SIXTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
31st March – 7th April 2019, Hong Kong

MEMORANDUM FOR CLAIMANT

NATIONAL CHIAO TUNG UNIVERSITY
SCHOOL OF LAW

ON BEHALF OF	**AGAINST**
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
75 COURT STREET	14 CAPITAL BOULEVARD
CAPITAL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
CLAIMANT	**RESPONDENT**

COUNSEL

Shih-Hui, Wang · Ai-Hsiang, Chang · Yu-Syuan, Chen

Chien-Yu, Lung · Zu-Yin, Ye · Yu-Wen, Lee

TABLE OF CONTENT

INDEX OF ABBREVIATIONS

Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
ed.	Edition
HKIAC	Hong Kong International Arbitration Centre
ibid.	ibidem (in the same place)
i.e.	id est (that is)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
Ltd.	Limited
No.	Number
p.	Page
para./ paras.	Paragraph/ Paragraphs
PO	Procedural Order
sec.	Section
UNCITRAL	United Nations Commission on International Trade Law
UPICC	UNIDROIT Principles of International Commercial Contracts
US$	United States Dollar
v.	versus

INDEX OF AUTHORITY

Born, Gary — International Arbitration: Cases and Materials, 2nd Ed. Kluwer Law International(2014) cited as: *Born, Cases and Materials* in para.22

Brunner, Christoph — Hardship as a General Principle of Law in: Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration pp. 391-420 Kluwer Law International (2008) cited as: *Brunner, sec.11* in paras.52, 74, 102

Brunner, Christoph — Legal Effects of Hardship in: Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration pp. 479-512 Kluwer Law International (2008) cited as: *Brunner, sec.13* in paras.102, 105

Ciematniece, Ilze — Contract renegotiation and adaptation LAP LAMBERT Academic Publishing (October, 2010) cited as: *Ciematniece* in para.52

CISG-Advisory Council — CISG Advisory Council Opinion No. 7 Exemption of Liability for Damages Under Article 79 of the CISG Pace Law School Institute of International Commercial Law (April 7, 2008) cited as: *CISG-AC Opinion No. 7* in paras.76, 87

Davies, Martin/DiMatteo, **Larry** A. (ed.)
Excuse of Impediment and Its Usefulness
pp. 295-306
in: International Sales Law: A Global Challenge (300) (2014)
Cambridge University Press
cited as: *Davies/DiMatteo*
in para.60

DiMatteo, Larry A.
Contractual Excuse under the CISG: Impediment, Hardship, and the Excuse Doctrines
in: Pace International Law Review (27) (2015)
cited as: *DiMatteo*
in para.52, 80

Drymer, Stephen
Gobeil, Valérie
Albert Jan van den Berg(ed.)
Legitimacy: Myths, Realities, Challenges
Kluwer Law International(2015)
cited as: *Drymer/Gobeil*
in para.24

Enderlein, Fritz
Maskow, Dietrich
United Nations Convention on Contracts for the International Sale of Goods
Oceana Publications (1992)
cited as: *Enderlein/Maskow*
in paras.78, 83

Felemegas, John
An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law
Cambridge University Press (October 2009)
cited as: *Felemegas*
in para.96

Garner A. Bryab(ed.)
Black's Law Dictionary, 10th ed.
Thomson Reuters (2014)
cited as: *Black's Law Dictionary*
in para.58

Girsberger, Daniel
Voser, Nathalie
International Arbitration: Comparative and Swiss Perspectives, 3rd Ed.
Schulthess Juristische Medien AG (2016)

cited as: *Girsberger /Voser*
in para.29

Lahlou, Yasmine
Poplinger, Andrew
Walters, Gretta
Enforcement of Foreign Arbitral Awards and Judgments in New York
Kluwer Law International (2018)
cited as: *Lahlou/Poplinger/Walters*
in para.29

Lawrence Collins
Professor C. G. J. Morse
Professor David McClean
CBE QC
Adrian Briggs
Jonathan Harris
Professor Campbell McLachlan
Professor Jonathan Hill
Dicey, Morris & Collins on The Conflict of Laws, 14th ed.
Sweet & Maxwell, London (2006)
cited as: *Collins/Morse/McClean/Briggs/Harris/McLachlan/Hill*
in para.4

Lookofsky, Joseph
Not Running Wild With the CISG
pp. 141-169
in : Journal of Law and Commerce (29) (2011)
cited as: *Lookofsky*
in para.74

Marghitola, Reto
Document Production in International Arbitration
Kluwer Law International(2015)
cited as: *Marghitola*
in para.26

Marghitola, Reto
Document Production: New Findings on an Old Issue
in ASA Bulletin 2016
pp. 78-94
Swiss(2016)
cited as: *Marghitola, ASA Bulletin*
in para.26

Melis, Werner
Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practices of the ICC Court of Arbitration
in: Journal of International Arbitration (1) (1984)
cited as: *Melis*
in para.52

Mercedeh Azerdo Da Silveira
Adaptation of the Contract on Grounds of Hardship
in: Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation
pp. 321-348
Kluwer Law International (2014)
cited as: *Mercedeh*
in paras.42, 105

Mim, Bower et al
The genetic origin and history of speed in the Thoroughbred racehorse
in: Nature Communications (3) (2012)
cited as: *Mim et al*
in para.104

Morrissey, Joseph F.
Graves, Jack M.
Arbitration as an Alternative to National Courts
in: International Sales Law and Arbitration: Problems, Cases,and Commentary
cited as: *Morrissey/Graves*
in para.9

Moser, Michael
Bao, Chiann
A Guide to the HKIAC Arbitration Rules
Oxford (2017)
cited as: *Moser/Bao*
in paras.8, 24, 34

Oxford Dictionary
Oxford Dictionary
available at:
https://www.oxforddictionaries.com/
visited on 6 December 2018
in para.57

Schwenzer, Ingeborg
Force Majeure and Hardship in International Sales Contracts
pp. 709-725
in: Victoria University of Wellington Law Review
cited as: *Schwenzer*
in paras.67, 74

Schwenzer, Ingeborg
Hachem, Pascal
Kee, Christopher
Global Sales and Contract Law
Oxoford (2012)
cited as: *Schwenzer/Hachem/Kee*
in para.54

Tajudin, Amalina Ahmad
Scafom International BV v. Lorraine Tubes S.A.S.: a case review of changing circumstances under the United Nations Convention on International Sale of Goods (CISG) of 1980
pp. 212-225
in: Juridical Tribune (Tribuna Juridica) (4) (2014)
cited as: *Tajudin*
in para.75

United Nations Commission on International Trade Law (UNCITRAL)
Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016)
cited as: *CISG Digests*
in paras.40, 50

William A.w. Neilson
Price Adjustments in Long-Term Supply Contracts: the Saga of the
Quintette Coal Arbitration
pp. 76-94
in: Canadian Business Law Journal (18) (1991)
cited as: *William*
in para.46

Zeller, Bruno

Four-Corners - The Methodology for Interpretation and Application of
the UN Convention on Contracts for the International Sale of Goods
Pace Law School Institute of International Commercial Law (19 May 2003)
cited as: *Zeller*
in para.91

INDEX OF CASES

Singapore

BCY v. BCZ
High Court of the Republic of Singapore
9 November 2016
Case No.: 2016 SGHC 249
cited as: *BCY case*
in paras.4, 7, 9

United Kingdom

Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Coy Ltd
High Court of Justice
19 December 2013
Case No.: 2012-1055
cited as: *Habas case*
in para.7

Sulamerica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors
Court of Appeal (Civil Division)
16 May 2012
Case No.: A3/2012/0249
cited as: *Sulamerica case*
in para.4

Quintette Coal Ltd. v. Nippon Steel Corp.
British Columbia Court Appeal
24 October 1990
Case No.: 48 B.L.R. 32 (B.C.S.C.)
cited as: *Quintette case*
in para.46

United States of America

Aluminum Co. of America v. Essex Group, Inc.
United States District Court, W. D. Pennsylvania
7 April 1980
Case No.: 78-598
cited as: *ALCOA Case*
in paras.63, 64

Filanto S.p.A. v. Chilewich International Corp.
U.S. District Court, Southern District of New York
14 April 1992
Case No.: 92 Civ. 3253 (CLB)
cited as: *Filanto Cas*e
in para.91

Roby v. Corp. of Lloyd's
United States Court of Appeals, Second Circuit
2 June 1993
Case No.:61 USLW 2796
cited as: *Roby case*
in para.17

INDEX OF AWARDS

ICC Case

ICC Case No. 6281 of 1989
cited as: *ICC Case No. 6281 (1989)*
in para.60

ICC Case No. 2508 of 1976
cited as: *ICC Case No. 2508 (1976)*
in para.105

ICC Case No. 10351 of 2001
cited as: *ICC Case No. 10351 (2001)*
in para.46

ICC Case Paris 8873 of 1997
cited as: *ICC Case Paris 8873 (1997)*
in para.54

ICC Case No. 9994 of 2001
cited as: *ICC Case No. 9994 (2001)*
in para.67

UNCITRAL

Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara
4 May 1999
cited as: *Himpurna case*
in para.60

ICSID

Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan
28 June 2013
Case No.: ARB/13/13
Cited as: *ICSID 28 June 2013*
in para.32

LEGAL SOURCES AND MATERIALS

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 28 May 1983, with amendments on 29 May 2010
ICC Hardship Clause	International Chamber Of Commerce Hardship Clause, February 2003
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules, 1 September 2008, with amendments on 1 November 2013 and 1 November 2018
PICC 2016	International Institute for the Unification of Private Law (UNIDROIT), May 2016
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 11 December 1985, with amendments on 4 December 2016

