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

PHAR LAP ALLEVAMENTO, *CLAIMANT*
V.
BLACK BEAUTY EQUESTRIAN, *RESPONDENT*

MEMORANDUM FOR CLAIMANT

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TABLE OF ABBREVIATIONS

&	And
Art.	Article
BGE / BGH	Bundesgerichtsentscheide (Federal Court of Justice (Germany))
Cir.	Circuit
CISG	The United Nations on Contracts for the International Sale of Goods of 11 April 1980
CISG-AC	United Nations on Contracts for the International Sale of Goods - Advisory Council
Cl. Ex.	CLAIMANT'S Exhibit
Co.	Company
Ed.	Edition
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules 2018
IBA	International Bar Association
IBA Rules on Evidence	International Bar Association Rules on the Taking of Evidence in International Arbitration
ICLQ	International Comparative Law Quarterly
ICC	International Chamber of Commerce
ICC Hardship Clause	International Chamber of Commerce Hardship Clause 2003
ICC Bull.	International Chamber of Commerce Bulletin
i.e.	id est [that is]
Id.	Idem
No.	Number
NoA	Notice of Arbitration
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959

p./pp.	Page/pages
¶ /¶¶	Paragraph/paragraphs
PO. 1	Procedural Order No. 1
PO. 2	Procedural Order No. 2
Res. Ex.	RESPONDENT'S Exhibit
U.K.	United Kingdom
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UPICC	UNIDROIT Principles of International Commercial Contracts of 2010
U.S.A.	United States of America
US$	United States Dollars
Vol.	Volume

STATEMENT OF FACTS

CLAIMANT, Phar Lap Allevamento (**"Phar Lap"**), is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, encompassing all areas of the equestrian sport [*NoA, p. 4, ¶ 1*]. As part of their extensive range of services, Phar Lap offers frozen semen of its champion stallions for artificial insemination, and is acclaimed for its breeding success regarding racehorses [*NoA, p. 4, ¶¶ 2, 3*].

RESPONDENT, Black Beauty Equestrian (**"Black Beauty"**), is a company in Equatoriana that is renowned for their success in the equine realm, particularly being known for their broodmare lines [*NoA, p. 5, ¶ 4*]. Equatoriana lifted their temporary ban on artificial insemination for breeding race horses in 2017. RESPONDENT then saw an opportunity to collaborate with CLAIMANT and develop what CLAIMANT expected to be a fructuous long-term relationship. An agreement for the sale of horse semen ("**Sales Agreement**") was entered into between CLAIMANT and RESPONDENT ("**the Parties**") on 6 May 2017.

The subsequent unexpected adoption of a more protectionist approach by Equatoriana, which was done by way of imposing a 30% tariff on agricultural products, had a substantially adverse effect on the Sales Agreement. Irrespective of the adverse effect onto CLAIMANT, the tariff is an unexpected circumstance for which CLAIMANT did not bear under the Sales Agreement.

TIMELINE

21 March 2017 RESPONDENT contacted CLAIMANT to inquire on the availability of Nijinsky III, one of Phar Lap's most successful racehorses, for their new breeding programme [*NoA, p. 5, ¶¶ 4-5*].

24 March 2017 While the requested number of doses was higher than usual, RESPONDENT explained that under Equatoranian law all incoming doses from the lifted ban could be used at a later date. CLAIMANT did not question this at the time as it appeared to be a good opportunity to increase their revenue without any major additional risk. CLAIMANT thus offered

	RESPONDENT 100 doses of Nijinsky III's frozen semen, with reservations that were noted in the communications between the Parties [*Cl. Ex. C2, p. 10*].
28 March - 12 April 2017	The Parties negotiated and agreed upon Delivery Duty Paid (DDP) delivery, price, and the relevant systems of law governing the Sales Agreement [*Cl. Ex. C4, p. 12, ¶ 3* ; *Res. Ex. R2, p. 34, ¶¶ 3-4*] .
6 May 2016	The Sales Agreement was signed [*Cl. Ex. C5, pp. 13-14*].
19 December 2017	Mediterraneo imposed a tariff on agricultural products from Equatoriana. The Equatorianian government retaliated by counter-imposing a 30% tariff on selected products from Mediterraneo, including horse semen. While the first and second deliveries were duly completed, the third was delayed by the governmental actions [*Cl. Ex. C6, p. 15, ¶ 1*].
21 January 2018	RESPONDENT informed CLAIMANT that they were confident the Parties would come to an agreement on price, resulting in CLAIMANT sending out the last shipment without a consensus on the price [*Res. Ex. R4, p. 36, ¶ 2*].
12 February 2018	RESPONDENT denied the claim that they had agreed on the change in price based on the tariff, putting CLAIMANT in an extremely difficult situation due to their own financial circumstances [*Cl. Ex. 8, p. 18, ¶ 9*].
31 July 2018	CLAIMANT submitted the dispute to the Hong Kong International Arbitration Centre (**"HKIAC"**) in a NoA to request outstanding contractual payments through price adaptation [*NoA, p. 4*].

SUMMARY OF ARGUMENTS

First, this Tribunal has the jurisdiction and/or the power to adapt the Sales Agreement under the arbitration agreement which is governed by the law of Mediterraneo [**II(B)**]. The arbitration agreement is capable of extending to the claim in question [**II(A)**]. Both Parties have chosen the law of Mediterraneo as the governing law not only for the substantive matters, but also for the arbitration clause contained therein for plethora of reasons [**I(B), (C) and (D)**]. RESPONDENT'S challenge to the jurisdiction of the Tribunal therefore is unfounded and is merely a disruptive tactic in an attempt to undermine the arbitral process and therefore should be denied.

CLAIMANT is entitled to submit evidence from the other arbitration, despite allegations that the evidence has been obtained through illicit means. Permitting this additional evidence is a critical factor in ensuring that due process is provided to both Parties, as every aspect of the case needs to be considered in order to make the most informed and accurate decision **[III(A)**].

Furthermore, the Tribunal has discretion in determining the admissibility of evidence based on relevance and materiality [**III(B)**]. CLAIMANT submits that the document in question is highly relevant to the case and material to its outcome, meaning that any reasoning or information from it would assist the Tribunal in considering a range of vantage points. Thus CLAIMANT is of the view that the evidence is significant to the extent that it outweighs the current presumption of wrongdoing [**III(C)**].

Lastly, since the Tribunal has the jurisdiction to adapt the contract, CLAIMANT is entitled to a price adaptation of US$ 1,250,000 [**IV(C)**]. The imposition of the tariff by the Government of Equatoriana amounts to hardship to CLAIMANT, falling within Clause 12 of the Sales Agreement [**IV(A)**], through which CLAIMANT bears no responsibility as agreed by both Parties. Alternatively, a possible cause of action could also be brought under Art. 79 of the CISG [**IV(B)**] as the tariff is tantamount to an impediment beyond the control of CLAIMANT, thereby disrupting the equilibrium of the Sales Agreement and destroying the commercial realities of the Sales Agreement.

ARGUMENTS

I. THE LAW OF MEDITERRANEO IS THE GOVERNING LAW OF THE ARBITRATION AGREEMENT

1. CLAIMANT submits that (A) the Tribunal has the jurisdiction to determine which law governs the arbitration agreement despite the lack of an express choice of law clause pertaining to the arbitration agreement in the Sales Agreement [*Cl. Ex. C5, p. 13,* ¶ *15*]; and (B) the arbitration agreement will be governed pursuant to the law of the underlying contract – the law of Mediterraneo.

A. The Tribunal has the Jurisdiction to Determine which Law Applies to the Arbitration Agreement

2. Art. 36(1) of the HKIAC Rules permits the Tribunal to decide the substance of a dispute according to the rules of law that the Parties have agreed upon. Failing which, the Tribunal will have the discretion to apply the rules of law that it deems appropriate. Therefore, in the present dispute, the Tribunal is empowered to determine which law is applicable to the arbitration agreement.

B. Both Parties have Expressly and/or Impliedly Agreed to the Law of Mediterraneo as the Governing Law of the Arbitration Agreement

3. CLAIMANT submits that, in the present dispute, the 3-stage choice of law analysis propounded in *Sulamérica* should be employed in determining which law is to govern the arbitration agreement [*Hook, p. 185*; *Sulamérica/Enes*a; *Arsanovia/Cruz City*; *Harisankar, pp. 629-631; Leong & Tan, p. 94*]. This involves identifying whether the Parties, with regards to the applicable law of the arbitration agreement, (1) have an express choice, as explained by (2) the doctrine of separability, or (3) implied choice, failing which the applicable law will be that which has the closest and most real connection to the arbitration agreement [*Sulamérica/Enesa*, *Moore-Bick LJ, pp. 9, 25]*. There is no need to consider the closest connection test because there was at least an implied choice of law governing the arbitration agreement.

