Memorandum for Claimant

Case No.: HKIAC/A18128

On Behalf Of:
Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

Against:
Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

Claimant

Alex Chan • Bobo Chan • Jasmine Chan • Esther Ho
Vanessa Hung • Aaron Kwong • Sharon Lee • Ben Poon
Nicole Xiao • Tricia Yu • Yuki Yung • Jenny Y. Zhang

Respondent
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   b. The Tribunal should adapt the Contract as the renegotiation failed.

2. The Tribunal should raise the price by US$1,250,000.
   a. The Parties objectively intended RESPONDENT to bear the Tariff costs.
   b. The Tribunal should adapt the Contract by 25% on the basis of good faith.

II. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 BY CONTRACT ADAPTATION UNDER CISG

A. ART.79 CISG APPLIES TO THE CONTRACT

B. THE TRIBUNAL SHOULD ALLOW CLAIMANT TO RELY ON ART.79 CISG

1. The Tribunal should prevent the use of domestic law to deal with hardship to promote uniformity in CISG’s application.

2. The Tribunal should not permit RESPONDENT to rely on a literal interpretation of Art.79 CISG to uphold good faith in international trade.

C. THE TARIFF SATISFIES ALL THE REQUIREMENTS UNDER ART.79 CISG

1. The Tariff is an impediment beyond CLAIMANT’s control.

2. CLAIMANT could not reasonably be expected to have taken into account the Tariff and its cost at the time of contracting.

3. CLAIMANT could not have reasonably avoided the Tariff or overcome the Tariff cost.

D. THE TRIBUNAL SHOULD ADAPT THE CONTRACT BY RAISING THE PRICE BY US$1,250,000 UNDER ART.7(2) CISG

1. The Tribunal should adapt the Contract under favor contractus.

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STATEMENT OF FACTS

1. **Phar Lap Allevamento** (CLAIMANT) operates Mediterraneo’s oldest and most renowned stud farm, covering all areas of the equestrian sport. **Black Beauty Equestrian** (RESPONDENT) is the owner of broodmare lines and a racehorse stable in Equatoriana.

2. In 2014, Danubia imposed new health and safety requirements. CLAIMANT incurred significant costs for long quarantine time and expensive tests for its sale of three mares to farms in Danubia.

3. Since 2014, CLAIMANT has been making substantial losses, and agreed on a restructuring plan to secure further credit. Under this plan, CLAIMANT must become profitable in 2017 and 2018.

4. In 2016, CLAIMANT, represented by Ms. Julie Napravnik, and RESPONDENT, represented by Mr. Chris Antley, first met at Equestrian World.

5. On 21 March 2017, Mr. Antley enquired with Ms. Napravnik if CLAIMANT can provide Nijinsky III’s frozen semen for RESPONDENT’s new breeding programme. RESPONDENT started this programme because Equatoriana lifted the ban on artificial insemination.

6. On 24 March 2017, CLAIMANT offered to sell 100 doses of Nijinsky III’s semen to RESPONDENT at US$99,500 each on EXW. It demanded RESPONDENT not to use the semen on any mares apart from those specified in the Contract, or resell it to any third party.

7. On 28 March 2017, RESPONDENT accepted CLAIMANT’s proposal that Mediterranean law applies if Equatorianian Courts have jurisdiction. It also insisted on standard DDP.

8. On 31 March 2017, CLAIMANT counter-proposed to use arbitration in Mediterraneo without objecting to the application of Mediterranean Law. While it accepted DDP, it required a rise in price by US$1,000 per dose and rejected any further risks of changes in import restrictions. CLAIMANT insisted to at least include a hardship clause in the Contract.

9. On 10 April 2017, RESPONDENT drafted the Arbitration Clause based on HKIAC Model Clause. CLAIMANT then amended the draft by deleting the paragraph that specifies Equatoriana as the law governing the Arbitration Clause, and changing the arbitral seat to Danubia.

10. On 12 April 2017, Ms. Napravnik and Mr. Antley, the Parties’ negotiators, had an accident and were severely injured. The Parties then replaced them with Mr. John Ferguson (for CLAIMANT) and Mr. Julian Krone (for RESPONDENT). Mr. Krone continued the negotiation for CLAIMANT with the pre-existing files left by Mr. Antley.
11. On 6 May 2017, Mr. Ferguson and Mr. Krone finalised and signed the Contract.

12. On 20 May 2017 and 3 October 2017, CLAIMANT delivered the first and second shipments, each of 25 doses of horse semen, to RESPONDENT.

13. On 15 November 2017, Mediterraneo imposed 25% tariffs on agricultural products from Equatoriana.

14. On 19 December 2017, contrary to its consistent trade policy, Equatoriana retaliated by unilaterally imposing the Tariff on agricultural products from Mediterraneo.

15. On 20 January 2018, CLAIMANT learnt that, to the Parties’ surprise, the Tariff applied to horse semen. CLAIMANT then put the third shipment on hold, and offered to renegotiate.

16. On 21 January 2018, by representing that breeding season was due to begin, RESPONDENT urged CLAIMANT to deliver the third shipment, and pay the Tariff cost for the time being. RESPONDENT promised to find a solution with CLAIMANT. Therefore, on the same day, RESPONDENT paid only US$5,000,000, but did not pay the Tariff cost.

17. On 23 January 2018, CLAIMANT timely delivered the third shipment to RESPONDENT.

18. On 12 February 2018, CLAIMANT challenged RESPONDENT for its breach of resale prohibition. RESPONDENT’s CEO stopped the Parties’ renegotiations and refused to pay the Tariff cost.

19. On 29 June 2018, the tribunal in the Other Arbitration rendered its Partial Interim Award.


21. On 24 August 2018, RESPONDENT filed the Answer to Notice of Arbitration, and objected to the Tribunal’s jurisdiction to adapt the Contract.

22. On 2 October 2018, CLAIMANT learnt about RESPONDENT’s legal position on contract adaptation in the Other Arbitration. CLAIMANT requested the Tribunal to admit the Evidence, which includes the Partial Interim Award.

