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

MEMORANDUM FOR CLAIMANT

LA TROBE UNIVERSITY

ON BEHALF OF:	**AGAINST:**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL:

|Janna Severine Baggio|Cindy Do|James Karl Fitsioris|
|Mohamed Naleemudeen|Kirtan Swamy|Kian Hong Wilson Tan|

MELBOURNE – AUSTRALIA

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INDEX OF ABBREVIATIONS

§/§§	paragraph/paragraphs
%	Per cent
Art./Arts.	article/articles
ACICA	Australian Centre for International Commercial Arbitration
BANI	Badan Arbitrase Nasional Indonesia
CLAIMANT	Phar Lap Allevamento
Contract	Frozen Semen Sales Agreement
contra proferentem	interpretation against the draftsman
e.g.	*exempli gratia* (for example)
ed.	edition
Ex. C	Claimant's Exhibit
Ex R.	Respondent's Exhibit
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IAC	International Arbitration Centre
IBA	International Bar Association
IBA Rules	International Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards

No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
Para	paragraph
Record	Twenty Sixth Annual Willem C. Vis International Commercial Arbitration Moot 2018-19 Problem
RESPONDENT	Black Beauty Equestrian
RNoA	Respondent Notice of Arbitration
SIAC	Singapore International Arbitration Centre
SIAC 2013 Rules	Singapore International Arbitration Centre Rules (2013)
SIAC 2016 Rules	Singapore International Arbitration Centre Rules (2016)
Tribunal	Arbitral Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985)
UNCITRAL Rules	United Nations Commission on International Trade Law Rules (2013)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)
v.	*Versus* (against)
P.O 1	Procedural Order 1
P.O 2	Procedural Order 2

STATEMENT OF FACTS

1. Phar Lap Allevamento (hereinafter: "CLAIMANT"), a company registered and located in Capital City, Mediterraneo operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport.

2. Black Beauty Equestrian (Black Beauty) (hereinafter: "RESPONDENT") in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. On **21 March 2017**, CLAIMANT was contacted by RESPONDENT of the terms and conditions for the provision of 100 doses of frozen semen.

4. On **24 March 2017**, CLAIMANT confirmed that they will supply the doses under certain conditions. Conditions being express written consent regarding resale to third parties and the provision of semen in several instalments. Additionally, CLAIMANT must be informed of the use of every dose.

5. On **28 March 2017,** RESPONDENT agreed to the terms but disagreed on the present delivery terms and the dispute resolution clause.

6. On **31 March 2017**, CLAIMANT responded with a US$ 1000 per dose for the change in delivery terms to DDP. CLAIMANT expressed an inclusion of a hardship clause and for the jurisdiction to be Mediterraneo.

7. On **10 April 2017**, RESPONDENT suggested the dispute resolution clause to be covered by the laws of Equatoriana. In the model arbitration clause attached, it was provided the law governing this clause was Equatoriana.

8. On **11 April 2017**, CLAIMANT proposed a change to the seat of arbitration to Danubia and reliance upon the ICC-hardship clause. CLAIMANT was silent upon the law that should govern the Arbitration Clause. The offer was conditional on the law of Mediterraneo being applicable to the Sales Agreement.

9. On **12 April 2017**, Ms Napravnik (CLAIMANT's lawyer) and Mr Antley (RESPONDENT's lawyer) were negotiating the contract before they were severely injured in a car accident. Both Parties' representatives had to be replaced before the finalisation of the contract which was on **6 May 2017**.

10. There were no disputes regarding the first two shipments on **20 May 2017** and **3 October 2017.**

11. On **19 December 2017,** a 30% tariff was imposed on all imported agricultural goods from Mediterraneo, including animal semen. This affected the third shipment. CLAIMANT contacted RESPONDENT on **20 January 2018,** regarding a price adjustment prior to the final shipment as a result of the tariff.

12. On **21 January 2018,** RESPONDENT urged CLAIMANT to deliver the third and final shipment prior to payment due to time pressures. They assured a solution would be found through negotiations. Before an agreement was reached on price, CLAIMANT complied with their obligation to deliver the remaining doses on **23 January 2018,** on the understanding they would be compensated for the additional expenses incurred.

13. On **12 February 2018,** RESPONDENT stopped negotiation and refused to pay any additional amount for the tariffs.

14. CLAIMANT issued the Notice of Arbitration (hereinafter: "*NoA*") to RESPONDENT on **31 July 2018.** RESPONDENT submitted Respondent's Notice of Arbitration (hereinafter: "*RNoA*") on **24 August 2018.**

15. On **2 October 2018**, CLAIMANT informed the Tribunal that they had received information relating to RESPONDENT's arbitration in another matter. RESPONDENT objects to the sharing of information.

SUMMARY OF ARGUMENT

ISSUE A

CLAIMANT submits the Tribunal has jurisdiction to adapt the contract with respect to price, per Mediterranean Arbitration Law. In the alternative, CLAIMANT submits Equatoriana Arbitration Law should apply before application of Danubian Arbitration Law. Further, the Tribunal has power to adapt the Contract, with the parties having consented to adapt the Contract with respect to price. Finally, CLAIMANT submits that application of interpretive principles available under Mediterraneo and Equatorianian Arbitration Law support a broad interpretation of the Arbitration Agreement.

ISSUE B

CLAIMANT is entitled to submit evidence from the other arbitration proceeding. The tribunal should use their broad discretion to accept and admit the evidence pursuant to HKIAC Rules. The tribunal may accept the evidence submitted by CLAIMANT to ensure procedural fairness. CLAIMANT submits that even if the evidence is found to be obtained through the breach of a confidentiality agreement or via an illegal hack, the evidence can nonetheless still be admitted.

ISSUE C

CLAIMANT is able to rely on the Hardship Clause in the Contract to seek adaptation of the price. The Hardship Clause should be interpreted to relieve CLAIMANT from the burdens associated with all risks from DDP-delivery. The import restrictions satisfy the hardship clause, and therefore, allow for adaptation of the contract as a remedy. Alternatively, CLAIMANT is able to claim the stipulated amount under the CISG. CLAIMANT submits that the inclusion of the Hardship Clause does not derogate from Art. 79 CISG. Furthermore, Art. 79 CISG adequately regulates the hardship borne by CLAIMANT. Consequently, its operation provides for the remedy requested, namely, an adaptation of the contract price.

I. ISSUE A: THE TRIBUNAL HAS THE JURISDICTION AND POWER TO ADAPT THE CONTRACT

1. CLAIMANT submits that the Tribunal has jurisdiction to resolve the Conflict of Laws, with Mediterranean Arbitration Law the correct governing law **(A)**. Additionally, the Tribunal has power under the Arbitration Agreement to adapt the Contract **(B)**.

A. The Tribunal has jurisdiction to resolve the Conflict of Laws, with Mediterranean arbitration law the correct governing law.

2. Neither CLAIMANT nor RESPONDENT denies the jurisdiction of the Tribunal to hear the matter [*P.O 2, p. 61 §48*]. However, CLAIMANT submits that Danubian Law does not govern the Arbitration Agreement as claimed by RESPONDENT [*RNoA, p. 31 §13*]. CLAIMANT submits that in this *Conflict of Laws* dispute the correct governing law for the *Arbitration Agreement* should be Mediterranean law.

3. The term 'arbitration agreement' refers to 'an agreement by parties to resolve disputes by a consensual, fair and impartial process by reference of the dispute to one or more persons appointed by the parties to consider and decide the matters and the parties agree that the decision will be binding upon them' [*ACICA*]. For the purposes of this dispute, the Arbitration Agreement is Clause 15 of the Sales Agreement [*Ex. C5, p. 14*].

4. The task of the Tribunal in this instance is to resolve the Conflict of Laws. A 'Conflict of Laws' occurs when there are two or more competing laws purporting to be the governing law of an agreement [*Lawrence & Rizzo, p. 3*]. The same agreement would have two distinct outcomes on issues such as enforceability and interpretation of clauses when different laws are applied to the agreement [*Allsop & Ward, p. 2*].

5. In the absence of an expressed jurisdiction by the parties, the Tribunal shall apply the law which it determines to be appropriate to govern the Arbitration Agreement [*Art. 36.1 HKIAC Rules*]. CLAIMANT submits that the correct law governing the Arbitration Agreement is the Law of Mediterraneo.

6. The HKIAC Rules are silent on the resolution of 'Conflict of Law' disputes. CLAIMANT submits that Art. 28(2) the Hong Kong Arbitration Ordinance No. 609 (hereinafter: "HKAO"), which is a verbatim adoption of the UNCITRAL Model Law Art. 28(2), should be relied upon to provide guidance for resolution for this 'Conflict of Law' dispute. Where the HKIAC Rules are silent, the closest connection test indicates use of the HKAO as its closest substitute. HKAO Art. 28(2) provides that the Tribunal 'shall apply the appropriate law determined by the Conflict of Laws rule it deems applicable'.

