SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG
2019

MEMORANDUM FOR CLAIMANT

FACULTY OF LAW, UNIVERSITY OF COLOMBO
COLOMBO, SRI LANKA

ON BEHALF OF:

PHAR LAP ALLEVAMENTO

RUE FRANKEL 1

CAPITAL CITY

MEDITERRANEO

CLAIMANT

AGAINST:

BLACK BEAUTY EQUESTRIAN

2 SEABISCUIT DRIVE

OCEANSIDE

EQUATORIANA

RESPONDENT

SENITH ABEYANAYAKE | **RASARA** JAYASURIYA | **VINESHKA** MENDIS | **HASINI** RUPASINGHE

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TABLE OF ABBREVIATIONS

§/§§	Paragraph/paragraphs
ANoA	Answer to the Notice of Arbitration (24 August 2018)
Art./ Arts.	Article/Articles
ch.	Chapter
DDP	Delivered Duty Paid (INCOTERMS 2010)
DRC	Dispute Resolution Clause
ed.	Editor
edn.	Edition
eds	Editors
et al.	*et alii* (and others)
Exhibit C	CLAIMANT's Exhibit
Exhibit R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Centre
i.e.	*id est* (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Centre of Settlement of Investment Disputes Tribunal
Letter by Fasttrack	Letter by Fasttrack of 3rd October 2018
Letter by Langweiler	Letter by Langweiler of 2nd October 2018
No.	Number/numbers
NoA	Notice of Arbitration of 31st July 2018

p./ pp.	Page/pages
PO1	Procedural Order No. 1 of 5th October 2018
PO2	Procedural Order No. 2 of 2nd November 2018
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law (Institut international pour l'unification du droit privé)
Vol.	Volume

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STATEMENT OF FACTS

1. The CLAIMANT, Phar Lap Allevamento (Phar Lap) is a company in Mediterraneo which operates Mediterraneo's most popular stud farm. The racehorse section of Phar Lap is well reputed for providing stallions for the breeding of English thoroughbreds and Anglo Arabs. Nijinsky III is one of the most successful and sort after racehorses, and is one of the most sought-after stallions for breeding. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Equatoriana is famous for its broodmare lines. In 2015 it embarked upon breeding racehorses, as horse racing was an extremely popular and growing sport in Equatoriana.

2. On 21st March 2017, Black Beauty invited Phar Lap to submit an offer for 100 doses of Nijinsky III's frozen semen if available. An offer was made by Phar Lap to which Black Beauty agreed, except that it objected to the choice of law and forum selection clause and insisted on DDP.

3. Black Beauty insisted on DDP, in order to benefit from Phar Lap's experience in the transportation of frozen semen. Therefore, they included a hardship reference to the existing force majeure clause in the Standard Frozen Semen Sales Agreement to address the increased risk through DDP.

4. Black Beauty also considered it inappropriate for the applicable law of the contract to be the Law of Mediterraneo and for Mediterraneo's courts to have jurisdiction. Phar Lap in turn suggested that any dispute be resolved through arbitration and suggested Danubia as the seat of arbitration and the Law of Mediterraneo to govern the contract.

5. Clauses 1-5 of the contract were conclusively agreed upon by the initial negotiators of the contract, Phar Lap's Ms. Napravnik and Black Beauty's Mr. Antley. However, they were unable to finalize on the rest of the clauses, as they were hospitalized due to an unfortunate car accident following their brief meeting on the 12th April 2017. This task was taken over by the two heads of the legal departments of the Parties.

6. On 19th December 2017, the Government of Equatoriana imposed a 30% tariff on all agricultural goods imported from Mediterraneo, retaliating to the President of

Mediterraneo's protectionist economic policies. To the surprise of both Parties, the said tariff scheme also applied to frozen horse semen; Ms. Napravnik was informed of this as the final shipment was being prepared.

7. Mr. Shoemaker, the person responsible for the racehorse breeding program, assured Phar Lap that the Parties will find an agreement on the price in light of the additional tariff. Phar Lap authorized the final shipment before coming into an agreement on the renegotiation of the price.

8. Pursuant to Art. 4 of the HKIAC Rules 2018, Phar Lap filed a Notice of Arbitration requesting the Tribunal to order Black Beauty to pay an additional amount of US$ 1,250,000 following an adaptation of the purchase price, which is made necessary due to the imposition of the retaliatory tariff by the government of Equatoriana.

ISSUE 01: THE TRIBUNAL HAS JURISDICTION TO ADAPT THE CONTRACT

9. Black Beauty wrongfully asserts that the Tribunal lacks jurisdiction to adapt the contract under the Law of Danubia as there has been no express conferral of such power by the Parties *[ANoA, §§ 12-13]*. On the contrary, the Tribunal *does* have jurisdiction to adapt the contract because the Laws of Mediterraneo must allow it to do so **(I)**. Alternatively, even if the Law of Danubia governs the DRC, the contract must be adapted **(II)**. Additionally, the Tribunal has inherent jurisdiction to adapt the contract **(III)**.

I. Laws of Mediterraneo must allow the Tribunal to adapt the contract

10. The DRC of the contract states that any dispute arising out of the contract including, *inter alia*, interpretation and performance, shall be resolved by arbitration *[Exhibit C5, Cl. 15]*. In the Notice of Arbitration, Phar Lap requested the Tribunal to increase the purchase price by at least 25 % due to the higher cost of DDP following the imposition of the new tariff *[NoA, § 18]*. Black Beauty requests the Tribunal to dismiss this claim for lack of jurisdiction *[ANoA, § 22]*. It asserts that the DRC is governed by the Law of Danubia under which the Tribunal must be *expressly* conferred the power to adapt the contract *[ANoA, § 13]*. However, the Tribunal has jurisdiction to adapt the contract under the Laws of Mediterraneo which provide for a broad interpretation of the DRC *[NoA, § 16; Bernardini, p. 211]*. For this purpose, Phar Lap submits that the DRC allows the Tribunal to adapt the contract **(A)**; and that the DRC is governed by the Law of Mediterraneo **(B)**.

A. The DRC allows the Tribunal to adapt the contract

11. The DRC of the contract can be interpreted under the Arbitration Law of Mediterraneo *[Born, p. 1319]*; Mediterranean contract law i.e. UNIDROIT Principles *[PO1, § 4, p. 53]*; and the CISG *[PO1, p. 53, § 4]*. The DRC allows the Tribunal to adapt the contract under the Arbitration Law of Mediterraneo **(i)**; under UNIDROIT Principles Art. 6.2.3 (4) (b) **(ii)**; under UNIDROIT Principles Arts. 4.1, 4.2 and 4.3 **(iii)**; and also under CISG Art. 8 **(iv)**.

i. The DRC allows the Tribunal to adapt the contract under Mediterraneo's Arbitration Law

12. The Arbitration Law of Mediterraneo, like most other jurisdictions, provides for a broad interpretation of the DRC ***[NoA, § 16]***. As such, the DRC of the contract clearly extends to a claim for an increased payment ***[NoA, § 16]***. A broad interpretation of a valid DRC demands that it should extend to any disputed claim ***[Born, p. 1326; Fiona Trust, § 18]***. Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration ***[Mitsubishi Motors Corp., p. 626; German assignee, p. 464]*** even if the DRC is 'narrow' ***[Ivax Corp., p. 1320; Manifest Corp., § 7]***. Here, the jurisdiction of the Tribunal to adapt the contract is a 'disputed claim' ***[ANoA, §§ 22]***. As such, by virtue of broad interpretation of the DRC under the Arbitration Law of Mediterraneo, it must be interpreted as encompassing adaptation of the contract ***[Welser & Molitoris, p. 19; Koller, § 3]***.

13. The scope of the DRC of the contract extends to disputes *'arising out of'* the contract ***[Exhibit C5, Cl. 15]***, as adopted from the model arbitration clause under the HKIAC Rules ***[HKIAC Rules 2018, p. 2; ICC Rules; UAR, p. 21]***. Regardless of the terminology, leading model arbitration clauses intend to apply expansively to all disputes relating to a contract ***[Bond, p. 17]***. The term *'arising out of'* has been interpreted broadly by several jurisdictions even to encompass tort claims ***[The Eschersheim; Case No. 5 U 167/84; Kickboards, scooters case]***. As such, the term *'arising out of the contract'* in Cl. 15 must be interpreted by the Tribunal to include adaptation of the contract, facilitated by the broad interpretation of the DRC under the Mediterranean Arbitration Law ***[NoA, § 16]***.

ii. The DRC allows the Tribunal to adapt the contract under UNIDROIT Principles Art. 6.2.3 (4) (b)

14. Although Black Beauty claims that the Tribunal lacks jurisdiction to adapt the contract ***[ANoA, §§ 13-15]***, an adaptation of the contract must be allowed as a consequence of hardship which requires restoring the equilibrium between parties ***[Bernardini, p. 215; Bernardini - Investments, p. 102]***. Upon failure by the parties to reach an agreement through renegotiations, either party may resort to the arbitral tribunal ***[UNIDROIT Principles, Art. 6.2.3***

(3); Art. 1.11]. If the Tribunal finds hardship, it may adapt the contract, which may involve a price adaptation *[UNIDROIT Principles, Art. 6.2.3 (4)(b); Art. 1.11; UNIDROIT Principles, p. 226]*. The Parties have been unsuccessful in efforts to solve the dispute amicably *[NoA, § 15]* and as a result, Phar Lap has approached the Tribunal with a request to adapt the contract price by at least an increase of 25% *[NoA, § 18]*. Further, there is consistent jurisprudence of contract adaptation in the Mediterranean courts in the context of Art. 6.2.3 (4)(b) *[PO2, § 39]*. As such, under UNIDROIT Principles Art. 6.2.3 (4)(b), the Tribunal has the jurisdiction to adapt the contract [*Ministry of Defense; UAB]*.

iii. The DRC allows the Tribunal to adapt the contract under UNIDROIT Principles Arts. 4.1, 4.2 and 4.3

15. Black Beauty submits that the interpretation of the contract is limited to the wording of the contract, and that no external evidence like drafting history and preceding communications can be relied upon because of the parol evidence rule followed in Danubia *[ANoA, § 16]*. However, under the contract law of Mediterraneo, the contract between the Parties must be interpreted according to their common intention *[UNIDROIT Principles, Art. 4.1]*, taking into account all circumstances including the preliminary negotiations, and the nature and purpose of the contract *[UNIDROIT Principles, Art. 4.3; Parcels of land sale case, § 642]*. During preliminary negotiations between Phar Lap's Ms. Napravnik and Black Beauty's Mr. Antley *[NoA, § 8]*, Mr. Antley himself had suggested that in a situation like hardship where the parties are unable to reach a solution by themselves, it should be the task of the arbitrators to adapt the contract *[Exhibit C8, p. 17]*. Mr. Ferguson and Mr. Krone used the pre-existing file and made necessary changes to the clauses of the standard agreement '*to reflect the agreement*' between Ms. Napravnik and Mr. Antley *[PO2, § 4]*. As such, the DRC must be interpreted to reflect the common intention of the Parties discerned from pre-contractual negotiations between the Parties, which suggest that the Tribunal must be allowed to adapt the contract *[Hideo Yoshimoto, § 89; Vector Gas Ltd., § 20]*.

