TWENTY-SIXTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

THAMMASAT UNIVERSITY

MEMORANDUM FOR CLAIMANT

ON BEHALF OF

PHAR LAP ALLEVAMENTO
RUE FRANKEL 1
CAPITAL CITY
MEDITERRANEO

AGAINST

BLACK BEAUTY EQUESTRIAN
2 SEABISCUIT DRIVE
OCEANSIDE
EQUATORIANNA

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Answer to the Notice of Arbitration	ANoA
CISG	United Nations Convention on Contracts for International Sale of Goods
Cl. Ex	Claimant Exhibit
ed.	Edition
Jan	January
Lr.	Letter
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
PO	Procedural Order
Q.	Question
Res. Ex	Respondent Exhibit
UNCITRAL	United Nations Commision on International Trade Law
UNCITRAL Model Law	Model Law
UNIDROIT	International Institute for the Unification of Private Law
v.	versus

INDEX OF AUTHORITIES

Schlechtriem/ Schwenzer	Peter Schlechtriem, Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sales of Goods (CISG)* (2016)	60,64,66,83,86
Schmitthoff	Clive M. Schmitthoff, *Hardship and Intervener Clauses*, J. Bus. L. 82, 85 (1980)	64
Schwenzer	Ingeborg Schwenzer, Force Majeure and Hardship in International Sales Contract (2008) Available at: https://edoc.unibas.ch/9861/3/20110929162413_4e847f8d2ae82PDFA15.pdf Visited on 6 December 2018	61,66,73,92
Schwenzer et al.	Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, *Global Sales and Contract Law* (2012)	51,55
Schwenzer et.al.2016	Schwenzer I, Commentary on The UN Convention On The International Sale Of Goods (CISG) (4th edn, Oxford University Press)	76
Vogenauer	Steven Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2015)	52,84,85,87,88,89

Preparatory Work

1990 UNIDROIT Study	UNIDROIT 1990 Study L Doc. 46, pg. 4-5: *Working Group for the Preparation of Principles for International Commercial*	85

Others

INDEX OF CASES AND AWARDS

The International Centre for Settlement of Investment Disputes ("ICSID") Awards

NAFTA

Domestic Cases

CvD Case	United Kingdom: *C v. D*, English and Wales Court of Appeals, EWCA Civ 1282, A3/2007/1697 (5 December 2007)	14
Fiona Case	United Kingdom: *Fiona Trust v. Privalov*, United Kingdom House of Lords, [2007] UKHL 40 (17 October 2007)	11
FirstLink Case	Singapore: *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others*, Singapore High Court, SGHCR 12 (19 June 2014)	18,21
Habas Case	United Kingdom: *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd,* English and Wales High Court, EWHC 4071 (19 December 2013)	9
Halpern Case	United Kingdom: *Halpern & Anor v. Halpern & Ors,* English and Wales High Court, EWHC 603 (24 March 2006)	9
Investment Compensation Scheme Case	United Kingdom: *Investors Compensation Scheme v. West Bromwich Building Society*, United Kingdom House of Lords, UKHL 28; [1998] 1 All ER 98; [1998] 1 WLR 896 (19 June 1997)	23
Lummus Case	United States of America: *Lummus Global Amazonas SA v. Aguaytia Energy Del Peru SR Ltda*, United States District Court, S.D. Texas, Houston Division, CIV.A.H-01-495 (27 March 2002)	44
Mamidoil Case	United Kingdom: *Mamidoil-Jetoil Greek Petroleum Company SA v. Okta Crude Oil Refinery AD,* English Court of Appeal (Civil Division) EWCA Civ 406 (22 March 2001)	69

Nuova Fucinati Case	Italy: *Nuova Fucinati v. Fondmetall International,* Tribunale Civile [District Court] di Monza, R.G. 4267/88 (14 January 1993)	57
Peterson Farms Case	United Kingdom: *Peterson Farms Inc v. C&M Breeding Ltd*, English and Wales High Court, EWHC 121 (4 February 2004)	11
Premium Nafta Product Case	United Kingdom: *Premium Nafta Products Limited v. Fili Shipping Company Limited*, House of Lords UKHL 40, 2007 (17 October 2007)	56
Sonatrach Case	United Kingdom: *Sonatrach Petroleum Corp v. Ferrell International Ltd,* English High Court, 1 AII E.R. (Comm) 627 (4 October 2001)	17
Steel Tube Case	Belgium: *Scafom International BV v. Lorraine Tubes s.a.s,* Court of Cassation [Supreme Court] (19 June 2009) Available at: http://cisgw3.law.pace.edu/cases/090619b1.html Visited on 6 December 2018	83,92
SulAmérica Case	United Kingdom: *SulAmérica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia,* Court of Appeals, EWCA Civ 638, A3/2012/0249 (16 May 2012)	8,10,11,14,17,18
Swiss case of 4A_84/2015	Switzerland: *X Co. v. Z Ltd.,* First Civil Law Court, 4A_84/2015 (18 February 2016)	13

ICC Arbitration cases

STATEMENT OF FACTS

The parties to this arbitration are Pharlap Allevamento (**"CLAIMANT"**) and Black Beauty Equestrian (**"RESPONDENT"**, collectively "**The Parties**")

CLAIMANT is a renown stud farm company located in Capital City, Mediterraneo. Its racehorse section offers frozen semen of its champion stallions for artificial insemination. Nijinksy III, one of CLAIMANT's racehorses, has won the Triple Crown of Danubia, Equatoriana Oceanside Cup and has successfully sired a number of racehorse champions. This has made Nijinsky III one of the most sought-after stallions for breeding.

RESPONDENT is a famous equestrian sports company based in Oceanside, Equatoriana. Three years ago, RESPONDENT decided to establish a racehorse stable. Horse racing is extremely popular in Equatoriana, and in the last five years, the growth rate in the business sector has never gone below 4 percent per year.

On **21 March 2017**, RESPONDENT contacted CLAIMANT for the availability of Nijinsky III's semen. At that time, the ban on artificial insemination in Equatoriana had been temporarily lifted due to restrictions on animal transportation resulted from foot and mouth disease. Seeing this as an opportunity, RESPONDENT had requested a high number of doses from CLAIMANT.

On **24 March 2017**, CLAIMANT offered RESPONDENT 100 doses of Nijinsky's frozen semen. RESPONDENT was satisfied with the most of the terms of the offer but objected to the choice of law and forum selection clause and insisted on a delivery DDP. CLAIMANT was only willing to accept delivery DDP against a moderate price increase the transfer of certain risks to Black Beauty and the inclusion of hardship clause to temper some of the additional risks.
During the negotiation phase on **12 April 2017**, two of the Parties' main Negotiators, Mr. Napravnik and Mr.Antley were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia.

This caused the contract to be finalized later than expected which was done on **6 May 2017**.
Both Parties agreed on three shipments. The first shipment was 25 doses on 20 May 2017. The second was on the 25th doses on 3 October 2017. Two months before the last shipment, the government of Equatoriania imposed 25% tax on agricultural goods imported from Mediterraneo.

After unsuccessful discussions with the government, the president retaliated with 30% tax on selected agricultural goods including animal semen from Mediterraneo.

CLAIMANT and RESPONDENT immediately started negotiations regarding the price of the semen. CLAIMANT now made 5% loss from the sales contract. RESPONDENT made it clear that timely delivery was important and accepted that a general increase in price.
It was later found out by the CLAIMANT that the RESPONDENT resold the semen without

CLAIMANT's consent. This was a breach of contract by the RESPONDENT which was to not resell the semen as they did for 15 doses at a price which is 20 percent above the price charged by CLAIMANT.

RESPONDENT was then ordered to pay the CLAIMANT an additional amount of US dollars 1,250,000 (25% of the price for the third delivery of semen).

Ms. Kayla Espinoza (RESPONDENT's CEO) stopped the negotiations and refused to pay any additional amount for the tariffs.

On the 4th of October 2018, both parties agreed to conduct proceedings according to Hong Kong Arbitration Rules (HKIAC Rules 2018) - Hong Kong International Arbitration Centre.

CLAIMANT designated Ms. Wantha Davis - 14 Churchill Downs, Capital City, Mediterraneo as the first co-arbitrator in this case. RESPONDENT designated Dr. Francesca Dettorie - Circus Maximus Avenue 1, Derby Equatoriana as second co-arbitrator in this arbitration. Lastly, Dr. Dettorie and Ms. Wantha Davis designated Prof. Calvin de Souza as Presiding Arbitrator.

