PHAR LAP ALLEVAMENTO (CLAIMANT)

v.

BLACK BEAUTY EQUESTRIAN (RESPONDENT)

MEMORANDUM FOR CLAIMANT

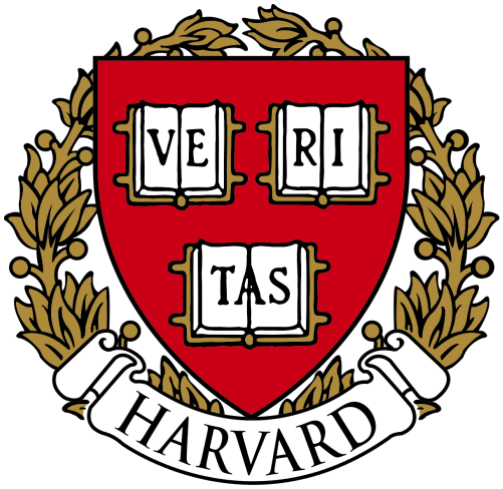

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TABLE OF ABBREVIATIONS

¶/¶¶	Paragraph/Paragraphs
§/§§	Section/Sections
Art./Arts.	Article/Articles
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
cl.	Clause
Cmt.	Comment
CoC	Code of Conduct
Ex.	Exhibit
GC	General Conditions
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
ibid.	*Ibidem*
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration
n.	Note
No.	Number
NoA	Notice of Arbitration
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
R.	Record
RNoA	Response to Notice of Arbitration
SA	Frozen Semen Sales Agreement
SCC	Stockholm Chamber of Commerce
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN GCP	United Nations Global Compact Principles
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar

TABLE OF AUTHORITIES

PRIMARY SOURCES

COMMENTARIES

CASES

National Courts

Russia

Singapore

United Kingdom

United States

STATEMENT OF FACTS

1. Phar Lap Allevamento (CLAIMANT), registered and based in Mediterraneo, operates Mediterraneo's most renowned stud farm [*NoA ¶1*]. Black Beauty Equestrian (RESPONDENT; jointly, the "Parties"), located in Equatoriana, established its racehorse stable three years ago [*NoA ¶4*]. CLAIMANT's racehorse Nijinsky III is one of the most sought-after stallions for breeding [*NoA ¶3*]. On 21 March 2017, following Equatoriana's temporary lifting of its ban on artificial insemination for racehorses, RESPONDENT's Mr. Antley contacted CLAIMANT's Ms. Napravnik about the availability of 100 doses of Nijinsky III's frozen semen for its new breeding program [*Ex. C1*].

2. While CLAIMANT had never sold frozen semen for racehorse breeding before, and the large quantity sought "came as a surprise," on March 24 2017 CLAIMANT agreed to provide the requested doses in several installments [*PO2 ¶15; Ex. C2*]. However, CLAIMANT attached terms and conditions to the sale, emphasizing that the doses were not to be re-sold without CLAIMANT's express written consent and that in making the exception, it desired to facilitate a long-term relationship with RESPONDENT [*Ex. C2*]. In making the sale, CLAIMANT was also motivated by a desire to overcome its financial difficulties [*PO2 ¶22, 29*]. In response, RESPONDENT explained that its request for such a high number of doses was due to the fact that it could use any doses acquired during the lifting of the ban even in the event of reinstatement [*Ex. C3*]. Tellingly, although RESPONDENT had always intended to resell the doses at a profit to other breeders in Equatoriana, it did not disclose this fact to CLAIMANT [PO2 ¶*20*]. It did, however, insist on delivery duty paid ("DDP") [*ibid.*]. RESPONDENT also objected to the choice of law and forum selection clause [*ibid.*]. On 31 March 2017, CLAIMANT agreed to delivery DDP for an additional USD 1000 per dose, on the condition that a hardship clause be included to protect it against "changes in customs regulation or import restrictions" [*Ex. C4*].

3. Negotiations between Mr. Antley and Ms. Napravnik over the dispute resolution and hardship clauses continued over email and in person until they were involved in a car accident together on 12 April 2017 [*Ex. C8*]. Mr. Krone and Mr. Ferguson abruptly took over the negotiations for CLAIMANT and RESPONDENT, respectively, although neither was previously involved in the drafting of the Sales Agreement (the "SA") and they were uninformed of the status of the negotiations [*Ex. C8; Ex. R3*].

4. Prior to the accident, Mr. Antley left a note reminding himself to clarify the venue and applicable law in the arbitration clause and to seek a narrowing of the hardship clause [*Ex. R3*]. Though aware of this note [*Ex. R3*], Mr. Krone failed to take any of the suggested actions before

finalizing the agreement [*PO2* ¶*7*]. The final contract was signed on 6 May 2017 [*SA*]. The dispute resolution clause lacked an express choice of law provision and the hardship clause was limited in scope to circumstances "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*ibid.*]. Although Ms. Napravnik and Mr. Antley agreed to adaptation of the contract by a tribunal in the event of a disagreement between the Parties, no reference to this was made in the SA [*Ex. C8*].

5. In November 2017, Mediterraneo levied a 25% tariff on agricultural products from Equatoriana, to which Equatoriana promptly retaliated by imposing a 30% tariff on agricultural imports from Mediterraneo [*NoA* ¶¶*9, 10*]. The tariff applied to frozen horse semen, an unprecedented measure for both counties [*Ex. C7; PO2* ¶*23*]. The third and final shipment of frozen semen was set for 23 January 2018 [*SA*]. On 20 January, Ms. Napravnik reached out to Mr. Shoemaker to discuss the tariff [*Ex. C7*]. The following day, after consulting his wife, an attorney, Mr. Shoemaker called Ms. Napravnik to urge authorization of the shipment and adapted verbatim the statement his wife prepared, which was designed to prompt authorization of the shipment without creating any binding agreement [*Ex. R4*]. Timely delivery of the shipment was crucial to RESPONDENT as it had already resold the doses and the buyers were awaiting receipt [*Ex. R4; PO2* ¶*33*]. Assured by Mr. Shoemaker's assertions, Ms. Napravnik believed the SA was modified such that CLAIMANT would deliver the doses in exchange for a price increase to be finalized later [*Ex. C8*]. This was the intended effect of Mr. Shoemaker's statements [*Ex. R4*].

6. CLAIMANT then learned that RESPONDENT had resold the semen contrary to the express written consent requirement and the express information requirement in the SA [*PO2* ¶*16*]. When confronted, RESPONDENT's CEO became aggressive and refused to continue negotiating a price increase [*Ex. C8*]. As a result, CLAIMANT suffered a loss of USD 1,250,000 and faces bankruptcy [*NoA* ¶*18; PO2* ¶*29*].

7. Following commencement of arbitral proceedings, CLAIMANT received reliable information that RESPONDENT had recently been party to a HKIAC arbitration in which it argued that, having been detrimentally impacted by an additional tariff, unforeseeable change of circumstances justified adaptation of the contract price [*R. p. 50*]. CLAIMANT sought to admit this information as material evidence demonstrating inconsistencies in RESPONDENT's position [*ibid.*]. RESPONDENT objected, arguing that the evidence was barred under the express confidentiality requirement articulated in HKIAC Art. 42 [*R. p. 51*].

SUMMARY OF ARGUMENT

8. The Tribunal should find it has the power to adapt the contract. The arbitration clause is governed by the law of Mediterraneo. Because the Parties indicated their intention for the clause to be read broadly and a broad reading of the arbitration agreement permits adaptation, the Tribunal has the power to adapt the contract under Mediterraneo law [***I***].

9. The Tribunal may and should admit CLAIMANT's evidence of RESPONDENT's prior arbitral proceeding, even if the evidence was obtained through an illegal hack of RESPONDENT's computer system. International arbitration generally, and HKIAC Rules specifically, confer broad discretion on the Tribunal with respect to admissibility of evidence. The confidentiality obligation from RESPONDENT's prior arbitration constrains neither the Tribunal nor CLAIMANT. In fact, international principles of transparency and justice compel admitting the evidence so that the Tribunal can render an informed decision [***II***].

10. CLAIMANT is entitled to the payment of USD 1,250,000 due to the additional delivery costs it incurred as a result of Equatoriana's unexpected tariffs. In accordance with UNIDROIT Art. 4, this tariff constitutes either hardship or unforeseen events as provided for in SA cl. 12, which states that, as the seller, CLAIMANT should not have borne the resulting additional costs. Specifically, CLAIMANT prevails under both the subjective and reasonableness tests set out in Art. 4. Alternatively, pursuant to UNIDROIT Art. 3.2, if the tariff costs are to be borne by CLAIMANT under the SA, it is as a result of a mistake in CLAIMANT's understanding caused by RESPONDENT. This gives CLAIMANT the retroactive right to partial avoidance of the third delivery and thus a right to recover the additional costs as restitution or damages [***III***].

11. In the unlikely event that the Tribunal decides not to adapt the price under cl. 12 of the SA, the price should still be increased under the CISG. Because there is a veritable gap in CISG Art. 79 regarding the meaning of impediment, UNIDROIT Art. 6.2.2 & 6.2.3 should supplement CISG Art. 79. Therefore, hardship constitutes an impediment in the meaning of CISG Art. 79 and the disadvantaged party has the right to request renegotiations and ask for adaptation from a court when the parties fail to reach an agreement within a reasonable time. In this case, because CLAIMANT has suffered a hardship and negotiations have decisively broken down, the Tribunal should award USD 1,250,000 to the CLAIMANT to restore the SA's equilibrium under the CISG [***IV***].

ARGUMENTS

I. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT.

12. Although RESPONDENT seeks to evade responsibility under the agreement with a baseless challenge, the Tribunal has the power under the arbitration agreement to adapt the contract. Under the 2018 HKIAC Rules (the "HKIAC Rules") and the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") that govern this arbitration [*P01, §§II, III(4)*], the Tribunal has the competence to decide on its own jurisdiction [*See HKIAC Rule 19.1; Model Law Art 16(10)*]. It may thus do so here.

13. As explained below, the Parties failed to include a choice of law provision in the arbitration agreement [*SA cl. 15*], but the underlying SA of which it forms a part is expressly governed by the law of Mediterraneo [*SA cl. 15*, *Ex. R2*]. Being aware of the need for a strong arbitration agreement, the Parties negotiated the arbitration agreement extensively before settling on the agreement in its current form [*Ex. C3, C4, R1, R2*]. As it stands, the arbitration agreement subjects *any* dispute arising out of the SA to arbitration [*SA cl. 15*]. Yet despite agreeing to this expansive arbitration clause, RESPONDENT now argues that the Tribunal lacks the power to adapt the contract [*Answer* ¶*12*]. However, RESPONDENT's plainly opportunistic objection fails as a matter of law and equity.