STATEMENT OF FACTS

1 The parties to this arbitration are Phar Lap Allevamento ("CLAIMANT") and Black Beauty Equestrian ("RESPONDENT").

2 CLAIMANT is a company operating the oldest and most renowned stud farm in Mediterraneo.

3 RESPONDENT is a company operating the broodmare lines in Equatoriana.

21 March 2017	CLAIMANT and RESPONDENT ("the Parties") started to negotiate a transaction regarding frozen semen.	*Exhibit C1, p.9*
24 March 2017	The two main negotiators, Julie Napravnik, representing CLAIMANT, and Chris Antley, representing RESPONDENT, began to discuss the details of the transaction.	*Exhibit C2, p.10*
31 March 2017	During the negotiation, CLAIMANT accepted the delivery on the basis of DDP but transferred major additional risks to RESPONDENT.	*Exhibit C4, p.12*
12 April 2017	Ms. Napravnik and Mr. Antley discussed the choice of law, the forum selection clause, and the inclusion of the adaptation mechanism into the contract. After discussion, they were severely injured in a car accident. As a result, the outcome of the discussion was not put into the final contract.	*Notice of Arbitration, para.8, p.5*
6 May 2017	The Frozen Semen Sales Agreement ("Sales Agreement") was concluded by two new negotiators, John Ferguson and Julian Krone. CLAIMANT agreed to provide RESPONDENT 100 doses frozen semen in exchange for a non-refundable fee of US$ 100,000 per insemination dose.	*Exhibit C5, p.13*

November 2017	Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariff on agricultural products from Equatoriana.	*Notice of Arbitration, para.9, p.6*
20 December 2017	The Equatorianian government announced to impose 30 per cent retaliatory tariff on selected products from Mediterraneo including animal semen.	*Exhibit C6, p.15*
20 January 2018	CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen and RESPONDENT appeared to accept the need for a price adaptation.	*Exhibit C7, p.16* *Exhibit C8, p.17*
23 January 2018	CLAIMANT delivered the remaining 50 doses before an agreement on the new price had been reached. RESPONDENT refused to adjust the price or adapt the contract after CLAIMANT's last delivery.	*Notice of Arbitration, para.13, p.6*
31 July 2018	CLAIMANT initiated the arbitration against RESPONDENT by submitting its Request for Arbitration to the HKIAC.	*Notice of Arbitration, p.4*
24 August 2018	RESPONDENT submitted its Answer to the Notice of Arbitration to the HKIAC.	*Answer to the Notice of Arbitration, p.29*
2 October 2018	During the arbitral proceedings, CLAIMANT intended to submit the partial interim award from another arbitration ("the Award") as an evidence to the arbitration.	*HKIAC's Letter, p.50*
3 October 2018	RESPONDENT strongly objected to the submission of the evidence since the evidence is claimed to be in breach of contractual obligations or obtained by illicit means.	*HKIAC's Letter, p.51*

SUMMARY OF ARGUMENTS

1 Based on the trust to RESPONDENT, CLAIMANT paid for the 30 per cent tariff for the last shipment though the tariff is excessively onerous for CLAIMANT. However, RESPONDENT refused to adapt the contract after CLAIMANT's last delivery. Thus, CLAIMANT is here to claim for an adaptation of the price to recover the equilibrium of the transaction.

2 First, Clause 15 of the Sales Agreement ("Arbitration Agreement") empowers the Tribunal to adapt the Sales Agreement. The Arbitration Agreement is governed by the law of Mediterraneo, and therefore should be interpreted with extraneous evidence which demonstrates the Parties' intent to confer the power to adapt the contract on the Tribunal. Therefore, the Tribunal has the power to adapt the Sales Agreement under the Arbitration Agreement **(Issue1)**.

3 Second, during the arbitral proceeding, CLAIMANT intended to submit the Award as evidence from another arbitration. RESPONDENT objected to CLAIMANT's submission and falsely claimed that such illegally obtained evidence should be excluded. However, submitting the Award shall be CLAIMANT's right to be heard and does not breach the rules related to the present case **(Issue2)**.

4 Third, according to Art. 8 CISG, the hardship clause under Clause 12 of the Sales Agreement ("Hardship Clause") entitles CLAIMANT to claim for adaptation. The present case fulfills the criteria of adaptation. The Tribunal may adapt the contract under the Hardship Clause. Alternatively, the Tribunal may adapt the contract according to Art. 79 CISG. Even if Art. 79 CISG has no explicit effect, the general principles and PICC should be introduced to establish the effect. Thus, CLAIMANT is entitled to the amount of US$ 1,500,000 or, alternatively, US$ 1,250,000 under adaptation. If the Parties had known the 30 per cent tariff during the negotiation process, the cost of US$ 1,500,000 on the tariff would have been added to the purchse price. Alternatively, the amount would be US$ 1,250,000, which is 25 per cent of the purchase price, because the limit of sacrifice of CLAIMANT is the 5 per cent of profit margin

(**Issue 3**).

ARGUMENTS ON THE PROCEEDINGS

ISSUE 1: THE TRIBUNAL HAS THE POWER TO ADAPT THE SALES AGREEMENT.

1 The Tribunal has the jurisdiction and/or the power to adapt the Sales Agreement based on the Arbitration Agreement. The law of Mediterraneo, which is the governing law of the Arbitration Agreement, allows a broad interpretation of the Arbitration Agreement that empowers the Tribunal to adapt the contract **(A)**. Even if the Tribunal considers the Arbitration Agreement is governed by Danubian Law, the Tribunal still has the power to adapt the Sales Agreement **(B)**. In addition, the modification of HKIAC Model Clause of the Arbitration Agreement does not preclude the Tribunal's power to adapt the Sales Agreement **(C)**.

A. Under the law of Mediterraneo, the Arbitration Agreement empowers the Tribunal to adapt the Sales Agreement.

2 The Arbitration Agreement, governed by the law of Mediterraneo, empowers the Tribunal to adapt the Sales Agreement. In the present case, the Arbitration Agreement is governed by the law of Mediterraneo **(I)**. The law of Mediterraneo provides a broad interpretation on the arbitration agreement with extraneous evidence. As a result, previous negotiations and subsequent conducts are allowed to prove that the Parties have common intentions to confer the Tribunal the power to adapt the contract through the Arbitration Agreement **(II)**.

I. The governing law of the Arbitration Agreement is the law of Mediterraneo.

3 The governing law of the Arbitration Agreement is the law of Mediterraneo for three reasons. First, the Parties chose the law of Mediterraneo to govern the Arbitration Agreement **(1)**. Second, mere seat of arbitration in the Arbitration Agreement cannot override that the Parties chose the law of Mediterraneo to govern the Arbitration Agreement **(2)**. Third, the doctrine of separability alleged by RESPONDENT is irrelevant to the case at hand **(3)**.

1) The Parties chose the law of Mediterraneo to govern the Arbitration Agreement.

4 The Parties chose the law of Mediterraneo to govern the Arbitration Agreement because the Parties agreed on the law of Mediterraneo to govern the entire Sales Agreement. In determining the governing law of the arbitration agreement, the tribunal should first respect the parties' choice of law [*Collins/Morse/McClean/Briggs/Harris/McLachlan/Hill, para.16-016*]. In *Sulamerica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors*, the court held that where the arbitration agreement does not contain an express choice of law, the express governing law of the main contract constitutes "*a strong indication*" of the parties' intention to govern the arbitration agreement by the same system of law [*Sulamerica case, para.26*]. Because the arbitration agreement forms part of the main contract, the parties are presumed to have impliedly chosen the governing law of the main contract to govern the arbitration agreement as well [*Sulamerica case, para.11; BCY case, para.49*].

5 In the present case, there is no express choice of law governing the Arbitration Agreement. Nonetheless, the Parties expressly chose the law of Mediterraneo to govern the Sales Agreement pursuant to Clause 14 of the Sales Agreement. This forms "*a strong indication*" of the Parties' intention to govern the Arbitration Agreement by the law of Mediterraneo. Therefore, the governing law for the Arbitration Agreement is presumed to be the law of Mediterraneo.

6 In addition, there is no evidence indicating that the Parties chose the law of Danubia as the governing law of the Arbitration Agreement. RESPONDENT suggested that "*The law of this arbitration clause shall be the law of Equatoriana*" in the first draft of the Arbitration Agreement in the email on 10 April, 2017 [*Exhibit R1, p.33*]. However, CLAIMANT objected to the proposal by deleting "*The law of this arbitration clause shall be the law of Equatoriana*" and emphasized that law applicable to the Sales Agreement remains the law of Mediterraneo in the email on 11 April 2017 [*Exhibit R2, p.34*]. Throughout the drafting history of the Arbitration Agreement, the Parties never indicated that the governing law of the Arbitration Agreement could be Danubian law. Therefore, there is no indications that the Parties chose

the law of Danubia, and the governing law of the Arbitration Agreement remains the law of Mediterraneo.

2) Mere seat of arbitration in the Arbitration Agreement cannot override that the Parties chose the law of Mediterraneo to govern the Arbitration Agreement.

7 The choice of the seat of arbitration, without more, does not indicate the governing law for the Arbitration Agreement. When the governing law of the arbitration agreement is absent, the law of the seat of arbitration could apply only when there is no express choice of law in the main contract or when there are sufficient factors pointing away from the presumption that the law of the main contract also governs the arbitration agreement [*Habas case, para.101*]. Mere choice of seat is insufficient to displace such presumption [*BCY case, para.55*]. In the present case, mere seat of arbitration does not indicate the governing law of the Arbitration Agreement to be the law of Danubia.