23. On 3 October 2018, RESPONDENT objected to the admissibility of the Evidence.

24. On 5 October 2018, PO1 was issued.

25. On 2 November 2018, PO2 was issued.
SUMMARY OF ARGUMENTS

26. CLAIMANT and RESPONDENT endeavoured to have a long-term collaborative relationship. In hope of forging such relationship, CLAIMANT unprecedentedly agreed to sell Nijinsky III’s frozen semen to RESPONDENT. To CLAIMANT’s dismay, a collaborative relationship turned out to be exploitative: RESPONDENT has been disguising itself as an aspiring leader in horse breeding, while its true intention has always been to resell CLAIMANT’s horse semen, and make unjustifiable profits at CLAIMANT’s expense. Out of the blue, a trade war broke out between Mediterraneo and Equatoriana. Forcing CLAIMANT to bear the Tariff alone means that CLAIMANT would be sacrificed to Equatoriana’s protectionist ambition.

27. Party autonomy is fundamental to international arbitration. The Parties’ choice of law governing the Arbitration Clause must be honoured. The Parties’ understanding has always been to empower the Tribunal to adapt the Contract. This possibility of adaptation forms the very basis of this transaction. Now, evading its liability to pay the Tariff cost, RESPONDENT attempts to strip the Tribunal of its adaptation power. In doing so, RESPONDENT blatantly disregards the Parties’ choice of law, places a strained interpretation of the Arbitration Clause, and twists the true meaning of the Four Corners Rule. To hold RESPONDENT to its promise and protect the Contract’s commercial basis, the Tribunal should find that it has jurisdiction to adapt the Contract [Issue 1].

28. The Tribunal is not only deciding on the merits of CLAIMANT’s claim, but the very existence of CLAIMANT. RESPONDENT took the position that contract adaptation was possible. The Tribunal should allow CLAIMANT to put forward the Evidence on RESPONDENT’s position to enable CLAIMANT to fully present its case [Issue 2]. Good faith is of utmost importance in international trade. Bearing this in mind, CLAIMANT has always treated RESPONDENT with nothing but good faith. To induce CLAIMANT to deliver the frozen semen despite the Tariff, RESPONDENT promised to renegotiate the price. Unfortunately, CLAIMANT has fallen into error of believing in RESPONDENT’s promise and acting upon it. Now, RESPONDENT’s CEO said there is “no deal”, stormed out of the Parties’ renegotiation, and denied its fair share of the Tariff cost. To refuse CLAIMANT’s request for contract adaptation would be to condone RESPONDENT’s breach of good faith. The financial ruin that the Tariff brings about would threaten CLAIMANT’s existence. Therefore, the Tribunal should adapt the Contract by raising the price [Issue 3].
JURISDICTION ARGUMENTS

ISSUE 1: THE TRIBUNAL HAS JURISDICTION UNDER THE ARBITRATION CLAUSE TO ADAPT THE CONTRACT

29. The Tribunal has jurisdiction under the Arbitration Clause to adapt the Contract. In deciding if a tribunal has jurisdiction to adapt contracts, it must determine: first, if parties can empower it to adapt contracts; and secondly, if they have done so [Kröll, p.3]. Whether parties can empower a tribunal to adapt contracts is governed by the procedural law of the arbitral seat [Berger I, p.85; Brunner, p.493; Kröll, p.3; Lew/Mistellis/Kröll, pp.107,418-419]. The arbitral seat is Danubia [CE5, p.14, c.15]. Danubian Arbitration Law adopted the Model Law as its procedural law [PO1, p.53, §III(4)]. Under the Model Law, the Parties can empower the Tribunal to adapt the Contract [I]. Whether parties have empowered the tribunal to adapt contracts is governed by the law of the arbitration agreement [Kröll, p.3]. The Tribunal should interpret the Arbitration Clause under Mediterranean Law, under which the Parties have empowered the Tribunal to adapt the Contract [II]. If the Tribunal interprets the Arbitration Clause under Danubian Law, the Parties have also empowered the Tribunal to adapt the Contract [III].

I. THE PARTIES CAN EMPOWER THE TRIBUNAL TO ADAPT THE CONTRACT UNDER THE MODEL LAW

30. The Parties can empower the Tribunal to adapt the Contract under the Model Law. Art.28(3) Model Law provides that the parties can expressly authorise a tribunal to adapt contracts [Trakman, pp.635-637; Waincymer, pp.1054,1057]. Under Danubian jurisprudence, the parties may do so by “an express conferral of powers” [PO2, p.60, §36]. Whether there is an express conferral is “a question of interpretation” of the parties’ arbitration agreement [Waincymer, p.1047]. Therefore, the Parties can empower the Tribunal to adapt the Contract.

II. THE PARTIES EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT UNDER A MEDITERRANEAN LAW INTERPRETATION

31. The Tribunal should interpret the Arbitration Clause under Mediterranean Law. Under to a Mediterranean Law interpretation, the Parties have empowered the Tribunal to adapt the Contract. The separability presumption does not prevent Mediterranean Law from governing the Arbitration Clause [A]. The Tribunal should look at all pre-contractual negotiations between Ms. Napravnik and Mr. Antley to ascertain the Parties’ intent under Art.4.3(a) UNIDROIT Principles [B]. Mediterranean Law governs the Arbitration Clause and its interpretation,
because the Parties expressly [C] or impliedly [D] chose Mediterranean Law. The Parties have empowered the Tribunal to adapt the Contract under a Mediterranean Law interpretation [E].