14. The Tribunal has the power to adapt the SA and provide CLAIMANT's requested relief. The Tribunal has the power to adapt the contract because the law of Mediterraneo governs the arbitration clause [***A***] and interpretation of the arbitration clause under Mediterraneo law gives the Tribunal the power to adapt the contract [***B***]. Application of international law principles further supports allowing the Tribunal to adapt the contract [***C***].

A. The law of Mediterraneo governs the arbitration agreement

15. The law of Mediterraneo governs the arbitration agreement. The HKIAC Rules do not offer a standard for determining which law applies to the arbitration agreement in the absence of an express choice by the parties. However, under the Model Law there is a presumption in favour of the substantive law of the contract where the parties either explicitly or implicitly indicated it would apply [***1***]. Here, the parties implicitly indicated the substantive law of the contract would govern the arbitration agreement [***2***], a conclusion which is further supported by the general presumption in favour of arbitrability in Model Law jurisdictions [***3***]. Further, despite RESPONDENT's claims, the

principle of separability does not negate application of the substantive law to the arbitration agreement [***4***].

1. Under the Model Law, the substantive law of the SA governs where the parties explicitly or implicitly indicated it would apply

16. Under the Model law, there is a presumption in favour of the substantive law of the contract governing the arbitration clause where the parties failed to include an express choice of law clause in the arbitration agreement. Articles 34(2)(a)(i) and 36(1)(a)(i) of the Model Law establish a two-prong standard for determining which law applies to the arbitration clause [*Model Law Art. 34(2)(a)(i) & 36(1)(a)(i); Born §4.04(a)(1)(h)(i)*]. First, the tribunal gives effect to any express or implied choice of law indicated by the parties [*Born §4.04(a)(1)(h)(i)*]. Second, if the parties failed to indicate either an express or implied choice of law, the tribunal will default to the law of the arbitral seat [*ibid.*]. Here, the Parties failed to include a choice of law provision in the arbitration agreement [*SA cl. 15*]. Since CLAIMANT and RESPONDENT failed to do so, their implied intent is at issue here [*See Sulamérica* ¶¶5, 10 (concluding that parties' implied choice of law was at issue where arbitration agreement itself did not contain express choice of law provision)].

2. The Parties implied that the substantive law of the SA would govern the arbitration clause

17. The Parties implied that the substantive law of the SA would govern the arbitration clause. The Parties' interactions show that they intended for the substantive law to apply [***i***]. Further, they could not have intended the result of applying Danubian law [***ii***].

i. The Parties' interactions show that they intended the substantive law to apply

18. The Parties implied that the substantive law of the SA would govern the arbitration clause. The underlying factual circumstances support the conclusion that the Parties implied that Mediterraneo law would apply. First, there is the choice of law clause contained in the underlying SA. "[A]n express choice of law governing the substantive contract is a strong indication of the parties' intention" as to what law should apply to the arbitration clause [*Sulamérica* ¶*26*]. This is because "the natural inference" is that the parties intended that the "law chosen to govern the substantive contract [would] also govern the agreement to arbitrate" [*Sulamérica* ¶*11*]. Here, the SA contains an express choice of law provision stipulating that the SA is governed by the law of Mediterraneo [*SA cl. 15* ("This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG).")]. Thus, the choice of

law provision in the SA serves as "a strong indication" that the Parties intended Mediterraneo law to apply to the arbitration clause [*Sulamérica* ¶*26*].

19. The negotiations surrounding the drafting of the arbitration agreement further support this conclusion since "[p]re-contractual negotiations are an excellent indicator of the real intention of the parties" [*ICC Case No. 7920*]. During the preliminary discussions, RESPONDENT wrote that it would accept the law of Mediterraneo for dispute-resolution purposes if the courts of Equatoriana had jurisdiction [*Ex. C3*]. Evidently, RESPONDENT felt that Mediterraneo law was appropriate for resolution of the dispute. Although CLAIMANT rejected the suggestion that Equatoriana courts have jurisdiction in their response [*Ex. C4*], it did not mention the law of Mediterraneo, suggesting it felt it was already decided that Mediterraneo law would apply [*ibid.*]. This is further supported by the fact that, when negotiating the substance of the arbitration clause, CLAIMANT suggested that the seat of arbitration be Danubia but specified that the law applicable to the SA remain the law of Mediterraneo [*Ex. R2*]. The arbitration clause is, on its face, part of the SA [*SA cl. 15*; *Leibinger* (holding that the proper law of an agreement to arbitrate in London was German law because parties had expressly chosen German law as substantive law of the contract and arbitration agreement was an adjunct to main contract)]. Further, the SA signed by both Parties did not include RESPONDENT'S earlier suggestion that the law of Equatoriana apply to the arbitration clause [*ibid.; Ex. R1*], indicating that in drafting the agreement CLAIMANT felt that the parties had already settled on the law of Mediterraneo for dispute resolution purposes.

20. RESPONDENT attempts to negate these indications of the Parties' intent by claiming they would have inserted a choice of law clause specifying that Danubian law would apply into the arbitration agreement had it known that no choice of law clause was included [*Ex. R3*]. However, this is after the fact. What parties claim after the fact should have no bearing on what parties intended the law to be at the time the contract and arbitration clause were written and signed. At the time the SA was signed, it was not the Parties' intention to insert a choice of law clause specifying the law of Danubia would apply to the arbitration agreement.

ii. The Parties could not have intended the result of applying Danubian law

21. In addition, the Parties could not have intended the result of applying Danubian law given that its application "would seriously undermine [the] agreement" [*Sulamérica* ¶*31*]. Application of Danubian law would restrict the applicability of the arbitration agreement to a narrow set of circumstances due to Danubian law's emphasis on the four-corners rule of contract interpretation [*PO1 p.52*]. As

discussed above, the Parties were highly conscious of the potential difficulties associated with submitting disputes to either the courts of Mediterraneo or Equatoriana and intensely negotiated the terms of the arbitration agreement [*Ex. C3, C4, R1, R2*]. Given their concern with fairness and the need for an equitable outcome, they could not have intended the arbitration clause to apply as narrowly as it would under Danubian law. Further, the agreement subjects *any* dispute arising out of the SA to arbitration, indicating that the parties intended the agreement to have a broad scope [*SA cl. 15*]. The Parties could not have intended Danubian law to apply given that it severely restricts what was intended to be a broadly encompassing agreement. That RESPONDENT now claims that Danubian law should apply only serves to emphasize their opportunism in seeking to limit the tribunal's jurisdiction and avoid any ramifications that might come from adopting the SA.

22. In conclusion, Parties' implied intent was for the law of Mediterraneo to apply and it is unnecessary to default to the law of the seat of arbitration.

3. Adopting the substantive law is further supported by the general presumption in favour of arbitrability in Model Law jurisdictions

23. Adopting the substantive law is further supported by the generally pro-arbitration approach of Model Law jurisdictions [*Born §9.02(D)(1)(e)*]. Courts in Model Law jurisdictions have shown a strong tendency to interpret arbitration clauses so as to allow for the settlement of disputes [*See, e.g., Onex Corp v. Ball Corp*. p.158–160 (stating that "where the language of the arbitration clause is capable of bearing two interpretations" the courts "should lean towards honoring [the interpretation that provides for arbitration]")]. This includes interpreting arbitration agreements so they encompass a wide swath of disputes to allow for a greater number of potential disputes to go to arbitration [*See, e.g., Klöckner Pentaplast* ¶*17* (holding that it would be illogical to assume that businessmen did not intend for tribunal to hear disputes over quality of goods where arbitration agreement provided that breach of contract claims would be heard by tribunal)]. That is to say, where the parties clearly indicated their intent to submit one type of dispute towards arbitration, courts will interpret the arbitration agreement to cover all sufficiently related claims. For example, in a case involving an arbitration provision similar to the one at issue in this dispute, the Austrian Oberster Gerichtshof held that since the agreement covered "'all disputes arising out of a contract,'" the agreement likewise covered extra-contractual claims when the "event giving rise to those claims and the breach of contract [were] indissolubly connected." [*R GmbH* ¶*6*]. In the court's view, the tribunal's jurisdiction under the arbitration agreement extended beyond strictly contract-related claims to allow the tribunal to settle the dispute at issue because the extra-contractual claims had a close functional connection to the contractual

claims [*ibid.*]. Model Law jurisdictions thus favour interpreting an agreement to allow for arbitration where possible.

24. Here, application of the substantive law of the SA is more consistent with the approach taken by Model Law jurisdictions. As the Tribunal has recognized, under Danubian contract law, the arbitration agreement would be interpreted narrowly, meaning that there is a high likelihood the agreement would be found not to authorize contract adaptation by the Tribunal [*P01 §II*]. If the Tribunal cannot adopt the contract, it will not have jurisdiction over this dispute [*ibid; Answer ¶12*]. Thus, RESPONDENT'S argument that the Tribunal should apply the *lex arbitri* takes the exact opposite approach of that favoured by Model Law jurisdictions. Rather than favouring arbitration, it limits the number of arbitral disputes, although it would be "illogical" to assume that the parties, savvy businessmen, intended this result [*Klöckner Pentaplast ¶17*]. This is particularly so given the Parties' long discussion about potential dispute resolution practices and the jurisdiction in which it would take place [*Ex. C3, C4, R1, R2*]. Danubian law would thus narrow the variety of disputes covered by the arbitration agreement contrary to Model Law jurisdictions' presumption in favour of arbitrability.

25. Application of the substantive law of the SA, by contrast, fits with the presumption of arbitrability and its underlying goals. Under Mediterraneo law, the Tribunal has the power to adapt the SA and thus hear this dispute [*infra §I(B)*]**.** By permitting a wider range of disputes to be arbitrated under the agreement, Mediterraneo law thus allows the Tribunal to interpret the agreement so as to fit with the presumption in favour of arbitrability in Model Law jurisdictions.

4. The doctrine of separability does not contradict this approach

26. Despite what RESPONDENT claims, the concept of separability does not contradict this approach. Under the doctrine of separability, the arbitration clause is considered to be a separate contract independent from the main contract [*Lew/Mistrelis/Kröll ¶6-9*]. Art. 16(1) of the Model Law specifically codifies this concept by dictating that in the event that the overall contract is declared null and void, the dispute can still be arbitrated [*UNCITRAL Art. 16(1)* ("A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso juro* the invalidity of the arbitration clause.")]. CLAIMANT agrees that the principle of separability is an important one and that, under the proper circumstances, that principle should apply. However, those are not the circumstances of the instant case. The concept of separability was developed to ensure arbitrability of a dispute in the event that the underlying contract was invalid [*Redfern & Hunter §2.101*]. By ensuring that the parties' intention to submit disputes to arbitration is not easily defeated, it "also protects the jurisdiction of the

arbitration tribunal" [*Lew/Mistrelis/*Kröll ¶6-10]. At its core, the concept of separability is intended to ensure the arbitration panel has jurisdiction over a wide swath of disputes. Applying this principle so as to restrict the Tribunal's jurisdiction, as RESPONDENT would have the Tribunal do, contradicts the concept's very purpose.