16. Phar Lap has entered into the contract in order to make a profit of US$ 300,000 in 2018 and to avoid having incurring additional expenses due to unforeseeable circumstances as experienced by them in the past *[Exhibit C4, p. 12]*. Phar Lap had heavily invested in new

stables the year before and was dependent on the revenues from the sale for servicing its debts ***[PO2, § 21]***. Black Beauty was aware of the financial difficulties that Phar Lap was still undergoing ***[PO2, § 22],*** and had knowledge of the impact of the 30% tariff on Phar Lap's financial situation ***[PO2, §§ 28-29].*** The objective of every seller is to earn a reward for his efforts in the form of profits ***[Docherty, p. 227].*** Accordingly, the purpose of any commercial contract is to have a profitable exchange. In addition to pre-contractual negotiations, the purpose of a contact is also to be taken into account in interpreting the DRC ***[UNIDROIT Principles, Art. 4.3 (d); Greek Companies].*** As such, the purpose of the present contract, which is the furtherance of a profitable exchange, must also favour price adaptation to be within the jurisdiction of the Tribunal.

17. When discussing the importance of having a mechanism in place to ensure an adaptation of the contract Mr. Antley had stated, as seen in Ms. Napravnik's Witness Statement, that *'it should probably be the task of the Tribunal'* ***[Exhibit C8, p. 17]***. This has been Ms. Napravnik's preference and understanding of the existing provisions ***[Exhibit C8, p. 17]***. UNIDROIT Principles Art. 4.2 (a) requires a party's statements to be interpreted according to that party's intention, if the other party knew or could not have been unaware of that intention ***[UNIDROIT Principles, Art. 4.2 (a)]***. This provision is inapplicable here, since Ms. Napravnik's understanding of Mr. Antley's statement in relation to adaptation of the contract by the Tribunal is contrary to Black Beauty's position on the same ***[ANoA, §§ 12-13]***. Therefore, in applying UNIDROIT Principles Art. 4.2 (b), a reasonable person in the same circumstances as Ms. Napravnik would have arrived at the same understanding, i.e., that the Parties agreed for the Tribunal to adapt the contract in situations of hardship where the Parties themselves could not agree on a solution.

iv. The DRC allows the Tribunal to adapt the contract under CISG Art. 8

18. The CISG governs sales contracts in Mediterraneo, and also applies to the conclusion and interpretation of arbitration clauses contained in such contracts ***[PO1, § 4; Schwenzer & Jaeger, p. 325]***. As Mediterraneo is a contracting state of the CISG, the CISG applies to the conclusion and interpretation of the DRC ***[Schwenzer & Jaeger, p. 325]***. The UNIDROIT Principles Art. 4.2 corresponds to CISG Arts. 8 (1) and (2) ***[Perillo; UNIDROIT Principles, p. 139]***. Accordingly, even

by applying CISG Arts. 8 (1) and (2), the intention of Mr. Antley conveyed through his statement that it should be the task of the Tribunal to adapt the contract ***[Exhibit C8, p. 17]*** must be interpreted objectively ***[CISG, Art. 8(2); CLOUT Case 222]***. An objective analysis under the CISG will also bring the Tribunal to the conclusion that Black Beauty's intention as understood by a reasonable person was for the Tribunal to adapt the contract ***[Magnesium Case; Hanwha Corp.]***. Further, CISG Art. 8 can be used to interpret the DRC itself ***[CISG Secretariat Commentary, § 2]***. Even when this is done, the same analysis of the DRC according to the intention of the Parties under UNIDROIT Principles Arts 4.1 and 4.3 ***[see §§ 15, 16]***, can be used to draw the conclusion that the Tribunal *does* have the jurisdiction to adapt the contract ***[Schwenzer & Jaeger, pp. 323-324; Fashion Products case; CLOUT Case 932]***.

B. <u>The DRC is governed by the Law of Mediterraneo</u>

19. Black Beauty claims that the Law of Danubia governs the DRC ***[ANoA, §§ 13-14]***. However, the DRC is governed by the Arbitration Law of Mediterraneo ***[PO2, § 14]***. In establishing that the Arbitration Law of Mediterraneo governs the DRC, Phar Lap submits that Law of Mediterraneo is the only law applicable through a choice-of-law analysis **(i)** and that the presumption of separability is not provoked as the contract is not invalid, inoperative or fraudulent **(ii)**.

i. Law of Mediterraneo is the only law applicable through a choice-of-law analysis

20. The DRC of the contract does not contain a written reference to the applicable law ***[Exhibit C5, Cl. 15]***. In such a situation, the Tribunal must decide on the law that governs the DRC by applying the rules of law which it determines to be appropriate ***[HKIAC Rules 2018, Art. 36.1]***. Phar Lap's assertion that the only law governing the DRC is the Law of Mediterraneo ***[NoA, § 15]*** is based on a choice-of-law analysis which contains a three-stage enquiry into the express choice, implied choice, and closest and most real connection ***[SulAmérica; Arsanovia Ltd.; Dicey & Morris pp. 606-607; Lee]***. As such, the Parties' express choice is for the Law of Mediterraneo to apply to the DRC **(a)**. Even if there is no express choice, the Parties' implied choice is for the Law of Mediterraneo to govern the DRC **(b)**. The closest connection test also indicates that the law governing the DRC is the Law of Mediterraneo **(c)**.

a. The Parties' express choice is for the Law of Mediterraneo to apply to the DRC

21. The Parties have expressly agreed that *'This Sales Agreement shall be governed by the law of Mediterraneo'* ***[Exhibit C5, Cl. 14]***. Black Beauty submits that this reference in the choice-of-law clause merely determines the law applicable to the main contract, i.e. the "sales" part of it ***[ANoA, § 14]***. However, the Sales Agreement titled as the *"Frozen Semen Sales Agreement"* as a whole, includes the DRC ***[Exhibit C5, p. 13]***. It has been identified that when Parties expressly choose the words "this agreement," it indicates an express agreement for the law of that agreement to apply to *all the clauses of the contract* ***[Arsanovia Ltd., § 22]***. As such, the express words "*this sales agreement,*" indicate the Parties' express choice of Mediterranean Law as the law governing the contract, including the DRC ***[Arsanovia Ltd., § 22; Lee - Jurisdiction]***.

b. The Parties' implied choice is for the Law of Mediterraneo to govern the DRC

22. The Parties have expressly agreed in the contract that '*this Sales Agreement*', including the DRC shall be governed by the Law of Mediterraneo ***[Exhibit C5, Cl. 14]***. It is also expressly agreed that Danubia shall be the seat of arbitration ***[Exhibit C5, Cl. 15]***. However, the Parties have excluded from the DRC, the choice-of-law clause provided in the model arbitration clause ***[Exhibit C5, Cl. 15; HKIAC Rules 2018, p. 2]***. Black Beauty argues that the implied choice of law governing the DRC is the Law of Danubia ***[ANoA, § 5].*** Even if there is no express choice for the Law of Mediterraneo to govern the DRC, the implied choice of the Parties is not in favour of the Law of Danubia, but that of Mediterraneo. An express choice of law for the matrix contract is generally regarded as an implied choice-of-law for the DRC unless there are indications to the contrary ***[SulAmérica, § 30; Arsanovia Ltd., §§ 19-21]***. In the absence of a choice-of-law clause in the DRC, as frequently seen ***[Schwenzer & Jaeger, p. 317; Born, p. 814]***, it is common for the law governing the DRC to be the law governing the contract of which it is a part, irrespective of the law of the seat of arbitration ***[Dicey & Morris, p. 597, Blackaby et al., pp. 158, 187; Sumitomo Heavy Industries Ltd.; Peruvian Insurance; Black Clawson Int. Ltd., pp. 446]***. Even according to The Hague Principles agreed to by the Parties ***[PO2, § 43]***, the choice-of-law clause can be a 'tacit choice' which appears clearly from the provisions of the contract or circumstances ***[The Hague Principles, Art. 4]***. As such, in the absence of any

additional indications to the contrary, such as that the DRC would be undermined under the law of the contract *[SulAmérica, §§ 30-31]*, the express choice-of-law provision of the sales agreement shall be an implied choice of law governing the DRC *[Leibinger; Sonatrach Petroleum Corp., § 32; Motorola Credit Corp.; Sphere Drake Ins. Ltd.; FR 8 Singapore Pty. Ltd.]*.

c. The closest connection test indicates that the law governing the DRC is the Law of Mediterraneo

23. Even if there is no implied choice of law governing the DRC, the Tribunal should apply the law which it considers to have the 'closest connection' to the matter at hand as determined by the rules of law *[Dicey & Morris, p. 607; The Hague Principles, Art. 12]*. Therefore, in order to determine the law governing the DRC, in the absence of an express or implied choice, the closest connection test must be applied *[Burckhardt & Groz, pp. 166-177]*.