7. In considering these factors, the Conflict of Laws dispute should be resolved through rules deemed applicable by the Tribunal. The appropriate law is then to be applied to the Arbitration Agreement. CLAIMANT submits that the Tribunal should choose to resolve the Conflict of Laws by applying the

'closest connection test' **(1)**. The Tribunal should not apply a *lex fori* approach to resolve the dispute, however should it do so, it should not apply the 'four corners rule'. **(2)**.

1. The closest connection test should be applied to determine the procedural validity of the Arbitration Agreement.

8. CLAIMANT submits that the Tribunal should apply the closest connection test to determine the law applicable to the Arbitration Agreement. The test provides that: in the absence of an express choice of law governing the Arbitration Agreement, the law governing the substantive contract is a 'strong indication' of the parties' intention in relation to the law governing the arbitration agreement [*Sulamerica,* §26; *Born (2014), p. 828*].

9. There is no express choice of law governing the Arbitration Agreement in this instance [*Ex. C5, p. 14*]. In the absence of such an express choice, the closest connection test is appropriate [*Sulamerica,* §26].

10. The procedural rules governing the arbitration are the HKIAC Rules [*Ex. C5, p. 14*]. As such, it is appropriate for the Tribunal to give greater weight to Hong Kong jurisprudence than other foreign jurisdictions. In the Hong Kong Court of First Instance, the closest connection test from *Sulamerica* was expanded to include consideration of the Arbitration clause itself, and the contract in question [*Klockner Plentaplast*]. The Court cited *Deutsche Schachtbau* which stated, 'in determining governing law, it is not permissible to look at the Arbitration Agreement in isolation, but that *regard should be had to the surrounding circumstances* as well'. In relying on the Hong Kong expanded closest connection test, regard must be given to the circumstances surrounding the formation of the contract.

i. In considering the surrounding circumstances, Mediterranean Law governs the Arbitration Agreement.

11. CLAIMANT submits that the law of Mediterraneo governed the Arbitration Agreement from the start [*Ex. C4, p. 12 §5*]. While RESPONDENT may argue that CLAIMANT eventually agreed to Mediterranean Law not governing the Arbitration Agreement [*Ex. R2, p. 34 §3*], the Tribunal should have regard to CLAIMANT's initial position.

12. After Mr Antley and Ms Napravnik's accident, it was CLAIMANT's Mr Ferguson and RESPONDENT's Mr Krone who continued negotiations [*Ex. R3, p. 35* §3]. Although they had access to the prior email chains, neither Party clarified what was meant by the "applicable law" in Mr Antley's note. [*P.O 2, p. 55 §§5-7*]. They also "cannot remember with sufficient certainty why they did not also include the sentence concerning the applicable law to the Arbitration Agreement" [*P.O 2 §6*]. Based on the decision to exclude the sentence without clarification of what the notes meant, Mr Ferguson and Mr Krone's actions should be considered an oversight, rather than an intentional decision.

13. The Tribunal should also note that both Mr Ferguson and Mr Krone had no experience in international contracts and they had not placed much importance on the negotiation of the arbitration and hardship clauses by their predecessors [*P.O 2, p. 55 §7*]. Additionally, the note prepared by Mr Antley showed that further clarification of the Arbitration Clause regarding the venue and applicable law was necessary [*Ex. R 3, p. 35*]. In considering the surrounding circumstances, CLAIMANT submits that Mediterranean Law is the correct law governing the Arbitration Agreement.

ii. In the alternative, in considering the surrounding circumstances, Equatoriana Arbitration Law should apply before Danubian Arbitration Law.

14. In the alternative, if Mediterranean Law applies to the Sales Agreement only and does not cover the Arbitration Agreement expressly or impliedly, RESPONDENT is mistaken in asserting that Danubian Law will cover the Arbitration Agreement.

15. RESPONDENT suggested to CLAIMANT that the law of Equatoriana was to be used for the Arbitration Agreement in the email dated 10 April 2017 [*Ex. R 1, p. 33*]. CLAIMANT raised no objections to Equatorianian Law governing the Arbitration Agreement in the reply email dated 11 April [*Ex. R 2, p. 34*]. Where the Tribunal does not find the law governing the Arbitration Clause to be Mediterraneo Law, this silence on behalf of the CLAIMANT should be considered implied acceptance of Equatorianian Arbitration Law [*Art. 1.8(2) UNIDROIT Principles*].

2. In the alternative, if the *lex fori* approach is adopted and Danubian Arbitration Law is applied, application of the 'four corners' rule should be rejected.

16. In the alternative, if the *lex fori* approach is adopted and Danubian Arbitration Law is applied, application of the 'four corners' rule should be rejected. Under *lex fori*, the law of the state where a lawsuit is instituted should govern all procedural matters as distinguished from substantive rights [*Green, p. 967*].

17. In the absence of an express choice of law governing the arbitration agreement and substantive contract, only then should the law of the seat of arbitration be considered as the appropriate law to govern the arbitration agreement [*Habas*]. The CLAIMANT submits that the *lex fori* approach should not be the preferred approach, due to the existence of an express law governing the substantive contract.

18. Where the Tribunal decides to apply the *lex fori* approach, Danubian Law would be established as the Law governing the contract. Danubian Law incorporates the 'Four Corner Rule', also known as the parole evidence rule, which is a long-standing rule which prohibits the introduction of oral evidence to vary or contradict the terms expressed in the written document.

19. However, application of the parole evidence rule should be rejected as failure to consider external evidence would lead to the contract being incomplete [*supra* §§**11-13**].

i. The parole evidence rule should be rejected.

20. It is not appropriate for the Tribunal to apply the parole evidence rule since 'national rules on the admissibility have been developed and may make sense in a national court system, but less so in an international arbitration context' [*Born, p. 1851*]. Institutional arbitrational rules often afford the tribunal the discretion to admit evidence, as permitted by the HKIAC Rules [*Art. 22.2 HKIAC Rules*; *Born, p. 1851-1856*]. To exercise this discretion, arbitrators must avoid the application of national laws on the exclusion of evidence [*BQP v BQQ; Born, p. 1852*].

21. Rejection of the parole evidence rule is permissible even if it is a traditional common law approach to prohibiting evidence from varying or contradicting the terms of the contract [*BQP v BQQ*]. The Singapore court in *BQP v BQQ* relied on the SIAC 2013 Rules. However, it was specifically noted that UNCITRAL Arbitration Rules and HKIAC Rules are similar to the SIAC 2013 Rules under consideration [*BQP v BQQ*].

22. The relevant SIAC 2013 Rules is now reflected as Art. 19.2 of the SIAC 2016 Rules. This provides that 'the Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is also not required to apply the rules of evidence of any applicable law in making such determination.' Its counterpart in the HKIAC Rules is Art. 22.2 provides that 'the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.' While not a verbatim adoption of the SIAC 2016 Rules, the HKIAC Rules should be given the same effect as the SIAC 2016 Rules, per the finding in *BQP v BQQ*. On this basis the HKIAC Rules allow for the Tribunal to consider extrinsic evidence.

23. The parole evidence rule may also be rebutted when an incomplete contract may exist [*Richfield Realty*]. Extrinsic evidence 'will not necessarily be rendered inadmissible by production of mere agreement, however complete it may look' [*Richfield Realty*]. The balance of probabilities must consider whether the written contract is the final integrated expression of the agreement and look at totality of evidence [*Richfield Realty*].

24. Where *Richfield Reality* the Sales Agreement is not necessarily precluded from the interpretation of the Hardship Clause to include price adaptation. Where the written contract was not intended by the original draftees to be the final version, the Tribunal should consider the 'totality of evidence' which includes evidence extrinsic to the contract [*Richfield Realty*].

25. CLAIMANT submits that the Arbitration Agreement was indeed incomplete. Mr Ferguson and Mr Krone "cannot remember with sufficient certainty why they did not also include the sentence concerning the law applicable to the Arbitration Agreement" [*P.O 2, p. 55 §6*]. The Parties merely added the last two sentences containing the number of arbitrators and the language of arbitration [*Ex. R 1, p. 34*]. In failing to address the note left in Mr Antley's "negotiation file", the Parties did not complete the Arbitration Agreement per

"the intention of the original draftees" [*Richfield Realty*]. The Arbitration Agreement is incomplete on this basis.

B. The Tribunal has power under the Arbitration Agreement to adapt the Contract.

26. The Tribunal has power under the arbitration agreement to adapt the contract with respect to price. An interpretation of the Arbitration Agreement indicates consent for price adaptation was given by the parties, as supported by the HKIAC Rules which are the applicable procedural rules of this arbitration [*Ex. C5, p. 14*] **(1)**. Application of the principles of interpretation available under both Mediterranean and Equatorianian Arbitration Law support CLAIMANT's interpretation of Arbitration Agreement **(2)**. In the alternative, if the Tribunal finds Danubian Arbitration Law to apply it should disregard the 'four corners rule', which will grant power to adapt the contract with respect to price **(3).**

1. The parties consented to adapt the contract with respect to price.

27. The Arbitration Agreement granted express consent to adapt the contract with respect to price in the arbitration agreement. Party consent is the most significant factor in determining the powers of an arbitrator and should be given significant weight [*Waincymer, p. 52, §2.2.1*].

