Sixteenth Annual Willem C. Vis East International Commercial Arbitration Moot

UNIVERSITY OF MANDALAY

MEMORANDUM FOR CLAIMANT

ON BEHALF OF	AGAINST
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1 CAPITAL CITY MEDITERRANEO	2 SEABISCUIT DRIVE OCEANSIDE EQUATORIANA

MYAT THINZAR KYAW . THINZAR THEINT.

MIN NYI KHANT. INGYING KHAING. NANG SAN AUNG

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LIST OF ABBREVIATIONS

&	and
AC	Advisory Council
Aug	August
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLOUT	Case Law on UNCITRAL Texts
CEO	Chief Executive Officer
DDP	Delivery Duty Paid (incoterms)
DAL	Danubian Arbitration Law
Danubian Law	Danubian Contract Law
Dec	December
ed.	edition
Feb	February
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA	International Bar Association
2010 IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
i.e.	*id est* (that is)
ibid.	*ibidem* (in the same place)

inter alia	among other things
Int'l Arb	International Arbitration
Jan	January
Ltd	Limited
Mediterranean Law	Mediterranean Contract Law
Mr.	Mister
Ms.	Miss
No.	Number
Nov	November
NY	New York
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Oct	October
p./pp.	page / pages
para.	paragraph(s)
%	per cent
PO1	First Procedural Order
PO2	Second Procedural Order
SD	Sydney
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
UNDROIT	International Institute for the Unification of Private Law

UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
USD / US$	United States Dollar
v.	versus
WTO	World Trade Organization

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STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento (the Claimant) and Black Beauty Equestrian (the Respondent). The Claimant is Mediterraneo‟s oldest and most renown stud farm, covering all areas of the equestrian sport. The Respondent is a famous stable of broodmare lines and racehorse in Equatoriana.

21 March 2017 The Respondent contacted the Claimant making an inquiry about the availability of Nijinsky III for the Respondent‟s new breeding programme. (Exhibit C1, p. 9)

24 March 2017 The Claimant agreed to sell 100 doses of frozen semen in accordance with some conditions. (Exhibit C2, p. 10)

28 March 2017 The Respondent objected to the choice of law and the forum selection clause and insisted a delivery on the basis of DDP. (Exhibit C3, p.11)

31 March 2017 The Claimant accepted DDP against a moderate price increase and the inclusion of a hardship clause. (Exhibit C4, p. 12)

10 April 2017 The Respondent made a proposal of the arbitration clause. (Exhibit R1, p. 33)

11 April 2017 The Claimant made changes to the arbitration clause about the seat of arbitration. (Exhibit R2, p. 34)

12 April 2017 The two main negotiators from both sides were involved in a severe car accident while meeting for the further discussion of the contract. (Exhibit C8, p 17 and Exhibit R3, p. 35)

6 May 2017 The final negotiations were made and the sale agreement had been signed. (Exhibit C5, pp. 13,14)

20 May 2017 & 3 Oct 2017 The first and second shipments were made. (Notice of arbitration, p. 6)

23 Nov 2017	The newly elected President of Mediterraneo announced 25% tariff on agricultural products from Equatoriana. (Notice of arbitration, p. 6)
19 Dec 2017	The Equatoriana Government retaliated by imposing 30% tariff on agricultural products from Mediterraneo including horse semen. (Exhibit C6, p. 15)
20 Jan 2018	The Claimant informed the Respondent about the newly imposed tariff of 30% and requested for renegotiation of price. (Exhibit C7, p. 16)
23 Jan 2018	The third shipment was made. (Notice of arbitration, p. 6)
12 Feb 2018	The respondent refused to pay the additional payment caused by the imposed tariff of 30%. (Exhibit C8, p. 18)
31 July 2018	The Claimant filed a Notice of Arbitration. (Notice of Arbitration, pp. 4-8)
24 Aug 2018	The Respondent submits the Answer to Notice of Arbitration. (Answer to Notice of Arbitration, pp. 29-32)

INTRODUCTION

2. The Claimant which is the most well-known and experienced company conducting business in all areas of the equestrian sport is especially famous for its breeding success concerning racehorses. Its offering of frozen semen of its champion stallions for artificial insemination attracted the Respondent which has no experience in the horse racing business.
3. When ordering the horse semen, the Respondent requested the size of 100 doses which exceeded than it was required for breeding with the intention of reselling the remained doses which is contrary to the condition made by the Claimant the negotiation process.
4. During the negotiation process, the Claimant tried its best to accommodate the Respondent's requests by accepting the DDP delivery term. However due to its internal policy, the Claimant could not accept the laws other than its own law to be applicable to the Arbitration Agreement. This situation was expressly said in the email but the

Respondent ignored it. Instead, the Respondent claimed that the governing law of the Arbitration Agreement is the Danubian Law and alleged that the Arbitration Agreement should be interpreted by limiting to its wording and excluding external evidence. As a matter of fact, the law governing the Arbitration Agreement has to be the Law of Mediterraneo and hence the Arbitration Agreement is to be interpreted by taking the intention of the partied into consideration.(**Submission 1**)

5. Due to the past experience concerning unforeseen changes in custom regulations, the parties included the hardship clause in the Contract and intended to transfer the power to adapt the Contract to the Arbitral Tribunal. It was only due to the unfortunate accident occurred to the main negotiators of both parties the adaptation clause was not expressly provided in the Contract. Therefore, the power to adapt the Contract when the hardship happens should be entrusted in the Arbitral Tribunal giving effect to the intention of the parties. (**Submission 1**)
6. The Claimant, having the procedural right to submit the evidence and the burden of proof to bear , wishes to submit evidence from the other arbitral proceeding to which the Respondent is a party. The evidence is highly material and relevant to the point it cannot be ignored. Nevertheless, the Respondent has objected to exclude the evidence on the grounds that it might have been obtained through the illegal hack of the Respondent‟s computer system or the breach of confidentiality agreement by their two employees. It is undisputed that the Claimant has not involved in any of the illegal activity that the Respondent alleged. The Respondent‟s attempt was to interrupt the due process of the arbitration and detours from the objective truth necessary for the resolution of the issues at hand. Therefore, the Claimant is entitled to submit evidence from the other arbitral proceedings (**Submission 2**).
7. On 19 December 2017, 30 per cent tariffs on selected products from Mediterraneo including on animal semen were announced by executive order of the Equatorianian government and took effect from 15 January 2018 onwards. It was before the last shipment of 50 doses of semen.
8. Thus the Claimant paid that 30% tariffs on behalf of the Respondent since the Respondent urged the Claimant to authorize the shipment as planned as soon as possible and thus the Claimant delivered the remaining 50 doses on 23 January 2018 by

complying with its delivery obligation. However now the Claimant claims for only 25% tariffs which are equivalent to US$ 1,250,000 for the sake of both parties excluding its 5% profit. But the Respondent refused to pay that payment by claiming hardship clause which is inserted in clause 12 of the contract does not provide an adaptation of the contract. Nevertheless both parties intended to include the hardship clause in the clause 12 of the Contract to transfer the power to adapt the Contract to the Arbitral Tribunal. Moreover there is hardship under clause 12 and pursuant to that clause the Claimant shall not be responsible for hardship. Thus there is no doubt that the Responsible is responsible for that and the Claimant is entitled to the payment of US$ 1,250,000 under clause 12 of the contract. Since, under the contract, the contract is governed by the CISG, the Claimant is also entitled to that payment under the CISG (**Submission 3**).

ARGUMENT

SUBMISSION 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

9. The Respondent objected to the jurisdiction of the Arbitral Tribunal to adapt the contract as there was no express conferral of powers upon the Arbitral Tribunal for the adaptation in the contract by claiming that the interpretation of the Arbitration Agreement was governed by the Law of Danubia [*Answer to the Notice of Arbitration, p. 31, No. 13*]. The Claimant respectfully requests to reject the Respondent's objection since the Arbitration Agreement is governed by the Law of Mediterraneo including its interpretation **(A)** and under the Law of Mediterraneo the Arbitration Agreement gives the Arbitral Tribunal the power to adapt the contract **(B)**.

A. The Arbitration Agreement is governed by the Law of Mediterraneo including its interpretation.

10. Following the principle of separability in international commercial arbitration, the law governing the arbitration agreement may be different from the law governing the main contract for the enforceability of international arbitration agreements [*Born, § 9.05*]. Therefore, a choice of law analysis for the Arbitration Agreement is to be considered to find the governing law. In this case, the Law of Mediterraneo applies to the Arbitration Agreement as **(I)** Mediterraneon Law is the most appropriate law among the potential laws applicable to the Arbitration Agreement and **(II)** choosing Danubia as the seat of arbitration cannot be interpreted that the Danubian Law governs the Arbitration Agreement.