24. In this dispute, the place of performance of the contract as agreed between the parties is Equatoriana *[Exhibit C5, p. 13]* as the frozen semen had to be delivered by Phar Lap to Equatoriana *[Girsberger & Voser, p. 359]*. Phar Lap is domiciled in Mediterraneo, whereas Black Beauty is in Equatoriana *[NoA, §§ 1, 4]*. In applying the closest connection test, the Tribunal should *objectively* determine the Parties' expectations in regard to the applicable law *[Burckhardt & Groz, p. 168]*. Factors such as the place of business or habitual residence of the parties, particularly of the party which is required to render the 'characteristic performance' and the place of performance of the contract are taken into account when applying this test *[Burckhardt & Groz, p. 168; Dicey & Morris, ch. 16]*. Furthermore, the seat of arbitration is generally regarded as an irrelevant factor *[Berger & Kellerhals, p. 369; Sumitomo Heavy Industries Ltd.]*, whereas *'there is a real and close connection between the law governing the arbitration agreement and the law governing the substantive contract'* *[Joseph, §§ 6.33–6.41]*. Phar Lap renders performance of the contract by delivering the frozen semen and as such its domicile has the closest connection to the dispute *[Exhibit C5, Cl. 8; Burckhardt & Groz, p. 168]*. Therefore, in the absence of an express agreement as to the choice of law applicable to the DRC, the law of the Jurisdiction which has the closest and most substantial connection to the DRC, which is the law of Mediterraneo as opposed to Danubia, shall govern the DRC.

ii. The presumption of separability is not provoked as the contract is not invalid, inoperative or fraudulent

25. Black Beauty claims that according to the presumption of separability which is expressed in Model Law Art. 16, the DRC must be considered as legally separate from the matrix contract in which it is included ***[ANoA, § 14]***. As a result, it is submitted that the choice-of- law clause of the contract does not extend to the DRC ***[ANoA, § 14]***. However, Black Beauty has not challenged the *validity* of the contract, but only intends to separate the DRC from it, for the purpose of interpreting the applicable choice of law ***[ANoA, § 14]***. However, the presumption of separability is provoked only in certain limited and special contexts, i.e. if it was contended that the main contract had become unenforceable, void or voidable, or suffered from any illegality, and if the issue was whether the arbitration agreement survived nonetheless ***[Born, pp. 350-360; Hussain, p. 188; Fal Oil Company Ltd., § 8; BCY]***. If the presumption of separability is to be provoked, it does not treat the DRC as a distinct agreement for other purposes, including that of choice of law ***[Glick & Venkatesan, p. 136; Landolt, p. 511]***. Even under the Model Law, the words "for that purpose" refer strictly to the purpose of *kompetenz - kompetenz* of the Tribunal ***[Model Law, Art. 16; Landolt, p. 521]*** and this provision can only be resorted to only when the *validity* of the DRC itself is challenged ***[Model Law, Art. 16; BCY; Waincymer, p. 114]***. Therefore, the presumption of separability is not provoked in this dispute, as the question is not that of the validity of the DRC ***[Fiona Trust, § 19]***. As such, the choice of law of the contract shall govern the DRC, as it cannot be treated as a separate clause from the main contract for the purpose of interpreting the applicable law.

II. Even if the Law of Danubia governs the DRC, the contract must be adapted by the Tribunal

26. The Danubian Contract Law, which is largely a verbatim adoption of the UNIDROIT Principles, allows adaptation of the contract by the Tribunal "if authorized" ***[PO2, § 45]***. For an action to be 'authorized,' it must have official permission or approval ***[Oxford Dictionaries]***. The contract lacks an express statement or reference in writing, but does not lack an 'authorization,' as Ms. Napravnik and Mr. Antley, both being the official negotiators for the Parties ***[NoA, § 8]*** intended for the Tribunal to adapt the contract in a situation of hardship ***[see §§ 17-18]***. The

lack of a written agreement was due to the unfortunate car accident that resulted in the inability of the primary negotiators to finalize the contact ***[NoA, p. 16]***. As such, contrary to Black Beauty's assertions, the express *agreement* between the Parties that the Tribunal must be able to adapt the contract in a situation of hardship, must be interpreted as an authorization of adaptation by the Tribunal.

27. The courts of Danubia are of the view that Art. 28 (3) of the Danubian Arbitration Law (identical to UNCITRAL Model Law Art. 28 (3)) contains a general standard to be applied to the conferral of exceptional powers to the Tribunal ***[PO2, § 36]***. Accordingly, if adaptation of a contract is considered an 'exceptional power', it must be 'expressly authorized' ***[Model Law, Art. 28 (3)]***. Drafting history of the Model Law shows how the Working Group has deliberated whether an authorization to adapt must be 'express' and 'in writing' ***[Model Law 6th session, § 22]***. The fact that Model Law Art. 28 (3) only requires *express authorization* by the Parties and not express authorization *in writing* necessarily implies that an express verbal agreement is sufficient. It has also been held that where the arbitration agreement had stated that the Tribunal was to be relieved of all judicial formalities in coming to a decision, an express authorization within the meaning of Model Law Art. 28 (3) was given ***[CLOUT Case 507]***, further confirming that written conferral is unnecessary. Hence, the express agreement between the Parties' Ms. Napravnik and Mr. Antley that the Tribunal must be able to adapt the contract ***[Exhibit C8, p. 17]*** qualifies as an express authorization or conferral of the power to the Tribunal to adapt the contract even under Model Law Art. 28 (3).

III. The Tribunal has inherent powers to adapt the contract

28. In this dispute, there is no express written reference to the Tribunal's jurisdiction to adapt the contract ***[PO2, § 2]***. Accordingly, Black Beauty claims that the Tribunal does not have the jurisdiction to adapt the contract ***[ANoA, § 12]***. Inherent powers have been defined as powers that are not explicitly granted to the tribunal, but are derived from the parties' consent to create an institution with a judicial nature, with the intent to safeguard the basic judicial functions ***[IUSCT No. B61; Northern Cameroon; Waincymer, pp. 73-75; Caron et al., p. 915]***. This implies the need to fulfil the Tribunal's function as an adjudicative body ***[Brown, p. 205].*** The notion of inherent powers comes into play when a tribunal determines its own jurisdiction to

entertain claims *[Ly et al., p. 9; Waguih Elie, pp. 136-138].* Arbitration, as opposed to litigation, is resorted to in order to provide a single, centralized mechanism for finally resolving all disputes under a commercial contract *[Born, p. 1328]*. As such, even if the DRC cannot be interpreted broadly according to the Law of Mediterraneo, the Tribunal still has inherent powers to adapt the contract in order to fulfil its function as an adjudicative body.

29. Despite Black Beauty's assertion that the Tribunal lacks the jurisdiction to adapt the contract under the Law of Danubia *[ANoA, §§ 12-13]*, the Tribunal must have such power in order to avoid an annulment of the award due to contravention of public policy under the NY Convention *[NY Convention, Art. V (2)(b)]*. The seat of arbitration is Danubia *[Exhibit C5, § 15]*, which is where the contract must be enforced *[Lozada, p. 74]*. Accordingly, the public policy of Danubian law is important under the NY Convention when it comes to enforcement of the award *[Waincymer, p. 70]*. According to the arbitration law of Danubia, it is mandatory for the parties to be treated with equality *[Model Law, Art. 18; PO2, § 14; Brekoulakis & Ribeiro et al., p. 878]*. It cannot be constrained or made inapplicable by exercising party autonomy *[Model Law, p. 31; Waincymer, p. 60]*. Equal treatment of the Parties can be upheld only if the Tribunal is allowed to adapt the contract so as to restore the equilibrium between the parties *[Bernardini, p. 215]*. Accordingly, if the Tribunal does not consider price adaptation to be within its inherent jurisdiction with a view to restoring the equilibrium between the Parties, the award is at risk of being set aside on the ground of contravening public policy *[NY Convention, Art. V (2)(b)]*. As such, the Tribunal must exercise its inherent jurisdiction to adapt the contract, as otherwise the contract may be set aside under the NY Convention.

CONCLUSION: The DRC is governed by the Law of Mediterraneo according to a choice-of-law analysis, and as such the DRC must be interpreted broadly to allow the Tribunal to adapt the contract. Furthermore, even if the DRC is governed by the Law of Danubia, the contract must be adopted by the Tribunal. In any case, the Tribunal has inherent powers to adapt the contract. As such, the Tribunal has jurisdiction to adapt the contract.

ISSUE 02: PHAR LAP MUST BE ENTITLED TO SUBMIT THE PARTIAL INTERIM AWARD FROM THE OTHER ARBITRATION INVOLVING BLACK BEAUTY

30. Phar Lap has informed the Tribunal about an arbitration that Black Beauty had with one of its customers, which is similar to the present arbitration ***[Letter by Langweiler, p. 49]***. Although Phar Lap intended to submit as evidence a copy of the award as well as the relevant submission ***[Letter by Langweiler, p. 49]***, it has only been able to arrange for obtaining a copy of the partial interim award ***[PO2, § 41]***. Black Beauty claims that this evidence is obtained by illegal means and should not be admitted in this arbitration ***[Letter by Fasttrack, p. 50]***. However, the Tribunal should take into consideration that the partial interim award is relevant and material to this arbitration **(I);** and is admissible in this arbitration **(II).** Even if Phar Lap is not entitled to admit the partial interim award, the Tribunal must still admit it under HKIAC Rules 2018 Art.22.3 **(III)**.