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1 CLAIMANT and RESPONDENT (collectively as the "**Parties**") to these arbitral proceedings are bound by the arbitration agreement which allows them to submit any dispute arising out of the Frozen Semen Sales Agreement (the "**Contract**") to arbitration administered under the Hong Kong International Center Arbitration Rules (the "**HKIAC Rules**") [Cl. Ex 5, p. 14 (Clause 15)]. Since the arbitration agreement provides for "Danubia" as the seat of arbitration, the law at the seat of this arbitration is the Arbitration Law of Danubia, identical to the provisions of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (the "**Model Law**") [*PO1, p. 52 para 4*].

2 With regards to the applicable version of the HKIAC Arbitration Rules in this case, it is undisputed that the 2013 version in force when the Notice of Arbitration was served upon RESPONDENT on 31 July 2018 shall be applicable, as the Parties have so agreed [*Cl. Ex 5, p. 14 (Clause 15)*]. This is also consistent with temporal scope of application under Articles 1.1 and 1.4 of the 2018 version.

3 In the Answer to the Notice of Arbitration dated 24 August 2018, RESPONDENT contended the lack of both the Arbitral Tribunal's jurisdiction and powers for the adaptation of the Contract in dispute. For the first matter, RESPONDENT mainly contended that the arbitration agreement does not provide any jurisdiction for the Arbitral Tribunal to adapt the Contract [*ANoA pp. 31-32 para 12-17*]. While, for the latter, RESPONDENT contended that the Parties' express authorization for the Arbitral Tribunal to adapt the Contract is missing in the Contract if this case is to be decided *ex aequo et bono* [*ANoA p. 31 para 13*].

4 In response to these submissions of RESPONDENT, CLAIMANT will demonstrate that the Arbitral Tribunal does have jurisdiction to adapt the Contract (**ISSUE 1.1**), and the Arbitral Tribunal does have powers to adapt the Contract, as in any event the Parties expressly authorized the Arbitral Tribunal to do so (**ISSUE 1.2**).

ISSUE 1.1: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO ADAPT THE CONTRACT

5 By virtue of the party autonomy principle, jurisdiction of any arbitral tribunal over a dispute emanates from the disputing parties' free will to arbitrate as reflected in an arbitration agreement. As in the present case, the Parties' will to arbitrate the dispute concerning the adaptation of the Contract to the Arbitral Tribunal is reflected in the arbitration agreement contained in Clause 15 of the Contract. This arbitration agreement, when interpreted in light of the proper law which is the law of Mediterraneo, shall give rise to the Arbitral Tribunal's jurisdiction for the adaptation of the Contract, the details of which are further provided in ISSUE 3 of this Memorandum.

6 For this, CLAIMANT will now prove that this arbitration agreement is governed by the law of Mediterraneo (**I.**), and accordingly, under the law of Mediterraneo, this arbitration agreement provides jurisdiction for the Arbitral Tribunal to adapt the Contract (**II.**)

I. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF MEDITERRANEO

7 RESPONDENT's contention regarding the lack of the Arbitral Tribunal's jurisdiction is primarily on the premise that absent the Parties' express choice of law for arbitration agreement, and the interpretation of the arbitration agreement is NOT governed by the law of Mediterraneo but by the law of Danubia, due to the separability of the arbitration agreement [*ANoA p. 31 para 14*].

8 Yet, the concept of separability does not at all intend the arbitration agreement to be insulated from the substantive contract for all purposes [*BCY Case, para 60-61*]. Rather, this concept only means to safeguard the Parties' intention of the agreed dispute resolution procedure to remain effective, even where the substantive contract is found to be invalid [*SulAmérica Case, para 26*]. In this regard, RESPONDENT's position depending on the sole notion of the separable arbitration agreement, in attempts to insulate the arbitration agreement from all possibilities to be governed by the same law as the Contract should not be followed.

9 The question of which law governs the arbitration agreement in this case shall not be determined by the Hague Principles on Choice of Law in International Commercial Contracts [*PO2 Q.43*], for Article 1(3)(b) thereof excludes arbitration agreement out of its scope of application. Therefore, the question concerned shall be referred to the conflict of law rules under the common law tradition [*Habas Case para 100, Halpern Case para 52*], given Danubia as the seat of arbitration also being a common law country [*PO2 Q.44*].

10 The common law test for determining the proper law governing the arbitration agreement in this case should be the so-called "three-stage test", as once laid down in *SulAmérica*. The rationale of this test is the natural presumption that "in the absence of any indication to the contrary, parties would ordinarily intend to have the whole of their relationship governed by the same system of law" [*Dicey et al. para 16-017; Mustill/Boyd, p. 63*]. Under the three-stage test, the governing law of an arbitration agreement is to be determined in three stages respectively: (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 [*SulAmérica Case para 26*]. At this juncture, CLAIMANT will embark on the three-tiered arguments that the express choice of law in this case is the law of Mediterraneo (**A.**); in the absence of such express choice of law, the Parties' implied choice of law is the law of Mediterraneo (**B.**); and alternatively, the system of law with which the arbitration agreement has its closest and most real connection is the law of Mediterraneo (**C.**).

A. THE EXPRESS CHOICE OF LAW IN THIS CASE IS THE LAW OF MEDITERRANEO.

11 This determination of law applicable to the arbitration agreement is a matter of contractual interpretation [*Peterson Farms Case para 45*] by taking into account all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense [*Lord Neuberger in SulAmérica*]. The wording expressed by the parties when drafting the arbitration agreement would generally flow from the commercial background and understanding of the parties [*Fiona Case para 5*]. The express choice of law is the law of Mediterraneo for the following three reasons.

12 First, considering the commercial background and understanding between the Parties in this case, CLAIMANT would never agree to have the arbitration clause, a part of the Contract, separately governed by a foreign law, either the one of Danubia or that of Equatoriana, because, in that event, CLAIMANT would trouble itself by its obligation to obtain a special approval from its creditors' committee [*Res Ex.2, p. 34*].

13 Second, given the aforementioned commercial background of CLAIMANT, even the first draft of the arbitration agreement by RESPONDENT did actually contain the choice of law provision to be the law at the seat of arbitration [*Res Ex.1, p. 33*], such choice of law was not simply forgotten by the Parties to include in the Contract. Yet, it was in fact replaced to be the law of Mediterraneo by CLAIMANT's revised draft sent to RESPONDENT on the following day [*Res Ex.2, p. 34*].

This can be seen in the provision of CLAIMANT's revised draft which reads "*That offer is naturally on the condition that the law applicable to the Frozen Semen Sales Agreement remains the law of Mediterraneo*". It follows that this draft by CLAIMANT has not been modified by any further exchange between the Parties [*Decision of the First Civil Law Swiss Court of 4A_84/2015 Judgment of 18 February 2016 pp. 3-5*], as evidenced by the provision of the Contract in its final version which reads "This Sales Agreement is governed by the law of Mediterraneo", the arbitration agreement is formed with the law of Mediterraneo as the Parties' express choice of law.

14 Third, what counted as "express terms" does not limit only to what is absolutely and unambiguously explicit, as opined by Andrew Smith J. in *Arsanovia* [*Arsanovia Case para 22*] The express terms could be construed from the ordinary and natural meaning of the parties' express words. In contrary to *SulAmérica* and *C v D* [*C v D Case* 1282], the choice of law provision in the Contract referred to as 'This Sale Agreement is governed by the law of Mediterraneo' and the word 'This Sale Agreement' is naturally and simply to be understood as covering the arbitration agreement forming part thereof.

B. ALTERNATIVELY, THE PARTIES' IMPLIED CHOICE OF LAW IN THIS CASE IS THE LAW OF MEDITERRANEO

15 RESPONDENT might argue for the Parties' implied choice of law of Danubia by the reasons that the first draft of the arbitration agreement contained an express choice of law provision for the arbitration clause to be the law at the seat of arbitration, and that such express choice of law was actually to be included in the final draft in accordance with the Model Arbitration Clause of the HKIAC Rules, but it was merely forgotten to be so included [*ANoA, p. 31 para 15*].