B. Interpretation of the arbitration clause under Mediterraneo law gives the Tribunal the power to adapt the SA

27. Interpretation of the arbitration clause under Mediterraneo law gives the Tribunal the power to adapt the SA. Mediterraneo law adopts the view that the interpretation and conclusion of arbitration clauses in CISG-governed sales contracts are likewise governed by the CISG [*PO1 §III(4)*]. Applying Art. 8 of the CISG to the circumstances of this case indicates the arbitration clause should be read broadly to cover adaptation of the SA. This is because RESPONDENT either subjectively knew or ought to have been aware of CLAIMANT's intent for the clause to be read broadly [***1***]. At the very least, an objectively reasonable person in RESPONDENT'S position would have understood that to be CLAIMANT's intent [***2***].

1. RESPONDENT knew or could not have been unaware that CLAIMANT intended the arbitration agreement to be read broadly

28. RESPONDENT knew or could not have been unaware that CLAIMANT intended the arbitration agreement to be read broadly. Under Art. 8(1) of the CISG, statements and conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was [*CISG Art. 8(1)*]. Art. 8(1) analysis is subjective, and requires that the intent was either easy to discern or the circumstances "practically compelled an inquiry" even if the party did not undertake one [*Schlechtriem/Schwenzer p.152*]. To determine party intent, the negotiations, any practices the parties established between themselves, usages, and subsequent conduct of the parties may be considered [*CISG Art. 8(3)*]. Consideration is to be given to all the relevant circumstances surrounding the material to be interpreted [*Schlechtriem/Schwenzer pp.150–151*]. However, the primary starting point should be the wording of the agreement [*ibid.*].

29. Considering the wording of the agreement, CLAIMANT clearly intended that the clause should be read broadly. The arbitration clause reads in relevant part that "*any* dispute arising out of this contract, including performance, breach, or termination thereof shall be referred to and resolved by arbitration" [*SA cl. 15* (emphasis added)]. That the arbitration agreement refers to "any" dispute arising out of the contract indicates that it applies to "whichever" dispute "might be chosen" from among the many possibilities [*Oxford English Dictionary*; *Yates v. U.S. p. 1092* (indicating that "any has an

expansive meaning that incorporates all types")]. The words "arising out of" are also broadly construed, covering even extra-contractual disputes so long as they are sufficiently related to the underlying contract [*R GmbH* ¶*6* (determining that where a close functional connection between contract claims and extra-contractual claims, the latter may still be covered by an agreement limited to claims arising out of a contract); *L v. M.* (determining that the words "arising out of" are "widely construed")]. Thus, the language of the arbitration clause shows an easily discernible intent for the clause to cover a wide variety of disputes, including contract adaptation [*Schlechtriem/Schwenzer p.152*]. If nothing else, the broad language of the arbitration clause should have pushed RESPONDENT to inquire as to CLAIMANT's understanding of the SA, which it failed to do [*ibid.*].

30. In addition, a "reliable and authentic expression of the parties' intentions is their choice of international arbitration to resolve their disputes" [*Born §9.02(D)(6)*]. Since CLAIMANT agreed to international arbitration to claims arising out of the SA [*SA cl. 15*], "it would be illogical to suppose that [CLAIMANT] wanted a 'split' jurisdiction" [*Landegericht Hamburg*]. That is, the fact that CLAIMANT agreed to arbitrate any dispute arising out of the SA, including breach and termination, makes it highly unlikely it would have intended for contract adaptation claims to be litigated in a different forum [*SA cl. 15*; *Klöckner Pentaplast* ¶*17* (determining that it would be specious to assume businessmen intended for the tribunal to decide breach of contract claims but not disputes over the quality of goods)]. Thus, CLAIMANT's intentions were easy to discern, or at the very least, the circumstances surrounding the agreement compelled the conclusion that CLAIMANT intended the clause to be read broadly.

2. Even if RESPONDENT was not aware, a reasonable person in the same circumstances would have understood that CLAIMANT intended the agreement to be read broadly

31. Even if RESPONDENT was not subjectively aware of CLAIMANT's intent, an objectively reasonable person in RESPONDENT'S position would have understood that CLAIMANT intended the agreement to be read broadly. In cases where Art. 8(1) does not apply—that is, where one party was unaware of the other's intent—Art. 8(2) applies in its place [*CISG Art. 8(2)*]. Under CISG Art. 8(2), the conduct of a party is to be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances [*CISG Art. 8(2)*]. Analysis under Art. 8(2) is thus objective where Art. 8(1) is subjective, although it considers the same circumstances listed in Article 8(3) [*Schlecthreim/Schwenzer p.153–154; CISG Art. 8(3)*]. Therefore, the Tribunal should consider all relevant circumstances of the case including negotiations, usages, and any subsequent conduct of the parties [*CISG Art. 8(3)*].

32. International arbitration general practice is one factor the Tribunal might consider [*ibid.*]. General practice holds that where there is doubt as to the scope of an arbitration agreement, the consensus is that clauses should be interpreted liberally [*Born* §9.02(D)(6); *Wintershall AG* ¶*10* (pointing out that trend has been not only to take a non-restrictive view of arbitration agreements, but even an expansive one)]. Arbitration agreements without an express limitation should thus be interpreted to cover all claims in connection with a contract to ensure that disputes are resolved in a single forum [*Lew/Misrelis/Kröll* ¶*7-61; Born §9.02(D)(6)*]. A reasonable person involved in an international sales contract with an arbitration agreement, as RESPONDENT is here, would thus have been aware that CLAIMANT intended the agreement to be read broadly as no contrary intent was expressly articulated. As a result of this broad reading, the Tribunal should find that it has the power to adapt the SA under the arbitration agreement.

C. International Law principles also support allowing the Tribunal to adapt the SA

33. Application of international law principles also supports allowing the Tribunal to adapt the SA. This involves adopting the method first introduced by the French courts and determining the existence and scope of the agreement exclusively by reference to the parties' discernible common intentions [*Redfern & Hunter §§3.33–3.34; Dalico p.116–117*]. This method answers any concerns RESPONDENT has with regard to the separability of the arbitration agreement since the French method places the arbitration agreement outside any reference to a specific choice of law regime [*FGG* ¶*436*]. Thus, the Tribunal does not have to refer to either Danubian or Mediteranneo law to determine whether it has the power to adapt the SA, but rather may refer to the Parties' common intent [*ICC Case No. 9302*]. As discussed above, a "reliable and authentic expression of the parties' intentions is their choice of international arbitration to resolve their disputes" [*Born §9.02(D)(6)*]. Given that the Parties chose international arbitration and must have been aware that arbitration clauses are interpreted liberally [*ibid.*], the Parties common intent was arguably to have the arbitration clause cover any disputes arising under the SA, including adaptation [*Lew/Mistrellis/Kröll* ¶*7-61*]. RESPONDENT'S disingenuous claims that Danubian law applies only serve to highlight its efforts to use spurious arguments about the SA's arbitrability to avoid its obligations thereunder.

II. CLAIMANT SHOULD BE PERMITTED TO SUBMIT EVIDENCE FROM RESPONDENT'S PRIOR ARBITRATION PROCEEDING

34. The Tribunal may and should permit CLAIMANT to submit evidence from other arbitration proceedings, even if the evidence was obtained through an illegal hack of RESPONDENT's computer system. International arbitration generally, and the HKIAC Rules specifically, confer broad discretion

on the Tribunal with respect to admissibility of evidence [***A***]. CLAIMANT and the Tribunal are neither impeded nor directly impacted by the confidentiality requirements of RESPONDENT's prior arbitration [***B***]. In addition, international principles of transparency and justice compel admitting the evidence [***C***].

A. The Tribunal has broad powers of discretion

35. Both the HKIAC Rules and international practice empower the Tribunal to permit the admission of any evidence it deems appropriate. The HKIAC Rules empower the Tribunal to make its own determinations [***1***]. This is consistent with international practice, as most international arbitration institutions grant tribunals wide discretion [***2***] and tribunals frequently make use of this broad power [***3***].

1. HKIAC Art. 22 empowers the Tribunal to make its own evidentiary determinations

36. The HKIAC Rules extend to tribunals broad discretion. "Consistent with other provisions of the HKIAC Rules, Art. 22 provides a high degree of flexibility for the parties and the arbitral tribunal to deal with evidentiary matters and to run hearings, whilst establishing minimum requirements to safeguard due process" [*Moser & Bao p.190*]. Specifically, Art. 22.2 establishes that the tribunal has the authority to determine the "admissibility, relevance, materiality and weight of the evidence" and may choose whether or not "to apply strict rules of evidence" [*ibid. p. 191*]. Here, too, the Tribunal is permitted broad discretion such that it may admit the contested evidence.

2. International practice is consistent with the HKIAC Rules

37. The HKIAC Rules are also consistent with the emerging international view of arbitral confidentiality. "[E]ven in the absence of [express authority] arbitral tribunals clearly have the implied authority to resolve issues of admissibility, weight and relevance of the evidence" [*Born §15.09(A)*]. Contrary to the "rigidity" of evidentiary standards in State court litigation, in arbitration "the rule of thumb for evidentiary matters . . . is flexibility" [*Tomka & Proulx p.3*].

38. In the age of WikiLeaks, tribunals have been faced with parties challenging the bounds of flexibility and seeking to admit evidence obtained through large scale data breach [*Ireton p.1*; *Yukos* (permitting confidential diplomatic cables that had been illegally obtained and published on WikiLeaks)]. In response, relying on either implied or express authority, tribunals have largely been receptive to admitting such evidence [*ibid.*].

39. HKIAC's position is also consistent with other international arbitration institutions who similarly grant tribunals largely unfettered authority [*Moser & Bao p.191*; *UNCITRAL Art. 19(2); UNCITRAL Arbitration Rules Art. 25(6); Hong Kong Arbitration Ordinance §47(3); IBA Rules Art. 9(1)*].