1. There was an Express Choice of Law Governing the Arbitration Agreement

4. While it is undisputed that the law governing the arbitration agreement has not been *expressly* provided for in the Sales Agreement, there is nevertheless an express choice to that effect because express terms do not stipulate only what is absolutely and unambiguously explicit [*Arsanovia/Cruz City, ¶ 21*]. When Parties have agreed that the contract they are entering into is to be governed by one system of law, the natural inference is that they intended the express choice of law to govern and determine the construction of all the clauses in the agreement which they have signed, including the arbitration agreement [*BCY/BCZ, pp. 59, 79*]. Therefore, to say that the word "agreement" contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning [*BCY/BCZ, p. 99; Merkin, ¶ 7.12*].

5. Over the course of the negotiations, CLAIMANT and RESPONDENT had deliberated over the specific law that should govern the arbitration agreement. In particular, CLAIMANT had expressly rejected RESPONDENT'S proposal in having the law of Equatoriana as the governing law due to CLAIMANT'S internal policy [*Res. Ex. R2, p. 34, ¶ 1*]. In doing so, CLAIMANT removed the choice of law clause of the arbitration agreement suggested by RESPONDENT while stating that the law of Mediterraneo was the applicable law to the Sales Agreement [*Res. Ex. R2, p. 34, ¶ 3*].

6. The result of this is two-fold. First, it was CLAIMANT'S understanding and intention that the law of Mediterraneo, being the law that applied to the Sales Agreement, also governed the arbitration agreement. Second, RESPONDENT'S acceptance of this offer naturally entailed its acceptance to the application of the law of Mediterraneo to the entire Sales Agreement that contained the arbitration agreement. The Sales Agreement was therefore concluded on the basis that the Parties were in agreement that the law of Mediterraneo governed *both* the substantive contract as well as the arbitration agreement [*Cl. Ex. C5, pp. 13-14*]. This interpretation of the word "agreement" gives effect to what the Parties' language naturally connotes or what it would have connoted to foreign businessmen such as the contracting Parties in the present dispute [*Poudret/Besson/Berti/Ponti, pp. 142-148, ¶ 178; Arsanovia/Cruz City, ¶ 22*].

2. The Doctrine of Separability Does Not Preclude or Override the Parties' Intention of Applying the Law of Mediterraneo to the Arbitration Agreement

7. It is well established that an arbitration agreement is an independent and separate agreement from the main contract in which it is found. Art. 19(2) of the HKIAC Rules restates this principle as "an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract". Indeed, Art. 16 of both the Danubian and Mediterranean Arbitration Law explicitly acknowledge the doctrine of separability [*ANoA, p. 31, ¶ 14*]. However, CLAIMANT submits the separability of an arbitration agreement does not necessarily mean that the arbitration agreement cannot be governed by the law of the underlying contract.

(i) An Arbitration Agreement is Not Independent and Separate From the Main Contract For All Intents and Purposes

8. CLAIMANT recognises the doctrine of separability which treats an arbitral clause as autonomous and juridically independent from the main contract in which it is contained [*ICC Case 8938; Born, p. 352*]. Indeed, an arbitration agreement whether agreed upon separately or included in the main contract, has complete autonomy from being affected by an eventual invalidity of the main contract, unless exceptional circumstances arise [*Pains du Sud/Tagliavini; Nat'l Power Corp/Westinghouse*]. This prevailing principle is no doubt consistent with arbitral jurisprudence and is observed in both common and civil law jurisdictions.

9. It is thus inaccurate to describe the arbitration clause as either wholly or necessarily "autonomous" or "independent" from the Parties' underlying contract [*Born, p. 352; Geisinger/Voser/M.Petti, pp. 46-47*]. In fact, the arbitration clause is closely linked to the matrix contract having an interrelated, supportive function for that contract. While the arbitration agreement should presumptively be separated from the underlying contract, CLAIMANT submits that this doctrine should not automatically or necessarily prevent the law applicable to both the arbitration agreement and the main contract from being the same, as alleged by RESPONDENT [*ANoA, p. 32, ¶ 17*].

(ii) An Arbitration Agreement is Independent Only in the Context of a Challenge to its Validity

10. The UNCITRAL Model Law provides the clearest illustration of this point. Art. 16(1) of the Model Law provides that: "the Tribunal may rule on its jurisdiction where the existence or validity of the arbitration agreement is being challenged." It is for this purpose that the arbitration agreement is regarded as a separate agreement. An arbitration agreement is separate so that the eventual/alleged nullity of the main contract does not invalidate the arbitration agreement.

11. Similarly, Art. 19.2 of the HKIAC Rules approaches the issue of separability in line with the Model Law. It provides that an arbitration agreement is to be treated as a separate agreement for the purposes of Art. 19 which concerns the Tribunal's jurisdiction to rule on its existence, validity and scope of the arbitration agreement. Further, most distinguished scholars and case laws also limit the objective of this principle to ensure the endurance of an arbitration agreement against an attack on the validity of the main contract [*Glick/Venkatesan, p. 137; Flannery, p. 12; BCY/BCZ, pp. 60-61*].

12. In particular, the English courts take the view that the arbitration agreement is to be treated as a distinct agreement and can be void or voidable only on the grounds which relate directly to the arbitration clause [*Fiona Trust/Privalov; L.Collins, ¶ 12-099*]. Therefore, the doctrine of separability is primarily concerned with protecting the validity of the arbitration agreement rather than with its status more generally or for other purposes, such as precluding the applicable law of the main contract from being applicable to the separate agreement. It treats the arbitration agreement as a distinct agreement only in the context of a challenge to its validity and not for other purposes, including that of choice of law [*Leong & Tan, p. 72; Ferroalloy Plant/Ronly Holdings*]. For any other purposes, the arbitration clause continues to be part of the main contract.

13. In determining the Parties' choice of law, CLAIMANT submits that there is no need to regard the arbitration agreement as being independent from the main contract. In any case, as explained above, the object of the doctrine of separability is *not* to preclude the application of a particular law to the arbitration agreement. RESPONDENT'S assertion that Clause 14 of the Sales Agreement providing for the Law of Mediterraneo only concerns the Sales part of it is thus flawed and untenable [*Cl. Ex. C5. p. 14, ¶ 14*; *ANoA, p. 31, ¶ 14*]. CLAIMANT submits that the Parties

have agreed for the law of Mediterraneo to be applicable to the entire agreement, including the arbitration agreement. It is erroneous to suggest that the law of Mediterraneo which governs the main contract, owing to the doctrine of separability, does not or cannot govern the arbitration agreement as well.

3. There was an Implied Choice of Law Governing the Arbitration Agreement

14. In the event that the Tribunal does not find that there is an express choice of law, CLAIMANT submits that the intent and conduct of the Parties clearly points to the law of Mediterraneo as the implied choice of law governing the arbitration agreement.

15. There is a strong presumption that the Parties have impliedly intended the main contract and the arbitration agreement to be governed by the same system of law [*Leong & Tan, p. 72; National Thermal Power/Singer; Recyclers/Hettinga; ICC 6840*]. Further, both Parties are presumed to have intended to resolve any possible disputes in one single forum [*Fiona Trust/Privalov*]. It is a logical presumption that a forum would be *most capable* of resolving a dispute expeditiously and effectively when the choices of law applicable to the dispute are uniform with the proper law of the contract. The natural inference, therefore, is that the proper law of the Sales Agreement should also govern the arbitration agreement [*Sulamérica/Enesa, Moore-Bick LJ, ¶¶ 11, 15; Dicey & Morris, p. 577*].

16. Furthermore, CLAIMANT and RESPONDENT had long submitted the governing law of the underlying contract to the law of Mediterraneo. The negotiations made it clear that no consensus was reached on the choice of Equatoriana law to the arbitration agreement [*Res. Ex. R2, p. 34*]. RESPONDENT had never attempted to incorporate an express choice of law clause in relation to the arbitration agreement or an express reservation to this effect; both CLAIMANT and RESPONDENT also did not consider it critical to specifically devise a choice of law clause for the arbitration agreement to be included in the final Sales Agreement. CLAIMANT thus submits that both Parties had impliedly accepted the law of Mediterraneo as the law that should govern the agreement to arbitrate [*Eitzen Bulk/Ashapura; Sulamérica/Enesa; BCY/BCZ*]. Accordingly, the arbitration agreement is to be governed by the law of Mediterraneo.