16 As submitted earlier in the preceding paragraph, the first draft by RESPONDENT should no longer be considered as reflecting any Parties' implied choice of law, for it had long been replaced by CLAIMANT's draft. Secondly, although the HKIAC Rules since its 2013 version normally provide the Model Arbitration Clause equipped with the choice of law for arbitration agreement, such choice of law is only "optional for the avoidance of the uncertainty" [*Note to the HKIAC Model Arbitration Clause*]. As such, it cannot be concluded that the Parties' selection of the HKIAC Rules would necessarily result in their arbitration agreement equipped with such choice of law provision. The selection of HKIAC Rules in this case is thus not indicative as to the Parties' implied choice of law for arbitration agreement.

17 In fact, a search for the Parties' implied choice of law for arbitration agreement must focus on the parties' express choice of law governing substantive contract, because this express choice of law made by the parties "offers a *strong indication* of the parties' implied intention to have both their arbitration agreement and substantive contract governed by the same system of law" [*SulAmérica para 26*]. This strong indication is such that parties' choice of seat "may not in itself be sufficient to displace such implied choice of law for arbitration agreement" [*Sonatrach Case para 32*]. Now that the law expressly chosen by the Parties is the law of Mediterraneo, this system of law shall also govern the arbitration agreement as the Parties' implied choice of law, regardless of the choice of the seat of arbitration in this case.

18 Most importantly, if one was to compare the present case to *FirstLink* [*FirstLink*], where the Singaporean Court took departure from *SulAmérica* by holding in essence that the law at the seat of arbitration should presumptively be the implied choice of law for arbitration agreement, due to the main reason that it is a natural inference that when entering the realm of dispute resolution, the parties would originally prefer the law at the seat of arbitration above all for the benefit of neutrality [*FirstLink Case para 13*], CLAIMANT would argue that the presumption of the law at the seat laid down by the Court in *FirstLink* should not be upheld as the precedent to be followed by the present case for the following two reasons: First, a parties' choice of law for arbitration agreement cannot be presumed to have neutrality as the parties' desire, since the parties' choice of law may be driven by the motivations other than the desire for neutrality, e.g. a choice of law conceded by one party to the other in exchange for the bargaining power in negotiating other parts of the contract [*Charles p. 56*]. As in this case, the Parties have long discussed over the law governing the arbitration agreement not simply for the benefit of neutral place of arbitration [*Res Ex.3, p. 35*] but also for accommodating CLAIMANT's compliance with its internal policy. RESPONDENT's proposed arbitration agreement was largely accepted by CLAIMANT in return.

19 Second, even if it can be so presumed that the parties would have neutrality in their minds when making the choice of law for arbitration agreement, the desire for neutrality may not simply lead to the selection of the law at the seat of arbitration over the law governing the substantive contract. In this case, after CLAIMANT's return of its revised draft to RESPONDENT, RESPONDENT by Mr. Julian Krone, who must also have had knowledge of the CLAIMANT's draft through his access to the prior email chains between CLAIMANT's Ms. Napravnik and RESPONDENT's Mr. Antley [*PO2 Q.7*], never objected to such revised draft, nor insisted on its favourable law at the seat of arbitration as previously proposed. Instead, Mr. Krone cooperated with CLAIMANT

in finalizing the Contract without RESPONDENT's proposed choice of law for arbitration agreement existing any longer [*Res Ex.1, p. 33; Res Ex.2, p. 34*], this can be seen that the Parties selected the law governing the Contract to govern the arbitration agreement because they deemed such choice of law neutral for them as well, as was the case in *BCY* [*BCY Case, para 63*].

C. IN ANY EVENT, THE SYSTEM OF LAW WITH WHICH THE ARBITRATION AGREEMENT HAS ITS CLOSEST AND MOST REAL CONNECTION IN THIS CASE IS THE LAW OF MEDITERRANEO

20 If the Arbitral Tribunal was to consider that no express and implied choice of proper law was made in this case, it would then be necessary for the Arbitral Tribunal to descend into identifying the system of law with which the agreement had the closest and most real connection [*Arsanovia Case, para 8*]. As addressed in [*Black Clawson Case - 2 Lloyd's Rep.,* pp. 446, 483], unless other factors point toward a different system of law, the system of law with which the arbitration agreement has the closest and most real connection is commonly the same system of law as governing the substantive contract, given that the Contract and the arbitration agreement were drafted up altogether.

21 In pre-emption of RESPONDENT's argument, a point of concern may be brought up by RESPONDENT that to apply the system of Danubian law for arbitration agreement could render the effectiveness and support to the arbitral proceedings [*FirstLink para 13*]. This, however, is not true at least in this context where the Model Law are largely adopted as the domestic Arbitration Law of both Parties [*PO2 Q14*]. Therefore, the concerns whether applying the law of Mediterraneo would yield less efficiency to arbitral proceedings should be alleviated in this case.

II. UNDER THE LAW OF MEDITERRANEO, THE ARBITRATION AGREEMENT PROVIDES JURISDICTION FOR THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

22 Clause 15 of the Contract constitutes the arbitration agreement which gives the jurisdiction for the Arbitral Tribunal over the dispute arising out of the Contract. Since the question of whether the Contract can be adapted in this case hinges on the interpretation of Clause 12, the Arbitral Tribunal shall have jurisdiction over this case (**A.**). Alternatively, even if this case does not concern interpretation of the Contract, CLAIMANT submits that it does concern the adaptation thereof over which the Arbitral Tribunal shall have jurisdiction, given that the interpretation of the arbitration agreement must be broadly done under the system of law of Mediterraneo (**B.**). In all

cases, no Parties' authorization shall be required for the Arbitral Tribunal to adapt the Contract if hardship arises in this case (**C.**).

A. THIS CASE CONCERNS A MERE INTERPRETATION OF HARDSHIP CLAUSE CONTAINED IN CLAUSE 12 OF THE CONTRACT

23 In *Arnold* [*Arnold Case,* para 17], the interpretation of a provision in a contract involves the ascertainment of what the parties meant through the eyes of a reasonable person [*Investment Compensation Scheme Case*]. Therefore, the term '*dispute arising out of this contract, including…interpretation...thereof*' under Clause 15 refers to the dispute arising out of the ascertainment of the meaning of any provision stipulated in the Contract.

24 In this case, CLAIMANT contended that the Parties intention is very well evidenced by the fact that in connection with a change in the delivery terms, they included an adaptation clause (i.e. Clause 12) into the Contract [*NoA, p. 7 para 19*]. On the other hand, RESPONDENT argued that the negotiations finally resulted in a very narrowly worded clause (i.e. Clause 12), which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal [*ANoA p. 30, para 9*]. For this reason, it could be seen that the Parties had disputed whether Clause 12 of the Contract would allow for any adaptation of the Contract by the arbitral tribunal.

B. EVEN IF THIS CASE DOES NOT CONCERN INTERPRETATION OF THE CONTRACT, IT DOES CONCERN THE ADAPTATION THEREOF OVER WHICH THE ARBITRAL TRIBUNAL SHALL HAVE JURISDICTION

25 According to Mediterranean system of law, interpretation of an arbitration agreement must be done in a such broad manner that allows the Arbitral Tribunal to adapt the Contract. This is so for two main reasons: The wording of the arbitration agreement, albeit being reduced from the HKIAC Model Clause, is sufficiently wide to cover the dispute concerning adaptation of the Contract (**i.**), and notwithstanding the allegedly narrow wording of the arbitration, the Parties' conducts in this case can be taken as impliedly agreeing to provide jurisdiction for the Arbitral Tribunal to adapt the Contract (**ii.**).

i. THE WORDING OF THE ARBITRATION AGREEMENT IS SUFFICIENTLY WIDE TO COVER THE DISPUTE CONCERNING THE ADAPTATION OF THE CONTRACT

26 RESPONDENT contended that it explicitly suggested to reduce the broad wording of the HKIAC Model Clause by deleting any reference which could be interpreted as an empowerment for contract adaptation [*ANoA, p. 31 para 13*]. This is not true, because the only wording that was exactly reduced from the Model Clause in this case is the redundant term of "*relating to this contract*". Without this term, the remaining arbitration agreement would stand to cover the dispute concerning adaptation of the Contract. If RESPONDENT really meant to delete all references which could be interpreted as an empowerment for contract adaptation as alleged, it would not have left the equally broad term "*any dispute arising out thereof*" to exist in the arbitration agreement, as was the case in *Capital Trust* where the wide wording of "*arising out of*" was employed by parties to ensure that all claims arising out of the contract can be included [*Capitol Trust, Case para 50*].