8 Furthermore, the HKIAC Administered Arbitration Rules 2018 ("HKIAC Rules") do not set the law of the seat of arbitration as the default governing law for the arbitration agreement [*c.f. Art. 16.4 LCIA Rules*]. To avoid uncertainty regarding the law of the arbitration agreement, the HKIAC Model Clause revised in 2013 additionally includes "*The law of this arbitration clause shall be ... (Hong Kong law).*" [*HKIAC Model Clause*]. The footnote of HKIAC Model Clause suggested that the optional law of the arbitration clause should particularly be incorporated "*where the law of the substantive contract and the law of the seat are different*" [*Moser/Bao, p.49*]. This suggests that the Parties need to specify the governing law of the Arbitration Agreement if the Parties intend to choose a different law to govern the Arbitration Agreement. Thus, without specification of such governing law in the Arbitration Agreement, though the Parties chose the seat of arbitration to be Danubia, the law of Mediterraneo still governs law of the Arbitration Agreement.

3) The doctrine of separability is irrelevant to the case at hand.

9 The doctrine of separability is irrelevant for the determination of the governing law of the

Arbitration Agreement. RESPONDENT alleges that the doctrine separates the Arbitration Agreement from the main contract, which suggests that the law of Mediterraneo does not govern the Arbitration Agreement [*Answer to the Notice of Arbitration, para.14*]. The allegation is meritless. The doctrine of separability aims to protect the validity of the arbitration agreement when the main contract is found to be void, so the jurisdiction of the arbitration can be preserved [*Morrissey/Graves, p.368-369*]. When it comes to determining the governing law of the arbitration agreement, the doctrine does not apply to distinguish the arbitration agreement from the main contract [*BCY case, para.60*].

10 In the present case, the validity of both the Sales Agreement and the Arbitration Agreement are not in dispute. The doctrine of separability is therefore irrelevant and not applicable.

II. Under the law of Mediterraneo, the Tribunal is authorized to adapt the Sales Agreement by the Arbitration Agreement based on the intents of the Parties.

11 Under the law of Mediterraneo, which includes the CISG, the Tribunal is authorized to adapt the Sales Agreement by the Arbitration Agreement based on the intents of the Parties. There is consistent jurisprudence in Mediterraneo when the sales contract is governed by the CISG, the CISG also applies to the interpretation of the arbitration clause contained in such contracts [*PO1, para.4, p.53*]. The CISG is applicable here, as both the states of the Parties' place of business are contracting states of CISG [*ibid.*], and Clause 14 of the Sales Agreement provides that the Sales Agreement is governed by the law of Mediterraneo, including the CISG. Thus, the CISG applies to the interpretation of the Arbitration Agreement. Art. 8(1) and Art. 8(3) CISG allows the Arbitration Agreement to be interpreted with the Parties' intent regarding all relevant circumstances [*Art. 8(1)/ Art. 8(3) CISG*]. The Arbitration Agreement should be interpreted to authorize the Tribunal to adapt the Sales Agreement based on parties' intents for the following reasons: first, the Parties' intent to authorize the Tribunal to adapt the contract when necessary was demonstrated in the main negotiations. **(1)**. Second, the talk between the Parties before the last shipment on 21 January 2018 indicated the Parties' intent

to resolve the dispute by authorizing the Tribunal to adapt the contract **(2)**.

1) The negotiations demonstrate the Parties' intent to authorize the Tribunal to adapt the contract when necessary.

12 The negotiations between the Parties demonstrate that the Parties intend to empower the Tribunal to adapt the Sales Agreement when the Tribunal deems appropriate. Art. 8(3) CISG provides that negotiations should be considered in determining the parties' intent. During the main negotiation process, CLAIMANT was represented by Ms. Napravnik and RESPONDENT was represented by Mr. Antley. On 12 April 2017, Ms. Napravnik mentioned to and reached consensus with Mr. Antley on having a mechanism that would ensure an adaptation of the contract [*Exhibit C8, p.17*]. Mr. Antley further suggested it be conducted by the arbitrators and promised to bring up a proposal [*ibid.*]. The intention is conveyed again through Mr. Antley's note saying "*connection of hardship clause with arbitration clause*" [*Exhibit R3, p.35*]. The above discussion demonstrates the Parties' intent to confer the power to adapt the Sales Agreement to the Tribunal.

13 The reason why the Sales Agreement does not contain an adaptation clause is merely a negligence of the successors who finalized the contract. Because a severe car accident happened to the two main negotiators, Ms. Napravnik was replaced by Mr. Ferguson for CLAIMANT while Mr. Krone took over Mr. Antley's job [*ibid.*]. Mr. Krone continued and finalized the negotiations conforming to Mr. Antley's will which is conveyed through a note Mr. Antley kept after the meeting with Ms. Napravnik on 12 April 2017 [*ibid.*]. Mr. Krone stated that she was not clear with what Mr. Antley meant with "*connection of hardship clause with arbitration clause*" [*ibid.*]. The non-inclusion of the adaptation clause was only a negligence that was not intended by the Parties and does not affect the Parties' intent to authorize the Tribunal to adapt the Sales Agreement. Therefore, according to Art. 8(1) and Art. 8(3) CISG, the Arbitration Agreement should be interpreted with the Parties' intent to authorize the Tribunal to adapt the Sales Agreement.

2) The subsequent conduct of the Parties on 21 January 2018 demonstrates their intent to authorize the Tribunal to adapt the contract.

14 The conversation between the Parties before the last shipment is the Parties' subsequent conduct demonstrating their intent to empower the Tribunal to adapt the Sales Agreement. Art. 8(3) CISG provides that subsequent conducts should be considered in determining the Parties' intent. When CLAIMANT found that the Government of Equatoriana increased the tariff after the conclusion of the Sales Agreement, CLAIMANT instantly proposed to RESPONDENT that a solution was needed so CLAIMANT could start the shipment [*Exhibit C7, p.16*]. However, Mr. Shoemaker, RESPONDENT's faculty in contact with CLAIMANT, urged CLAIMANT to ship the frozen semen and promised that the Parties "*will certainly find an agreement on the price*" because RESPONDENT needed the doses immediately [*Exhibit R4, p.36*]. Based on Mr. Shoemaker's promise, CLAIMANT delivered the last shipment of frozen semen on 23 January 2018. The conversation, the Parties' subsequent conduct, indicates that both Parties would accept a price adaptation and would authorize the arbitrators to adapt the contract given the dispute resolution mechanism in the Arbitration Agreement. Thus, the conversation before the last shipment constitutes the Parties subsequent conduct that the Arbitration Agreement should be interpreted with the Parties' intent to authorize the Tribunal to adapt the Sales Agreement.

B. Alternatively, even if Danubian law governs the Arbitration Agreement, the Tribunal still has the power to adapt the Sales Agreement.

15 Even if the Tribunal considers that Danubian law governs the Arbitration Agreement, the Tribunal still has the power to adapt the Sales Agreement. Danubian Contract Law contains four corner rule which RESPENDENT alleged would result in a narrow interpretation excluding extraneous evidence. However, four corner rule does not preclude extraneous evidence which is used to ascertain the meaning of the terms in the contract [*Carpenters case*]. Under this circumstance, allowing extraneous evidence is consistent with the purpose of four

corner rule to achieve certainty and finality of the contract [*ibid.*]. In the present case, to ascertain the scope of the Arbitration Agreement, extraneous evidence discussed in Issue 1. A. II. can assist to determine the exact scope of the Arbitration Agreement. Thus, four corner rule in Danubian Contract Law does not preclude the extraneous evidence used in the present case.

C. The Tribunal's power to adapt the contract is not precluded by the wording of the Arbitration Agreement.

16 The Tribunal's power to adapt contract is not precluded by the wording of the Arbitration Agreement. Apart from RESPONDENT's contention on exclusion of extraneous evidence, RESPONDENT further asserts that adaptation of contract is out of the scope given the narrow worded Arbitration Agreement. However, even though the Arbitration Agreement does not contain "*controversy, difference or claim relating to*" this contract as well as "*any dispute regarding noncontractual obligations arising out of or relating to it*" provided by the HKIAC Model Clause [*Answer to the Notice of Arbitration, para.13, p.6*], it does not preclude adaptation of contract out of the scope of the Arbitration Agreement for the following reasons. First, there is no substantive difference between "*arising out of*" and the deleted "*relating to*" **(I)**. Even if the Tribunal considers "*arising out of*" and "*relating to*" are different, the Arbitration Agreement does not preclude the Tribunal's power to adapt the contract **(II)**.

I. There is no substantive difference between "*arising out of*" and "*relating to*".

17 The narrowed wording in the Arbitration Agreement has little difference compared to the HKIAC Model Clause. In *Roby v. Corp.Lioyd's*, the court remarked that phrases such as "*relating to"* "*in connection with*" or "*arising from*", these linguistic differences are "*largely semantic,"* and there is *"no substantive difference in the present context between the phrases*." [*Roby case*] As long as the dispute is either "*relating to*", "*in connection with*" or "*arising out of*" this contract, there is no substantial difference in the wording used by parties. Thus, no matter which phrases are used in the Arbitration Agreement, they refer to the same situations and include a claim for contract adaptation.

II. Even if the Tribunal considers that the terms "*arising out of*" and "*relating to*" are different, the Tribunal's power to adapt the contract are not precluded.