C. Interpreting the Arbitration Agreement With the Law of Danubia May Defeat the Parties' Wishes to Adapt the Contract

17. Crucially, RESPONDENT'S conduct further points the arbitration agreement to the law of Mediterraneo. On 12 April 2017, CLAIMANT, who suggested a contract adaptation mechanism, was informed by RESPONDENT that the issue of adaptation should be *left* for the arbitrators to decide [*Cl. Ex. C8, p. 17,* ¶ *4*]. Although specifically incorporating a clause to this effect was not necessary from a legal perspective, RESPONDENT promised to tender a proposal the next morning so as to avoid any doubts and possible conflicts [*Id.*].

18. It is apparent that both CLAIMANT and RESPONDENT had shared the same understanding with respect to the issue of contract adaptation. Both Parties had agreed and intended that even without an express clause that specifically set out the ambit of the Tribunal's jurisdiction, at the very least, the Tribunal would have the innate power to decide on the adaption of the Sales Agreement [*Cl. Ex. C8, p. 17,* ¶ *4*]. This power would be redundant if the Tribunal were to apply Equatoriana law to the arbitration agreement, as the power to adapt would be controversial, in the requirement of an express reference to adaptation. CLAIMANT submits that the Parties' long-established intention to surrender the issue of adaptation of contract to the Tribunal cannot be frustrated.

19. Moreover, RESPONDENT had fallaciously asserted that it would have included an express reference to the law of Danubia into the arbitration agreement had they known that the "applicable law" meant by Mr. Antley was referring to the law applicable to the arbitration agreement as opposed to the law applicable to the Sales Agreement. CLAIMANT submits that there can be no uncertainty in relation to the law applicable to the Sales Agreement as both Parties had long agreed on the law of Mediterraneo [*Cl. Ex. C3, p. 11,* ¶ *1*]. Therefore, RESPONDENT cannot unilaterally or retrospectively change the agreement of the Parties.

20. Further, RESPONDENT'S assertion that it would have objected to the transferral of powers to the Tribunal to adapt the contract price upon its discretion is equally flawed. Ms. Napravnik had access to the prior email chains [*PO.2, p. 55,* ¶ *5*]; she would have or ought to have been aware that her successors had the intention of permitting the Tribunal to adapt the contract.

Therefore, the law of Danubia could not have been intended to be applicable to the arbitration agreement as doing so would go against the Parties' wishes.

D. Applying the Law of Mediterraneo Effectuates Parties' Intention and Is Coherent With the Validation Principle

21. In line with the validation principle, there is a preference for the choice of law that will render an international arbitration agreement as substantively valid. Its validity would thus be upheld, even if it is not valid under any of the other potentially applicable laws [*Born, ¶51*]. The rationale behind this is that Parties, when entering into an arbitration agreement, intended to surrender any disputes that may arise to arbitration as a dispute resolution mechanism. It would go against Parties' intention and commercial values if certain disputes which were not expressly excluded were disallowed from being subjected to arbitration [*Born, ¶51*]. Therefore, the choice of law for the arbitration agreement cannot be the law of Danubia as it undermines the Tribunal's jurisdiction, and in effect, the arbitration agreement [*Arsanovia/Cruz City; Sulamérica/Enesa*].

22. As evidenced from the facts, both CLAIMANT and RESPONDENT took immense interest in negotiating a dispute resolution clause, aiming at an effective and peaceful settlement of potential disputes. The intention to do so was made clear following several email exchanges, when the Parties had scheduled to meet and discuss the newest proposal for the dispute resolution clause [*Cl. Ex. C8, p. 17, ¶ 3*]. Clearly, both Parties intended all disputes that might arise over the course of their contractual relationship to be settled through arbitration. The arbitration agreement would be significantly undermined if the law of Danubia, being the law of the seat, were to be applied. This is because the Tribunal *may* not have the jurisdiction to determine the issue of adaptation due to the lack of "express empowerment" as required by the law of Danubia [*ANoA, p. 31, ¶ 13*], although CLAIMANT reserves their right to argue otherwise after the Tribunal's determination on the applicable law.

23. In order to allow for an effective method of neutrally resolving international disputes, the arbitration agreement must be rendered valid as far as possible [*Born, pp. 542-549; Nygh, p.119*]; failing which, an arbitration agreement risks becoming "mere waste paper" [*Born, p. 545*]. CLAIMANT submits that the Parties' intention of resorting any potential disputes relating to the

Sales Agreement must be respected and given effect, particularly with respect to the question of contract adaptation. Therefore, by applying the validation principle, the law that governs the arbitration agreement should be the law of Mediterraneo, which empowers the Tribunal to rule on the question of whether or not the contract can be adapted, irrespective of the lack of an "express empowerment".

II. THE TRIBUNAL HAS THE JURISDICTION AND/OR POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE SALES AGREEMENT WHICH IS GOVERNED BY THE LAW OF MEDITERRANEO

24. The arbitration agreement is not governed by the law of Danubia but the law of Mediterraneo. The law of Mediterraneo provides for a wide interpretation of arbitration agreements and does not restrict the Tribunal's jurisdiction to adapt the contract by requiring an express empowerment for adaptation.

A. The Arbitration Agreement is Capable of Extending to a Claim for an Increased Remuneration

25. On its proper construction, the arbitration clause is capable of extending to a claim for an increased remuneration, as is applicable in the present case [*NoA, p. 7, ¶ 16*]. This is notwithstanding RESPONDENT'S alleged attempt at narrowing down and streamlining the wording of the HKIAC Model Clause on which the arbitration agreement in the present case is based [*Res. Ex. R1, p. 33*]. The result of this allegedly narrow wording, that merely refers to "dispute(s) arising out of this contract", does not in itself exclude the claim in question from the scope of the arbitration agreement. Both Parties, as rational businessmen, are likely to have intended any dispute arising out of the contract into which they have entered, or purported to enter, be decided by the same Tribunal [*Fiona Trust/Privalov; Mediterranean Enterprises/SSangyong ; Cape Flattery/Titan*].

26. Further, RESPONDENT has duly failed to state precisely which omission of the words of the HKIAC Model Clause has indeed restricted the scope of the arbitration agreement in any appreciable way. There was no express agreement or implied language that made it clear that certain questions were intended to be excluded from the Tribunal's jurisdiction [*Cl. Ex. C5, pp. 13-14*].

27. Therefore, by agreeing to refer a matter to arbitration, both Parties had impliedly agreed to confer upon the Tribunal jurisdiction beyond that which would have existed pursuant to the arbitration clause [*Redfern/Hunter, p. 95*]. While the arbitration clause is undoubtedly a modified version of the HKIAC Model Clause, the effect of the modification is unclear. What is clear, however, is that the modification does not prevent the claim to rise under the arbitration agreement nor does it incapacitate the Tribunal from hearing and ruling on it.

B. This Tribunal Can Adapt the Sales Agreement

28. There is no requirement under the law of Mediterraneo for there to be an express empowerment in the Sales Agreement in order for the Tribunal to acquire the necessary jurisdiction to consider the issue of contract adaptation. Therefore, CLAIMANT submits that the question of whether or not there has been an express empowerment pertaining to an adaptation of Sales Agreement is irrelevant; the Tribunal can adapt the Sales Agreement because (1) both Parties intended for the Sales Agreement to be adapted, and (2) even if the law of Danubia applies, the Tribunal still has the power to adapt the Sales Agreement.

1. Both Parties Intended for the Sales Agreement to be Adapted in Light of Unforeseen Circumstances

29. In considering this issue, it is of paramount importance to have regard to Art. 8 of the CISG which applies to the conclusion and interpretation of the arbitration clause [*PO.1, p. 52, ¶ 4*]. It provides that due consideration is to be given to all relevant circumstances of the case in determining the intention of a party. It is well established that both CLAIMANT and RESPONDENT were in consensus with regard to leaving the question of adaptation of contact to the Tribunal. This, as a result, empowers the Tribunal under the arbitration agreement to adapt the contract in the event that there is a hardship situation.

30. In the absence of an adaptation clause, the Tribunal is competent to adjust the contract in order to reinstate the equilibrium of the Sales Agreement [*Timegate/Southpeak*]. CLAIMANT submits that the Tribunal's competence should be recognised in light of the Parties' expectations in having a long-term commercial relationship extending beyond the current transaction.

2. Even if the Law of Danubia were to Govern the Arbitration Agreement, the Tribunal Would Still Be Competent to Adapt the Sales Agreement

31. CLAIMANT submits that the Tribunal would still be competent to adapt the Sales Agreement despite the lack of an express empowerment required under the law of Danubia. According to Art. 6.2.3 of the UPICC, in the event that the Parties are unable to reach an agreement regarding the adaptation of the contract due to a change in circumstances, either party is authorised to resort to the court. This means that the courts are empowered to rule on the question of contract adaptation.