3. Tribunals frequently leverage this broad discretion

40. Consistent with the wide discretion bestowed on tribunals by the HKIAC Rules and general international law practice, tribunals rarely exclude evidence as inadmissible [*Born §15.09(A)* ("In practice, international arbitral tribunals typically do not apply strict rules of evidence…the tribunal will err substantially on the side of permitting presentation of the facts that a party desires.")]. Rather, "tribunals generally admit evidence to avoid risking vacatur for failure to provide a full and fair opportunity to present the case," and instead impose some evidentiary burdens through determinations of credibility, weight and value [*Sussman p.521* (reporting that 89% of arbitrators admitted evidence otherwise excludable under national evidentiary standards)]. This approach reflects a concern that barring evidence, instead of merely limiting its weight where necessary, would impact a party's right to be heard and deny them the full opportunity to present their case. [*Waincymer p.96*]. Thus, while "[d]efects in evidence are . . . usually taken into account in evaluating its credibility, weight and value," they do not preclude admissibility [*Born §15.09(A)*].

41. Therefore, consistent with HKIAC Rules and international law, the Tribunal has the authority and discretion to admit CLAIMANT's evidence.

B. The confidentiality requirements of RESPONDENT's prior arbitration are not dispositive

42. The confidentiality requirements of RESPONDENT's prior arbitration are not dispositive in this case. HKIAC Art. 45.1 does not create an absolute duty of confidentiality [***1***], and therefore does not impact the admissibility of CLAIMANT's evidence because third parties fall outside the confidentiality requirement [***2***]. Even assuming that Art. 45.1 impacts the admissibility of CLAIMANT's evidence, HKIAC Art. 45.3 negates the confidentiality requirement and therefore allows its admission [***3***].

1. HKIAC Art. 45.1 does not impose an absolute duty of confidentiality

43. HKIAC Art. 45.1 does not impose an absolute duty of confidentiality. HKIAC Art. 45 introduces the need for confidentiality in arbitral proceedings and HKIAC Art. 45.1 specifically forbids the disclosure of information relating to an arbitration. Yet "the duty of confidentiality related to arbitral proceedings or awards is not absolute" [*Moser & Bao p.283*]. "[I]nstitutional rules which parties may incorporate in their arbitration agreements generally do not provide broad confidentiality protections," and while preserving privacy they do not ensure confidentiality [*Noussia p. 24–26*]. That is, "international arbitration rules often go no further than requiring that arbitrators maintain limited levels of confidentiality in the processes they administer" [*ibid. p.26 n.28*].

44. The AAA's International Arbitration Rules, for example, include a presumption that hearings

remain private, but that selected awards may be publicly available unless the parties agree otherwise [*Noussia p.26 n.28*]. Significantly, the rules only limit the confidentiality requirement to the arbitrators; the parties are not bound [*ibid.*]. Similarly, ICC Internal Rules generally do not restrict the parties' rights to disclose evidence or information they learn during arbitration [*ibid.*]. In fact, most international rules leave even the meaning of "confidential nature" unclear, further weakening the impact of confidentiality provisions [*ibid.*].

45. State courts also take a more lenient stance with respect to the duty of confidentiality. Though State laws in various jurisdictions do not expressly address their stance on arbitral confidentiality, "[t]he emerging view of the courts appears to be that such disclosures may be compelled" [*Noussia p.35*]. Courts have permitted discovery of arbitration materials in subsequent cases before the court, consolidated arbitral proceedings, and most importantly, permitted disclosure of prior arbitral proceedings (and the arbitral award) in subsequent proceedings [*Noussia p.26; Kouris p.134–135*].

46. American courts, for example, are generally unwilling to grant protective orders that prevent the introduction of arbitration communications and instead promote a longstanding judicial policy favouring admissibility of evidence [*Noussia p.28; Reuben p.1260–1268*]. In *U.S. v. Panhandle,* the court held that arbitration communications are discoverable and admissible and refused to grant an order protecting them under the U.S. FRCP 26(c). The court rejected the argument that internal arbitration rules require confidentiality and also rejected as inadequate to establish good cause the idea that economic harm might be caused by disclosure [*Noussia p.28*]. Likewise, in *Cont'ship Containerlines*, the court compelled discovery of arbitration communications from an international commercial arbitration held in London. The court rejected the argument that duty of confidentiality is implied at law [*ibid.*]. More importantly, the court noted that there was a lack of external constraints, such as a contractual confidentiality agreement [*ibid.*].

47. European Union law has similarly evolved and broadened the scope of permissible evidence. "[T]he prevailing principle of European Union law is the unfettered evaluation of evidence and the sole criterion relevant in the evaluation is the reliability of the evidence" [*Dalmine* ¶*72*; *Persia Int'l Bank* ¶*95* (permitting disclosure of diplomatic cables from U.S. Government to defendant EU Members States, as it was "relatively credible" and "ha[d] not been disputed by the U.S. Government")].

48. This general treatment of confidentiality provisions recognizes that confidentiality is not always reasonable in arbitral proceedings. In *Abu Dhabi Gas*, in an effort to achieve consistency in judicial outcomes, the court appointed the same arbitrator to two similar cases, and effectively made all relevant documents and transcripts from one proceeding available in the next. This decision underscores the futility in "impos[ing] an obligation of confidence, which in reality can't be enforced" without

compromising other arbitral goals [*Noussia p.81*]. Confidentiality is also unachievable where witnesses are not subject to such obligations and there are numerous opportunities for disclosure of the award in court, either by a party to the arbitration or by publication of court proceedings [*ibid.*].

2. HKIAC Art. 45.1 only creates an obligation of confidentiality with respect to the current arbitral proceeding

49. Even assuming that HKIAC Art. 45.1 should be strictly applied, Art. 45.2 elaborates that only parties who consent to arbitration are bound by an express duty of confidentiality [*Moser & Bao p.282*]. HKIAC Art. 45.2 also specifically extends the confidentiality requirement to the arbitral tribunal and related parties. Both provisions only create a confidentiality requirement amongst the members implicated in the arbitration proceeding. The provision does not provide that the duty of confidentiality is applied to third parties who did not consent to confidentiality in the original proceeding. Here CLAIMANT is a party to the current arbitral proceeding, but was a non-party to RESPONDENT's prior arbitral proceeding. A duty of confidentiality cannot now be imposed on Claimant who never provided consent to such terms.

50. International law recognizes confidentiality provisions "bind only the parties entering those agreements" [*Noussia p.17*]. Confidentiality agreements may not bar parties, witnesses and other third-party non-signatories from publicly revealing underlying information where they have not signed binding agreement [*Noussia pp.21, 25, 27; Schmitz pp.1211, 1222*]. Further, third parties are permitted to seek compulsory disclosure of materials produced in arbitral proceedings from the parties to those proceedings, unrestricted by confidentiality obligations [*Born §20.03(C)*].

51. Even State courts which favour a more conservative approach in the evidence they admit recognize this distinction. For example, in Germany, representative case law attests that the obligation to preserve confidentiality is protected, "only so far as the proceedings themselves are concerned and so long as they last and that it does not extend beyond them" [*Noussia p.76*].

52. In *Esso v. Plowman*, the High Court of Australia found that the confidentiality provision in the underlying arbitration agreement would bind only the parties and the arbitrators [*Esso v. Plowman* ¶*31*]. Alternatively, witnesses, and similar non-signatories, were under no obligation of confidentiality [*ibid.*]. Similarly, in *Jaffe*, the court compelled production of arbitral communications at the request of a third party, notwithstanding an express confidentiality agreement [*Noussia p.28*]. In doing so, the court made a distinction between disclosures to the general public and disclosures in the context of formal legal proceedings [*ibid.*].

3. Even assuming CLAIMANT falls within the confidentiality requirement of

RESPONDENT's prior arbitration, the evidence is an exception to the general obligation

53. Even assuming a duty of confidentiality is imposed on the CLAIMANT, HKIAC Art. 45.3 provides certain exceptions to the confidentiality requirement. Specifically, HKIAC Art. 45.3(a)(i) grants disclosure of confidential information "to protect or pursue a legal right or interest of the party." If CLAIMANT does fall within the scope of HKIAC Art. 45.1 and 45.2, then the fact that the evidence will be used to pursue a legal interest and to further advance their case for a price adaptation should compel permitting the evidence and override confidentiality concerns.

54. The IBA Rules also advance CLAIMANT's right to admit the evidence in question. IBA Rules Art. 2 and Art. 9.1 grant arbitral tribunals "complete control" over the evidentiary standards, subject to Art. 9.2 which enumerates certain conditions where evidence should be limited or excluded. However, none of the conditions of Art. 9.2 apply in the instant case. RESPONDENT's prior arbitration is relevant to current proceedings because it demonstrates the legitimacy of CLAIMANT's position, which RESPONDENT previously endorsed [*IBA Rules Art 9.2(a)*]. This also reflects RESPONDENT's general duplicity and opportunism. Further, disclosure of the award within the confines of this arbitration does not create a legal impediment or privilege [*ibid. Art. 9.2(b)*]. Finally, the evidence is not unreasonable to produce, is not lost or destroyed, lacks any compelling commercial or technical confidentiality interests that cannot easily be overcome by redacting pertinent information, lacks any special political or institutional sensitivity, and violates no considerations of procedural economy, proportionality, fairness or equality [*ibid. Art. 9.2(c)–(g)*].

55. Thus, while CLAIMANT is obligated to preserve confidentiality with respect to current arbitral proceedings, disclosure of RESPONDENT's prior arbitration does not constitute a violation.

C. Interests of justice compel admitting the evidence

56. The barriers to appealing arbitral awards, and unique constraints on arbitration underscore the need for admitting all relevant evidence [***1***]. Interests of fairness and judicial efficacy advance the need for less rigid evidentiary hurdles [***2***]. Even supposing CLAIMANT acted illegally, the resulting injury is outweighed here by the interest in truth [***3***].

1. HKIAC Art. 2.2 underscores the need to permit CLAIMANT's evidence

57. The broad permissibility of evidence is particularly necessary in international arbitration because, as HKIAC Art. 2.2 dictates, "unless otherwise determined by HKIAC, all decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal." This reflects one of several discrepancies between State court litigation and international arbitration,

where notions of efficiency override interests of justice. The informal character of the arbitral procedure, finality of the award (subject to limited appeal) [*Conoco Phillips* (raising *res judicata* to reject request to reconsider prior arbitral decision under ICSID rules even in light of new evidence directly contradicting previous factual findings of the tribunal)], limited range of discovery and the restricted opportunity to cross-examine witnesses, are strong considerations that justify broader evidentiary standards [*Noussia p.20*]. Considering the numerous constraints inherent in the arbitral proceedings, CLAIMANT has limited opportunity to realize justice and should not be barred from presenting evidence material to the case. Interests of justice therefore demand that CLAIMANT be given a fair opportunity to present their case to the best of their abilities, unfettered by standards of evidence that are too rigid and exclusive.