I. The partial interim award is relevant and material to this arbitration

31. Phar Lap has obtained reliable information about another arbitration proceeding where Black Beauty has requested the Tribunal to adapt the contract due to the imposition of a tariff ***[Letter by Langweiler, p. 49; PO2, § 24].*** Black Beauty has objected to the submission of evidence from that arbitration ***[Letter by Fasttrack, p. 50]***. The Tribunal should however allow Phar Lap to produce this partial interim award in this arbitration, as it is factually relevant and material to this arbitration **(A)**; and also is relevant and material under the applicable laws **(B)**.

A. The partial interim award is factually relevant and material to this arbitration

32. Black Beauty asserts that the submission by Phar Lap of Black Beauty's stance on price adaptation in the other arbitration, is taken out of context, and as such, evidence from the other arbitration should not be admitted in this arbitration ***[Letter by Fasttrack, p. 50]***. To the contrary, the partial interim award from the other arbitration is factually relevant to this arbitration **(i)**, and is factually material to the outcome of this arbitration **(ii)**.

i. The partial interim award is factually relevant to this arbitration

33. The transactions in both arbitration proceedings concern the horse racing industry: the other arbitration proceedings in which Black Beauty is involved concerns the sale of a mare ***[PO2, § 39]***; and this arbitration is concerned with the sale of horse semen ***[C5, p. 13]***. Further, both sales agreements are governed under the Law of Mediterraneo ***[Exhibit C5, p. 13; PO2, § 39]***. An unexpected tariff has been imposed in both arbitrations ***[NoA, § 9; PO2, § 24]***, and both consider the issue of price adaptation as a result of tariffs ***[NoA, § 18; PO2, § 39]*** since both contracts are based on DDP (INCOTERMS 2010) ***[Exhibit C5, Cl. 8; PO2, § 39]***. Black Beauty has asked for price adaptation in the other arbitration under the ICC Hardship Clause and UNIDROIT Principles ***[PO2, § 39]***, similar to Phar Lap's request in the present arbitration ***[ANoA, § 4; NoA, § 20]***. Evidence is relevant if it directly relates to the issues disputed or discussed ***[Black's Law Dictionary].*** The relevance of evidence is dependent on the relationship between the evidence to be admitted, and a matter to be proved in the particular case ***[Draye, p. 303]***. Therefore, the partial interim award from the other arbitration is relevant to this arbitration, as it directly relates to the issue of price adaptation consequent to a tariff, as faced in this arbitration ***[PO2, § 39]***.

ii. The partial interim award is factually material to the outcome of this arbitration

34. The Tribunal in the other arbitration proceedings has confirmed its powers to adapt the contract in the partial interim award rendered on 29th June 2018, should it be proved that the tariff resulted in hardship for Black Beauty ***[PO2, § 39]***. The partial interim award is likely to contain information as to the Tribunal's treatment of the Parties' procedural application and pleadings ***[IBA Arb40 Subcommittee, p. 34, § 4.4]***. Further, as the other arbitration proceedings are governed by the HKIAC Rules 2013, the award will state the reasons based on which it was made ***[HKIAC Rules 2013, Art. 34.4]***. The notion of materiality refers to the importance of the evidence to the outcome of the dispute at hand ***[Draye, p. 303; Marghitola, pp. 52-54]***. Material evidence is further described as evidence that can affect the conclusion or outcome of a case ***[Black's Law Dictionary].*** As such the partial interim award of the other proceedings is material to the present arbitration, as the information and reasoning of the Tribunal of that

arbitration contained therein, would be of significant assistance to this Tribunal in determining the outcome of the similar issues in dispute *[NoA §§ 18-20; PO2, § 39]*.

B. The Tribunal should consider the partial interim award to be relevant and material to this arbitration under the applicable laws

35. The Tribunal should consider the partial interim award to be relevant to this arbitration as well as material to its outcome, both the HKIAC Rules 2018 **(i)**, as well as the IBA Rules on Evidence **(ii)**.

i. The partial interim award should be considered relevant and material under the HKIAC Rules 2018 Art. 22

36. The parties have agreed, pursuant to Model Law Art. 19 (1), that this arbitration will be governed by the HKIAC Rules 2018 *[PO1, p. 51]*. The HKIAC Rules 2018 grant the Tribunal a wide discretion in relation to evidence and hearings *[HKIAC Rules 2018, Art. 22]*. As it is Phar Lap who has submitted that Black Beauty has previously asked for price adaptation due to a tariff in a separate arbitration proceeding, Phar Lap bears the burden of proving this fact *[HKIAC Rules 2018, Art. 22.1]*. However, The HKIAC Rules 2018 do not expressly allow or bar Phar Lap from producing the partial interim award into evidence; the Tribunal is given the discretion to determine relevancy and materiality of evidence *[HKIAC Rules 2018, Art. 22.2*], and will admit or exclude the partial interim award based on their determination on if the partial interim award is relevant to the case and material to its outcome *[HKIAC Rules 2018, Art. 22.3]*. Given how the partial interim award is factually relevant to this arbitration and material to its outcome *[see §§ 33-34]*, the Tribunal should allow the production of the partial interim award into evidence, under HKIAC Rules 2018 Art. 22.

ii. The partial interim award should be considered relevant and material under the IBA Rules on Evidence Art. 9

37. Phar Lap has initiated the process of obtaining the partial interim award of the other arbitration proceedings, in order to produce it as evidence in the present arbitration *[Letter*

by Langweiler, p. 49; PO2, § 41]. The IBA Rules on Evidence provide an efficient, economical and fair process for the taking of evidence *[IBA Rules on Evidence, Preamble, p. 4; Marghitola, p. 37]*. They have attained the status of "soft law" within the arbitration community *[Hodges, p. 218]* and may be used to supplement the HKIAC Rules 2018 that govern the conduct of the arbitration in this case *[PO1, p.* 52*]*. They further function as a guide to the exercise of broad discretions *[Veeder, p. 757]*, such as that of the Tribunal in determining the relevance and materiality of evidence *[IBA Rules, Art. 9.1; Waincymer, p. 856]*. The standard required by the IBA Rules on Evidence is prima facie relevance and materiality *[Marghitola, § 5.02; Brower & Sharpe, p. 612; Hanotiau, p. 117; Waincymer, p. 858].* The IBA Rules on Evidence also provide for the exclusion of evidence that is not sufficiently relevant to the case or material to its outcome *[IBA Rules on Evidence, Art. 9.2 (a)]*. As shown above, the partial interim award contains pertinent information, making it relevant and material to the present arbitration *[§§ 33-34].* As such, the Tribunal should allow Phar Lap to produce the partial interim award into evidence, as it is sufficiently relevant and material to the present arbitration under IBA Rules on Taking of Evidence Art. 9 *[Ashford, p. 98]*.

II. The partial interim award is admissible in this arbitration

38. The Tribunal should consider the partial interim award to be admissible in the present arbitration, notwithstanding Black Beauty's objections to its production in evidence by Phar Lap *[Letter by Fasttrack, p. 50]*. The Tribunal is granted the power to determine admissibility *[HKIAC Rules 2018, Art. 22.2; IBA Rules, Art. 9 (1)]*. As such, the partial interim award must be considered admissible in this arbitration as it has not been obtained by illegal means **(A)**. Furthermore, it is admissible even if a breach of confidentiality has occurred **(B)**, and even if it has been obtained by hacking **(C)**. In any case, the partial interim award must be admitted to avoid risk of annulment under the NY Convention **(D).**

A. The partial interim award is admissible as it has not been obtained by illegal means

39. Black Beauty objects to the admission of evidence from the other arbitration, claiming that the information of the other arbitration has been obtained illegally, either through two of its former employees who had been witnesses in the other arbitration and who were obliged to

maintain confidentiality of those proceedings, or through a hack of its computer system *[Letter by Fasttrack, p. 50]*. The partial interim award is available to be obtained from a company which provides intelligence on the horseracing industry *[PO2, § 41]*. Given that it was only through a *first* investigation that Black Beauty has assumed the sources through which the company may have obtained the information about the award *[Letter by Fasttrack, p. 50]*, it is highly probable for other sources to be discovered through further investigation. Phar Lap first got to know of the other arbitration through a former employee of the Mediterranean buyer in the other arbitration; he knew the main issues in dispute despite not even being involved in that arbitration *[PO2, § 40]*. This indicates that information from this arbitration had already spread beyond those who were covered by the obligation of confidentiality *[HKIAC Rules 2013, Arts. 42.1- 42.2].* As such, the information could have been made available to the company without a violation of confidentiality obligations by a covered individual.

40. The security gap in Black Beauty's computer system which allowed the hackers to exploit their computers, was caused by Black Beauty's negligence *[PO2, § 42]*. Black Beauty itself has failed to ensure confidentiality of the other arbitration and its partial interim award. As such, information about the other arbitration proceedings could already be in the hands of many others in addition to the company who is supplying Phar Lap with the copy of the partial interim award. In any case, it is not confirmed that the hacker had accessed information concerning the other arbitration; and as such, it cannot be definitely stated that the partial interim award the company is providing has been obtained due to this hack. Accordingly, it is clear that it has not been conclusively established that the company supplying the award has obtained the partial interim award by illegal means, either by a covered individual's violation of a confidentiality obligation or by hacking. As such, the partial interim award should be considered to be admissible in this arbitration.

41. In any case, it is not Phar Lap who has been guilty of any illegal activity in obtaining the copy of the partial interim award which it is attempting to produce into evidence; Phar Lap is only a stranger to the other arbitration *[Gotham Holdings, p.665]*. Phar Lap itself is not in breach of any such confidentiality obligation as it is a third party to the other arbitration *[Smeureanu,*

p.31] nor has it hacked Black Beauty's computer system. It is merely seeking to make use of a partial interim award which has already been obtained by the company. The manner in which it has been made available to the company is beyond Phar Lap's control and it was not done under Phar Lap's authority; the purported illegal activity involved in the company obtaining the partial interim award cannot therefore be imputed to Phar Lap. As such it is clear that Phar Lap's copy of the partial interim award must be allowed to be admitted in evidence.