I. Mediterranean Law is the most appropriate law among the laws applicable to the Arbitration Agreement.

11. According to Art. 16 (1) of both the Danubian Arbitration Law and the Mediterranean Arbitration Law, the Arbitration Agreement is treated as an agreement independent of the main contract. This is to avoid invalidation of the arbitration agreement through application of local rules of law [*Born, §4.02(A)(3)*].Where the arbitration agreement is separable from the main contract, the laws governing it can be (i) the law of the seat of arbitration, (ii) the law governing the underlying contract and (iii) the law having the

closet connection or the most significant relation. Among these laws, Mediterranean Law which is the law governing the underlying contract is the most appropriate as it is impliedly chosen as the law applicable to the Arbitration Agreement **(a)** and applying laws other than the Mediterranean Law will create complexity for the Claimant while the Respondent has no impact **(b)**.

a. The Mediterranean Law is impliedly chosen as the law applicable to the Arbitration Agreement.

12. In the absence of a choice of law agreement by the parties, there is no one specific approach to determine the law governing the arbitration agreement and the parties' intentions and expectations are of paramount importance in such determination [*Born, § 4.04(A)*]. This is affirmed by Art. V (1) (a) of the New York Convention, Art. 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law which state the standard for selecting the law governing the arbitration agreement and give effect to the parties' intentions by providing that an award will not be recognized if the arbitration agreement is "not valid under the law to which the parties have subjected it."

13. In *Sulamerica v. Enesa Engenharia*, the court found that "the proper law of the arbitration agreement is to be determined in accordance with the established common law rules which require it to recognize and give effect to the parties' choice of proper law, express or implied". It has also been held in many cases (*Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG, Sonatrach Petroleum Corp v. Ferrell International Ltd, Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission*) that where there is no express choice of law governing the arbitration agreement, the choice of law governing the substantive contract will usually be decisive in determining the proper law of the arbitration agreement. What is more, as a principle, where the arbitration agreement forms part of a substantive contract, it is the intention of the parties that the whole of their relationship is governed by the same system of law as the law governing the substantive contract unless there is indication to the contrary [*Sulamerica v. Enesa Engenharia*].

14. In the case at hand, there was no express choice of law governing the Arbitration Agreement and the Contract is governed by the Mediterranean Law of which the Arbitration Agreement forms part of it [*Exhibit C5, p.14*]. There is no indication contrary

to the application of the Mediterranean Law in the Contract. Therefore, it is impliedly chosen by the parties as the law governing the Arbitration Agreement.

15. However, the Respondent claimed that based on the doctrine of separability enshrined in both the Mediterranean Law and the Danubian Law, the Arbitration Agreement was not governed by the Mediterranean Law [*Answer to the Notice of Arbitration, p. 31, No. 14*]. Even so, in *Fiona Trust & Holding Corp v. Privalov*, the Court found that the separability of arbitration agreements should enable the parties' intention to be effective. The main negotiators of the Contract had the intention to give the power of adaptation to the Arbitral Tribunal and such intention can only be given effect by applying the Mediterranean Law. Thus the parties impliedly chose the Mediterranean Law so as to give effect to their intention to arbitrate.

b. Complication will occur to the Claimant by applying laws other than the Mediterranean Law while the Respondent will not be affected by such application.

16. During the negotiation process concerning the arbitration clause, the Claimant expressly informed the Respondent that the submission of a contract to a foreign law requires a special approval by the creditor's committee [*Exhibit R 2, p. 34*]. Therefore, the required (implied) consent of Claimant to application of a law other than the Mediterranean Law cannot be established. Should the Arbitral Tribunal nevertheless apply Danubian or Equatorianian Law to the Arbitration Agreement, then any award rendered will be prone to be set aside under article 34 (2) (a) (i) Danubian Arbitration Law.

17. On the other hand, the Respondent while negotiating with the Claimant, proposed the Mediterranean Law to be applicable law subject to the courts of Equatoriana having jurisdiction [*Exhibit C3, p. 11*]. From this it follows that application of the Law of Mediterraneo is in principle acceptable for the Respondent. Later, the Respondent proposed the Equatorianian Law to be applied to the Arbitration Agreement [*Exhibit R1, p. 33*]. The Respondent never suggested the Law of Danubia as the law applicable to the Arbitration Agreement. In fact, it was only until its Answer to the Notice of Arbitration that the Respondent all of a sudden asserted that the Law of Danubia would govern the Arbitration Agreement. Such tactics shall be disproved by the Arbitral Tribunal.

18. Therefore, if the Mediterranean Law was not applied to the Arbitration Agreement, the Claimant would have the risk of unenforceability of the Arbitration Agreement while there would be no impact on the Respondent.

II. Choosing Danubia as the seat of arbitration cannot be interpreted that the Danubian Law governs the Arbitration Agreement.

19. In the Contract, there was no express choice of law for the Arbitration Agreement [*Exhibit C5, p. 14*] and Danubia was only chosen as the seat of arbitration. In terms of implied choice of law, Danubia was only mentioned once during the negotiation process to regard as the seat of arbitration [*Exhibit R2, p. 34*]. The only reason that Parties choose Danubia as the seat of arbitration is neutrality. Parties wanted to have the place of arbitration in a state other than the home states of the Parties. By that choice Parties did never intended to also submit themselves to the substantive law of Danubia.

20. In assessing the implied intentions of the parties in determining the choice of law of the Arbitration Agreement, case-by-case consideration is crucial [*Born, §4.04(A), p. 514*].

21. It was the Claimant that proposed to choose Danubia as the seat of arbitration and the underlying reason for proposing so is just to be consistent with its internal policy [*Exhibit R2, p.34*]. Moreover, the Claimant made changes only to relevant part of the proposed arbitration clause which could not be accepted and did not include the accepted part in the proposed arbitration clause since it was said in the email to the Respondent that "to accommodate your wish not to be submitted to the jurisdiction of the courts in Mediterraneo, […] we would largely accept your proposal with an amendment as to the place of arbitration, so that the clause would read in its relevant part " [*Exhibit R2, p.34*]. Therefore the Claimant does not have the intention to apply the law of the seat (i.e., the Danubian Law) to the Arbitration Agreement. On part of the Respondent, neither Danubia nor the Danubian Law was mentioned during the negotiation process or even after the conclusion of the Contract.

22. The allegation that the Danubian Law is the governing law of the Arbitration Agreement was based on the doctrine of separability which will in turn lead to the fact that the adaptation of the Contract cannot be determined by the Arbitral Tribunal. In fact, the purpose of the separability presumption is to put forward the parties' genuine intention

and objectives to arbitrate rather than invalidating their intention to arbitrate [*Born, §4.04(B), p. 592*].

23. During the negotiation process, both parties had the intention to allow the adaptation of the Contract to be done by the Arbitration Tribunal [*Exhibit C8, p. 17*]. Therefore, applying the Danubian Law as the governing law of the Arbitration Agreement will affect the intention of the parties to submit to the Arbitral Tribunal for the adaptation of the Contract.

24. In addition, the doctrine of separability only causes the possibility that an arbitration agreement can be governed by the law that differs from the law governing the main contract. It does not mean that the arbitration agreement must necessarily be governed by a different law.

25. Therefore, in light of the intention of both parties and the purpose of the separability doctrine, choosing Danubia as the seat of arbitration cannot be interpreted to be applicable to the Arbitration Agreement as its governing law.

26. Concluding, the Arbitration Agreement is governed by the Mediterranean Law since it is the most appropriate one and the law of the seat cannot be interpreted to be applicable to the Arbitration Agreement.

B. The Arbitration Agreement should be interpreted to give the Arbitral Tribunal the power to adapt the Contract.

27. As the Mediterranean Law governs the Arbitration Agreement, it is to be interpreted in accordance with the Mediterranean Contract Law which is a verbatim adoption of the UNIDROIT Principles on the International Commercial Contracts [*PO 1, III(4)*]. Art. 4.1 of the UNIDROIT Principles requires a contract to be interpreted according to the common intention of the parties. In the present case, it is the intention of both parties to transfer the power of adaptation of the Contract to the Arbitral Tribunal **(I)** and the wordings adopted in the Arbitration Agreement cover the adaptation of the Contract. **(II)**

I. Both parties intended to give the Arbitral Tribunal the adaptation power according to Art. 4.3 of the UNIDROIT Principles.