A. THE SEPARABILITY PRESUMPTION DOES NOT PREVENT UNIDROIT PRINCIPLES FROM GOVERNING THE ARBITRATION CLAUSE

32. Contrary to RESPONDENT’s submission [ANA, p.31, §14], the separability presumption does not prevent UNIDROIT Principles from governing the Arbitration Clause. In deciding which law governs an arbitration agreement, a tribunal should always start with the separability presumption [Born, p.475]. The separability presumption applies in two situations. First, it applies to save an arbitration clause from invalidity when the contract is “null and void” under Art.16(1) Model Law [BCY; Blackaby/Partasides, pp.345,346; Born, pp.377-378,405; Holtzmann/Neuhaus, p.480; Lew/Mistellis/Kröll, pp.102,104]. Secondly, it excludes CISG’s application to an arbitration clause under Danubian jurisprudence [PO2, p.60, §36]. However, it does not require the law of an arbitration clause to be different from the law of the contract [BCY; Blackaby/Partasides, p.167; Born, pp.464,476; Betancourt, pp.95,96].

33. The Parties agreed that the Contract is valid [NA, p.6, §14; ANA, pp.30-32, §§5-8,13-17]. The separability presumption permits the Arbitration Clause to be governed by the law of the Contract, which is Mediterranean Law [CE5, p.14, c.14]. Mediterranean Law comprises CISG and Mediterranean Contract Law, which is the verbatim adoption of UNIDROIT Principles [PO1, p.52, §III(4)]. Under Danubian jurisprudence, the separability presumption only prevents CISG from applying to the Arbitration Clause [PO2, p.60, §36]. Accordingly, UNIDROIT Principles still apply to the Arbitration Clause and its interpretation.

B. THE PARTIES EXPRESSLY CHOSE MEDITERRANEAN LAW TO GOVERN THE ARBITRATION CLAUSE AND ITS INTERPRETATION

34. Mediterranean Law governs the Arbitration Clause and its interpretation, because the Parties expressly chose Mediterranean Law to govern the Contract. The parties’ express choice of law governs their arbitration agreement [Sulamérica; Redfern/Hunter, pp.158,159], and its interpretation [Gatoil; Insurance; International Tank; Recyclers; 4A_376/2008; Blackaby/Partasides, pp.166,167; Born, pp.635,1397-1398]. The Parties expressly chose Mediterranean Law to govern the Contract [CE5, p.14, c.14], which contains the Arbitration Clause. Therefore, Mediterranean Law governs the Arbitration Clause and its interpretation.
C. THE TRIBUNAL SHOULD LOOK AT ALL PRE-CONTRACTUAL NEGOTIATIONS TO ASCERTAIN THE PARTIES’ INTENT UNDER ART.4.3(a) UNIDROIT PRINCIPLES

35. The Tribunal should look at all pre-contractual negotiations between Ms. Napravnik and Mr. Antley to ascertain the Parties’ intent under Art.4.3(a) UNIDROIT Principles. Under Art.4.3(a), to ascertain the Parties’ intent, a tribunal should look at all relevant circumstances, including the parties’ pre-contractual negotiations [Vogenauer, pp.588,589]. The law of the principal’s registration place governs an agent’s authority to negotiate arbitration agreements [Born, pp.633,634]. CLAIMANT and RESPONDENT are from Mediterraneo and Equatoriana respectively [NA, pp.4,5, §§1,4]. Both jurisdictions’ general contract laws have adopted UNIDROIT Principles verbatim [PO1, p.53, §III(4)]. Under Art.2.2.3(1) UNIDROIT Principles, if an agent acts within his authority and the third party knew, or ought to have known, the agent was acting as such, the agent’s act “directly binds” his principal [Official Comment, Art.2.2.3, §2]. Any intent that the agent communicates to, or receives from, the third party affects the principal’s legal position as if the principal itself had made or received it [Official Comment, Art.2.2.3, §2].

36. The Parties know and agree that Ms. Napravnik and Mr. Antley acted within authority as their “prime” and “exclusive” negotiators [CE8, p.17, §2; RE3, p.35, §§1,3]. All the written and oral representations they made during negotiations affect the Parties’ legal position. The Parties replaced Ms. Napravnik and Mr. Antley with new negotiators [CE8, p.17, §2; RE3, p.35, §§1,4]. However, all intents communicated to, and received from, Ms. Napravnik and Mr. Antley, before they were replaced, continue to affect the Parties, as if the Parties themselves were involved in those negotiations. These include those communicated during the short meeting between Ms. Napravnik and Mr. Antley on 12 April 2017 [CE8, p.17, §§3,4]. As the Parties continued to negotiate based on their “preexisting file”, later negotiations continued on the same basis [PO2, p.55, §4]. Therefore, to ascertain the Parties’ intent, the Tribunal should look at all pre-contractual negotiations between Ms. Napravnik and Mr. Antley.

D. THE PARTIES IMPLIEDLY CHOSE MEDITERRANEAN LAW TO GOVERN THE ARBITRATION CLAUSE AND ITS INTERPRETATION

37. Alternatively, Mediterranean Law governs the Arbitration Clause and its interpretation, because the Parties impliedly chose Mediterranean Law. If there is no parties’ express choice of law to govern their arbitration agreement, their implied choice governs it [BCY; Sulamérica; Blackaby/Partasides, p.231; Kaplan/Moser, pp.134,135], and its interpretation [Gatoil; Insurance; International Tank; Recyclers; 4A_376/2008; Blackaby/Partasides, pp.166,167; Born, pp.635,1397-1398]. Mediterranean Law presumptively governs the Arbitration Clause.
and its interpretation as the Parties’ implied choice of law [1]. This presumption is not rebutted because the Parties intended Mediterranean Law to apply [2].

1. Mediterranean Law presumptively governs the Arbitration Clause and its interpretation as the Parties’ implied choice of law

38. Mediterranean Law presumptively governs the Arbitration Clause and its interpretation as the Parties’ implied choice of law. Parties are presumed to have chosen the law of the contract to govern their arbitration agreement [BCY; ICC 6752; Krauss; Sulamérica; Blackaby/Partasides, pp.166,167; Born, pp.515,581; Lew, p.127; Lew/Mistellis/Kröll, pp.107,120]. The presumption is stronger if the parties’ arbitration agreement is valid under the law of the contract [Born, pp.590-593]. The Parties have presumptively chosen Mediterranean Law, the law of the Contract [CE5, p.15, c.14], to govern the Arbitration Clause. The Parties do not dispute the Arbitration Clause’s validity [PO2, p.61, §48]. Therefore, the Parties’ presumptive, implied choice of Mediterranean Law governs the Arbitration Clause and its interpretation.