28. The Arbitration Agreement provides that "*any dispute arising out of the contract*, including the existence, validity, *interpretation*, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted" [*Ex. C5, p. 14*].

29. The substantive issue in this dispute requires interpretation of the hardship clause found in clause 12 of the Contract of Sale and application of relevant CISG provisions [*Ex. C5, p. 14*]. The phrase 'any dispute arising out of the contract" should be read to include disputes relating to interpretation of a hardship clause within the contract. Early English decisions on Arbitration Clauses demonstrated a narrow and pedantic approach to Arbitration Clauses [*Waincymer, p. 143 §3.2.5*]. In these cases, the phrase 'disputes arising under' a contract was found to be narrower than 'disputes arising out of' a contract [*Heyman v. Darwins*]. Even if a narrow approach is preferred for interpretation of Arbitration Clauses, the Tribunal should still find the interpretive matter to be "a dispute arising out of the contract".

30. The HKIAC Rules uphold the Tribunal's discretion to make an award per the powers granted to them by the Arbitration Agreement and Sales Agreement [*Art. 35.1 HKIAC Rules*]. When read together with Art. 2.1 HKIAC Rules, the Tribunal is given the right to adapt the contract, insofar as the adaptation relates to its powers and duties. Adaptation of the contract with respect to price may be necessary to resolve interpretive disputes arising out of the Contract's Hardship Clause. On this basis price adaptation is a power available to the Tribunal.

31. CLAIMANT's interpretation of the Arbitration Clause does not contravene the New York Convention. Under Art V(1)(c), recognition and enforcement of the award may be refused 'if (the award) contains decisions on matters beyond the scope of the submission to arbitration'. Where the dispute is found to be "arising out of the contract" it falls within the scope of material available to the Tribunal per the New York Convention.

32. While party autonomy is central, the jurisdictional source of an arbitrator's power must still recognise a particular form of party consent [*Waincymer, p. 52 §2.2.1*]. The different jurisdictions available to the Tribunal, and their impact on Tribunal power, will now be considered in **(2)** and **(3)**.

2. Interpretive principles available under Mediterranean and Equatorianian Arbitration Law support a broad interpretation of the Arbitration Agreement.

33. Mediterraneo and Equatorianian Arbitration Law support the Tribunal's power to adapt the contract with to price. The jurisdictional basis of an arbitrator's rights, duties and powers is to be found in the applicable Arbitration Law [*Waincymer, p. 67 §2.5*].

34. The law applicable to Arbitration Agreement is Mediterranean or Equatorianian, per CLAIMANT's first submission. Equatoriana and Mediterraneo are contracting states of the CISG [*P.O 1 §4*]. The general contract law Equatoriana and Mediterraneo is a verbatim adoption of the UNIDRIOT Principles with no relevant exceptions [*P.O 1 §4*]. Mediterraneo Arbitration Law has traditionally taken a broad approach in interpretation of Arbitration Clauses [*NoA §16*]. Parallels between Equatorianian and Mediterranean Arbitration Law and principles require a broad approach when interpreting the Arbitration Agreement for both of the jurisdictions available to the Tribunal.

35. Application of Mediterranean and Equatorianian Arbitration Law in this dispute permits consideration of the CISG. There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the latter also applies to the conclusion and interpretation clause contained in such contracts [*P.O 1 §4*].

36. Art. 8(3) of the CISG requires: 'in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to *all relevant circumstances of the case* including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.' This list is not an exhaustive list of elements to be taken into account in interpreting statements or other conduct by the parties [*United Nations §E.81.IV.3*].

37. Application of Art. 8(3) CISG indicates a clear intention by RESPONDENT to allow adaptation of the contract with respect to price. In initial discussions regarding adaptation, Mr Antley had explicitly stated to Ms Napravnik that the arbitrators should adapt the contract in case the parties should not be able to reach

a solution [*Ex. C8, p. 17*]. In these communications both parties agreed that from a legal point of view the addition of an express reference to adaptation of the contract was not necessary, but would provide clarity to the Arbitration Agreement. The discussed amendment was not included due to the hospitalisation of Mr Antley and Ms Napravnik. Therefore, in considering the surrounding circumstances of the case per Art. 8(3) CISG, adaptation of the contract was contemplated and agreed upon by both parties. The Tribunal should not accept RESPONDENT's distinction between adaptation of the contract generally and adaptation of the contract with respect to price, which was not contemplated at any stage by either party in pre-contractual negotiations.

3. In the alternative, if the Tribunal applies Danubian Arbitration Law, the Tribunal still has the power to adapt the contract.

38. If the Tribunal finds that Danubian Arbitration Law applies, it should disregard the 'four corners rule' and permit consideration of external evidence. In doing so, the Tribunal will have the power to adapt the contract with respect to price.

39. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDRIOT Principles, with two changes: the interpretation rule in Art. 4.3 is replaced for written contracts by the four corners rule and Art 6.2.3(4)(b) is worded differently granting the power 'adapt the contract' to the court only 'if authorized' [*P.O 2 §45*].

40. There is no consistent case law as to the meaning of 'if authorized'. CLAIMANT submits that if Danubian law is found to cover the Arbitration Agreement, 'authorization' occurs when consent is given by the parties to adapt the contract. This interpretation supports Danubia's narrow approach to interpreting arbitration agreements, reducing the scope of contract adaptation available to parties. Consent is the most significant factor in determining the powers of an arbitrator, giving weight to this interpretation [*Waincymer, p. 52 §2.2.1*]. Party consent was demonstrated in **(1)**, indicating 'authorization' has occurred.

41. The four corners rule should not be found to apply, even where Danubian Law applies to the Arbitration Clause. This is supported by arguments presented [*supra* §**40**].

42. CLAIMANT submits that the 'authorization' requirements of Danubian Arbitration Law are satisfied and the 'four corners rule' should not apply. Danubian Arbitration Law is identical to Mediterranean and Equatorianian Arbitration Law, with exception to these two principles. Accordingly, the Tribunal has power to adapt the contract even if Danubian Arbitration Law is to apply.

Conclusion for Issue A

43. CLAIMANT submits that the Tribunal has jurisdiction and power under the Arbitration Agreement to adapt the contract.

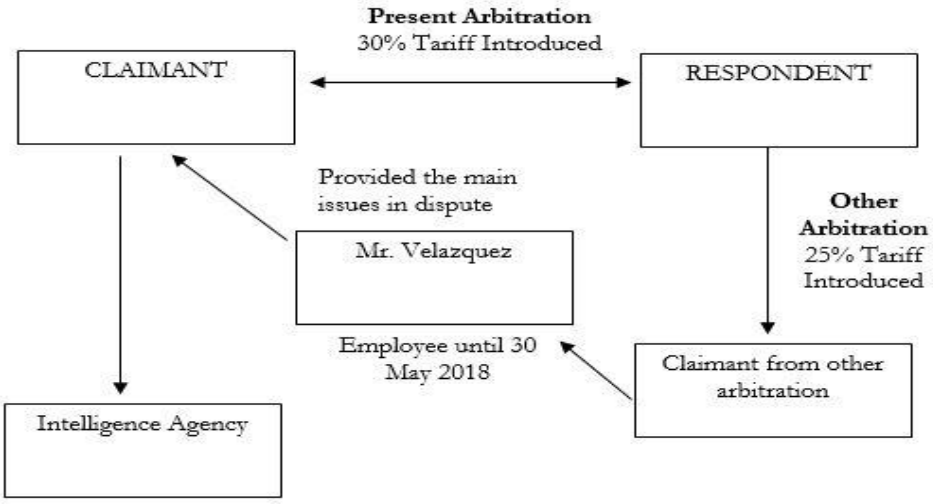
II. ISSUE B: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

44. CLAIMANT is entitled to submit evidence from the other arbitral proceedings. The 'Partial Interim Award' and the testimony of Mr Velazquez is relevant to the case and material to its outcome **(A).** CLAIMANT requests that the Tribunal exercises its broad discretion to accept and admit the evidence submitted by CLAIMANT **(B).** CLAIMANT requests the Tribunal to admit evidence to ensure procedural fairness **(C).** Mr Velazquez is not bound by the confidentiality agreement, which subsequently means that his testimony is admissible **(D).** If the Tribunal finds that the evidence was obtained via an illegal hack of RESPONDENT's computer system, CLAIMANT submits it should still be admitted **(E).**

A. The 'Partial Interim Award' and the testimony of Mr Velazquez is relevant to the case and material to its outcome.

45. The Tribunal may determine the relevance of evidence submitted and whether the evidence submitted is material to its outcome [*Art. 22.3 HKIAC Rules*]. At first instance, CLAIMANT seeks to admit the 'Partial Interim Award' as evidence. The evidence sought to be adduced is an accurate reflection of the issues from the other arbitration. In the instance that the 'Partial Interim Award' is unable to be admitted, CLAIMANT seeks to admit the testimony of Mr Velazquez. The evidence which CLAIMANT seeks to admit is from another arbitration that RESPONDENT was a party to [*P.O 2, p.60 ∫39*]. In that instance, there was an unforeseen tariff of 25% imposed by the President of Mediterraneo. RESPONDENT asked for an adaptation of the price as it was to its own detriment [*P.O 2, p.60 ∫39*]. In the instance that the 'Partial Interim Award' is unable to be admitted, CLAIMANT seeks to admit the testimony of Mr Velazquez. Both the 'Partial Interim Award' and the testimony of Mr Velazquez highlights RESPONDENT's contradictory nature in this present dispute. RESPONDENT only wants a price adaptation when it suits its own needs. The following graphic illustrates the relationship between CLAIMANT, RESPONDENT, Mr Velazquez, claimant from the other arbitration and the intelligence agency.

