MEMORANDUM FOR

CLAIMANT

SNULAW

SEOUL NATIONAL UNIVERSITY
SCHOOL OF LAW

ON BEHALF OF:	AGAINST :
PHAR LAP ALLEVAMENTO Rue Frankel 1 Capital City Mediterraneo	BLACK BEAUTY EQUESTRIAN 2 Seabiscuit Drive Oceanside Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL

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MinKyeong Cho ● NakWon Choi ● SeungMin Jeon

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STATEMENT OF FACTS

CLAIMANT	Phar Lap Allevamento (Hereafter CLAIMANT) is a company renown for all areas of equestrian sport and its own mare herd, offspring and stallion depot. CLAIMANT is registered and located in Capital City, Mediterraneo
RESPONDENT	Black Beauty Equestrian (Hereafter RESPONDENT) is a company based in Oceanside, Equatoriana, and is famous for its broodmare lines that have resulted in a several world champions in equestrian sports
21 March 2017	RESPONDENT sent an e-mail to CLAIMANT, inquiring whether they can use frozen semen of Nijinsky III for their own breeding program. In this e-mail, RESPONDENT mentioned temporary alleviation of the ban on artificial insemination for racehorses, which is due by December 2018. At that time, the Equatorianian Government had ongoing restriction on the transportation of living animals due to foot and mouth disease which has lasted for two years. To take advantage of this temporary lift of the ban, RESPONDENT requested 100 doses of frozen semen, and this was unusually high number of doses considering trade custom of this area.
28 March 2017	RESPONDENT insisted on a delivery DDP, for CLAIMANT has an expertise in the transportation of frozen semen. At the same time, RESPONDENT mentioned the possibility of change in this delivery term if it is required.
31 March 2017	CLAIMANT was willing to accept the delivery DDP on condition that hardship clause is included in this contract to temper the additional risks taken, in particular, those associated with changes in customs regulation or import restrictions.

10 April 2017	In RESPONDENT's first suggestion, both "[t]he seat of arbitration shall be Equatoriana" and "[t]he law of this arbitration clause shall be the law of Equatoriana" was written *[Re Ex R1 p.33]*
11 April 2017	Then in CLAIMANT's reply, the representative did erase the sentence from the clause and emphasized the law applicable to the Sales Agreements remains the law of Mediterraneo, just revising the seat sentence "[t]he seat of arbitration shall be Danubia" *[Re Ex R2 p.34]*. That is, in the email, CLAIMANT suggested Danubia as the "place of arbitration."
12 April 2017	During the negotiation, RESPONDENT emphasized the importance of timely delivery. Mr. Antley, the prime negotiator of the contract on RESPONDENT's side, stated that it should be the task of the arbitrators to adapt the contract if the Parties could not agree. *[Cl Ex C8 p.17]* At the same day, the negotiators from both sides were injured from accident, and Mr. Antley was in in a coma for four weeks. Due to the accident, the negotiators of the contract from both sides were replaced for the finalization of the contract.
29 December 2017	The Government of Equatoriana announced that it will impose a tariff of 30 per cen upon all agricultural goods from Mediterraneo.
January 2018	CLAIMANT was told to its great surprise that newly imposed tariffs for agricultural products covered all animal products. The tariffs results in making the shipment 30% more expensive, destroying CLAIMANT's profit margin of 5% and corresponding to considerable hardship

21 January 2018	RESPONDENT created the impression of accepting general need for a price adaptation, by urging CLAIMANT to authorize the shipment as planned and emphasizing their interest in a long-term relationship.
2 February 2018	CLAIMANT was approached by another breeder from Equatoriana which was enquiring about the prices of frozen semen from another stallion. During the conversation, CLAIMANT was able to know that some of the products that was sold to Respondent had been sold to 10 different breeders.
30 May 2018	Kieron Velazquez stopped working for the Mediterranean buyer in the other arbitration. Mr. Velazquez later on met CLAIMANT on the annual breeder conference and told CLAIMANT's CEO about the other arbitration between RESPONDNET and the Mediterranean buyer.
29 June 2018	A "Partial Interim Award" was rendered in the proceedings of the other arbitration, and the arbitral tribunal had confirmed its power to adapt the contract should the tariff result in hardship for Respondent. Respondent has previously argued in the other arbitration that imposition of tariffs on agricultural products by the President of Mediterraneo is a hardship to RESPONDENT, thus the initial price should be increased.
6 July 2018	Two employees of RESPONDENT who had been witnesses in the other arbitration was fired, and they had been under a contractual obligation to keep all information about the other arbitral proceedings confidential.

ARGUMENTS

ISSUE I. THE ARBITRAL TRIBUNAL HAS THE JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

A. ARBITRATION AGREEMENT, *LEX CAUSAE* AND *LEX ARBITRI* ARE YARDSTICKS IN DETERMINING THE TRIBUNAL'S AUTHORITY TO ADAPT THE CONTRACT.

1 There is no general rule on whether the tribunal has jurisdiction to adapt the contract. Per the primacy of party autonomy, parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [*UNCITRAL Model Law on International Commercial Arbitration*]. The principle of party autonomy provides a right for the parties to refer their contractual disputes to arbitration, while this consent authorizes the arbitrators the power to decide the dispute.

2 The primacy of party autonomy in international commercial arbitration has a decisive influence on the determination of an arbitrator's power to adapt the contracts or fill gaps. Moreover, in cases where a contractual authorization is given, *Pacta sunt servanda* would not speak against but in favor of arbitrators' competence [*Berger, p.1*].

3 In determining the scope of power of the arbitral tribunal, the top priority should be the existence of the parties' consent. According to the UNCITRAL Working Group, this consent does not have to be made expressively but also can be derived from the significance and purpose of the agreement [*UNCITRAL Working Group, § 15*]. So, the arbitrators can consider the implicit or tacit intent of the parties.

4 Once party consent has been established, the tribunal should look to whether the provisions in the contract or *lex causae*, alongside *lex arbitri*, allows establishes a situation under which the arbitrators may adapt the contract.

B. THE ARBITRATION AGREEMENT GRANTS THE TRIBUNAL AUTHORITY TO ADAPT THE CONTRACT.

1. The law governing the arbitration agreement is not the contract law of Danubia

a) Danubia is the place (venue) of arbitration, not its legal jurisdiction to which the arbitration is tied

a It is important to differentiate between the "seat" or legal jurisdiction of the arbitration and "place" of arbitration

5 There is a marked difference between the venue of the arbitration and the jurisdiction of said arbitration. For example, the venue of the arbitration may be Vienna while its legal jurisdiction is London. The contracting parties may want to abide by the procedural laws of England, yet still want the hearing to be in Vienna for the sake of convenience. Which means that the choice of the place, where the arbitration physically takes place, do not ipso facto imply *lex arbitri* (while the two may coincidentally be the same or the parties may decide to use the term "seat" to encompass both).

6 The term "seat" and "place" are often used interchangeably. Contracting parties have used either one of the terms to refer to either venue or jurisdiction or the arbitration. Thus, it is important to determine what the parties had intended to when they chose the "seat" of the arbitration as Danubia in the contract, through careful interpretation. Just because the term "seat" was used, doesn't mean that both parties have decided to refer to both the place and jurisdiction of the arbitration.

b Danubia is the place (venue) of arbitration

7 The "seat" of arbitration stated in FROZEN SEMEN SALES AGREEMENT (hereafter the Sales Agreement) between CLAIMANT and RESPONDENT is simply place or venue of the arbitration, not its jurisdiction. CLAIMANT first suggested in the email of 24 March 2017 that the purchase of the frozen semen will follow the law of Mediterraneo [*Cl. Ex. 2, p.10*]. As CLAIMANT and RESPONDENT which jurisdiction the arbitration agreement would fall under, CLAIMANT suggested that RESPONDENT opt for arbitration in Mediterraneo if they cannot agree on the jurisdiction of the courts in Mediterraneo [*Cl. Ex. 4, p.12*]. Hence and suggested that they discuss the matter in a personal meeting in Vindobona in April.