18 Even if the Tribunal considers that the scope of the Arbitration Agreement is limited to "*any dispute arising out of this contract*" that is different from the scope that was provided by the term "*relating to,*" the Tribunal's adaptation power is not precluded by such term. The phrase "*relating to*" usually refers to both contractual and non-contractual claims [*Born, p.1349*]. In contrast, the phrase "*arising out of*" encompasses contractual claims and excludes non-contractual claims [*ibid.*]. By deleting "*relating to*" and "*any dispute regarding non-contractual obligations arising out of or relating to it"*, only non-contractual claims are precluded by the modification of the HKIAC Model Clause. Price adaptation is to adjust the obligations deriving from the contract. In the present case, CLAIMANT's request to adapt the price the Sales Agreement shall be considered contractual claims. Therefore, the modification of the Model Clause does not affect the Tribunal's power to adapt the Sales Agreement.

CONCLUSION OF THE FIRST ISSUE

19 The Tribunal has the jurisdiction and/or the power to adapt the Sales Agreement based on the Arbitration Agreement. The Arbitration Agreement, governed by the law of Mediterraneo, is interpreted with extraneous evidence and thus authorizes the Tribunal to adapt the contract. Even if Danubian law governs the Arbitration Agreement, it does not deprive the Tribunal's power to adapt the contract. Lastly, the modification of HKIAC Model Clause of the Arbitration Agreement does not deprive the Tribunal's power to adapt the Sales Agreement.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

20 CLAIMANT is entitled to submit the Award from the other arbitration proceedings as evidence for the following two reasons. The ways CLAIMANT obtained the evidence does not violate any rules for the admission of evidence either through breaching a confidentiality

agreement or an illegal hack of RESPONDENT's computer system **(A)**. Alternatively, even if the Tribunal considers that the evidence is legal impediment or privilege under Art. 9.2(b) IBA Rules 2010, the evidence shall still be admissible due to its relevancy and materiality to the outcome of the case under Art. 22.3 HKIAC Rules 2018 **(B)**.

A. The ways CLAIMANT obtained the evidence do not violate any rules for the admission of evidence either through breaching a confidentiality agreement or an illegal hack of RESPONDENT's computer system.

21 It is within the Tribunal's authority to decide whether CLAIMANT is entitled to submit the Award from another arbitration as evidence **(I)**. Since the Parties did not agree upon the rules governing evidence taking, the Tribunal shall apply IBA Rules on the Taking of Evidence in International Arbitration 2010 ("IBA Rules") under international practice **(II)**. Submitting the Award as evidence is not legal impediment or privilege under Art. 9.2(b) IBA Rules **(III)**.

I. The Tribunal has the authority to decide whether CLAIMANT is entitled to submit the Award.

22 In the arbitration, the Tribunal shall have the power to decide the admissibility of evidence. Where the parties have not agreed upon particular (or any) procedural matters, most national arbitration laws, and institutional rules, grant the tribunal in an international arbitration substantial discretion to establish arbitral procedures [*Born, Cases and Materials, p.778*]. Such practice is embodied in Art. 19(2) of the UNCITRAL Model Law on International Commercial Arbitration 2006 ("UNCITRAL Model Law"). UNCITRAL Model Law can be referred in the present case because Danubia, the seat of the arbitration, has adopted the UNCITRAL Model Law. Failing such agreement, the Tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the Tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence [*Art. 19(2), UNCITRAL Model Law*]. In the present case, both Parties did not reach an agreement in advance to regulate evidence, so the Tribunal shall have the authority to decide the

admissibility of the evidence.

23 Furthermore, the present case is conducted under the HKIAC Rules, and HKIAC Rules also stand on the same position of giving the Tribunal the widest discretion on the taking of evidence. The Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. [*Art. 22.2, HKIAC Rules*] Therefore, in the present case, the Tribunal has the authority to choose the applicable rules on the taking of evidence.

II. The Tribunal shall apply IBA Rules to the present case under international practice.

24 Under international practice, most tribunals may apply IBA Rules on the Taking of Evidence to solve issues relevant to the admissibility, relevance, materiality and weight of evidence [*Born, p.200*]. IBA Rules reflect a successful and practicable compromise between different cultural and legal traditions [*Drymer/Gobeil, p.209*]. Therefore, IBA Rules are widely applied to arbitrations and it has become an international practice to adopt IBA Rules. IBA Rules are also commonly adopted or referred to in HKIAC Arbitration [*Moser/Bao, p.193*]. Considering the wide application and the advantages of IBA Rules, the Tribunal shall apply IBA Rules.

III. Submitting the Award as evidence does not satisfy Art. 9.2(b) IBA Rules.

25 In the present case, the Tribunal shall admit the submission of the Award as evidence because such submission does not satisfy Art. 9.2(b) IBA Rules. CLAIMANT first learned about the other arbitration of RESPONDENT's at the annual breeder conference [*PO2, para.40, p.60*]. CLAIMANT contacted a company which had promised to sell CLAIMANT a copy of the Award [*PO2, para.41, p.60*]. CLAIMANT itself did not obtain such evidence through illegal means. CLAIMANT's submission of the Award as evidence does not meet Art. 9.2(b) IBA Rules **(1)**. Even if the Award was leaked through the alleged means, the Award should still be admissible **(2)**.

1) CLAIMANT's submission of the Award as evidence does not meet Art. 9.2(b) IBA Rules.

26 CLAIMANT's submitting the Award as evidence does not meet Art. 9.2(b) IBA Rules. Art. 9.2(b) IBA Rules provides that the Tribunal shall exclude evidence if there is legal impediment or privilege in evidence under the legal or ethical rules determined by the Tribunal to be applicable [*Art. 9.2(b), IBA Rules*]. A legal impediment can be defined as a rule of law or an order of a public authority which prohibits disclosure [*Marghitola, p.90*]. As for the requirement of privilege, the tribunal has the discretion to determine the legal or ethical rules applicable to privilege [*Marghitola, ASA Bulletin, p.75*]. In the present case, there are no specific rules dealing with evidence obtained in breach of contractual obligations or by illicit means in the arbitration law of Equatoriana, Mediterraneo, and Danubia [*PO2, para.46, p.61*]. The arbitration laws of Mediterraneo, Equatoriana, and Danubia are all tolerant on the taking of evidence and encourage parties to submit any evidence they wish to support their case. Hence, the way CLAIMANT procured the Award does not meet Art. 9.2(b) IBA Rules because there are no legal impediment or legal or ethical rules governing the evidence in the arbitration laws of both countries and the seat of arbitration.

2) Even if the Award was leaked through the alleged means, the Award shall still be admissible.

27 The Award shall still be admissible in the present case even though the Award was unveiled by unlawful ways. Even if the Tribunal considers the evidence is obtained illegally, under international practice such evidence should still be admissible. First, the Tribunal shall accept the evidence to ensure the Parties' right to be heard and equal treatment in arbitration **(a)**. Moreover, the Tribunal shall deal with the issue on a case-by-case basis **(b)**.

a) The Tribunal shall accept the evidence to ensure the Parties' right to be heard and equal treatment in arbitration.

28 When determining the admissibility of the evidence submitted by the parties to an arbitral proceeding, the tribunal shall accept the evidence to ensure parties' right to be heard and equal treatment in arbitral proceeding according to Art. 13.1 HKIAC Rules 2018 and Art. 18

UNCITRAL Model Law 2006. Moreover, the practice of international commercial arbitration indicates that tribunals do almost accept all kind of evidence in arbitral proceedings.

29 Submitting evidence is the right of parties and the tribunals should ensure the parties' equal treatment and an opportunity to be heard [*Born, p.2143*]. A party's right to a fundamentally fair hearing includes the right to present affirmative evidence and arguments that bear on the matters in dispute. [*Lahlou/Poplinger/Walters, p.185*] Art. 13.1 HKIAC Rules 2018 provides that the tribunal shall ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case. Moreover, Art. 18 UNCITRAL Model Law 2006 is in line with HKIAC Rule. If a tribunal excludes evidence unequally or wrongfully, the award may be annulled or set aside [*Girsberger /Voser, p.411*]. In the present case, presenting evidence in arbitral proceedings shall be the fundamental right of CLAIMANT. Therefore, the Tribunal shall admit the evidence to ensure such right.

b) The Tribunal shall deal with the issue on a case-by-case basis.

30 Although Art. 9.2(b) IBA Rules excludes the evidence under the situation of legal impediment or privilege, the applicable legal or ethical rules in each case are not fixed but should reflect different legal and cultural background [*Bishop/Crawford/Reisman, p.1170*]. The Tribunal shall deal with the issue case by case rather than take a unified or consistent approach to decide whether or not to admit the evidence.

31 However, there is no comprehensive standard for deciding the admissibility of illegally obtained evidence, but one clear conclusion is that the evidence obtained illegally will not automatically be inadmissible [*Blair/Gojković, p.256*]. In fact, some common elements and trends such as the necessity of protecting the documents and the status of the confidential documents can still be referred.

32 If a relevant document has found its way to the tribunal through the hands of a third ('disinterested') party, even if originally obtained through unlawful conduct, an argument could be made that such evidence should be considered *prima facie* admissible [*ibid.*].

Furthermore, the necessity of protecting the specific documents is another factor that the Tribunal shall take into consideration. In *Caratube International Oil Company and Mr Devincci Saleh Hourani v. Kazakhstan*, the tribunal admits the evidence obtained from 60,000 documents uploaded on a website named "*Kazakhleaks*" by hackers. Art. 9 IBA Rules is applied to the case. The award provides that the tribunal shall access to the information which is leaked by the third party in the public domain [*ICSID 28 June 2013*]. This demonstrates that if there is no necessity to protect the specific documents, the tribunal shall allow the admission of the documents [*ibid.*].

