not be the ground for excluding the evidence when it is relevant and material.

3. RESPONDENT's former employees' breach of confidentiality does not preclude the admissibility of the evidence

60. The evidence should be admitted regardless of its source. It is RESPONDENT's former employees who breached the contractual confidentiality obligation. The evidence offered in violation of a contractual duty of confidentiality does not give rise to the exclusion of evidence [*O'Malley*, *para. 9.119*]. In Enron v. Argentina case, the Tribunal found that a confidentiality undertaking was a personal legal issue to that witness, and was not ground for denying the admissibility of the witness statement [*Enron v. Argentina*]. The situation is similar to the case at hand. So in the present case, the breach of contractual confidentiality is a legal issue between RESPONDENT and their former employees. The employees should undertake the responsibility for the breach of contract. But it does not hinder the admissibility of the evidence in this arbitration proceeding.

61. Taking all these into consideration, CLAIMANT submits that neither the breach of a confidentiality agreement nor the illegal hack is ground for excluding the evidence.

62. **CONCLUSION OF ISSUE B**: In conclusion, according to HKIAC Rules 2018, CLAIMANT

is entitled to submit the evidence as long as the evidence is relevant to the case and material to its outcome. Besides, the evidence from another arbitration should not hinder its admissibility. Last but not least, the method by which CLAIMANT acquires the evidence does not hinder the evidence's admissibility. Therefore, even if the evidence from the other arbitration proceedings is assumed to be obtained either through a breach of a confidentiality agreement or through an illegal hack, CLAIMANT is still entitled to submit such evidence.

ISSUE C: CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD UNDER CLAUSE 12 OF THE CONTRACT AND CISG

63. CLAIMANT and RESPONDENT contracted for the sale and delivery of frozen semen from the stallion Nijinsky III and agreed on three shipments [*CE5*, *p. 13*]. Two months before the third shipment was due, the Mediterraneo government announced 25 per cent tariff on agricultural products from Equatoriana. A month later, the Equatorianian government retaliated with 30 per cent tariff on selected products from Mediterraneo [*CE6*, *p. 15*].

64. The Parties only found out that the tariff was applicable to the third shipment several days before it was supposed to be dispatched and started negotiations at once. Before an agreement could be reached, CLAIMANT delivered the goods relying on the contractual terms. However, the following negotiations did not have a positive outcome and RESPONDENT refused to pay any additional amount for the tariff [*CE8*, *p. 18*].

65. The tariff was not foreseen by the Parties and made the contract more onerous for CLAIMANT. Therefore, CLAIMANT is entitled to the payment of 1,250,000 USD under clause 12 of the contract [**A**]. Alternatively, CLAIMANT is entitled to the payment under the CISG [**B**].

A. CLAIMANT is entitled to the payment of 1,250,000 USD under clause 12 of the contract

66. Under clause 12, the additional tariff falls within the realm of hardship [**1**] and CLAIMANT is entitled to the payment of 1,250,000 USD through price adaptation [**2**].

1. Under clause 12, the additional tariff falls within the realm of hardship

67. The additional cost of the retaliatory tariff should not be borne by CLAIMANT. Although the Parties have agreed on a DDP-delivery obligation, it does not settle the risk allocation under hardship situation [***i***]. Clause 12 regulates the responsibility and risk distribution issue in the event of hardship. Under clause 12, seller shall not be responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*CE5*, *p. 14*]. The retaliatory tariff meets all the requirements under clause 12 [***ii***]. Therefore, CLAIMANT is not responsible for the cost resulting from the retaliatory tariff.

i. DDP-delivery obligation does not settle the risk allocation under hardship situation

68. To benefit from CLAIMANT's great experience in export and import, the Parties agreed on a DDP-delivery obligation, however, with a varied risk allocation under hardship situation. Clause 12, a combination of both force majeure and hardship clause, has been included to relieve CLAIMANT from certain risks which should be borne by CLAIMANT under DDP obligation. It is true that under a DDP obligation, the seller should bear the risks involved in clearance of import [*Ramberg*, *p. 149*]. However, if the risk has been materialized into an incident satisfying clause 12, the seller is no longer responsible for the payment resulting from that incident. Therefore, even the Parties have included a DDP-delivery obligation, the particular risk faced by both Parties today has materialized into an incident that fits the requirements under clause 12. In this regard, CLAIMANT is not responsible for the additional tariff caused by that particular incident and its liability exemption does not violate the DDP obligation.

