PEKING UNIVERSITY
SCHOOL OF TRANSNATIONAL LAW

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WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT
Hong Kong - 31st March to 7th April 2019

MEMORANDUM FOR CLAIMANT

ON BEHALF OF

Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

CLAIMANT

AGAINST

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

RESPONDENT

COUNSEL

Jiang Ruiling | Zhang Han | Zhang Ziheng | Zheng Hanxi

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3. Mediterranean law should govern the interpretation of the arbitration clause because it is not only a conventional presumption, but also an implied choice reflected by the facts. ... 9

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2. The tariff imposition satisfies the standards in Art. 79 CISG. 29

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3. Adapting the price is an allowable remedy because there is a gap in Art. 79 CISG and it should be filled with Art. 7(2), which points to principles providing a remedy of adapting the contract. 31

3.1. There is a gap in Art. 79 CISG, which should be filled with Art. 7(2) CISG. 31

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LIST OF ABBREVIATIONS AND DEFINITIONS

Cited as:	Full Citation
&	and
Arb.	Arbitration
Art.	Article
CISG	United Nation Convention on Contracts for the International Sale of Goods
CISG-AC Opinion	CISG Advisory Council Opinion
Cl. Ex.	Claimant's Exhibit
e.g.	*exempli gratia* (example given)
ed.	edition
et al.	*et alius* (and others)
HKIAC Rules	Hong Kong International Arbitration Center Administered Arbitration Rules
i.e.	*id est* (that is)
IBA Rules	International Bar Association Rules on Taking of Evidence in International Arbitration
ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce
id.	*idem* (the same)
inter alia	among other things

NO.	Number
p.	page
para.	paragraph
paras	paragraphs
PO	Procedural Order
pp.	pages
Re. Ex.	Respondent's Exhibit
s.	section
SCC	Stockholm Chamber of Commerce
SCC Court	Arbitration Institute of the Stockholm Chamber of Commerce
U.S.	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Laws	United Nations Commission on International Trade Law Model Laws
UNCITRAL Rules	United Nations Commission on International Trade Law Model Rules
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
US$	United States Dollar
v.	versus

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SUMMARY OF FACTS

1 **Phar Lap Allevamento** (**"CLAIMANT**) a Mediterranean company, has a reputation for offering training and professional development courses on horse care, breeding and riding. **Black Beauty Equestrian** (**"RESPONDENT"**), an Equestrian company, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

2 In terms of substantive law, Equatoriana, Mediterraneo and Danubia are all Contracting States of the CISG; Equatoriana and Mediterraneo adopt verbatim the UNIDROIT Principles on International Commercial Contracts. In terms of procedure, Danubia adopts the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.

3 RESPONDENT was aware that CLAIMANT has been making losses since 2014 primary due to the high loan interest payment.

4 CLAIMANT originally had a profit margin of 5 percent for the transaction and now suffers a loss of 25 percent due to the 30 percent tariff on the product imposed by the Equatorianian authorities.

5 CLAIMANT has Julie Napravnik as witness, who is one of Phar Lap's two lawyers since 1 January 2011, and primarily responsible for contractual relations to CLAIMANT's suppliers and customers. He has a law degree from the University of Mediterraneo.

6 RESPONDENT has Julian Krone and Greg Shoemaker as witness. Julian is the head of the legal department at Black Beauty Equestrian, the RESPONDENT. Greg was responsible for the development of the racehorse breeding program since 1 November 2017.

21 March 2017	RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III for breeding. The Equatorianian had imposed serious restrictions on the transportation of all living animals due to foot and mouth disease lasted for two years. In response to that and driven by powerful interests in the Equatorianian racehorse breading industry the	*Clmt. Ex. C1, p.9*

	ban on artificial insemination for racehorses had been temporarily lifted.	
24 March 2017	CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards*	*Clmt. Ex. C2, p.10*
28 March 2017	RESPONDENT responded to CLAIMANT that it had no problem with terms of the offer except the choice of law and the forum selection clauses.	*Clmt. Ex. C3, p.11*
31 March 2017	CLAIMANT requested to increase the price if DDP is adopted.	*Clmt. Ex. C4, p.12*
10 April 2017	RESPONDENT requested that the Sales Agreement be governed by the law of Mediterraneo.	*Res. Ex. R1, p. 33*
11 April 2017	CLAIMANT changed the suggested place of arbitration in the reply but not objected to RESPONDENT'S proposal that the law of the place of arbitration should govern the arbitration agreement.	*Res. Ex. R2, p. 34*
12 April 2017	CLAIMANT's Napravnik and RESPONDENT's Antley were severely injured in an accident after the annual colt auction in Danubia. Until then, they had already agreed on clauses 1-5 and had made the necessary additions to the template.	*Clmt. Ex. C8, p.17*
6 May 2017	The Sales Agreement was finalized, agreeing both on the hardship clause, and an acceptable choice of law and arbitration clause.	*Clmt. Ex. C5, p.13*
18 May 2017	The first instalment of US$ 5,000,000 was due.	*Clmt. Ex. C5, p.14*
20 May 2017	The first shipment of 25 doses was made.	*Clmt. Ex. C5, p.14*
3 October 2017	The second shipment of 25 doses was made.	*Clmt. Ex. C5, p.14*

15 November 2017	Mediterraneo surprisingly announced 25 percent tariffs on agricultural products from Equatoriana. The tariff is extraordinary in terms of the breadth of the goods and the countries covered, the amount and the speed with which it had been imposed. The newly elected President Bouckaert had appointed Ms. Cecil Frankel, an ardent critics of free trade, as his "superminister" for agriculture, trade and economics on 5 May 2017.	*PO2, p.58, No. 23*
19 December 2017	Equatoriana unprecedentedly announced its tariff on agricultural goods in retaliation, which took effect from 15 January 2018 onwards.	*PO2, p.58, No. 25*
20 December 2017	Peak Business News reported on Equatorianian tariff, describing it "a surprise even to informed circles", for a country that has been embracing free trade, and never adopted retaliatory measures.	*Clmt. Ex. C6, p.15*
15 January 2018	Equatorianian tariff policy took effect.	*PO2, p.58, No. 25*
20 January 2018	Ms. Napravnik learned from custom that the tariff applied to semen as well. CLAIMANT unsuccessfully tried to call RESPONDENT and left a message on voice mail. CLAIMANT also sent an urgent email to RESPONDENT to try to negotiate the solution before the third shipment which supposed to go out on 22 January 2018.	*PO2, p.58, No. 26*
21 January 2018	RESPONDENCE made the second instalment of US$ 5，000，000. It urged CLAIMANT to authorize the shipment as planned since Black Beauty needed the doses and had already initiated the payment of the second installment. Besides, it emphasized their interest in a long-term	*Res. Ex. R4, p. 36*

	relationship and the plans to buy also 50 doses from CLAIMANT. CLAIMANT claimed 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."	
23 January 2018	CLAIMANT made the third shipment of 50 doses.	*Clmt. Ex. C5, p.14*
2 February 2018	CLAIMANT learned from another Equatorianian breeder that RESPONDENT resold the semen.	*PO2, p.57, No. 20*
12 February 2018	RESPONDENT's CEO, angry and aggressive, shouted that the permanent additional requests from Phar Lap had no contractual basis, and claimed to end a further cooperation. She stopped the negotiations and refused to pay any additional amount for the tariffs.	*Clmt. Ex. C8, p.18*
4 October 2018	CLAIMANT informed the Arbitral Tribunal that it just received reliable information about another arbitration under the HKIAC Rules where RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo.	*Commencement of Arbitration, p. 19*

SUMMARY OF ARGUMENTS

7 CLAIMANT entered into the contract in good faith with RESPONDENT, and demonstrated due respect and concern throughout the negotiation. Now the dispute arising out of an unexpected tariff sanction. For the following reasons, CLAIMANT here respectfully asks the Tribunal to find for it.

8 This Arbitral Tribunal should reject RESPONDENT'S challenge to Tribunal's power-to-adapt for three reasons: first, the choice of Danubia as the "seat of arbitration" does not create a presumption that Danubian law should govern the interpretation of the arbitration clause; second, the doctrine of separability does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract; third, Mediterranean law should govern the interpretation of the arbitration clause because it is not only a conventional presumption, but also an implied choice reflected by the facts **(ISSUE 1).**

9 RESPONDENT has strongly objected to CLAIMANT's submission of the copy of the award and the relevant submission from a previous arbitration where RESPONDENT was seeking a contradictory legal outcome, alleging that the evidence could only occur in violation of confidentiality obligations and was illegally obtained. CLAIMANT will demonstrate, however, the obligation of confidentiality should not be imposed on CLAIMANT. The evidence sought is so relevant and material that the Tribunal should exercise the discretion to the admission of the evidence, so as to protect the due process of CLAIMANT **(ISSUE 2).**

10 CLAIMANT asserts US$ 1,250,000 compensation from RESPONDENT to cover the loss caused by the tariff imposition. This Arbitral Tribunal should grant the request of CLAIMANT, as prescribed by clause 12 of Agreement or CISG. Under clause 12, CLAIMANT is entitled to the payment resulting from an adaptation of the price. First, given the plain meaning rule and the evidence in the present case, this tariff imposition is included in clause 12. Second, CLAIMANT's payment is reasonable and should not be an implied burden **(ISSUE 3(1))**.