32. Therefore, based on the principle of synchronised competence, the Tribunal is entitled to exercise this specific power embodied by the courts [*Sanders p. 70; Ferrario p. 75*]. CLAIMANT submits that if the courts are competent to rule on the issue of contract adaptation, the Tribunal should be empowered to do the same in spite of the lack of a specific provision in the Sales Agreement that empowers the Tribunal to do so.

III. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION

33. On the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT'S computer system, the Tribunal has the discretion and authority to determine whether or not the evidence can be admitted in accordance with Art. 22 of the HKIAC Rules.

34. Reading in line with Art. 36.1 of the HKIAC Rules, the Tribunal shall decide on the dispute with respect to the rules of law agreed upon by the Parties. In addition to the HKIAC Rules, the UNCITRAL Model Law is applicable to the dispute since Danubia, the seat of arbitration, has adopted it [*PO.1, p. 52, ¶ 4*]. These are the only two rules of law that the Parties have expressly agreed upon in relation to this point of contention, neither of which are specific to laws of evidence. However, in accordance with Art. 36.1 of the HKIAC Rules as outlined above, the Tribunal possesses the discretion to apply a rule of law which it determines to be appropriate failing such

agreement. Such a provision is also central to Art. 19 of the UNCITRAL Model Law, and for that reason the UNCITRAL Secretariat described it as 'the Magna Carta of arbitral procedure' [*Binder, p. 5-013; Trittmann/Kasolowsky, p. 330*].

35. CLAIMANT submits that in the event that the Tribunal is not satisfied with the use of the HKIAC Rules and UNCITRAL Model Law to govern the law of evidence, the IBA Rules on Evidence are highly relevant and may be considered by the Tribunal. The IBA Rules on Evidence mirrors the key provisions that CLAIMANT is relying on under HKIAC Rules and UNCITRAL Model Law; this demonstrates that in any case, CLAIMANT seeks to apply the international best practices during the arbitration.

A. In Line with the Principle of Due Process, CLAIMANT is Entitled to Submit All Evidence that is Connected to the Case

36. Due process functions as the cornerstone of procedural rule of law [*Reed, p. 366; Steindl, p. 257; Jain, p. 150; Hoffman/Gendron, p. 4; Born, p. 3404*]. It is of utmost importance that each Party is granted due process as a fundamental right in order to maintain the integrity of arbitral proceedings as a whole [*Waincymer, pp. 597-98; Lew/Mistelis/Kröll, p. 95*]. In this case, the Tribunal possesses full authority to ensure that due process is abided by, particularly with respect to Art. 18 of the UNCITRAL Model Law which requires (1) equal treatment of the Parties and (2) complete opportunity for each Party to present their case; (3) compliance with the principle of due process is also necessary for the enforcement of the award at a later stage.

1. Equal Treatment Between the Parties is of Paramount Importance

37. The concept that "all Parties shall be treated with equality" is applicable to all aspects of the arbitration, including matters of evidence [*UNCITRAL Digest*]. The case of *Noble China* in the Ontario Court of Appeal propagated that this provision of equal treatment is mandatory and non-derogable under any and all circumstances [*Noble China/Cheong; Holtzmann/Neuhaus, p. 538*]. Any demonstration of dependence or partiality would be incompatible with the integrity and basic character of the arbitral process [*Id.*].

38. The understanding that upholding equality is of utmost importance is also reflected in Art. 34(2)(a)(iv) of UNCITRAL Model Law , where the finality of the award can be questioned if the arbitral procedure was not in accordance with provisions of the same law that cannot be derogated. The issue of equality is particularly relevant to the admission of extraneous evidence, wherein both Parties must be treated in the same way.

39. Although RESPONDENT has opposed the inclusion of extraneous evidence by utilizing the 'four corners rule', their submissions gain favour from, and find basis in email communications between the Parties [*ANoA, p. 32, ¶ 16*]. CLAIMANT submits that since the Tribunal is aware of these inconsistencies, consideration should be taken to allow both Parties to submit external evidence as not only is RESPONDENT already doing so, but has only sought to support such a stance when such evidence was in their favour [*Letter by Langweiler, p. 49, ¶ 2*]. The concern of apparent bias may materialize in the event that RESPONDENT is permitted to submit extraneous evidence and CLAIMANT is not [*Luttrell, p. 104*].

2. In Ensuring Equal Treatment, Each Party Shall be Given a Full Opportunity of Presenting Their Case

40. CLAIMANT is entitled to submit their evidence so that the Tribunal can make a holistic assessment of the facts. The right to have a full opportunity to present a case is established as the fundamental principle in all arbitrations [*Born, pp. 3500, 3506; Karl/Albert, p. 371*]. This principle extends to both evidence and submissions, whereby each party will be given reasonable opportunity to present their own case.

41. The test for procedural fairness of full opportunity to present one's case in an arbitration is primarily objective [*Acorn/Schnuriger*]. To show that a party has been deprived of the opportunity to present its case, there is a two-limb test to be adopted [*Trustees of Rotoaria/Attorney-General*]. First, a reasonable litigant in the applicant's position would not have foreseen a reasoning on the part of the Tribunal laid down in the award. Second, with adequate notice, it might have been possible to convince the Tribunal to reach a different result [*Id.*].

42. In accordance with the first limb, RESPONDENT'S involvement in the previous arbitration was not within the knowledge of the Tribunal or CLAIMANT. To disallow the CLAIMANT'S submission of evidence would deny CLAIMANT of the full opportunity to present their case as the previous arbitration is not only factually similar, but also demonstrates the intention of RESPONDENT in adopting contradictory positions. Applying the test in *Trustees of Rotoaria*, a reasonable litigant in CLAIMANT'S position would not be able to foresee the decision of the Tribunal if the evidence was not admissible as it infringes integrity, one of the key elements of arbitration itself.

43. With respect to the second limb, the Tribunal must also allow the Parties an opportunity to present arguments on all of the "essential building blocks" of the Tribunal's conclusions [*OAO/Remolcadores*]. This opportunity would extend to allow CLAIMANT to present the evidence so as to not cause substantial injustice to CLAIMANT [*Id.*]. The element of serious injustice is satisfied if CLAIMANT had been deprived of the opportunity to advance submissions which were "at least reasonably arguable", or even simply something better than "hopeless" [*Vee Networks Ltd/Econet*]. Based on the similarities which may bring alternative interpretations to the Tribunal's attention, CLAIMANT has thus surpassed the threshold for what constitutes serious injustice.

3. Failure to Achieve Due Process May Give Rise to Issues With Enforcement

44. After establishing the significance of due process under subsections (1) and (2), it is submitted that failure to fully align with due process may raise issues with enforcement. Art. V(1)(b) of the NY Convention states that the recognition and enforcement of an award may be refused "if the party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". As indicated in (1), Art. 34(2)(a)(iv) of the UNCITRAL Model Law reflects similar values; inequality is sufficient to undermine the finality of an award. CLAIMANT submits to the Tribunal that by permitting the evidence and ensuring due process, issues of recognition and enforcement can be avoided altogether at a later stage. By providing equal treatment and a full opportunity for each case to be presented, the Tribunal would be serving in a larger movement of promoting lasting and impactful awards.

B. The Evidence in Question is Relevant to the Case and Material to the Decision of the Tribunal

45. In the absence of an expressly agreed upon rule of evidence in this dispute, both Parties have mutually agreed that the Tribunal possesses full discretion to decide on what evidence may be used during the arbitration [*HKIAC Administered Arbitration Rules Art. 22.2*]. In the same vein, the Tribunal may hinge their decision to either include or exclude evidence on (1) the grounds of relevance to the case, and (2) materiality to the outcome [*HKIAC Administered Arbitration Rules Art. 22.3*]. CLAIMANT submits that the evidence at hand upholds this standard and therefore asks the Tribunal to decide in favour of admitting the evidence.

1. Based on the Factual Similarities in Both Arbitration Proceedings, the Evidence is Relevant to the Current Dispute

46. The standard for "relevance to a case" is whether the documents are relevant to the purpose of the proceedings where the documents are expected to be used [*ADF/United States*]. This standard also refers to the probative value of the evidence as it relates to a party's burden of proof. The burden of proof will be on the party seeking to establish a fact which in the current dispute lies on CLAIMANT [*AAPL/Sri Lanka*]. CLAIMANT'S evidence is relevant to the current dispute and the burden falls on CLAIMANT to prove on a balance of probabilities where the essential question is whether the evidence a party produced is sufficient to establish the facts in question [*Kardassopoulos/Georgia*].