ii. The retaliatory tariff meets all the requirements of hardship under clause 12

69. In the present case, the retaliatory tariff is comparable to additional health and safety requirements [**a**], was unforeseen by the Parties [**b**], and has made the performance more onerous [**c**]. Therefore, all the hardship requirements have been met.

a. The retaliatory tariff is a comparable event

70. The retaliatory tariff in this case falls within the realm of hardship because it is comparable to additional health and safety requirements under clause 12. Pursuant to Art. 8(1) and (3) CISG, clause 12 should be interpreted under the subjective test with due consideration given to prior negotiations. In the case at hand, "comparable event" should be interpreted according to CLAIMANT's intent that RESPONDENT knew. CLAIMANT's intent is to relieve itself from the changes in custom regulation and import restrictions. This intent has been expressly stated in CLAIMANT's email of 31 March that "we are not willing to take over any further risks……in particular not those associated with changes in customs regulation or import restrictions" [*CE4*, *p. 12*]. The "comparable event" in nature includes all the changes of import restrictions. RESPONDENT was aware of that because RESPONDENT had participated in the

drafting procedure, and the final wording of clause 12 was drafted directly in reference to the risks mentioned in CLAIMANT's email of 31 March [*PO2*, *p. 56*]. Thus, the Parties have agreed that the "comparable events" particularly included the risks associated with changes in import restrictions.

71. The "additional health and safety requirement" is merely an example set by the Parties. In a specific event which is known by both Parties [*PO2*, *p. 58*], "additional health and safety requirement" is a type of import restrictions which triggered the hardship situation. CLAIMANT referred to this specific event as an example to express its intent that CLAIMANT is not willing to take over similar risks [*CE4*, *p. 12*]. Since it was impractical to list all the potential hardship-triggering events, "additional health and safety requirement" was listed in the clause merely as an example to help interpret the "comparable" situation, which in nature includes any forms of import restrictions imposed by governmental authorities.

72. In the case at hand, the imposition of the new tariff on the product by the Equatorianian authorities was a retaliatory tariff against Mediterraneo where CLAIMANT registered and located [*CE6*, *p. 15*]. The retaliatory tariff, in nature, is comparable to additional health and safety requirement because it is a type of restriction on import as well, which falls within the realm of comparable event according to CLAIMANT's intent that RESPONDENT knew.

b. The retaliatory tariff was not foreseen by the Parties

73. Neither of the Parties has foreseen the tariff when signing the contract. "Unforeseen" is a subjective standard according to which the event is not foreseen by the Parties at the time of the conclusion of the contract [*Black's Law Dictionary*, "*unforeseen*"]. In the case at hand, the contract was signed on 6 May 2017 [*CE5*, *p. 13*], however, this retaliatory tariff imposed by Equatoriana was announced on 19 December 2017 and took effect on 15 January 2018 [*CE6*, *p. 15*; *PO2*, *p. 58*], which was roughly seven months after the signing of the contract. Even if the tariff imposed by Mediterraneo was taken into consideration, it took effect from 15 November 2017 [*PO2*, *p. 58*], which was still six months after the conclusion of the contract. Hence, the Parties did not foresee the retaliation at the time of the conclusion of the agreement.

74. Further, the tariff was unforeseen because neither of the Parties expected that their transaction of frozen horse semen would be affected by the retaliatory measure. It had never crossed their

minds that the frozen semen could be considered to be an "agricultural good" so that the tariff would apply to it. In fact, the Parties were not aware of the fact that the increased tariff covered all animal products including frozen horse semen until Ms. Napravnik asked for customs clearance in January 2018 [*PO2*, *p. 58*], and when Ms. Napravnik was informed about that fact, she was in great surprise [*CE8*, *p. 17*]. Besides, RESPONDENT has expressed its confidence about the permanent lifting of the ban on artificial insemination in Equatoriana [*CE1*, *p. 9*], which implies that RESPONDENT did not expect any similar restrictions on import of horse semen. Therefore, the retaliatory tariff meets the subjective requirement of "unforeseen" under clause 12.

c. The retaliatory tariff made the performance more onerous for CLAIMANT

75. The retaliatory tariff fits the "more onerous" requirement. Hardship situation in the present case is designed to be easily triggered from the "more onerous" wording and its prior negotiation. The 30 per cent increase of retaliatory tariff is sufficient enough to satisfy the requirement of "more onerous" and trigger hardship.