2. The presumption that Mediterranean Law governs the Arbitration Clause and its interpretation is not rebutted

39. The presumption that Mediterranean Law governs the Arbitration Clause and its interpretation is not rebutted. The presumption is rebutted if the parties intend to apply a law different from the law of the contract to their arbitration agreement [BCY; Sulamérica]. A tribunal may look at the parties’ words and acts to ascertain their intent [Lew/Mistellis/Kröll, p.415]. Including an arbitration clause in a contract indicates the parties’ intent to apply the contract’s governing law to the arbitration clause [BCY; Sulamérica; Lew/Mistellis/Kröll, p.120].

40. RESPONDENT never intended to apply a law different from Mediterranean Law to the Arbitration Clause. RESPONDENT only refused to simultaneously apply Mediterranean Law “and” submit disputes to Mediterranean Courts [CE3, p.11, §3]. It “could accept the application of the Law of Mediterraneo” [CE3, p.11, §3]. Thus, CLAIMANT removed the reference to Mediterranean Courts from the Arbitration Clause’s original version [PO2, p.55, §4] and suggested “arbitration in Mediterraneo” [CE4, p.12, §5]. RESPONDENT then proposed that Equatorianian Law governs the Arbitration Clause and Equatoriana should be the arbitral seat [RE1, p.33, §2]. CLAIMANT rejected RESPONDENT’s proposal on “the law of this arbitration clause”, and counter-proposed that Mediterranean Law “remains” applicable and Danubia should be the arbitral seat [RE2, p.34, §§3,4]. RESPONDENT did not object to CLAIMANT’s proposals. Although the Parties replaced their negotiators [CE8, p.17, §2; RE3, p.35, §§1,4], they still included CLAIMANT’S
proposals in the Contract [PO2, p.55, §6]. This indicates the Parties’ intent to apply Mediterranean Law to the Arbitration Clause. As Mediterranean Courts have no jurisdiction, CLAIMANT’s proposals are consistent with RESPONDENT’s intent not to apply Mediterranean Law “and” submit disputes to Mediterranean Courts. Accordingly, the presumption that Mediterranean Law governs the Arbitration Clause and its interpretation is not rebutted.

E. THE PARTIES HAVE EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT UNDER MEDITERRANEAN LAW

41. The Parties have empowered the Tribunal to adapt the Contract under Mediterranean Law. The Parties have empowered the Tribunal to adapt the Contract according to Mediterranean Courts’ jurisprudence [1] and under an Art.4.1 UNIDROIT Principles interpretation [2].

1. The Parties have empowered the Tribunal to adapt the Contract by a standard arbitration agreement according to Mediterranean Courts’ jurisprudence

42. The Parties have empowered the Tribunal to adapt the Contract by a standard arbitration agreement under Mediterranean Courts’ jurisprudence. A standard arbitration agreement empowers a tribunal to adapt contracts as a court can under Art.6.2.3(4)(b) Mediterranean Contract Law [PO2, p.60, §39]. A standard arbitration agreement is one that is recommended by the parties’ chosen arbitral institution [Blackaby/Partasides, p.110; Bond, p.69]. It specifies three essential elements: an agreement to arbitrate, its scope, and the finality of awards [Lew/Mistellis/Kröll, pp.167-170].

43. The Parties chose HKIAC [CE5, p.14, c.15], which “recommends the use of” the HKIAC Model Clause [HKIAC Website]. The Parties adopted the HKIAC Model Clause with minor modifications as the Arbitration Clause [RE1, p.33, §1; Infra, §53]. However, the Arbitration Clause still contains the essential elements: the Parties’ agreement to arbitrate, “any dispute arising out of this contract, including the... interpretation... thereof” as its scope, and “finally resolved” to ensure the finality of the arbitral award [CE5, p.14, c.15]. Accordingly, the Arbitration Clause remains a standard arbitration agreement. Therefore, the Parties have empowered the Tribunal to adapt the Contract under Mediterranean Courts’ jurisprudence.

2. The Parties have empowered the Tribunal to adapt the Contract under an Art.4.1 UNIDROIT Principles interpretation

44. The Parties have empowered the Tribunal to adapt the Contract under an Art.4.1 UNIDROIT Principles interpretation. UNIDROIT Principles can be used to interpret the Contract [Supra
§33. The Parties’ common intent was to empower the Tribunal to adapt the Contract under Art.4.1(1) UNIDROIT Principles [a]. The Parties also objectively intended to empower the Tribunal to adapt the Contract under Art.4.1(2) UNIDROIT Principles [b].

a. **The Parties’ common intent was to empower the Tribunal to adapt the Contract under Art.4.1(1) UNIDROIT Principles**

45. The Parties’ common intent was to empower the Tribunal to adapt the Contract under Art.4.1(1) UNIDROIT Principles. Art.4.1(1) is used to interpret contracts pursuant to the parties’ common intent at the time of contracting [Vogenauer, pp.575,576]. A tribunal should consider all relevant circumstances, including preliminary negotiations, when applying Art.4.1(1) [Art.4.3 UNIDROIT Principles; Official Comment, Art.4.3, §1; Vogenauer, p.576].