8 In the end, they reached an agreement to hold the arbitration in a third nation, Danubia [*Rs. Ex. 2, p34*]. That is, Danubia was chosen so that the arbitration would be held in a neutral country rather than so that it would be under the jurisdiction of Danubia. This discussion process shows that the choice of seat was first raise in determining where to go through the legal process and that both

parties was considering seat of arbitration as the venue or place of arbitration.

9 Furthermore, it is revealed through the fact that the parties use "place" as interchangeable word with "seat." In the Answer to the Notice of Arbitration, RESPONDENT used the phrase "place" of arbitration instead of the "seat," which shows that RESPONDENT's understanding is that Danubia is merely a place that the arbitration takes place. According to the witness statement of Julian Krone, Mr. Antley the original negotiator of RESPONDENT side, wrote "neutral venue" and "applicable law" separately in his note [*Rs. Ex. 3, p.35*]. The note written on 12 April 2017 and their correspondence up until 11 April 2017 was deciding the both "seat" of arbitration and the "applicable law" of the arbitration clause [*Rs. Ex. 1* & *2, pp.33-34*] – separately.

10 Both CLAIMANT and RESPONDENT were actually referring to the venue of the arbitration rather than the jurisdiction of arbitration in their correspondence. Had they meant to agree on Danubia to have jurisdiction of the arbitration, Mr. Antley would not have differentiated between venue and applicable law – as there would have been no reason to clarify the *lex arbitri*. In conclusion, CLAIMANT and RESPONDENT, unable to decide on the jurisdiction, merely agreed on the place of arbitration, leaving the applicable law a matter of later discussions – which they were not fortunate enough to conclude to the accident.

c The seat of the arbitration shall be HK pursuant to Art. 14 of the HKIAC.

11 According to the Art. 14.1 of HKIAC, when the seat of arbitration remains undecided by the parties, the seat of arbitration shall be Hong Kong (hereafter "HK"). Here the term "seat" is used to refer to the jurisdiction of the arbitration – its *lex arbitri*. As far as the designation of the seat is just limited to the choice of place of arbitration, since there is no further decision on the legal jurisdiction of the arbitration, the seat of arbitration remains undecided. Therefore, as the parties have decided to resolve the dispute under the HKIAC Rules [*Cl. Ex. 5, p.13*], the seat of arbitration shall be HK under HKIAC rules.

b) Even if Danubia is the seat, the parties have not agreed on the law of Danubia as the law governing the arbitration agreement.

12 The *lex arbitri* and the law governing the arbitration agreement are fundamentally different. The former deals with the procedural aspect of the arbitration whereas the latter deals with the interpretation and the validity of the arbitration agreement.

a Even under the Doctrine of separability, it is more beneficial to apply Mediterraneo law to the arbitration agreement between the parties, not the law of the seat of arbitration.

13 As There is no explicit designation of law applied in interpreting the arbitration clause and that will of both parties is either unclear or does not correspond with each other, the law governing the clause is Mediterraneo law – either because it is applicable law of the underlying contract or because it is the most closely related law in the case.

14 If there is neither written designation regarding law governing the arbitration agreement in the agreement nor explicit or implicit correspondent between CLAIMANT and RESPONDENT, the law applicable for the agreement shall be decided based on that of underlying contract

B.1.b.a.1Separability presumption does not imply that the law governing the arbitration agreement should be different from the law applied to the main contract it is involved.

15 An international arbitration agreement is mostly treated as presumptively separable from the substantive contract that the agreement is included in, which is called "doctrine of separability" or "separability presumption" [*Born, pp.349-350*]. The separability presumption is widely accepted in both common law and civil law perspective. A frequently-cited arbitral award states that "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained." Several international arbitration conventions are including provisions assuming the separability presumption: New York Convention Art. II and V(1)(a), European Convention Art. I(2)(a), ICSID Additional Facility Rules, Rule 45(1). The presumption is also desirable in terms of parties' autonomy and has central importance since it is the foundation of the contemporary legal regime applicable to international arbitration agreements: especially related to the issues of choice of law, contractual validity, and competence-competence.

16 However, separability presumption does not mean that the law applicable to the arbitration clause is necessarily different form that applicable to the underlying contract [*Born, p.476*]. None of the international arbitration conventions mentioned above expressly refer to the separability presumption, which means that there is also possibility that arbitration clause is governed by the law applied to the main contract. The provisions of the conventions indirectly imply only the possibility of divergence. Rather, they are written under different context not the context of interpreting arbitration agreement.

17 For example, New York Convention V(1)(a) is dealing with the recognition of arbitral award issue, not with the governing law; thus, it is under controversy whether the Art. is appropriate to be applied outside the context of the original issue. Despite the presumption, in many cases the arbitration agreement and the underlying contract were governed by the same law [*Born, p.476*]. These cases have interpreted general choice-of-law clauses as extending to "separable" arbitration provisions contained within an underlying contract. Therefore, it is theoretically possible for parties to decide same law to govern arbitration clause with underlying contract; furthermore, sometimes it is more desirable for two agreements to be interpreted under the same law.

B.1.b.a.2 There was consent between CLAIMANT and RESONDENT to apply Mediterraneo law to the arbitral clause; it is at least evident that the parties did not set governing law as Danubian law, even though there was designation of the place of arbitration.

18 CLAIMANT and RESPONDENT both agreed to designate Mediterraneo law as the governing law of the arbitration agreement; at least CLAIMANT made clear that the governing law of the arbitration agreement shall be decided after further discussion, following neither RESPONDENT's national law nor law of the seat. Replying to the suggestion of RESPONDENT deciding law of Equatoriana as the law of arbitration clause [*Rs. Ex. 1, p.33*], CLAIMANT erased the sentence from the clause and emphasized the law applicable to the Sales Agreements remains the law of Mediterraneo [*Rs. Ex. 2, p.34*]. In the prior email of RESPONDENT, both the seat(venue) of arbitration and the law governing the arbitration clause were explicitly written down in separation. Thus, if parties had intent to designate law of the seat(venue) as the governing law as well, they would have stated "the law of this arbitration clause shall be the law of Danubia" in addition. This shows that considering past correspondence, the lack of law governing the arbitration agreement does not mean that the governing law of the arbitration agreement shall be the same as the seat of arbitration. Rather it should follow the law of the main contract as the governing law and the arbitration contract are both included in the sales contract.

b The law applicable to the main contract is adopted as the law governing the arbitration agreement when the main contract contains "both" explicit choice of law governing the contract and the arbitration agreement as one of its clauses

19 Out of a series of methods to determine the governing law of arbitration agreement, that of the

substantive contract frequently extends to the arbitration agreement. The approach applying law governing the underlying contract to arbitration agreement was first adopted in English judicial decisions, which stated "where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract" [*Sonatrach Petroleum Corp. v. Ferrel Int'l Ltd*, *§32*].

20 In *Sulamérica*, the English Court of Appeal has provided welcome guidance on determining the proper law of the arbitration agreement where none is expressly stated. The Court undertook a three-stage enquiry: express choice, implied choice, and closest and most real connection.