76. The choice of word has suggested a more relaxed hardship-triggering standard. The drafter is able to determine what changes of circumstances will suffice to trigger the right to invoke hardship (especially the required degree of severity, *i.e.*, a "material disadvantage" or a "substantial financial burden", *etc.*) [*Brunner*, *p. 513*]. In practice, contracting parties can use wordings such as "excessively onerous", "radically more onerous" or "more onerous" to set different standards for hardship determination. The fact that the Parties have provided for a hardship clause with a less stringent wording suggests that a more relaxed standard including a lower threshold test would apply. For example, "more burdensome" (and not "excessively burdensome") appears to include a more relaxed standard [*id.*, *p. 515*]. In the present case, the Parties have chosen the wording "more onerous" instead of "excessively onerous" or "radically more onerous" as the requirement to trigger the hardship situation, expressing their intent of a more liberal hardship test and thus opted for a more easily-triggered hardship standard.

77. Further, the purpose of including a DDP delivery is not to burden CLAIMANT with all the associated risks. In accordance with Art. 8(3) CISG, all relevant circumstances of the case

including the negotiations must be considered as well as the purpose of the contract [*Schlechtriem*/*Schwenzer*, *p. 243 para. 21*; *UNCITRAL Digest of Case Law*, *p. 57*]. During the prior negotiation, when RESPONDENT proposed a DDP delivery, it stated that the reason behind its proposal is "the urgency of the delivery and [CLAIMANT's] much greater experience in the shipment of frozen semen including the necessary export and import documentation" [*CE3*, *p. 11*]. When accepting RESPONDENT's proposal of a DDP-delivery, CLAIMANT expressed its intent that it was not willing to bear all the other risks associated with the change in the delivery terms, which is exactly the purpose of including this hardship clause [*CE4*, *p. 12*]. The Parties had shown the intent that DDP delivery was included to benefit RESPONDENT from CLAIMANT's greater experience in import, instead of posing all the risks on CLAIMANT. Therefore, the hardship invoked by change of circumstances related to import restrictions is designed to be easily triggered, and a high degree of severity was not taken as an essential factor in the first place.

78. In conclusion, the retaliatory tariff is a comparable unforeseen event making CLAIMANT's performance more onerous. Therefore, under clause 12, CLAIMANT shall not be responsible for this tariff.

2. CLAIMANT is entitled to the payment resulting from an adaptation of the contract

79. As stated by RESPONDENT, clause 12 of the contract is a combination of force majeure clause and hardship clause [a*nswer to NoA*, *p. 32*]. Although there is no expressly stated remedy for hardship under clause 12, the Parties formulated a specific remedy for hardship. During the negotiation process, the Parties reached an implied consent of price adaptation [***i***]. Alternatively, price adaptation was included into the contract as a usage [***ii***]. Relying upon the remedy of price adaptation, CLAIMANT delivered the remaining frozen semen [***iii***].

i. The Parties reached an implied consent of price adaptation

80. On 12 April 2017, Ms. Napravnik mentioned to Mr. Antley that it was important to include a mechanism of price adaptation into the contract. Mr. Antley agreed to the remedy of price adaptation and emphasized that it should be the task of the arbitrator to adapt the contract [*CE8*, *p. 17*]. Thus, the Parties reached an implied consensus on price adaptation.

81. The price adaptation is offered as a remedy under hardship situation. Although the Parties

intended to include an express reference of price adaptation into the hardship clause [*CE8*, *p. 17*], the fact that they failed to do so does not in itself prevent CLAIMANT from resorting to price adaptation as a remedy under their implied consent.

ii. Price adaptation was included into the contract as a usage

82. The Parties impliedly included the UNIDROIT Principles as a usage, which allows arbitral tribunal to adapt the contract.

83. The UNIDROIT Principles meet the requirements of a usage under Art. 9(2) CISG. According to Art. 9(2) CISG, the parties are considered to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. Therefore, the requirements for an applicable usage can be summarized as follows: it is widely known, possessing international nature and it is known or should have been known by the parties [*Schlechtriem/Schwenzer*, *Art. 9*, *para. 16-20*].