2. UNCITRAL Rules of Transparency reflect current international aspirations with respect to evidence standards

58. While UNCITRAL Rules of Transparency are not dispositive, they reflect the general sentiments of the international community and the growing recognition of the value of transparency in dispute settlement. The UN General Assembly Resolution approving the adoption of the UNCITRAL Rules of Transparency articulated the aspiration for a "harmonized legal framework for a fair and efficient settlement of international investment disputes, increasing transparency and accountability and promoting good governance" [*UN Resolution*]. This same aspirational interest in promoting fair and efficient dispute resolution should extend to private commercial arbitration.

59. Art. 3 enumerates a list of documents that must be made available to the public, including the notice of arbitration, statements of claim and defense, and further written statements or written submissions by the disputing parties. This extensive list covers the evidence that CLAIMANT seeks to admit.

60. Art. 7(2)(a)–(c), narrows the expansive transparency requirements and limits Art. 3 by providing an exhaustive list of circumstances where confidentiality should be respected. None of these instances apply here. The information is not confidential business information, nor is it information that is protected against being made available to the public under an international treaty. Finally, the disclosure of this information would not impede law enforcement.

61. Furthermore, Art. 7(3) provides an opportunity for redaction where information is in fact confidential. If the RESPONDENT is concerned with disclosing their business information, it is possible to redact the pertinent information without rejecting the evidence wholesale. For example, in *AAY v. AAZ*, the Singaporean High Court permitted making a prior arbitral judgement public, finding that public interest compelled doing so [*Chan*]. However, in deference to the sensitive nature of some

business information, it redacted irrelevant but important business information [*ibid.*]. The Tribunal should act similarly here.

62. This interest in transparency and judicial efficacy in arbitration are recognized by State courts as well. State courts have permitted the disclosure of confidential documents used or relating to an arbitration in two situations: (1) where the documents are necessary for the fair disposal of the case [*Hassneh Ins.* (finding exception to confidentiality agreement where it was reasonably necessary to do so for the establishment by the defendant of his causes of action against the opposing party)], and (2) where the information sought could not be otherwise obtained by any less expensive means [*Smeureanu p.36*; *Dolling-Baker*; *see also Euro. Reins.* (finding exception to confidentiality clause where disclosure of first arbitration award was necessary to effectuate the "essential purpose of arbitration" in the second arbitration); *Emmott v Michael* (granting disclosure of earlier award in later foreign litigation because while material was in principle confidential, interest of justice required that the cloak of confidentiality should not mislead foreign courts)].

63. Courts have also dismissed confidentiality concerns in other contexts. "To avoid inconsistent findings, a party, to more than one, arbitration will sometimes, appoint the same arbitrator in each proceeding" [*Noussia p.70*; *Aquator* (upholding two awards supported in part by identical reasons where a common arbitrator was appointed to the related proceedings between the parties); *see also Compania* (permitting consolidation of two arbitration proceedings)].

64. The Tribunal should similarly pursue the interests in transparency and judicial efficacy that would otherwise be circumvented if Claimant fails to have a full and fair opportunity to be heard.

3. CLAIMANT's alleged illegal conduct does not negate the need to permit the evidence

65. It is not in evidence that CLAIMANT acted illegally. Even if it did, such conduct would still not negate the need to permit the evidence. While there are no bright line tests that govern the admissibility of illegally obtained evidence, prior arbitral determinations emphasize who committed the wrongful act, whether the documents are privileged, and whether the information revealed was material to the decision on the merits [*Sussman p.7*]. Such an analysis should compel the Tribunal to find that on balance, interests of justice warrant admitting the evidence despite the injury that may arise out of CLAIMANT's assumed illegal conduct.

66. In the seminal case, *Corfu Channel*, heard before the ICJ, the U.K., in violation of Albania's sovereignty, conducted a mine sweeping operation in Albania waters to find evidence in support of its case that Albania had failed to give warning to the U.K. about mines in the channel as required by

international law. That tribunal, appropriately, acknowledged that the U.K.'s actions were unlawful, but did not exclude the evidence and did not apply any material sanctions against the U.K. [*But see Methanex* (declining to admit the wrongfully obtained evidence where it was of only "marginal evidential significance")].

67. Here, CLAIMANT's evidence is material to tribunal's determination on the merits and to ignore the existence of such glaring evidence on the baseless supposition that it was procured illegally, would deny CLAIMANT a fair opportunity to be heard and lead to an award based on an incomplete and misleading understanding of the dispute.

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 UNDER CL. 12 OF THE SA

68. CLAIMANT is entitled to the payment of USD 1,250,000 due to the additional delivery costs it incurred as result of the unexpected tariff levied by Equatoriana. This tariff can be considered as either hardship or an unforeseen event pursuant to SA cl. 12, which provides that CLAIMANT, as the seller, should not bear the resulting additional costs [***A***]. Alternatively, a mistake in CLAIMANT's understanding of the SA, caused by RESPONDENT, entitles CLAIMANT to avoidance of the third shipment. As performance has been affected, CLAIMANT has a right to retroactive partial avoidance and is thus entitled to recover the additional costs as either restitution or damages [***B***].

A. CLAIMANT experienced hardship pursuant to cl. 12 of the SA and is entitled to the payment of USD 1,250,000, consistent with the common intention of the parties

69. Given the intentions of the Parties, SA cl. 12, interpreted pursuant to the CISG as supplemented by UNIDROIT Art. 4, entitles CLAIMANT to the payment of USD 1,250,000. CLAIMANT prevails under both the subjective test [***1***] and reasonableness test [***2***] set out by UNIDROIT Art. 4 as a framework for interpretation. Under UNIDROIT Art. 4, an analysis of the relevant circumstances prior and subsequent to the conclusion of the SA demonstrates CLAIMANT's entitlement to payment.

70. The CISG, as elaborated by the UNDIROIT principles, provides the appropriate law for interpreting SA cl. 12. CISG Art. 8 provides that statements and conduct of parties are to be interpreted according to their intent "where the other party knew or could not have been unaware of what the intent was" [*CISG Art. 8*]. Should this subjective test fail to apply, Art. 8 further calls for interpretation according to that of reasonable persons in the parties' position [*ibid.*]. UNIDROIT supplements the CISG, explicitly providing for the interpretation of contracts and "fill[ing] many of the gaps in the CISG text" [*Ziegel ¶1; see infra ¶91*]. UNIDROIT Art. 4, in specifically supplementing

Art. 8 of the CISG, provides "an elaboration of the more succinct provisions in CISG Art. 8 and should therefore be admissible gap fillers on an analogical basis" [*ibid.; see also Yoshimoto pp.88–89* (stating that UNIDROIT Art. 4 "refines and expands the principles contained in the [CISG Art. 8]")].

71. In supplementing the CISG, UNIDROIT Art. 4 provides both a subjective test and a reasonableness test for the interpretation of contracts. Art. 4 sets out that, "contracts shall be interpreted according to the common intention of the parties" and, in the event such a common understanding cannot be found, "according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances" [*UNIDROIT Art. 4.1*]. Under either test, the common intention of the Parties in including the hardship clause was that RESPONDENT, rather than CLAIMANT, should bear the costs of hardship, including tariff levies.

1. CLAIMANT prevails under the subjective test

72. Under the subjective test for determining the intention of the parties, cl. 12 of the SA is written such that RESPONDENT bears the costs of unexpected tariffs. The subjective test provides that "a contract term may be given a meaning which differs both from the literal sense of the language used and from the meaning which a reasonable person would attach to it, provided that such a different understanding was common to the parties at the time of the conclusion of the contract" [*UNIDROIT Art.4.1, Cmt. 1*]. Furthermore, in order to have a common understanding it is not necessary for the parties to have had a historical business relationship, so long as the "statements and conduct" of the parties could be "known and decoded" [*ICC Case No. 8324*]. While RESPONDENT contends that under strict DDP standards, CLAIMANT should be responsible for all costs in delivery, the hardship clause modified standard DDP to relieve CLAIMANT of responsibility for events such as the unexpected tariff levy. This is clear upon a consideration of the relevant circumstances concerning the SA clause.

73. Under the subjective test, factors considered include preliminary negotiations between the parties, practices established between the parties, conduct of the parties subsequent to the contract, and the nature and purpose of the contract [*UNIDROIT Art. 4.3*]. Each of these factors support CLAIMANT's interpretation of SA cl. 12.

74. In the preliminary negotiations between Mr. Antley and Ms. Napravnik, CLAIMANT clarified that it would not be responsible for unforeseen costs of an alike nature to the eventual Equatoriana tariff. Consistent with UNIDROIT Art. 4.1, preliminary negotiations can be used to construe the scope of a contract where the expectations raised in those negotiations were reflected in the contract [*Lemire* (stating that investment agreement will be construed in accordance with expectations raised

during negotiations if text of the agreement reflects said negotiation)]. CLAIMANT explicitly stated that it would not to be responsible for an event like a sudden introduction of tariffs, stating "we are not willing to take over any further risks . . . in particular not those associated with changes in customs regulation or import restrictions" [*Ex. C4*]. These statements were offered as a qualification of the Parties' obligations under DDP and said modified obligations were reflected in SA cl. 12, which states that CLAIMANT would not be responsible for "health and safety requirements or comparable unforeseen events making the contract more onerous" [*SA cl. 12*]. It is in fact RESPONDENT who suggested the wording of cl. 12 in direct reference to Ms. Napravnik's concerns [*PO2 ¶12*]. As such, despite RESPONDENT's claim that the "narrowly worded clause is not applicable to the present impediment" [*Answer ¶19*], the negotiations and understanding between the parties actually construe the text to include unexpected tariffs, making RESPONDENT responsible for the payment of the USD 1,250,000 incurred by CLAIMANT in making the third shipment.

75. As regards the conduct of the parties subsequent to the SA, both CLAIMANT and RESPONDENT engaged in actions suggesting an understanding that a modified DDP involving hardship had been agreed upon. The relevancy of subsequent conduct under UNIDROIT Art. 4.3 embodies the principle of *venire contra factum proprium* [*Ad hoc Arbitration* (estopping claimant from invalidating loan agreement based on its conduct)]. Furthermore, as stated by Schlechtriem, "it is possible to 'cure' uncertainties or *incongruities* in the parties' oral expression by taking into account their conduct and its objective meaning" [*Schlechtriem 1986 p.48* (emphasis added)]. RESPONDENT conducted itself in a manner which implied it would cover the additional costs arising from the tariffs. Ms. Napravnik acted immediately upon learning of the imposition of the 30% tariff and contacted Mr. Shoemaker, as this would have been the type of change in "import restrictions" envisioned by the parties' earlier understanding [*Ex. C4 & C7*]. Mr. Shoemaker admitted he "knew CLAIMANT would not deliver if [he] were to reject their request outright" and this was why he used a prepared statement that could be read as accepting Ms. Napravnik's requirements and inviting performance [*Ex. R4*]. RESPONDENT now claims, however, that it never accepted Ms. Napravnik's request [*Answer ¶10*]. The Tribunal should not reward this type of opportunistic behavior Mr. Shoemaker intended and RESPONDENT should be bound to the pretentions of its conduct, which strongly support CLAIMANT's depiction of the Parties' understanding of the SA.