B. The partial interim award is admissible even if a breach of confidentiality has occurred.

42. Black Beauty claims that the submission of the partial interim award by Phar Lap can only occur in violation of contractual and statutory confidentiality obligations ***[Letter by Fasttrack, p. 50]***. The Model Law is silent on the issue of confidentiality ***[Binder, § 11; Weeramantry & Choong, p. 89]***. However, the respective provisions governing the confidentiality in the two arbitrations do not require the Tribunal to exclude evidence which has been obtained by a breach of confidentiality ***[HKIAC Rules 2013, Art. 42; HKIAC Rules 2018, Art. 45]***. Black Beauty's representation of an obligation of confidentiality on the part of Phar Lap is erroneous, as such an obligation only rests on those listed out in Arts. 42.1 and 42.2, which does not include Phar Lap, who is a stranger to the other arbitration ***[HKIAC Rules 2013; Gotham Holdings, p. 665]***. Even HKIAC Rules 2018 Art. 22 which governs evidence does not bar the admissibility of an award obtained by a breach of confidentiality. Instead, it gives the Tribunal the discretion to admit such evidence as it deems relevant and material, with no mention of a compulsion to exclude so-called illegal evidence ***[HKIAC Rules 2018, Art. 22]***. As such, even if the partial interim award has been made available to Phar Lap as a result of a breach of confidentiality, the partial interim award should still be considered as admissible.

43. The fact that Mr. Velazquez, a third party to the other arbitration, knew of the main issues in dispute is taken into consideration, makes it is clear that the crux of the information relating to the other arbitration has already been made known to persons beyond those involved in the arbitration ***[PO2, § 40]***. Even under the IBA Rules on Evidence, the Tribunal is given the discretion to determine admissibility of evidence ***[IBA Rules on Evidence, Art. 9.1]***. IBA Rules on Evidence Art. 9.2 (b) allows the tribunal to exclude from evidence any document on the basis

that there is a legal impediment or privilege. The only such impediment in this dispute may be that the confidentiality of the other arbitration could be violated by the contents of the partial interim award being made known in this arbitration. However, IBA Rules on Evidence Art 9.3 (d) guides the Tribunal to take into account any possible waiver of such applicable legal impediment or privilege by virtue of earlier disclosures, such as the disclosure of information to Mr. Velazquez ***[PO2, § 40]***. As such, the partial interim award, the contents of which have already been made available to those outside the other arbitration, must be admitted, notwithstanding any purported legal impediment, as breach of confidentiality is not a compelling enough reason for the Tribunal to exclude the partial interim award ***[Gotham Holdings]***.

44. Black Beauty's objections to Phar Lap's production of the partial interim award as evidence in this arbitration, centres is based on its concern of preserving the confidentiality of the other proceedings, as the other arbitration is governed by the confidentiality provisions in the HKIAC Rules 2013 ***[Letter by Fasttrack, p. 50; HKIAC Rules 2013, Arts. 42.1, 42.2].*** However, it has been held that a confidentiality agreement between the parties did not preclude reliance on the arbitral award from a prior arbitration ***[AEGIS Ltd.; Hwang & Chung, pp. 623-624]***. Furthermore, IBA Rules on Evidence provide that if the partial interim award is to be considered a document that is produced but is not otherwise in the public domain, it shall be kept confidential by the Tribunal and the other parties, and shall be used only in connection with the arbitration ***[IBA Rules on Evidence, Art. 3]***. IBA Rules on Evidence Art. 9.4 further provides that the Tribunal may make certain arrangements, such as entering into a confidentiality agreement or order, to permit evidence to be considered subject to suitable confidentiality protection ***[IBA Rules Commentary]***. The Tribunal in this arbitration can thereby make arrangements to protect the copy of the partial interim award from leaving the confines of the present arbitral proceedings, preserving its alleged confidentiality. In any case, the courts have held that such documents may be admitted despite being qualified as confidential information ***[Hassneh; Smeureanu, p.36; John Fairfax & Sons Ltd.].*** As such, the Tribunal must admit the partial interim award into evidence, even if it has been obtained by the company as a result of a breach of confidentiality.

C. The partial interim award is admissible even if it has been obtained by hacking

45. Black Beauty claims that the information may have been obtained by a hack of their computer system where the hackers managed to retrieve a considerable amount of data *[Letter by Fasttrack, p. 50]*. There are no clear rules on how to treat improperly obtained evidence *[Waincymer, p. 817].* The HKIAC Rules 2018 do not specifically address the issue of evidence that has been obtained (as the case may be in this arbitration), by hacking. *[HKIAC Rules 2018, Art. 22]*. The Tribunal will decide what evidence is relevant and material in a case, depending upon the circumstances and the arbitrators *[Derains & Sicard-Mirabel, p. 208; HKIAC Rules 2018, Arts. 22.2-22.3]*. Thereby, the procedural rules in this arbitration (i.e. HKIAC Rules 2018) leave it to the arbitrators to not only decide the admissibility of illegally obtained evidence, but what weight to give it when analysing the dispute *[HKIAC Rules 2018, Art. 22.2; Hwang & Lim, p. 31; Derains & Sicard-Mirabel, p. 208]*. Even in the case of unlawful collections of evidence which have been declared violations of international law, no sanction has been imposed on the gatherer *[Corfu Channel case; Reisman & Freedman, p. 748]*. Furthermore, even documents that have been taken from diplomatic premises have been admitted in evidence, where the user was not the one who had illegally taken them *[Rose; Reisman & Freedman, p. 751]*. Therefore, if the Tribunal were to disallow the admittance of the partial interim award into evidence, it would have no clear basis for doing so, as Phar Lap has not acted illegally. As made clear above, the so-called illegally obtained partial interim award is both relevant and material as evidence in this arbitration *[see §§ 33-34]*. As such, even if the partial interim award has been obtained by hacking, it is admissible as evidence in this arbitration.

46. Black Beauty has asserted that the possibility that the information from the other arbitration has been made available due to a hacking of its computer system, must warrant its exclusion from evidence *[Letter by Fasttrack, p. 50]*. The IBA Rules on Evidence consider a legal impediment to bar admissibility, but this must be so under rules that the Tribunal considers to be applicable *[IBA Rules on Evidence, Art. 9(2) (b)]*. Hacking is illegal under criminal law, but is not discussed under laws relating to this arbitration. On principle, an international tribunal may admit documents as evidence even if they have been obtained by hacking a computer

network ***[Caratube International]***. Additionally, the Tribunal must not ignore the existence of the partial interim award and its relevance, as this would lead to a '*travesty of justice*' ***[ConocoPhillips]***. It has also been held that even if unlawful collections of evidence have violated international law, it does not mean that such illegally obtained evidence will be deemed inadmissible ***[Corfu Channel; Reisman & Freedman, p. 748]***. Therefore, the legal impediment in this award of being obtained by hacking, does not warrant exclusion by the Tribunal. As such, the partial interim award should be considered as admissible in this arbitration, even if it has been obtained by hacking.

D. <u>The partial interim award should be admitted to avoid risk of annulment of the award under the NY Convention</u>

47. Black Beauty has strongly objected to Phar Lap producing evidence from the other arbitration ***[Letter Fasttrack, p.50],*** thereby attempting to restrict Phar Lap from submitting evidence that is both relevant and material ***[see §§ 33-34]***. If the Tribunal were to allow such a restriction, it will be a violation of Phar Lap's right to present its case. The arbitration laws of both Danubia and Mediterraneo are largely a verbatim adoptions of the Model Law ***[PO2, § 14]***. Model Law Art. 18 states that parties must be treated equally and each party must be given an opportunity to present its case. This provision reflects the basic notions of natural justice and fairness which is based on the right of a party to be heard and the right to an impartial tribunal ***[Model Law 18th Session; Sheldon; Generica Ltd.; Soh Beng Tee; Methanex Motonui Ltd.; John Holland Ltd.]***. Furthermore, the NY Convention lays down the grounds on which an award can be set aside, and refuses the enforcement of an award where a party has been unable to present its case ***[NY Convention, Article V(1)(b); Born, p. 2155]***. NY Convention Article V(1)(b) imposes a uniform international standard of procedural fairness and equality ***[Born, p. 2158; ELSI case]*** and as such embodies the notion of natural justice and equality in the Model Law Art. 18. The application of NY Convention Article V (1)(b) extends to instances involving denial of basic requirements of procedural fairness such as denying a party a reasonable opportunity to present evidence ***[Born, p. 2158].*** This provision comes into application when the evidence that is denied admittance is material to the outcome of the case ***[Born, p. 2158; see §44; Apex Tech Investment Ltd.; McKendrick, p. 265].*** It has also been held that the violation of due

process is also a ground for refusal of an award on the ground of public policy ***[NY Convention, Article V(2)(b); Waincymer, p. 98]***. Even the procedural rules the parties have agreed on require the Tribunal to do everything necessary to ensure the fair conduct of the arbitration ***[Exhibit C5, Cl. 15; HKIAC Rules 2018, Art. 13.5]***. As such, the violation of Phar Lap's right to admit material evidence by the Tribunal, will render the award in this arbitration capable of being annulled under the NY Convention for the reason of breach of fundamental principles of due process. Therefore, the Tribunal should allow for the partial interim award to be admitted, so as to avoid the risk of the award in this arbitration being annulled under the NY Convention ***[NY Convention, Arts. V(1)(b), V(2)(b)]***.

III. Even if Phar Lap is not entitled to admit the partial interim award, the Tribunal must still admit it under HKIAC Rules 2018 Art. 22.3

48. Black Beauty argues that Phar Lap should not be allowed to admit the evidence on the basis that it has been obtained illegally ***[Letter by Fasttrack, p. 50]***. HKIAC Rules 2018 Art. 22.3 empowers the Tribunal to require a party to produce documents or other evidence that it determines to be relevant to the case and material to its outcome at any time of the proceedings ***[HKIAC Rules 2018, Art. 22.3]***. The Tribunal is similarly empowered by the IBA Rules on Evidence to request any party to produce any *documents* as evidence ***[IBA Rules on Evidence, Art. 3.10; Blackaby et al., p. 379]***. Furthermore, the weight that the Tribunal should give for relevance and materiality of the partial interim award overrides the method by which the company who is selling it to Phar Lap has obtained it ***[CRW Joint Operation; PO2, § 41]***. As such, even if the Tribunal decides that the partial interim award has been obtained by illegal means and as such that Phar Lap is not allowed to admit it in evidence, the Tribunal should still require Black Beauty to produce the partial interim award on the grounds of relevance and materiality ***[see § § 33-34]***.