28. Pursuant to Art. 4.3 of the UNIDROIT Principles, regard has to be given to all the circumstances including preliminary negotiations between the parties and the conduct of the parties subsequent to the conclusion of the contract. During the negotiation process,

the Respondent proposed to have the Contract adapted by the Arbitrators if the unlikely event occurred and both parties agreed to include an express reference into the hardship clause or the arbitration clause [*Exhibit C8, p. 17*]. Likewise, the negotiation file of the Respondent's main negotiator, Mr. Antley confirms his attention to adapt the Contract as he intended to connect hardship clause with the Arbitration Clause [*Exhibit R3, p. 35*]. Therefore, both parties have the common intention to give the Arbitral Tribunal to adapt the Contract.

29. When the hardship occurred after the conclusion of the Contract, the Claimant and the Respondent negotiated in order to adapt the price in the Contract but failed to reach agreement and the Claimant submitted the issue to this Arbitral Tribunal [*Exhibit C8, p. 18*]. Such conduct of both parties followed the procedure provided in Art. 6.2.3 of the UNIDROIT Principles. Hence, the parties had the intention to do in accordance with Art. 6.2.3 of the UNIDROIT Principles which transfers the power of adaptation to the arbitral tribunal when the hardship happened.

30. Therefore, according to the statements that were made in preliminary negotiations as well as the subsequent conducts done by the parties, it is their common intention to give the Arbitral Tribunal to adapt the Contract.

II. The adaptation of the Contract is covered by the wordings of the Arbitration Agreement.

31. The authority of an arbitral tribunal depends on the scope of an arbitration agreement. In general, claims incidental to the main contract is within the scope of the arbitration agreement [*Redfern and Hunter, § 2.64, p. 92*]. As the adaptation of the Contract is incidental to the hardship clause in the Contract, it is covered by the Arbitration Agreement. **(a)** Moreover, in deciding the scope of an arbitrator's jurisdiction, the interpretation of the words of the arbitration agreement and the intention of the parties are always depended upon [*Redfern and Hunter, § 2.67, p. 94*]. Pursuant to the intention of the parties, the term "dispute" covers the adaptation of the Contract. **(b)**

a. The adaptation of the Contract is incidental to the hardship clause in the Contract.

32. In the case at hand, the Contract is governed by the Mediterranean Contract Law which is the UNIDROIT Principles. Art. 6.2.2 and Art. 6.2.3 provide the definition of the hardship

and the effects of hardship. The Contract included a hardship clause and one of the legal consequences of it is the adaptation of the contract by the arbitral tribunal according to Art. 6.2.3 (4)(b) of the UNIDROIT Principles. Therefore, the adaptation of the Contract is a claim resulting from the hardship clause included in the Contract.

b. The term "dispute" covers the adaptation of the Contract.

33. Although the Arbitration Agreement was narrowed down by the Respondent, the term "dispute" still covers the adaptation of the Contract since the wordings of an arbitration agreement has to be interpreted so as to fulfil the intention of the parties [*Redfern and Hunter, § 2.65, p. 93*]. The word "dispute" is interpreted as a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons [*Mavrommatis Palestine Concessions*]. In the present case, the Claimant and the Respondent have a disagreement on whether the Arbitral Tribunal has the jurisdiction to adapt the Contract.

34. In addition, unless there is a specific exception made in an arbitration agreement, the parties intend to resolve all disputes between them by arbitration [*Redfern and Hunter, § 2.65, p. 93*]. As there was no exception made in the Arbitration Agreement, the adaptation of the Contract is covered by the Arbitration Agreement.

35. To summarize; the Arbitration Agreement gives the Arbitral Tribunal the power to adapt the Contract owing to the common intention of the parties which was evidenced by their conducts in preliminary negotiations and after the conclusion of the Contract. Additionally, the wording of the Arbitration Agreement includes the adaptation of the Contract as it is incidental to the hardship clause provided in the Contract and even if the Respondent has narrowed down the Arbitration Clause, the term "dispute" still covers the adaptation of the Contract in order to accommodate the intention of the parties to arbitrate.

CONCLUSION OF SUBMISSION 1

Since the Law of Mediterraneo applies to the Arbitration Agreement including its interpretation, it shall be interpreted in accordance with the Mediterranean Contract Law (i.e., UNIDROIT Principles) Pursuant to Art. 4.3 of the Principles, the common intention of the parties requires the adaptation of the Contract to be done by the Arbitration

Agreement. Even of the intention does not amount to that extent, the term "dispute" prescribed in the Arbitration Agreement covers the adaptation of the Contract. Therefore, the Arbitral Tribunal has jurisdiction under the Arbitration Agreement to adapt the Contract.

SUBMISSION 2: THE CLAIMANT SHALL BE ALLOWED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRAL PROCEEDINGS.

36. The Claimant desires to submit a copy of the **Partial Interim Award** and the relevant submissions from the other arbitral proceedings to which the Respondent is a party [*Mr. Langweiler's letter, p.49*]. Nevertheless, the Respondent has objected to the Claimant's right of submitting evidence by the alleged confidential value and illegality in the means of obtaining evidence [*Ms. Fasttrack's letter, p.50*]. However, the Claimant does not owe any duty of confidentiality nor does he take part in the former illegal disclosure of the said evidence. Therefore, the Claimant respectfully requests the Arbitral Tribunal to find that the Claimant is entitled to submit the evidence from the other arbitral proceedings which is essential and material to the fact-finding of the case at hand.

37. In the case at hand, the Claimant shall be entitled to submit evidence from the other arbitral proceedings, since the Claimant shall be afforded a full opportunity to present its case **(A)**.Not allowing the evidence from the other arbitral proceedings will endanger a situation of conflicting awards **(B)**. Lastly, there are no pressing reasons for excluding evidence concerning with commercial or technical confidentiality in particular **(C).** Insofar there are limits of confidentiality, these can properly be assessed by having a third party review the evidence.

A. The Claimant shall be afforded a full opportunity to present its case.

38. At hand, the parties have consented to arbitrate any disputes arising out of the Contract [*Exhibit C5, clause 15, p.14*]. As Custodio O. Parlade defined, arbitration is a "private process of dispute resolution where parties agree to submit their dispute to a neutral and impartial third person for hearing and decision." [*Pryles/ Moser, p.373*]. A neutral third party, an arbitrator, has to hear presentation and evidence brought by the parties to make

a justifiable decision. As a party to the arbitration, the Claimant has a "right" to present his case pursuant to Art. 18 of the DAL **(I)**. In the event, the evidence shall not be permitted, any eventual award may be set aside or rendered unenforceable **(II)**. The Claimant has not breached any duty of good faith in the process of obtaining evidence **(III)**. The information that the Claimant wishes to bring forward is material and relevant to the point it cannot be ignored **(IV)**

I. The Claimant has the procedural right to submit the evidence.

39. Art.18 of the DAL provides a general rule of due process. Pursuant to this article, each party shall be given equal opportunity to present evidence and argument in support of its own case [*CLOUT Case No.658*]. This provision has been called "Magna Carta" of arbitral procedure [*Binder p.124,125*]. It includes inter alia "right to submit relevant documentary evidence either in defense or support of claims" [*Kurkela/Turunen/Yiliopisto, p.188*]. Parties to the arbitration must not only have notice of the time and place of the meeting but he should also be allowed a reasonable opportunity of presenting his case either by evidence or by arguments or both, and of being fully heard [*Paklito Inv. Ltd. v. Kockner E. Asia Ltd*]. Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute [*Soh Beng Tee&Co. v Fairmount Dev.Pte*]. Therefore, as a party to the arbitration, the Claimant has the right to present evidence.

II. In the event the evidence shall not be permitted to submit, any eventual award may be set aside or rendered unenforceable.

40. Art. 19(2) of the DAL provides that "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." The DAL is adopted from the UNCITRAL Model Law [*PO1, p.52*]. The UNCITRAL Model Law"s drafting history underscores the arbitrator"s broad discretion over issues of admissibility and relevance of evidence [*Born p.2307*]. Similarly, Art. 22(2) of the HKIAC Rules provides that "the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence". It can be said that international arbitration rules as described above, generally entrusts evidentiary matters to the discretion of the arbitrator

[*Roger K ward*]. Therefore, whether to apply strict rules of evidence depends mainly on the Arbitral Tribunal.