76. The nature and purpose of the SA also provides important evidence supporting CLAIMANT's interpretation of SA cl. 12. A contract should not be read in a way that directly contradicts the shared

purpose of the parties and that the seller would never have agreed to [*Russia 11/2002* (holding that seller could not refuse to pay intermediary's fees where buyer returned product, as such conditional payment was not in nature and purpose of contract between seller and intermediary)]. From the earliest stages of the negotiations, RESPONDENT made clear that securing the SA was in pursuit of its "interest in entering into a long-term mutually beneficial relationship" [*Ex. C2*], and CLAIMANT indicated accordingly that it was "highly interested [in] long-term cooperation . . . going clearly beyond this single purchase" [*Ex. C3*]. In light of this purpose of a long-term relationship, it is reasonable to conclude that neither party intended the SA to provide for the financial imperilment or ruin of either party [*ibid.*]. A reading of SA cl. 12 to not allow adaptation would be directly contrary to this purpose, since the Equatoriana tariff was outside of CLAIMANT's financial capacity. As Ms. Napravnik communicated, not adapting the price in light of the tariff would result in costs "impossible for CLAIMANT to shoulder" if it wanted to be "able to stay in business" [*Ex. C8*]. Conversely, RESPONDENT could pay off the additional costs without difficulty [*PO2 ¶30*]. SA cl. 12 should thus be read in light of the nature and purpose of the SA, which was intended to be the beginning of a sustained business relationship and not a financially ruinous obligation.

77. It thus follows that under the subjective test, cl. 12 of the SA should be interpreted in favour of CLAIMANT. An analysis of the preliminary negotiations of the parties, their conduct subsequent to the SA, and the nature and purpose of the SA show that it was the shared understanding of the parties that RESPONDENT would be responsible for the additional costs associated with unexpected tariffs.

2. CLAIMANT prevails under the reasonableness test

78. In the event that the Tribunal finds no shared understanding of the Parties, the reasonableness test pursuant to UNIDROIT Art. 4 should still be resolved in favour of CLAIMANT. The relevant factors for the reasonableness inquiry under UNIDROIT Art. 4 are common meaning and standard usages [*UNIDROIT Art. 4.3*]. The common meanings of "hardship," "health and safety requirements" and "unforeseen comparable events," as reflected in the text of SA cl. 12, demonstrate reasonable persons in the Parties' position would have understood RESPONDENT to be responsible for the additional costs associated with the Equatoriana tariff.

79. SA cl. 12 specifies that CLAIMANT is not responsible for "hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*SA cl. 12*]. As the general contract law of both Equatoriana and Mediterraneo are verbatim adoptions of UNIDROIT, the definition of hardship within UNIDROIT Art. 6.2.2 can be understood as the

common meaning within the trade. Under this meaning, CLAIMANT has experienced hardship and is able to recover the USD 1,250,000 [*See infra §IV*]. Alternatively, even absent an extrinsic commonly held subjective understanding of hardship, an interpretation of the text of cl. 12 by its plain meaning shows that hardship can, at a minimum, be demonstrated by "additional safety requirements" and, if not, by comparable events to the former so long as they are (a) unforeseen and (b) more onerous to the SA [*SA cl. 12*].

80. The Equatoriana tariff can be considered a health and safety requirement pursuant to cl. 12 of the SA, relieving CLAIMANT of responsibility for their additional cost. According to *Peak Business News*, Mediterraneo's tariff, which prompted the Equatoriana retaliatory tariff in question, were made in "reliance on an alleged threat to national security as a justification for the tariffs" [*Ex. C6*]. Where tariffs—import duty requirements—are raised for national security purposes, they at a minimum implicate safety. It follows that the tariff would fall under health and safety requirements.

81. Alternatively, the Equatoriana tariff can be considered a "comparable" event of the Meditarraneo tariff which, as established above, was a health and safety requirement. The Equatoriana tariff was in direct response to the Mediterraneo tariff and of a similar magnitude. As a comparable event, the Equatoriana tariff furthermore satisfies the conditions in cl. 12 of being "unforeseen" and making the SA "more onerous" [*SA cl. 12*]. It was completely unforeseen politically and "[t]he retaliation as well as the size of the [tariff] came as a big surprise even to informed circles" [*Ex. C6*]. The tariff was onerous in that it drove up CLAIMANT's costs by 30% in a manner that would be financially ruinous to their business. CLAIMANT's hardship, thus, was directly caused by a comparable event to additional health & safety requirements, relieving CLAIMANT of responsibility and entitling it to recovery of its costs. Therefore, under a reasonable person's plain meaning analysis of cl. 12 of the SA, the Equatoriana tariff would constitute hardship and CLAIMANT should be able to recover the USD 1,250,000 in additional costs.

B. CLAIMANT is still entitled to recover USD 1,250,000 under theories of mistake and partial avoidance

82. Even if the Tribunal decides not to adopt the CLAIMANT's interpretation of SA cl. 12, CLAIMANT is still entitled to recover USD 1,250,000 as a result of its mistaken belief, caused by RESPONDENT, that the Parties had modified the SA [*1*]. Following the unexpected Equatoriana tariff, Ms. Napravnik was placed under the impression that Mr. Shoemaker agreed to modification of the SA during their call on 20 January 2018. To the extent that there was not in fact a modification of the

SA, in accordance with UNIDROIT Art. 3.2.1, CLAIMANT's misunderstanding was intentionally caused by RESPONDENT. Consequently, CLAIMANT is entitled to partial avoidance of SA cl. 12 and relieved of responsibility for the additional USD 1,250,000 in tariff costs [*UNIDROIT Art. 3.2.2; UNIDROIT Art. 3.2.13*]. Furthermore, as delivery has occurred and cannot be undone, CLAIMANT is entitled to retroactive partial avoidance and restitution for the USD 1,250,000 in costs it incurred under mistaken belief [*UNIDROIT Art. 3.2.15*] [***2***].

1. RESPONDENT caused CLAIMANT to mistakenly believe that the Parties had modified the SA

83. RESPONDENT caused CLAIMANT to mistakenly believe that the Parties had modified the SA. MS. Napravnik's understanding was that, in light of the new tariff, Mr. Shoemaker had agreed to modify the SA and bear the additional costs of shipment [*Ex. C8*]. This modification is provided for by CISG Art. 29(1), which allows for the modification of contract by the parties [*CISG Art. 29(1)*], and UNIDROIT Art. 1.2, which adds that there are no requirements as to form in contracting or modification [*UNIDROIT Art. 1.2*]. From CLAIMANT's perspective, it promptly shipped the doses in exchange for a "promise that a solution would be found," within which RESPONDENT would pay a higher price [*Ex. C8*]. While there may have been a lack of consideration in the modified agreement, such an imbalance is permitted in modification [*Schlechtriem 2005 §E* ("[M]odifications . . . are valid, even though consideration has neither been agreed upon nor given.")].

84. Insofar as Mr. Shoemaker possessed a different understanding of whether there had been a modification, he intentionally did not make a clear and conclusive statement that his position diverged from that of CLAIMANT. As Shoemaker stated, "according to my understanding DDP meant that all risks had to be borne by Phar Lap . . . I merely stated that 'if the SA provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price'" [*Ex. R4*]. Mr. Shoemaker, however, also wanted to "ensure" shipment of the remaining 50 doses of horse semen and, to achieve this, made sure to not "reject [CLAIMANT's] request outright" [*Ex. R4*]. In securing prompt delivery in exchange for "certainly find[ing] an agreement on the price," Mr. Shoemaker was able "to avoid making any concessions" while implying modification of SA cl. 12. RESPONDENT's own Answer is unambiguous in stating that despite "[Mr. Shoemaker's] understanding of the contract that . . . CLAIMANT had to bear costs," it was nonetheless "obvious" that Mr. Shoemaker did not reject Claimant's request for an increased price due to "RESPONDENT's interest in a delivery of the outstanding doses" [*Answer ¶10*]. RESPONDENT thus demonstrates that it caused CLAIMANT's mistake in order to opportunistically secure timely delivery of the third shipment.

2. CLAIMANT is entitled to retroactive partial avoidance

85. CLAIMANT is entitled to retroactive partial avoidance. UNIDROIT Art. 3.2.2 elaborates that a party may avoid a SA due to mistake if the "party in error would have only concluded the SA on materially different terms" and the other party knew or should have known of the mistake it caused and left the mistaken party in error in a manner contrary to "reasonable commercial standards of fair dealing" [*UNIDROIT Art. 3.2.2*]. The record shows that the difference between CLAIMANT's and RESPONDENT's understanding was of such importance that CLAIMANT would not have performed in the same manner if it had been aware of RESPONDENT's contended understanding. Not only did Ms. Napravnik state that it "had been clear to both parties that CLAIMANT should not bear all risks associated with such a delivery," but "it was [also] impossible for CLAIMANT to shoulder this additional 30% tariff" [*Ex. C8*]. Mr. Shoemaker's conduct clearly violated standards of fair dealing [*see supra* ¶*75*]. While the avoided performance would be specific to the costs associated with SA cl. 12, as opposed to the whole SA, Article 3.2.13 clarifies that parties may claim partial avoidance of specific SA terms [*UNIDROIT Art. 3.2.13*]. Furthermore, while CLAIMANT was authorized to declare the SA avoided, such a declaration is not obligatory [*Liu* §2.2].

86. CLAIMANT is entitled to recover the USD 1,250,000 on avoidance through Art. 3.2.15's provisions for restitution. ¶2 of this article provides that "[i]f restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable" [*UNIDROIT Art. 3.2.15*]. CLAIMANT has already performed the delivery, which for practical reasons cannot be reversed. As UNIDROIT Art. 3.2.14 points out avoidance can take effect retroactively [*UNIDROIT Art. 3.2.14*]. In fact, scholars have explained that in situations of retroactive restitution, parties should be returned to the positions they were in before avoidance [*Schwenzer/Hachem/Kee* ¶*19.25; du Plessis* ¶¶*5, 10–13*]. In this case, the recovery of USD 1,250,000 allows CLAIMANT to break even, such that it is financially returned to their position before the third delivery. Additionally, the legislative history of Art. 3.2.15(2) shows that the UNIDROIT Working Group discussed at length whether to use the word "allowance" or "market value" to describe the money entitlement where restitution in kind was not possible [*Zimmerman §4*]. The outcome of this exchange is that "'Allowance' . . . should be taken to correspond to 'value' either in a subjective or objective sense" [*ibid.*]. The value of the avoided term in the instant case would be the USD 1,250,000 that CLAIMANT incurred due to fronting the tariff costs under a mistaken belief. Thus, under the UNIDROIT framework of restitution, the Tribunal should find that CLAIMANT is entitled to the recovery of the USD 1,250,000 in additional costs.