CONCLUSION: The Tribunal should find that partial interim award from the other arbitration Black Beauty is involved in is relevant and material to the outcome of this arbitration, both factually as well as under the applicable laws. It should find that the partial interim award is admissible in evidence in this arbitration as it has not been obtained by illegal means. Even if it has been obtained by breach of confidentiality or hacking, the Tribunal should still find it

admissible by law. Furthermore, the Tribunal should admit the partial interim award in order to avoid risk of annulment under the NY Convention, and should admit it even if it is decided that Phar Lap is not entitled to do so. As such, Phar Lap must be entitled to submit the partial interim award from the other arbitration involving Black Beauty.

ISSUE 03: THE TRIBUNAL MUST ADAPT THE PRICE BY AT LEAST US$ 1,250,000 IN PHAR LAP'S FAVOUR

49. The circumstances surrounding the last shipment of 50 doses of semen delivered on 22nd January 2018 were significantly different to those surrounding the prior shipments, due to the unprecedented retaliatory tariff of 30% on agricultural goods imposed by the Government of Equatoriana ***[NoA, §§ 9-11]***. As such, Phar Lap is entitled to receive at least US$ 1,250,000 and any other amount as a result of adaptation, since Cl. 12 of the contract governs the adaptation **(I)** and as the CISG and UNIDROIT Principles favour Phar Lap for price adaptation due to hardship **(II)**.

I. Clause 12 of the contract governs the adaptation

50. Phar Lap is entitled to receive additional payment subsequent to adaptation under Cl. 12 of the contract, as contractual hardship has been caused by the Equatorian tariff and surrounding circumstances **(A)**; as bearing the entire tariff by Phar Lap will cause impending financial ruin **(B)**; and since Phar Lap did not assume the risk by incorporating modified DDP **(C)**.

A. The Equatorian tariff and Black Beauty's conduct have caused contractual hardship

51. Cl. 12 of the contract includes hardship caused by unforeseen events "*comparable to additional health and safety requirements"* that make the contract "more onerous" ***[Exhibit C5, Cl. 12]***. This standard of hardship was established in the clause because of Phar Lap's previous experience where it had to suffer a 40% increase of expenses in order to comply with additional health and safety requirements; such compliance negatively impacted Phar Lap's creditworthiness ***[Exhibit C4, p. 12]***. The Parties' intention was thus to ensure that Phar Lap

was not subject to "comparable" impediments in performing the present contract *[Exhibit C4, p. 12]*. A contractual hardship clause completely replaces accepted hardship standards *[Brunner, p. 422; Bernardini, p. 213]*. Parties often include examples of events and additional burdens which constitute hardship in such contractual hardship clauses, with the term 'hardship' only playing the role of a fall-back solution *[Kröll, p. 445]*. This is consistent with the principle of party autonomy established in CISG Art. 6 *[Borisova]*. The Parties have thereby established a lower hardship standard for the performance of the contract through Cl. 12 *[Exhibit C5, Cl. 12]*, making irrelevant the fact that cost increases ranging from 13% to 50% are generally considered insufficient to amount to hardship *[Steel bars case; Petroleum case]*. The present 30% retaliatory tariff imposed by the Equatorian government was completely unforeseeable, as the Equatorian government was an ardent supporter of free trade *[Exhibit C6, p. 15; PO2, § 25]*. The tariff's effect on the price of the semen was also "astonishing" to both Parties, as this was contrary to the prevailing categorization *[NoA, § 11]*. The unforeseen tariff has thereby directly made the third shipment of frozen semen 30% more expensive *[Exhibit C7, p. 16],* causing hardship, as Phar Lap's performance of the contract has been made more onerous.

52. Black Beauty's conduct consequent to the tariff also caused hardship by making Phar Lap's performance of the contract more onerous *[Exhibit C8, p. 18; Exhibit R4, p. 36]*. Although Phar Lap put the remaining shipment of 50 doses on hold after learning of the tariff, it was rushed to bear the entire burden of the tariff by Black Beauty's insistence on the scheduled delivery and assurances of negotiations for solutions for the price increase *[Exhibit C8, p. 18; Exhibit R4, p. 36; NoA, § 18]*. Black Beauty's intention behind urging the delivery was to secretly resell the doses in direct violation of its contractual obligations *[Exhibit R4, p. 36]*. Nijinsky III was a peerless stallion whose frozen semen was not in the market prior to the contract *[PO2, § 4]*. Resale of the semen by Black Beauty bypassing the contractual safeguards by Phar Lap *[PO2, § 16; Exhibit C2, p. 10; Exhibit C5, p. 13]* made the semen commonly available, thus significantly damaging the comparative market advantage enjoyed by Phar Lap. As such, the aggregate effect of the 30% increase in cost caused by the tariff *[see § 50],* along with Black Beauty's conduct, is comparable to the hardship standard set in Cl. 12 *[McKendrick; van Houtte, p. 111; ICC No. 9479; Strohbach, p. 40; Puelinckx, p. 54]*.

53. The Tribunal must adapt the contract through a price revision which will amount to at least US$ 1,250,000 so that Phar Lap can avoid an extremely damaging loss ***[NoA, § 18]***. Hardship is one of the reasons for which an arbitral tribunal would generally adapt a contract ***[Blackaby et al., p. 537; Waincymer, pp. 1095-1189].*** In addition, even if the parties have not included a renegotiation clause in their contract, a renegotiation of the contract can be taken into consideration where a hardship clause provides an appropriate starting-point ***[Berger, p. 55; Doudko, p. 483, 507].*** Given the hardship suffered by Phar Lap, Cl. 12 of the contract which governs hardship must be used by the Tribunal to adapt the price.

B. Bearing the entire tariff will result in Phar Lap's financial ruin

54. Phar Lap has been consistently making losses since 2014 due to its previous adverse experiences, and so it relied heavily on the profits of the present sale ***[PO2, § 29]***. The increase in cost caused by bearing the entire tariff seriously endangers the existence of Phar Lap, as the amount lost (US$1,250,000) is more than 400% the expected profit Phar Lap planned to show its creditors ***[PO2, § 29]***. The hardship exemption is available where completion of performance would result in the financial ruin of the obligor, especially due to increased costs of performance ***[Brunner, p. 426]***. The present tariff will harm the already damaged financial reputation of Phar Lap and eventually lead to heavy losses against its biggest competitors ***[PO2, §29]***. As such, the hardship exemption under Cl. 12, must govern the present impediment.

55. The fundamental change in equivalence is much greater in favour of Black Beauty due to the unauthorized reselling of the doses at a significantly higher profit margin of 20%, against the explicit request by Phar Lap ***[PO2, § 20]***. Thus, Black Beauty has benefited not only from the non-payment of the tariff but also through its actions which lack good faith ***[North American Co.]***. As such, Black Beauty must be liable for the losses caused to Phar Lap as a result of breaking off negotiations in lack of good faith ***[UNIDROIT Principles, Art. 6.2.3(3); Exhibit C8, p. 18]***. In any case, Black Beauty has a legal duty to accept an 'equitable' adjustment proposed in good faith by Phar Lap ***[Speidel, pp. 404-405]***, which in this case is an adaptation of the contractual price by the Tribunal.

C. Phar Lap did not assume the risk by incorporating a modified DDP

56. The modified DDP incorporated by the Parties excludes the Equatorian tariff since the assumption of such a risk was not the intention of the Parties **(i)**, and because the profit margin of Phar Lap does not reflect the assumption of such risk **(ii)**. Even if Phar Lap agreed to unconditional DDP terms, exemption of the risk is available under Cl. 12 **(iii)**.

i. Parties did not intend for Phar Lap to assume the risk under modified DDP

57. The incorporation of DDP was suggested by Black Beauty due to the expertise and documentation possessed by Phar Lap in the handling and transportation of the goods ***[Exhibit C3, p. 11]***. Phar Lap's acceptance of the incorporation of DDP after much deliberation was not unqualified, as it specifically requested a hardship clause to address the stark increase in risk ***[Exhibit C4, p. 12]***. Furthermore, since both Parties agreed to the inclusion of a hardship clause ***[RNoA, § 4]***, it is apparent that the Parties did not intend for Phar Lap to assume unqualified risk under DDP. Therefore, as per CISG Art. 8, the negotiations, practices and drafting history of Cl. 12 of the contract should be interpreted in light of the intention of the Parties ***[Schlechtriem, p. 7]***, which was to relieve the risk borne by Phar Lap through DDP ***[ANoA, § 4]***. Accordingly, since Phar Lap would not have undergone the current impediment if not for DDP, the incorporation of DDP does not result in the assumption of risk by Phar Lap and as such, the hardship exclusion remains applicable to the present impediment.

ii. The profit margin of Phar Lap does not reflect the assumption of such risk

58. Subsequent to the inclusion of a qualified DDP, Phar Lap increased the price of a dose of semen by US$ 1000; the direct cost of the DDP per dose is US$ 200 ***[PO2, § 8; Exhibit C4, p. 12]***. The profit from DDP is thus US$ 800, which is only 0.837% of the initially offered sales price of US$ 95,500, and this does not reflect a substantial increase in price ***[Exhibit C2, p. 10; Exhibit C4, p. 12; PO2, § 8].*** It is however an unusually high profit margin that is indicative of the seller's assumption of a proportionately greater risk ***[Cameroon Airlines, § 33]*** The assumption of the risk of an unforeseen and uncontrollable event such as the tariff in question should amount to a significant increase in the profit margin to mitigate potential losses

[Brunner, p. 425; Perillo]. The direct profit margin from the quoted cost per unit for DDP does not however reflect such an assumption of risk. In addition, even the total profit margin generated per unit is a mere 5% *[PO2, § 31]*, which amounts to US$ 5000 per unit and does not reflect the level of risk concerned. Therefore, neither the individual profit for the DDP nor the profit share of the entire product indicates an assumption of risk.

iii. Even if Phar Lap agreed to unconditional DDP terms, it is exempted from such risk

59. Black Beauty requested Phar Lap to deliver DDP due to their greater experience in shipping and customs documentation *[Exhibit C3, p. 11]*. Phar Lap repeatedly emphasized that it is not willing to assume all risks associated with DDP and included the safeguard of a hardship clause *[Exhibit C4, p. 12; Exhibit C5, p. 13]*. According to INCOTERMS (2010) rules, the parties may be relieved from various obligations such as the clearance of goods for import which they have undertaken, if exemptions under the terms of the contract or national laws are satisfied *[ICC Guide, p. 18]*. Therefore, according to the CISG, the parties may be relieved from their obligations through DDP if they are prevented from performing, due to reasonably unforeseeable and unavoidable impediments beyond control *[ICC Guide, p. 33]*. As such, even if Phar Lap assumed unconditional DDP terms, it is exempted from this impediment since the tariff and surrounding circumstances qualify as hardship under Cl. 12 of the contract *[see § 57]*.