46. Ms. Napravnik and Mr. Antley were the Parties’ negotiators [Supra, §36]. At their meeting on 12 April 2017, Ms. Napravnik sought a contract adaptation mechanism. Mr. Antley then agreed it should be “the task of the arbitrators” to adapt the Contract [CE8, p.17, §4]. This was also Ms. Napravnik’s “understanding of the existing provisions” [CE8, p.17, §4]. The Parties are deemed to have been involved in this meeting [Supra, §36]. Thus, under an interpretation of the then-existing draft of the Arbitration Clause, the Parties’ common intent on 12 April 2017, was to empower the Tribunal to adapt the Contract. After the Parties replaced Ms. Napravnik and Mr. Antley with new negotiators [CE8, p.17, §2; RE3, p.35, §§1,4], the new negotiators added two sentences to that draft. The two sentences concern only the number of arbitrators and the language of arbitration [PO2, p.55, §6]. Accordingly, the relevant parts of the draft Arbitration Clause of 12 April 2017 and the Arbitration Clause are identical. The Parties did not discuss contract adaptation afterwards. The Parties’ common intent at the time of contracting remained unchanged. Therefore, their common intent was to empower the Tribunal to adapt the Contract.

b. **The Parties objectively intended to empower the Tribunal to adapt the Contract under Art.4.1(2) UNIDROIT Principles**

47. The Parties objectively intended to empower the Tribunal to adapt the Contract under Art.4.1(2) UNIDROIT Principles. Art.4.1(2) is used to interpret a contract pursuant to a reasonable person’s understanding [Vogenauer, p.576]. The standard of reasonableness is “individualized and contextualized” [Vogenauer, p.577]. A reasonable person would have asked for legal advice and has the “linguistic knowledge” and “technical skill” of the parties [Official Comment, Art.4.1, §2; Vogenauer, pp.576,577]. A tribunal should consider all relevant circumstances,
including preliminary negotiations, when applying Art.4.1(2) [Art.4.3 UNIDROIT Principles; Official Comment, Art.4.3, §1; Vogenauer, p.577].

48. RESPONDENT has a legal department [RE3, p.35, §1]. A reasonable person in RESPONDENT’s position would thus have sought legal advice from the legal department, which has the linguistic knowledge and technical skill of a competent lawyer. RESPONDENT, represented by Mr. Antley, agreed that if a hardship arises and the Parties “could not agree” on an amendment, it should be “the task of the arbitrators to adapt” the Contract [Supra, §46]. RESPONDENT accepted this “connection of hardship clause with arbitration clause” [RE3, p.35, §2]. RESPONDENT, with its legal expertise, would have known that Mr. Antley’s act binds it [Supra, §36]. However, RESPONDENT, later represented by Mr. Krone, did not depart from this agreement [PO2, p.55, §6]. Therefore, a reasonable person in RESPONDENT’s position would understand that the Parties’ objectively intended to empower the Tribunal to adapt the Contract.

III. THE PARTIES HAVE EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT IF THE TRIBUNAL INTERPRETS THE ARBITRATION CLAUSE UNDER DANUBIAN LAW

49. If the Tribunal interprets the Arbitration Clause under Danubian Law, the Parties have empowered the Tribunal to adapt the Contract. Danubian Contract Law largely adopted UNIDROIT Principles [PO2, p.61, §45], and contains the Four Corners Rule [PO1, p.52, §II]. RESPONDENT submits that the Tribunal cannot look at external evidence to interpret the Arbitration Clause under the Four Corners Rule [ANA, p.32, §16]. The Parties empowered the Tribunal to adapt the Contract by the clear wording of the Arbitration Clause [A]. The Parties also empowered the Tribunal so when the Contract is read as a whole under Art.4.4 UNIDROIT Principles [B]. If the Arbitration Clause is unclear on its face, external evidence shows that the Parties empowered the Tribunal to adapt the Contract [C].

A. THE PARTIES EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT BY THE CLEAR WORDING OF THE ARBITRATION CLAUSE

50. Under Danubian Contract Law, the Four Corners Rule confines the four corners to the Contract [PO1, p.52, §II]. The Arbitration Clause is part of the Contract. The Parties empowered the Tribunal to adapt the Contract through the expression “any dispute arising out of this contract” in the Arbitration Clause [1]. Contrary to RESPONDENT’s submission [ANA, p.31, §13], the Parties did not exclude the Tribunal’s jurisdiction to adapt the Contract by modifying the HKIAC Model Clause [2].
1. The Parties empowered the Tribunal to adapt the Contract through the expression “any dispute arising out of this contract” in the Arbitration Clause

51. The Parties empowered the Tribunal to adapt the Contract through the expression “*any dispute arising out of this contract*” in the Arbitration Clause. When there is an arbitration agreement, all disputes are usually to be resolved by arbitration unless the contrary is shown [Fili; Born, p.1319]. A tribunal should broadly interpret “*any dispute*” to extend to all potential factual and legal disputes relating to the parties’ agreement or dealings [Bechtel; Mgmt. & Tech.; Born, p.1347]. Further, “*arising out of*” covers all matters within and beyond the contract that can be submitted to arbitration [Commandate; Dean; Fili; Blackaby/Partasides, p.109; Born, p.1353]. By agreeing that the Tribunal can decide on “*any dispute arising out of this contract*”, the Parties have empowered the Tribunal to adapt the Contract.

2. The Parties did not exclude the Tribunal’s jurisdiction to adapt the Contract by modifying the HKIAC Model Clause

52. RESPONDENT submits that by deleting certain phrases from the HKIAC Model Clause, the Parties excluded the Tribunal’s jurisdiction to adapt the Contract [ANA, p.31, §13]. Contrary to RESPONDENT’s submission, deleting those phrases does not exclude the Tribunal’s jurisdiction to adapt the Contract. It is “*artificial*” and “*obscure[s] the underlying commercial purposes*” of an arbitration agreement to draw fine distinctions in wording of arbitration clauses [Fili; Born, p.1346]. Accordingly, wording should “all be given expansive interpretations”, the differences between “*dispute*” and “*controversy, difference or claim*”, as well as “*arising out of*” and “*relating to*”, are minimal [Born, pp.1348,1350]. This is because these phrases “*encompass any sort of disagreement, dispute, difference, or claim*” that can be submitted to arbitration [Born, pp.1348,1350; Supra, §51]. “Non-contractual obligations” typically include “*claims not based on contractual provisions*” [Born, pp.1357,1358].