21 One of the most notable recent case is *BCY v. BCZ*, which was decided by the Singapore High Court. The Court relying on the *Sulamérica* also reiterated that the governing law of an arbitration agreement is to be determined via a three-step test: (a) the parties' express choice; (b) the implied choice of the parties, as gleaned from their intentions at the time of contracting; or (c) the system of law with which the arbitration agreement has the closest and most real connection [*BCY v. BCZ, §40*]. Since there was no express choice of law to govern the arbitration agreement, the Court was concerned with part (b), and held that the choice of law analysis for an arbitration agreement would differ depending on whether it sits within a main contract or is instead a freestanding arbitration agreement. If the arbitration agreements form part of the main contract, "the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary" [*BCY v. BCZ, §65*].

22 There is a possibility that the starting point is displaced by the choice of a seat, but it is only possible with additional justiciable reason, not sufficient just with the choice of seat. On the other hand, if the arbitration agreements are freestanding from the main contract, "the law of the seat would most likely be the governing law of the arbitration agreement" [*BCY v. BCZ, §67*]. This analysis of *BCY v. BCZ* is giving possibility of more uniform decision on the governing law issue in arbitration. Therefore, according to the analysis, if an arbitration agreement is written in the main contract as a clause, forming it, the governing of the main contract will be the law applicable to the arbitration agreement unless the starting point is moved away for justifiable reason.

23 Furthermore, several arbitral tribunals had arrived at same conclusion under similar situation [*Born, p.476*]. For an instance, in *Final Award in ICC Case No. 6379* (1992), the seat of the arbitration was a third country and governing law of the distribution agreement was substantive law of one of the

parties; the governing law of the main agreement was decided as the that of arbitration agreement, mainly because it was more evident toward the controversial issue of the case than the law of the seat. *Final Award in ICC Case No. 5294* (1989) stated that in determining governing law of the arbitral clause its back ground must be considered. In the case, the main contract contains the arbitration clause. The Tribunal decided governing law of the arbitration clause is that of the main contract because the clause was intimately connected with the main contract.

c The interpretation of the arbitration clause depends heavily on the interpretation of the hardship clause of the sales contract, governed by the law of Mediterraneo.

24 Under analysis on *BCY v. BCZ*, since the arbitration clause is included as part of the Sales Agreement, implied choice of law for the arbitration agreement should be the same as the law of the substantive contract, which is Mediterraneo law. As it seems that there is no express choice of law to govern the arbitration agreement, the implied choice must be considered; in case of the arbitration agreement forming part of the main contract, governing law of the main contract will be the primary factor to determine implied choice of law. The arbitration agreement of this case is written in Art. 15 of the Sales Agreement [*Cl. Ex. 5, p.13*]. Besides, there is no other justifiable reason to suffice to displace the starting point.

25 Moreover, the interpretation of the arbitration agreement is not separable from the interpretation of the substantive contract. The interpretation of arbitral clause is mainly controversial with regards to the scope of the authority of Arbitral Tribunal; that is, whether Art. 12 of the Sales Agreement allows for adaptation of contract by the Tribunal. Therefore, there would be considerable confusion if the interpretation of two related agreements should follow completely different law.

26 Furthermore, considering that enforcement of the case is unlikely be conducted in Danubia, it is more desirable to have Mediterraneo law govern the arbitral agreement to ensure the enforceability of the award.

27 Even if, arguendo, the *lex arbitri* is the law of Danubia, the parties have agreed so in order to insure the neutrality process not to interpret any contents of the arbitration agreement. While there have been cases where Tribunal concluded that the laws of the seat also govern arbitration agreements, they did so because choice of law issues were raised mainly with respect to their validity, not their

interpretation. For example, in *FirstLink* even if the Singapore High Court stated that the law of the seat of the arbitration be the governing law of the arbitration agreement in order to achieve consistency between the *lex arbitri*, the issue with regards to the governing law in that case was whether the arbitration clause was null and void [*FirstLink*], which is not currently a problem between CLAIMANT and RESPONDENT. Consequently, law of the seat of the arbitration is not appropriate for interpreting the arbitration clause and law of the substantive contract shall govern the clause, which is Mediterraneo law.

2. The parties consented to the adaptation of the contract through the arbitration agreement.

a) The parties have agreed to the adaptation of the contract in their arbitration clause *per scripturam*

28 The text adopted in the arbitration agreement is the most primary and decisive yardstick in determining the existence of parties' consent, as arbitration agreement should be adequate to fulfill the intents of the parties. CLAIMANT and RESPONDENT agreed on the following arbitration clause which authorizes the arbitral tribunal to adapt the contract:

29 "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the HKIAC under the HKIAC Rules in force when the Notice of Arbitration is submitted."

a 'Any dispute,' in its 'plain and ordinary meaning' encompasses matters regarding contract adaptation.

30 (i) Arbitration agreement clause can be either specific or general. Authorities concluded that the wording 'any disputes' extends to all disputes having any plausible factual or legal relation to the contract [*Steingruber, ∫ 7.08.*].

31 (ii) The term 'dispute' extends the jurisdiction of the arbitral tribunal. This is supported by several cases from the Permanent Court of International Justice (hereafter PCIJ) and the International Court of Justice (hereafter ICJ). For instance, in the *Mavrommatis Palestine Concessions* case, the permanent court defined dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons' [*Mavrommatis Palestine Concessions, ∫19*]. Even if the

concept of 'dispute' is additionally qualified as a 'legal dispute', ICSID tribunals have adopted broad definition of 'dispute' [*Maffezini v. Spain, ∫94*].

32 (iii) The scope of the present arbitration agreement, albeit narrower than that of the HKIAC model clause, still encompasses the present dispute at hand. There is clearly a heated dispute regarding both the arbitrability of the case and the invocation of the hardship clause under the contract and under the CISG. Also, the present matter pertains applicability of Art. 12 of the contract, which is a contractual obligation arising out of the contract.

b The arbitration agreement is not an exhaustive list; it is rather an illustrative list

33 The normal use of 'include' is to introduce an illustrative and non-exclusive list [*DIRECTV, Inc. v. Crepsin, ∫8*]. This view is also consistently supported by Auer v. Commonwealth and other cases which states that "the word 'include' implies that the provided list of parts or components is not exhaustive and, thus, not exclusive." In this sense, even though this arbitration agreement does not specifically mention 'the adaptation or modification of the contract,' still, it does not mean that this arbitration agreement excludes the dispute concerning the adaptation of the contract from the scope of dispute which can be referred to arbitration.

b) The Parties have consented to the possibility of contract adaptation during negotiations

34 Assuming arguendo that it is not possible to deduce the Parties' authorization of contract adaptation to the arbitral tribunal in the words of the arbitration agreement, the Parties consented to the adaptation in light of the drafting history of the arbitration agreement. The correspondence between CLAIMANT and RESPONDENT in combination determines consent.

a The four corners rule does not apply as the contract law of Danubia does not govern the interpretation of the arbitration clause.

35 As CLAIMANT previously pointed out, the arbitration clause and its interpretation are governed by the law of Mediterraneo, which does not state four corners rule as an interpretation principle. RESPONDENT, mistakenly presumes that the law of Danubia applies to the interpretation of the arbitration agreement.

36 Also, applying the four corners rule would go against Art. 8(3) of the CISG, to which Equatoriana,

Mediterraneo, and Danubia are all contracting parties. There exists consistent jurisprudence that CISG be applied to the interpretation of the arbitration agree when it is contained in the sales contract governed by CISG [*PO1, p.53, ∫ 4*]. According to the CISG, "due consideration … to all relevant circumstances of the case" should be done in determining the intent of the Party [*CISG Art. 8(3)*]. Thus, all evidence should be considered so as not to restrict the interpretation of Parties' intent.

b Even if it applies, the clause is vague, thus extrinsic evidence must be considered.