33 First of all, the Award is procured from the company which is a third party in the present arbitration [*PO2, para.41, p.60*]. No matter how the company obtained the evidence, the evidence is *prima facie* admissible. Moreover, the evidence in the present case is in the public domain and it does not need to be protected anymore because anyone who wants the Award can pay and then acquire the Award from the company. Also, CLAIMANT can also summon the witness in replacement of submitting the Award, and both of the ways can gain the same purpose. Considering this situation, the Tribunal shall have the power to access the evidence instead of excluding it. In conclusion, even if the award was illegally leaked in the first place, it shall still be admissible.

B. Under Art. 22.3 HKIAC Rules, even if the evidence may meet Art. 9.2(b) IBA Rules, the evidence shall still be admissible due to its relevancy and materiality to the outcome of the case.

34 Assume that submitting the Award may meet Art. 9.2(b) IBA Rules, the Tribunal shall still admit the evidence due to the evidence's substantial impact on the outcome of the case. At any time during the arbitration, the tribunal may allow or require a party to produce documents, exhibits or other evidence that the tribunal determines to be relevant to the case and material to its outcome. The tribunal shall have the power to admit or exclude any documents, exhibits or other evidence [*HKIAC Rules, Art. 22.3*]. As a general rule, all relevant

evidence that is material to the outcome of the arbitration is admissible [*Moser/Bao, p.193*].

35 In the present case, the Tribunal shall admit the Award from another arbitration because the Award is relevant and material to the outcome of the case. Relevance suggests the document must be useful for the line of evidence by the requesting party, and materiality means that the Tribunal must deem it necessary to decide whether a factual allegation is true or not [*ibid.*] First, the two arbitrations are both conducted under HKIAC and the factual backgrounds are quite similar [*PO2, para.39, p.60*]. The disputes both arose from the boost of tariff and the main issues are whether to adapt the contracts. Second, the information of another arbitration reveals RESPONDENT's intention of adapting the contract in the situation of the rise of tariff. The intention of RESPONDENT toward the adaptation of the contract is material to the present case. Last, the Tribunal's final decision of ordering the adaptation of the contract or not depends on whether RESPONDENT has the intention of adapting the contract. In conclusion, due to the relevancy and materiality of the evidence to the present case, the Tribunal shall admit the evidence even though the submission of the evidence may violate the related regulations.

CONCLUSION OF THE SECOND ISSUE

36 CLAIMANT is entitled to submit the Award from another arbitral proceeding as evidence. Neither of the ways of obtaining the evidence breaches the rules related to the present case. Even if the submission of the evidence may violate the above-mentioned rules, the evidence shall still be admissible due to its relevancy and materiality to the outcome of the case.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 OR OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT AND CISG.

37 CLAIMANT is entitled to additional payment for the 30 per cent tariff. Firstly, the hardship clause under Clause 12 of the Sales Agreement ("the Hardship Clause") entitles CLAIMANT to claim for an adaptation of the purchase price **(A)**. Second, even if the Hardship Clause does

not empower the Tribunal to adapt, CLAIMANT is entitled to the payment from an adaptation under Art. 79 CISG **(B)**. Lastly, resulting from the adaptation of the Sales Agreement, CLAIMANT is entitled to additional payment of US$ 1,500,000, or alternatively, US$ 1,250,000 **(C)**.

A. According to the Hardship Clause the purchase price under clause 6 with regard to the second instalment should be adapted.

38 The Hardship Clause entitles CLAIMANT the right to seek for adaptation when an unforeseen event occurs **(I)**. The change in tariff is comparable to health and safety requirement, unforeseen, and onerous to CLAIMANT; thus, the instant case fulfills the requirement of the Hardship Clause **(II)**. The purchase price under clause 6 with regard to the second instalment ("the Price")should be adapted.

I. The Hardship Clause entitles CLAIMANT the right to seek for adaptation when an unforeseen event occurs.

39 Upon interpretation, the Hardship Clause entitle CLAIMANT to request for adaptation since the intention of the Parties is to include an adaptation mechanism into the Sales Agreement **(1)**. Alternatively, a reasonable person in the same situation would interpret that the Hardship Clause entitled the seller to request for adaptation in case of hardship **(2)**. Moreover, hardship as a triggering event of adaptation is a trade usage by which the Parties are bound **(3)**.

1) By interpreting the Hardship Clause in accordance with the intention of the Parties, the adaptation is required in the events of hardship.

40 To interpret the Hardship Clause, one should follow the rules under CISG. Art. 8 (1) CISG provides that to interpret statements made by and other conduct of a party, one must first consider the subjective intentions of the parties [*CISG Digests, para.6, p.54*]. To determine the intention of the parties, Art. 8(3) states that consideration is to be given to all relevant circumstances of the case including the negotiations.

41 During the negotiation process, the Parties had an explicit intention to include the adaptation

mechanism by adding the Hardship Clause **(a)**. Alternatively, the Hardship Clause provides CLAIMANT the right to request adaptation since the Parties intend to preserve the Sales Agreement for a mutually beneficial relationship **(b)**.

a) The Parties have an explicit intention to include the adaptation mechanism by adding the Hardship Clause.

42 The Parties have an explicit intention to include the adaptation mechanism by adding the Hardship Clause. CLAIMANT proposed to include ICC Hardship Clause 2003 in the Sales Agreement [*Exhibit R2, p.34*]. ICC Hardship Clause places the duty upon the Parties to negotiate alternative reasonable terms without expressly referring the matter to a court [*ICC Hardship Clause, note, para.(e)*]. If the negotiation failed, ICC Hardship Clause only provides that the parties are entitled to terminate the contract [*ibid.*]. However, it is a contractual remedy for a disadvantaged party suffering from hardship to seek amendments from the tribunal to the contract in case the negotiation failed [*Mercedeh, p.344-345*]. Specifically, when the renegotiation fails and they resort to the tribunal, the tribunal has the power to adapt the contract to secure every party's interest against the hardship [*AL-Emadi, p.152*].

43 CLAIMANT proposed to RESPONDENT to include an adaptation mechanism into the Sales Agreement [*Exhibit C8, p.17*]. Mr. Antley agreed on the mechanism [*ibid.*].

44 In addition, the Parties wish to include a legal consequence beyond what is provided in the ICC Hardship Clause 2003. Namely, the Parties intended to refer their dispute to the Tribunal for adaptation in case the negotiation fails [*ibid.*]. It could further be evidenced by the fact that the final version of the Hardship Clause is different from ICC Hardship Clause 2003. Furthermore, after the car accident, the successors of negotiating representatives do not alter the Parties' previous understanding [*PO2, para.12, p.56*]. Therefore, the Parties have an explicit intention to include the adaptation mechanism by adding the hardship clause.

b) Alternatively, the Hardship Clause provides CLAIMANT the right to request adaptation since the Parties intend to preserve the contract for a mutually beneficial

relationship.

45 Even if the Tribunal considers that the witness statement of Ms. Napravnik is not strong enough to prove that the Parties have the intentions to include an adaptation mechanism, the Parties' intentions to preserve the contract for a mutually beneficial relationship empower the Tribunal to adapt the Sales Agreement upon unforeseen hardships.

46 If the parties expect to maintain a balanced contract for all the duration agreed, the tribunal is authorized to adapt the contract based on the principle of good faith and fair dealing [*ICC Case No. 10351 (2001)*]. In *Quintette Coal Ltd. v. Nippon Steel Corp.*, even without an adaptation clause, the court finds that a hardship clause as well as the parties' intentions to preserve the contract are evidence of the flexibility and the basis for adaptation of the contract [*Quintette Case; William, p.85-86*].

47 The intentions of the Parties to include the Hardship Clause is to preserve the Sales Agreement for a long-term and mutually beneficial relationship. RESPONDENT wishes to build up its own racehorse breeding program [*Exhibit C1, p.9*]. Being aware of the situation that CLAIMANT has been in serious financial difficulty since 2014 [*PO2, para.29, p.59; para.21, p.58*], RESPONDENT ordered a significant amount of doses and asked for a favorable price [*Exhibit C2, p.10*]. Moreover, RESPONDENT proposed to develop a long-term cooperation beyond single purchase with CLAIMANT in order to become the leading breeder in the international market [*Exhibit C3, p.11*]. RESPONDENT's ultimate goal is to lift the ban of artificial insemination [*Notice of Arbitration, para.6, p.5*].

48 CLAIMANT shows its interest in long-term relationship as well, and states that "*hardship clause should be included to deal with subsequent changes regarding delivery*" [*Exhibit C4, p.12*]. The risk of delivery was transferred to RESPONDENT, so the Parties agreed to lower the price of the semen [*PO2, para.8, p.56*]. Thus, RESPONDENT will have high amount of doses of semen at a favorable price to develop its business to become a leading breeder in the racehorse [*Exhibit C1, p.9*].

49 In light of the above evidence, the Parties have the consensus to relieve CLAIMANT from unpredictable cost. Hence, RESPONDENT can have a continual supply of semen from CLAIMANT to develop its business on a favorable price. At the time of the conclusion of the Sales Agreement, the intentions of the Parties to include the Hardship Clause is to preserve the Sales Agreement for a long-term, mutually beneficial relationship. In conclusion, the Hardship Clause should entitle CLAIMANT to seek for adaptation in order to preserve the Sales Agreement.

2) Alternatively, a reasonable person in the same situation would interpret that the Hardship Clause entitles CLAIMANT to request for adaptation in case of hardship.