i. ON THE ALTERNATE, THE PARTIES' CONDUCT CAN BE TAKEN AS AN IMPLIED AGREEMENT TO PROVIDE JURISDICTION FOR THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

27 As supported by the most prominent practitioners in this field, Alan Redfern and Martin Hunter, "*the parties, by their conduct in referring a matter to arbitration, may be taken as impliedly agreeing to confer on the arbitrator jurisdiction beyond that which would have existed pursuant to the arbitration clause*" [*Redfern/Hunter,* p. 95]. In the Notice of Arbitration served upon RESPONDENT, CLAIMANT explicitly argued that RESPONDENT's Mr. Antley did make a statement in a way that accepted the jurisdiction for the Arbitral Tribunal for contract adaptation should the Parties not be able to reach solution [*NoA para 16*], corresponding to Witness Statement given by Ms. Napravnik, our direct witness [*Cl. Ex 8 p. 17*]. Even more so, this argument was never retorted by RESPONDENT in its Answer to the Notice of Arbitration, as it admittedly sought to argue that arbitrators may adapt contracts but requires express empowerment for that instead [*ANoA para 13*]. This conduct of RESPONDENT's Mr. Antley can thus be taken as impliedly agreeing to vest the Arbitral Tribunal with its jurisdiction to adapt the Contract.

C. IN ALL CASES, THE ADAPTATION OF THE CONTRACT DOES NOT REQUIRE THE PARTIES' AUTHORIZATION

28 Under the contract law of Mediterraneo, it is not to be disputed that unlike the contract law of Danubia [*PO2. Q45*], the UNIDROIT Principles on International Commercial Contracts 6.2.3 (4)(b) only requires the Parties to prove that the hardship arises in this case without any need to prove the Parties' authorization for that. Therefore, whether or not the Parties authorized the

Arbitral Tribunal to adapt the Contract in the presence of hardship should not frustrate the CLAIMANT's position.

29 In addition, considering that the Parties had already resorted to negotiation but failed to agree on the adaptation of the price [*NoA, p. 6, para 12*], this failure to settle the renegotiation entitles the Arbitral Tribunal to adapt the terms of the Contract [*Advisory Council Opinion No. 7, para 40*].

ISSUE 1.2: THE ARBITRAL TRIBUNAL PROCEDURALLY HAS POWERS TO ADAPT THE CONTRACT

30 RESPONDENT finally contended that under the law of Danubia as the law at the seat of arbitration, the contract adaptation by the Arbitral Tribunal requires the Parties' express authorization, and that the express authorization was missing in this case [*ANoA, p. 31, para 13*]. Since any arbitral tribunal's power for contract adaptation must be assessed through the law at the seat of arbitration [*Brunner, p. 493*], the Parties' express authorization is not to be required in this case, given that the Parties only request the Arbitral Tribunal to decide the case in accordance with the Contract and the CISG under Article 28(1) of the Arbitration Law of Danubia (**I.**). Alternatively, if this case is to be decided *ex aequo et bono*, the Parties did expressly authorize the Arbitral Tribunal (**II.**).

I. THE PARTIES' EXPRESS AUTHORIZATION IS NOT REQUIRED FOR THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT IN THIS CASE

31 CLAIMANT would not argue that Article 28(3) of the Arbitration Law of Danubia does provide for the Arbitral Tribunal to be, first, expressly authorized by the Parties, should this case be decided *ex aequo et bono*. However, this is not the case here where the Parties both submitted the dispute to be decided by the Arbitral Tribunal on the basis of the Contract and alternatively the CISG [*NoA p. 8 para 20*] pursuant to Article 28(1) of the Arbitration Law of Danubia under which no Parties' express authorization is to be required.

II. IF THIS CASE IS TO BE DECIDED *EX AEQUO ET BONO* FOR THE ADAPTATION OF THE CONTRACT, THE PARTIES EXPRESSLY AUTHORIZED THE ARBITRAL TRIBUNAL TO DO SO

32 If this case is to be decided *ex aequo et bono* for the adaptation of the Contract, the Parties did expressly authorize the Arbitral Tribunal to do so. In Herwit, the authorization of the Arbitral

Tribunal to decide the case *ex aequo et bono* normally requires party agreement that is clear, specific and either made in writing or evidenced in writing [*Herwit Case, para 54*].

33 Considering the statement made by RESPONDENT's Mr. Antley to CLAIMANT's Napravnik referred to in para 28, such statement displays a very clear and specific wording as to the adaptation of the Contract by the Arbitral Tribunal, as it specifies to be so done only in the case where the Parties could not reach the solution where no other methods than deciding this case *ex aequo et bono* is left for the Parties. Further thereto, such statement is also evidenced by RESPONDENT's Mr. Julian Krone who himself admitted in his Witness Statement that he "*would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion*" [*Res Ex.3, p. 35*]. Therefore, such statement would suffice to be qualified as the Parties' express authorization in this case.

ISSUE 2: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS EVEN ALLEGEDLY OBTAINED THROUGH BREACH OF A CONFIDENTIALITY AGREEMENT AND THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

34 RESPONDENT erroneously asserted that the evidence in dispute is inadmissible mainly because its obtainment constitutes a breach of contractual and confidentiality obligations [*Lr by Fasttrack, p.50, para 6*]. However, in determining the admissibility of the evidence under HKIAC Rules, the Arbitral Tribunal must analyze the admissibility, relevance, materiality and weight of the evidence, including whether to admit or exclude any documents, exhibits or other evidence [*HKIAC Rules, Art 22.2/22.3*]. In light of this, CLAIMANT shall submit that Article 42 of the HKIAC Rules 2013 is not applicable in this case (**I.**) and the evidence has legitimate grounds to be admissible to the proceedings (**II.**).

I. CLAIMANT'S CONDUCT OF OBTAINING EVIDENCE DOES NOT CONSTITUTE BREACH OF A CONFIDENTIALITY AGREEMENT PURSUANT TO ARTICLE 42 OF THE HKIAC RULES IN THIS CASE

35 RESPONDENT contended that the information obtained from the other arbitral proceedings shall be protected by virtue of Article 42 of the HKIAC Rules [*Lr by Langweiler, p.49 paras 5-8*]. In response to this contention, CLAIMANT will now demonstrate that such Article of the HKIAC Rules only applies to the parties to that other arbitral proceedings (**A.**). In any event, a breach of Article 42, if possible, does not render the evidence in dispute inadmissible before the Arbitral Tribunal (**B.**).

A. ARTICLE 42 OF THE HKIAC RULES IS NOT APPLICABLE IN THIS CASE

36 RESPONDENT argued that to adduce the evidence which is the Partial Interim Award of its previous arbitral proceedings would violate the principle of confidentiality under Article 42 of the HKIAC Rules 2013 [*Lr by Fasttrack, p.50 para 3-8*]. Article 42.2 of the HKIAC Rules provides that unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitration under the arbitration agreement or an award made in the arbitration [*HKIAC Rules, Art 42.2*].

37 However, this is not true because the obligation of confidentiality, whether by statutes or agreements, only has the binding effect upon the parties to the arbitration not on such a third party [*Born, p.2819, para 33-36*] as CLAIMANT in the present case. Therefore, it does not necessarily bar the disclosure of evidence by the third parties to the arbitral proceedings. RESPONDENT's contention based on Article 42 of the HKIAC Rules is thus ill-founded.

B. IN ANY EVENT, A BREACH OF ARTICLE 42, IF POSSIBLE, DOES NOT RENDER THE EVIDENCE IN DISPUTE INADMISSIBLE BEFORE THE ARBITRAL TRIBUNAL

38 Even if we proceed on the assumption that the other party was involved in the leakage of RESPONDENT's information from the other arbitral proceedings and therefore in breach of Article 42 of the HKIAC Rules, such breach would not render the evidence in dispute inadmissible in this case, given that the only remedies available to the injuring party of such breach are the claim for damages [*Moser/Bao, para 12.30*] and the request for the breaching party to refrain from disclosing further information [*HKIAC Rules, Art 23*].