37 The four corners rule only applies when the document "on its face" is complete. It does not exclude the consideration of extrinsic evidence when the written document is not evident. Both CLAIMANT and RESPONDENT realize that there is inherent vagueness in the arbitration agreement of this contract – naturally so as the replaced negotiators could not fully reflect their predecessors' intent on the finalized arbitration agreement [*Cl, Ex.8, p.17*]. Also, RESPONDENT themselves have relied on the drafting history of the arbitration clause in arguing for the law of Danubia as the law governing the arbitration agreement [*ANoA, p.31, ∫∫14, 15*].

c Considering extrinsic evidence, it is evident that the Parties have consented to authorize the tribunal to adapt the contract.

38 (i) Both parties have agreed that arbitrators be given the authority to adapt the contract right before the tragic accident. During negotiations, Julie Napravnik, on behalf of CLAIMANT, expressed concerns to Mr. Antley of RESPONDENT that "it was important to have mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment." [*Cl, Ex.8, p.17*]. Upon that concern, Mr. Antley replied, "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [*Cl, Ex.8, p.17*] Both parties have agreed that arbitrators be given the authority to adapt the contract on the day of the tragic accident.

39 (ii) Mr. Antley had promised to draft a proposal which encompasses said agreement but found himself unable to do so due to the accident. However, his intent to amend the contract and be inferred from his "negotiating file", which he prepared after the meeting on 12 April. He made note of issues, including the "connection of hardship clause with arbitration clause" [*Rs. Ex.3, p.35*]. No further negotiations upon that matter took place between Mr. John Ferguson of

CLAIMANT and Ms. Julian Krone of RESPONDENT, largely due to Ms. Krone's lack of understanding.

c) The tribunal can adapt the contract under *lex causae* of the contract

a The contract itself grants the tribunal authority to adapt the contract

1 The tribunal's act of adapting the contract will not create additional rights or obligations through a new contract. Rather it is interpreting and implementing a pre-existing right under Art. 12 of the contract. RESPONDENT only objects to the tribunal's jurisdiction to adapt the price, not to its jurisdiction related to contract interpretation. [*PO2, p61, §48*] As the present case relies heavily upon the interpretation of Art. 12 of the contract and the implementation of the CISG, the dispute a contract interpretation case in nature. Therefore, it is fully within the tribunal's jurisdiction.

b By Clause 14 of the Sales Agreement, *lex causae* governing the current contract includes the CISG and the law of Mediterraneo

40 Clause 14 of the Sales Agreement explicitly states *lex causae* or the law governing the substantive contract. As it is written in the Sales Agreement, *lex causae* of the contract is the law of Mediterraneo and the CISG, of which Mediterraneo is the signed party.

c The general contract law of Mediterraneo, which is a verbatim adoption of UPICC, grants CLAIMANT a right to request adaptation of the contract in order to rebalance the equilibrium

41 Regarding the matter of hardship, Clause 12 regulates that in the case of hardship the disadvantaged party would not be responsible for hardship. Although the meaning of disadvantaged party 'not being responsible for hardship' is not specifically depicted in the Clause or other clauses of the Agreement, one of *lex causae*, general contract law of Mediterraneo, suggests the means to achieve resulting exemption. Art. 6.2.3 of the general contract law of Mediterraneo, which is a verbatim adoption of UPICC, states that if the court finds hardships the court "(a) may terminate the contract" or "(b) adapt the contract with a view to restoring it equilibrium." Thus under the Sales Agreement and *lex causae* of the current case, CLAIMANT has a right to request adaptation of the contract terms in order to rebalance the equilibrium.

42 While the Art. 6.2.3 of UPICC states that 'either party may resort to the court', not mentioning

the arbitral tribunal, this Art. should be understood that arbitral tribunal also has the authority to renegotiate. The Art. 1.11 of UPICC clearly states that the "court" in these principles includes an arbitral tribunal.

43 An unexpected imposition of 30 per cent tariff is a 'comparable unforeseen events making the contract more onerous', and this forms an 'integral part of the parties' dispute. It is thus covered by the tribunal's general authority granted to it by the arbitration agreement.

d) The *lex arbitri* does not prevent a tribunal from adapting the contract.

a The *lex arbitri* is HK Arbitration Ordinance

44 As seen above, the seat of this arbitration resides in HK, not Danubia.

b HK Arbitration Ordinance does not prevent adaptation of contract.

45 Nothing in the HK Arbitration Ordinance prevents the arbitrators from adapting the contract. It is irrelevant that the law of Danubia grants the power "to adapt the contract" to the court only "if authorized". [PO2, p. 61, § 45]

ISSUE II. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS REGARDLESS OF WHETHER THE EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OR RESPONDENT'S COMPUTER SYSTEM.

A. ARBITRAL TRIBUNAL HAS FULL DISCRETION REGARDING TAKING OF EVIDENCE. ARBITRAL TRIBUNAL SHOULD TAKE ALL EVIDENCES AS MUCH AS POSSIBLE TO MAKE A JUST, RIGHT DECISION.

46 In the 'taking of evidence,' consent of both parties should primarily be considered. Consent may be derived from the arbitration agreement or the law by which both parties have agreed upon to follow with matters regarding the taking of evidence. Absent such consent, institutional rules should be applied. If the institutional rules also remain silent as to the taking of evidence, soft laws such as the IBA rules or the Prague Rules may be referred to

1. The parties have not agreed on a law regarding the taking of evidence.

47 In the present case, CLAIMANT and RESPONDENT did not expressly specify which rule would govern the taking of evidence in the arbitration clause [*Cl. Ex.5, p.13*]. As the 'taking of evidence' is a distinguished legal issue from other procedural issues, the *lex arbitri*, whether it be Danubia or Mediterraneo, is irrelevant in terms of taking of evidence. Even if the tribunal finds that the law of Danubia should oversee the taking of evidence, there are no specific rules on evidence in the arbitration laws of either Danubia or Mediterraneo. [*PO2, p.61 §46*]

48 Moreover, Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. *[PO1 p.53 §46]* According to Art. 18.2 the arbitral tribunal may "subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

2. Institutional rules (2018 HKIAC Rules) gives the tribunal full discretion.

49 Art. 22.2 of HKIAC Rules gives he arbitral tribunal full discretion to determine the admissibility, relevance, materiality, and weight of the evidence, including whether to apply strict rules of evidence.

3. The Tribunal may consult soft laws such as IBA Rules / Prague Rules.

50 The parties may refer to soft laws such as the IBA Rules on the taking of Evidence in International Arbitration (henceforth, IBA Rules) or the Rules on the Efficient Conduct of Proceedings in International Arbitration (henceforth, Prague Rules), when the parties have not agreed on an evidentiary law. However, this does not bar the tribunal its full discretion to accept whichever evidence it may consider relevant and necessary. In the preamble of IBA Rules, it is stated as following:

51 "The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration".

52 Also, the preamble of Prague Rules demonstrates that the Rules are not intended to replace the arbitration rules provided by various institutions and are designed to supplement the procedure to be agreed by Parties or otherwise applied by Arbitral Tribunals in a particular dispute. While the IBA Rules have traditionally been the most commonly consulted law, the newly drafted Prague Rules may also be considered in addition. CLAIMANT is entitled to submit evidence under both rules mentioned.

B. CLAIMANTS EVIDENCES ARE ENTITLED SUBMISSION UNDER THE IBA RULES

1. CLAIMANT's evidences are relevant and material to the outcome of the case.

53 According to Art. 3 of IBA Rules, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it intended to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties. The evidence is paramount in proving CLAIMANT's claims on both 'arbitrability' and 'hardship'

54 The Evidence is as follows:

55 (i) RESPONDENT had a contract with a buyer in Mediterraneo which concerned the sale of mares. Following the imposition of the tariffs on agricultural products by the President of Mediterraneo, Respondent asked for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law. The Arbitral Tribunal of this case had

confirmed its power to adapt the contract, admitting that an increase of tariff may result in hardship for Respondent [*PO2 p.60, ∫39*].