50 When it is not possible to use the subjective intent standard in Art. 8(1) CISG to interpret a party's statements or conduct, one must resort to "*a more objective analysis*" as provided for by Art. 8(2) CISG [*CISG Digests, para.11, p.55*]. Under this provision, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Oldenburg 12 O 2943/94*].

51 The notion of *force majeure* and hardship are both included in Clause 12 [*Exhibit C5, Clause12, p.14*]. The first half of Clause 12 is a *force majeure* clause and the second half is a hardship clause [*ibid.*]. A reasonable person would have understood that the Hardship Clause has a different legal effect from the *force majeure* clause. Specifically, when hardship occurs, the Hardship Clause should be the triggering provision of adaptation of the Sales Agreement.

52 It is generally understood that the legal consequences of hardship differ from *force majeure*. The *force majeure* regulats the event rendered the performance impossible [*Melis, p.215*]. The legal consequence of which is an excuse of non-performance [*Ciematniece, p.62*]. Hardship is the occurrence of a fundamental alteration of the equilibrium of the contract and does not render the performance impossible [*DiMatteo, p.263*]. Therefore, the notion of hardship requires flexible legal consequences [*Brunner, sec.11, p.400*]. In case of hardship, the

disadvantaged party is entitled to request renegotiations and, upon failure to reach an agreement, the court may either terminate or adapt the contract to restore its equilibrium [*ibid.*].

53 In the instant case, the Hardship Clause is added onto the template [*PO2, para.2, p.55*]. The Hardship Clause in italics differentiates itself from the first half of Clause 12, i.e. *force majeure* clause [*ibid.*]. A reasonable person would have viewed them as the different. Secondly, as explained above, the occurrence of events of *force majeure* exempts the disadvantaged from performing its obligation. In contrast, the occurrence of hardship entails an adaptation or renegotiation. Therefore, by adding the Hardship Clause to the Sales Agreement and distinguishing it from the *force majeure* clause, under the interpretation of Art. 8(2) CISG, a reasonable person would understand that the Hardship Clause entitles CLAIMANT to request for adaptation in case of hardship.

3) The term hardship, as a trade usage, includes the legal effect of contract adaptation and binds the Parties.

54 The term hardship in the Hardship Clause is a trade usage and includes the legal effect of contract adaptation. Art. 9(2) CISG provides that the parties of a contract are bound by international trade usage unless otherwise agreed [*Art. 9(2) CISG*]. A trade usage is any practice or method of dealing having such a regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question [*Schwenzer/Hachem/Kee, paras.27, 31, p.317*]. Art. 6.2.3(4) PICC and Art. 6:111 PECL both encompass the notion that hardship carries the legal effect of adaptation [*Schwenzer/Hachem/Kee, paras.45, 115, p.673*]. The term hardship, as a trade usage, includes the legal effect of contract adaptation and binds the Parties under Art. 9(2) CISG [*ICC Case Paris 8873 (1997)*].

55 In the present case, CLAIMANT proposed to incorporate the Hardship Clause into the Sales Agreement [*Exhibit R2, p.34*]. The term hardship, as a trade usage, includes the legal effect of contract adaptation. Therefore, according to Art. 9(2) CISG, the Parties are bound by this trade

usage. The adaptation of the Sales Agreement is required when the requirement of Hardship Clause is fulfilled.

II. The instant case fulfills the requirement of the Hardship Clause. Thus, the Price should be adapted.

56 The instant case fulfills the three requirement of the Hardship Clause. The 30 per cent tariff is comparable to health and safety requirement **(1)**. The 30 per cent tariff is unforeseen by the parties at the time of the conclusion of the contract **(2)**. The 30 per cent tariff is onerous for CLAIMANT to bear the additional cost **(3)**.

1) The 30 per cent tariff is comparable to health and safety requirement.

57 Under the Hardship Clause, hardship can either be changes of health and safety requirement or anything comparable to health and safety requirement. Comparable means "*able to be likened to another; similar* [*Oxford dictionary*]." Thus, anything similar or able to be likened to health and safety requirement fulfills this condition.

58 The Parties consider the 30 per cent tariff imposed by the government of Equatoriana is similar to health and safety requirement. During the negotiation, CLAIMANT told RESPONDENT that CLAIMANT did not want to take any further risk associated with the change in the delivery terms, "*in particular not those associated with changes in customs regulation or import restrictions* [*Exhibit C4, p.12*]." CLAIMANT has made an analogy to "*customs regulation*" and "*import restriction*" to be an issue which should be dealt by the hardship clause [*ibid.*]. The import restriction may refer to health and safety requirement. The customs mean the "*duties imposed on imports or exports* [*Black's Law Dictionary, p.1164*]." The definition for tariff is "*a schedule or system of duties imposed by a government on imported or exported goods* [*Black's Law Dictionary, p.4559*]," which is of the same meaning to customs. Thus, tariff is generally construed as included in custom regulation, which the parties considered parallel to health and safety requirement.

59 In addition, the Hardship Clause is to remove the risks associated with a DDP delivery

obligation [*PO2, para.8, p.56*]. The commercial basis, referred in the previous email, includes not only the health and safety requirement, but also anything which would increase the cost of delivery [*Exhibit C4, p.12*]. As such, anything comparable to the health and safety requirement are the events which lead to the increase of the cost of delivery. The increase in tariff by 30 per cent is an additional cost for CLAIMANT to bear and is comparable to the health and safety requirement.

2) The 30 per cent tariff is unforeseeable by the Parties at the time of the conclusion of the Sales Agreement.

60 Under the notion of hardship, a risk is foreseeable if the parties can reasonably take into account such risk at the time of the conclusion of the contract [*Davies/DiMatteo, p.302*]. To determine whether a risk could reasonably be taken in to account, two considerations must be examined: the frequency and the magnitude of the event [*ICC Case No.6281 (1989)*]. In *Scafom International Bv v. Lorraine Tubes S.A.S.*, the court has considered the increase in price of steel within a short amount of time by 70 per cent is unforeseeable [*Scafom Case*]. If the situation seldom happens or is even unprecedented, the event is unforeseeable [*Himpurna Case, para.203*].

61 In the present case, the government of Equatoriana has constantly been a supporter of free trade [*Exhibit C6, p.15*]. Especially, the government of Equatoriana has never used retaliatory sanctions against previous restrictions by other countries [*ibid.*]. Moreover, the additional 30 per cent tariff imposed by the government of Equatoriana is also extraordinary in other regards, i.e. the breadth of the goods and the countries covered, the amount and the speed with which it had been imposed [*PO2, para.23, p.58*]. Therefore, the increase in tariff by 30 per cent is not only unprecedented but also sudden and extraordinary. Accordingly, in terms of frequency and magnitude, the 30 per cent increase in tariff was unforeseeable to CLAIMANT at the time of the conclusion of the treaty. In sum, the increase in tariff by 30 per cent was unforeseeable by the Parties at the time of the conclusion of the Sales Agreement.

3) It is onerous for CLAIMANT to bear the additional cost caused by the 30 per cent tariff.

62 The additional cost caused by the increase in tariff by 30 per cent is onerous for CLAIMANT as the threshold of onerous element has been met. The standard should be whether the situation "*involves a great deal of effort, trouble, or difficulty*," and should be made on a case-by-case basis [*Brunner, sec.12, p.436*].

63 The purpose of the Sales Agreement will be undermined, because CLAIMANT is required to bear the additional cost under the Sales Agreement. In *ALCOA v. Essex Group Inc.*, the court determined that since the purpose of the contract is frustrated, the performance of the contract is onerous for Plaintiff and the adaptation of the contract is required [*ALCOA Case, p.76*].

64 In *ALCOA*, the court has determined that the intention of the parties is to allow a stable net income by incorporating an adjustable pricing mechanism in exchange of a long term supply and favorable price to gain the market position and compete with other firms. Therefore, the essential basis of the contract is to establish a mutually beneficial relationship among the parties. The Court noted that, in light of those contract arrangement, the "*principal purpose*" for ALCOA in making the contract was to generate profit. During the performance of the contract, Organization of the Petroleum Exporting Countries ("OPEC") imposed an environmental tax that greatly increased ALCOA's electricity costs. The court determined that the principle purpose of the contract to generate profits is frustrated [*ALCOA Case, p.70-77*].

65 The instant case is similar to the *ALCOA* case, the Parties' intent is to have a mutually beneficial relationship and the principle purpose for CLAIMANT is to generate profit.

66 Like *ALCOA*, the commercial basis for the contract is to develop a mutually beneficial relationship. In the present case, CLAIMANT has been in financial difficulty since 2014 [*PO2, para.21, p.58; para.29, p.59*]. CLAIMANT's primary concern is to increase its revenues to fulfill its restructuring plans [*PO2, para.15, p.57; para.29, p.59*]. At the same time, RESPONDENT intends to develop its racehorse business and secure its market position by

ordering extraordinarily high doses of frozen semen on a favorable price [*Exhibit C2, p.10*]. CLAIMANT agrees to lower the value of the semen while RESPONDENT agrees to bear any additional cost for the delivery terms [*PO2, para.8, p.56*]. The Parties develop a mutually beneficial relationship to ensure CLAIMANT to generate profit and RESPONDENT have an edge in the relevant market. The increase in tariff by 30 per cent renders CLAIMANT no longer profitable. Thus, the primary purpose of guaranteeing mutually beneficial relationship is undermined. Given the reasons above, the increase of tariff by 30 per cent has caused the deal to become onerous to CLAIMANT.