53. In drafting the Arbitration Clause, the Parties modified the HKIAC Model Clause by deleting the phrases: “*controversy, difference or claim*”, “*relating to [the contract]*” and “*any dispute regarding non-contractual obligations arising out of or relating to [the contract]*”. These deletions are immaterial, and do not indicate that the Parties refused to empower the Tribunal to adapt the Contract. Price adaptation is a contractual claim, as it concerns the interpretation of Clause 12 of the Contract. Therefore, the Parties did not exclude the Tribunal’s jurisdiction to adapt the Contract by modifying the HKIAC Model Clause.
B. THE PARTIES EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT WHEN THE CONTRACT IS READ AS A WHOLE UNDER ART.4.4 UNIDROIT PRINCIPLES

54. The Parties empowered the Tribunal to adapt the Contract when the Contract is read as a whole under Art.4.4 UNIDROIT Principles. Under Danubian Courts’ jurisprudence, Art.4.3 UNIDROIT Principles are replaced by the Four Corners Rule [PO2, p.61, §45]. Art.4.4 is still applicable. Under Art.4.4, a tribunal should interpret terms “in light of the whole contract”. A tribunal should interpret an arbitration clause together with other clauses in a contract “as a whole” to “render them consistent with each other” [Mastrobuono; Born, p.1323]. The Tribunal should interpret the Arbitration Clause with Clause 12, to render them consistent with each other. Under the Arbitration Clause, the Tribunal can decide on “any disputes arising out of” Clause 12 [CE5, p.14, c.15]. Clause 12 contains a hardship clause and provides that the “Seller shall not be responsible… for hardship” [CE5, p.14, c.12]. The Tribunal must decide on the Parties’ responsibilities, and thus how to adapt the Contract. Therefore, the Parties have empowered the Tribunal to adapt the Contract when the Contract is read as a whole.

C. IF THE ARBITRATION CLAUSE IS UNCLEAR ON ITS FACE, EXTERNAL EVIDENCE CONFIRMS THAT THE PARTIES EMPOWERED THE TRIBUNAL TO ADAPT THE CONTRACT

55. Under the Four Corners Rules, the Tribunal can look at external evidence if the Arbitration Clause is unclear on its face. The Four Corners Rule prohibits the parties from relying on external evidence to interpret a written agreement that is “clear on its face” [Posner, p.21; Zuppi, p.239]. External evidence is evidence that is outside the “four corners” of the written contract [Posner, p.21; Zuppi, p.239]. The Four Corners Rule has similar effects as a merger clause under Art.2.1.17 UNIDROIT Principles [PO2, p.61, §45]. Under Art.2.1.17, external evidence is admissible to interpret the contract, but not to contradict or supplement it. External evidence includes all “previous correspondence of the parties” and their “oral undertakings and statements … during the course of the negotiations” [Vogenauer, p.373]. A tribunal may look beyond the contract’s four corners to interpret a contract when its express terms are ambiguous [Matria; Farnsworth, p.275]. A term is ambiguous when it is “reasonably susceptible to different interpretations” [Energy Partners; Matria].

56. The language of the Arbitration Clause, on its face, is ambiguous. There are different interpretations of “any dispute arising out of this contract” as to whether it includes a dispute on contract adaptation [CE5, p.14, c.15]. The Tribunal can look at the external evidence, such as the Parties’ previous correspondence and oral statements, to interpret the Arbitration Clause.
RESPONDENT also accepted that the Tribunal can look at “drafting history and preceding communications” if the wording is unclear [ANA, p.32, §16]. The Parties’ previous correspondence and oral statements are used only to interpret the Arbitration Clause [Supra, §§46, 48]. They do not contradict or supplement the Contract, as the scope of the Arbitration Clause is clear and already covers a price adaptation claim [Supra, §51]. By looking at relevant external evidence, the Parties empowered the Tribunal to adapt the Contract.

57. **Issue 1 Conclusion**: Danubian Arbitration Law permits the Parties to empower the Tribunal to adapt the Contract. As the Parties expressly and impliedly chose Mediterranean Law to govern the Arbitration Clause, the Parties empowered the Tribunal to adapt the Contract. If Danubian Law governs, the Parties similarly empowered the Tribunal to adapt the Contract.

**ISSUE 2: THE TRIBUNAL SHOULD ADMIT THE EVIDENCE**

58. The Tribunal should admit the Evidence. The Tribunal has a wide discretion in admitting evidence and should not apply strict rules of evidence [I]. The Tribunal should admit the Evidence as it is relevant and material [II]. The Evidence is admissible although it was obtained by a breach of a confidentiality obligation [III] or illegal hacking [IV].

I. **THE TRIBUNAL SHOULD EXERCISE ITS WIDE DISCRETION TO ADMIT EVIDENCE AND DISAPPLY STRICT RULES OF EVIDENCE**

59. The Tribunal should exercise its wide discretion to admit evidence, and should disapply strict rules of evidence. The Parties agreed to have the arbitration administered under HKIAC Rules [CE5, p.14, c.15]. Under Art.22.2 HKIAC Rules, which largely mirrors Art.19(2) Model Law, a tribunal “shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence”. A tribunal has a wide discretion to admit the Evidence under Art.22.2 [Moser/Bao, p.191]. Further, the Tribunal should not apply strict rules of evidence. It is “essential” that arbitrators should not rely on strict rules of admissibility in civil cases [Carr; CSX; Holtzmann/Neuhaus, p.567; Redfern/Hunter, p.376; Secretariat Note, p.175]. These rules “have no place in international arbitration” as they were derived from the criminal jury system [Carreteiro, pp.93,94; Redfern/Hunter, pp.295,377; Pietrowski, p.375; Waincymer, p.793]. Any defects in obtaining the evidence only affects its credibility, weight, and value, but not admissibility [ICSID ARB13/13; Born, p.2311; Reisman/Freedman, p.743].

60. Since this is an international arbitration dispute, the Tribunal should not rely on the strict rules of evidence. RESPONDENT submits that the Evidence is inadmissible because of the assumed
defects in obtaining the Evidence [Fasttrack Email, p.51, §§1, 3; PO1, p.53, §III(1)(b)]. However, the Tribunal should first admit the Evidence, and then consider how such assumed defects affect its credibility, weight, and value. Therefore, the Tribunal has a wide discretion to admit evidence, and should not apply strict rules of evidence.