11 Under Art. 79 CISG, CLAIMANT is entitled to the remedy as well. First, Art. 79 CISG covers hardship situation. Second, the tariff imposition meets the standards in Art. 79 CISG. Third, adapting the price is an allowable remedy when applying Art. 79 CISG and Art. 7(2) to the instant case. Specifically, Art.79 CISG has a gap, that is, it does not provide the situation where the disadvantaged party such as CLAIMANT could still perform despite impediment. Art. 7(2) CISG fills this gap with UNIDROIT Principles, or general principles of CISG, rendering the adaption of a contract is an allowable remedy **(ISSUE 3(2))**.

ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND POWER TO ADAPT THE CONTRACT.

12 It is submitted by CLAIMANT that, the law governing the Parties' arbitration clause should be the law of Mediterraneo, as a result of which, the Arbitral Tribunal has the jurisdiction and power to adapt the contract.

13 RESPONDENT has challenged the power of the Arbitral Tribunal to adapt the contract [*Answer to the Notice of Arbitration, p. 31, para. 12*]. The basis of RESPONDENT's argument is that the applicable law for the interpretation of the arbitration agreement should be the law of Danubia. As a consequence, the arbitration agreement should be interpreted narrowly so the Arbitral Tribunal is not entitled to adapt the contract [*id., p. 31, paras. 13-16*].

14 CLAIMANT respectfully requests the Arbitral Tribunal to reject RESPONDENT'S challenge. CLAIMANT's submissions are as follow: the choice of Danubia as the "seat of arbitration" does not create a presumption that Danubia's law should govern the interpretation of the arbitration clause **(1)**; the doctrine of separability does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract **(2)**; Mediterraneo's law should govern the interpretation of the arbitration clause because it is not only a conventional presumption, but also an implied choice reflected by the facts **(3)**.

1. The choice of Danubia as the "seat of arbitration" does not create a presumption that Danubia's law should govern the interpretation of the arbitration agreement.

15 CLAIMANT submits that, "seat of arbitration" only means that the arbitration itself is governed by the law of the seat, as a result of which, the law interpreting the arbitration agreement should be determined independently **(1.1.)**; Parties choose the seat of arbitration for reasons unconnected to how the law in the country would interpret the arbitration clause **(1.2.)**.

1.1. "Seat of Arbitration" itself is of little significance to the law governing the interpretation of the arbitration agreement, and the law applicable to the arbitration agreement should be determined independently.

16 The "Seat of the arbitration" is defined as the "juridical seat of the arbitration" designated by the parties, or by an arbitral institution or the arbitrators themselves [*Redfern, pp. 172-173,*

citing English Arbitration Act 1996, s. 3]. The concept that an arbitration is governed by the law of the seat of the arbitration, the place in which it is held, is well established in both the theory and practice of international arbitration [*id., pp. 171-172*]. Such a rule is called "Seat Theory" [*ibid.*]. It demonstrates a clear territorial link between the place of arbitration and the law governing that arbitration: the *lex arbitri*. Such a link is well shown in Article 1(2) of the UNCITRAL Model Law, which provides that the provisions of the Model Law, except article 8, 9, 35, 36, "apply only if the place of arbitration is in the territory of this State" [*Model Laws, Art. 1(2)*].

17 However, this doctrine only suggests that the "Arbitration" itself is governed by the law of the seat of arbitration, which usually leads to the arbitration law of the country. This kind of law does not deal with issues concerning the interpretation of the arbitration agreement. Rather, the law governing the "Arbitration" comprises rules mainly governing procedural matters [*Redfern, p. 167*]. The *lex arbitri* helps to ensure that the arbitral process works as it should. It gives an established legal framework to an international arbitration, so that the arbitration is firmly anchored in a given legal system.

18 In this regard, the so-called "Seat Theory" has no place in the issue of interpreting the arbitration agreement.

1.2. Parties choose the seat of arbitration for reasons unconnected to how the law in the country would interpret the arbitration clause.

19 A place of arbitration may be chosen for many reasons unconnected to the law of that place. It may be chosen because of its geographical convenience to the parties, or because of the suitability as a neutral venue, or because of the high reputation of the arbitration services, or for some other equally valid reasons [*Redfern, p. 221*]. The tribunal in a case before the SCC's Arbitration Institute said that:

20 It is highly debatable whether a preferred choice of the situs of the arbitration is sufficient to indicate a choice of governing law. There has for several years been a distinct tendency in international arbitration to disregard this element, chiefly on the ground that the choice of the place of arbitration may be influenced by a number of practical considerations that have no bearing on the issue of applicable law [*SCC Award No. 117/1999, p. 59, with commentary by Fernandez-Armesto*].

21 In the instant case, the Parties here chose Danubia as the seat of arbitration simply because it is a neutral country, not because how the law of Danubia would interpret their arbitration

agreement [*Cl. Ex., C 3, p. 11, para 3; Re. Ex., R 2, p. 34, para 2*]. Such an absence of intention is further demonstrated by two important facts.

22 First, throughout the whole negotiation history, there is no express mention of Danubia's law by RESPONDENT. Instead, it was CLAIMANT who suggested to resort to arbitration and chose Danubia as the seat [*Cl. Ex., C 4, p. 12, para. 5; Re. Ex., R 2, p. 34, para. 4*]. This makes it totally a hindsight argument that, in the witness statement from Julian Krone, he said if he could have known Mr. Antley's "intent", he would have chosen Danubia's law as the law applicable to the arbitration clause [*Re. Ex., R 3, p. 35, para. 3*].

23 Second, in the April 10 email, RESPONDENT suggested a choice of law provision, saying that the arbitration clause shall be the law of Equatoriana [*Re. Ex., R 1, p. 33*]. As the facts show, the general contract laws of Equatoriana and Mediterraneo are basically the same because they are both verbatim adoption of the UNIDROIT Principles [*PO 1, p. 52, para. 4*]. Accordingly, it makes no difference in terms of the interpretation of the arbitration agreement. Under both countries' law (*i.e.* the UNIDROIT Principles), an arbitral tribunal is entitled to adapt the contract when it finds hardships [*UNIDROIT Principles, Art. 1.11 & 6.2.3(4)(b)*]. It can fairly be inferred from these two facts that RESPONDENT didn't want the Danubia's law to be the governing law of the arbitration agreement.

2. The doctrine of separability does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract.

24 The doctrine of separability provides that an international arbitration agreement is presumptively separable from the underlying contract with which it is associated [*Born, p. 475*]. One of the most direct consequences of the separability presumption is that parties' arbitration agreement would be governed by a different law than the one governing the underlying contract [*Born, p. 475*].

25 However, the separability doctrine does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract [*ICC Case No. 4131, pp. 131-132*]. It only means that different laws may apply to the main contract and the arbitration agreement [*Born, p. 476*]. Actually, in many cases, the same law governs both the arbitration agreement and the underlying contract [*ICC Case No. 6752, pp. 54-56; ICC Case No. 6379, pp. 212, 215*].

26 Moreover, the result in many cases where the law applied to the arbitration clause differs from that applicable to the underlying contract has been that the arbitration clause was upheld against

challenges to its validity [*Born, p. 464*]. International tribunals have sought to safeguard international arbitration against challenges to their validity based on local law by applying a law other than one governing the parties' underlying contract [*ICC Case No. 6162; ICC Case No. 1507; ICC Case No. 4381*]. These cases arose mainly because the application of the local law or the law governing the underlying contract would invalidate the parties' arbitration agreement.

27 CLAIMANT submits that, the doctrine of separability concerns mainly the validity of the arbitration agreement. It is often used by tribunals as a method to circumvent the result which would frustrate Parties' will to arbitrate. However, there is no issue about the validity of the arbitration agreement in our case. Accordingly, there is no need to apply a law different from the one governing the underlying contract to interpret the arbitration agreement.

3. Mediterranean law should govern the interpretation of the arbitration clause because it is not only a conventional presumption, but also an implied choice reflected by the facts.

28 CLAIMANT submits that, it is fair to start with the presumption that the Mediterranean law chosen by the parties to govern the underlying contract will also govern their arbitration agreement **(3.1.)**, and the presumption is strongly evidenced by the facts **(3.2.)**.

3.1. It is a conventional presumption that in the absence of any contrary indication, the Parties intended their relationship to be governed by the same system of law.

29 As mentioned in (II), the doctrine of separability is not absolute and it mainly deals with the issue of validity of the arbitration agreement [*para. 13*]. The autonomy of the arbitration clause and of the underlying contract does not mean that they are totally independent one from the other [*Derains, pp. 16–17*]. The acceptance of the contract usually entails acceptance of the clause, without any other formality [*ibid.*].

30 Since the arbitration clause is only one of many clauses in a contract, there is a very strong presumption in favor of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement [*Redfern, p. 158*]. Some scholars even suggested that this can be implied as an agreement of the parties as to the law applicable to the arbitration clause [*Lew, p. 143*].