II. THE EVIDENCE IN DISPUTE HAS LEGITIMATE GROUNDS TO BE ADMISSIBLE IN THIS CASE

39 Apart from its contention relating to a breach of confidentiality under the HKIAC Rules, RESPONDENT further contended that the evidence in dispute shall be inadmissible in this case because of several illegitimate grounds, including the bad-faith of CLAIMANT and the illegality of the evidence obtainment [*Lr by Langweiler p.49 para 5-8*]. However, it is CLAIMANT's position that it should be entitled to submit such evidence before the Arbitral Tribunal, as first, it did not obtain such evidence in breach of the principle of good faith (**A.**), second, the evidence also satisfies the fundamental standards of admissibility as reflected in the international arbitration

practices (**B.**), and third, CLAIMANT is entitled to submit evidence by virtue of principle of transparency (**C.**).

A. CLAIMANT DID NOT OBTAIN EVIDENCE IN BREACH OF THE PRINCIPLE OF GOOD FAITH

40 Under the principle of good faith which serves as one of the fundamental rules of arbitration, parties are obliged to arbitrate their dispute fairly [*O'Malley, para 7.52*] in all procedural aspects, including but not limited to the evidentiary matters, because to depart from this principle of good in taking evidence could result in the exclusion of the evidence by the Arbitral Tribunal [*Methanex case; Libananco case*]. In this case, CLAIMANT submits that there is no reason for the Arbitral Tribunal to exclude the evidence in dispute, for the fact it did not obtain evidence itself in breach of the principle of good faith. This can obviously be seen that in this case, RESPONDENT did not involve in any process of obtaining such evidence in dispute.

B. IN ANY EVENT, THE EVIDENCE IN DISPUTE ALSO SATISFIES GENERAL STANDARDS OF ADMISSIBILITY AS REFLECTED IN THE INTERNATIONAL ARBITRATION PRACTICES

41 For any evidence to be admissible in international arbitral proceedings, it must satisfy the general standard of evidentiary rules reflected in the IBA Rules on the Taking of Evidence (the "**IBA Rules**") as generally applied by several leading arbitration institutions, including the HKIAC. Given that the prominent criteria for determining the admissibility of any evidence are the standards of relevance and materiality as reflected in Article 9.2 (a) of the IBA Rules [*Pilkov, p148 para 36-38; O'Malley, para 3.68*], CLAIMANT submit that the relevant and material evidence can be submitted despite the principle confidentiality clause being breached.

42 The relevance and materiality standard of the illegally-obtained evidence must be taken into account together with the legality of obtainment [*Caratube case; Contship case*]. In *Conship Container* case, it is permissible to rely on the document produced in an earlier arbitration despite the opposing party claims on confidentiality protection clause, provided that the relevance and materiality test aforementioned have been satisfied. In this case, CLAIMANT's evidence is relevant to the case at hand (i.), and material to the outcome of the case (ii.).

i. THE DISPUTED EVIDENCE IS RELEVANT TO THE CASE AT HAND

43 In order to prove the relevance of an evidence, a party needs to convince that the evidence submitted is "likely" to be relevant [*Tidewater case*]. This relevance standard does not require that

the evidence has to be absolutely relevant to the case [*O'Malley, para 3.69*]. That is, the submitting party just has to demonstrate the relevance by "establishing why it finds the document necessary to successfully meet its burden of proof" [*O'Malley, para 3.73*].

ii. THE DISPUTED EVIDENCE IS MATERIAL TO THE OUTCOME OF THE CASE

44 For the evidence to be material, it must be helpful or necessary for the arbitral tribunal to construct the award [*Lummus case*] or likely to be the merit of the point that the requesting party seeks to support [*United Parcel case*]. In this case, as CLAIMANT's evidence may give rise to a precedent of the case or could be used to support the substantive issues regarding the entitlement of CLAIMANT to price adaptation. The arguments established by RESPONDENT in the previous arbitration may imply the intention to allow the Arbitral Tribunal to adapt the contract.

C. PRINCIPLE OF TRANSPARENCY PERMITS CLAIMANT TO SUBMIT THE EVIDENCE IN DISPUTE

45 In recent years International arbitration society has been supporting for more transparent procedures. [*Porooye/Freehily, p.314, para 19-23*]. The UNCITRAL Rules on Transparency, albeit not directly applicable in commercial arbitration such as our case [*Transparency Rules, Art 1; Porooye/Freehily, p.309, para 7-10*], is the solid evidence on the trend towards transparent arbitral conduct as a whole [*Porooye/Freehily, p.311, para 6-10*]. While each arbitration is bound to its own parties, the arbitral awards of the similar cases could be used as a precedence to determine the disputed case [*ibid*], and thus, create a consistency and orderliness in the Arbitral Jurisprudence [*ibid*]. While Confidentiality could be protected in some aspect, no party should be able to exploit the principle of confidentiality to arbitrate the same point until they get the result they prefer [*Aegis case*]. Where the substantially similar cases are decided in the same standards, the arbitration society, including arbitral institutions [*Lr by Langweiler, p.49, para 14-19*; *PO2 Q60, para 39*], would uphold its legitimacy and integrity within the arbitration process [*Porooye/Freehily, p.312, para 5-8*].

46 In this particular dispute, the need for legal consistencies has arisen in respect of the RESPONDENT's contradictory stances in different arbitrations. RESPONDENT object the extraneous evidence in the disputed proceedings while using one itself in the other arbitration where such evidence benefits its own case. In the other arbitration, RESPONDENT explicitly claimed the arbitrator's jurisdictions on price adaptation in respect of the unforeseeable change in circumstances [*Lr by Langweiler, p.49, para 15-19, PO2 Q60, para 39*]. The tribunal in the arbitration declared its jurisdiction to adapt the contract terms in respect of the unexpected hardships that

occurred to RESPONDENT [*ibid*]. Where the facts, claims and circumstances in the previous proceeding were highly similar, if not the same, to the Parties', CLAIMANT insists on its submission of evidence to ensure that the same circumstances are determined in the same standards.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

47 RESPONDENT incorrectly asserted that CLAIMANT has no right to request for the adaptation of the contract on the bases of the force majeure/hardship clause and Article 79 of the CISG [*ANoA, p. 32, para 18*]. On the contrary, CLAIMANT respectfully requests the Tribunal to find that RESPONDENT must pay for the additional price on bases of the contractual clause (I) and the provisions of CISG (II).

I. CLAIMANT IS ENTITLED TO AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT

A. THE INCREASE OF TARIFF FALLS UNDER HARDSHIP PURSUANT TO CLAUSE 12

48 CLAIMANT is not responsible for the incurred tariff cost as CLAIMANT can benefit from the Clause 12. Clause 12 of the Contract includes a list of cases for that the Seller is not responsible. Among others the seller is not responsible "(…) for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." As the new enactment of the tariff rate by RESPONDENT's government is not explicitly written, it is the CLAIMANT's contention that such event falls within the scope of Clause 12 as it is a comparable unforeseen event (i) and causes the Contract to be more onerous (ii).

i. THE INCREASE OF TARIFF IS A *COMPARABLE* UNFORESEEN EVENT

49 In order to constitute as a "comparable unforeseen event"", the change of tariff rate by RESPONDENT's government must first be unforeseeable (a) and second, it must be a comparable unforeseeable event (b).

a. The change of regulation is unforeseeable

50 An unforeseeable event means a circumstance that cannot be reasonably expected at the time of the conclusion of contract [*Schlechtriem/Schwenzer, p. 1134, para 14*]. RESPONDENT's government are supporters of free trade [*NoA p.6 para 9*], thus it was not predictable the tariff rate would increase [*Cl. Ex.6*]. Furthermore, in racehorse semen is categorized differently than other farm

animals [*NoA p.6 para 11*], thus having racehorse semen listed in the schedule is unforeseeable by both Parties.

b. Moreover, the increase of tariff is a *comparable* unforeseen event.

51 It is CLAIMANT's contention that the change of tariff rate is a comparable unforeseen event as the effect of this event gives rise to the same effect as that of the hardship caused by additional health and safety requirements under Clause 12 of the Contract. This is interpreted by the mutual intentions of the parties (1) and in accordance with the understanding of a reasonable person (2) [*Schwenzer et al., p. 293*], taking into account the parties' good faith. [*Schwenzer et al., p. 299*].

1. The parties had the mutual intention to include increase of tariff under scope of Clause 12

52 To determine the common intentions of the parties, all relevant circumstances must be taken into account including preliminary negotiations, practices established between parties and subsequent practices [*Vogenauer, p. 499*].