56 (ii) RESPONDENT's previous admission that increased tariffs can be a hardship in performing a contractual duty is relevant and material to the outcome of this case. As the debate centers around whether the tribunal has the authority to adapt contracts and what constitutes an 'hardship' under the contract, it is crucial to understand the intent of both parties in interpreting the arbitration agreement and hardship clause. The fact that RESPONDENT took their case to as HKIAC tribunal suggests that RESPONDENT understood that an arbitral tribunal has the right to adapt prices under a hardship clause and Art. 6.2.3 of the Mediterranean Contract Law (which is an in verbatim adaptation of the CISG).

57 While this Tribunal is not bound by the jurisprudence of other Tribunals, RESPONDENT's admission is important in determining the intent of parties. Also, the fact that RESPONDENT had argued for price renegotiation under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law proves that RESPONDENT considered the imposition of tariff to be a hardship that warrants price negotiation.

2. CLAIMANT's conducts have been fair and in good faith.

58 According to ∫ 3 of Preamble of IBA Rules, the taking of evidence shall be conducted on the principles that each Party shall act in good faith. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence [*IBA Rules, Art. 9(7)*]. None of CLAIMANT's conducts were unfair, unlawful, and in bad faith.

a) CLAIMANT's conducts were fair and lawful

a RESPONDENT's participation in other arbitration has already became public knowledge.

59 RESPONDENT's participation in other arbitration has already became public knowledge. CLAIMANT's CEO heard the information from Mr. Kieron Velazquez, the new CEO of one of CLAIMANT's regular customers. CLAIMANT met Mr. Velazquez at the annual breeder conference. He had been working for the Mediterranean buyer in the other arbitration until 30 May 2018. He has not been involved in the arbitration [*PO2, p.60, ∫40*].

60 Although Mr. Velazquez was not involved in the other arbitration, he knew the main issues in dispute, including the fact that Respondent was only willing to deliver the mare once the price has been increased to reflect the tariff. That is, the issues regarding RESPONDENT's other arbitration and that RESPONDENT was willing to adapt the contract to increase the price was already public. Several PCIJ and ICSID cases have admitted the submission of evidences that were somewhat confidential but already known to public.

b Confidentiality of an award is not CLAIMANT's obligation.

61 According to Art. 45.1 of HKIAC Rules, "unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration". Art. 45.1 also applies to the arbitral tribunal, an emergency arbitrator, expert, witness, tribunal secretary and HKIAC [*HKIAC Rules, Art. 45.2*]. Thus, it is evident that the confidentiality obligation only applies on RESPONDENT and its counterparty, arbitral tribunal, witness of the other arbitration, but does not apply on CLAIMANT or any other people who were not involved in the arbitration.

62 Also, CLAIMANT heard the information about the 'other arbitration' from Mr. Velazquez who had been a former employee of the Mediterranean buyer (RESPONDENT's counterparty) and had not been involved in the arbitration. It is clear that neither CLAIMANT nor Mr. Velazquez are obliged under Art. 45 of HKIAC Rules. Thus, CLAIMANT's evidence is lawful. (corresponding to Art. 42 of HKIAC Rules 2013).

63 RESPONDENT argues that CLAIMANT tried to acquire the "Partial Interim Award" from two former employees – who had been witnesses in the other arbitration before they were fired on 6 July 2018 and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential [*PO2, p.60, §41*]. RESPONDENTS accusations are mere speculation only and the burden of proof is on RESPONDENT. Even if, the two employees had provided information to any intelligence company – there was no foul play on the part of CLAIMANT

b) CLAIMANT's evidence does not infringe upon RESPONDENT's due process rights.

64 Even if the Arbitral Tribunal considers the 'possibility' that CLAIMANT's evidences were

somewhat collected unlawfully by the intelligence company, submission of CLAIMANT's evidences does not infringe upon RESPONDENT's due process rights. RESPONDENT is free to properly comment or refute the probative power of CLAIMANT's evidence or make rebuttals during the proceedings, with solid evidence. Submission of CLAIMANT's evidences does not directly disturb RESPONDENT's rights to make arguments in the arbitration process. Rather, diversity and abundance of evidences are more likely to lead the parties and the Arbitral Tribunal to reach a reasonable conclusion. Also, CLAIMANT's right to due process may be harmed if all relevant information cannot be heard before the tribunal based only on thin conjecture of RESPONDENT.

3. CLAIMANTS evidence are entitled submission under the Prague Rules

65 Should the tribunal refer to the Prague Rules, which takes a more inquisitorial approach, CLAIMANT is – in fact – entitled to request that RESPONDENT provide the Tribunal with all relevant information, including the Partial Interim Award. According to Art. 3.1. "The Arbitral Tribunal is entitled and encouraged to take an active role in establishing the facts of the case which it considers relevant for the resolution of the dispute." Also, Art. 4.3 and 4.4 states, "A Party may, however, request the Arbitral Tribunal to order another Party to produce specific document(s) which: (a) Is/are relevant and material to the outcome of the case; (b) Is/are not in the public domain; and (c) Is / are in the possession of another Party or within its power or control. The Arbitral Tribunal, after hearing the Part[ies'] view on such request, may order it to produce the requested document[s]."

66 As RESPONDENT's Partial Interim Award is relevant and material to the outcome of the case, already in the public domain, and in the possession of RESPONDENT and within its power or control, CLAIMANT urges the tribunal to order RESPONDENT to produce the award.

67 While CLAIMANT acknowledges that there is no obligation for the Tribunal to rely exclusively on the Prague Rules, it urges the tribunal to consider the recent trend of giving tribunals more active roles in establishing the facts of the case. Whilst under the Prague Rules CLAIMANT would be entitled to request that RESPONDENT produce their Partial Interim Award, it is only natural that it should be allowed to submit pre-obtained evidence which is both relevant and lawful under both the IBA Rules and the Prague Rules.

ISSUE III. CLAIMANT IS ENTITLED TO AN INCREASE OF THE PURCHASE PRICE OF AT LEAST 25 PER CENT.

68 CLAIMANT submits that CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent by the laws and rules governing the commercial contract between CLAIMANT and RESPONDENT. As CLAIMANT has submitted above, *lex causae* to be considered in the current conflict consists of (1) the Sales Agreement, (2) the contract law of Mediterraneo, which is a verbatim adoption of the UPICC and (3) the CISG. All laws comprising lex causae of the current case indicates that CLAIMANT's request for increase of the purchase prices is justified.

A. CLAUSE 12 OF THE SALES AGREEMENT ENTITLES CLAIMANT TO PRICE ADJUSTMENT

69 Clause 12 of the Sales Agreement is a typical hardship clause. Clause 12 regulates that in certain circumstances which imposes onerous burden on Seller in fulfilling one's responsibility, Seller (CLAIMANT) is exempted from one's responsibility. The certain circumstances, in which Seller can be exempted from fulfilling one's responsibility, in Clause 12 is depicted as "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." CLAIMANT submits that Equatoriana government's recent measure amounts to hardship stated in Clause 12 of the Sales Agreement and thus exempts CLAIMANT from one's original responsibility.

1. New measure undertaken by Equatoriana government amounts to "*additional health and safety requirements*"

70 The mainly controversial part of the present case is about Equatoriana government's newly imposed tariff. Equatoriana government has recently imposed 30 per cent tariffs on agricultural good from Mediterraneo and this measure has caused significantly enormous burden on CLAIMANT's responsibility fulfillment. CLAIMANT submits that Equatoriana government's controversial measure is indeed "additional health and safety requirement" stated in Clause 12 of Sales Agreement, regarding historical context.