87. A recovery along similar lines is alternatively called for by UNIDROIT Art. 3.2.16, which states that "[i]rrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other part in same position" it was in before the avoided contract [*UNIDROIT Art. 3.2.16*].

88. In conclusion, under either the subjective or reasonableness test, CLAIMANT is entitled to recover the USD 1,250,000 in costs it incurred in overcoming the hardship. SA cl. 12 specifies that such hardship would not be CLAIMANT's responsibility. Alternatively, CLAIMANT is entitled to the recovery of USD 1,250,000 as a result of CLAIMANT's rights to restitution in avoidance of the additional tariff costs as a consequence of RESPONDENT's causing of CLAIMANT's mistake.

IV. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 RESULTING FROM AN ADAPTION OF THE PRICE UNDER THE CISG

89. Even if the Tribunal decides not to adapt the price under SA cl. 12, the price should still be increased under the CISG. It is undisputed that Equatoriana and Mediterraneo are Contracting States of the CISG [*PO1 ¶4*]. Therefore, the CISG applies to the SA between the Parties [*CISG Art. 1(1)(a)*]. While CISG does not specifically mention hardship, hardship should nevertheless be considered an impediment within the meaning of CISG Art. 79 given the gap-filling role of UNIDROIT [***A***]. Because the requirements of UNIDROIT Art. 6.2.2 are met, the 30% retaliatory tariff imposed by Equatoriana has caused CLAIMANT to suffer hardship [***B***]. As RESPONDENT has, in bad faith, refused to negotiate a price increase with CLAIMANT, the Tribunal should award USD 1,250,000 to CLAIMANT to restore the equilibrium of the SA under UNIDROIT Art. 6.2.3 [***C***].

A. Hardship constitutes an impediment within the meaning of CISG Art. 79 and adaptation is the appropriate remedy

90. Given the gap-filling role of UNIDROIT, UNIDROIT Art. 6.2.2 and 6.2.3 should be used to supplement CISG Art. 79 [***1***]. This supplementation is consistent with both the CISG framework as a whole [***2***] and the legislative history of CISG Art. 79 [***3***]. Therefore, hardship constitutes an impediment within the meaning of CISG Art. 79 and adaptation is the appropriate remedy.

1. UNIDROIT Art. 6.2.2 and 6.2.3 should supplement CISG Art. 79

91. CISG Art. 7 states that "regard is to be had to its international character" when interpreting the CISG and that "[q]uestions not expressly settled [within the CISG] are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law" [*CISG Art. 7*]. Art. 9(2)

further states that parties are considered to have impliedly made applicable any "usage . . . which in international trade is widely known" [*CISG Art. 9(2)*]. When taken together, these provisions suggest that the interpretation and coverage of the CISG are not to be construed strictly in conformity with the explicit terms of the CISG literally understood. In actual practice, UNIDROIT, written 14 years after the adoption of the CISG with the aim to restate existing international contract law, has received extremely favourable treatment from courts and arbitral tribunals alike as a means to fill veritable gaps in the CISG on the basis of Art. 7 and Art. 9(2) [*See, e.g., ICC Case No. 8817; ICC Case No. 8547; Russia 229/1996*]. The fact that UNIDROIT can be used in this fashion is supported by its preamble, which states that UNIDROIT "may be used to interpret or supplement international law instruments" [*UNIDROIT Preamble*]. The Chairman of the Working Group that prepared UNIDROIT has also spoken approvingly of this practice [*Bonell pp.109–110*]. Moreover, this use of UNIDROIT is particularly appropriate for the instant case as the general contract law of Equatoriana and Mediterraneo is a verbatim adoption of UNIDROIT [*PO1 ¶4*].

92. In the context of CISG Art. 79, there exists a veritable gap with regard to the meaning of impediments. CISG Art. 79(1) states:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

While this article releases the liabilities of a party facing an impediment, the CISG does not define the meaning of "impediment" and it is unclear from the text alone whether hardship is covered [*Kofod §3.1.2*]. By contrast, UNIDROIT specifically addresses the question of hardship. UNIDROIT Art. 6.2.2 finds hardship where "the occurrence of events fundamentally alters the equilibrium of the contract . . . because the cost of a party's performance has increased" if certain preconditions are met [*UNIDROIT Art. 6.2.2*]. UNIDROIT Art. 6.2.3 additionally grants the party disadvantaged by the hardship the right to "request renegotiations" and allows a court to "adapt the contract with a view to restoring its equilibrium" should the parties fail to reach agreement [*UNIDROIT Art. 6.2.3*]. Therefore, these two articles are natural candidates for filling this gap and at least one court, the Belgium Supreme Court, has adopted such a usage to supplement CISG Art. 79.

93. In *Scafom*, a French seller and a Dutch buyer entered into a contract for the sale of steel tubes under the CISG, but before delivery was due, the market price of steel increased by approximately

70% and the seller asked the buyer for a renegotiation of the contract [*Uribe §3.2*]. After the buyer refused and sued for breach of contract, the seller counterclaimed for adjustment of price [*ibid.*].

94. Relying on CISG Art. 7.2 and the express allowance given to hardship under UNIDROIT, the Belgium Supreme Court held that the concept of "impediment" under CISG Art. 79 is broad enough to encompass, and should in fact encompass, situations of hardship [*ibid. p.129*]. In addition, even though hardship is covered under impediment within the meaning of CISG Art. 79, that article does not provide a proper remedy for hardship when the seller has delivered the goods [*ibid.*]. This is because CISG Art. 79 only exempts a party from liability to perform contractual obligations [*CISG Art. 79(1)*]. Thus, the Court further held that the expansive and comprehensive treatment given to hardship under UNIDROIT Art. 6.2.2 and 6.2.3 should govern, thereby giving the seller a right to request renegotiations [*Uribe pp.129–130*]. Because the Dutch buyer insisted on payment of the originally agreed upon price, the Court found the buyer to have committed a breach of its duty to renegotiate in good faith and thus awarded the seller the original contract price plus the consignment of half of the proposed price increase [*ibid. p.132*].

95. As scholars have recognized, because *Scafom* was decided by a Supreme Court and the volume of case law on this subject is far from abundant, this case is especially relevant as a source of guidance for future disputes about hardship under the CISG [*ibid. p.120*]. As a legally binding document, the CISG suffers from many deficiencies as an instrument of hard compromises that can be indefinite or ambiguous at times [*ibid. p.134; Bonell p.102*]. The supplementation endorsed by the Belgian Supreme Court addresses such deficiencies by harmonizing the varying treatments of hardship in different legal systems and preventing the CISG from becoming an obsolete and static instrument [*Uribe p. 134*]. As the facts in the instant case are very similar to those in *Scafom* [*NoA ¶¶1–13*], the approach of the Belgium Supreme Court should be used.

2. Such a supplementation is consistent with the CISG framework

96. The reading given to "impediment" by the Belgium Supreme Court is consistent with the majority of scholarly opinion. Most scholars are in favour of a broader interpretation of impediment to include changes in circumstances that are short of impossibility [*See, e.g., Schwenzer pp.712–713; Rimke pp.222–223*]. As noted by Schwenzer, "it is more or less unanimously accepted in court and arbitral decisions, as well as in scholarly writing, that Article 79 does indeed cover issues relating to hardship" [*Schwenzer p.713*]. The CISG Advisory Council is similarly supportive of this broad interpretation [*CISG AC Opinion No. 7 ¶3.1*].

97. Moreover, the remedy provided by UNIDROIT Art. 6.2.3, giving a right to the disadvantaged party to request renegotiations and to seek adaptation of contract by courts if renegotiations fail to produce an agreement, is also acceptable within the CISG framework. Admittedly, the CISG does not mention adaptation of contract as a possible remedy and Art. 79 only provides for release of contractual obligations. This has led some scholars to conclude the impossibility of such a remedy under the CISG [*See, e.g., Rimke p.226*]. This position, however, is untenable. As Schwenzer has pointed out, when the duty to mitigate under CISG Art. 77 is used in conjunction with the usual remedy mechanism, outcomes very similar to adaptation of the price can be reached under the CISG [*Schwenzer p.724*]. In addition, CISG Art. 79(5) states that "[n]othing in this article prevents either party from exercising any right other than to claim damages under [CISG]" [*CISG Art. 79(5)*]. As the CISG Advisory Council noted, the presence of this article means that the absence of adaptation as a remedy from the text of the CISG does not foreclose its being used and CISG Art. 79(5) can thus be further relied upon to grant a remedy of adaptation [*See CISG AC Opinion No. 7* ¶*40*]. Schlechtriem has also suggested, alternatively, that CISG Art. 50, which provides for a remedy of price reduction, can be read as a kind of contract adaptation and used as a springboard to develop a general rule of adjustment in hardship cases [*See Schlechtriem 1999 pp.236–237*]. The supplementation of CISG Art. 79 by UNIDROIT Art. 6.2.2 and 6.2.3 is therefore consistent with the CISG framework as a whole.

3. The legislative history of CISG Art. 79 does not prohibit such a supplementation

98. Contrary to the contentions of certain scholars, the legislative history of CISG Art. 79 does not prohibit supplementation by UNIDROIT Art. 6.2.2 and 6.2.3. In making their arguments, these scholars principally rely on the fact that the working group drafting Art. 79 considered an alternative formulation put forth by the Norwegian delegation [*See., e.g., Rimke pp.212–213*]. That formulation would have released the debtor from obligations if there were a radical change in the underlying circumstances [*ibid.*]. The rejection of this formulation by the working group should not be relied upon as a basis for excluding hardship from the coverage of Art. 79.