41. If the Claimant would not be allowed to submit the evidence from the other arbitral proceedings which is material and relevant to the outcome of the case, its procedural right to fully present its case will be impaired which may cause the eventual award to be prone for being set aside under Art. 34(2) (a) (ii) of DAL or to be declared unenforceable under Art. V (I) (b) of the New York Convention. If an arbitrator failed to consider a party's submissions on a disputed issue, it is a breach of natural justice and the setting-aside of an arbitral award may happen [*Front Row Investment Holdings (Singapore) Pte Ltd. v. Daimler South East Asia Ltd.*]. Award should be vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as the due process jurisprudence defines it [*Sheldon v. Vermonty*]. Therefore, if the Claimant is not afforded the full opportunity to present its case, any eventual award may be set aside or rendered unenforceable.

III. The Claimant has not breached any duty of good faith in obtaining the evidence.

42. The Respondent has alleged that the disclosure of the evidence would have only resulted due to the violation of the contractual obligation by the either of the two former employees of the Respondent or the hack of the Respondent"s system [*Ms. Fasttrack's letter, p.50*]. Notwithstanding the Respondent"s allegation that the evidence is obtained illegally at some point, it is undisputed that the Claimant has not initiated or participated in any unlawful activity that has led to the disclosure of the documents. Moreover, the Claimant had no prior knowledge of the other arbitral proceedings and has only learnt about it at the annual breeder conference from Mr. Kieron Velazquez, the new CEO of one of the Claimant"s regular customer [*PO2, No.40, p.60*].The Claimant is to obtain the said documents only by payment of 1000 USD from a company he has been directed to by Mr. Kieron Velazquez [*PO2, No.41, pp.60-61*]. The Claimant, in obtaining the evidence by payment, does not violate any duty of good faith.

43. Both arbitrations and national courts have applied "good faith" as a legal tool to resolve disputes [*Henriques, p.514*]. Art. 13.5 of the HKIAC Rules that the parties have agreed on also states: "the arbitral tribunal and the parties shall do everything necessary to

ensure the fair and efficient conduct of the arbitration. The concept of good faith indicates "the duty to employ honest, loyal and fair behaviour, and that that behaviour should be absent of malice or any intention to deceive … and that the acts or omissions must be covered by a cloak of good intentions and sincerity." [*Henriques, p.517*]. In the case at hand, the Claimant has no deceptive intention upon the arbitral tribunal nor malicious intention to harm the Respondent by bringing the evidence forward. In fact, the Claimant wishes to divulge the relevant documents in good intentions for the arbitral tribunal to find the objective truth contained in the documents. The payment of 1000 USD in obtaining the evidence is also justifiable since the Claimant has the burden of proof [*Art. 22.1 of HKIAC Rules*] to support his claim and bring forth the material and relevant evidence out of necessity.

44. With the dawn of the WikiLeaks scandal in 2010, different jurisdictions and courts have different rulings on the admissibility of leaked documents obtained from the WikiLeaks cables or other documents obtained through "similarly unlawful means" as evidence [*Boykin & M.Havalic, TDM, p.32*]. In the Yukos Majority Awards, it is assumed "none of the claimants in the Yukos arbitrations breached the duty of good faith" by relying on the WikiLeaks cables since neither party had participated in the unlawful actions that led to the disclosure of the evidence [*Boykin & M.Havalic, TDM, p.7*]. A party"s clean hands in seeking to introduce the evidence is emphasized in the admission of the evidence [*Bible case*].Likewise, in the present case, the Claimant desires to rely on the leaked documents obtained from the company as evidence. Since, the Claimant has his hands clean in the means of obtaining evidence and has no ill intention, the Claimant has acted in good faith in obtaining evidence in order to be afforded a full opportunity to present it.

IV. The evidence is relevant and material to the outcome of the proceedings.

45. In the case at hand specifically, the Claimant shall be allowed to submit the evidence from the other arbitral proceedings. The evidence is material and relevant to the point it cannot be ignored. The document is material when it is necessary in aiding the considerations of a legal issue by the tribunal [*Kaufmann-Kohler/G. Bartsch/P, p.18*]. In the present case, the evidence the Claimant wishes to bring forward is material in aiding

the considerations of a legal issue: whether tariff imposition amounts to a "hardship" necessary for the adaptation of the contract.

46. The evidence that the Claimant desires to submit are the **Partial Interim Award** and the Respondent"s submission from the other arbitral proceedings to which the Respondent is a party. In the other arbitral proceedings conducted also under HKIAC Rules [*Ms. Fasttrack's letter, p.50*], the Respondent has asked for the adaptation of the contract concerned with the sale of a mare as a result of 25% tariff imposition by the Mediterraneo government [*PO2, No.39, p. 60*]. The Arbitral Tribunal had confirmed its power to adapt the contract should the tariff result in hardship for the Respondent [*ibid.*]

47. The evidence is material and relevant in deciding whether the Respondent has in fact acknowledged tariff imposition as a "hardship" **(a)** and whether the Respondent has taken an unethical inconsistent position between the two proceedings **(b)**

a. The Respondent has acknowledged tariff imposition as a "hardship".

48. The Respondent has himself claimed tariff imposition as a "Hardship" necessary for the adaptation of price in the other arbitral proceedings. In the other arbitration, the Respondent has refused the delivery of a mare due to the tariff imposition on the agricultural products by the Mediterraneo government and asked the other party for the renegotiation of price [*PO2, No.39, p.60*]. Thus, the evidence specifically highlights that the Respondent has acknowledged tariff imposition as a "Hardship" for him.

b. The Respondent has taken an unethical inconsistent position between the two proceedings.

49. The evidence to be submitted also indicates the Respondent"s contradictory behavior on the similar issue. The Respondent has taken inconsistent position prioritizing only his interests in both proceedings. This is clearly unethical of the Respondent as a fellow businessman. In considering the question of fairness, "it seems patently wrong to allow a person to abuse the judicial process by first advocating one position, and later, if it becomes beneficial, to assert the opposite." [*Schreiber, p.327*]. The evidence the Claimant wishes to submit specifically highlights the Respondent"s unfair, inconsistent and contradictory behaviour which the arbitral tribunal should not ignore.

50. Should the evidence be excluded, the arbitral tribunal will have no access to the material information, namely the Respondent's acknowledgment of tariff imposition as hardship and his questionable inconsistent behaviour comparable between the two proceedings. Therefore, the arbitral tribunal shall have to permit the introduction of evidence in the case at hand specifically, since it is material and relevant to the outcome of the case.

B. Not allowing the evidence from the other arbitral proceedings to submit will endanger a situation of conflicting awards.

51. If the evidence from the other proceedings would not be allowed, there will be a risk of conflicting awards. The two arbitrations mostly deal with the same legal question of whether the imposition of tariffs can be regarded as a situation of hardship. The two arbitrations are conducted under the same institution with the same rules. Therefore, in this case, presenting the evidence from the other arbitral proceedings is essential to keep the awards consistent and to prevent the conflict of arbitral awards.

52. The HKIAC Institution itself has means to keep the awards consistent where a common question of fact and law arises in the arbitrations by means of joinder of additional parties, consolidations of arbitrations, simple arbitration under multiple contracts and concurrent proceedings [*Art 27,28,29,30 of HKIAC Rules*]. The scholars from the sociological perspective also found that jurisprudential inconsistency is linked to a perceived lack of determinacy, reliability and predictability of the dispute settlement proceedings [*Franck, pp.1584-1587: Diel-Gligor, p.121*]. If the arbitral tribunal were to decide differently for two proceedings with the same legal question, it could render the whole arbitration unreliable.

C. There are no pressing reasons for excluding evidence concerning with commercial or technical confidentiality in particular.

53. In the case at hand, there is no specific evidential rules that the Parties has agreed on. In practice, many jurisdictions and institutional rules are silent on procedural issues and evidential issues that apply to international arbitrations [*P'Ashford 1, p.170*]. Hence, 2010 IBA Rules would be the most appropriate guideline for the procedure of taking evidence "in cases where the parties come from different legal backgrounds and in case

they have not come to any agreement on the procedures of taking evidence." [*Kubalczyk, p.97*]

54. In international arbitration, it is a general legitimate rule to keep sensitive business or technical information secret [*O'Malley, p.301*]. The Art. 9.2 (e) of the 2010 IBA Rules permits the exclusion of a document where the confidentiality is compelling [*P'Ashford 2, p.*165]. Therefore, ordinary confidentiality would be insufficient [ibid]. However, in the case at hand, the compelling standard is not overwhelming enough to exclude the evidence **(I)** and even if the Tribunal finds it compelling to some degree, an impartial confidentiality expert can be appointed by the Tribunal pursuant to Art. 25 of HKIAC Rules to review and exclude particular sensitive commercial information **(II)**.