31 Furthermore, the English Court of Appeal also accepted that it was fair to establish the assumption that, in the absence of any contrary indication, the parties intended their relationship to be governed by the same system of law [*Sulamérica v. Enesa Engenharia, p.*

11]. Starting from that assumption, it could be easily inferred that the parties intended that law chosen to govern the substantive contract also govern the agreement to arbitrate [*Redfern, p. 160*]. Such an approach followed previous authority recognizing that the proper law of the arbitration agreement would typically be the same as the substantive law of the contract [*Channel Tunnel Group v. Balfour Beatty Construction; Black Clawson International v. Papierwerke Waldhof-Aschaffenburg; Sonatrach Petroleum Corporation v. Ferrell International Ltd; Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission; Leibinger v. Stryker Trauma GmbH*].

32 Of course, there are cases applied a different law to govern the arbitration agreement other than the applicable law of the contract [*Sulamérica v. Enesa Engenharia; Bulgarian Foreign Trade Bank Ltd v. Al Trade Finance Inc.; Matermaco SA v. PPM Cranes Inc., Brussels Tribunal de Commerce*]. However, in all of these cases, it is plain that the effect of the decision was to validate the arbitration agreement. This could even be one of the driving forces behind it [*Redfern, p. 162*].

33 Such an understanding accords with the requirement set forth by the Article II of the New York Convention. It is widely understood that Article II of the New York Convention prescribes uniform rules of substantive international law, including a rule of presumptive validity, applicable to all arbitration agreements falling within the Convention's scope, without expressly addressing choice-of-law issues [*Born, p. 493*].

34 However, there is no need to achieve the goal set forth by Article II of the New York Convention in the instant case, since the arbitration agreement in this case is valid without any doubt. Accordingly, it is fair to start with the presumption that the Mediterranian law chosen by the Parties to govern the underlying contract will also govern their arbitration agreement.

3.2. It is reasonable to imply that the Parties intended to have the law governing the underlying contract also govern the arbitration clause.

35 CISG Article 8(3) provided that, in determining the intent of a party, "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" [*CISG Art. 8(3)*]. Such canon of interpretation makes the above-mentioned presumption much stronger [*paras. 17-22*].

36 First, as mentioned in *para. 11*, throughout the whole negotiation, there is no express mentioning of Danubian law from RESPONDENT. Instead, it was CLAIMANT who

suggested to resort to arbitration, and chose Danubia as the seat [*CLAIMANT's Exhibit C 4, p. 12, para. 5; RESPONDENT's Exhibit R 2, p. 34, para. 4*].

37 As a matter of fact, CLAIMANT suggested arbitration as a mean of dispute resolution out of good faith and showed due respect in the negotiation. More precisely, such suggestion is a response to RESPONDENT's concern of subjecting the dispute to Mediterraneo's state court. In the 28 March mail from RESPONDENT, Mr. Antley wrote that they "consider it not appropriate that **your law** [Mediterraneo's law] applies and **your courts** [Mediterraneo's court] have jurisdiction", and further he wrote, "we [RESPONDENT] could **accept** the application of the **Law of Mediterraneo** if the courts of **Equatoriana** have jurisdiction" [*Ex. C 3, p. 11, para 3; EMPHASIS ADDED*]. According to these lines, it logically follows that RESPONDENT agreed to arbitrate **solely** because of its reluctance to **Mediterraneo's court**, **not its law**, governing the dispute [*EMPHASIS ADDED*]. In this sense, RESPONDENT agreed with the choice of seat unrelated to choosing the seat's law as the law governing the arbitration agreement.

38 Second, the agent of RESPONDENT who concluded the contract with CLAIMANT was Julian Krone, not Mr. Antley [*Ex. R 3, p. 35*]. It does not really matter what Mr. Antley truly meant and wanted in his notes, because there is no evidence shows that it is binding on Mr. Krone. As Mr. Krone said, he actually "took over the negotiations" [*ibid.*]. Moreover, there is no decisive conclusion on the interpretation of Mr. Antley's notes. The best way to understand one's intent is to ask him directly, and here Mr. Antley did not come as a witness. It would be a total hindsight argument if the RESPONDENT were to interpret Mr. Antley's notes unilaterally.

39 Lastly, it is actually the parties' contemplation that the applicable law to the arbitration agreement should empower the Arbitral Tribunal to adapt the contract. When asked the mechanism to ensure an adaptation of the contract for the event that Parties could not agree on an amendment, Mr. Antley replied that in his view that it should be the task of the arbitrators to adapt the contract [*Cl. Ex., C8, p. 17, para 5*]. Moreover, as mentioned in *para. 12*, RESPONDENT actually expressly wanted a law that can ensure an adaptation of the contract by an Arbitral Tribunal. In the April 10 email, RESPONDENT suggested a choice of law provision saying that the arbitration clause shall be the law of Equatoriana [*Re. Ex., R1, p. 33*]. As the facts show, the general contract laws of Equatoriana and Mediterraneo are basically the same because they are both verbatim adoption of the UNIDROIT Principles [*PO1, p. 52, para. 4*]. Accordingly, it makes no difference in terms of the interpretation of the arbitration

agreement. Moreover, under both countries' law (*i.e.* the UNIDROIT Principles), an arbitral tribunal is entitled to adapt the contract when it finds hardships, which is not possible under Danubia's law [*UNIDROIT Principles, Art. 1.11 & 6.2.3(4)(b)*].

40 In conclusion, it can be inferred from these facts that parties impliedly chose Mediterrranean law the law governing the interpretation of their arbitration agreement.

CONCLUSION OF ISSUE 1

To conclude, the law governs parties' arbitration clause should be the law of Mediterraneo, as a result of which, the Arbitral Tribunal has the jurisdiction and power to adapt the contract.

ISSUE 2: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

41 CLAIMANT requested the adoption of a copy of a Partial Interim Award and the relevant submission from another arbitration under the HKIAC Rules, where RESPONDENT had been negatively affected by the tariffs and asked for an adaption [*Arbitral Proceedings HKIAC/A18128, p.49*]. The source of information could either be two former employees of RESPONDENT, or a hack of RESPONDENT's computer system. parties did not agree on an express confidentiality agreement [*Arbitral Proceedings HKIAC/A18128, p.50*].

1. Confidentiality is not breached by submitting evidence.

42 In the present case, the award from a prior arbitration should be entitled to submission without breaching obligation of confidentiality. There is no obligation of confidentiality on the part of CLAIMANT **(1.1)**. Additionally, even if such an obligation exists, the information regarding the underlying arbitration should be an exception **(1.2)**.

1.1. There is no confidentiality in the present case.

43 In the present case, there should be no obligation of confidentiality on the part of CLAIMANT. The obligation of confidentiality is not an essential attribute of arbitrations so that it cannot be automatically implied **(1.1.1.)**. The HKIAC Rules on confidentiality are not necessarily binding **(1.1.2.)**. There is no express confidentiality agreement between the parties in prior arbitration as such an agreement is the focal point in determining confidentiality **(1.1.3.)**. Additionally, CLAIMANT is not a party in the underlying arbitration so that it should not be

bound by if any obligation of confidentiality **(1.1.4.)**. Lastly, awards assume weaker presumption of confidentiality if there is any **(1.1.5.)**.

1.1.1. The obligation of confidentiality should not be implied.

44 The obligation of confidentiality should not be imposed by implication.

45 Confidentiality is not an "essential attribute" of arbitrations nor a necessary aspect of an arbitration agreement [*Born I, p. 2796*].

46 In *Esso v. Plowman*, the Australian court decided to compel the disclosure of documents produced in the arbitration by an adverse party [*Esso v. Plowman*]. The court belied the longstanding obligation of confidentiality by differentiating "private" and "confidential", explaining that strangers being excluded from arbitrations does not mean arbitration-related information should not be disclosed. The court continued to explain that not only there are numerous avenues for possible public disclosure of materials relating to the arbitration, but when such an obligation is implied, it would be perceivably difficult to formulate exception. As a result, no general obligation of confidentiality should be implied at the very beginning [*Born I, pp. 2796-2797*].

47 In *Caringal v. Karteria*, the court concluded that even if documents are confidential, a court may order disclosure if the documents are relevant and "disclosure is necessary for disposing fairly of the cause or matter or for saving costs" [*Caringal v. Karteria*].

48 Like in *Caringal*, the documents required in the instant case are relevant, the disclosure of which would render the disposition fairer and the arbitration cheaper. The documents required are the copy of the award and the relevant submission from the prior proceeding, wherein the facts are basically same as the instant one and RESPONDENT was one party [*Arbitral Proceedings HKIAC/A18128, p.49*]. The documents are so closely related that could be a directional guidance to the outcome.

49 Therefore, no obligation of confidentiality in the instant case should be implied.

1.1.2. The HKIAC Rules Article 45's prescribed obligation of confidentiality should not be binding when there is no express confidentiality agreement.

50 Confidentiality is based on agreements so that institutional rules on the issue of confidentiality does not change the private nature of arbitration proceedings [*Born I, p. 2795*].

51 In *BTFB v. AI*, the Swedish Supreme Court decided that any party is bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this arbitration

[*BTFB v. AI*]. In the reasoning, the court explained that the private nature of arbitration proceedings is not changed by the fact that certain aspects thereof are regulated by law, the purpose of which is no more than granting stability to the institution of arbitration and legal effect to arbitral awards respecting procedural impediments and enforceability.