II. THE TRIBUNAL SHOULD ADMIT THE EVIDENCE WHICH IS RELEVANT AND MATERIAL TO SAFEGUARD CLAIMANT’S OPPORTUNITY TO PRESENT ITS CASE

61. The Tribunal should admit the Evidence which is relevant and material [A], and the Tribunal should safeguard CLAIMANT’s opportunity to present its case [B].

A. THE EVIDENCE IS RELEVANT AND MATERIAL

62. The Evidence is relevant and material. In deciding admissibility, a tribunal should consider the evidence’s relevance and materiality [ICSID ARB/01/02; Moser/Bao, p.192; Born, pp.2357, 2362; O’Malley, p.296]. The Evidence is relevant and material to determine: first, whether RESPONDENT should be estopped from asserting contradictory positions [1]; and secondly, RESPONDENT’s factual allegations are true [2].

1. The Evidence is relevant and material in determining if RESPONDENT should be estopped from asserting contradictory positions

63. The Evidence is relevant and material in determining if RESPONDENT should be estopped from asserting contradictory positions. Estoppel is “widely recognised” in international arbitration [ICC 1512; Gaillard, p.128; Rovine, p.113]. A tribunal should apply estoppel when a party has advanced contradictory positions in separate proceedings; and by doing so, it has obtained a benefit to the other party’s detriment [ICSID ARB/81/1; Gaillard/Savage, p.820]. It should consider the two proceedings’ context [ICSID ARB/81/1; Brandon]. When estoppel applies, a party is barred from raising a contradictory legal position in the subsequent proceedings [Brandon; Cleveland; Golshani; Patriot Cinemas]. In the present proceedings, estoppel applies [a], and the Evidence is relevant and material [b].

a. Estoppel applies

64. RESPONDENT should be estopped from asserting contradictory positions. RESPONDENT has advanced a contradictory position in these proceedings. The context of these proceeding is similar to that of the Other Arbitration: both contracts provide for Incoterms 2010 DDP and Mediterranean Law as the choice of law; both arbitration clauses are based on the HKIAC Model Clause; both goods are subject to tariffs [PO2, p.60, §39]. In the Other Arbitration,
RESPONDENT relied on the tariff as an “unforeseeable change of circumstances” and “asked for an adaptation” under Art.6.2.3(4)(b) UNIDROIT Principles [PO2, p.60, §39]. In these proceedings, CLAIMANT relies on the Tariff, and claims for contract adaptation also under Art.6.2.3(4)(b) [NA, p.8, §20]. Under Art.6.2.3(4)(b), a tribunal can only adapt the contract “if reasonable”. However, RESPONDENT asserts that adaptation is “not justified” and “completely baseless” [ANA, p.29, §§2,3], contradicting its position in the Other Arbitration.

65. RESPONDENT has obtained a benefit to CLAIMANT’s detriment. The tribunal in the Other Arbitration has endorsed an adaptation in RESPONDENT’s favour under Art.6.2.3(4)(b) [PO2, p.60, §39]. In this case, if the Tribunal accepts RESPONDENT’s contradictory legal position, RESPONDENT would not bear the Tariff cost either. CLAIMANT would have to bear the Tariff cost. Accordingly, RESPONDENT would obtain a benefit to CLAIMANT’s detriment. Therefore, RESPONDENT should be estopped from denying in these proceedings that Art.6.2.3(4)(b) applies.

b. The Evidence is relevant and material

66. The Evidence is relevant and material. Evidence is relevant if it proves facts from which legal conclusions are drawn [Born, p. 2362; Moser/Bao, p.193; Raeschke-Kessler, p.22; Waincymer, p.858]. The materials from other proceedings are relevant if they show that a party has made contradictory assertions [Waincymer, p.789]. Evidence is material if it assists a tribunal to determine if a factual allegation is true [Moser/Bao, p.193; Raeschke-Kessler, p.22].

67. The Evidence is relevant and material to determine if estoppel applies. First, the Evidence proves facts from which the Tribunal may draw legal conclusions of whether estoppel applies. Secondly, it assists the Tribunal to decide if CLAIMANT’s factual allegations regarding estoppel are true. Therefore, as the Evidence is relevant and material, the Tribunal should admit it.

2. The Evidence is relevant and material in determining if the Parties have agreed on contract adaptation

68. The Evidence is relevant and material in determining if the Parties have agreed on contract adaptation. RESPONDENT alleged that it would have “never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators” [ANA, p.32, §19]. However, the Evidence contradicts this allegation. The Evidence shows that RESPONDENT entered into another contract that allows for a tribunal’s adaptation [PO2, p.60, §39], which is “dependent on the discretion of the arbitrators” [Langweiler Email, p.50, §2]. This raises doubts regarding the truthfulness of RESPONDENT’s factual allegation.
Further, RESPONDENT alleged that according to its “understanding”, it did not agree to any adaptation [ANA, p.30, §10]. However, according to CLAIMANT, RESPONDENT’s Mr. Antley stated that “it would be the task of the arbitrators to adapt the contract” [CE8, p.17, §3]. The Evidence supports CLAIMANT’s version of the facts. The Evidence shows that in the Other Arbitration, RESPONDENT supported contract adaptation by the arbitrators [Langweiler Email, p.50, §3], based on a contract also negotiated by Mr. Antley [PO2, p.60, §39]. The Evidence assists the Tribunal to determine if RESPONDENT’s alleged “understanding” on adaptation is true. Therefore, the Tribunal should admit the Evidence as it is relevant and material in determining if the Parties agreed on contract adaptation.