I. The compelling standard is not overwhelming enough to exclude the evidence.

55. As Nathan D. O"Malley stated, "determining what may be considered a compelling commercial or technical reason for denying disclosure or the admissibility of a document is largely a question of fact" [*O'Malley, p.301*]. Formulas, know-how and model are examples of technical confidentiality [*ibid*] and examples of commercial confidentiality are price calculations, financial records, tax records and documents covered by confidentiality agreements with third parties [*O'Malley, p.302*]. The evidence to be excluded must meet the compelling confidentiality standard. To meet the compelling standard, the arbitral tribunal must accordingly find the grounds for confidentiality overwhelming and irresistible on an ordinary dictionary meaning [*P'Ashford 2, p.146*].

56. To meet the compelling ground, it must also contain high economic value which could incur significant damage in the event the secret is divulged [*Marghitola, p.93*]. Firstly, it does not meet this compelling standard since the evidence to be submitted would not contain any sensitive trade secrets or "know-how" procedures which can be considered "crown jewels" of the Respondent"s business. The evidence to be submitted is concerned with the dispute arising from "the sale contract of a mare" between the Respondent (the seller) and the other party (the buyer) residing in Mediterraneo [*PO2, No.39, p.60*]. In fact, the mare is not an intellectual property. The sale of a mare would not contain any "know-how" procedures or complex manufacturing process or sale method that could incur significant damage to the Respondent if it is divulged. Besides, the Claimant is not

a business competitor to the Respondent. Their interest in business is different [*Notice of Arbitration, para. 1,4; p, 4,5*]. Therefore, there is unlikely to be any significant damage to the Respondent if the documents are to be presented to the arbitral tribunal.

57. Moreover, the admission of this evidence would not cause damage to the buyer from the other arbitral proceedings. This is because in a sale process, trade secrets and know-how procedures are mainly concerned with the seller.

II. Insofar there are limits of confidentiality, an impartial confidentiality expert can be appointed by the Tribunal pursuant to Art 25 of HKIAC Rules to review and exclude particular sensitive commercial information.

58. There are measures in which the tribunal may handle confidential and privilege issues if one of the party alleged the evidential document to be confidential or privileged [*Kubalczyk, p.101*]. One of which is by "asking an independent expert to review the documents and indicate which parts of the documents are relevant for the case." [*ibid.*]. As Peter Ashford stated, "If an Article 9(2) objection is taken on the grounds of confidentiality, the tribunal can appoint an independent expert under Article 3(8) to review the document and report on the objection." [*P'Ashford 1, p.218*]. The HKIAC institution which the parties have chosen also gives the tribunal the authority to appoint experts to assist in the assessment of evidence [*Art. 25.1, HKIAC Rules*]. Since there are ways in which the tribunal can assess the alleged confidential evidence by precluding the sensitive commercial information, the Respondent"s objection on the admissibility is without merits.

59. In conclusion, there are no pressing reasons for the exclusion of evidence and even if there are limits of confidentiality, a confidentiality expert could be appointed to review and assess the documents.

CONCLUSION OF SUBMISSION 2

In this case specifically, the evidence from the other arbitral proceeding should be allowed. It is not only the procedural right of the Claimant to submit evidence and present its case but also the evidence is highly material and relevant to the outcome of the case.

Should the evidence be not allowed for submission, the danger of conflicting awards could also arises. Even if there is confidentiality complication, the evidence can be reviewed and excluded the parts which the confidentiality expert deems to be sensitive business information. In fact, the Respondent's objection to the submission of the evidence is an attempt to interrupt due process of arbitral proceeding. Therefore, the Claimant respectfully requests the Arbitral Tribunal to reject the Respondent's groundless allegations and allow to submit the evidence.

SUBMISSION 3: THE CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM THE ADAPTATION OF THE PRICE EITHER UNDER CLAUSE 12 OF THE CONTRACT OR PURSUANT TO CISG.

60. On 19 Dec 2017, 30% tariffs on selected products from Mediterraneo including on animal semen were announced by executive order of the Equatorianian government and took effect from 15 Jan 2018 onwards [*PO2, p. 58, No. 25*]. It was before the last shipment of 50 doses of semen [*Exhibit C5, p. 14, clause 8*].

61. When shipping the last doses, the Claimant paid 30% tariffs on behalf of the Respondent since the Respondent urged the Claimant to authorize the shipment as planned as soon as possible [*Exhibit C8, p. 18, para. 7*] and thus the Claimant delivered the remaining 50 doses on 23 January 2018 by complying with its delivery obligation [*Exhibit C5, p. 14, clause 8*]. However now the Claimant claims for only 25% tariffs which are equivalent to US$ 1,250,000 for the sake of both parties excluding its 5% profit. The Claimant is entitled to the requested amount according to either clause 12 of the Contract (A) or the CISG (B).

A. Under the clause 12 of the Contract, the Claimant is entitled to the amount claimed.

62. In the case at hand, the Respondent refused to pay that payment by claiming hardship clause which is inserted in clause 12 of the Contract does not provide an adaptation of the contract. As the Contract is governed by the law of Mediterraneo including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) [*Exhibit C5, p. 14, Clause 14*], the Claimant is entitled to the payment of US$ 1,250,000

under clause 12 of the Contract pursuant to CISG since **(I)** There is hardship under clause 12 of the Contract. **(II)** Hardship leads to adaptation of price under clause 12. **(III)** And as a result of such adaptation, the Respondent is responsible to pay that price to the Claimant.

I. There is hardship under clause 12 of the contract.

63. Clause 12 of the Contract provides that "Seller shall not be responsible for (….....) neither for hardship caused by (……..) or comparable unforeseen events making the contract more onerous." Thus in the case at hand, there is hardship under clause 12 of the Contract since sudden imposition of tariff amounts to hardship under that clause.

64. Clause 12 of the Contract is to be interpreted pursuant to Art. 8 of CISG and that Article provides that for the purposes of this Convention, statements made by and other conduct of a party are to be interpreted by subjective intention where the other party knew or could not have been unaware of what that intent was or by objective interpretation and they are to be determined by negotiations, practices, usages and subsequent conduct of the parties. In the *Magnesium case,* the tribunal interpreted the clause of the agreement pursuant to Art. 8 of the CISG.

65. Thus clause 12 is to be interpreted by the intention of the parties. In fact, the Claimant inserted hardship clause into clause 12 of the Contract with the aim of not willing to take over further risks associated with changes in customs regulation or import restrictions [*Exhibit C4, p. 12, para. 4*] and it had been known and agreed by the Respondent since the Respondent replied the email and did not argue against that [*Exhibit R1, p. 33*].

66. In addition, that hardship was caused by comparable unforeseen event. It is undisputed that on 19 Dec 2017, just before the last shipment of 50 doses, the Government of Equatoriana announced to impose a tariff 30% upon all agricultural goods from Mediterraneo as retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo. As a matter of fact Equatoriana has always been one of the biggest supporters of the existing system of free trade [*Exhibit C6, p. 15, para. 1*]. And both countries are part of the World Trade Organization [*PO2, p. 61, No. 47*]. WTO's main function is to ensure that trade flows as smoothly, predictably and freely as possible. To join the WTO, a government has to bring its economic and trade policies in line with WTO rules and negotiate its terms of entry with the WTO membership

[*https://www.wto.org/*]. Pursuant to those facts, there is no doubt that imposition of tariff was caused by comparable unforeseen event.

67. That event made the Contract more onerous as well. Onerous of a near synonym is burdensome. In legal usage, onerous describes a contract that has more obligations than advantages [*Vocabulary.com Dictionary*]. In the case at hand, it fundamentally alters the equilibrium of a contract resulting in an excessive burden being placed on the Claimant since the aggregate cost required to fulfill the agreement is higher than the economic benefit to be obtained from it and it was a major financial burden for the Claimant. Imposition of 30% tariff is apparently higher than that of the Contract which is equilibrium.