99. To start with, as Schwenzer noted, the drafting history of this provision as a whole is not quite clear [*Schwenzer p.712*]. While the rejection of the Norwegian proposal supports the contention that the CISG does not favour an easy exemption from nonperformance, it is insufficient to conclude from that rejection alone that Art. 79 can never allow exemption when performance is made excessively difficult by a totally unexpected event [*CISG AC Opinion No. 7* ¶*28*]. In addition, the remedy provided by UNIDROIT Art. 6.2.3 is far less drastic than the release from contractual

performance that the working group was concerned about. UNIDROIT Art. 6.2.3 expressly follows *pacta sunt servanda* and states that "[t]he request for renegotiation does not in itself entitle the disadvantaged party to withhold performance" [*UNIDROIT Art. 6.2.3*]. In contrast to the unrefined interpretation given to CISG Art. 79's legislative history, it is far more convincing to read the omission of hardship and the lack of definition of impediment as consistent with the CISG's general intention to find a common ground for different legal systems [*See Kofod §3.1.2*]. This is especially true given that common law systems are unfamiliar with the concept of adaptation while continental systems generally contemplate such a remedy. [*See Uribe pp.122–124*]. Therefore, the legislative history of CISG Art. 79 does not prohibit this supplementation.

100. Therefore, because hardship is a matter governed by the CISG but not expressly resolved therein, the Tribunal should follow the weight of scholarly and judicial opinions and use UNIDROIT Art. 6.2.2 and 6.2.3 to supplement CISG Art. 79. Hardship therefore constitutes an impediment within the meaning of CISG Art. 79 and price adaptation is the appropriate remedy.

B. The 30% retaliatory tariff by Equatoriana has caused hardship to the CLAIMANT

101. Under UNIDROIT Art. 6.2.2, hardship arises when:

> The occurrence of events fundamentally alters the equilibrium of the contract . . . because the cost of a party's performance has increased and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

This definition of hardship is more demanding than the requirements for impediment under CISG Art. 79(1), which merely require that the situation be (1) beyond the party's control, (2) unforeseeable, and (3) unavoidable [*Schlechtriem/Schwenzer p.1133*]. This overlap further confirms the appropriateness of the proposed supplementation.

102. In the instant case, because all the conditions listed in UNIDROIT Art. 6.2.2 are satisfied, the 30% retaliatory tariff imposed by Equatoriana has caused CLAIMANT to suffer hardship. The equilibrium of the SA has been fundamentally altered [***1***]; the tariff was imposed after the conclusion of the SA [***2***]; the tariff could not reasonably have been taken into account by CLAIMANT at the time [***3***]; the tariff was beyond the control of CLAIMANT [***4***]; and finally, CLAIMANT has not assumed the risk of the tariff [***5***].

1. The equilibrium of the SA was fundamentally altered

103. The 30% retaliatory tariff imposed by Equatoriana fundamentally altered the equilibrium of the SA by significantly increasing the costs of CLAIMANT's performance. While UNIDROIT previously set a 50% alteration in cost as a benchmark for deciding whether the equilibrium of a contract has been fundamentally altered, since 2004 the Official Comments no longer invoke this numerical benchmark, making this determination contingent instead on the circumstances of a given case [*See Loofofsky p.440*]. The circumstances that exist in the instant case justify a finding of fundamental alteration.

104. CLAIMANT had a profit margin of 5% before the tariff was imposed and now makes a loss of 25% due to the new tariff imposed on the third shipment of frozen semen [*NoA ¶18*]. In addition, the equilibrium of the SA was further altered by RESPONDENT's opportunistic and intentional violations of the consent requirement for the use of Nijinsky III's semen. CLAIMANT made clear during the negotiation process that express written consent has to precede a resale to third parties and the SA also has an express information requirement in the section listing the mares on which the frozen semen may be used [*Ex. C2 & C5*]. RESPONDENT also made representations to CLAIMANT that the semen was purchased to build its own racehorse breeding program and never suggested an intention to resell [*Ex. C1 & C3*]. Because RESPONDENT had emphasized the importance of timely delivery for its planning purposes and implied that it generally accepted the need for a price increase, CLAIMANT agreed to pay for the 30% tariff in advance until a price increase could be agreed upon [*Ex. C8*]. However, as CLAIMANT recently discovered, RESPONDENT resold 15 doses of the frozen semen to other breeders without CLAIMANT's consent and made a 20% profit therefrom [*NoA ¶20; PO2 ¶20*]. In other words, RESPONDENT intentionally made misrepresentations and profited from CLAIMANT's goodwill by violating the consent requirement. Finally, the burden placed upon CLAIMANT is further exacerbated by the financial difficulties that CLAIMANT has been experiencing for the past two years [*Ex. C8*]. CLAIMANT was only able to stay in business through extensive restructuring measures and a considerable cut of the workforce [*ibid.*]. If forced to bear the costs of the tariffs, CLAIMANT would likely have to sell parts of its business to stay afloat [*PO2 ¶29*]. Under such circumstances, it is only fair to say that the equilibrium of the SA has been fundamentally altered.

2. The tariff was imposed after the conclusion of the SA

105. Both the initial tariff by Mediterraneo and the retaliatory tariff by Equatoriana were imposed after the SA had been concluded on May 6, 2017 [*SA & Ex. C6*].

3. The tariff could not reasonably have been taken into account by CLAIMANT at the time of the conclusion of the SA

106. Given what the Parties knew at the time of the conclusion of the SA, the retaliatory tariff imposed by Equatoriana could not reasonably have been taken into account by CLAIMANT. While some courts have seemingly adopted a stringent interpretation of the foreseeability requirement, finding situations including general economic circumstances, currency fluctuations, and armed hostilities to be reasonably foreseeable, those determinations were highly fact-dependent and made in light of the particular circumstances of the given case [*See Fucci §II.B; Perillo pp.122–123*]. It would thus be improper to conclude that those findings should control the outcome here.

107. The particular circumstances of the instant case support a finding of unforeseeability. The Government of Equatoriana has a long-standing reputation in favour of free trade and previous restrictions imposed by other countries have, with a single exception, never resulted in direct retaliatory measures [*Ex. C6*]. Most analysts of international trade were surprised by the 30% retaliatory tariff in this case [*ibid.*].

108. A finding of unforeseeability here is also consistent with the example included in the UNIDROIT Official Comments. In that example, a sales contract was expressed in a currency the value of which was already slowly depreciating [*UNIDROIT Art. 6.2.2, Cmt., Illustration 3*]. Later, because of a political crisis, the currency underwent a sudden massive depreciation of 80% and this dramatic acceleration in the rate of depreciation was said to be unforeseeable [*ibid.*]. This example suggests past experience is a crucial indicator of unforeseeability. As discussed above, past experience in this case makes the retaliatory tariff by Equatoriana unforeseeable.

4. The tariff was beyond the control of CLAIMANT

109. As the operator of a stud farm in Mediterraneo, CLAIMANT exerts no control over the trade war between Mediterraneo and Equatoriana [*NoA ¶11*].

5. The risk of the tariff was not assumed by CLAIMANT

110. While CLAIMANT agreed to DDP, it was very explicit in allocating the risks of unforeseeable events to RESPONDENT and this is reflected in cl. 12 of the SA [*Ex. C4 & C5 cl. 12; see supra §III(A)*]. Therefore, the risk of the tariff was not assumed by CLAIMANT.

111. Consequently, as all the constitutive elements are satisfied, the 30% retaliatory tariff imposed by Equatoriana has caused CLAIMANT to suffer hardship.

C. Given that the Parties have failed to reach agreement on a price increase within a reasonable time, the Tribunal should award USD 1,250,000 to CLAIMANT to restore the SA's equilibrium

112. UNIDROIT Art. 6.2.3 states:

> (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement with a reasonable time either party may resort to the court. (4) If the court finds hardship, it may if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.

In this case, preconditions (1) to (3) for resorting to the Tribunal have been met. CLAIMANT made the request to renegotiate the price as soon as it learned about the retaliatory tariff imposed by Equatoriana and indicated the grounds for its request [*Ex. C7*]. After RESPONDENT promised to work out a solution, CLAIMANT delivered the third and last shipment of frozen semen on time [*Ex. C8*]. However, RESPONDENT has since reneged on its promise, stopped the negotiations, and refused to pay any additional amount for the tariff that CLAIMANT covered [*ibid.*]. The negotiations broke down decisively on 12 February 2018, and have not resumed to this date [*ibid.*]. Therefore, given the need for promptness and legal certainty in international trade, the outright refusal of RESPONDENT to renegotiate constitutes a clear case of bad faith and entitles CLAIMANT to turn to the Tribunal for a remedy [*Schwenzer p.723; UNIDROIT Art. 6.2.3, Cmt. 6*].

113. In view of the fact that CLAIMANT has performed all of its contractual responsibilities, adaptation of the SA is clearly the appropriate remedy under UNIDROIT Art. 6.2.3(4). The Comment indicates that the court has great flexibility in its power to revise in order to "make a fair distribution of the losses between the parties" [*UNIDROIT Art. 6.2.3, Cmt. 7; Perillo p. 131*]. In this case, because RESPONDENT has profited from the frozen semen by reselling it to other breeders in breach of good faith and the SA's consent requirement, the Tribunal should at the very least make sure CLAIMANT does not sustain a loss in view of RESPONDENT's unjust enrichment.

114. For all these reasons, in the event the Tribunal decides not to adapt the price under cl. 12 of the SA, the Tribunal should nonetheless increase the price by USD 1,250,000 to restore the equilibrium of the SA under the CISG.

CONCLUSION

115. RESPONDENT has proven themselves to be opportunistic at every turn. From the beginning, RESPONDENT sought to exploit CLAIMANT's goodwill in agreeing to an extraordinary request, disguising its intention to re-sell the frozen semen while claiming it only asked for an increased dose as a safeguard against a reinstatement of Equatoriana's ban on semen importation. After making every effort to convince CLAIMANT to follow through with the shipment, despite knowing the cost, and even inviting modification of the SA, RESPONDENT now seeks to evade the consequences of its own contracting practices. When CLAIMANT instituted this arbitral proceeding, RESPONDENT countered with a baseless challenge to the Tribunal's powers under the arbitration agreement and an objection to the admission of material evidence based solely on its desire to disguise its own hypocrisy. RESPONDENT's opportunism should not be rewarded. The Tribunal should therefore find that it has the power to adapt the contract and that the evidence of the prior arbitration is admissible. Additionally, it should find that CLAIMANT is entitled to USD 1,250,000 from RESPONDENT under cl. 12 of the SA, or, alternatively, under the CISG.

***

REQUEST FOR RELIEF

On the basis of the foregoing submissions, CLAIMANT respectfully requests that the Tribunal:

1. Determine that it has the power to adapt the contract;
2. Admit the evidence from RESPONDENT's prior arbitration; and
3. Find that CLAIMANT is entitled to USD 1,250,000
    a. under cl. 12 of the SA; or
    b. under the CISG.

Vindobona, Danubia, 6 December, 2018

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Youzhihang Deng | Ayako Fujihara