46.



47. CLAIMANT seeks to admit the specific evidence of the 'Partial Interim Award' and the testimony of Mr Velazquez [*P.O 2, p.60 §41*]. CLAIMANT is empowered to submit this evidence from the other arbitral proceeding pursuant to the rules and principles of the HKIAC [*Art. 22.1 HKIAC Rules*]. CLAIMANT has the onus to present the evidence from the other arbitral proceeding, as CLAIMANT is the party wanting to bring the evidence forward and thus bears the burden to prove the facts necessary to establish its claim [*Art. 22.1 HKIAC Rules*]. CLAIMANT is generally free to submit this evidence in order to prove the facts necessary to establish its case [*Art. 22.1 HKIAC Rules*]. The Tribunal may exercise their discretion to consider all relevant material that CLAIMANT wishes to present in this arbitration [*Art. 22.2-22.3 HKIAC Rules*].

48. Additionally, the IBA Rules should be used to interpret the power of the Tribunal, to admit evidence under the HKIAC Rules. While the Parties have not expressly agreed to the application of the IBA Rules to this arbitration, the Tribunal may take them into account on the basis they represent best practice with regard to the admission of evidence in international commercial arbitrations. The IBA Rules assist in establishing a test for admission which is not strict or exclusionary [*Pilkov (2014) p. 148*]. As opposed to court proceedings, arbitrations prefer to take a broad approach when admitting evidence, which is advantageous [*Pilkov (2014) p. 150; Kalisti Case*]. Pursuant to Art. 3.11 IBA Rules, parties must merely *believe* in the relevance and materiality of the evidence. CLAIMANT submits that they *believe* that the evidence is relevant and material to the case. Therefore, the evidence submitted by CLAIMANT is enabled to be interpreted within the broad scope of the IBA Rules.

49. In the alternative that the 'Partial Interim Award' is not admissible, claimant from the other arbitration can join the dispute via a joinder [*Record, p. 49 §4*]. CLAIMANT submits that the Tribunal should find that a joinder of parties is permissible [*Art. 28.1 HKIAC Rules; Record, p. 49 §4*]. If the Parties agree to consolidate or if a common question of law or fact arises in the arbitration, the Tribunal has the power to deem the arbitrations compatible and consolidate them. This is in line with Art. 4(1) UNCITRAL Rules of Transparency and Art. 17(5) UNCITRAL Rules, which provides the Tribunal with the discretion to allow a third-party to join the proceedings. Tribunals are traditionally reluctant to support consolidation, absent contractual authorisation [*Connecticut General Life Case*]. However, the Tribunal should allow the consolidation because the material facts and arbitration agreement of the other arbitration, address the same questions of law and facts as the current matter using the HKIAC Rules. The only difference between the arbitrations is an express choice of law favouring Mediterraneo Law and a properly worded ICC Hardship Clause, which does not affect the ability of a joinder [*Art. 28.1(a),(c) HKIAC Rules; Record, p. 49 §4; P.O 2, p. 60 §39*].

B. CLAIMANT requests that the Tribunal exercises its broad discretion to accept and admit the evidence submitted by CLAIMANT.

50. Arbitration proceedings that occur in a particular jurisdiction are subject to the applicable arbitration legislation. The Tribunal must comply with these rules, unless the parties have agreed to deviate from these

rules [*Art. 2.1 HKIAC Rules*]. In this instance, the Parties have consented to the use of the HKIAC Rules [*P.O 1, p.52 §2*].

51. The Tribunal 'shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply and adhere to the strict rules' [*Art. 22.2 HKIAC Rules*]. The power of the Tribunal to admit evidence is further consolidated where the Tribunal 'may allow for documents, exhibits and other evidence to be admitted' [*Art. 22.3 HKIAC Rules*]. Ultimately, the Tribunal shall have the broad power to decide whether the evidence should be admitted [*Born (2014) p.2122-2123; Pilkov (2014); Bockstiegel (2010)*]. This power of the Tribunal is further elucidated by Art. 19 UNCITRAL Rules, which states that the Tribunal has the power to determine 'the admissibility, relevance, materiality and weight of any evidence' [*Art. 19 UNCITRAL Rules*].

52. In the alternative, even if these provisions do not confer a broad discretion, the Tribunal is not bound by strict rules of evidence and may still accept the evidence [*IBA Rules (2010)*]. The Tribunal can consider any evidence that it thinks is relevant to the matter before the parties [*IBA Rules (2010)*]. The International Bar Association provides that there needs to be 'efficient, economical and a fair process for the taking of evidence in international arbitration' [*IBA Rules (2010); IBA Working Party*]. The IBA Rules are based on the UNCITRAL Rules which provide mechanisms for 'the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings' [*Born (2014); Art 22.3 HKIAC Rules*]. The IBA Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures such as the HKIAC Rules, which were agreed upon by the parties [*IBA Working Party*]. As such, even if the Tribunal finds that the evidence produced by CLAIMANT was not within the parameters set out in Art. 22 HKIAC Rules, the Tribunal may nonetheless admit this evidence if it believes that it is relevant to ensure an 'efficient, economical and a fair process for the taking of evidence' [*Art. 2(1) IBA Rules*]. CLAIMANT submits that the IBA Rules should only be used in an instance where the specific HKIAC Rules are rendered inapplicable by the Tribunal.

53. If the evidence is determined to be admissible by the Tribunal, it is within the scope of the Tribunal's power to assess how much weight to attribute to CLAIMANT's proposed evidence [*Art. 22.2 HKIAC Rules*]. The weight that the Tribunal gives to evidence is relevant to the standard of proof [*Art. 22.2 HKIAC Rules*].

C. CLAIMANT requests the Tribunal to admit evidence to ensure procedural fairness.

54. CLAIMANT submits that the Tribunal should admit the evidence provided as it ensures procedural fairness in the present matter. CLAIMANT should be allowed to present the evidence, as the refusal to admit the evidence would materially impact the outcome [*Art. 22.3 HKIAC Rules; Apex Tech Investment Case*]

55. Admission of the evidence will not unfairly prejudice RESPONDENT. The Tribunal may call Mr Velazquez as a witness in an oral hearing upon the request of RESPONDENT. Therefore, both Parties at any point of

the arbitration may exercise their right to examine the witness and challenge his evidence [*Art. 22.4 HKIAC Rules*]. The Tribunal 'shall decide whether to hold a hearing for presenting this evidence or for oral arguments, or whether the arbitration shall be conducted solely on the basis of the documents and other materials' [*Art. 22.4 HKIAC Rules*]. This ensures that the evidence provided is fairly admitted and does not unfairly prejudice either party to the dispute, ensuring equal treatment of parties. Equal treatment of parties is a founding principle in arbitration which is enshrined across different arbitration rules [*Art. 13.1 HKIAC Rules; Art. 18 UNCITRAL Rules; Art. 19.1 SIAC 2016 Rules; Art. 14.4 LCIA*].

56. If the Tribunal decides to deny the admission of CLAIMANT's evidence, the subsequent award may be denied recognition on grounds of procedural unfairness, or denial of an opportunity to present a party's case under Art. V(1)(b) New York Convention [*Born (2014) p. 3494*].

D. Mr Velazquez is not bound by the confidentiality agreement which subsequently means that his testimony is admissible.

57. CLAIMANT submits that Mr Velazquez is not subject to the restrictive confidentiality clause within Art. 45 HKIAC Rules. This precludes parties from 'publishing, disclosing or communicating any information relating to the arbitration under the arbitration agreement, or any decision relating to an award or Emergency Decision made in the arbitration' [*Art. 45.1 (a)- (b) HKIAC Rules*].