84. Firstly, the UNIDROIT principles are considered to be widely known and regularly observed by parties in international practice. According to a survey conducted in more than 39 countries such as the United States, Japan and Russia, a large amount of replies demonstrated that the UNIDROIT Principles have been used as a guide in contract negotiations, as the law chosen by the parties to govern their contract and *etc*. [*Bonell*, *pp. 34 & p.38-39*]. Thus, the UNIDROIT principles are widely known and observed by the majority of those involved in the international transactions.

85. Secondly, the UNIDROIT Principles have the international nature. According to Preamble of the UNIDROIT Principles, "these Principles may be used to interpret or supplement international uniform law instruments and may serve as a model for national and international legislators." In addition, concerning the hardship which is related to the present case, the UNIDROIT Principles have been considered to express international trade usage to deal with situations of hardship [*Schwenzer et al*., *para. 27.52*; *Schlechtriem*/*Butler*, *para. 291*]. Thus, the UNIDROIT Principles were developed for international transaction and possess the international nature.

86. Thirdly, the UNIDROIT Principles should have been known by the Parties. The general

contract law of both Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1*, *p. 53*] and the Parties have agreed that the Sales Agreement is governed by the law of Mediterraneo [*CE5*, *p. 14*]. Under Art. 6.2.3 UNIDROIT Principles, price adaptation is allowed if hardship occurs. Thus, the hardship remedy provided in the UNIDROIT Principles should have been known to the Parties since they are experienced in international commercial practice.

87. Therefore, the UNIDROIT Principles have been made applicable to the contract as a usage. Since Art. 6.2.3 UNIDROIT Principles provides a remedy that the aribitral tribunal could adapt the contract when hardship is triggered, CLAIMANT is entitled to the payment resulting from the price adaptation.

iii. Relying upon the remedy of price adaptation, CLAIMANT delivered the remaining frozen semen

88. After the retaliatory tariffs were imposed, the Parties immediately started negotiations regarding a price adjustment for the frozen semen. RESPONDENT's statement that a solution on the price would be found [*CE8*, *p. 18*; *RE4*, *p. 36*] gave the impression that RESPONDENT accepted the general need for a price adaptation. Since the Parties had agreed on the remedy and RESPONDENT accepted to adapt the price in the negotiation, considering that the contractual equilibrium will be restored through price adaptation, CLAIMANT complied with its delivery obligation and shipped the remaining 50 doses of frozen semen in good faith. The burden of retaliatory tariff was unreasonably imposed on CLAIMANT. Thus, it is necessary to adapt the contractual price to relieve CLAIMANT from the risk of retaliatory tariff which RESPONDENT ought to bear.

89. Therefore, if the occurrence of the burdensome tariff constitutes a hardship invoking clause 12 of the contract and the Parties failed to reach an agreement, an adaptation of the contract should be made.

B. Alternatively, CLAIMANT is entitled to the payment under the CISG resulting from an adaptation of the price

90. Art. 79 CISG governs but does not settle situations of hardship. Therefore, the hardship provision of UNIDROIT Principles should be applied to fill the gap [**1**]. Under Arts. 6.2.2 and

6.2.3 the UNIDROIT Principles, there is hardship in the case at hand [**2**] and the Tribunal should adapt the contract to restore its equilibrium [**3**].

1. Art. 79 CISG governs but does not settle situations of hardship and the hardship provision of the UNIDROIT Principles should be applied to fill the gap

91. Cases of hardship are governed but not settled under Art. 79 CISG [***i***]. However, pursuant to Art. 7(2) CISG, the UNIDROIT Principles can be applied to fill the gap to promote uniformity [***ii***].

i. Cases of hardship are governed but not settled under Art. 79 CISG

92. According to the prevailing view, cases of hardship can be considered as a particular group of cases under the notion of force majeure, in which the impediment to performance consists in a change of circumstances resulting in hardship [*Schwenzer et al*., *para*. 45.95; *Brunner*, *p*. 392; *Schlechtriem*/*Butler*, *p*. 203 *para*. 291; *Schlechtriem*/*Schwenzer*, *Art*. *79 para*. *31*; *Kröll et al*., *Art*. *79 para*. *78*; *CISG-AC Opinion No*. *7*, *para*. *3.1* and *Comments 26-39*]. An impediment under Art. 79(1) is not only an event that renders the performance physically impossible, but also one which makes the performance excessively onerous for the obligor [*Schlechtriem*/*Butler*, *p*. 203 *para*. 291; *Schlechtriem*/*Schwenzer*, *Art*. *79 para*. *31*; *Kröll et al*., *Art*. *79 para*. *78*]. The language of Art. 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible [*CISG-AC Opinion No*. *7*, *para*. *3.1* and *Comments 26-39*]. Consequently, situations of hardship are encompassed by Art. 79 CISG.