68. Thus there is hardship under clause 12 of the contract since imposition of tariffs amount to hardship pursuant to intention of parties and it was caused by comparable unforeseen events making the Contract more onerous.

II. Hardship leads to adaptation of price under clause 12.

69. Under clause 12 of the Contract, both parties had the intention for an adaptation of the Contract in the hardship clause **(a)** in addition sudden imposition of tariffs leads to an adaptation of the Contract **(b)** and that adaptation of the Contract amounts to an adaptation of the price**(c)**.

a. Both parties had the intention for an adaptation of the Contract under hardship clause.

70. Pursuant to Art. 8 of CISG, the Claimant mentioned to have a mechanism in place which would ensure an adaptation of the Contract for the unlikely event that the Parties could not agree on an amendment and the Respondent replied that it should probably be the task of the arbitrators to adapt the Contract if the Parties could not agree. Thus the Claimant suggested including an express reference into the hardship clause [*Exhibit C8, p. 17, para. 4*]. Thus the intent of the parties to have the Contract adapted in a situation of hardship follows from the Contract, despite the lack of a specific contractual provision on adaptation since the Contract was finalized by lawyers from both sides who were not involved in the detailed negotiations and have no experience in international contracting [*Exhibit R3, p. 35, para. 1*] and [*Exhibit C8, p. 17, para. 2*].

b. Sudden imposition of tariffs leads to an adaptation of the Contract.

71. An adaptation of the Contract is an exemption of hardship. The very essence of the hardship exemption suggests that hardship may arise due to certain events in the course of the performance of Contract which cause disequilibrium between the parties. This disequilibrium may have two different effects: an increase of costs of performance, or a diminution of the value of the performance [*Girsberger, Zapolskis, p. 122, 2012]*. In the case at hand, the event, imposition of tariffs, is an increase of costs of performance.

72. In fact hardship is a flexible legal concept that may occur in different forms; and therefore, no list of contractual disequilibrium situations will be complete. However, there are five particularly important situations: threat to people or property, financial ruin of the debtor, opportunity costs, windfall gains and frustration of purpose. [*Girsberger, Zapolskis. p. 130, 2012]*. In the case at hand, one out of those situations which is financial ruin of the debtor meets the event of the case.

73. According to the general rule, the deterioration of a party,,s financial capacity falls within the sphere of control of this party and thus does not authorize this party to invoke the hardship exemption. However, in some exceptional cases, especially when the debtor is a small company and loses a major part of its income due to changed circumstances, a more flexible approach towards alteration threshold may be justified. The essential criterion in this situation is the fact that performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor [*Girsberger, Zapolskis. p. 131, 2012*]. In the case at hand, the Claimant is financially endangered and almost leads to suffer bankruptcy by paying the 30% tariffs [*PO2, p. 59, No. 29*]. Thus sudden imposition of tariffs alters the equilibrium of the Contract and then hardship arises in this case. An adaptation of the Contract is an exemption of hardship.

c. That adaptation of the Contract amounts to an adaptation of the price.

74. According to principle of adaptation of the contracts, the Contract must be adapted to the changing circumstances. By adapting to the changing circumstances, the contract balance, which is destroyed due to changed circumstances that caused hardship, ultimately attempted to be restored [*Guzeloglu, Kurban*]. In the case at hand, the changing circumstance is sudden imposition of 30% tariffs and it makes the price of the last shipment of 50 doses of semen increase. That increasing price destroyed the balance

of the Contract. Thus in order to restore it, the price must be adapted in line with increased tariffs.

III. As a result of such adaptation, the Respondent is responsible to pay that price to the Claimant.

75. In the case at hand, sudden imposition of tariffs makes the Contract more onerous. It fundamentally alters the equilibrium of a contract resulting in an excessive burden being placed on the Claimant. At the moment the Claimant is financially endangered and almost leads to suffer bankruptcy by paying the 30% tariffs. And the Claimant is not responsible for that under the Contract. Thus in order to restore the equilibrium of the contract, the price shall be adapted to US$ 1,250,000 (a) and the Respondent is responsible for that price (b).

a. The price shall be adapted to US$ 1,250,000.

76. In fact, the price shall be adapted to US$ 1,500,000 which is 30% tariffs of the price for the last delivery of semen which were imposed by the Equatorianian government. However for the sake of both parties, the Claimant only claims for US$ 1,250,000 which is only 25% tariffs of the price without claiming for his profit margin which is 5% of the price.

b. The Respondent shall be responsible for that price.

77. Clause 12 of the Contract provides that "Seller shall not be responsible for (….....) neither for hardship caused by (……..) or comparable unforeseen events making the contract more onerous." which means that the Respondent shall be responsible for hardship. In the case at hand, according to interpretation of that clause, pursuant to Art. 8 of CISG, the requirements of that clause which are sudden imposition of tariffs amounts to hardship, it was caused by comparable unforeseen events and they made the Contract more onerous are fulfilled. Moreover, the Respondent agreed to pay the price **(i)** the Respondent breached the resale prohibition under the Contract **(ii)** and the Respondent claimed an adaptation of the price invoking an unforeseeable change of circumstances in another arbitration **(iii)**.

i. The Respondent agreed to pay the price.

78. In addition, the Respondent agreed to the Claimant that if the contract provides for an increased price in the case of such a high additional tariff he was certain that agreement on the price would be found through negotiation [*Exhibit R4, p. 36, para. 4*]. Pursuant to Art. 11 of CISG, a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. In fact both parties agreed to have an adaptation of the Contract clause into hardship clause for the unlikely event [Exhibit C8, p.17, para. 4] which means that the contract provides for an increased price in the case of such a high additional tariff. As a result, on 12 Feb 2018, the Claimant initiated a meeting which took place in a hotel in Equatoriana in order to solve the issue of adaptation as agreed at the senior management level. It involved the CEO' of both parties and Ms. Napravnik and Mr. Shoemaker [*PO2, p. 60, No. 35*]. However, the Respondent stopped the negotiations and refused to pay any additional amounts for the tariffs since the Claimant discovered and told the Respondent that the Respondent was actually breaching the resale prohibition under the Contract [*Exhibit C5, p. 13, para. 5 and Exhibit C2, p. 10, para. 3*] and thus needed part of the doses shipped for commitments towards other parties [*Exhibit C8, p. 18, para. 9*].

ii. The Respondent breached the resale prohibition under the Contract.

79. The Claimant was approached on 2 Feb 2018 by another breeder from Equatoriana which was enquiring about the prices of frozen semen from another stallion. During the conversion he told the Claimant that he had been very with the Nijinsky III semen which he had brought from the Respondent for US$120,000. He knew that 15 doses had been sold to 10 different breeders, all of which had bought just one or two doses [*PO2, p. 57, No. 20*]. As a result, the Respondent gained the profit US$ 300,000.

80. So in the case at hand, apart from the disequilibrium of the contract, the Respondent breached the resale prohibition. In 24 March 2017 email, sent by the Claimant to the Respondent, it is said that frozen semen may not be re-sold to third parties without the Claimant's express written consent. Furthermore, the Claimant would like to be informed about the use of every dose [*Exhibit C2, p. 10, para. 3*]. Then the Respondent replied that most of the terms of offer are acceptable to him and he argued against some facts which

in his view are not acceptable but excluding resale prohibition [*Exhibit C3, p. 11*]. Since both parties agreed with that fact, they inserted a resale prohibition clause into the Contract and it provides that "the semen is to be used for the following mares which are Azeri, Ta Wee and Zenyatta and others after information of the Seller [*Exhibit C5, p. 13, para. 5*].

iii. The Respondent claimed an adaptation of the price invoking an unforeseeable change of circumstances in another arbitration.

81. As a matter of fact, there is another arbitration which the Respondent had with one of its customers concerning the sale of a promising mare to Mediterraneo. That sale had been affected by the unforeseen tariff of 25% imposed by the president of Mediterraneo. As a result, the Respondent has been negatively affected by the tariffs. In that arbitration, the Respondent had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances [*PO2, p. 60, No. 39*]. Thus it is highly contradictory that in such case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable retaliatory tariff of 30% allegedly does not justify an adaptation when it is to the Respondent's detriment.