58. The confidentiality clause in Art. 45.2 HKIAC Rules is intended to affect specific people and sources of evidence. The confidentiality clause applies to the 'arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC' [*Art. 45.2 HKIAC Rules*]. Mr Velazquez is not restricted by the confidentiality clause as he cannot be considered a party to the other arbitration. Evidence of this is Mr Velazquez working for the buyer in the other arbitration but without direct involvement in the other arbitration itself [*P.O 2, p. 60 §40*]. However, he knew the main issues in dispute [*P.O 2, p. 60 §40*]. In considering these factors, Mr Velazquez's is not a party to the matter and will not fall within the ambit of Art. 45.2 HKIAC Rules.

59. Mr Velazquez is not a party to the other arbitral proceeding and thus the evidence obtained from him may be brought before the Tribunal as a 'witness or expert' to the present arbitration [*Art. 22.5 HKIAC Rules*]. CLAIMANT submits the Tribunal may determine the manner in which Mr Velazquez may be examined as a witness or expert [*Art. 22.5 HKIAC Rules*].

60. CLAIMANT submits that there is no general duty of confidentiality in a private arbitration. The High Court of Australia found that there is no duty of confidentiality found regardless of an arbitrations private character [*Esso/BHP Case*]. Although Mr Velazquez has material knowledge of the other private arbitration, the information that he acquired is not clothed with confidentiality, merely because of the privacy of the hearing.

E. If the Tribunal finds that the evidence was obtained via an illegal hack of RESPONDENT's computer system, CLAIMANT submits it should still be admitted.

61. RESPONDENT alleges that information regarding the other arbitration could have been obtained through an illegal hack of RESPONDENT's computer system [*Record, p. 50 §4*]. CLAIMANT submits that even if the evidence is obtained through an illegal hack, it is still admissible. Equatoriana, Mediterraneo and Danubia Arbitration Law do not have any specific rules on evidence, in particular how to deal with evidence obtained by illicit means [*P.O 2, p. 61 §46*].

62. CLAIMANT paid a third party for the evidence, which should not preclude the evidence from being admitted [*P.O 2, p. 61 §41*]. CLAIMANT should not be held responsible for the actions of a third party to the extent of being disadvantaged in this arbitration. The third party is a separate entity which acted independently and without any direction from CLAIMANT. Furthermore, RESPONDENT claims that the third party may have obtained the information via an ex-employee or through a security gap in RESPONDENT's computer system [*P.O 2, p. 61 §41*]. These are both bare assertions which are unsubstantiated by the facts and are materially incorrect.

63. CLAIMANT submits that the procedure of obtaining this evidence is irrelevant, as even if it was obtained via a hack it is still admissible. The finding in *Caratube* is an example of reasoning that may assist the Tribunal. The court in this case found that a Tribunal can admit evidence that was illegally obtained via a hack. In this case, claimant was allowed to admit evidence as the evidence lost its private and confidential nature. The evidence in the present matter is no longer private and confidential for two reasons. First, the third-party company provides intelligence on the horse racing industry and may have sold the evidence to other interested parties, not just the CLAIMANT [*P.O 2, p. 61 §41*]. Second, the security gap in RESPONDENT's computer system is "easily exploited by hackers" which could mean that this may not have been the first instance that a hack has occurred [*P.O 2, p. 61 §42*]. Once the information was accessible in a public domain, this information is public knowledge and therefore can no longer be considered private or confidential [*Caratube Case; Ansell Rubber Case*]. Additionally, the procedure by which the evidence was obtained does not taint its probative value. As the evidence is material to the case, CLAIMANT submits that it should be admitted.

Conclusion for Issue B

64. CLAIMANT submits it is entitled to admit the evidence from the other arbitration, irrespective of whether the evidence was obtained via a breach of confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

III. ISSUE C: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 AS RESULT OF ADAPTATION OF THE PRICE

65. CLAIMANT submits that it is entitled to the payment of US$ 1,250,000, as a result of the adaptation of the price. RESPONDENT erroneously argues that CLAIMANT is not entitled to seek adaptation of the price by relying on the Hardship Clause of the Contract [*Ex. C5, p. 14*]. RESPONDENT claims that the Hardship Clause should not extend to the imposition of the tariff due to it being "narrowly worded" [*RNoA, p. 32 §19*]. RESPONDENT further argues that the Hardship Clause does not provide for any adaptation, nor did the RESPONDENT agree to adaptation following CLAIMANT's request [*RNoA, p. 30 §10*]. CLAIMANT respectfully requests the Tribunal to find that the agreement between Parties allows for adaptation of the price because RESPONDENT agreed to this adaptation **(A)**. Alternatively, CLAIMANT submits that Art. 79 CISG can be relied upon for the adaptation **(B)**.

A. CLAIMANT is entitled to adaptation of price under the Contract's Hardship Clause.

66. The Parties agreed in Clause 14 that the Contract is to be governed by the law of Mediterraneo, which includes the CISG [*Ex. C5, p. 14*]. The contract law of Mediterraneo is a verbatim adoption of UNDIROIT Principles. [*P.O 1, p. 52 §4*].

67. CLAIMANT submits that the circumstances permit reliance on Clause 12 of the Contract, which is the Hardship Clause [*Ex. C5, p. 14 §12*]. First, the Parties agreed under the Contract to not burden CLAIMANT with all risks associated with DDP-delivery, specifically the risks that have arisen in these circumstances **(1)**. The Hardship Clause may be invoked because the three requirements under the clause are satisfied **(2)** thus allowing for adaptation of the contract **(3)**.

1. Under the Contract, the Parties agreed to not burden CLAIMANT with all risks associated with DDP-delivery.

68. CLAIMANT and RESPONDENT entered into the Agreement for the sale of frozen semen from the Stallion Nijinsky III on 6th May 2017 [*Ex. C5, p. 13*]. Within this Agreement is a Hardship Clause, which states "Seller shall not be responsible… for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C5, p. 13 §12*].

69. There is no obligation on CLAIMANT to be burdened with the risks arising from DDP-Delivery. In pre-contractual negotiations CLAIMANT explicitly stated they did not want to be burdened with risks "associated with changes in customs regulations or import restrictions" [*Ex. C4, p. 12 §4*]. Pursuant to Art. 8 CISG, the Contract must be read to incorporate this understanding between the Parties **(i)**. CLAIMANT submits that Clause 12 should be read to prohibit placing an onerous burden on CLAIMANT **(ii)**. In this instance party autonomy does not preclude application of the Hardship Clause **(iii)**. Alternatively, the clause should be interpreted *contra proferentem* **(iv)**.

i. It was the intent of the Parties that the Hardship Clause should apply to subsequent changes in import restrictions.

70. CLAIMANT submits that when the intent of the Parties is interpreted per the tests in Arts. 8(1)-(2) CISG, the Hardship Clause should be read to include subsequent changes in customs regulations. Art. 8(1) CISG is a subjective test which provides that 'statements made by [parties] and other conduct are to be interpreted according to the intent where the other party knew or could not have been unaware what that intent was' [*Honnold/Flechtner, §105*]. In the absence of such intent, the understanding of a reasonable third person of the same kind, when placed in the same circumstances, is determined under the objective test provided in Art. 8(2) CISG [*ICC Case No. 7331 (1994); Schlechtriem/Schwenzer I, Art. 8 §20*]. Application of either of these tests should lead the Tribunal to the conclusion that the Hardship Clause applies to increase the contract price.

71. CLAIMANT submits that the Parties' understanding was to allow for the Hardship Clause to protect CLAIMANT against all the burdens of the risks associated with DDP-delivery, and any subsequent changes in customs regulations or import restrictions.

ii. Interpretation of the Contract, with regard to the conduct of the Parties, indicates their intention for the Hardship Clause to encompass subsequent changes in import restrictions.

72. CLAIMANT submits that interpretation of the Contract, with regard to the conduct of the Parties, indicates their intention for the Hardship Clause to encompass subsequent changes in import restrictions.

73. The subjective test of Art. 8(1) CISG should be applied in favour of CLAIMANT. The test determines whether RESPONDENT "could not have been unaware" of CLAIMANT's intention. This is known as imputable awareness [*Schlechtriem/Schwenzer, Art. 8 §17; Art. 8(1) CISG; cf. Lookofsky, pp. 42-43*]. Moreover, where both parties have expressed an indication of their intention to the other, they are deemed to have reached a 'meeting of minds' [*Schlechtriem/Schwenzer, Art. 8 §11; Franklins v. Metcash*]. During the initial drafting of the Contract, CLAIMANT expressly indicated to RESPONDENT the necessity for a hardship clause which covers subsequent changes to customs regulations or import restrictions [*Ex. C4, p. 12 §4*]. RESPONDENT indicated their willingness to negotiate over such a clause [*Ex. C8, p. 17 §4*]. This interaction should be interpreted as CLAIMANT and RESPONDENT having reached a 'meeting of minds', with both parties aware of the necessity for inclusion of import tariffs in a hardship clause.