93. However, Art. 79 CISG only excludes a claim for damages and does not provide for other remedies in cases of hardship, such as the obligor's right to ask for an adjustment of the contractual terms or to avoid the contract [*Kröll et al*., *Art*. *79 para*. *80*]. Hardship is not only about limiting the claim for damages; it is also about the specific performance claim [*id*.]. Therefore, it has to be submitted that the question of hardship, although governed by the CISG, cannot be solved under Art. 79 [*id*.].

ii. Pursuant to Art. 7(2) CISG, the UNIDROIT Principles should be applied to fill the gap

94. Under Art. 7(2) CISG, questions concerning matters governed by but not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based.

95. In the Scafom International BV v. Lorraine Tubes S.A.S. case where the seller had invoked hardship due to an unforeseeable price increase of raw material, the Belgian Supreme Court decided that CISG was applicable but there was a gap to be filled by general principles of international trade, among others, the UNIDROIT Principles [*Scafom International BV v. Lorraine Tubes S.A.S.*]. It was held that changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract can form an impediment in the sense of Art. 79 CISG. Further, the court decided that the seller is entitled to claim the renegotiation of the contract in accordance with Art. 6.2.3(1) UNIDROIT Principles, which fills the gap of Art. 79 CISG [*id.*]. Consequently, the court provides an important guideline for the practical implication of Art. 79 CISG relying on the provisions of the UNIDROIT Principles.

96. As has been established, Art. 79 governs hardship but does not provide for other remedies such as the right to ask for an adjustment of the contractual terms or avoid the contact. Therefore, Arts. 6.2.2 and 6.2.3 UNIDROIT Principles should be applied to fill the gap of Art. 79 CISG to provide for the legal consequences desired in cases of hardship.

2. Under Art. 6.2.2 UNIDROIT Principles, there is hardship in the case at hand

97. According to Art. 6.2.2 UNIDROIT Principles, there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract; the events occur or become known to the disadvantaged party after the conclusion of the contract; the events could not have been reasonably considered by the disadvantaged party; the events are beyond the control of the disadvantaged party; and the risk of the events was not assumed by the disadvantaged party.

98. In the case at hand, increased tariff fundamentally altered the equilibrium of the contract [***i***], and it is unforeseeable which occurred after the contract conclusion as well as beyond CLAIMANT's control [***ii***], also its risk cannot be assumed by CLAIMANT [***iii***], composed of the hardship.

i. The increased tariff fundamentally altered the equilibrium of the contract

99. Changed circumstances are relevant only in exceptional cases. Generally, parties are bound to

perform their obligations, as long as it is possible and regardless of the burden it may impose on the performing party. The premise of an exceptional case is that the alteration of the equilibrium of the contract is fundamental, in derogation to the general principle of *pacta sunt servanda* [*Brunner*, *p. 146 para. 5*]. "Fundamental" alteration usually depends upon whether there is an increase in cost of performance or decrease in value of the performance [*Art. 6.2.2 UNIDROIT Principles*, *Comment 2*]. Nevertheless, whether a party faces hardship can only be determined on all circumstances of particular case [*Brunner*, *p. 427 para. 2*; *Vogenauer*, *p. 816*]. Besides the cost increase or value loss, its financial situation, the counter-performance to be received by the obligor ought to be considered as well [*Azerdo*, *p. 326 para. 491*].

100. In the present case, because of the dramatic increase in tariff, CLAIMANT had to pay excessive amount of money to conduct its contract, which made the cost increase by 30 per cent. Through case by case analysis, considering all the mentioned factors, CLAIMANT had been in financial difficulty for the last two years [*CE8*, *pp. 17-18*], without being profitable again, CLAIMANT is faced with losing credit lines and suffering bankruptcy [*PO2*, *p. 59*]. Therefore, the extra tariffs, which had to be paid immediately, resulted in considerable burden for CLAIMANT. Moreover, after leaving CLAIMANT the impression of accepting the increased price, RESPONDENT refused to pay any additional amount for the tariffs and even stopped negotiations which demonstrated that the counter-performance from RESPONDENT is inconsistent [*CE8*, *pp. 17-18*]. Thus, as all the factors mentioned above, the extra payment for the tariffs fundamentally altered the equilibrium of the contract through comprehensive consideration.