52 Like in *BTFB v. AI*, where national arbitration legislation regulates, the present arbitration undergoes under the framework of arbitration rules prescribing confidentiality. Similar to national arbitration law, HKIAC Rules, an institutional arbitration rule, merely have merits in stabilizing the proceedings and furnishing some enforceability to arbitral awards, but should not override parties' autonomy. Thus, the prescriptions in HKIAC Article 45 should not affect the issue of confidentiality undertaking and should not be employed in the instant case.

53 Moreover, the confidentiality article in the HKIAC Rules does not cover CLAIMANT in the present case. The HKIAC Rules provides that:

> *"45.1 Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to:*
>
> *(a) the arbitration under the arbitration agreement; or*
>
> *(b) an award or Emergency Decision made in the arbitration.*
>
> *45.2 Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC"* [*HKIAC Rules, p. 54*].

54 As CLAIMANT here is neither a party of the underlying arbitration nor anyone listed in Article 45.2, it should not bear the duty of confidence as prescribed in HKIAC Rules.

1.1.3. No contractual obligation of confidentiality between the parties in the prior proceeding

55 In virtually all developed legal systems, the parties' autonomy regarding the confidentiality of international arbitral proceedings is the first priority to be recognized [*Born I, p. 2787*].

56 In *Biwater v. Tanzania*, the tribunal concluded that "If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement" [*ICSID No. ARB/O5/22; Born I, p. 2787*].

57 In contrast, in the instant arbitration, no express agreement regarding confidentiality has been presented from the prior arbitral proceeding. As a result, RESPONDENT cannot rely on any agreement to impose confidentiality on the award and relevant submissions from the prior arbitration.

58 In conclusion, the tribunal should not impose any confidentiality undertaking because of the lack of private agreement and non-binding property of HKIAC Rules.

1.1.4. Evidence of a prior arbitral proceeding obtained by the non-arbitrating party should be admitted.

59 The obligation of confidentiality is at most between the arbitrating parties rather than a non-arbitrating party. First, a third party is at liberty to disclose what they know of the proceedings; second, a third party is free to seek disclosure produced in or in connection with arbitration proceedings [*Born I, pp. 2788-2789*].

60 In *Lawrence v. Household*, the court compelled production of communications in arbitration at the request of the third party, notwithstanding express confidentiality agreement.

61 In the instant case, CLAIMANT is not any one of the parties in the prior arbitration, so the obligation of confidentiality, if any, would not bind CLAIMANT. As a result, CLAIMANT is at liberty to seek disclosure of the evidence pertaining to the prior arbitration. In addition, the evidence in the instant case, although remains uncertain whether it was from former employees or through a hack of the computer system, was from a non-arbitrating party [*Arbitral Proceedings HKIAC/A18128, p.50*]. Thus, the access to the very evidence does not breach the duty of confidentiality if there is any.

62 In conclusion, the disclosure of the evidence pertaining to the prior arbitration does not breach confidentiality because the evidence was sought by third parties.

1.1.5. The award itself has a weaker presumption of confidentiality.

63 The awards, unlike other documents, assume a weaker presumption of confidentiality. In other words, the disclosure of awards should not be regarded as breaching confidentiality undertakings [*Born II, p. 854*].

64 The reasoned award, containing the arbitrator's determination of the issues between the parties which have been referred, identifies the rights and duties of the parties inter se in relation to which they have been in dispute [*ibid.*]. Additionally, the award is subject to the supervisory jurisdictions and enforcement of courts, ultimately being presented in open courts and public

law reports [*ibid.*]. Consequently, the awards will ultimately be in the public domain and deserve less protection under confidentiality [*ibid.*].

65 In *Hassneh v. Mew,* where the court drew a distinction between the confidentiality of "raw material" and the award, the court explained that arbitral awards deserve a differentiated treatment because awards are "at least potentially public documents" for the purposes of supervision or enforcement by the courts [*Hassneh v. Mew; Smeureanu/Lew, p. 66*]. It further explains that awards not only could be set aside or remitted to the arbitrator for misconduct in the court, but also be enforced in courts by a summary procedure, which requires them to be open to the court. The court thus held that the awards are expected to be used in the course of commerce [*Born II, pp. 855-856*].

66 In the instant case, a copy of the award of the prior arbitration, an award in the course of international commerce, is the major document sought to be submitted. As the awards are principally public documents having a weaker presumption of confidentiality, the submission of a copy of the award would not violate any duty of confidentiality.

1.2. Even if an obligation of confidentiality exists, there are exceptions to the obligation of confidentiality between the parties.

67 Even if RESPONDENT argues that confidentiality exists either contractually or statutorily, public interest exceptions can absolve the party from this particular obligation. The logic behind enforcing confidentiality between private parties does not extend to situations involving public interests, because they concern not only the parties alone but also people in general [*Misra/Jordans, p. 40*].

68 In *Esso,* where the public energy authorities were involved in arbitration proceedings with their suppliers [*Esso v. Plowman*]. The court decided that even if confidentiality is considered to be an inherent part of arbitration, public actors might be under a positive duty to disclose information to the public [*id.*].

69 In *Cockatoo*, a journalist requested a release of information under the Freedom of Information Act 1982, in relation to an arbitration between Australia and Cockatoo Dockyard Pty Ltd., which essentially concerned the environmental conditions around the Cockatoo Island [*Cockatoo; Misra/Jordans, pp. 43-44*]. Cockatoo Dockyard applied to the sole arbitrator to secure the confidentiality of the documents, and Australia resisted, on the ground that such an order would restrict the free flow of information and would also impinge upon governmental powers [*id.*].

70 Similar to *Esso* and *Cockatoo*, where the court held the information pertaining to public interest should be disclosed, the instant case involves significant public interests. CLAIMANT is now under the restructuring plan funded by multiple banks and planned to make a profit in 2018 to rescue itself from bankruptcy. The outcome of the instant arbitration is decisive to the restructuring of the company and concerns the interest of a number of creditors and the financing banks. In other words, the bankruptcy of CLAIMANT put jobs and the economics at stake.

71 Thus, the obligation of confidentiality should be exempted due to the public interests.

2. The Tribunal should exercise discretionary judgment over the admissibility of evidence and admit the evidence.

72 As to the admissibility of evidence under HKIAC Rules, the tribunal is empowered by Art. 22.3, HKIAC Rules with the discretion **(2.1.)**. Evidence should be admitted because it is relevant, material and has a public nature that becomes indispensable for truth-seeking **(2.2.)**.

2.1. Where international arbitration is concerned, it is likely to be a discretionary matter for a tribunal and may depend on the circumstances, in particular, who obtained it illegally.

73 The HKIAC Rules [*HKIAC Rules, p. 23*] prescribe the discretionary power to evidence admissibility for tribunals:

> *"22.3 At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence."*

74 Moreover, according to Art. 9.1 IBA Rules, the Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of evidence [*IBA Rules, p. 19*].

75 Even in the absence of statutory provisions like those in the Model Law, national courts uniformly affirm the arbitral tribunal's inherently broad discretion over evidentiary issues [*Born I, pp. 2307-2308*]. In *Int'l Chem. Workers Union v. Columbian Chem. Co.*, the US court held that "[a]rbitrators have broad discretion to make evidentiary decisions" [*Int'l Chem.; Born I, p. 2308*].

76 In practice, international arbitral tribunals typically do not apply strict rules of evidence, because the freedom over the admissibility of evidence is the hallmark of arbitration [*id.* at 2310]. In *Parker v. United Mexican States*, the tribunal declared that however appropriate the technical rules of evidence may be, they have no place in regulating the admissibility before the international tribunals [*Parker v. United Mexico States*]. The tribunal replaces the criteria of a good evidence admission rule with the discovery of the whole truth by reasoning that "the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted" [*id.*].

77 As in *Parker*, the parties in the instant proceeding have submitted to the jurisdiction of HKIAC in their contract. Whereas the HKIAC Rules applies, this Tribunal should have the power of discretion regarding the admissibility of evidence. Given the importance of the particular evidence illustrated, the Tribunal should exercise its discretion and employ the evidence submitted.

2.2. Illicitly obtained evidence could still be admissible.

78 Although it is questioned to be illegally obtained, the requested evidence should still be adopted. The evidence is so relevant and material that supports an important contention of CLAIMANT **(2.2.1.)**. The interests of seeking truth regarding the particular evidence overweigh the concern for the partial interest of RESPONDENT **(2.2.2.)**. The evidence is potentially public and "lawfully available to the public **(2.2.3.)**.

2.2.1. The requested evidence is relevant and material to the case.

79 Unlike in US common law, evidence obtained in an inappropriate way can be admissible in a court of law. Because of the arbitral tribunal's broad discretion in the area and the absence of any binding rules on the matter, there is no precise rule that prevents the admission of illegally obtained evidence [*Mirabal/Derains*, p. 208].

80 The admissibility of evidence is decided on a case-by-case basis as to illegally obtained evidence [*Marghitola/Lew, pp. 40-41*]. In civil cases, admissibility was not affected by the illegality of the means by which evidence was obtained that there was no reason to exclude the evidence so long as it was relevant and material [*id.* at 50].