67 Also, in cases where the financial ruin is caused by increase in cost of performance, the situation should be considered onerous and the adaptation of the contract is required [*Schwenzer, p.716*]. Specifically, the tribunal in *ICC Case No. 9994* noted that the principle of good faith imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances in order to ensure that its performance does not cause the ruin of one of the parties [*ICC Case No. 9994 (2001)*].

68 The purpose of the Sales Agreement is to fulfill CLAIMANT's restructuring plan which CLAIMANT agreed with its creditors [*PO2, para.29, p.59*]. To bear the additional cost by the increase of tariff, the restructuring plan would be seriously endangered [*ibid.*]. The dressage business of CLAIMANT would be likely to be sold in order to have a new credit [*ibid.*]. Thus, CLAIMANT will be in a serious financial ruin if it has to bear the additional cost arising out of the increase in tariff. The increase in tariff is therefore onerous for CLAIMANT.

69 To conclude, the Hardship Clause should be interpreted as having the legal effect of adaptation. The instant case has fulfilled the requirement of the adaptation, since the increase in tariff is comparable to health and safety requirement, unforeseen and onerous. Thus, the price of the shipping of the semen should be adapted.

B. CLAIMANT IS ENTITLED TO THE PAYMENT FROM AN ADAPTATION OF THE PRICE UNDER CISG.

70 Alternatively, the Tribunal may adapt the Sales Agreement under CISG. Art. 79 CISG covers the situation of economic hardship, and CLAIMANT is under economic hardship due to the tariff **(I)**. According to Art. 7(1) and Art. 7(2) CISG, adaptation is allowed under Art. 79 CISG together with general principles and PICC **(II)**.

71 The Hardship Clause would not constitute a derogation of Art. 79 CISG, because it does not address the problem about the claim of price adaptation. The Hardship Clause will not affect the application of CISG.

I. Art. 79 CISG is applicable for the economic hardship caused by additional 30 per cent tariff.

72 Art. 79 CISG applies for the following four reasons. The tariff rendered CLAIMANT in serious financial difficulty, and constitute an "*impediment*" under Art. 79 CISG **(1).** The tariff is beyond CLAIMANT's control **(2)**, not reasonably be expected to have taken into account **(3)**, and couldn't be avoided or overcome by CLAIMANT **(4)**.

1) The 30 per cent tariff is an "*impediment*" for CLAIMANT to perform its obligation under Art. 79 CISG.

73 According to Art. 79(1) CISG, a party is exempted from its contractual obligations when an "*impediment*" prevents the performance. The term "*impediment*" includes economic hardship. Therefore, Art. 79 CISG applies to situations where performance has become excessively onerous due to an economic hardship. CLAIMNT is "*excessively onerous*" due to the increase of tariff by 30 per cent.

74 The prevailing view supports a broader interpretation of the term "*impediment*" under Art. 79(1) CISG [*Brunner, sec.11, p.401*]. Under this view, Art. 79(1) CISG is applicable not only when the performance is absolutely impossible, but also when the performance has become excessively onerous for the obligor [*Lookofsky, p.157-58; Schwenzer, p.713*]. The CISG Advisory Council adopts this proposition and concludes that hardship is found within Art. 79(1) as an event that renders performance "*excessively onerous*" [*CISG-AC Opinion No. 7,*

para.3.1].

75 The Belgian Supreme Court held that hardship is covered under Art. 79 CISG [*Scafom case*]. In *Scafom,* a sudden and unexpected market fluctuation is categorized as impediment under Art. 79 CISG [*Tajudin, p.215*].

76 The drafting history could not support that impediment should be limited the concept of "*insurmountable obstacle*" [*CISG-AC Opinion No. 7, Comments 28*]. The drafters avoided the use of various familiar domestic legal terms from different jurisprudence. Such as "*force majeure*", "*wegfall der geschäftsgrundlage*", "*eccessiva onerosità sopravvenuta*", "*impossibility*", and "*impracticability*". The drafter intended to maintain the neutrality of CISG, but did not deliberately omit situations of hardship in CISG [*Anderson, p.94*].

77 As submitted previously in Issue 3. B. III. 3., after paying the 30 per cent tariff, CLAIMANT will be in financial ruin if CLAIMANT has to bear the additional cost of the tariff. Additionally, to require CLAIMANT to bear the additional cost will undermine the purpose of the Sales Agreement. Therefore, CLAIMANT is in the situation of economic hardship, and the hardship is excessively onerous for CLAIMANT. CLAIMANT may invoke Art. 79 CISG to be exempted from its obligations.

2) The 30 per cent tariff was beyond CLAIMANT's control.

78 Impediments are within the seller's control, if an event can be routinely organized and prevented, such as the personnel's qualifications, the technical equipment and the financial means to ensure manufacture and procurement [*Enderlein/Maskow, p.322*].

79 CLAIMANT could not control the tariff policy of both Mediterraneo and Equatoriana. The tariff and the rate is completely based on the governments' autonomy. The 30 per cent tariff was beyond CLAIMANT's control.

3) The 30 per cent tariff could not reasonably be expected to have taken into account.

80 An impediment is not reasonably expected to have taken into account, when the impediment is unforeseeable, and there is no risk allocation for it [*DiMatteo, p.299*].

81 As above mentioned in Issue 3. B. II., the tariff is unforeseeable by CLAIMANT at the time of the conclusion of the Sales Agreement. Furthermore, there is no risk allocation of the additional tariff in the Sales Agreement. If the Hardship Clause does not entitle CLAIMANT to adapt (which CLAIMANT does not concede), the risk of the tariff is not allocated in the Sales Agreement.

82 Therefore, the increase in tariff by 30 per cent could not reasonably be expected to have taken into account by CLAIMANT.

4) The 30 per cent tariff could not be avoided or overcome.

83 Whether the impediment is avoidable depends on if reasonable measure can be taken before the impediment occurs. If an impediment has already revealed, it has to be overcome as quickly as possible by taking necessary steps to preclude the consequences of the impediment [*Enderlein/Maskow, p.324*].

84 The tariff was announced on 19 December 2017, and then took effect on 15 January, 2018 [*PO2, para.25, p.58*]. The tariff was targeted toward agricultural goods [*Exhibit C6, p.15*]. Racehorse breeding is often categorized differently from agricultural goods such as pigs, sheep, or cattle. [*Notice of Arbitration, para.11, p.6; PO2, para.26, p.58*]. Therefore, CLAIMANT was impossible to be aware of the frozen semen being listed in the tariff schedule before the it went into effect. There was no way CLAIMANT's last shipment of the frozen semen could avoid the 30 per cent tariff.

II. CLAIMANT has the right to request for an adaptation under Art. 79 CISG.

85 If the disadvantaged party still performs its obligation, Art. 79 CISG does not provideany other remedy. According to Art. 7 CISG, the matter has to be resolved by referring to the general principles on which the CISG is based **(1)**. Interpreting Art. 79 CISG with general principles of *favor of contractus,* good faith, and PICC would lead to the conclusion of adaptation **(2)**. Even if CISG does not cover hardship, the Tribunal shall introduce PICC to address the present case and adapt the price **(3)**.

1) General principles of CISG shall be used to supply the legal effect of Art. 79 CISG.

86 As established above, Art. 79(1) CISG covers hardship, however, the legal effect of Art. 79(1) CISG, according to the text, only provides that a party is not liable for its failure to perform. This article does not provide the effect when the disadvantaged party still performs its obligation. According to Art. 7 CISG, the matter has to be resolved by referring to the general principles on which the CISG is based.

87 The Advisory Council of Opinion provides that the court or tribunal may provide further relief consistent with the CISG and the general principles on which it is based [*CISG-AC Opinion No. 7, para.3.2*].

88 Art. 7 CISG acknowledges the potential deficiencies and tries to resolve issues not expressly addressed within CISG. Art. 7(1) CISG requires those interpreting the deficient instruments in CISG to focus on the instruments' internationality, uniformity and good faith in international trade. Also, the tribunal shall first try to resolve the issue by applying the general principles [*Art. 7(1) CISG*]. According to Art. 7(2) CISG, only in the absence of general principles should the tribunal resort to rules of private international law to determine the applicable law, and resolve the issue according to the rules of applicable domestic law [*Art. 7(2) CISG*].

89 Art. 79(1) CISG does not provide a resolution to adaptation, this issue should be resolved with reference to Art. 7 CISG.

2) Interpreting Art. 79 CISG with general principles of *favor of contractus,* good faith, and PICC would lead to the conclusion of adaptation.

90 First, by interpreting Art. 79 CISG with general principle of good faith, the Parties should renegotiate about the Sales Agreement **(a)**. Second, the general principles of *favor of contractus* and Art. 6.2.3 PICC, entitles CLAIMANT to request for adaptation **(b)**.

a) The Parties should renegotiate under general principle of good faith.

91 According to Art. 7(1) CISG, the principle of good faith should be used to interpret the provisions of CISG [*Art. 7(1) CISG*]. Furthermore, the principle of good faith provides that

the presence of good faith is an obligation of the parties in the jurisprudence of the CISG [*Zeller, chapter4*]. The Preamble of CISG states that "*[c]onsidering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States.*" [*Preamble CISG*]. Case law has also demonstrated that good faith applies rights and obligations of the parties. [*Filanto Case; SARL Case; Mushrooms case*]

92 According to the principle of good faith, the Parties must, in good faith, enter into renegotiation to revert the contractual balance and enable the performance of the Sales Agreement. After the imposition of the 30 per cent additional tariff, CLAIMANT tried to renegotiate with RESPONDENT, and RESPONDENT promised that "*a solution will be found*" [*Exhibit C8 p.18*]. However, after obtaining the frozen semen, RESPONDENT rejected further negotiation [*Exhibit C8, p.18; PO2, para.35, p.60*]. CLAIMANT was left to face the result of going bankrupt [*PO2, para.29, p.59*]. Therefore, Under the principle of good faith, RESPONDENT should renegotiate with CLAIMANT about the price.

b) The general principles of *favor of contractus* and Art. 6.2.3 PICC entitle CLAIMANT to request for adaptation of the Sales Agreement.