101. Even take a step back to admit that there is an alleged threshold, a somewhat lowered standard alteration threshold may, in effect, apply if the obligor's financial ruin is impending [*Brunner, p. 438*]. The 30 per cent increase in cost should be sufficient to cause serious imbalance for CLAIMANT with serious financial difficulty, which constitutes fundamental alteration of the contract equilibrium.

ii. The increase in tariffs is unforeseeable which occurred after the contract conclusion as well as beyond CLAIMANT's control

102. Firstly, the imposition of tariff is unforeseeable for both Parties. Unforeseeable is an objective

standard while in comparison, "unforeseen" as drafted in clause 12, is a subjective standard. Equatoriana has always been one of the biggest supporters of free trade system, especially in times when Progressive Liberals, a party with more positive attitude towards free trade in power [*CE6*, *p. 13*; *NoA*, *p. 7*]. Moreover, even if RESPONDENT may argue that Mediterraneo government had constantly announced its preference for a more protectionist approach to agricultural products, it was an unreasonable demand for CLAIMANT to be aware that horse semen used for artificial insemination fell in the scope of agricultural products together with vegetables as well as meat. And it can be proved by the fact that Mr. Shoemaker and the customs authority were both not certain whether the semen was covered under "animal products" one month after the imposition of the tariff [*RE4*, *p. 36*].

103. Further, whether it is a reasonably foreseeable increase in the seller's cost of performance should be historically based [*Eisenberg*, *p. 245*; *Ishida*, *p. 374*]. During the past ten to twenty years before the conclusion of the contract, no additional tariff had been imposed to horse semen before. Thus, the 30 per cent increase took place out of the hypothetical percentage and, therefore, a "reasonable person" could not expect. It can be speculated that the CLAIMANT would not enter into the contract should it had contemplated the retaliatory tariff policy, which in turn elaborates how acute and surprising the event of increased tariffs was [*Vogenauer*, *p. 818 paras.13-14*]. Therefore, the increased tariff was unforeseeable.

104. Additionally, CLAIMANT cannot control the changed circumstances. Events ought to beyond the control of disadvantaged party, *i.e.*, so outside the bounds of probability that reasonable parties would not provide for it [*Perillo*, *pp. 128-129*]. In the present case, the requirement of outside the bounds can be met in the case of "acts of rulers and governments" [*Vogenauer*, *p. 818*, *paras. 13-14*]. Since the changed policy is a sort of inter-governmental act, hardly could CLAIMANT avoid the event from occurring, let alone control the event merely through adjusting performance on its own. In face with the unexpected impediment, the CLAIMANT had no alternative but to pay that 30 per cent more expensive tariffs, due to the fact that it could neither change the policy nor refuse to pay. Thus, the sudden increased tariffs are completely out of CLAIMANT's control.

105. Therefore, the increase in tariffs is unforeseeable which occurred after the contract conclusion as well as beyond CLAIMANT's control.

iii. The risk of the event was not assumed by CLAIMANT

106. CLAIMANT did not assume the risk associated with the increase in tariff under the contract and is not prevented from invoking hardship. Under Art. 6.2.2(d) UNIDROIT Principles, there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. However, in the present case, CLAIMANT did not expressly assume the risk of the tariff and it cannot be deduced from the nature of the contract that CLAIMANT is responsible for the additional tariff.

107. In the email of 31 of March 2018, CLAIMANT stated that it was not willing to take over any further risks associated with DDP, especially not those associated with import restrictions [*CE4*, *p. 12*]. RESPONDENT did not raise any objection thereto. The rationale behind the DDP delivery was primarily to ensure better transportation and import documentation, as stated by RESPONDENT [*CE3*, *p. 11*]. Thus, the Parties did not intend to burden CLAIMANT with the additional risks relating to DDP, which include the risk of tariff in this case.