81 The current IBA Rules require that the requested document must be relevant to the case. In other words, the requesting party can use the requested document to support an important contention [*ibid.*].

82 A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn [*Marghitola/Lew, p. 53*].

83 In the instant case, the requested evidence supports CLAIMANT's major contention and is more than relevant and material to the proceeding. CLAIMANT is seeking to adapt the original contract to get compensated for the tariff [*Notice of Arbitration, p. 8, para. 20*]. In terms of materiality, the requested award not only involves the same facts and same party, but also is rewarded the favorable holding for CLAIMANT. If adopted, the evidence is legally persuasive that the instant case should have the same decision so as to maintain the consistency among judgments. Whereas materiality to the case is a much stricter criterion than relevance, the requested evidence deductively has relevance.

84 In conclusion, both relevance and materiality to the case exist.

2.2.2. Inappropriately obtained evidence should still be admitted, when the interests underlying truth-seeking outscore the impartial interest of protecting RESPONDENT's benefits.

85 In *United Kingdom of Great Britain and Northern Ireland v. Albania*, where the plaintiff sought to use mined collected in sweeping operation whose legality is in question as evidence, the court held that the evidence was admissible [*Corfu Channel*]. The court weighed the desire to use international adjudication in alleged violations of international law over the concern of overzealousness in gathering evidence, and decided that the particular evidence was so important that "laid the groundwork for the case" [*Corfu Channel*; *Reisman/Freedman, p. 752*].

86 Like *Corfu Channel*, where the evidence was so fundamentally important to the case, the sought-to-be-admitted evidence is important to the case because of its relevancy in fact and law application. Although the evidence might be obtained in breach of contractual confidentiality or by illicit means, the evidence presents basically the same facts and applies the same law. Moreover, the information therein involves one of the parties in the instant case and the same series of tariff policy giving rise to the disputes, building up the framework for the instant case. Due to the pertinency and the significance of the evidence regarding the instant case, the evidence should be admitted albeit its illicit way of obtaining.

2.2.3. The requested evidence has a nature of publicity so that there is a strong reason that it should be admitted.

87 In *Caratube International Oil Company LLP v. Kazakhstan*, where leaked documents now publicly available due to the WikiLeaks page was at issue, the tribunal reached an admissibility decision. In the reasoning, besides the relevance and materiality, the tribunal emphasized the fact that the evidence was "lawfully available to the public" [*ICSID No. ARB/08/12; Ross*].

88 Likewise, the award sought to be admitted has a nature of publicity. The award itself is potentially public either when facing the enforcement or supervision by the courts and thus is going to appear in front of the courts and in law review reports.

89 In conclusion, the evidence in the instant case, notwithstanding the possible illicit way of obtainment, has a nature of publicity, and is so relevant and material that the Tribunal should admit it in this proceeding.

2.3. The evidence should be admitted liberally in order to protect the due process right of CLAIMANT.

90 A tribunal will naturally consider due process, specifically fairness, a sufficient opportunity of presenting a case, emerging best practice and the reasonable expectations of the parties [*Born I, p. 752*].

91 Discretions must be subject to mandatory due process norms [*id.*]. Party autonomy is paramount in the protection of due process rights [*id.*]. While parties can have very differing views on evidentiary matters, it is desirable to seek the input of the parties and wherever possible have an agreement between them to obviate the need for a discretionary determination [*id.*].

92 In the context of international commercial arbitration, given the fact that appeals of arbitral awards on the merits are not permitted under the laws of most countries, the liberality in permitting parties to present whatever evidence they please can be regarded as reasonable [*Hanessian/Newman, p. 146*].

93 In conclusion, the evidence should be entitled to submission in a liberal way so as to protect CLAIMANT's due process right.

CONCLUSION OF ISSUE 2

Even if the evidence was obtained in a tainted way and involves the other arbitration proceeding, the Tribunal should entitle CLAIMANT to the submission.

There is no confidentiality in the present case, especially as CLAIMANT was non-party to the other arbitration and awards assume weaker presumption of confidentiality. The Tribunal should exercise its discretion to receive the evidence as long as the evidence is relevant and material to the case.

ISSUE 3 (1): Under clause 12 of the contract, CLAIMANT is entitled to the payment from an adaptation of the price.

94 In order to analyze whether clause 12 entitles CLAIMANT to the payment of US$ 1,250,000, according to *pacta sunt servanda,* Agreement itself should be emphatically analyzed.

95 From the joint intention, two parties wrote "seller shall not be responsible for … hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Clmt. Ex. C5, p.14*]. Therefore, if the tariff imposition can be proved as a comparable unforeseen event like additional health and safety requirements, and it makes Agreement more onerous; CLAIMANT shall not be responsible for it. And since CLAIMANT is not responsible, RESPONDENT should be responsible.

96 In this case, if it is proved that CLAIMANT's payment belongs to RESPONDENT, and its payment is reasonable and not an implied burden, RESPONDENT should be responsible for this payment.

1. This tariff imposition is included in clause 12 and CLAIMANT shall not be responsible for this tariff imposition.

1.1. Under the plain meaning rule, this tariff policy is included in clause 12.

97 In this case, under the plain meaning rule, like additional health and safety requirement, this tariff policy is a comparable unforeseen event, making Agreement more onerous.

98 Firstly, this tariff policy is announced on 19 December 2017, after the date of the Agreement, May 6th, 2017, which means "additional." Secondly, there are many similarities between the tariff policy and health and safety requirements. For example, both of them are the government

policy on importing goods. The purposes of them are both protecting the market. Thirdly, to be considered as making Agreement onerous, the size of 30 percent is enough.

1.2. From the current evidence, this tariff policy is included in clause 12.

99 When it comes to the contract interpretation, both CISG Art. 8 and UNIDROIT Principles Art. 4 have the relevant provisions. "The rules of interpretation of contracts in Chapter 4 of the Principles are only an elaboration of the more succinct provisions in Article 8 of CISG and should therefore be admissible gap fillers on an analogical basis" [*Jacob Ziegel, The UNIDROIT Principles, CISG and National Law*]. Therefore, when interpreting Agreement, CISG should be preferentially applied, which states that the intent that can be known prior to the reasonable person standard [*CISG, Art. 8 (1); 8 (2)*]. Besides, according to CISG 8 (3), all relevant circumstances, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties, can be used [*CISG, Art. 8(3)*].

100 In this case, "comparable unforeseen event" first appears in Agreement, and there is no specific definition for it. Therefore, according to CISG 8, this phrase should be interpreted under the reasonable standard. From the joint intention on clause 12, "comparable" means "making the contract more onerous." Therefore, if it is proved that this tariff imposition is unforeseen and makes the contract more onerous, this imposition is included in clause 12.

1.2.1. This tariff imposition is an unforeseen event.

101 Firstly, Equatorianian retaliatory measures is an unforeseen event. Equatoriana has always been one of the biggest supporters of free trade [*Clmt. Ex. C6, p.15*]. Previous restrictions imposed by other countries affecting imports from Equatoriana have only once resulted in direct retaliatory measures [*id.*]. And until 2018, Equatoriana has been no tariffs imposed on agricultural goods [*PO2, p.58, No. 25*].

102 Secondly, listing frozen semen as the agricultural goods is an unforeseen event. Racehorse breeding is generally categorized differently from pigs, sheep, or cattle [*Notice. Arb., p.6, para 11*]. And even when Equatorianian Government imposed serious restrictions on the transportation of living animals, artificial insemination for racehorses is not banned [*Notice. Arb., p.5, para 5*]. Moreover, Equatoriana has never imposed tariffs on horse semen before 2018 [*PO2, p.58, No. 25*].

103 Therefore, this policy is a big surprise to everyone, including informed circles [*Clmt. Ex. C6, p.15*]. And even Julie Napravnik, a lawyer who has worked on contractual relations to the

suppliers and customers for seven years, is also astonished of the tariff imposition [*Clmt. Ex. C8, p.17*].

104 Since even experts from informed and legal areas are surprised by this imposition, this policy should be considered as an unforeseen event as clause 12 stated.

1.2.2. This tariff imposition makes Agreement onerous.

105 If the complained event cannot be assumed when signing the contract, making the investment unprofitable, the tribunal would consider this event as causing the contract onerous [*Total S.A. v. Argentine Republic*]. In this case, the tariff imposition cannot be assumed when signing Agreement, and if CLAIMANT bore the tariff, it would be lost from this transaction.

106 Firstly, tariff imposition cannot be assumed when signing Agreement. Agreement is made on May 6th, 2017, while this retaliation of 30 percent tariffs on selected products from Mediterraneo is announced on 19 December 2017 and takes effect from 15 January 2018 onwards [*PO2, p.58, No. 26*]. In fact, the Parties knew animal semen is included in selected products on 20 January 2018 [*Clmt. Ex. C7, p.16; Res. Ex. R4, p. 36*]. Besides, from the above "unforeseen" analysis, a reasonable person cannot assume this tariff imposition on May 6th, 2017. And this tariff imposition even surprises its citizens [*Clmt. Ex. C6, p.15*] and two experts from different areas [*Clmt. Ex. C7, p.16; Clmt. Ex. C8, p. 17*]. In this way, CLAIMANT, a foreign company, cannot assume this policy.