82. To summarize, clause 12 of the Contract provides that the Claimant shall not be responsible for hardship and in this case, sudden imposition of tariffs amount to that hardship pursuant to both parties‟ intention. And that hardship clause leads to an adaptation of the price as well. Thus there is no doubt that the Respondent is responsible for sudden imposition of tariffs as a result of such adaptation. In fact, in another arbitration, the Respondent himself claimed for an adaptation of the price invoking an unforeseeable change of circumstances which only increased for 25% tariffs while 30% tariffs is increased in this case. Moreover, the Respondent agreed to pay that increased price. In addition, the Respondent also breached the resale prohibition under the Contract. As a result, the Respondent gained the profit US$ 300,000. Nevertheless, the Claimant does not claim for any damages for that.

B. The Claimant is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under the CISG along the lines of the hardship provision in Art. 6.2.3 of the UNIDROIT Principles.

83. Since both the Mediterraneo and Equatoriana are signatories to the CISG, the Convention applies in accordance with Art. 1(1) (a) of the Convention. However the CISG does not govern the adaptation of the contractual price in the case of changed circumstances. Making reference to the CISG Art. 7(2), it is to apply as a result of the closet connection test [*Clothes Case*]. The contract law of both the Equatoriana and Mediterraneo is a verbatim adaption of the UNIDROIT Principles on International Commercial Contracts. Therefore, for the price adaptation, the principle of hardship in the contract should be interpreted in accordance with Art. 6.2.3 of the UNIDROIT Principles **(I)** and under Art. 6.2.3 UNIDROIT Principles, the Contract should be adapted to achieve that the Respondent bears all (or part of) the import tariff charge of US$ 1,250,000 **(II)**.

I. The principle of "Hardship" in the Contract should be interpreted in accordance with Art. 6.2.3 of the UNIDROIT Principles.

84. The hardship suffered by the Claimant as a result of the import tariffs should be addressed by adapting the Contract through application of Art. 6.2.3 of the UNIDROIT Principles. This is because the contract is governed by the CISG **(a)**, and the CISG recognizes the principle of impediments **(b)** and as a result Art. 6.2.3 of the UNIDROIT Principles should be applied **(c)**.

a. The contract is governed by the CISG

85. The CISG "applies to the Contract of sale of goods between parties whose place of business are in different States… when the States are contracting States." [*Forestal Guarani, S.A. v. Daros International, Inc*]. In this case, it is undisputed between the Parties that Equatoriana and Mediterraneo are signatories to the CISG and the parties" places of business are in different contracting States, as is required by Art. 1(2) of the CISG. Further, Clause 14 of the Sale Agreement states that "This Sale Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1080) (CISG)." Also the issue at hand involves the Sale of Goods, which the CISG governs. Consequently, the CISG is applicable in this case.

86. In the case at hand, the Respondent's argumentation on the exclusion of application of CISG Art. 79, using CISG Art. 6 derogation clause is unsuccessful. In order for the Contract signed between parties of different contracting states to exclude application of

the CISG, it must include the language which affirmatively states that CISG does not apply [*BP Oil Int'l, Ltd., v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 *(5th Cir.2003)*]. Thus, only an explict exclusion of the CISG is possible [*Roser Technologies V. Carl Schreiber GmbH*]. Consequently, the CISG hardship clause applies because there is no explicit statement in writing that excludes the application of CISG.

87. Moreover, the exclusion of the CISG requires mutual agreement; a unilateral derogation from the Convention is not possible [*Machine case*]. In fact neither party chose, by express provision in the contract at issue, to opt out the application of the CISG [*TeeVee Tunes, Inc. et al v. Gerhard Schubert GmbH*].

88. Furthermore, in the email exchange, Exhibit C4, on 31 March 2017, 08:42am the Claimant had mentioned to include the hardship dealing with the passing of risk, such as the changes in customs regulation or import restrictions, however, due to the replacement of two main negotiators (Mr. Napravnik and Mr. Antley) following the severe car accident no express statement to that extent was either included in the adaptation clause or the arbitration clause. Pursuant to Art. 8 CISG, in order to interpret the Contract, regard must primarily be paid to the perceptible intent of both parties. The negotiations preceding the conclusion of contract and any subsequent conduct must also be considered [*Packing Machine Case]*. The Respondent's attempt to exclude the application of the CISG for the adaptation of the contract is without effect. Having determined that the CISG is the applicable law, the adaptation clause is supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariff, like in the present.

b. The CISG recognizes the principle of impediments.

89. Acts of government have been recognized as impediments under Art 79 [*the UNICITRAL Digest Art. 79 para.16*]. In the present case, The Claimant is materially negatively affected due to the imposition of a 30% import tariffs by the Equatorianian government on the selected products from Mediterraneo including on animal semen. Such tariffs were imposed after the conclusion of the Contract. The tariff imposition constitutes a changed of circumstances to the Contract that amount to a situation of hardship [*CISG AC-Opinion No.3.1*] because the increased tariff is not under the Claimant‟s sphere of control **(i)**, it was unforeseeable **(ii)** and unavoidable for the Claimant **(iii)**.

i. The increased tariff is not under the Claimant's sphere of control.

90. A natural disaster or change of political and economic factors may considerably determine circumstances beyond the parties' sphere of control. In the case at hand, the imposition of tariffs by both the Claimant's and the Respondent's government is an impediment, which lies outside of the Claimant's sphere of control, particularly as there is no means of the Claimant to deliver the good contracted for without being impacted by the import tariffs.

ii. The increased tariff was unforeseeable.

91. In the case at hand, the imposition of tariff by both Mediterraneo Government and Equatorianian Government was a complete surprise. Neither the Claimant nor the Respondent had expected anticipated such events. Especially the reaction of the Equatoriana Government who had always been an ardent supporter of free trade and always tried to settle dispute amicably, had taken retaliatory measures by imposing 30% tariff on all agricultural products from Mediterraneo *[Exhibit 6, p. 15*] that also applied to racehorse semen. Generally racehorse breeding is categorized differently from pigs, sheep or cattle. Unlike the market price fluctuation, the imposition of tariff was unforeseeable both for the Claimant and the Respondent.

iii. The Claimant cannot reasonably be expected to avoid or overcome the consequences of the increased imposition of tariff.

92. It is impossible for the Claimant to take all the risks and overcome the consequences of the increased imposition of tariff, as the Respondent had known the Claimant's fragile financial situation that the Claimant had a profit margin of 5% for the transaction and now makes a loss of 25%. It is the imposition of tariff by the Respondent's home country and therefore are closer associated with Respondent than with Claimant.

93. In addition, the tariff imposition constitutes an impediment outside the sphere of control of the Claimant and it was also unforeseeable after the conclusion of the Contract and unavoidable for the both parties. The Claimant had fulfilled the requirement of the standard conditions of the impediment. On the basis of this consideration the Claimant can rely on the impediment under Art. 79(1) CISG [*Schwenzer II*].

c. In the event of an impediment or hardship under the CISG, Art. 6.2.3 of the UNIDROIT Principles should be applied.

94. The imposition of tariff fundamentally altered the equilibrium of the Contract and makes it onerous to the Claimant, primarily because the increased cost of the delivery will make the transition not less profit but even a loss for the Claimant, as the parties intended a mutually profitable transition. Thereby adaptation of the contract is needed for the fair dealing. However, Art. 79(5) of the CISG, as has already been pointed out in paragraph, expressly relieve the affected party from damages only. In order to reach the desirable result of the adaptation Art. 6.2.3 of the UNIDROIT Principles should be applied because there is a gap in the CISG that can be filled by the Arbitral Tribunal and creates the power to adapt the Contract to the change circumstances in line with the UNIDROIT Principles [*Pursuant to the CISG Art 7(2)*].

II. Under Art 6.2.3 UNIDROIT Principles, the Contract should be adapted to achieve that the Respondent bears all (or part of) the import tariff charge of US$ 1,250,000.

95. The Contract should be adapted to achieve that the Respondent bears all (or part of) the import tariff charge of US$ 1,250,000 under Art. 6.2.3 UNIDROIT Principles because in the absence of price adaptation principles, which are not expressly settled in the CISG are to be settled in conformity with the UNIDROIT Principles (I), In a situation of hardship under Art. 79(1) the tribunal may provide further relief consistent with the UNIDROIT Principles **(a)** and the hardship situation in this case leads to a necessary to adapt the Contract to restore the contractual equilibrium in line with the parties‟ intention **(b)**.

a. In the absence of price adaptation principles, which are not expressly settled in the CISG are to be settled in conformity with the UNIDROIT Principles.