108. Further, it cannot be inferred from the nature of the contract that CLAIMANT intended to assume all the risks of the tariff. A party who enters into speculative transactions, for example, is deemed to accept a certain degree of risk, even though it may not have been fully aware thereof when it entered into the contract [*Art. 6.2.2 UNIDROIT Principles*, *Comment 3*(*d*)]. However, in the case at hand, CLAIMANT entered into a sales contract and it cannot be deduced from the nature of the contract that it has assumed all the risks of the tariff. Therefore, CLAIMANT did not assume the risk of the increase in tariff, neither explicitly nor impliedly.

109. In conclusion, there is hardship in the present case because the additional tariff fundamentally altered the equilibrium of contract as well as fulfilling all the other requirements under Art. 6.2.2 UNIDROIT Principles.

3. The Tribunal should adapt the contract to restore its equilibrium

110. Under Art. 6.2.3 UNIDROIT Principles, in case of hardship the disadvantaged party is entitled to renegotiations. Upon failure to reach agreement within a reasonable time, either party may resort to the court or arbitral tribunal which may terminate or adapt the contract. In the case at hand, the Parties failed to reach agreement through renegotiation [***i***]. Considering RESPONDENT's inconsistent behavior and the original contractual equilibrium [***ii***], the

Tribunal should adapt the contract to grant CLAIMANT the payment of 1,250,000 USD.

i. The Parties failed to reach agreement through renegotiation

111. Under Art. 6.2.3(1) and (3) UNIDROIT Principles, in case of hardship the aggrieved party is entitled to renegotiation and the request shall be made without undue delay. The request shall also indicate the grounds on which it is based. However, if an agreement on new terms could not be reached within reasonable time, either party may resort to the court.

112. In the present case, CLAIMANT promptly requested for renegotiation of the original terms of the contract after hardship had occurred. The grounds on which the request is based were indicated by CLAIMANT. After renegotiation had failed, CLAIMANT resorted to the Tribunal for an adaptation of the price.

113. CLAIMANT contacted RESPONDENT and requested for renegotiation right after being informed that the tariffs applied to the third shipment. In the email of 20 January 2018, CLAIMANT stated that the additional tariffs made the shipment 30 per cent more expensive and that a solution must be found before the third shipment could go out [*C7*, *p. 16*]. That CLAIMANT only informed RESPONDENT of the additional tariffs several days before the shipment was due, was because no one expected that the tariffs would also apply to racehorse semen. Even the employees in the relevant ministry of the Equatorianian government were not certain whether frozen racehorse semen was covered under "animal products", to which the tariffs were targeted [*R4*, *p. 36*]. Therefore, CLAIMANT requested for renegotiation without undue delay and the grounds thereof were indicated.

114. CLAIMANT and RESPONDENT had entered into renegotiation before the third shipment was dispatched and continued to negotiate afterwards. However, the renegotiation did not have a positive outcome. In the UNIDROIT Principles, "court" includes an arbitral tribunal [*Art. 1.11*, *UNIDROIT Principles*]. Thus, CLAIMANT can resort to the court for the adaptation of the contract upon failure of renegotiation.

ii. The Tribunal ought to restore the contractual equilibrium through adapting the price and RESPONDENT assuming all the imposed tariffs

115. Under Art. 6.2.3(4) UNIDROIT Principles, if the court finds hardship it may, terminate or adapt

the contract with a view to restoring its equilibrium. An adaptation is regarded to be preferable as the adapted terms were to provide for an increased price and the aggrieved party has a legitimate and prevailing interest through adaptation [*Brunner*, *p. 510*]. Termination of the contract may only be requested "if adaptation of the contract is not possible or cannot reasonably be imposed on one party" which means adaptation is the most likely solution in the majority of cases [*Vogenauer*, p. *821*] and it is a tendency to establish mechanisms for an adaptation of the contract to the changed circumstances [*Schwenzer et al*., *para. 43.21*]. Thus, considering CLAIMANT's legitimate interest as well as RESPONDENT's contractual obligation, the Tribunal ought to choose the latter remedy, that is, adapting price of the contract to restore the equilibrium.

116. Considering the Parties' original risk allocation in the contract [*Brunner*, *p. 499 para. 1*], as well as the Parties' legitimate expectations [*Mekki*, *para. 40*], along with the purpose of recover original contract equilibrium [*Vogenauer*, *p. 821*], the Tribunal should adapt the price to the extent that RESPONDENT assuming all the imposed tariffs.