47. In order to establish whether the evidence is relevant to the dispute, the nexus between the previous arbitration and the current dispute must be taken into account. First, the dispute arising in both arbitration proceedings concern the adaptation of contract [*ANoA, p. 31, ¶ 12; Letter by Langweiler, p. 49, ¶ 2*]. Second, the cause of conflict in both disputes is an unforeseen tariff [*Cl. Ex. C6. p. 15; Letter by Langweiler p. 49, ¶ 2*]. Third, in both disputes the contracts were negotiated by Mr. Antley, both providing for DDP delivery and containing the HKIAC Model Clause for arbitration [*Cl. Ex. C5. p. 13, ¶ 15; PO. 2, p. 60, ¶ 39*].

48. Therefore, based on the striking similarities between the two disputes, CLAIMANT submits that on a balance of probabilities, evidence regarding the previous arbitration is sufficiently relevant to establish the current dispute. The Tribunal would thus benefit from being aware of various approaches to a similar conflict due to its relevance.

2. The Evidence is Material to the Outcome of the Dispute as it Demonstrates RESPONDENT'S Breach of Good Faith

49. In determining whether evidence is "material to the outcome" of the arbitration, the Tribunal should consider whether the evidence will affect their deliberations in reaching a final award; if the Tribunal has already come to a decision, it then becomes a question of whether the evidence would modify the decision [*Watkins Johnson Co/Iran*]. On the other hand, evidence will be denied on the basis that the Tribunal had already issued a preliminary finding on the matters similar to the evidence [*Modsaf/Iran*]. As such, the Tribunal would be required to look at the reason for bringing in the evidence.

50. CLAIMANT'S reasoning in submitting the evidence is to show that RESPONDENT was not acting in good faith when RESPONDENT challenged the adaptation of contract [*ANoA, p.31, ¶ 12*]. Art. 2A of the UNCITRAL Model Law states that, "in the interpretation of this law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith". In the previous dispute, RESPONDENT had requested for an adaptation of contract from the Tribunal in the other arbitration when they were the ones adversely affected by the unforeseen tariff [*Letter by Langweiler, p. 49, ¶ 2*]. When CLAIMANT was in the same predicament, however, RESPONDENT had argued against the price adaptation despite being awarded the remedy in the other arbitration.

51. The RESPONDENT'S refusal of contract adaptation shows that they do not seek to serve the interests of justice, but rather to manipulate and take advantage of the law in order to meet their specific circumstances. CLAIMANT thus submits that the Tribunal should recognize that RESPONDENT has adopted a contradictory position in another proceeding where the same facts impacted them adversely.

52. CLAIMANT submits that the evidence would be material to the outcome as the evidence will affect the Tribunal's decision. The reason being, that the matter proven by CLAIMANT'S evidence was never disclosed in any earlier discussions or brought to the attention of the Tribunal. The Tribunal thus did not have an opportunity to consider the weight of the evidence, which CLAIMANT submits is crucial in proving that RESPONDENT'S action is contrary to the principle of good faith [*Modsaf/Iran*].

53. With regards to the principle of good faith, CLAIMANT submits that the RESPONDENT'S action of refusing relevant and material evidence would be contradictory. The duty to act in "good faith" in international arbitration is closely aligned with the assumed obligation of a party to cooperate in the taking of evidence [*Bernard, p. 373*]. It is a basic principle of international commercial arbitration that Parties have a duty to co-operate in good faith for the performance of their agreement as well as in the arbitral proceedings [*Id.*]. If a party raised procedural objections, whether in relation to evidentiary matters or are otherwise baseless, that will be considered as procedural bad faith as these actions would generally be considered as acts to delay the proceedings [*ICC 7920*].

C. The Extent of the Evidence's Significance Outweighs the Assumption of Wrongdoing, thus Admission Would Serve the Broader Interests of Arbitration's Fundamental Features

54. To fully address the assumption that the evidence was obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT'S computer system, CLAIMANT submits that the significance of admitting the evidence should be prioritized over the nature of the actions that have been alleged. CLAIMANT urges the Tribunal to consider this perspective in light of (1) policy considerations and arbitration as an practice, (2) the use of confidentiality as a shield, and that in any event, (3) the privacy of RESPONDENT can be protected on a larger scale as the documents will not be subjected to the public domain.

1. Between the Pursuit of Improving Arbitral Quality and Following Procedures, the Former Bears More Weight in Meeting the Aims of these Proceedings

55. To take the position that the evidence had been obtained illicitly, CLAIMANT submits that the Tribunal may base their decisions on a balance between confidentiality and transparency. Deciding between these two opposing concepts in international arbitration is not always a zero-sum balance, but determination of which ideal needs to be prioritized is based on the specific facts of each case.

56. Based on the common understanding that the authenticity of evidence is not disputed, the sole issue is whether or not the evidence was obtained by 'unauthorized means'; thus admitting the evidence would be in favour of achieving justice as the evidence is understood to be legitimate and accurate [*Jones, p. 245*]. RESPONDENT raised that they have suffered either a breach of confidentiality from a previous employee or a hack of RESPONDENT'S computer system [*Letter by Fasttrack, p. 50, ¶ 3*]. CLAIMANT acknowledges that evidence obtained by means of infringing an individual's physical or emotional integrity would generally be considered inadmissible, however such circumstances are not relevant to the present dispute [*von Segesser, p. 3*]. In the absence of any forms of pressure or duress onto RESPONDENT that would render the documents in discussion to be inaccurate or counterfeit, CLAIMANT submits that admission of this evidence paves the way to justice and truth.

57. CLAIMANT submits that justice is best reached by full transparency, when all of the relevant information is brought to the Tribunal's attention [*Born, p. 2346*]. Although arbitration is not subject to a system of precedent, the Tribunal should be able to take into account decisions and analyze certain points of law from various vantage points in related disputes to truly make a holistic decision [*Ruscalla, pp. 13-14*]. This view, being information-centric in nature, also means that all tribunals, in rendering a decision, are playing a role much greater than merely resolving a dispute, but are going further to develop the law and provide perspectives for the future.

58. In taking a step back, CLAIMANT invites the Tribunal to consider the dispute in the larger context of the international commercial arbitration practice. As reflected mainly in investor-state arbitration, the importance of transparency is being amplified to avoid "secret courts" being used to

render decisions that impact public interests [*Waibel/Kaushal/Chung/Balchin, p. 215*]. CLAIMANT submits that commercial arbitration is inclined to follow these winds of change based on the similarity in issues faced [*Rogers, p. 1334*].

59. CLAIMANT intends to rely on the principles derived from the Transparency Rules of UNCITRAL, and apply them to a commercial context. The rule of law, as a general principle cannot be developed or upheld behind closed doors, which is precisely the circumstance it is being subjected to during arbitration [*Letter by Langweiler, p. 49, ¶ 3*]. To continue to do so leaves matters of legal certainty, predictability, accountability, and prevention of arbitrariness, to fall lower on a spectrum of priorities within arbitration [*Rivkin, p. 340*].

60. While the current state of confidentiality and transparency are not under threat, that does not mean that it is a sustainable means of maintaining the quality of arbitration [*Partasides/Maynard, p. 197*]. Therefore, admission of this evidence is an opportunity for the Tribunal to support a larger movement, directed towards integrating the concept of transparency into international commercial arbitration, *de facto* increasing the quality and legitimacy of international commercial arbitration as a method of dispute resolution [*Hay, p. 212*].

2. Confidentiality Must Not be Manipulated to Circumvent Integrity and Justice

61. It is the position of CLAIMANT that rendering this evidence as inadmissible contradicts public interests in arriving at a just outcome; it is common to have conflicts with public interests when the element of confidentiality is placed on a pedestal [*Noussia, p. 8*]. In light of the autonomous and consensual nature of arbitration, the system rests on the expectation that fairness and justice will be incorporated throughout all procedures and be part of the outcome.

62. In adopting a macroscopic approach, integrity and legitimacy are paramount to the survival of the arbitration practice as a whole [*Caron/Schill/Smutny/Triantafilou, p. 3*]. RESPONDENT should not be allowed to be cloaked by the blanket of confidentiality, when integrity should be placed at the forefront of disputes. The question on our set of facts is whether to prioritize alleged procedural inaccuracy or arbitral integrity, the latter of which CLAIMANT propagates. Such a view is also reflected by the Australian government, which more closely analyzes the desirability of admitting the

evidence against the undesirability of admitting evidence given the manner by which it was obtained [*ALRC*].