96. The Convention that governs the Contract on the basis of CISG Art. 1(1)(a) states that gaps in the Convention are to be filled by the UNIDROIT Principles if the Convention does not provide a solution [*U.S (federal) Court of Appeals, Fourth Circuit; Case No.580 CISG, 21 June 2002*]. Thus, the absence of a specific provision for the price adaptation is to be settled in conformity with the UNIDROIT Principles, which provide the adaptation clause in case of hardship [*Pursuant to Art. 7(2)*].

b. In a situation of hardship under Art. 79(1) the tribunal may provide further relief consistent with the UNIDROIT Principles.

97. The tariff imposition caused the changed circumstances that were not reasonably foreseeable at the time of the conclusion of the Contract and burden the Claimant to perform the Contract in a disproportionate manner forms an impediment in the sense of Art. 79(1) CISG. Thus, the Arbitral Tribunal may provide further relief consistent with the UNIDROIT Principles because under the UNIDROIT Principles, the party who invokes changed circumstances that fundamentally disturb the contractual balance is entitled to claim the renegotiation of the contract [*Schmitz-Werke v. Rockland*].

c. The hardship situation in this case leads to a necessity to adapt the Contract to restore the contractual equilibrium in line with the parties' intention.

98. The imposition of 30% tariff made it onerous for the Claimant to deliver the last shipment of 50 doses because of the increased in delivery cost. Thereby the Claimant and the Respondent immediately started negotiation regarding the price adjustment for the frozen semen [*Exhibit 7, Pg. 16*]. Mr. Shoemaker who is the Respondent"s employee had made the contractual oral promise to negotiate for the price adjustment [*CISG Art. 29*] saying, "He was certain a solution would be found through negotiation given the good relationship between the Parties" [*Exhibit 8, Pg. 18, para. 7*]. The Contract is accordingly accepted given the promise by the Mr. Shoemaker. Thus the Arbitral Tribunal should adapt the contract to restore the contractual equilibrium in line with the parties" intention because due to the hardship under Art. 6.2.3 of UNIDROIT Principles, the parties have a duty to renegotiate **(i)**, the renegotiation has failed **(ii)**, termination of the contract is no viable alternative **(iii)** and adaptation of contract is required to make the Respondent liable (part of) the import tariff in order to restore the equilibrium of the Contract **(iv)**.

i. Due to the "hardship" under Art.6.2.3 of UNIDROIT Principles, the parties have a duty to renegotiate.

99. Pursuant to Art.6.2.3 of the UNIDROIT Principles, the Claimant is entitled to request the renegotiation of the Contract regarding the price adjustment for the frozen semen because of the hardship. In the situation of a permanent impediment or hardship, the tribunal commonly provides for the avoidance of the Contract or even the obligation to renegotiate it. [*Shwenzer I, p.1152*]. In the present case, regardless of the higher delivery cost, the Claimant had delivered the last shipment, thereby renegotiation of the contract is the only option and the Respondent is under the obligation to renegotiate the Contact.

ii. The renegotiation has failed.

100. In the meeting of 12 Feb 2018 Ms. Kayla Espinoza, Respondent"s CEO stopped the negotiations and refused to pay any additional amount for the tariffs [*Exhibit C8, P.18, para. 9*]. A party is free to negotiate and is not liable for failure to reach an agreement [*Pursuant to the UNIDROIT Principle Art. 2.1.5*]. However, a party who negotiates or breaks off in bad faith is liable for the losses caused to the other party. It is bad faith, in particular, for a party to onerously institute an intention to renegotiate when in fact it is intending not to reach an agreement with the other party. [*Conf. Hanrei Jiho No.1337, P. 51, 1984*].

101. With hindsight it is obvious that the behavior of the Respondent has no intention of reaching to an agreement from the beginning during the meeting on 12 Feb 2018 as in seeing she had told Phar Lap that she was no longer interested in a further cooperation.

iii.Termination of the Contract is no viable alternative.

102. Termination of the Contract is no option in this case as the horse-breeding season started from Feb to July and the Claimant had made the last shipment on 23rd Jan 2017, the frozen semen may be used for insemination. It is also impossible to send back the frozen semen back to Maditerraneo, which will even end up paying tariff fees again and costing more for the parties. Therefore, the parties should not destroy the Contract by termination.

iv. Adaptation of the Contract is required to make the Respondent liable (part of) the import tariff in order to restore the contractual equilibrium.

103. The Claimant was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted on the inclusion of the hardship clause and the Respondent had consented to that term. The fact that such tariffs were not explicitly included had to do with the fact that at the time of contracting no one expected such measures. Had such measures been foreseeable it is indisputable that the Claimant would have insisted on their mention, as the primary goal of including the hardship clause was to prevent unforeseeable circumstances from significantly disturbing the contractual balance of the deal.

104. Moreover, while neither party is responsible for the tariffs, it was the Respondent home's Government who imposed the 30% tariff and therefore the tariffs are closer

associated with the Respondent. The Claimant was also able to make the transportation to commercially much more favorable terms than the Respondent. Therefore the Arbitral Tribunal should adapt the Contract to make the Respondent responsible for (part of) the import tariff in order to restore the contractual equilibrium. This is because the parties intended a mutually beneficial agreement **(aa),** and due to the import tariff and without the adaptation of the price, the Contract will no longer be beneficial to the Claimant **(bb).**

aa. The parties intended a mutually beneficial agreement.

105. The key to the mutually beneficial agreement is to gain net profit from both sides. Before the Parties entered into the Contract, both parties intended a mutually beneficial agreement, however, the 30 per cent imposition from the Respondent's Home Country, the Claimant is at a loss of net profit without the adaptation of the Contract. The Claimant is encountering the financial situation due to the lack of benefit from its side.

bb. Due to the import tariffs and without the adaptation of the price, the Contract will no longer be beneficial to the Claimant.

106. Claimant has calculated the price for the frozen semen and the profit margin on the basis of the general cost-calculation in the racehorse department. Concerning the allocation of fixed costs and overheads one dose of frozen semen was treated the same as one natural covering, i.e. fixed costs of 80,000 USD were included into the calculation. In relation to the variable costs Claimant relied on its experience with frozen semen in the other areas of equestrian sport, where regularly frozen semen is sold. Claimant included variable costs of 15.000 USD per dose. On the basis of this calculation Claimant came to (fixed & variable) costs in the amount of 95,000 USD. The remaining 5,000 USD per dose are considered to be profit. Due to the 30% import tariffs the Claimant now at a loss of 25% net profit without the adaptation of the Contract, the Contract will no longer be beneficial to the Claimant.

107. Therefore, it should be noted that if the tribunal were to adapt the Contract with the aim of making the Respondent liable for the import tariffs, this would likely not prevent the profitability of the deal for the Respondent, as it is likely to make a significant profit on the use of the semen. Moreover, it has become evident to Claimant that Respondent is likely to profit even more than it would have from the originally intended deal, as a result of its reselling the semen samples, even contrary to the Parties" contractual agreement.

Consequently the only way to restore balance in the present case and prevent severe and unfair hardship to the Claimant is to re-allocate the responsibility for paying the tariffs, fully or at least partially, to the Respondent.

CONCLUSION OF SUBMISSION 3

Clause 12 of the contract provides that the Claimant shall not be responsible for hardship. There is hardship under clause 12 of the Contract and that hardship leads to adaptation of the price pursuant to both parties' intention. And also the price should be increased under the CISG because CISG allows for the price adaptation in the case of changed circumstances along the lines of the hardship provision in UNIDROIT Principles. The Respondent is responsible to pay that price to the Claimant since the Respondent agreed to pay the price. In addition, the Respondent breached the resale prohibition under the contract. Moreover the Respondent claimed an adaptation of the price invoking an unforeseeable change of circumstances in another arbitration. Therefore, the Claimant respectfully request the Arbitral Tribunal to come to the finding that the Claimant is entitled to an increase of the imposition of 25% new tariffs which is US$ 1,250,000 resulting from the adaptation of the Contract.

REQUEST FOR RELIEF

In light of the above submissions Counsel, on behalf of the Claimant, respectfully requests the Arbitral Tribunal to find that

1. The Arbitral Tribunal has jurisdiction under the arbitration agreement to adapt the contract;
2. The Claimant shall be allowed to submit evidence from the other arbitral proceedings;
3. The Claimant shall be entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price both under
   i. clause 12 of the contract and
   ii. the CISG.

CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose name are listed and signed below.

Mandalay, December 2, 2018

Myat Thinzar Kyaw

Thinzar Theint

Nang San Aung

Min Nyi Khant

Ingying Khaing