117. Firstly, the original equilibrium of the contract is given as a yardstick for adaptation [*Maskow*, *p. 662*]. According to party intention and the wording of this contract, CLAIMANT is not obliged to undertake any risk out of the comparable changed circumstances. Some arbitral awards support that adaption the contract of international commercial transaction is based on the balance of the parties' respective obligations [*Bernardini*, *p. 212*]. As discussed above, since the changed circumstances met the requirements under clause 12 and triggered hardship, with clear risk allocation, CLAIMANT is not responsible for the increased 30 per cent tariff. Therefore, RESPONDENT should bear all of the additional cost of the tariffs.

118. Further, a promisor should be entitled to judicial relief if a financial loss resulting from changed circumstances significantly greater than the risk of loss that the parties would reasonably have expected the promisor to have undertaken [*Eisenberg*, *p. 234*]. The tribunal should seek to make a fair distribution of the losses between the parties [*Art 6.2.3 UNIDROIT Principles*, *Comment 7*]. However, a "fair" distribution may be an equal distribution but it need not be equal to be "fair" [*Vogenauer*, *p. 821*]. To decide what is the reasonable distribution standard, the economy wanted by the parties as well as the actual profit on both sides must be rediscovered [*Mekki*, *p. 21*; *Hinestrosa*, *p. 412*].

119. Due to the fact that CLAIMANT had been in financial difficulty for two years, the only purpose of this transaction is to be profitable again and continue its restructuring plan [*CE8*, *p. 17*; *PO2*, *p. 59*]. However, the imposed tariff completely frustrated the aim of this contract and CLAIMANT had to pay extra 25 per cent of tariffs deducting only 5 per cent profit. Additionally, in contrast to CLAIMANT's substantial loss, RESPONDENT, who would not be financially endangered if it bore the 1,250,000 USD, even breached the resale prohibition and resold the semen at a 20 per cent higher price than it initially bought from CLAIMANT [*PO2*, *p. 57*]. Since CLAIMANT has paid such unfair and unforeseeable tariffs, which absolutely goes against CLAIMANT's expectation for this trade. In other words, CLAIMANT would not enter into the contract with imposed risk and tariffs. In the respect of justifiable wishes for the trade, CLAIMANT ought not to assume any additional tariffs.

120. Besides, RESPONDENT's inconsistent behavior also aggravated CLAIMANT's loss. The Parties started communication after the imposition of 30 per cent tariffs and in the phone call RESPONDENT promised CLAIMANT to find a constructive solution [*RE4*, *p. 36*]. Specifically, it stressed its willingness to uphold a long-term relationship, starting by purchasing another stallion's semen from CLAIMANT [*CE6*, *p. 18*]. However, RESPONDENT abruptly broke off renegotiation after getting its hands on the goods. Its CEO got angry and said they were no longer interested in a further cooperation with CLAIMANT, which expressed a completely opposing attitude as before [*CE6*, *p. 18*]. Although RESPONDENT did not promise to pay for the additional tariff during the negotiation, CLAIMANT has reasonably relied on its willingness to fulfill its contractual obligation, namely, to shoulder the additional tariff. Thus, RESPONDENT is liable for the detriment it has caused to CLAIMANT under Art 1.8 UNIDROIT Principles. This is another factor that Tribunal ought to take into consideration when adapting the contract.

121. Therefore, the Tribunal should order RESPONDENT to pay 1,250,000 USD through adapting the price to restore the contractual equilibrium.

122. **CONCLUSION OF ISSUE C**: CLAIMANT's request for the payment resulting from the adaptation of the price is justified under clause 12 of the contract. Even if the Arbitral Tribunal should find that clause 12 does not apply to the case at hand, CLAIMANT is entitled to price adaptation under CISG.

PRAYER OF RELIEF

Therefore, based upon the foregoing arguments and the evidence in this case, it is requested with all due respect that this Tribunal finds in CLAIMANT's favor that:

1. The Arbitral Tribunal has the jurisdiction and power to adapt the contract with the law of Mediterraneo governing the contract;
2. CLAIMANT is entitled to submit the evidence from the other arbitration proceedings;
3. CLAIMANT is entitled to the payment of 1,250,000 USD.

Respectfully signed and submitted by counsel on 6 December 2018.

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