63. CLAIMANT thus submits that allowing RESPONDENT to proceed in knowledge of the existence of such evidence, which explicitly shows that they are contradicting themselves, is enabling RESPONDENT to take advantage of the privilege of confidentiality within arbitration [*Letter by Langweiler, p. 49, ¶ 1*]. If the evidence is rendered inadmissible, RESPONDENT will indirectly be granted the capacity to use confidentiality as a means to take multiple conflicting positions on the same matters, without it being discovered. While CLAIMANT is able to appreciate the practicality of utilizing arbitration in commercial disputes, concealing bad faith and ill-will through confidentiality should not be a weapon in RESPONDENT'S arsenal. CLAIMANT holds that adopting conflicting positions is a clear demonstration that RESPONDENT is not acting in the interests of fairness and justice, but instead exploiting rules and procedures to their favour.

3. In Any Event, the Confidentiality of RESPONDENT'S Previous Award Will Be Protected from the Public and Used Only for This Arbitration

64. Art. 45.1 of the HKIAC Rules states that unless otherwise agreed upon 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". This would ensure the privacy of RESPONDENT'S award and limit it to the confines of the present dispute if the Tribunal were to admit it as evidence.

65. However, to provide a more appropriate rule of evidence, CLAIMANT raises Art. 3.13 of IBA Rules on Evidence as a gap-filling mechanism that neither the HKIAC Rules nor the UNCITRAL Model Law encompasses. As stated above, although this law of evidence has not been expressly agreed upon, CLAIMANT submits that this particular provision also favours RESPONDENT'S protection of privacy. The Tribunal may take the IBA Rules on Evidence as the law of evidence for a more accurate and comprehensive approach towards the confidentiality of evidence admitted. Art. 3.13 of the IBA Rules on Evidence is raised to assure the Tribunal that the confidentiality of RESPONDENT'S previous arbitration will not be exposed to the public through the medium of the present arbitration. This provision also empowers the Tribunal to issue orders to

set forth the terms of this confidentiality. CLAIMANT raises this provision to address RESPONDENT'S potential concerns of their information remaining confidential to confirm that the relevant documents will only be used for the purposes of arriving at a just outcome.

66. Thus, RESPONDENT does not need to be concerned that other profitable projects conducted by their company, ongoing relationships with other companies, or trade secrets being leaked will be affected by this arbitration [*Baldwin, pp. 451, 453*]. Several jurisdictions unite on the basis that evidence which has been obtained unlawfully or improperly shall be excluded if the admission of that evidence would be unfair or detrimental to the administration of justice [*Caenegen, p. 2*]. To apply the converse of this principle, the admission of the award from RESPONDENT'S other arbitration would not result in injustice as CLAIMANT merely wishes to extract the facts and interpretations from the award to assist the Tribunal in making a more informed decision.

IV. THE CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1, 250, 000

67. CLAIMANT submits that by virtue of Art. 29(1) of the CISG, both Parties have orally agreed to modify the Sales Agreement to include RESPONDENT'S amended contractual obligation to reach a solution for price adaptation through negotiation. [*Cl. Ex. C8, p. 18, ¶ 1*; *Propane Case, pp. 16, 22*]. For the purposes of Art. 29(1) of the CISG, there is no need for consideration to be provided by CLAIMANT nor form requirements, as oral agreements between both Parties would suffice [*Di Matteo/Dhooge/Greene/Maurer/Pagnattaro, p. 331; Eiselen, p. 13*; *Shoes Case, pp. 6, 17; Dividing Wall Panels Case, p. 11*]. Hence, CLAIMANT is bringing a cause of action against RESPONDENT for the breach of the amended contractual obligation to exempt their liabilities for the hardship suffered from the tariff imposed by the Government of Equatoriana.

68. The tariff imposed by the Government of Equatoriana could amount to a hardship falling within the ambit of Clause 12 of the Sales Agreement as it had significantly disrupted the equilibrium of the Parties' agreement. Alternatively, CLAIMANT submits that the said hardship would amount to an 'impediment beyond control' of CLAIMANT for the purposes of Art. 79 of the CISG. As such, CLAIMANT is entitled to a price adaptation of US$ 1, 250, 000 under the Sales Agreement.

A. The Tariff Imposed by the Government of Equatoriana Could Amount to Hardship Falling Within the Ambit of Clause 12 of the Sales Agreement

69. The hardship clause within Clause 12 of the Sales Agreement [*Cl. Ex. C5, p. 14, Clause 12*] dictates that CLAIMANT should not be responsible for the cost of the 30% tariff imposed by the Government of Equatoriana, which constitutes an unforeseen risk [*NoA, p. 7, ¶ 19*]. With regards to the interpretation of Clause 12, the general principles of law regarding the hardship defence [*ICC 9994, pp. 79-80*] will have to be adhered to – namely that (1) the Tribunal must look at the Sales Agreement in an objective manner, (2) the CLAIMANT must not have assumed the risk of the tariff under the Sales Agreement, and (3) the 30% tariff must amount to a 'fundamental alteration' [*Brunner, p. 204-205*].

1. The Tariff Imposed by the Government of Equatoriana Amounts to an Unforeseen Hardship Disrupting the Equilibrium of the Sales Agreement

70. To insist CLAIMANT'S performance, which was in accordance with the unchanged terms of the contract, would be contrary to the principle of good faith and amount to an abuse of rights - particularly since CLAIMANT had not assumed the risk of the change of circumstances [*Brunner, pp. 205, 212 ; BGH/NJW (1977) ('to maintain the original contract would produce intolerable results incompatible with law and justice'), p. 2262-2263 ; Zimmermann, p. 13*]. Although CLAIMANT had performed the contract via delivery of the last instalment of horse semen, CLAIMANT had done so based on the impression that RESPONDENT would bear the additional costs of the tariffs from their negotiations [*Cl. Ex. C8, p. 18, ¶ 1*]. Hence, RESPONDENT'S subsequent refusal to fulfill their promise would be contrary to the principle of good faith.

71. Thus, the principle of *pacta sunt servanda* should be deviated from as the tariff imposed had fundamentally altered the equilibrium of the Sales Agreement. Commentators opine that such a risk of change of circumstances is to be assessed by contractual interpretation, from looking at the explicit or implicit intention of Parties [*Brunner, p. 204*]. This can be done by adopting an objective approach whereby the Tribunal would have to examine functional and equitable considerations [*Zweigert & Kötz, pp. 535, 536*]. Looking at the Sales Agreement objectively, any reasonable person in CLAIMANT'S position would also be under the same impression that RESPONDENT had

accepted CLAIMANT'S position to bear the cost of the tariffs due to the statement of assurance by RESPONDENT that "a solution would be found through negotiation" [*Cl. Ex. C8, p. 18, ¶ 1*].

2. CLAIMANT Had Not Assumed the Risk of the Imposition of the Tariff Prior to the Conclusion of the Sales Agreement

72. The general approach regarding hardship situations utilizes an objective criteria, and if the seller had assumed the risk under the Sales Agreement, the seller would be prevented from raising the hardship defence [*Brunner, p. 204*]. An examination of the negotiation stage prior to the conclusion of the Sales Agreement would indicate that both Parties would not have foreseen the Equatoriana Government's retaliation with an imposition of tariff on Mediterraneo's agricultural goods, particularly where the trade history of Equatorania suggests that they are ardent supporters of free trade [*NoA, p. 6, ¶ 10; ICC 8486, pp. 162-173*].

73. Moreover, although both Parties are made aware of the tariff via the Peak Business News article, it never occurred to either Party that horse semen would be considered an agricultural good. [*Cl. Ex. C6, p. 15, ¶ 3*] Thus, the imposition of the tariff could not be said to have been assumed by CLAIMANT, regardless of whether the Sales Agreement was speculative or not. [*Iron Molybdenum Case, pp. 3, 20*]

74. Alternatively, the Tribunal may also look at the profit margin of the seller to determine if they had assumed a proportionately greater risk [*Brunner, p. 226*]. On the facts, CLAIMANT'S profit margin under the Sales Agreement was a meagre 5% for the transaction. The imposition of the 30% tariff was unexpected by CLAIMANT, and as stipulated under Clause 12 of the Sales Agreement, the occurrence of such situations should be RESPONDENT'S responsibility in the event it occurs. Although neither party is responsible for the tariffs, since they were imposed by the RESPONDENT'S home country, they are therefore closer associated with RESPONDENT than with CLAIMANT [*NoA, p. 7, ¶ 18*].