71 The measure by the Equatorianian government was more than a mere political retaliation. Newly imposed tariff by Equatorianian government should be interpreted as a means to protect health and safety of own country. As most people, including CLAIMANT and RESPONDENT, are aware of, the Equatorianian government is well-known for its advocating stance on international

commerce and free trade. Equatorianian government's past stance like this was one of the main reasons that many people reacted with surprise to Equatorianian government's measure of tariff increase.

72 The reason why most people were surprised to current measure is that they were not including further historical context that Equatoriana was experiencing serious hardship regarding health and safety issue. As CLAIMANT has stated in Notice of Arbitration [*NoA, p.5, ∫5*] and RESPONDENT had mentioned in e-mail correspondence [*Cl. Ex. 1, p.9*], Equatoriana had been imposing trade restriction as a measure to solve foot and mouth disease crisis occurred in Equatoriana even before such conflict between Mediterraneo and Equatoriana started. Thus, increase in tariff on agricultural goods should be interpreted as an extension of past regulation to protect public interest, not as a wholly new retaliatory restriction depriving any kind of public interest.

2. The Equatoriana government's measure amounts to "*comparable unforeseen events making the contract more onerous.*"

73 Even if the tribunal determines the current situation to be not included in "additional health and safety requirements," Clause 12 of the Sales Agreement opens up to other possibilities. According to Clause 12 of the Sales Agreement, CLAIMANT is not responsible for hardship caused by "comparable unforeseen events making the contract more onerous." Although additional tariffs are not explicitly stated in the Clause 12, new imposition of tariff in the current case was not foreseeable by neither of parties and its extent has made the CLAIMANT's responsibility to be significantly more onerous compared to the time when CLAIMANT and RESPONDENT had signed the contract.

a) Equatoriana government's recent measure was unforeseen by neither of parties

74 In the letter sent along with the Sales-Offer, Mr. Tsai specifically pointed out the changes CLAIMANT wanted to make regarding Tender Documents but silenced about the incorporation of its conditions [*Cl. Ex. 3, p.15*]. RESPONDENT would have chosen a different supplier if CLAIMANT had not intended to bear contractual obligations described in RESPONDENT's conditions. Thus, altering conditions constituting this specific contract was even more important than adjusting the product's features and payment terms. Considering that CLAIMANT distinctively stipulated its intention to change even less critical elements of the contract, a

reasonable third person would not believe that CLAIMANT intended to incorporate its conditions into the contract without explicit indication. Therefore, CLAIMANT's reference to General Conditions of Sale does not constitute an offer.

a Newly imposed tariff was unpredictable considering historical records of Equatoriana's stance on international commerce

75 First of all, historical records of Equatoriana's stance on international commercial trade indicates that it was difficult for any agent to foresee the current issue. As it was depicted in the renowned business newspaper Art., imposition of 30 per cent tariff was "a big surprise even to informed circles." [*Cl. Ex. 6, p.15*] It was well known fact to most of informed circle that "Equatoriana has always been one of the biggest supporter of the existing system of free trade." [*Cl. Ex. 6, p.15, ∫2*] Thus, it was rational for both parties to assume that the possibility of restriction by Equatoriana government making the fundamental change in the conditions of contract is very low. Considering magnitude of the measure by Equatoriana, it was much more unlikely for parties to predict that well-known advocate of free trade would impose significantly high tariff.

b Characteristics of commodity consolidates unforeseeable property of the current issue

76 Secondly, incongruence regarding the characteristics of frozen horse semen makes imposition of tariff on purchase product of the current contract more unforeseeable. As CLAIMANT has discussed above, it is true that Equatoriana was in the middle of solving health and safety problem related to foot and mouth disease issue. From that fact, it might be argued that possibility of imposing additional restriction in order to prevent further negative consequence form foot and mouth disease must have been predicted and included as a risk by parties. However, it is very unlikely to predict that frozen horse semen would be restricted in order to prevent the current problem. Most of all, foot and mouth disease is caused by virus and known to be transmitted by fecal-oral, oral-oral, and respiratory routes. However, sexual transmission is not reported to be its route. In addition, the category on which Equatoriana government has imposed tariff was agricultural product. It is very unlikely to predict that frozen horse semen is included in the category of agricultural product.

c RESPONDENT also agrees that the current hardship is unforeseeable

77 Lastly, RESPONDENT has also agreed that Equatorianian government's new tariff imposition

was unpredictable. RESPONDENT's opinion of agreement regarding the issue can be found in "Partial Interim Award" of the other arbitration. In the other arbitration under the HKIAC-Rules, regarding the same matter, RESPONDENT has argued for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law on the grounds that newly imposed tariff of 25 per cent was unpredictable [*PO No. 2, p.60, §39*]. Thus, it would be irrational to enforce CLAIMANT to take a burden on the matter which even RESPONDENT also thinks unforeseeable.

b) Hardship caused by Equatoriana government's recent measure caused contract to be significantly onerous

78 CLAIMANT submits that the change in the circumstance in the current issue makes RESPONDENT's performance to fulfill responsibility from the Sales Agreement significantly onerous compared to before. In the contract *Pacta sunt servanda* is the basic general contract principle, so the effort to protect it is needed. However, adhering to the determined responsibilities is not always rational or just. In cases where there is a change and that change has made unpredicted and fundamental consequence, adaptation and readjustment to the new altered condition are requested.

79 Thus, exemption can be made when there is a change is circumstance. In civil law country, in the case where fundamental alteration of the equilibrium occurs, doctrine of *Rebus Sic Stantibus* is applied. Although the origin doctrine of *Rebus Sic Stantibus* is civil law system, it is applied in name of doctrine of impossibility, impracticability and frustration [*Saliba*]. The name might be different, but the concept that fundamental change in equilibrium can grant disadvantaged party the right to request adaptation or adjustment in contract term is recognized as general principle [*Marchisio*].

80 In fact, Clause 12 of the Sales Agreement is an exemplary term which regulates doctrine of *Rebus Sic Stantibus*. Thus, whether increase in the burden of CLAIMANT caused by change in the circumstance is sufficiently onerous is to be reviewed in order to determine whether CLAIMANT's argument based on Clause 12 or doctrine of *Rebus Sic Stantibus* can be justified or not. Considering the other general contract principle *Pacta sunt servanda* the scope of applying Rebus Sic Stantibus has to be determined carefully.

81 Although no boundary determining sufficiently "onerous" condition can be found in the sales agreement or the CISG, the general contract law of Mediterraneo (verbatim adoption of the UPICC) offers a guideline. The official commentary to the UPICC suggests that "onerous"

condition in the hardship clause of the UPICC Art. 6.2.1 should be interpreted as the circumstance which causes fundamental alteration of the equilibrium of the contract.

82 CLAIMANT submits that the hardship CLAIMANT faces in the current issue amounts to "excessive onerous" condition and thus, Clause 12 of Sales Agreement and the doctrine of *Rebus Sic Stantibus* should be applied to exempt or extenuate CLAIMANT's responsibility. This is much more clear when the object of the contract between two parties is considered. As all commercial trades are, the very fundamental object for both parties is to earn benefit from the trade. However, in this case, newly imposed tariff, which could not be anticipated by any party, has caused the burden of one party to increase significantly. The increase in burden was very large in scale that it not only nullified all predicted profit but caused a huge loss which is threatening even the party's solvency and corporate viability [*PO2, p.59. §29*]. Change of the circumstance changing the trade from profitable source to burden causing detrimental financial consequence should be determined as "events making the contract more onerous" stated in Clause 12 of the Sales Agreement.

c) CLAIMANT is not responsible for burden increased by hardship and can request price increase by Clause 12 of Sales Agreement and Mediterranean general contract law

83 Clause 12 of Sales Agreement states that Seller, on this issue CLAIMANT, is not responsible for hardship. Clause 12 is exempting CLAIMANT from bearing any burden that is caused by unanticipated and onerous hardship. Since increase in cost of CLAIMANT's performance due to newly imposed tariff by Equatoriana government creates hardship and has caused the fundamental alteration in equilibrium, CLAIMANT should be exempted from such burden.