53 CLAIMANT had explicitly stated that the risk such as customs regulations and import restrictions will not be accepted and thus the Contract shall include a hardship clause. [*Cl. Ex. 4*]. Due to the fact that CLAIMANT will not accept such risk, it had insisted on the addition of the hardship clause [*Cl. Ex. 4*]. In spite of having knowledge that CLAIMANT did not intend to accept such risks, RESPONDENT still concluded the Contract with CLAIMANT.

54 Further, subsequent to imposition of tariffs, RESPONDENT as seller had demanded for price adaptation due to hardship in another sale of goods contract with a third party. The conduct of RESPONDENT shows the intent to include increase of tariff under the scope of Clause 12 of the contract [*PO2, Q60, para 39*].

2. It is an understanding of a reasonable person that a change of tariff rate is within scope of Clause 12

55 The term in the contract should be understandable to person whom the contract addresses. [*Schwenzer et al., p. 293*]. Moreover, the contract shall be interpreted in accordance to the understanding of "the same kind of person as the party in such circumstances".

56 Both parties in are businessmen, and according to this case [*Premium Nafta Products Case- Opinions of the Lords of Appeal for Judgement, para 5*], a reasonable businessman would not subject themselves to risk of an extreme price change, in particular one that would lead them to a potential loss. The Parties acknowledge that hardship caused by health and safety requirement affects the cost by a margin of 40 percent [*Cl. Ex 4*], and this risk is not accepted by CLAIMANT. The increase of tariff by RESPONDENT's government will increase the price by 30 percent, thus having the same consequence of the hardship. Therefore, a reasonable businessman would not subject themselves to a risk of tariff change. Therefore, the increase of tariff is an unforeseen event which is comparable to that of hardship, thus falling under scope of Clause 12.

c. The increase of tariff rate causes the contract to be onerous

57 To fall under the scope Clause 12, another requirement is that the change of event must cause the contract to be onerous. In the Nuova Case, a 30 per cent price increase was deemed onerous [*Nuova Cas*e]. Similarly, in our case, the tariff had increased by 30 per cent resulting in heavy burden on CLAIMANT. Therefore, the increase of tariff causes the Contract to be onerous.

58 Furthermore, prior to the change of tariff rate, CLAIMANT had profit margin of 5% [*NoA, p. 7 para 18*]. However, with the regulation change, CLAIMANT is now at a 25% profit loss which affects the commercial basis of the Contract imposing heavy burden on the CLAIMANT

59 In summary, CLAIMANT is not responsible for the additional cost because of Clause 12 of the Contract that includes an adaption clause as proven later in this submission Paragraph 71. The rapidly increased tariff regulation of Mediterraneo is the unforeseeable event, which makes the Contract way more onerous for CLAIMANT. On top of that, the Parties had the intention to balance the risks between both sides agreeing on Clause 8 of the Contract. Hence, CLAIMANT is, under Clause 12 of the Contract, entitled to adapt the purchase price by the amount that resulted from the new tariff regulation (USD 1,250,000).

B. CONSEQUENTLY, CLAIMANT IS ENTITLED AN ADAPTATION OF THE PRICE UNDER THE CONTRACT

i. THE INTERPRETATION OF HARDSHIP CLAUSE RESULTS IN AN ADAPTATION OF THE PRICE

a. The parties intended hardship clause to result in adaptation of the price

60 By interpreting the hardship clause, it is the intention of the parties that price adaptation can be made. Article 8 (1) of the CISG laid down the interpretation of the statements made by the party shall be interpreted by their express intention where the other party knew or could not have been unaware of it. In order to interpret the Contract, there must be an agreement of intentions from both parties, whether it is expressly shown or could not have been unknown to the other party [*Schlechtriem/Schwenzer, p. 119, para4; UNIDROIT Principles 4.1(1)*].

61 The Parties had intended for hardship clause contained in Clause 12 to allow adaptation of the Contract. The Parties have agreed either through express intention or implied intention which the other Party could not have been unaware of, that the hardship clause will lead to adaptation of the Contract by the arbitrators [*NoA, para 19*]. CLAIMANT has expressly shown intention to allow for the Hardship Clause to lead to adaptation in Ms. Napravnik's email to Mr. Antley which she expressly stated 'hardship clause should be included into the Contract to address such subsequent changes' [*Cl. Ex. C4*]. From its plain meaning, this means CLAIMANT had wished to include the adaptation of the Contract as hardship clauses generally allow adaptation of the contract due to 'subsequent changes' [*PECL Article 6.111(2); BGB Section 313; Schwenzer, p. 723*].

62 Additionally, hardship clauses are generally included in contracts to disallow one party from being disadvantaged due to onerous terms that occur due to unforeseen circumstances [*UNIDROIT Principles, Article 6.2.3; Frick, p. 178*]. In this case, CLAIMANT has expressly mentioned to RESPONDENT that they were not willing to bear on increased responsibilities created by circumstances such as '*risks associated with such a change in the delivery terms, in particular, those associated with changes in customs regulation or import restrictions*' [*Cl. Ex. 4*]. Thus, clearly showing CLAIMANT's intention to have hardship clause as a mechanism to adapt the contract should an onerous circumstance arise.

63 Although RESPONDENT did not expressly show their intention to allow hardship clause to include the adaptation of the Contract, RESPONDENT's intention could have not been unaware by CLAIMANT. Through RESPONDENT's action of accepting CLAIMANT's offer of receiving the remaining instalments and stating they wanted a long-term relationship with CLAIMANT [*Cl. Ex. 8*], this implied that they also intend for the hardship clause to include the adaptation of the Contract.

64 Additionally, Article 8 (3) of the CISG also stipulates that other relevant circumstances must also be taken into account when interpreting statements, such as the usage of the terms

[*Schlechtriem/Schwenzer, p. 121, para 45*]. It is widely accepted that a hardship clause leads to adaptation of the contract [*Schmitthoff; Rimke; Kluwer, p. 197-243*] as the lack of adaptation of the contract, where there is an inclusion of the adaptation clause, would merely render the goal of the adaptation clause useless.

b. In any event, a reasonable person would interpret the hardship clause to lead to adaptation of the Contract

65 In the case that the Arbitral Tribunal finds no express or implied intention has been established, it shall use the view of a reasonable person to determine the meaning of the contract [*CISG, Art. 8 (2)*].

66 A reasonable person would interpret hardship clause to include the adaptation of contract. According to Schwenzer [*Schwenzer p. 719-724*], a hardship clause would lead to either a termination or modification of the contract as it eliminates the onerous terms that are placed on a party. A reasonable person, in this case, would be a person of the same standpoint as the Parties [*Schlechtriem/Schwenzer, p. 121, para 24*]. As the Parties have stated their wish to maintain a long-term relationship [*Cl. Ex. 2; Cl. Ex. 3*], an adaptation of the contract would be a more logical choice from a reasonable person's perspective [*Frick, p. 153]*

ii. THE CONTRACT CAN BE ADAPTED IN ACCORDANCE WITH THE GENERAL PRINCIPLE

67 Under general principle of law, hardship results in adaptation of contract [*Brunner, p. 479*]. Notwithstanding the terms used in the contract, hardship clauses will give rise to the revision of the contract term when an unforeseen change of circumstances causes contractual in equilibrium [*Frick, p. 178*]. The recourse to the principle of *pacta sunt savanda* is not sufficient [*ICC Case No. 3189*]. The Arbitral Tribunal can resort to trade usage to adapt the price [*UNCITRAL, Art. 28(4)*] using the concept of equity [*Frick, p. 181*]. It is the rule of *lex mercatoria* that the obligation performance must be in equilibrium from economic point of view [*ICC Case No. 2291*].