II. The CISG and UNIDROIT Principles favour Phar Lap for price adaptation due to hardship

60. Cl. 12 of the contract deals with force majeure and hardship *[Exhibit R3, p. 35]*. However, since Mediterraneo is a contracting State of the CISG and because the general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT principles *[PO1, § 4]*, the Tribunal may apply such applicable provisions to determine hardship. Accordingly, Phar Lap is entitled to receive payment as CISG Art. 79 requires price adaptation due to hardship **(A)**. Even if Art. 79 is insufficient for price adaptation, Phar Lap is entitled to receive payment in accordance with the UNIDROIT Principles **(B)**.

A. CISG Art. 79 requires price adaptation due to hardship

61. Black Beauty asserts that Phar Lap has no right to adapt the contract under CISG Art. 79, stating that its application has been excluded by Cl. 12 which addresses hardship/force majeure ***[ANoA, § 20]***. However, CISG Art. 79 has not been so excluded, because an exclusion or derogation of the CISG would require the contract to include a clause *in violation* or providing *a different* solution to its counterpart in the CISG, i.e. Art. 79 ***[CISG, Art. 6; Schlechtriem, p. 9]***. This has not however occurred in the present case. As such, Phar Lap is entitled to a payment due to adaptation of the price even under the CISG, as CISG Art. 79 recognises the current hardship **(i)** and because CISG Art. 79 requires price adaptation **(ii)**.

i. CISG Art. 79 recognises the current hardship

62. The imposition of the tariff made Phar Lap put the shipment of the remaining 50 doses on hold, only delivering them on Black Beauty's promise of favourable negotiation ***[Exhibit C8, p. 17]***. As such, Phar Lap expressed its inability to meet the obligation of delivering goods at the contractual price ***[Exhibit C8, p. 17; Exhibit R4, p. 36]***. Phar Lap did so because the unexpected retaliatory tariff by Equatoriaan Government along with the conduct of Black Beauty, has been an impediment which, although not an absolute bar to performance, still entails a situation of economic impossibility which Phar Lap cannot be reasonably expected to fulfill ***[NoA, §18]***. CISG Art. 79 primarily addresses situations of force majeure, while principally recognizing hardship through the generality of the term 'impediment' ***[Schlchtriem, p. 5; Tallon, § 2.4.; Bonell; Ziegel;*** Tomato concentrate case***; Potatoes case]***. Additionally, the CISG was drafted to satisfy uniform application across various standards of applicable legal doctrines; the standard of impossibility in CISG Art. 79 stands between the strictest and the most liberal of domestic systems ***[Honnold, p. 476; Ferrari, pp. 15-18].*** This implies that CISG Art. 79 recognizes excessive hardship. Furthermore, CISG Art. 79 provides for the failure to perform 'any' of the obligations, not merely the inability to deliver the goods ***[Honnold, p. 490]***. CISG Art. 79(3) include both impediments for a limited time and those affecting part of the contract, like in the present case ***[Tallon]***. Therefore, the Equatorian tariff along with Black Beauty's action which results in Phar Lap's inability to perform the contract at the agreed price falls within the ambit of hardship under CISG Art. 79.

63. The impediment in the present case is the 30% increase in cost of delivering the 3rd shipment of frozen semen along with the insistence by Black Beauty to meet the delivery deadline on 22nd January 2018 ***[NoA, § 18; Exhibit C8, p. 17]***. The tariff was beyond Phar Lap's control since it was an executive order by the Government of Equatoriana and retaliatory in nature ***[Exhibit C6, p. 15]***. Phar Lap only completed delivery subsequent to an assurance by Black Beauty to negotiate the price favourably ***[Exhibit C8, p. 17; Exhibit R4, p. 36]***. Furthermore, the tariff and the potential reselling of the frozen semen by Black Beauty in violation of the contractual obligations were not foreseeable by Phar Lap at the conclusion of the contract, since the tariff was of an unprecedented nature, and Black Beauty undertook necessary precautions to avoid reselling without their knowledge ***[Exhibits C2, C5, C6, C8, pp. 10-17]***.The individual requirements of the hardship and force majeure exemptions are, in principle, identical ***[Brunner, p. 421; Montero, pp. 85–95]***. As the party claiming exemption under CISG Art. 79, Phar Lap has to prove that the non-performance was due to an impediment; that the impediment was beyond its control; and that the impediment was reasonably unforeseeable when the contract was made and was an impediment that could not reasonably have been expected to avoid or overcome ***[Nicholas, § 5.02]***. An impediment under CISG Art. 79 includes changed circumstances due to economic forces such as price increases and sanctions ***[Tomato concentrate case; Coke fuel case; Vital Berry Marketing NV; Société Romay AG]***. The requirement of at least 50% cost increase for a fundamental alteration amounting to hardship contained in the Official Comment on the UNIDROIT Principles of 1994 was deleted in 2004 in light of criticism by legal commentators; it was replaced by the general statement that '[w]hether an alteration is "fundamental" in a given case will depend upon the circumstances' ***[Brunner, p. 428; Kröll, p. 464]***. Therefore, even cost increases which are completely redeemable subsequent to the award can amount to hardship based on the factors surrounding the case ***[CLOUT Case 893].*** Furthermore, unforeseeability in the sense of CISG Art. 79 (1) does not mean that an event is unthinkable or not considered even remotely possible ***[Kröll et al., p. 1075-1076]***. As such, it is evident that both the tariff and the reselling of semen have fulfilled the above requirements, and the reselling induced Black Beauty to insist on delivery regardless of the imposition of the tariff, thus making performance of the contract all the more burdensome for Phar Lap. As such, the impediment qualifies for hardship under the CISG Art. 79.

ii. CISG Art. 79 requires price adaptation

64. Phar Lap has endured hardship which has resulted in severe financial strain ***[PO2, § 21-22, 28-29]***. The failure to uphold the obligation of delivering goods at the agreed price is because Phar Lap cannot bear the 30 % cost increase of the tariff. Hence an adaptation of price by at least an increase of 25% will ensure that Phar Lap will not face financial ruin ***[PO2, § 29].*** Black Beauty' unwillingness to come to a compromise has resulted in a dispute on the remedial action ***[Exhibit C8, p. 17]***. CISG Art. 79(5) deals with consequences of non-performance and remedies available to the parties ***[CISG, Art. 79(5); Ziegel]***. CISG Art. 79 (5) may be relied upon by the Tribunal to determine what the Parties owe each other, thus adapting the terms of the contract to the changed circumstances ***[CISG ACO 7; Swiss Co.].*** The hardship exemption is geared toward fulfilment of the contract ***[Bund, pp. 390-393; Maskow, p. 664]***, and so the Tribunal, as an impartial third party must implement an adaptation mechanism to solve the dispute to restore equilibrium between the Parties ***[Gaillard & Savage, p. 28]***. Black Beauty, unlike Phar Lap, is not financially endangered if it were to bear the added cost ***[PO2, § 30]***. By requesting at least US$ 1,250,000, Phar Lap is in good faith willing to sacrifice its narrow profit margin of 5% ***[NoA, § 8]***. Accordingly, the Tribunal must choose adaptation of price as the remedy under CISG Art. 79 so as to restore the equilibrium between the Parties.