84 The means for CLAIMANT to be free from one's responsibility is not thoroughly described or exemplified in Clause 12. However, Mediterranean general contract law, which is a verbatim adoption of UPICC suggests the ways to rebalance the equilibrium. Art. 6.2.3 of Mediterranean general contract law (verbatim adoption of the UPICC) regulates effects of hardship. Art. 6.2.3 (4) states that "If the court finds hardship it may, if reasonable, […] (b) adapt the contract with a view restoring its equilibrium." Thus, based on Clause 12 of the Sales Agreement and Mediterranean general contract law, CLAIMANT's request of relief arguing increase of price of product by 25 per cent in order to restore its equilibrium should be admitted by the tribunal.

B. ART. 79 OF THE CISG GRANTS CLAIMANT RIGHT TO ADJUST THE PURCHASE PRICE IN THE CIRCUMSTANCE OF HARDSHIP

85 Even if the tribunal decides that the imposition of the tariff by Equatorianian government does not amount to hardship stated in Clause 12 of the Sales Agreement, CLAIMANT is still entitled to increase in purchase price under Art. 79 of the CISG.

1. The application of Art. 79 CISG is NOT excluded by the hardship clause of the contract.

86 Inclusion of the force majeure and hardship clause into the contract does not exclude an application of Art. 79 of the CISG. There was no mutual consent between CLAIMANT and RESPONDENT regarding exclusion of the application of the Art. 79, neither explicitly nor implicitly.

87 According to AC Opinion No. 16, the intent of the parties to exclude the content of the CISG must be determined in accordance with Art.8 CISG. Parties' intent to exclude the CISG should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. Furthermore, such clear intent to exclude should be inferred, for example, from (i) express exclusion of the CISG, (ii) choice of the law of a non-Contracting State, and (iii) choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application. On the other hand, such intent to exclude the clauses of the CISG cannot not be inferred merely from (i) the choice of the law of a Contracting State or (ii) choice of the law of a territorial unit of a Contracting State.

88 As the CISG stipulates, "statements made by a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." [*CISG Art. 8 (1)*] The formula "could not have been unaware" is commonly equated to gross negligence in German academic commentary, which requires a greater degree of carelessness. [*Schwenzer, p.118*]

89 However, in the current case, RESPONDENT has never expressed exclusion of the Art. 79 of the CISG at the time of concluding the contract, even though RESPONDENT could have done during the negotiation period. Therefore, CLAIMANT was completely unaware of RESPONDENT's intention. If CLAIMANT had known or at least assumed such intent, CLAIMANT would have contended that inclusion of hardship clause does not imply the exclusion of the Art. 79 CISG. As a result, CLAIMANT was not only unaware of RESPONDENT's intent

but also could not have been aware of it.

90 As interpretation according to the intentions of the Parties is unavailable, the provision is to be interpreted in compliance with an understanding which a reasonable person of the same kind in the same circumstances would have had [*CISG Art. 8 (2)*]. In determining the hypothetical understanding of a reasonable person, due consideration is to be given to the relevant circumstances [*CISG Art. 8 (3)*].

91 Considering the fact that the contract itself clarifies this Sales Agreement shall be governed by the law of Mediterraneo including CISG [*Cl. Ex. 5, p.5, §14*], it is hard to assume that exclusion of CISG provision would be implied merely by including the hardship clause.

92 In light of not only CLAIMANT's understanding but also any reasonable person's, there is no agreed intent to exclude Art. 79 CISG. As a result, it does not constitute the derogation of Art. 6 of the CISG.

2. IMPOSITION OF THE TARIFFS IN THE PRESENT CASE CONSTITUTES ART. 79 (1) CISG

93 Imposition of the tariffs in the present case satisfies Art. 79 (1) CISG, since it is an impediment beyond CLAIMANT's control, CLAIMANT could not reasonably be expected to have taken the impediment into account and CLAIMANT could not have avoided or overcome the impediment or its consequences.

a) Hardship constitutes the 'impediment' under Art. 79 CISG

94 Art. 79 CISG is not exactly the language of impossibility and therefore, hardship situations which make performance excessively onerous entitle the party to invoke the exemption from liability. The AC Opinion No.7 asserts that hardship may qualify as an "impediment" under Art. 79 CISG.

95 The Belgian Supreme Court in Scafom International v. Lorraine Tubes SA states that hardship may constitute an impediment for the purposes of Art. 79 CISG, which may exempt the non-performing party from liability for damages. [*Scafom case, §IV.1*]

96 Even if RESPONDENT argues Art. 79 CISG only covers the language of impossibility or force majeure, there is no evidence in Art. 79 CISG that hardship was supposed to be excluded within its scope of application. The cases where the arbitral tribunals excluded the hardship within the scope of Art. 79 CISG were mostly because each hardship is not sudden, substantial or

unforeseeable, not because of its non-applicability. If the hardship is insurmountable, unforeseeable and irresistible enough, no reason exists to keep Art. 79 from covering the concept of hardship.

b) The imposition of the tariff in the present case corresponds to hardship.

97 As mentioned above, Art. 79 CISG can be applied in the case of changed circumstances along the lines of the hardship provision in Art. 6.2.3 UPICC. That is because hardship is not specifically addressed in the CISG and a stated purpose of the UPICC is to be used to interpret or supplement international uniform law instruments (Preamble to the Principles). That is, the UPICC can be used as gap fillers of the CISG. Accordingly, the requirements for hardship can be deduced from the Art. 6.2.3, all of which are clearly met in the present case.

a It was the fundamental alteration of equilibrium of the contract.

98 Firstly, imposition of the tariffs in the present case corresponds to the fundamental alteration of equilibrium of the contract. According to UPICC 2016, the fundamental alteration includes increase in cost of performance, which is characterized by a substantial increase in the cost for one party of performing its obligation.

99 In the present case, the substantial increase in the cost arose from the imposition of the tariffs and the increase is so huge that not only CLAIMANT's profit margin of 5% is destroyed, but also CLAIMANT is at the risk of not being able to stay in business [Cl. Ex 8]. Therefore, the change in circumstances corresponds to the fundamental alteration of equilibrium of the contract.

b It could not reasonably have been taken into account by CLAIMANT.

100 Secondly, the imposition of the tariffs took place after the conclusion of the contract and it could not reasonably have been taken into account by CLAIMANT at the time the contract was concluded.

101 25% tariff announced by Mediterraneo's newly elected President had neither been part of any strategy papers released earlier by the new President nor of the election manifesto. Subsequently, to the big surprise of everyone, the Equatorianian government retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo including on animal semen [Cl. Ex. 6]. Both CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the schedule that fell under the new tariffs-regime and that this also applied to racehorse semen. In

short, CLAIMANT could not reasonably have taken the imposition of the tariffs into account.

c It occurred beyond CLAIMANT's control

102 Thirdly, it is clear that the event causing the hardship is beyond control of CLAIMANT. The impositions of the tariffs were the governmental decisions which CLAIMANT has no power to control, not to mention CLAIMANT is not responsible for such impositions.

d Risk was not assumed by CLAIMANT.

103 Lastly, CLAIMANT had not assumed the risk of the change in circumstances. During the negotiation, CLAIMANT clearly mentioned CLAIMANT was not willing to take over any further risks associated with such change in the delivery terms in particular not those associated with changes in customs regulation or import restrictions. In addition, inclusion of the hardship clause was CLAIMANT's condition to accept the DDP contract [Cl. Ex. 4]. That is, the underlying legal basis of the hardship clause is to address such subsequent changes by the hardship clause, not for CLAIMANT to take all further risks.

e Imposition of the tariff in the present case satisfies Art. 79 (1) CISG.