68 Presently, even if the Contract has no specific appearance of adaptation clause, CLAIMANT is entitled to the price adaptation. The increase of tariff imposed excessive burden against CLAIMANT causing 25% loss arising out of this transaction [*NoA, p. 7, para 18*]. Should CLAIMANT solely bear this additional cost, equitable result is not reached. Therefore, such adaptation will restore the parties to the equilibrium positions resulting in equitable outcome.

iii. THE CONTRACT CAN BE ADAPTED *EX AEQUO ET BONO*

69 CLAIMANT is entitled to a price adaptation by resulting from *ex aequo et bono*. In deciding *ex aequo et bono*, the Arbitral Tribunal can be adapted on the basis of equity, given the circumstances of the case without resorting to any legal rules [*Basketball Tribunal Case, para 31; UNCITRAL Model Law, Art. 28(3)*]. It can make an adaptation of the price to on what is reasonable [*Mamidoil Case, p. 14*]

70 In the light of the circumstances of this case, it will be reasonable for the Arbitral Tribunal to make a price adaptation. CLAIMANT requests the Tribunal to adapt the price to make fair distribution by increasing the price at 25% rather than 30%. This shows the intention that CLAIMANT only wishes to be relieved from unfair disadvantage rather than make profit. Furthermore, RESPONDENT, knowing of the hardship, received the performance without delay or any loss of benefit. In fact, RESPONDENT acted in bad faith as illustrated in its position in the the other arbitration [*Lr. by Langweiler, p.49; PO2 Q60, para 39*]. In the interest of fairness, the Arbitral Tribunal shall adapt the price to rectify this hardship unfairly imposed upon CLAIMANT.

II. CLAIMANT IS ENTITLED TO AN ADAPTATION OF THE PRICE UNDER CISG

A. THE CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG) IS APPLICABLE AS THE GOVERNING LAW OF THE CONTRACT

71 Pursuant to Clause 14 of the Contract, the contract of sale of goods between Parties dated 6 May 2017 is governed, not only by the law of Mediterraneo, but also by the CISG [*Cl. Ex. 5, p .14, para 12*]. Additionally, as provided in Article 1(1)(a), CISG is also applicable to the present dispute as the countries of both parties are Contracting States of the CISG [*PO1, p. 53, para 4*].

72 It is argued by RESPONDENT that the inclusion of the force majeure and hardship clause into the Contract constitutes as a derogation under Article 6 of the CISG [*NoA, p. 32, para 20*]. However, the application of the CISG can only be excluded with clear intent of the parties [*Asante Technologies*]. Provisions of the CISG may also be derogated by express mentioning of particular law applicable to intended part of the contract [*Auto Case*]. In the present case, there is no clear intent to exclude the application of the CISG nor mentioning of other applicable law to the hardship clause [*Cl. Ex. 5*]. Mere inclusion of the hardship clause does not constitute as a derogation from provisions of the CISG under Article 6. Therefore, Article 79 of the CISG is applicable to govern the situation of hardship in this case.

B. HARDSHIP IS ADDRESSED BY ARTICLE 79 OF THE CISG

73 Hardship falls within the scope of 'impediment" under Article 79 conforming with Article 7 in the expansion of the CISG of addressing hardship. Article 7 addresses the need of parties to perform in good faith by having regard to the origin of the rules, promoting uniformity in the application of rules, and promoting good faith in trade. A party acts in bad faith when the party does not fulfil the obligation of the convention, by taking advantage of the other party and taking benefits not obliged by the contract [*Pace Law School, 1997, para 4*]. In observing "good faith" in Article 7, in conjunction with Article 79 of the CISG, may lead to the obligation of the disadvantaged party to renegotiate and mitigate losses which allows the party to solve cases of hardship under the CISG [*Schwenzer et.al, p. 567-569*]. Article 7(2) states that when in circumstances that are not explicitly determined by the CISG, the gaps can be filled with underlying principles of the CISG or private international law in the expansion of certain matters.

74 RESPONDENT may argue that the Drafting Committee of the CISG in writing Article 79 indicated that "hardship" does not fall within the scope of "impediment". The Drafting Committee of the CISG had never had come to such conclusion. Nevertheless, the word 'impediment' defined by the Oxford English Dictionary is "something that impedes, hinders, or obstructs". In accordance with these definitions, hardship is qualified as an impediment [*Ishida, 2018, p. 26*]. The International Chamber of Commerce came to the conclusion that "impediment" under Article 79 is a definition that leaves room for hardship because the event shall be an obstacle that was usually unforeseen [*Nagy, 2013, p. 10-11*].

C. CLAIMANT HAS FULFILLED THE REQUIREMENTS UNDER ARTICLE 79(1) OF THE CISG

75 Under Article 79 of the CISG sets out four conditions for hardship. First, the inability to perform the obligation was out of control of the party. Second, the impediment was reasonably unpredictable before the conclusion of the contract. Third, the impediment was reasonably impossible to solve or avoid at that time. Fourth, the party could not have been reasonably expected to have overcome its consequences.

i. THE IMPEDIMENT IS BEYOND CLAIMANT'S CONTROL.

76 An impediment is an act that falls outside of the scope of authority or control of the party, that party is then exempted under Article 79. In defining what falls outside the scope of the party shall be out of the party's control and a result of an external factor [*Schwenzer et al., 2016, p. 1133*]. The

economic hardship that CLAIMANT suffered was a result of an unmanageable and totally exceptional factor that could not have been predicted.

ii. THE TARIFF WAS NOT REASONABLY EXPECTED AND IT COULD NOT HAVE BEEN TAKEN INTO ACCOUNT DURING THE CONCLUSION OF THE CONTRACT.

77 In defining the term "reasonably" in Article 79 by Article 8(2), statements and acts done by the other party shall be interpreted in the same way a reasonable person would have done so in the same circumstances. It can be inferred that "reasonableness" is a general principle in the way that the CISG is based. Article 8(2) establishes a standard of a "reasonable person" in doing acts applied to Article 79. "Reasonable expectation test" is used to investigate whether a "reasonable person" would have been expected to predict such an event during the conclusion of the contract [*Ishida, 2018, p. 27-30*].

78 Article 8(3) also stipulates that in understanding the party's purpose or a how a reasonable person would have acted, consideration must be given to all relevant events of the case established between the parties. In understanding Article 8 in conjunction with Article 79, the "reasonable expectation test" is whether the contracting party in the shoes of the seller during the same time and circumstances at the conclusion of the contract would have been able to take such impediment into account or to have avoided it, or its consequences, thus, which describes the "reasonable person."

79 The sudden increase of tariffs by the newly elected president was an impediment which could not have taken the impediment into account at the time of the conclusion of the contract, to have avoided or overcome it, or its consequences. The event of the sudden increase of tariffs by RESPONDENT's government was an impediment and could not have been predicted by both of the Parties. A person of "reasonable person" would not have agreed to make such a contract that would cause them to be taken advantage of another party and by not making a profit.

80 Additionally, in the light of the circumstances, governmental actions such as trade sanctions are favoured to be impediments and can be accountable as a force resulting in the disadvantaged party be excused for economic hardship [*Nagy, 2013, p. 24; Caviar case*]. Given that the imposition of tariffs was never released by RESPONDENT in the election manifesto [*NoA, p. 5, para 9*] and RESPONDENT's government was always an ardent supporter of free trade and never resorted to retaliatory measures [*NoA, p. 5, para 10*]. Moreover, there was a temporary lift of the ban on

artificial insemination for racehorses due to powerful interests in the Equatorianian racehorse breeding industry (Paragraph 5, Statement of Facts, Page 5). Also, horse racing is extremely popular in Equatoriana and the growth rate has never been below 4 percent in the business sector in the past five years [*NoA, p. 5, para 5*]. CLAIMANT could not have reasonably expected that the that the government of Equatoriana would contradict its economic interests. This satisfies the "reasonable expectation test" as mentioned earlier in the conjunction of Article 8 and 79. As a result, CLAIMANT had to suffer from hardship caused by an unforeseeable event impacting the contract to become more onerous and disadvantageous for CLAIMANT.

iii. CLAIMANT COULD NOT BE REASONABLY BE EXPECTED TO OVERCOME THE TARIFF

81 It is impossible for CLAIMANT to be expected to deliver the goods to RESPONDENT with this qualified impediment under Article 79. It is illogical to require performance from a party which "could not be reasonably expected to have overcome the impediment, forcing the party to overcome what he reasonably could not have expected to overcome. This is clearly unreasonable, and even folderol." [*Ishida, 2018, p. 21-22*] Thus, resulting in hardship for the disadvantaged party by incurring a total of 25 percent loss in the sale of the semen to RESPONDENT. Additionally, CLAIMANT cannot be reasonably be expected to overcome the tariff or be expected to avoid it because the semen is to only be delivered to Equatoriana from Mediterraneo.