107 Secondly, CLAIMANT would be lost in business if bearing this tariff [*Clmt. Ex. C8, p.17*]. CLAIMANT originally had a profit margin of 5 percent [*Notice. Arb., p.7, para 18*]. However, after bearing this 30 percent tariff payment, it makes a loss of 25 percent [*id.*].

108 Moreover, CLAIMANT is in a comparatively weak business status and cannot afford this heavy load [*Arbitral Proceedings HKIAC/A18128, p.49*]. CLAIMANT has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures [*PO2, p.59, No. 29*]. Its restructuring plan provides that CLAIMANT would be profitable again from 2017 onwards [*id.*]. And the automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively [*id.*]. However, if CLAIMANT bore the 1,250,000 USD, that plan would be seriously endangered [*id.*]. And negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of CLAIMANT's largest competitor who is interested in buying the dressage part of CLAIMANT [*id.*].

109 Therefore, following the reason of *Total S.A.*, because of the tariff imposition, Agreement is more onerous.

110 After analyzing through plain meaning rule and current evidence, this tariff policy is included in clause 12. According to clause 12, if this policy causes lost semen shipments or delays in delivery, CLAIMANT shall not be responsible [*Clmt. Ex. C5, p.14*]. Since Agreement is the law among the Parties, if CLAIMANT shall not be responsible for this, RESPONDENT shall logically be responsible for the lost or delays.

2. RESPONDENT should be responsible for this tariff payment.

111 In this case, CLAIMANT's payment belongs to RESPONDENT. If it is proved that this payment is reasonable and is not an implied burden, RESPONDENT should be responsible for the payment.

112 CLAIMANT's reasonable payment is based on the trust that RESPONDENT will bear the tariff, instead of an implied burden. In this case, because the breeding season is from February to July [*Notice. Arb., p.4*] and the last shipment of the half doses is agreed on 23 January 2018 [*Clmt. Ex. C5, p.14, Art. 8*], timely delivery is extremely important. However, when reading the newspaper article in the Peak Business News, CLAIMANT did not know that the frozen semen was an "agricultural good," which applied to the tariffs [*PO2, p.58, No. 26*]. Only when Ms. Napravnik asks customs for clearance on 19 January 2018 was she told by email, which she only read in the morning of 20 January 2018, that the tariff applied to semen as well [*PO2, p.58, No. 26*]. And even if CLAIMANT immediately called RESPONDENT and left a message on RESPONDENT's voice mail [*Clmt. Ex. C7, p.16*], it cannot successfully contact RESPONDENT [*id.*]. And then CLAIMANT sent a priority e-mail to RESPONDENT at 9:03 a.m., explaining the application of the tariffs on the frozen semen and the urgency of finding a solution [*id.*]. On the morning of 21 January 2018, the Parties discussed the tariff issue [*Res. Ex. R4, p. 36*]. RESPONDENT stated 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" [*id*]. Even if RESPONDENT defends that Greg Shoemaker, who stated it to CLAIMANT never directly committed to the adaptation and he does not have the required authority to do so [*id.*], CLAIMANT cannot know its internal condition. And from his statement, according to CISG 8 (2), it is reasonable to say that CLAIMANT believes that RESPONDENT would bear the additional costs [*Clmt. Ex. C8, p.17*].

113 Besides, on 20 January 2018, CLAIMANT has clearly stated in its email that if no solution to this more expensive shipment, CLAIMANT would not start the shipment [*Clmt. Ex. C7, p.16*]. On 21 January, RESPONDENT urged CLAIMANT to authorize the shipment, without any objection to CLAIMANT's requirement [*Clmt. Ex. C8, p.17*]. Therefore, according to CISG 8 (2), CLAIMANT can believe that RESPONDENT has agreed with the requirement.

114 Considering the importance of timely delivery and the second installment has already initiated, with the reasonable reliance of RESPONDENT, CLAIMANT paid the tariff and sent the last 50 doses to RESPONDENT even before reaching the details of an adaptation agreement [*Clmt. Ex. C8, p.17*].

115 In *Suez et al. v. Argentina Republic*, Arbitrator Pedro Nikken stated that the international standard for such contracts in the event of "hardship" aims to impose an obligation on the parties to negotiate an adaptation of the contract to the changed circumstances or the termination of the contract. Therefore, granted that RESPONDENT does not agree with the adaptation, RESPONDENT still has an obligation to negotiate an adaptation.

116 Therefore, CLAIMANT's payment should be born by RESPONDENT.

117 All in all, considering that clause 12 has stated that CLAIMANT shall not be responsible for this tariff imposition and CLAIMANT's reasonable payment is not an implied burden; under clause 12, CLAIMANT is entitled to the payment resulting from an adaptation of the price.

ISSUE 3(2): CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTION OF THE PRICE UNDER CISG ART. 79 AND ART. 7(2).

118 CLAIMANT asserts US$ 1,250,000 compensation from RESPONDENT to cover the loss caused by the tariff imposition, basing on Art. 79 CISG. This arbitral tribunal should grant the request under CISG.

119 Art. 79(1) exempts a party from liability for damages when that party has failed to perform any obligation "*if they can establish that nonperformance was due to an 'impediment' beyond their control which they could not reasonably have been expected to take into account when the contract was made and which, or the consequences of which, they could not reasonably have been expected to avoid or overcome*" [*CISG-AC Opinion NO.7, para.1*]. Herein, on the surface, Art. 79 CISG cannot serve as a basis to CLAIMANT's request. Firstly, the non-performance

precondition is not satisfied, because CLAIMANT has indeed performed the obligation to deliver the stub semen [*Notice. Arb., p. 6*]. Moreover, the remedy CLAIMANT pursues falls outside Art. 79 CISG, because CLAIMANT requests to attain reimbursement rather than the exemption from obligation or damages [*Notice. Arb., p. 8*].

120 However, failing to meet Art. 79 CISG literally does not mean CLAIMANT cannot receive any remedy under it. First, Art. 79 CISG covers hardship situation **(1)**. Second, the tariff imposition meets the standards in Art. 79 CISG **(2)**. Third, adapting the price is an allowable remedy applying Art. 79 CISG and Art. 7(2) to the instant case **(3)**. To be specific about the third point, Art.79 CISG has a gap, that is, it does not provide the situation where the disadvantaged party performs despite impediment, like CLAIMANT. Then Art. 7(2) CISG fills the gap with UNIDROIT Principles, or general principles of CISG, where the adaption of contract is an allowable remedy**.** Therefore, CLAIMANT is entitled to the remedy of adapting the price, and this arbitral tribunal should grant the request of CLAIMANT.

1. Art. 79 CISG covers hardship situation.

121 We will discuss Art. 79 CISG governs hardship from two aspects. First, the tariff in the instant case can suffice as an impediment in Art. 79 CISG, because the tariff was beyond "the limit of sacrifice" and would fatally harm CLAIMANT. Second, inferring from the legislative history of Art. 79 CISG, the drafters was not intended to exclude hardship situation from it.

1.1. The tariff imposition constitutes an economic impediment in Art. 79 CISG, because it is "excessively onerous" for CLAIMANT.

122 Normally Art. 79 CISG applies under any occurrence that makes performance impossible [*Mercedeh Azerdo Da Silveira, p. 477*]. Several earlier decisions suggested that exemption under Art. 79 CISG requires satisfaction of "something akin to an 'impossibility' standard" [*Tomato concentrate case; Vital Berry Marketing v. Dira-Frost; Iron molybdenum case; Nuova Fucinati v. Fondmetall International; Shoes case*].

123 However, there is a tendency that economic hardship can constitute an impediment in Art. 79 CISG as well. Schwenzer says that, an increase in the costs of performance can satisfy the factors of Art. 79 CISG as an impediment, as long as "the obligor could not reasonably be expected to overcome it as this would exceed the 'ultimate limit of sacrifice'" [*Schwenzer, p. 1076, para. 30*]. Also, an unforeseeable change of circumstances, rendering the performance "excessively onerous (hardship)," although not impossible, may also qualify Art. 79(1) CISG [*CISG-AC Opinion NO.7, p.2*]. The Belgian Court of Cassation has indicated that the

"impediment" referred to in Art. 79(1) CISG may include changed circumstances that have made a party's performance a matter of economic hardship, even if performance has not been rendered literally impossible [*Vital Berry Marketing v. Dira-Frost*].

124 The tariff in this case was an economic impediment for CLAIMANT, because it would fatally harm CLAIMANT and make the performance "excessively onerous" [*CISG-AC Opinion NO.7, p.2*]. To constitute an impediment, an increase in the costs of performance must be such that the obligor could not reasonably be expected to overcome it as this would exceed the "ultimate limit of sacrifice" [*Mercedeh Azerdo Da Silveira, p. 479*]. In *Scafom International BV*, after the conclusion of the contracts, the price of steel rose unexpectedly by about 70%, so the seller requested a price negotiation but the buyer refused [*Scafom International BV v. Lorraine Tubes S.A.S.*]. The Supreme Court reasoned that the fact that Art. 79(1) CISG deals explicitly with impediment justifying exemption, does not implicitly exclude the relevance of hardship [*id.*]. Besides, these unforeseen increases in the price gave rise to "a serious imbalance" which rendered the further performance "exceptionally detrimental" for the seller [*id.*]. Thus the Supreme Court held for the seller and granted him renegotiation remedy [*id.*].