3. The Government of Equatoriana's Imposition of Tariff on Agricultural Goods From Mediterraneo Amounts to a 'Fundamental Alteration' of the Equilibrium of the Sales Agreement

75. As Danubia is a common law country [*PO. 2, p. 61, ¶ 44*], reference is made to common law jurisdictions which have taken varying stances with regards to the degree required to constitute hardship. The question as to whether the 30% tariff imposed by the Equatoriana Government is "fundamental" will depend upon the circumstances of the case, as opposed to the thumb nail rule previously adhered to by Tribunals within common law jurisdictions [*Fucinati/Fondmetall, p. 11*; *Bonnell, pp. 42, 117; Official Comment On The UNIDROIT Principles*].

76. The circumstances surrounding the present dispute suggest that it would be contrary to the principles of good faith if CLAIMANT is required to bear the 30% increase in cost of performance, as it could constitute hardship, particularly since CLAIMANT is undergoing impeding financial ruin [*Schlechtriem, p. 138; Brunner, p. 230; Alsing/Greece, p. 320*]. Commentators have opined that the criterion of impending financial ruin of CLAIMANT lowers the threshold for the hardship defence [*Schlectriem, p. 138*]. Moreover, CLAIMANT had performed delivery of the horse semen in reliance and expectation that RESPONDENT would bear the additional costs of the tariff [*Alimenta/Gibbs, p. 3*]. Hence, it is concluded that the imposition of 30% tariff by the Equatoriana Government amounts to a fundamental alteration of the equilibrium of the Sales Agreement, particularly since CLAIMANT is on the verge of financial ruin and has been making losses since 2014 [*PO. 2, p. 59, ¶ 29*].

B. CLAIMANT is Exempt From Any Liability for Damages Under Art. 79 of the CISG, Which is Not Derogated in the Sense of Art. 6 of the CISG

77. CLAIMANT asserts that (1) the inclusion of the combined force majeure and hardship clause does not constitute a derogation in the sense of Art. 6 of CISG. Moreover, (2) CLAIMANT'S responsibility for the 30% tariff is exempted pursuant to Art. 79 of the CISG, as CLAIMANT'S failure to perform its obligation was due to an impediment beyond their control; (3) CLAIMANT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and (4) CLAIMANT could not have avoided or overcome the

impediment or its consequences. Another methodological approach that could be taken by the Tribunal would be to (5) interpret the CISG by filling up the gaps of the intentionally broad and vague wording of Art. 79 via Art. 7(1) and 7(2) of the CISG by reference to the UPICC.

1. Clause 12 of the Sales Agreement Does Not Constitute a Derogation in the Sense of Art. 6 of the CISG

78. CLAIMANT submits that the inclusion of the force majeure and hardship clause into the Sales Agreement does not mean that Parties have provided for a special regulation for the problem of changed circumstances excluding the application of Art. 79 of the CISG, and it does not constitute a derogation in the sense of Art. 6 of the CISG. According to several courts, opting-out requires a clear, unequivocal and affirmative agreement of the parties [*UNCITRAL Digest, p. 33 ; Stave Manufacturing Machines Case, pp. 3-4 ; Automobiles Case, pp. 14-15*]. Several commentators propound that such intention of derogating from the CISG would require 'real' and not 'theoretical' intent, whereby exclusions must be 'express' or 'clearly implied in fact' [*Honnold, pp. 107-108*]. The high threshold for intention to derogate under Art. 6 of the CISG is necessary to ensure greater and more predictable and uniform application of the CISG [*CISG-AC Opinion No.16, ¶ 3.5*].

79. Looking at the present dispute, it could not be said that the reference of the term 'hardship' would indicate CLAIMANT'S intention to derogate from the provisions of Art. 79 of CISG. CLAIMANT'S intention would have to be interpreted according to the understanding of a reasonable person based on the relevant circumstances of the case, including negotiations and conduct of both Parties [*Art. 8(2) & 8(3) of the CISG*]. As RESPONDENT had refused the ICC Hardship Clause 2003 that was suggested by CLAIMANT for being too broad, both CLAIMANT and RESPONDENT later agreed on a narrow hardship reference to be included into Clause 12 of the Sales Agreement [*Res. Ex. R3, p. 35, ¶ 3*]. This was necessary in order to regulate some other risks in the Sales Agreement due to the DDP delivery insisted upon by RESPONDENT [*Res. Ex. R3, p. 35, ¶ 3*]. Without such a provision, CLAIMANT would never have agreed to the DDP delivery, as such a delivery agreement would clearly bring along several risks unfavourable to CLAIMANT which may destroy the commercial realities of the Sales Agreement. [*NoA, p. 5, ¶ 7*].

80. As such, according to the understanding of a reasonable person looking at the present circumstances, it could not be said that CLAIMANT had a clear, unequivocal, and affirmative intention to derogate from Art. 79 in the sense of Art. 6 of the CISG. If CLAIMANT had a clear intention to derogate from the provisions of Art. 79 of the CISG, CLAIMANT would have legislated within the Sales Agreement to reflect such an intention, which is not present in the current dispute. Hence, CLAIMANT may still rely on the provisions of Art. 79 of the CISG.

2. CLAIMANT'S Failure to Perform Its Obligation Was Due to An Impediment Beyond Its Control

(i) The Tariff Imposed by the Equatoriana Government Constitutes an Impediment

81. The ambit of "impediment" under Art. 79 CISG is that economic hardship could constitute an impediment even if performance had not become literally impossible [*Steel Tubes Case, p. 12*]. The impediment may include changed circumstances that have made a party's performance excessively onerous, i.e. hardship [*CISG-AC Opinion No.7, ¶ 3.1*]. The question of what amounts to hardship could also be interpreted broadly as was done by the court in the *Steel Tubes Case*. This broad interpretation may include circumstances whereby a reluctance to renegotiate the terms of the contract following an unforeseeable circumstance which had given rise to a severe imbalance in the reciprocal obligation of either party, would be contrary to the principle of good faith.

82. In the present dispute, the Sales Agreement concluded by both Parties is a fixed-term contract which proves to be less ideal particularly where there are risks of market fluctuations, making such contracts difficult to execute during price fluctuations [*Tajudin, p. 5*]. The imposition of the tariff by the Equatoriana Government had caused CLAIMANT a cost increase of 25%, as well as disentitling CLAIMANT of their expected 5% profit margin.

83. Although performance of instalment of the last delivery of horse semen had been completed, CLAIMANT had done so on the assurance of RESPONDENT to a price renegotiation. RESPONDENT'S subsequent refusal to continue on with discussions for renegotiation and refusal

to bear the increased cost of performance caused by the 30% tariff [*Cl. Ex. 8, p. 18, ¶ 1*] would be contrary to the principle of good faith since there exists a severe imbalance in the equilibrium of the present Sales Agreement.

84. This had caused CLAIMANT much distress as they would have to bear the costs of the increased performance which would affect CLAIMANT'S restructuring plan with its creditors, being forced to sell off their dressage part of the business [*PO. 2, p. 59, ¶ 29*]. In light of the above, and following the reasoning in the *Steel Tubes Case,* it is submitted that the tariff amounts to an impediment [*Hansebout ('Scafom International was a landmark decision whereby the Supreme Court had categorized market fluctuations as an impediment under Art.79') pp. 1-3*].

(ii) The Impediment Was Beyond the Control of CLAIMANT

85. In assessing whether the impediment was beyond the control of CLAIMANT, the Tribunal would have to consider the objective standard of the nature of tariff by considering whether it has "roots outside the sphere of influence of the obligor" [*Atamer, ¶ 47*]. This factor would have to be considered alongside with whether CLAIMANT has explicitly or implicitly allocated risk of the imposition of the tariff into the Sales Agreement [*Vine Wax Case, p. 10 ; Iron Molybdenum Case, p. 19 ; UNCITRAL Digest, p. 375*]. This would require a value judgment as to why the risk of the aggrievement should not be left with the CLAIMANT. [*Perillo, p. 24*]

86. In the present dispute, the Government of Equatoriana's implementation of the tariff could not be said to be within the sphere of influence of CLAIMANT because CLAIMANT would not be able to predict nor prevent the Equatoriana Government's decision not to implement the tariff. The tariff was a State-level intervention against Mediterraneo's agricultural goods resulting from a retaliation which was inclusive of horse semen, an even unpredictable element unexpected by both CLAIMANT and RESPONDENT [*NoA, pg. 6, ¶ 10*].

(iii) CLAIMANT'S Non-performance Was Due to the Impediment

87. CLAIMANT urges this Tribunal to consider the fact that despite CLAIMANT having performed the final instalment of delivery of horse semen, this was upon RESPONDENT'S

insistence of timely delivery and assurance of price renegotiation of the Sales Agreement. CLAIMANT would not have carried on with the final delivery had such assurances not been made due to the impediment, which would not only destroy the commercial realities of the Sales Agreement but also lead to the financial ruin of CLAIMANT.