74. The application of the reasonable third person test as per Art. 8(2) CISG is in favour of CLAIMANT. In the circumstances, the 'reasonable person' is a reasonable business person, who would prioritise commerciality. It does not make commercial sense for a seller to enter into a contract which would not protect them from a risk they were not willing to take. CLAIMANT is a party that was insistent on safeguarding its interests during the negotiation, and unwilling to place any more pressure on its already precarious financial position [*Ex. C2, p. 10*]. Taking into consideration these pre-negotiations, and commercial sensibility of CLAIMANT,

it should not be interpreted that CLAIMANT would be willing to enter such a commercially perilous obligation, without protection from the risk.

75. The Contract ought to be interpreted as a whole [*Schlechtriem/Schwenzer I, Art. 8 §§29-30*]. The purpose of the Parties' Contract is to ensure the delivery of horse semen by CLAIMANT to RESPONDENT. This Contract is intended to serve the commercial purposes of both Parties and protect their commercial interests. Per the Contract, CLAIMANT aims to sell the frozen semen for payments, while RESPONDENT aims to use the frozen semen for breeding of racehorses for its stable [*Ex. C1, p. 9; Ex. C2, p. 10*]. Additionally, both Parties in their pre-contractual negotiations have indicated an interest in building a "long-term relationship" with mutual benefits [*Ex. C3, p. 11 §1*].

76. The specific terms of the Hardship Clause should be read using the principle of *ejusdem generis*. The principle stipulates that the phrase be read down with reference to the genus of events listed before it [*Baetens, pp. 133-134, Desert Line Projects LLC*]. Import tariffs and "additional health and safety requirements" are both financial burdens imposed on a seller by government [*Ex. C5, p. 14 §12*]. Per *ejusdem generis* import tariffs and "additional health and safety requirements" should both be construed as falling under the same genus of "comparable unforeseen events" [*Ex. C5, p. 14 §12*]. Therefore, the Hardship Clause should be read to extend to the burden of import tariffs.

77. The subsequent conduct of the Parties must be considered when ascertaining the original intent of the Parties [*Art. 8(3) CISG*]. When sending the third shipment, CLAIMANT relied on the belief that the Hardship Clause would negate the burden of risks associated with the imposition of the tariff. This conduct, subsequent to conclusion of the Contract, indicates a belief that the Hardship Clause would allow for the renegotiation of the payments [*Ex. C7, p. 16; Ex. C8, p. 18*]. Further, CLAIMANT indicated the need for renegotiation of prices, and were also unwilling to bear any burdens of the imposed tariffs [*Ex. C7, p. 16; Ex. C8, p. 18*].

iii. Party autonomy does not preclude the application of the Hardship Clause in the circumstances.

78. Party autonomy does not preclude the application of the Hardship Clause in the circumstances. The principle allows parties to a contract to have the ability to shape it [*Art. 1.1 UNIDROIT Principles; Schulze, pp. 6-7; TransLex-Principles, No. IV.1.1*]. This is not limited to when parties decide to enter into contract, but is also applicable when parties negotiate to shape its content [*Coester-Waltjen, pp. 41-42; Printing v. Sampson*]. The terms of a contract may be express or implied [*Art. 8 CISG*]. The interpretation of a contract to include implied terms is not inconsistent with the principle of party autonomy [*Coester-Waltjen, pp. 41-42*]. An implied term will exist in a contract when there has been a 'meeting of minds' [*Art. 8(3) CISG*].

79. Consideration of the extraneous circumstances regarding the formation and shaping of the contract will indicate whether a 'meeting of minds' occurred. The car accident which involved Mr Antley and Ms

Napravnik led to creation of a contract that failed to expressly include several issues which were being discussed [*Ex. C8, p. 17*]. One of the issues which had been agreed between the Parties was the inclusion of a hardship clause which incorporated changes in customs duties [supra §**79**]. In considering these extraneous circumstances, the Tribunal should find that party autonomy does not preclude the application of the Hardship Clause.

iv. Alternatively, the Hardship Clause should be interpreted contra proferentem.

80. If intent of parties is not discernible, *contra proferentem* should be used to interpret the Hardship Clause. *Contra proferentem* is founded on the basic principle that the party which has drafted the term must bear the risk of its possible ambiguity [*Schlechtriem/Schwenzer I, Art. 8 §49; Honnold/Flechtner, §107.]*. This applies under the CISG and is further confirmed by the UNIDROIT Principles [*Art. 4.6 UNIDROIT Principles*]. CLAIMANT originally proposed the inclusion of an ICC-hardship clause [*Ex. R3, p. 35*]. RESPONDENT suggested, as stated in Mr Antley's note, that this clause would be "too broad and not fit the purpose of the Contract" [*Ex. R3, p. 35*]. The note was of importance for drafting of the Contract after the accident [*Ex. R3, p. 35*]. In considering this fact, the Tribunal should find that RESPONDENT drafted the clause, or supplied formulation for the term, and must bear the risk of its possible ambiguity [*Art. 4.6 UNIDROIT Principles*]. The Hardship Clause should be read to include customs regulations and import restrictions.

2. The requirements to satisfy the Hardship Clause are met.

81. The Hardship Clause in Clause 12 states that the "seller shall not be responsible… for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". There are three requirements to be met in this term to satisfy the Hardship Clause. First, the hardship must be *comparable to additional health and safety requirement*. Second, it must be *unforeseen*. Third, it must make performance of the contract *more onerous*. The three requirements are met.

82. First, the event must be comparable to "additional health and safety requirements". In applying the principle of *edjusdem generis* [*supra* §**76**], customs regulations are in the same genus of events as additional health and safety requirements. Customs regulations are also a governmental standard imposed by authorities which create extra obligations for CLAIMANT. Therefore, customs regulations are comparable to "additional health and safety requirements".

83. The event was unforeseeable. An unforeseeable event is an event which "could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract" [*Art. 6.2.2 UNIDROIT Principles, Schmitthoff §83]*. The imposition of these tariffs was not within the contemplation of the Parties, as it was unprecedented in the history of Equatoriana [*Ex. C6, p. 15*]. The tariffs were introduced 27 days before the final shipment, and CLAIMANT only became aware that the tariff applied to horse semen one day before the agreed shipment date [*P.O 2, p. 58 §26*]. It could not have been reasonably foreseen by

CLAIMANT that a regulation of this nature, which has never occurred before in Mediterraneo's history, would be introduced by RESPONDENT's government at the time of the conclusion of Contract [*P.O 2, p. 58 §23*].

84. The hardship is only required to be "beyond the control of the disadvantaged party", which is the case of "acts of rulers and governments" [*McKendrick p. 721 §14*]. The introduction of these import regulations satisfies this standard as it was imposed the Government of Equatoriana [*Ex. C6, p. 15*]. The actions of RESPONDENT's Government is beyond CLAIMANT's control [*Ex. C6, p. 15*]. On this basis CLAIMANT submits they could not exert any amount of control on negating the circumstance.

85. Third, the hardship must make performance of the Contract "more onerous". The words are similar to the established term of 'excessively onerous'. These terms will be held to the same threshold, unless an inclusion of a hardship clause is seen as an indication that a somewhat more liberal standard should apply [*Brunner, §514*]. "More onerous" is distinguished from standard hardship clauses which require an 'excessively onerous' burden. Clause 12 should therefore be read to have a less stringent test and be read liberally. Therefore, as the introduction of the importation restrictions does cause the performance of the contract to become financially onerous, this requirement is satisfied [*Ex. C8, p. 17*].

3. Adaptation of the price in the Hardship Clause was agreed to by the Respondent.

86. CLAIMANT is entitled to seek adaptation of price by relying on the Hardship Clause. Failure to provide a remedy in the Hardship Clause does not preclude adaptation of the Contract **(i)**. Further, through analysis of pre-contractual and subsequent conduct, CLAIMANT submits that both Parties have agreed for adaptation of the Contract **(ii)**.

i. Failure to provide a remedy in the Hardship Clause does not preclude adaptation of the Contract.

87. Failure to provide a remedy in the Hardship Clause does not preclude adaptation of the Contract [*Schlechtriem §235-36*]. There is no evidence that RESPONDENT intended to prevent adaptation of the Contract. Where there is no explicit exclusion of a remedy under a hardship clause, it is assumed a remedy is available [*Schlechtriem §235-36; Brunner; Art. 79 CISG §27*]. In this instance, CLAIMANT submits that the remedy available is price adaptation.

88. The Parties originally intended to permit "an adaptation of the Contract for the unlikely event that Parties could not agree on an amendment" [*Ex. C8, p. 17 §14*]. The clause cannot be given effect if a remedy or consequence from a finding of hardship is not provided [*Schmitthoff, p. 85*]. Non-existence of a remedy in the Hardship Clause should be considered a mere error in the drafting of the contract, due to the creators of the Hardship Clause failing to consider the original draftees' intention to permit adaptation of the Contract [*Ex.*

R3, p. 35 §2]. CLAIMANT submits that there was an error in drafting of the original contract, and this allows for a price renegotiation.

ii. Conduct of Parties indicates agreement for renegotiation of prices.