125 Similar to *Scafom International BV* that the cost of performance has increased substantially, here the tariff imposed on CLAIMANT was 30% of the third shipment, amounting to US$ 1,500,000. In *Scafom International BV*, the damage the seller suffered was only 450,000 Euro, so the harm to CLAIMANT's financial condition was even more severe [*id.*]. Besides, the harm to CLAIMANT would be fatal saddling with all the tariff, because the enormous loss in 2018 will deprive CLAIMANT the access to loans and the capacity to continue business [*PO NO.2 para. 29*]. CLAIMANT has been in financial dilemma since 2014 [*id.*]. CLAIMANT has struggled so badly to turn the loss to profits that it finally began to make profits of US$ 180,000 in 2017 [*id.*]. The tariff was over 8 times as much as it earned in one year. In sum, saddling CLAIMANT with the tariff rendered "a serious imbalance" to the transaction and was "exceptionally detrimental" for CLAIMANT. The tribunal should follow the reasoning in *Scafom International BV*, and found the impediment "excessively onerous" for CLAIMANT.

1.2. The drafting history of Art. 79 CISG reveals that it is intended to cover "hardship".

126 Scholarly opinions are divided, concerning the drafting history of CISG, on whether this situation of hardship, short of impossibility, is governed by Art. 79 [*CISG-AC Opinion NO.7, para. 26*]. Whereas some scholars opine that the history of Art. 79 rules out the assumption of

the existence of a gap [*Rimke, Joern, pp. 197-243*]. The reason is that UNCITRAL in its preparation of the 1977 "Sales" Draft proposes the provision of changed circumstances to solve excessive difficulties for one of the parties [*John O. Honnold, pp. 349-350*]. The committee, however, did not retain this proposal [*id.*]. Furthermore, a Norwegian proposal submitted at the Vienna Conference to provide a permanent exemption under changed circumstances was rejected, because "it was feared that the changed circumstance would be introduced into the CISG by the suggested alteration" [*id. at pp. 602-603*]. However, the arbitral tribunal should not adopt the above opinion, because it is based on a quite rough examination of the evolution of CISG.

127 A careful look at the CISG's legislative and drafting history suggests that the absence of a provision dealing explicitly with hardship is not a "silence" [*Mercedeh Azerdo Da Silveira, pp. 332-333*]. Instead, Art. 79 CISG is intended to cover hardship situation. The following three aspects are rebuttals to the opinion that the legislative history of Art. CISG reveals hardship was excluded.

128 Firstly, the fact that the committee rejected a "proposed article on hardship" should not be regarded as a conclusive evidence of a deliberate intention not to offer any remedy to a party facing hardship," because no reason of rejection was given [*Mercedeh Azerdo Da Silveira, pp. 332-333*]. Moreover, the other principles such as UNIDROIT Principles, where hardship clause came into existence, were adapted after CISG, one cannot argue CISG deliberately omit hardship question [*id.*].

129 Secondly, the First Committee rejected a Norwegian proposal to add a second sentence to Art. 79(3) CISG to the effect a permanent exemption "if, after the impediment ceases to exist, the circumstances have changed so radically that it would be manifestly unreasonable to hold the defaulting party liable" [*id.*]. It is obvious that the proposal would bring "hardship" concept into CISG 79. However, the reason for the committee to draw the rejection decision is not to exclude hardship from Art. 79 CISG [*id.*]. In fact, many delegates plainly supported the proposal [*id.*]. The ones opposing to the proposal "questioned whether an exemption from liability for damages would be an appropriate solution in situations of changed circumstances," or worried that the proposed provision was not sufficient to cover all kinds of hardship situations [*id.*]. Only one delegate argued that the committee should dismiss the proposal in case of bringing in hardship, frustration or force majeure inside [*id.*]. Thus nearly all delegates accepted, at least did not refuse, Art. 79 CISG to cover hardship.

130 Thirdly, the intention to choose the particular word "impediment" is not to exclude "hardship" or "changed circumstances" [*Honnold, p. 627, para. 432.2*]. The concern was to narrow the application of excuse and encourage the performance of contract, because "impediment" is relatively difficult criterion to meet and the exemption is a strong remedy [*id.*]. This substitution did not, however, imply that no relief should be granted in cases of fundamental changes in circumstances" [*id.*].

2. The tariff imposition satisfies the standards in Art. 79 CISG.

131 To satisfy Art. 79 CISG, the event should result to the performance excessively onerous [*Mercedeh Azerdo Da Silveira, p.* P479]. Furthermore, to justify an exemption from liability for non-performance, an economic impediment must satisfy all the conditions of Art. 79 CISG [*Id.*]. Thus in this part, we will discuss the tariff meets all the factors of Art. 79 CISG. First, the tariff imposition is beyond the control of CLAIMANT **(2.1)**. Second, CLAIMANT could not reasonably be expected to have taken the tariff imposition into account at the time of the conclusion of the contract **(2.2)**. Third, CLAIMANT could not reasonably be expected to avoid or overcome the tariff **(2.3)**.

2.1. The tariff imposition is beyond the control of CLAIMANT.

132 Art. 79(1) requires that the impediment is beyond the control of the party who asserting remedy [*2012 UNCITRAL Digest on Article 79 Case Law*]. An impediment was beyond the control of a party if it was imposed by "governmental regulations or the actions of governmental officials" [*RTICA, 22 Jan 1997*]. In *RTICA, 22 Jan 1997*, the buyer failed to take delivery where the goods could not be imported into the buyer's country, because officials would not certify their safety, the tribunal held that the buyer was exempted from liability for damages for failing to take delivery, reasoning that the circumstances were beyond the buyer's control [*id.*].

133 Similarly, an arbitral tribunal found that a prohibition on the export of coal implemented by the seller's State constituted an impediment beyond the control of the seller [*Coal case*] (denying an exemption because the impediment was foreseeable at the time of the conclusion of the contract).

134 Here, similarly with *RTICA, 22 Jan 1997*, where the impediment was derived from the national authority, the tariff was imposed by Equitoriana government, and is compulsory against all importing goods. Besides, the CLAIMANT cannot be exempted from or obtain a reduction in the tariffs, so the mere choice for him is complying with the tariff policy. Thus, the arbitral

tribunal should follow the reasoning in *RTICA, 22 JAN 1997*, and found the tariff imposition beyond CLAIMANT's control.

2.2. CLAIMANT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract (as discussed in Issue 3(1) 1.2.1).

2.3. CLAIMANT could not reasonably be expected to avoid or overcome the impediment.

135 CISG Art. 79(1) additionally requires the impediment involved should be to the extent that the party could not reasonably be expected to have avoided [*2012 UNCITRAL Digest of Case Law*]. If there is a possibility to avoid the harm of it, the impediment can be overcome [*Milling equipment case*]. In *Milling equipment case*, the seller argued that the delivered roller mills with high-power roller bearing were never produced by the firm M that it had ceased production already in 1976, so he claimed an exemption. The tribunal denied the exemption, with the reasoning that the seller can overcome it, because he regularly overhauled and refurbished used equipment and thus was capable of supplying goods equipped with components not offered by the original manufacturer [*id.*]. Different from the above case where the seller could find a substitute to avoid the impediment, in this case, no alternatives can CLAIMANT bypass the imposition of tariffs, as long as the goods were passing through the custom of Equatoriana. Frist, CLAIMANT cannot overcome the impediment because it cannot get tax reduction or exemption, and in order to perform the obligation he must pay tax. Besides, the official information to impose tariffs on stub semen was too late for CLAIMANT to prepare to avoid it. To be specific, it was on 20 January 2018 that CLAIMANT was informed by the customs authorities of the tariff, while the last shipment was agreed to deliver on 23 January 2018. Therefore, the tribunal should follow the reasoning in *Milling equipment case*, and find CLAIMANT without the capacity to overcome the impediment.

136 RESPONDENT may argue that this impediment can be overcome, because CLAIMANT could have delivered the last shipment earlier to escape the tariff. In more detail, around one month before the last shipment, on 20 December 2018, through the news CLAIMANT had knowledge of that Equatoriana government imposed a tariff of 30 percent upon all agricultural goods from Mediterraneo, thus CLAIMANT had choice to prepare goods as soon as possible in case of any specific restriction on semen [*Cl. Ex. C6. p. 15*]. As a response to that, even if CLAIMANT knew the news, CLAIMANT still cannot predict the tariff on semen, because the Parties cannot expect the frozen semen could be considered to be an "agricultural good" mentioned [*PO NO 2, para. 26*]. Thus there is substantial uncertainty beyond CLAIMANT's control and

expectation, so he cannot have sent goods earlier. Besides, there is no evidence that earlier delivery could escape from the tariff on semen. It is likely that Equiatoriana government would have also imposed tariffs on the semen in December, just after releasing the news. Lastly, it is not Claimant's responsibility to explore whether the tariff covers semen. Instead, RESPONDENT had access and convenience to the information of their own country, and under good faith principle, they should make it clear and notify CLAIMANT timely.