104 As all the requirements are clearly met, the imposition of the tariffs in the present case corresponds to hardship of UPICC Art. 6.2.3. and ultimately impediment of Art. 79 (1) CISG. Since the impediment was beyond CLAIMANT's control, unforeseeable and irresistible as mentioned above, the present case satisfies the requirements of Art. 79 (1) CISG.

C. ART. 79 CISG PROVIDES FOR THE REMEDY REQUESTED BY CLAIMANT.

105 By satisfying the requirements of Art. 79 (1) CISG, CLAIMANT is "not liable for a failure to perform any of his obligations", which would result in the increase of the contract price in the present case.

1. The increase of the contract price is consistent with the purpose of Art. 79 CISG.

106 Paragraph 3.2 of the AC Opinion No. 7 states "in a situation of hardship under Art. 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based." What the Council meant by "further relief" was "relief specially tailored for hardship" and therefore, the remedy of Art. 79 CISG is not restricted to the termination of the contract but adaptation of the contract would fall within this category. [*Lookofsky, p.162*]

107 The purpose of Art. 79 should be interpreted as restoring the lost equilibrium of the contract. Accordingly, in each case, what would be the best way to maintain equilibrium of the contract should be decided and it can vary case by case. In the case of 'impossibility', the best option to maintain equilibrium of the contract would be exempting a party from liability and terminating the contract. However, in the present case, the contract between the parties corresponds to the situations of hardship, where the performance of the parties has become much more onerous and difficult but not impossible, and moreover, CLAIMANT has already complied its liability. As a result, the increase of the contract price would be the most reasonable and effective way to balance equilibrium of the contract in light of the purpose of Art. 79 CISG.

2. The increase of the contract price is consistent with the purpose of Art. 79 CISG.

108 Renegotiation of the contract price is a process by which the principle of *Pacta sunt servanda* and good faith are balanced together. [*Arroyo, p.37*]

109 The Belgian Court in the Scafom case ordered the adaptation of the contract due to change of circumstances. The remedy was the result of the application of the good faith provision of French Law, since it was not expressly provided for in the CISG. [*Scafom case, §III.14*]

110 When renegotiation of the contract remains possible, it prevails over the termination of the contract according to the principle of *Pacta sunt servanda*. That is, if renegotiation of the contract is possible, fairer and more consistent with the general principles, it should be prior to termination of the contract.

111 Especially in the present case, RESPONDENT appeared to generally accept the need for a price increase [*Cl. Ex. 8*, *p.17*] creating the impression of accepting the general need for a price adaptation, based on which CLAIMANT complied with its delivery obligation even after the imposition of the tariffs. Therefore, if RESPONDENT refuses to renegotiate the price, it would contravene the principle of good faith.

112 The increase of the contract price as the remedy provided by Art. 79 CISG is consistent not only with the purpose of CISG, but also with the general principles. International transactions require flexibility when supervening events make performance extremely onerous for one of the parties, thus arbitral tribunals should be able to adapt the terms of contracts governed by the CISG, in application of the general principles under which the Convention is based. [*Arroyo, p.41*] In short, arbitral tribunal can order the renegotiation of the contract and adaptation of the contract must

be done looking for a fair distribution of the losses between the parties. As a result, CLAIMANT is entitled to ask for the price increase under the Art. 79 CISG.

3. The increase of the contract price is also possible pursuant to Art. 6.2.3. UPICC.

113 Even if Art. 79 CISG itself does not provide remedy requested by CLAIMANT, the remedy is still possible pursuant to Art. 6.2.3 UPICC. That is because, as mentioned above, hardship is not specifically addressed in the CISG and UPICC, which clearly address the situation of hardship, can be used as gap fillers of the CISG. If the requirements for hardship could be deduced from the UPICC, it is only reasonable to conclude that effect of hardship can be deduced from the UPICC as well.

114 Art. 6.2.3 UPICC states in case of hardship the disadvantaged party is entitled to request renegotiations. As a result, Art. 79 CISG itself provides for remedy CLAIMANT requests, but even if it does not, CLAIMANT is still entitled to ask for the increase of the contract price pursuant to Art. 6.2.3 UPICC.

Request for Relief

In light of the above submissions, counsel for CLAIMANT respectfully requests the Tribunal to find that:

1) The Tribunal has the jurisdiction to adapt the contract between CLAIMANT and RESPONDENT;

2) CLAIMANT is entitled to submit evidence from the other arbitration proceedings even if the evidence is assumed to be obtained through a breach of confidentiality agreement or an illegal hack of RESPONDENT's computer system;

3) CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent

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

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DIRECTV, Inc. v. Crepsin	United States Court of appeals, *Directv, Inc. vs. Crespin*, No. 04-1385 (10th Cir. 2007), March 16, 2007	§33
FirstLink	*FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*, [2014] SGHCR 12.	§27
Maffezini v. Spain	*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7	§31
Mavrommatis Palestine Concessions	*Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30)*	§30
Scafom case	*Belgium Scafom International v. Lorraine Tubes S.A.S*, Hof van Cassatie (Cour de cassation: Supreme Court), June 2019	§§95, 109
Sonatrach Petroleum Corp. v. Ferrel Int'l Ltd	*Sonatrach Petroleum Corp. (BVI) v. Ferrel Int'l Ltd* [2002] 1 All ER 627, para. 32 (Comm) (English High Ct.).	§19
Sulamérica	*Sulamérica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638.	§§20, 21

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Final Award in ICC Case No. 5294 (1989)	*Final Award in ICC Case No. 5294*, XIV Y.B. Comm. Arb. 137, 140-41 (1989).	§23
Final Award in ICC Case No. 6379 (1992)	*Final Award in ICC Case No. 6379*, XXII Y.B. Comm. Arb. 212, 215 (1992).	§23

Index of Legal Sources

Cited as	Source
CISG	United Nations Convention on the International Sales of Goods, Vienna, 11 April, 1980
European Convention	European Convention on International Commercial Arbitration, adopted on 21 April 1961, effective from 7 January 1964
HKIAC Rules	HKIAC Administered Arbitration Rules, 2018
ICC Hardship Clause 2003	ICC Hardship Clause 2003
ICSID Additional Facility Rules	International Centre for Settlement of Investment Disputes Additional Facility Rules, adopted on September 27, 1978, effective from January 1 2003
IBA Rules	IBA Rules on the taking of Evidence in International Arbitration, adopted on 29 May 2010
New York Convention	Convention on the Recognition and Enforcement of Foreign Awards, New York, adopted on 10 June 1958, effective 7 June 1959
Prague Rules	Rules on the Efficient Conduct of Proceedings in International Arbitration, draft on 1 September 2018
UNCITRAL Model Law on International Commercial Arbitration	UNCITRAL Model Law on International Commercial Arbitration, adopted on 21 June 1985, amended in 2006
UPICC	UNIDROIT Principles of International Commercial Contracts 2010

List of Abbreviations

&	and
§(§)	paragraph(s)
ANoA	Answer to Notice of Arbitration
Art.	Article(s)
Cl. Ex.	CLAIMANT's Exhibit Number
HK	Hong Kong
HKIAC	Hong Kong International Arbitration Centre
ICJ	International Court of Justice
Mr.	Mister
NoA	Notice of Arbitration
p(p).	page(s)
PCIJ	Permanent Court of International Justice
PO	Procedural Order No
Rs. Ex.	Respondent's Exhibit Number
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institut International Pour L'Unification du Droit Prive (International Institute for the Unification of Private Law)