93 The general principles of *favor of contractus* and Art. 6.2.3 PICC provide the resolution of adaptation. The principle "*favor of contractus*" states that whenever possible, a solution should be adopted in favor of the validity of the contract and against its premature termination on the initiative of one of the parties [*Bianca/Bonell, p.81*]. Several provisions in CISG show that CISG will allow contract avoidance only under narrow conditions and as the last resort [*Art.25, 34, 37, 47, 48, 49, 63, 64 CISG*].

94 The tariff is onerous for CLAIMANT. But considering RESPONDENT's urgent need for the frozen semen, CLAIMANT still made the last shipment [*Exhibit C8, p.18*]. If the legal effect of Art. 79 CISG is limited to exempting CLAIMANT's obligation, the Sales Agreement can only be terminated when a hardship occurs. According to the principle of *favor of contractus*,

CISG should provide a solution in the favor of the validity of the contract. Therefore, CLAIMANT may resort to the Tribunal to look for a remedy under the general principle of *favor of contractus*.

95 PICC should be introduced as a general principle to fill the gap of the legal effect of Art. 79 CISG. Art. 6.2.3 PICC provides for the remedy to adapt the price of the Sales Agreement.

96 PICC can be used "*as part of the general principles*" of CISG to fill the gap under Art. 7(2) [*Felemegas, p.10*]. PICC is based on general principles of comparative law, and one of the stated purpose of PICC is that "*[t]hey may be used to interpret or supplement international uniform law instruments.*" [*Preamble, PICC*]. In *Scafom*, the court provides that this unsettled question should be addressed with Art. 6.2.3 PICC [*Scafom Case*].

97 Hardship provisions of PICC contain a solution which requires the parties to renegotiate the contract terms [*Art. 6.2.3 (1) PICC*]. If the renegotiation fails, the parties may resort to the court to adapt or terminate the contract [*Art. 6.2.3(3)/ Art. 6.2.3(4) PICC*].

98 After CLAIMANT paid the additional cost, CLAIMANT had suffered in hardship. However, the Parties could not reach an agreement through renegotiation [*Exhibit C8 p.18*]. Therefore, according to Art. 6.2.3 PICC, CLAIMANT can resort to the Tribunal to adapt the price of the Sales Agreement.

3) Even if CISG does not covers hardship, the Tribunal shall still introduce PICC to address the present case, and adapt the price.

99 If hardship could not be addressed by the general principles of CISG, the situation of hardship should then be addressed by the private international law [*Art. 7(2) CISG*]. Since the Parties are both from the countries which their domestic contract law are verbatim adoptions of PICC [*PO1, para.4, p.52*]. According to Art. 6.2.3 PICC, CLAIMANT can still request the Tribunal to adapt the Sales Agreement.

100 To sum up, according to CISG, the Tribunal shall adapt the price of the Sales Agreement.

C. Claimant is entitled to additional payment of US$ 1,500,000, or alternatively, US$

1,250,000, resulting from the adaptation of the Sales Agreement.

101 Presuming the Parties' intention, the Price should have been adapted by adding 30 per cent tariff **(I)**. Otherwise, the Price shall be adapted to add 25 per cent tariff, as fairness should be considered in adaptation **(II)**. Therefore, CLAIMANT is entitled to the amount of US$ 1,500,000, or alternatively US$ 1,250,000.

I. The Price should be adapted by adding the 30 per cent tariff.

102 The 30 per cent tariff would have been added on the Price if it had been foreseen by the Parties during negotiation. The hypothetical intention of the parties should be the primary reference [*Brunner, sec.13, p.500*], since the arbitral tribunal must balance the parties' interests and minimize the intervention when adapting the contract [*ibid.*]. However, it is hard to ascertain what the parties would consider if they had foreseen the change of circumstances. Thus, it is necessary to adopt an objective approach [*Brunner, sec.11, p.395*]. To determine the reasonable hypothetical intentions of the Parties, the Tribunal should comply with Art. 8(2) CISG [*Brunner, sec.11, fn1977*]. Therefore, the hypothetical intentions should be what reasonable person of the same kind as the Parties would have had if the 30 per cent tariff had been foreseen.

103 In the position of CLAIMANT, the primary goal is to make profits and to avoid any risks which might cause further loss [*PO2, para.15, p.57*]. Achieving the business with RESPONDENT is important for CLAIMANT, because the large amount of cash resulting from 100 doses will help CLAIMANT's financial difficulty. CLAIMANT, a prudent businessman who was in the pressure of debts, is impossible to bear the tariff without charge. Namely, CLAIMANT would have added 30 per cent tariff on the Price if it had foreseen the 30 per cent tariff.

104 In view of RESPONDENT, the matching of Nijinsky Ⅲ is important, because it will advance the business of RESPONDENT's. Since the horse racing industry is vigorous in Equatoriana [*Notice of arbitration, para.4, p.5*], RESPONDENT started to build up its own racehorse

breeding. Under this purpose, Nijinsky Ⅲ is one of the first choice [*Exhibit C1, para.1, p.9*]. Nijinsky Ⅲ had won many racing competitions, and it also sired many champion racehorses. Due to the pedigree matters the strength and stamina of a racehorse, it may further influence the decision of buyers [*Mim et al; PO2, para.19, p.57*]. The reputation of Nijinsky Ⅲ will help to promote the immature racehorse business of RESPONDENT. Further, the only lifting of artificial insemination and CLAIMANT's unique storage technique will encourage RESPONDENT to purchase frozen semen from CLAIMANT [*Exhibit C1, para.1, p.9; Notice of Arbitration, para.2, p.4*]. In conclusion, the Price with adding the 30 per cent tariff would still have been accepted by RESPONDENT, if it had foreseen the 30 per cent tariff. In other words, the 30 per cent tariff, i.e. US$ 1,500,000 shall be permitted.

II. In any event, sharing 5 out of the 30 per cent tariff is the limit of sacrifice of CLAIMANT.

105 Alternatively, the Tribunal considers that CLAIMANT should share a portion of tariff, 5 per cent tariff would be the limit. A fair distribution of the losses between the parties should be pursued when adapting the contract [*Comment No. 7 on Art. 6.2.3, PICC*]. The extent to which one of the parties has taken a risk and the extent to which the party entitles to benefit from the performance shall be considered [*ibid.*]. Thus, it may have to be limited to what is necessary to make performance bearable for the aggrieved party when an adjustment of the contract is granted [*ICC Case No. 2508 (1976); Brunner, sec.13, p.499; Mercedeh, p.345*].

106 In the present case, the sacrifice of CLAIMANT and the benefit RESPONDENT received should be considered into the adaptation of the Price. Bearing 5 per cent tariff is the limit of sacrifice for CLAIMANT because 5 per cent was the profit margin that CLAIMANT was supposed to earn in the sale of frozen semen [*PO2, para.31, p59*]. Although sharing 5 out of the 30 per cent tariff will lead to zero profit, it will not harm the poor financial condition of CLAIMANT's at least. In other words, bearing 5 per cent tariff is the limit of sacrifice, any number beyond 5 per cent is not bearable for CLAIMANT. In contrast to CLAIMANT gaining

zero profit from this transaction, RESPONDENT obtained 50 doses of frozen semen of Nijinsky Ⅲ which is the most successful stallion. Furthermore, without CLAIMANT's prior written consent, RESPONDENT had resold 15 doses of frozen semen at a price that was 20 per cent above the Price [*PO2, para.33, p.59; Notice of arbitration, para.20, p.8*]. This proves that RESPONDENT is able to afford and will not be financially endangered if it bears the 25 per cent tariff, i.e. US$1,250,000 [*PO2, para.30, p.59*]. Considering the extent of risks CLAIMANT takes and the extent of benefits RESPONDENT receives, it is reasonable and fair to request RESPONDENT to bear 25 per cent tariff. To conclude, CLAIMANT is entitled to an additional payment of US$ 1,500,000, or in any event US$ 1,250,000.

CONCLUSION OF THE THIRD ISSUE

107 According to the Hardship Clause of the Sales Agreement and Art. 79 CISG, CLAIMANT respectfully requests the Tribunal to adapt the price, and find that CLAIMANT is entitled to an additional payment of US$ 1,500,000, or in any event US$ 1,250,000.

PRAYER FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT.

For the reasons stated in this Memorandum, Counsel respectfully requests this Tribunal to declare that:

The Arbitration Agreement governed by the law of Mediterraneo empowers the Tribunal to adapt the Sales Agreement **[Issue 1]**.

CLAIMANT is entitled to submit evidence from the other arbitration proceedings because the ways CLAIMANT obtained the evidence does not violate any rules for the admission of evidence **[Issue 2]**.

Under the Hardship Clause or Art. 79 of the CISG, CLAIMANT is entitled to the outstanding payment from RESPONDENT in the amount of US$ 1,500,000, or alternatively, US$ 1,250,000, resulting from the adaptation of the Sales Agreement **[Issue 3]**.

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person who is not a member of this team.

COUNSEL

Shih-Hui, Wang	Ai-Hsiang, Chang	Yu-Syuan, Chen
Chien-Yu, Lung	Zu-Yin, Ye	Yu-Wen, Lee