89. CLAIMANT submits that the subsequent conduct of the Parties evidences an agreement to renegotiate the price [*Art. 8(3) CISG*]. To rectify the Hardship Clause's failure to include a remedy, any express or implied agreement between the parties should be relied upon [*Art. 8(3) CISG*]. Previous dealings that could amount to established practices may also be relied upon [*Art. 8(3) CISG*].

90. As there is an absence of 'agreement or established usage or practice' [*Art. 9(1) CISG*], it is necessary to examine whether there is 'a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned' [*Art. 9(2) CISG*]. Unless otherwise agreed, the parties are considered to have impliedly made a usage applicable to the Contract [*Art. 9(2) CISG*]. As there is an absence in applicable trade usage, the gap in the CISG can be remedied by drawing from general principles from CISG [*Art. 8 CISG; Silveria §338*]. These general principles include accounting for subsequent conduct of the Parties [*Art. 8(3) CISG*].

91. RESPONDENT's subsequent conduct to the conclusion of the Contract should be interpreted as acceptance to renegotiate the price. As the person responsible for answering "questions concerning the Frozen Semen Sales Agreement", assertions made by Mr Shoemaker are representative of RESPONDENT's position [*Ex. R4, p. 36*]. RESPONDENT's Mr Shoemaker indicated to CLAIMANT that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*Ex. R4, p. 36 §4*]. This assertion, coupled with RESPONDENT receiving the goods without rejecting CLAIMANT's request for renegotiation, is an implied acceptance for renegotiation [*Ex. R4, p.36*]. In considering these factors, RESPONDENT's conduct subsequent to formation of the Contract implied the existence of a renegotiation clause, and acceptance of this clause [*Schlechtriem/Schwenzer I, Art. 8 §54*].

B. CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under the CISG.

92. CLAIMANT submits that the CISG can be relied on to seek an adaption of the price of the Contract. Art. 79(1) CISG states that: 'A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'

93. The inclusion of the Hardship Clause does not exclude the operation of Art. 79 CISG by derogation according to Art. 6 CISG **(1).** Art. 79 CISG adequately regulates hardship **(2)** and its operation provides for

the remedy requested, namely an increase of the contract price **(3).**

1. CLAIMANT can rely on the CISG to adapt the Contract. The inclusion of the Hardship Clause does not derogate from Art. 79 CISG.

94. The scope of the Hardship Clause covers a broad set of circumstances, including the imposition of tariffs, equivalent to Art. 79 CISG **(i)**. The Hardship Clause should be considered in tandem with Art. 79 CISG **(ii)**.

i. The scope of the Hardship Clause covers a broad set of circumstances, including the imposition of tariffs, equivalent to Art. 79 CISG.

95. The Hardship Clause is consistent with Art. 79 CISG as it does not only apply to a set of circumstances narrower than what is provided under Art. 79 CISG.

96. The CISG does not explicitly state how contracting parties may derogate from its provisions. However, it is generally accepted that the contractual terms agreed to by parties in a sales agreement will be given precedence over the provisions of the Convention, in the event that there is a discrepancy [*Winship, p. 525-554*]. This is consistent with the principle of party autonomy stated in Art. 8(1) CISG.

97. The Hardship Clause of the Frozen Semen Sales Agreement [*Ex. C5, p. 14 §12*] does not present a discrepancy with Art. 79 CISG as to constitute a departure from the CISG. RESPONDENT claims that the Contract provides for a "special regulation of the problem of changed circumstances" as the basis of the alleged derogation [*RNoA, p. 32 §20*]. However, the Hardship Clause should not be construed to limit the scope of hardship to only "additional health and safety requirements" [*Ex. C5, p. 14*]. Such an interpretation would neglect the qualifying phrase "or comparable unforeseen events making the contract more onerous".

98. To determine what "comparable unforeseen events" encapsulates, the *ejusdem generis* principle may be employed to ascertain the scope of an open hardship clause that contains an unexhaustive list [*McNamara, p. 604 §2*]. This principle stipulates that the phrase be read down with reference to the genus of events listed before it and has been employed in international commercial arbitration [*Helnan Hotels Case; Wintershall Aktiengesellschaft v Argentine Republic*].

99. The Hardship Clause's reference to "additional health and safety requirements" bears the characteristics of a government-imposed policy that compromises the commerciality of an international transaction. The imposition of a 30% tariff by the Equatorianian Government is an unforeseen event which has largely the same consequences [*Ex. 6, p. 15 §1*]. It is evident that CLAIMANT intended the Hardship Clause to cover such circumstances pursuant to Art. 8 CISG. In her correspondence with Mr Antley, Ms Napravnik expressed an intention to limit CLAIMANT's liability in relation to "customs regulation or import restrictions" [*Ex. C4, p. 12 §4*]. On this basis, the scope of the Hardship Clause covers the imposition of a tariff.

ii. The Hardship Clause should be considered in tandem with Art. 79 CISG.

100. The term "comparable unforeseen event" may be likened to Art. 79(1) CISG that limits the liability of a party to an 'impediment beyond his control' that could not be 'reasonably expected' to have been taken into account 'at the time of the conclusion of the contract'.

101. Ultimately, both the Hardship Clause and Art. 79 CISG have the same effect. Both protect CLAIMANT from liability due to non-fulfilment of the contract, caused by an impediment outside of its sphere of influence [*Iron molybdenum Case*].

102. UNCITRAL has expressly addressed the concern of cohesion between a contractual hardship clause and Art. 79 CISG. It has been provided that "Article 79 is not excepted from the rule in [A]rticle 6 empowering the parties to 'derogate from or vary the effect or provisions of' the Convention". On the contrary, arbitral decisions have construed Art. 79 CISG in tandem with hardship clauses [*UNCITRAL Digest 2016, p. 379 ∫23*].

103. The Hamburg Appellate Court found a seller to not be exempt from liability, neither upon reliance on the relevant hardship clause, nor Art. 79 CISG. The arbitrators stated that the former clause did 'not lead to an exemption from liability that would have a greater effect than Art. 79 of the CISG'. The relevant implication is that Art. 79 CISG is not pre-empted by the inclusion of a contractual hardship clause [*Iron molybdenum Case*].

104. Practically, this allows CLAIMANT to rely on Art. 79 CISG in the event that the Tribunal makes a finding that they are not entitled to the US$ 1,250,000 under Clause 12 of the Contract. If a party's performance or non-performance of a contract is not exempt pursuant to an event defined in a hardship clause, the possibility remains that the party can seek exemption under Art. 79 CISG (or vice versa) [*Bund, p. 15 ∫54*]. Art. 79 CISG should be considered a gap-filling rule so long as the contract does not provide an otherwise inconsistent provision [*Lookofsky p. 1-192*].

105. Given the nature of the rule and its cohesive co-existence with the Hardship Clause, it is incorrect of RESPONDENT to assert that CLAIMANT cannot rely upon Art. 79 CISG for the adaptation of the contract price.

2. CLAIMANT's hardship constitutes an 'impediment' and thus CLAIMANT can rely on Art. 79 CISG for adaptation of the Contract.

106. 'Impediment' per Art. 79 CISG should be interpreted to include hardship **(i)**. The hardship borne by CLAIMANT constitutes an impediment **(ii)**. Thus, CLAIMANT can rely upon Art. 79 CISG for adaptation of the Contract **(iii)**.

i. 'Impediment' per Art. 79 CISG should be interpreted to include hardship.

107. An 'impediment' under Art. 79 CISG is a type of hardship that CLAIMANT has borne. Accordingly, Art. 79 CISG can be invoked in the circumstances. The requirements to permit the operation of Art. 79 CISG, according to its wording, can be divided into three factors: (1) the failure to perform is due to an impediment beyond the party's control; (2) it could not reasonably be expected to have been taken into account at the time of the conclusion of the contract; and (3) it could not reasonably be expected to have been avoided or overcome [*Schwenzer, p. 714 §1*]. Art. 79 CISG makes no reference to the impossibility to perform the contract as a pre-requisite to invoke its operation as to only regulate *force majeure* and not hardship [*Schwenzer, p. 714 §1*].

108. The definition of 'hardship' according to Art. 6.2.2 UNIDROIT Principles refers to 'the occurrence of events [that] fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished'. The relevant provision proceeds to list the aforementioned factors pertaining to Art. 79 CISG. The specific method of drafting provides a basis of employing the UNIDROIT Principles as a gap-filler for the purposes of ascertaining the scope of Art. 79 CISG.

109. This approach of Art. 79 CISG has been adopted by Tribunals. The Belgian Supreme Court considered the impairment of the contractual equilibrium as sufficient to constitute an impediment [*Scafom International Case*]. CLAIMANT's circumstances are comparable to the decision. The newly imposed 30% tariff destroyed the commercial basis of the transaction and therefore was not reasonably foreseeable [*Ex. C7, p. 16 §2*].