B. <u>UNIDROIT Principles require price adaptation</u>

65. Despite its implicit recognition of hardship, CISG Art. 79 does not provide clear guidance on determining hardship ***[da Silviera, p. 331]***. There are two alternatives to the gap-filling process: using the general principles underlying the CISG and other accepted usages ***[Electronic hearing aid case; Ferrochrome case]***; or using the applicable domestic law ***[CISG ACO 7; Visser, ch. 8; Kritzer]***. In the present case, there is no ambiguity of the choice of principles for the gap filling process since both the aforementioned alternatives lead to the UNIDROIT Principles. This is so, because while UNIDROIT principles are widely regarded as the most appropriate to supplement the CISG in gap filling under the first alternative ***[Bonell; ICC No. Chemical fertilizer case; Rolled metal sheets; Scafom International BV]***, the Contract Law of Mediterraneo in the present case is a verbatim adoption of the UNIDROIT principles as well ***[PO1, § 4]***. As such,

adaptation must be allowed under UNIDROIT Principles Art. 6. 2. 2 **(i)** and UNIDROIT Principles Art. 6. 2. 3 **(ii)**.

i. UNIDROIT Principles Art. 6. 2. 2 requires price adaptation

66. UNIDROIT Principles Art. 6.2.2 provides guidelines for the determination of hardship ***[Kröll, p. 425]***. Phar Lap can request for the contract to be adapted because UNIDROIT Principles Art. 6. 2. 2 (a) is satisfied **(a)**, Art. 6. 2. 2 (b) is satisfied **(b)**, Arts. 6. 2. 2 (c) and (d) are satisfied **(c)**.

a. Art. 6. 2. 2 (a) is satisfied

67. The contract was concluded on 6th May 2017 ***[Exhibit C5, p. 14]***. However, the tariff of 30% by Equatoriana was imposed on 19th December 2017 ***[Exhibit C6, p. 15]***. Furthermore, even the initial tariff of 25% declared by the President of Mediterraneo which triggered the Equatorian tariff occurred on 15th of November 2018 ***[PO2, § 25]***. Art. 6. 2. 2 (a) requires the event to occur or be known to the party after the conclusion of the contract ***[McKendrick***]. As such, the events occurred well after the conclusion, thus fulfilling this requirement.

b. Art. 6. 2. 2 (b) is satisfied

68. Even though the newly elected President of Mediterraneo had announced an interest in certain protectionist measures, the tariff in November took most analysts by surprise ***[Exhibit C6, p. 15]***. Furthermore, even though Ms. Frankel, an ardent critic of free trade was appointed as the "superminister" for agriculture, trade and economics, this was done on 5th May 2017 ***[PO2, § 23]*** a day before the signing of the contract ***[Exhibit C5, p. 13]***. Therefore, the Parties could not have been aware of or foreseen the potential of the developments occurring in Mediterraneo. In addition, the retaliatory tariff by Equatoriana in December was completely unexpected as it was a complete reversal of their international trade policy ***[Exhibit C6, p. 15; PO2, § 23]***. UNIDROIT Principles Art. 6.2.2 (b) requires for the event to not have been reasonably anticipated at the time of the contact ***[Peter, p. 236]***. The standard should be what is reasonably foreseeable, taking into account the developments of the country and the region during the past ten to fifteen years ***[Kröll, p. 442]***. When deciding whether Phar Lap, the

disadvantaged party, could reasonably have reasonably foreseen the event in question, it may be necessary to distinguish between 'mild' and 'acute' forms of the event ***[McKendrick]***. Sanctions cover a spectrum ranging from mild economic activity, such as failure to renew some benefits, to more comprehensive measures such as a trade embargo or seizure of assets ***[Lowenfeld; Shahani, pp. 849–860]***. Hence UNIDROIT Principles Art. 6.2.2 (b) is satisfied, as the retaliatory tariff could not have been reasonably foreseen by either party since neither country has ever imposed a tariff on agricultural products (or horse semen) till 2018, and because a retaliatory tariff is not a mild form of economic sanction.

c. Art. 6. 2. 2 (c) and (d) are satisfied

69. The tariffs in question are results of government policy ***[Exhibit C6, p. 15; PO2, § 23***]. The companies in question are not state-owned, nor do they have significant influence in policy matters. Even though Black Beauty may attempt to influence the ban on artificial insemination in Equatoriana ***[Exhibit C8, p. 17]***, Phar Lap has no control over the policies of the Government of Mediterraneo. The sphere of control approach put forward in UNIDROIT Principles Art. 6.2.2 (c) guides that the Party that is bound to performance, i.e. Phar Lap, then has the burden of proving that the impediment to such performance lies beyond its control ***[DiMatteo, p. 287]***. Moreover, in order to calculate a relevant cost increase, any part of the cost increase that is attributable to the sphere of control of the supplier must be deducted ***[Brunner, p. 434]***. However, presently, no cost of the 30% increase is in Phar Lap's control; hence Phar Lap must be granted the opportunity to request for the total increase of cost through adaptation. In addition, UNIDROIT Principles 6. 2. 2 (d) requires that the risk of the event is not assumed by the disadvantaged party ***[da Silveira, p. 422].*** This has been satisfied as the parties have incorporated a modified DDP ***[see §§ 55-58]***. As such, UNIDROIT Principles Art. 6. 2. 2 (c) and (d) are satisfied.

ii. UNIDROIT Principles Art. 6. 2. 3 requires adaptation

70. UNIDROIT Principles Art. 6.2.3 states the effect of hardship and provides requirements which the injured party has to fulfil ***[Peter, p. 234]***. This Article gives the disadvantaged party a right to request that the parties renegotiate the contract so as to re-establish the equilibrium of

the contract and to facilitate its survival upon failure to reach an agreement, as is the situation here, the disadvantaged party can request the Tribunal to adapt the contract ***[ICC No. 9994; Gabo; Chengwei, § 3]***. Phar Lap satisfied the conditions of Art. 6.2.3 of UNIDROIT principles since Art. 6. 2. 3 (1) **(a)** and Art. 6. 2. 3 (2) is satisfied **(b)**.

a. Art 6. 2. 3 (1) is satisfied

71. The executive order on the tariff was announced on 19th December 2017 and took effect on 15th January 2018 ***[PO2, § 23]***. Even though both Parties read the newspaper article reporting on the tariff, they did not realize that the tariff included horse semen ***[PO2, § 26]***. It is reasonable for them to have operated under the assumption that this tariff would not be of any effect on this contract, since it is not usual practice to classify horse semen as an agricultural good under 'animal semen' ***[NoA, §§ 10, 11]***. Hence, the fact that Phar Lap informed Black Beauty immediately after clarifying with the customs office on 20th January 2018 does not invalidate the request for renegotiation. The disadvantaged party must request for renegotiation without undue delay in order to successfully raise a claim for renegotiations ***[UNIDROIT Principles, Art. 6.2.3, AB SEB bankas; da Silveira, p. 435; Perillo]***. Undue delay may occur either due to failure to inform within a particular time frame or being negligently unaware when a reasonable person ought to have acted. Moreover, the precise time for requesting renegotiations will depend upon the circumstances of the case: it may, for instance, be longer when the change in circumstances takes place gradually ***[UNIDROIT Principles, Art. 6.2.3, Comment 2]***. Thereby, the period of time must begin to run from the implementation of the tariff on 15th January 2018 instead of merely the announcement on 19th December 2017 ***[Exhibit C6, p. 15]***. Hence, Phar Lap has complied with the requirement of requesting renegotiation without undue delay. Furthermore, Phar Lap as the disadvantaged party has satisfied its duty to clearly indicate under what grounds the request for negotiation is made in the email dated 20th January 2018 ***[Exhibit C4, p. 12]***. Phar Lap's representative has clearly drawn the attention towards the newly imposed tariff, thus satisfying the requirement of the indicating grounds of renegotiations ***[UNIDROIT Principles, Art. 6.2.3]***. Therefore, Phar Lap has satisfied its obligations under UNIDROIT Principles, Art. 6.2.3 (1).

b. Art 6. 2. 3 (2) is satisfied

72. Phar Lap has no economic benefit through the renegotiation, save for the mitigation of losses. It is even willing to forego its profit ratio for the remaining 50 doses by renegotiating for only a 25 % increase in price instead of mirroring the 30 % tariff *[NoA, § 18]*. The initiation of the renegotiations must be done by the disadvantaged party subject to the general principle of good faith and fair dealing and to the duty of co-operation *[UNIDROIT Principles, Art. 5.1.3; UNIDROIT Principles, Art. 1.7; Kessedjian; Perillo]*. However, the duty of good faith extends to both Parties since it is expected that once the request has been made, both Parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information *[Ministry of Defense; Brunner, p. 481; Obeid; Bernardini]*. Therefore, Phar Lap has initiated negotiations in good faith.

73. Black Beauty entered into renegotiations due to the statement made by Mr. Shoemaker which neither accepted nor denied adaptation but suggested further negotiations, intending to induce Phar Lap to perform the contract within the limited time frame *[Exhibit R4, p. 36]*. However, Black Beauty has not continued negotiations, as reflected by the behaviour of its CEO at the meeting held on 12th February 2018 at which point the negotiations were abruptly called off *[Exhibit C8, p. 17]*. The other party should be able to refuse to enter into renegotiations for no stated reasons without assuming a contractual liability for damages *[da Silveira, p. 456]*. However, if a party enters into negotiations, it must act in good faith; if it negotiates or breaks off negotiations in bad faith, it may nevertheless become liable for the losses caused to the other party *[ICC No. 10021; North Sea Continental Shelf Cases; Kröll, p. 446]*. Especially due to the absence of a renegotiation clause, an infringement of the duty to renegotiate must entail consequences in the context of the cost allocation of the subsequent court or arbitral proceedings *[Brunner, p. 483]*. Hence Black Beauty is liable to the expenses of the negotiation process and Phar Lap has the right to request an adaptation, pursuant to UNIDROIT Principles Art. 6.2.3 (2).

CONCLUSION: The price must be adapted in Phar Lap's favour under Cl. 12 of the contract, as contractual hardship has been caused by the Equatorian tariff and surrounding circumstances; and because Phar Lap bearing the entire tariff will result in its financial ruin. Additionally, Phar

Lap did not assume the risk by incorporating a modified DDP. The price must be adapted in Phar Lap's favour due to hardship under CISG Art. 79. Even if CISG Art. 79 is insufficient for price adaptation, UNIDROIT Principles require the price adaptation. As such, the Tribunal must adapt the price by at least US $ 1,250,000 in Phar Lap's favour.

PRAYER FOR RELIEF

On the basis of the foregoing arguments and Phar Lap's prior written pleadings, Phar Lap respectfully submits to the Tribunal, while dismissing all contrary requests and submissions by Black Beauty

TO ORDER BLACK BEAUTY TO

i. Pay Phar Lap an additional amount of US $ 1, 250,000 which is 25 %of the price for the third delivery of semen;
ii. Bear the costs of the arbitration

CERTIFICATION

06.12.2018

Colombo, Sri Lanka.

We hereby confirm that this memorial was written by the undersigned.

Senith Abeyanayake

Rasara Jayasuriya

Vineshka Mendis

Hasini Rupasinghe