D. IN ANY EVENT, HARDSHIP CAN BE ESTABLISHED UNDER THE UNIDROIT PRINCIPLES

82 Even if hardship is not addressed by Article 79 of the CISG, CLAIMANT is entitled to the price adaptation in the ambit of UNIDROIT Principles. Relying on the provisions of UNIDROIT Principles to supplement the CISG **(i)**, the increase of tariffs fulfilled the definition of hardship under the UNIDROIT Principles **(ii)**.

i. UNIDROIT PRINCIPLES CAN BE USED TO SUPPLEMENT THE PROVISIONS OF THE CISG

83 UNIDROIT Principles has been used to assist in the interpretation of the CISG [*Kruisinga, p. 18*]. UNIDROIT Principles as international uniform law is used to "promote uniformity in its application [*CISG, Art.7(1)*]" in lines with its international character [*Schlechtriem/Schwenzer, Art. 7, p. 131*]. The reference to the general principles in Article 7(2) is also a basis for the reliance on the UNIDROIT Principles by arbitral tribunals [*Scherer p.130, para 44; CISG/Unidroit Principle Case*]. In

the context of hardship, Article 6.2 of the UNIDROIT Principles can be used to supplement Article 79 of the CISG [*Bund, p.391-393; Steel Tube Case*]. In the present case, CLAIMANT sought to refer to the provisions on hardship under UNIDROIT Principles to supplement the interpretation of Article 79 of the CISG allowing for the claim of price adaptation [*NoA, p. 8, para 20*].

ii. THE REQUIREMENTS OF HARDSHIP UNDER ARTICLE 6.2.2 OF THE UNIDROIT PRINCIPLES HAS BEEN FULFILLED

84 The increase of tariff constitutes as hardship in the meaning of Article 6.2.2 of the UNIDROIT Principles. Pursuant to Article 6.2.2, hardship can be established where "*the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased*" and the requirements set forth in sub-paragraph (a) to (d) are met [*Office Comment 1 to Article 6.2.2, p. 218; Vogenauer, p. 814, para 1*].

85 Hardship cannot be invoked if there is no fundamental alteration of equilibrium of the contract [*Office Comment 2 to Art. 6.2.2, p. 219*]. A change in regulation imposing more stringent conditions on the party can be considered as an alteration of contractual equilibrium [*Vogenauer, p. 815, para 3; ICC Case No. 9994*]. To be 'fundamental' alteration, the Arbitral Tribunal can decide in the light of the facts and circumstances of a particular case [*Vogenauer, p. 816, para 7-8*]. This also includes the situation where performance has become substantially more onerous [*1990 UNIDROIT Study, p. 4-5*] through an increase in cost of performance [*Office Comment 2 (a) to Art. 6.2.2, p. 219*]. Indeed, the imposition 30 per cent tariff on frozen semen is a substantial increase in the cost of performance, under Article 6.2.2 causing loss to CLAIMANT [*NoA, p. 7, para 18*]. Such alteration of contractual equilibrium is fundamental given that CLAIMANT is faced with financial difficulties which RESPONDENT was well-aware of [*PO2 Q60, para 22*]. CLAIMANT had also been clear that it would not take any risks associated with the changes in regulation [*Cl. Ex. 4, p. 12*]. Consequently, such increase of tariff is considered as a fundamental alteration to the equilibrium of the Contract.

86 To rely on hardship, Article 6.2.2 (a) requires that the alleged events must occur to the disadvantaged party after the conclusion of the contract. A contract is concluded when parties express mutual agreement [*Schlechtriem/Schwenzer, Art. 18, p. 332*]. It is undisputed that the Parties had concluded and signed the contract dated on 6 May 2017 [*Cl. Ex.5, p. 14*]. Such conclusion of the Contract was prior to the imposition of tariff either of 25 per cent or, subsequently, 30 percent

[*NoA, p. 6, para 9-10*]. Hence, the occurrence of hardship via the increase of tariff took place after the conclusion of the contract in accordance with Article 6.2.2 (a).

87 Pursuant to Article 6.2.2 (b), hardship can be established if the alleged events could not have reasonably been taken into account by the disadvantaged parties at the time the contract was concluded. This depends on the degree of foreseeability of the event in question [*Vogenauer, p. 818, para 13*]. Even in case where the change in circumstance is gradual, the final result of such changes may constitute as hardship [*Office Comment 3 (b) to Art. 6.2.2, p. 219*]. In the case at hand, the increase of tariff was a complete surprise for the parties both at 25 per cent and, later, at 30 percent [*NoA, p. 6, para 9-11*]. CLAIMANT could not have foreseen the change in tariff given there was continuing support for free trade between the governments Equatoriana and Mediterraneo for years [*Cl. Ex. 6, p. 15*]. Therefore, it is evidenced that CLAIMANT could not have taken into account the drastic increase of tariff.

88 Article 6.2.2 (c) further requires that the events of hardship must also be beyond the control of the disadvantaged party. Act of government are generally beyond control of contracting parties [*Vogenauer, p. 818, para 14*]. CLAIMANT certainly has not controlled over the increase of tariff in Equatoriana. Thus, the requirement under subparagraph (c) is satisfied.

89 Provided under Article 6.2.2 (d), risks of the alleged hardship event must also not be assumed by the disadvantaged party. This assumption of risk can be followed from the nature of the contract [*Office Comment 3 (d) to Art. 6.2.2, p.* 221; *Vogenauer, p. 818, para 14*]. Here, it cannot be substantiated that CLAIMANT assumes the risks by taking delivery DDP as it was made clear it will not willing to bear further risks associated with a change in delivery term [Cl. E*x 4, p.12*]. This shall be interpreted in line with the intention of CLAIMANT which is known by RESPONDENT [*UNIDROIT, Art. 4.2 (1);* Vogenauer*, p. 584, para 3*]. On this account, risk of the tariff increase was not assumed by CLAIMANT.

90 Consequently, as the requirements establishing definition are fulfilled, the increase of tariff is qualified as hardship under Article 6.2.2 of UNIDROIT Principles.

E. CONSEQUENTLY, THE MOST APPROPRIATE REMEDY AVAILABLE FOR THE ARBITRAL TRIBUNAL TO DECIDE IN THIS CASE IS THE ADAPTATION OF THE CONTRACT

91 As a result of hardship being established as an impediment under Article 79 of the CISG, CLAIMANT is entitled to the price adaptation. A price adaptation can be made by resorting Article 79(5) and the good faith interpretation [*CISG, Art. 7(1); CISG Advisory Council Opinion No.7, para 40*] in addressing the most appropriate remedies.

92 Such adaptation can be made relying on Article 6.2.3 constituting international trade usage [*CISG, Art. 9; Schwenzer, p. 724*]. By interpreting Article 79 of the CISG in line with Article 6.2.3 of UNIDROIT Principles, the situation of when the parties must renegotiate to restore equilibrium of the contract even in absence of price adaptation clause can be found [*Steel Tube Case*]. In particular, Article 6.2.3 (4) of UNIDROIT Principles provides for the adaptation by the arbitral tribunal to make fair distribution of losses between parties, provided that the parties fail to renegotiate [*Office Comment 6 to Art. 6.2.3, p. 225-226*].

93 In the present case, the price adaptation will be the most appropriate remedies. The Parties had resorted to negotiation but failed to agree on the adaptation of the price [*Notice of Arbitration, p. 6, para 12*]. Such failure to settle by renegotiation would lead to necessary consequence that the price can be adapted by the arbitral tribunal. RESPONDENT create the impression for the price adaptation and urges CLAIMANT to deliver the frozen semen without delay [*CISG, Art. 8(1); NoA, p. 6. para 12-13; Cl. Ex.8, p. 17-18*]. Additionally, RESPONDENT also acted in bad faith by reverting its position in the other arbitration [*Lr. by Langweiler, p.49*]. In line with the circumstances of this case, it would be reasonable for the tribunal to adapt the price of the contract.

PRAYER FOR RELIEF

In the light of the foregoing submissions, CLAIMANT respectfully requests the Tribunal should find that:

1. CLAIMANT is entitled to an increase in the purchase price by 1,250,000 US dollars at least, which is a 25 per cent increase due to the higher costs caused by the imposition of tariffs by the Equatarainian government.
2. CLAIMANT has fulfilled the requirements under Article 79(1) of the CISG and hardship is established under Article 79 the CISG.
3. RESPONDENT is responsible for the costs of the Arbitration.

Akira Manuskiattikul

Tilman Lakämper

Nattachaat Urairong

Deeksha Lalwani

Deeksha Lalwani

Teetach Sarakhet

Irene Ittisarnronnachai

Nantaporn Suvannathat