110. While the CISG does not define 'impediment', the CISG Advisory Council has stated that a 'change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ('hardship'), may qualify as an 'impediment' under Article 79(1)' [*CISG A-C Opinion No. 7 §3.1*]. CLAIMANT bore the additional costs despite two years of financial difficulty [*Ex. 8, p. 17 §7*], exacerbating the company's already dire circumstances. It follows that 'hardship' falls within the scope of 'impediment' so that CLAIMANT may rely on Art. 79 CISG for the purposes of seeking an adaptation of price.

ii. CLAIMANT meets the requirements of 'impediment' according to Art. 79 CISG, and therefore 'hardship'.

111. In order to invoke Art. 79 CISG, CLAIMANT must satisfy three factors: the impediment was beyond CLAIMANT's control **(a)**; the impediment could not reasonably have been accounted for before the conclusion of the Contract **(b)**; and the impediment could not reasonably have been expected to be avoided or overcome **(c)**.

a. The impediment CLAIMANT encountered was beyond their control.

112. The imposition of the 30% tariff was independent of CLAIMANT's conduct. Tribunals in the past have recognised the actions of state officials as sufficiently constituting impediments to performance that invoke the operation of Art. 79 CISG. The Tribunal of the International Commercial Arbitration ruled that the refusal of state officials to permit the importation of goods into a buyer's country excused a party's performance of the sales contract, as provided for by the CISG [*Russian Butter Case*]. CLAIMANT submits that the actions of the Government of Equatoriana should lead to a similar outcome in this instance.

b. The impediment in question could not reasonably have been taken into account before the conclusion of the Contract.

113. The Government of Equatoriana maintained a continuing system of free trade prior to the imposition of the new tariff. The policy implemented by the Government was not predictable even amongst those closely informed [*Ex. 6, p. 15 §2*]. It would therefore be unreasonable to expect the Parties to predict the import tariff.

114. The Bulgarian Chamber of Commerce and Industry found that the prohibition on the export of coal implemented by a seller's government was an impediment beyond the control of the seller and thus Art. 79 CISG would operate to relieve them of their contractual responsibility. However, as the new rules were implemented prior to the conclusion of the contract, the seller was not entitled to the relief [*Steel Ropes Case*]. In contrast, the Frozen Semen Sales Agreement was concluded approximately seven months prior to the imposition of the new tariffs being announced and can be distinguished from the aforementioned case on the facts [*Ex. C5*, *p. 12*].

115. The hardship borne by CLAIMANT is also distinguishable from the *Iron molybdenum Case*. The Tribunal ruled that while the triplication of the market price for Chinese iron-molybdenum was excessive, it did not constitute hardship according to Art. 79 CISG. The justification behind the decision was that the relevant field of business was highly speculative and this was reflected in the contract. Therefore, a degree of foreseeability as to prevent reliance on Art. 79 CISG exists. However, the actions of the Government of Equatoriana could not have been speculated by the parties prior to the conclusion of the contract. The factors that caused the price increase in the current circumstances were in no way tied to the business CLAIMANT is engaged in.

c. The impediment could not reasonably be expected to have been avoided or overcome.

116. Although CLAIMANT bore the additional costs by completing the final shipment of semen to RESPONDENT, 'avoided or overcome' according to Art. 79 CISG must be construed in relation to the hardship caused by bearing said costs. CLAIMANT could not have reasonably avoided or overcome the hardship of assuming the additional costs caused by the tariffs.

117. Art. 6.2.2 UNIDROIT Principles defines 'hardship' to account for the alteration of the equilibrium of the contract 'because the cost of a party's performance has increased or because the value of the performance a party receives has diminished'. In the previous two years, CLAIMANT has experienced substantial financial difficulty [*Ex. C8, p. 17*]. This has required "extensive restructuring measures and a considerable cut of the work force" [*Ex. C8, p. 17 §7*]. In conjunction with attempting to meet RESPONDENT's urgent need for the doses of semen [*Ex. R4, p. 36 §3*], the hardship of the diminished commerciality of the transaction could not reasonably have been avoided.

118. Furthermore, no commercially reasonable substitute was available to CLAIMANT. The doses of semen were required by RESPONDENT in time for the breeding season. Any compromises made regarding the delivery of the transaction would have a detrimental effect on RESPONDENT's racehorse breeding programme. Overcoming the impediment requires the parties to 'take the necessary steps to preclude the consequences of the impediment' [*Macromex Srl. v. Globex International Inc.*]. However, as established, the consequences of hardship caused by the altered equilibrium of the contract could not have been avoided. The imposition of the tariffs was beyond the Parties' sphere of control. CLAIMANT meets the requirements of Art. 79 CISG for the circumstances to constitute an 'impediment', and therefore hardship.

iii. The operation of Art. 79 provides for an increase of the Contract price as requested by CLAIMANT.

119. Art. 79 CISG does not specifically provide explicit consequences or remedies if impediment/ hardship is found. However, if the requirements of the provision are satisfied, a Tribunal 'may provide further relief consistent with the CISG and the general principles on which it is based' [*CISG-AC Opinion No. 7, §3.2*]. This principle is consistent with Art.7(2) CISG which permits issues not addressed in the CISG to be considered in light of the rules of private international law.

120. The rules applicable, maintaining conformity with Art. 7(2) include the *rebuc sic stantibus* principle **(a)** and the obligation of good faith **(b)**. Alternatively, the Tribunal has the power to adapt the Contract pursuant to the UNIDROIT Principles **(c)**.

a. An increase in the Contract price is available under the *rebuc sic stantibus* principle.

121. The *rebuc sic stantibus* provides that a contract will no longer be applicable if there is a fundamental change in circumstances [*Zeitschrift, §36*]. The *rebuc sic stantibus* principle is imminent in the provisions of the CISG including Art. 79. According to this principle, the substantial change in circumstances imposed by the new tariff must be accounted for in executing the contract. While not expressly mentioned, Art. 79 CISG in essence provides an exception to the binding nature of a contract in the event certain requirements are fulfilled [*Zeitschrift, §36*]. Accordingly, measures that may be ordered by the Tribunal include the adaptation of the Contract in the event that such substantial change in circumstances occur [*Scafom International Case*].

CLAIMANT submits that adaptation of the Contract is an appropriate measure to be taken by the Tribunal in this instance.

b. An increase in the Contract price is available under the duty of good faith.

122. The duty to renegotiate 'may be derived from the principle of good faith, which is the underlying basis of the hardship exception' [*Brunner, p. 480, §2*]. CLAIMANT fulfils the requirements of hardship, and subsequently Art. 79 CISG as to entail cooperation between the parties to renegotiate in light of the changed circumstances. Art. 7(1) CISG requires, in the interpretation of the Convention, to maintain the 'observance of good faith in international trade'.

123. In the *Scafom International Case*, the decision of the Belgian Supreme Court to grant the seller's request of renegotiating the contract price was made within the framework of the CISG, specifically with reference to Art. 7(1) CISG [*Veneziano, p. 13 §6*]. Accordingly, while explicit wording is absent if Art. 79 CISG is considered in isolation, the overarching principles of the CISG allow the remedy sought by CLAIMANT to be deliberated.

c. The Tribunal has the power to adapt the Contract under the UNIDROIT Principles.

124. The UNIDROIT Principles may operate as a gap-filler [*UNCITRAL Digest 2016, p. 379 §23*]. Given the absence of explicit wording in the CISG, Art. 6.2.3(4)(b) UNIDROIT Principles provides that '[i]f the court finds hardship it may, if reasonable…adapt the contract with a view to restoring its equilibrium'. The equilibrium of the transaction with RESPONDENT has been calculated at 5% [*P.O 2, p. 59, §31*]. In order to maintain this margin, CLAIMANT's request for US$ 1,250,000 must be enforced. Such a request is available on the basis of a finding of hardship under Art. 79 CISG as provided.

125. The underlying principles of the CISG govern the consequences and remedies available pursuant to application of Art. 79 CISG which include the adaptation of the contract price, either by negotiation between parties or through the exercise of the Tribunal's powers.

Conclusion for Issue C

126. CLAIMANT submits it is entitled to the payment of US$ 1,250,000 under Clause 12 of the Contract. Alternatively, CLAIMANT is able to rely on the CISG for the adaptation.

REQUEST FOR RELIEF

In light of the above submissions, CLAIMANT requests the Arbitral Tribunal to find that:

(i) The Tribunal has the jurisdiction and power to adapt the Contract;

(ii) CLAIMANT is entitled to submit evidence from the other arbitration proceedings; and

(iii) CLAIMANT is entitled to the payment of US$ 1,250,000

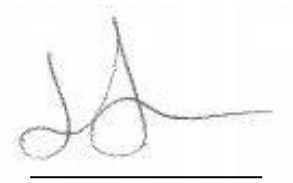
CERTIFICATES

Thursday, 6 December 2018

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

Janna Severine Baggio

Cindy Do



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