3. CLAIMANT Could Not Reasonably Be Expected to Have Taken the Impediment Into Account At the Time of the Conclusion of the Sales Agreement

88. The requirement that the impediment is unforeseeable after conclusion of a contract essentially means that it must have become evident at the time of performance as a result of unforeseen and unpreventable events with extraordinary character [*Coal Case, p. 4*]. If such impediment was foreseeable, the party concerned should have taken measures to prevent it in the first place. One school of thought adopted by commentators is that an assessment of foreseeability has to be considered in the perspective of a diligent merchant, i.e. the objective man [*Arroyo, p. 26 ; Almeida, p. 102*]. In the present dispute, it is submitted that the 30% tariff imposed by the Equatoriana Government was never expected, nor could it be prevented by CLAIMANT particularly where the trade history of Equatoriana suggests that they have always been fervent supporters of the free trade [*NoA, p. 6, ¶ 10*].

4. CLAIMANT Could Not Have Avoided or Overcome The Impediment or Its Consequences

89. Where CLAIMANT could overcome the impediment, it would not amount to an impediment under Art. 79 [*Tomato Concentrate Case, p. 9*]. In this dispute, CLAIMANT submits that as tariffs are products of governmental intervention, CLAIMANT could not have been expected to overcome the impediment, and would *de facto* be helplessly be affected by it.

5. Alternatively, the Tribunal May Fill In the Gaps of Art. 79 of the CISG by Reference to the UPICC On What Amounts to a 'Hardship'

89. Commentators have accurately stated that it is not sufficient to rely on the rules of the CISG alone when importing or exporting internationally [*Ferrari, p. 315*]. In many aspects, the CISG and

the UPICC complement one another since they share many common grounds, and thus the appropriate solution would be for courts to interpret CISG in line with the UPICC [*Arroyo, p. 38*]. Further, for the Tribunal to allow gap-filling of the CISG by reference to the UPICC promotes the central goal of unification of international sales law [*Garro, p. 1184*].

90. This Tribunal is allowed to fill in the broad wording of Art. 79 of the CISG by reference to the UPICC by virtue of Art. 7(1) and 7(2) of the CISG, which allows the Tribunal to interpret the CISG with regards to its international character and promote uniformity in application and observance of good faith in international trade. This thereby allows UPICC to fill in the gaps of Art. 79 of the CISG since it is an openly debated issue of whether Art. 79 encapsulates "hardship" [*Steel Tubes Case, pp. 2-3*].

91. Under Art. 6.2.2 of the UPICC, there is hardship where there is an 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, and (a) the events occur or become known to the disadvantaged party after conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

92. Upon first glance, it seems that the provisions of Art. 6.2.2 of the UPICC and the general elements consistently considered by Tribunals needed to satisfy that hardship would qualify as an "impediment beyond control" are by and large the same. As such, CLAIMANT submits the same that the (a) tariff imposed by the Equatoriana Government had occurred after the conclusion of the Sales Agreement; (b) the tariff could not have reasonably been taken into account by CLAIMANT as neither CLAIMANT or RESPONDENT would foresee that an ardent supporter of free trade such as Equatoriana would retaliate with a tariff on Mediterraneo agricultural goods; (c) the tariff imposed is beyond CLAIMANT'S control as it is a government interventionist measure; (d) and lastly CLAIMANT had not assumed any such risks under the Sales Agreement, as seen in the 5% profit margin which CLAIMANT had intended to profit under the Sales Agreement. Thus, CLAIMANT is entitled to request for renegotiations, and if such negotiation fails, the Tribunal may

adapt the contract with a view to restore the equilibrium of the Sales Agreement [*Art. 6.2.3(1) and 6.2.3(4)(b) of the UPICC*].

C. Establishment of the Hardship Defence Under Clause 12 of the Sales Agreement and the CISG Would Entitle CLAIMANT to Renegotiations With a View of Termination or Price Adaptation of the Contract Under Art. 6.2.3(4)(b) of the UPICC

93. As CLAIMANT had fulfilled all elements of the hardship of defence under Clause 12 of the Sales Agreement and proven that there was an impediment beyond control leading to an imbalance in the equilibrium of the Sales Agreement under the CISG, CLAIMANT is entitled to renegotiations pursuant to Art. 9(2) of the CISG and Art. 6.2.3(1) of the UPICC. Commentators propagate that Art. 9(2) is relevant as it considers the idea of renegotiation as a usage since many industries and commodity markets are characterized by sudden changes, and it is common that Parties to international transactions renegotiate the terms of the Sales Agreement including the price with the purpose of keeping their contracts "alive" [*Arroyo, p. 45; Ferrari, p. 576*].

94. In the present dispute, CLAIMANT'S counsel, Ms. Napravnik, had negotiated with RESPONDENT'S counsel, Mr. Shoemaker, following the Equatoriana Government's decision to impose the tariff [*Cl. Ex. C8, p. 18, ¶ 1*]. During negotiations, RESPONDENT had acknowledged the problems faced by CLAIMANT and agreed for a solution to be reached through negotiations, and had further gone on and urged CLAIMANT to authorize shipment as planned, even before an agreement on price had been reached. In doing so, RESPONDENT was acting contrary to what was agreed upon under Clause 5 of the Sales Agreement [*Cl. Ex. 5, p. 14, Clause 5*].

95 After delivery was made, CLAIMANT discovered that RESPONDENT had breached the resale prohibition under the Sales Agreement and urgently needed part of the doses to satisfy RESPONDENT'S creditors – indicating that negotiations were done in bad faith with no intention to continue with price adaptation. Supporting this proposition was the manner by which RESPONDENT'S CEO, Ms. Espinoza had called all negotiations off and were disinterested with having a long-term relationship with CLAIMANT [*Art. 2.15 of the UPICC*].

96. Under Art. 2.15(2) of the UPICC, the provision suggests that RESPONDENT who acted in bad faith is liable for the losses caused to CLAIMANT. It should be noted that without RESPONDENT'S assurance that (i) a solution would be found through negotiation; (ii) intention to maintain a long-term relationship with CLAIMANT; and (iii) their future plans to purchase 50 doses from Empire's State which is CLAIMANT'S second world renowned stallion, CLAIMANT would not have gone through with the delivery of the final instalment of semen without agreeing on a price.

97. Aside from that, as renegotiation between both CLAIMANT and RESPONDENT had failed, CLAIMANT has resorted to this Tribunal to request for a price adaptation upon proving that the hardship has led to an imbalance in the fundamental equilibrium of the Sales Agreement, as it is a relief consistent with the CISG [*Art. 6.2.3 (4)(b) of the UPICC* / ¶ *3.2 of AC Opinion No.7*]. During an adaptation of the Sales Agreement, the Tribunal would have to balance the Parties' interests and try to minimize the intervention in the Parties' contract [*Brunner, p. 269*]. In doing so, the hypothetical intention of Parties should be used as the primary starting point: the question being, what the Parties, in view of the terms of the contract and other declarations made during or after the conclusion of the contract, would have provided if they had considered the change of circumstances [*BGE 127 III (2001), pp. 300, 307*].

98. The Tribunal may adjust the Sales Agreement by ordering an appropriate compensatory payment or monetary adjustment to adequately allow for RESPONDENT to indemnify CLAIMANT for the 25% increased cost of performance of the Sales Agreement [*Lando/ Beale, p. 327*]. It should be noted that CLAIMANT is merely requesting 25% of the increased costs, as opposed to the full 30% increased cost of performance due to the tariff imposed. Thus CLAIMANT would rather lose a 5% profit margin which was originally expected under the Sales Agreement. This gesture speaks to the intention of CLAIMANT, which has not wavered in the aspirations for a long-term relationship between CLAIMANT and RESPONDENT.

PRAYER FOR RELIEF

For the reasons stated above, CLAIMANT respectfully requests that the Tribunal:

(1) Declare that the law of Mediterraneo is the governing law of the arbitration agreement;

(2) Seize the jurisdiction and/or power to adapt the contract under the arbitration agreement;

(3) Entitle CLAIMANT to submit the evidence from the other arbitration; and

(4) Award CLAIMANT full compensation for the increased cost of performance of the Sales Agreement in the amount of US$ 1, 250, 000 via the mechanism of price adaptation, plus interest and costs of arbitration, including legal fees, which will be calculated after the evidentiary hearing.

CLAIMANT reserves the right to amend its prayer for relief as may be required.

(signed)

\s\ Matthew Lum Jun Liang

\s\ Rachel Tee Zi Wei

\s\ Robin Ho Ming Teck

\s\ Wong Wen Sheng