137 RESPONDENT may also argue that CLAIMANT has sent the delivery out, paid the tariff, and successfully performed the obligation, and it proves from the reality that the impediment can be overcome [*Notice. Arb., p. 6*]. As a response to that, first, to determine whether there is an economic impediment, we do not need to focus on whether the obligor has the capacity to accomplish the obligation. An increase in the costs of performance, constituting an impediment, must be such that the obligor could not reasonably be expected to overcome it as this would exceed the "ultimate limit of sacrifice" [*Mercedeh Azerdo Da Silveira, p. 479*]. Thus, if the obligor may still have methods to perform, but the costs would be excessive, then it can still constitute impediment. Here in this case, as long as the costs of performance become onerous, no matter CLAIMANT has performed or not, it still satisfies the factors of Art. 79 CISG as an impediment. Second, the impediment is not a result of incapacity to perform the obligation; rather, it is caused by tariff expense. Thus it does not matter whether CLAIMANT has sent the goods or not. The key point is that CLAIMANT cannot afford the tariff, which constitutes an economic impediment.

3. Adapting the price is an allowable remedy because there is a gap in Art. 79 CISG and it should be filled with Art. 7(2), which points to principles providing a remedy of adapting the contract.

138 In this part, first, there is a gap in Art. 79 CISG **(3.1)**. To fill this gap, Art. 7(2) CISG applies, which is the regime of CISG to fill any gap of CISG. Under Art. 7(2) CISG, we can apply general principles or UNIDROIT principles **(3.1)**. Second, we fill the gap with UNIDROIT Principles **(3.2)**. Third, the general principles of CISG applies to fill the gap **(3.3)**.

3.1. There is a gap in Art. 79 CISG, which should be filled with Art. 7(2) CISG.

139 We have discussed that CISG covers hardship, and in this case, tariff satisfies the requirements of Art. 79 CISG. Thus Art. 79 CISG governs this case. When the CISG is applied, questions with regard to these issues may arise, and thus, the answer to these questions cannot be found in the CISG [*Evelien Visser, Chapter II*]. Literally, Art. 79 CISG only provides a remedy if the

party with impediment fails to perform. However, there is no provision in Art. 79 CISG to illustrate the remedy, under the situation where the party with impediment carries out obligations, as the instant case. Thus there is a gap here.

140 Therefore, a "gap-filling" technique needs to be applied in order to find the right solution. The CISG provides one interpretive tool, which can serve to fill the gap, Art. 7 CISG, which must be applied whenever interpretation problems of the text of the CISG arise [*CISG-AC Opinion NO.7, para. 34*]. According to Art. 7(2) CISG, when there is a gap in CISG, then it should be settled with "the general principles" which CISG is based on, and "in the absence of such principles," one can use "the law applicable by virtue of the rules of private international law" [*CISG Art. 7(2)*].

3.2. UNIDROIT Principles applies under CISG Art. 7(2), and UNIDROIT Principles Art. 6.2.3 provides a remedy of renegotiation and adaption of contracts.

141 "Parties to a contract which is governed by the CISG, however, are free to agree on the applicability of the UNIDROIT Principles to their contract" [*Rimke, Joern, pp. 197-243*]. When the Principles' provisions on hardship become a part of their agreement, UNIDOIRT Principles supplement Art. 79 CISG [*id.*]. In the instant case, the parties agreed that the sales contract was governed by Mediterraneo law, which is a verbatim adaption of UNIDROIT Principles. Thus UNIDROIT Principles can apply. Because tariff is a hardship, UNIDROIT Principles Art. 6.2.3 can fill in the gap generated by CISG, which provides a remedy of renegotiation and adaption of contracts.

142 The other opinion is even looser. Bonell argues that help and guidance in finding the Convention's general principles could be sought in the UNIDROIT Principles. He points out that the only requirement for applying a provision in the UNIDROIT Principles is that the provision is an expression of a general principle in the CISG [*Bonell, Michael Joachim, pp. 89-98*]. *Scafom International BV* has filled the gap of Art. 79(1) with Art. 7(2) regarding situations of hardship [*Scafom International BV v. Lorraine Tubes S.A.S.*]. In this case, the Supreme Court held the economic hardship constituted impediment of Art. 79 CISG [*Id.*]. For gap-filling purposes, the Supreme Court turned to "general principles governing the law of international commerce as incorporated inter alia in the UNIDROIT Principles of International Commercial Contracts" [*id.*]. Therefore, the Supreme Court used UNIDROIT Principles Art. 6.2.3 to grant the remedy of renegotiation [*id.*].

143 In this case, just like *Scafom International BV*, the tariff constitutes an impediment in Art. 79 CISG, and of course economic hardship as well, then we can also use Art. 6.2.3 UNIDROIT Principles to fill the gap. According to Art. 6.2.3(1) UNIDROIT Principles, first, the disadvantaged party has the right to request a renegotiation with the other party [*UNIDROIT Principles Art. 6.2.3(1)*]. If the renegotiation fails, the disadvantaged party may turn to the court or arbitral tribunal [*UNIDROIT Principles Art. 6.2.3(3)*]. The court or the arbitral tribunal may, if reasonable, "terminate the contract at a date and on terms to be fixed" or adapt the contract to restore its equilibrium [*UNIDROIT Principles Art. 6.2.3(4)*]. In the instant case, the Parties has failed to reach an agreement about the tariff allocation, so CLAIMANT requests for adaption of contracts to get compensation. The arbitral tribunal should grant the requests according to UNIDROIT Principles Art. 6.2.3(4).

3.3. General principles of CISG can be aroused under CISG Art. 7(2), and they also provide renegotiations and adapting contracts remedy.

144 The five general principles of CISG can combine together to provide a remedy of renegotiations. The general principles underlying the CISG include the following, the principle of good faith, the principle of reasonableness, the general duty to cooperate, the principle of *favor contracts*, the duty to mitigate losses [*Mercedeh Azerdo Da Silveira, p. 342*]. "The right of a party to seek renegotiation in case of hardship may be derived from a combination of these five general principles. The parties must, in good faith, enter into renegotiation conducted according to objectively reasonable standards, with a view to restoring the contractual balance and enabling the performance of the contract" [*id.*].

145 If renegotiations have failed, the party disadvantaged by hardship should be entitled to seek court-ordered amendments to the contract [Rimke, Joern, *p. 240*].

146 The other remedies in CISG can be referred to fill the gap. Firstly, the right to seek a court-ordered adaptation of the contract following an unsuccessful attempt to renegotiate its terms may be inferred from Art. 50 CISG applied by analogy [*Mercedeh Azerdo Da Silveira, p. 346*]. Schlechtriem argues Art. 50 includes a price reduction remedy for the aggrieved party, which could be interpreted as "a general principle allowing for an adaption of the contract in situations of hardship" after the balance between the contractual obligations has been disturbed [*Harry M. Flechtner, pp. 235-236*]. The non-conformity in the performance in Art. 50 CISG also results in an imbalance between the contractual obligations, which is radically similar to

hardship [*id.*]. The price reduction amends this imbalance, thus it exposes the potential to adapt the price to fix the imbalance caused by hardship as well [*id.*].

147 Secondly, Schlechtriem argues that the principle of good faith and fair dealing presumes that both parties try to adapt the contract to unpredictable and unforeseen changed circumstances [*id.*].

148 In the instant case, the two parties have failed to renegotiate for a new price and RESPONDENT has refused to pay any additional amount for the tariffs [*Cl. Ex. C8, p.18*]. Thus, the arbitral tribunal should adapt the contract and restore the balance of the contract.

CONCLUSION OF ISSUE 3 (1) & (2)

- In sum, in this case, tribunal should grant the remedy of US$ 1,250,000 to CLAIMANT as requested, under Clause 12 of Agreement or CISG. RESPONDENT is a big company and it would not be financially endangered if it bore the $1,250,000 [*Notice. Arb., p.5*]. However, CLAIMANT is in financial difficulty and cannot afford this 30% tariffs [*PO2, p.59, No. 29*]. In order to quickly settle the dispute, as CLAIMANT, we voluntarily give up 5% margin profit, only require the payment of US$ 1,250,000 to make up CLAIMANT's loss.

REQUEST FOR RELIEF

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

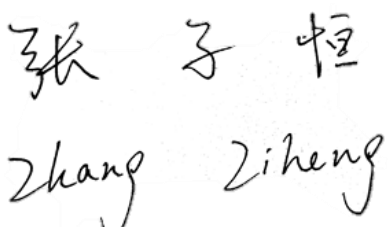
1. This Arbitral Tribunal has the jurisdiction and power to adapt the contract;
2. This Arbitral Tribunal should entitle the CLAIMANT to submit evidence from the other arbitration proceeding;
3. Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen;
4. Black Beauty Equestrian bears the costs of the Arbitration.

CERTIFICATE

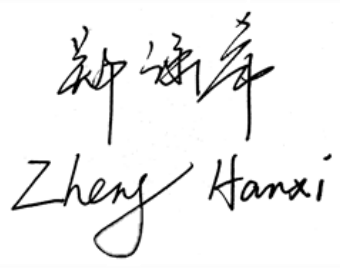
We hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Shenzhen, 6 December 2018

Jiang Ruiling



Zhang Ziheng



Zheng Hanxi

Zhang Han