B. THE TRIBUNAL SHOULD ADMIT THE EVIDENCE TO SAFEGUARD CLAIMANT’S OPPORTUNITY TO PRESENT ITS CASE

The Tribunal should admit the Evidence to safeguard CLAIMANT’s opportunity to present its case. Art.13.1 HKIAC Rules provides the parties with a “reasonable opportunity” to present their case. A “reasonable opportunity” has the same effect as a “full opportunity” under Art.18 Model Law [ADG; Holtzmann/Neuhaus, p.574; Welgand, p.272]. Any potential ground for a party’s inability to present its case encroaches upon its “full opportunity” to do so [Born, p.3496]. This may render the final arbitral award unenforceable [Art.36(ii) Model Law]. The Evidence is relevant and material [Supra, §§62-69]. CLAIMANT would be deprived of its opportunity to present its case, if CLAIMANT is not allowed to adduce the Evidence. Thus, the final arbitral award may be unenforceable. Therefore, the Tribunal should admit the Evidence.

III. THE EVIDENCE IS ADMISSIBLE ALTHOUGH IT WAS OBTAINED BY A BREACH OF A CONFIDENTIALITY OBLIGATION

The Tribunal should admit the Evidence despite a third party’s breach of a confidentiality obligation [A] to promote the transparency of the proceedings [B].

A. THE TRIBUNAL SHOULD ADMIT THE EVIDENCE DESPITE A THIRD PARTY’S BREACH OF A CONFIDENTIALITY OBLIGATION

The Tribunal should admit the Evidence despite a third party’s breach of a confidentiality obligation. Evidence is not “automatically” inadmissible when a confidentiality obligation is breached [Ali; Gas; Shearson; Ma/Kaplan, p.181; Gaillard/Savage, p.693]. Confidentiality is not absolute in private arbitration [Esso; Blackaby/Partasides, p.127; Ma/Kaplan, p.300; Drahozl, p.47]. A tribunal should not allow confidentiality obligations to “stifle the ability to bring to light any wrongdoing” [Profilati; Westwood]. When the same party is involved in two
arbitrations, if an award of one arbitration “may reinforce or contradict” that of another, the tribunal should admit the award to understand the “broader picture” [Ruscalla, p.9; Wälde, p.118]. The tribunal of the other arbitration must balance a claimant’s “right of equality of arms” against a respondent’s “right of defence” to ensure “the procedure’s integrity” [Dolling; ICSID ARB/05/22; ICSID ARB/07/5; Born, pp.855,856]. The right of equality of arms equates to the opportunity to present one’s case [Kaufman].

73. Assuming that the Evidence was obtained by a confidentiality breach by RESPONDENT’s former employees [PO1, p.53, §III(1)(b); PO2, pp.61,62, §41], the Tribunal should still admit the Evidence. Confidentiality of the Evidence is not absolute. The Tribunal should balance the Parties’ rights to ensure the procedure’s integrity. Since the Evidence is relevant and material, the Tribunal should admit the Evidence to safeguard CLAIMANT’s opportunity to present its case [Supra, §70]. On the other hand, admitting the Evidence would not encroach upon RESPONDENT’s right of defence. Under Art.22.4 HKIAC Rules, RESPONDENT can still request the Tribunal to hold a hearing to present additional evidence to contest the Evidence. Admitting the Evidence allows the Tribunal to understand this broader picture and protect the procedure’s integrity. RESPONDENT was a party to the Other Arbitration and this arbitration [PO2, p.60, §39], both of which arose out of the trade war between Mediterraneo and Equatoriana and, involved similar circumstances [CE6, p.15, §1; Supra, §64]. The Evidence may reinforce or contradict the Tribunal’s conclusions in the final award rendered in this arbitration. As the need to protect CLAIMANT’s opportunity to be heard outweighs the need to protect RESPONDENT’s right of defence, the Tribunal should admit the Evidence.

B. THE TRIBUNAL SHOULD ADMIT THE EVIDENCE TO PROMOTE THE TRANSPARENCY OF THE PROCEEDINGS

74. The Tribunal should admit the Evidence to promote the transparency of the proceedings. Tribunals have recognised that public interests are at stake when trade restrictions are involved [Banana Tariff; Ruscalla, p.9; Taniguchi, p.220]. A legal framework that produces predictable outcomes for investors can protect public interests [Zoellner, p.587]. Despite HKIAC’s emphasis on confidentiality [Art.45 HKIAC Rules], transparency in arbitration makes the outcomes more predictable [Born, pp.2821,2824; Drahozal, pp.523,530; Rogers, p.1301; Schultz, pp.579,1246]. Thus, tribunals tend to consider relevant awards as “persuasive authority” to protect investors’ interests [ICC 4131; ICC 7061; Meza-Salas; Ruscalla, p.9].
75. The Tribunal should admit the Evidence to promote the transparency of the proceedings. This dispute emerged from a series of trade restrictions imposed by the Equatorianian and Mediterranean governments [CE6, p.15, §1; PO2, p.60, §39]. These trade restrictions put public interests at stake, as they affect investor relationships between Mediterraneo and Equatoriana. To protect their interests, the Parties should be able to predict the outcome in this arbitration. The Other Arbitration is similar to this arbitration [Supra, §64]. Accordingly, the Tribunal should consider the Partial Interim Award of the Other Arbitration as persuasive authority. Therefore, the Tribunal should admit the Evidence to ensure the proceedings’ transparency.

IV. THE EVIDENCE IS ADMISSIBLE ALTHOUGH IT WAS OBTAINED BY ILLEGAL HACKING

76. The Evidence is admissible although it was obtained by illegal hacking. Illegal means in obtaining evidence does not “automatically” render the evidence inadmissible [Corfu; PCA AA 227; Reisman/Freedman, p.743; ICSID ARB/13/13]. The Tribunal should admit the Evidence as CLAIMANT acted in good faith in seeking to admit the Evidence [A]. The interest in pursuing the truth outweighs any violation of rights in obtaining the Evidence [B].

A. THE TRIBUNAL SHOULD ADMIT THE EVIDENCE AS CLAIMANT ACTED IN GOOD FAITH IN SEEKING TO ADMIT THE EVIDENCE

77. The Tribunal should admit the Evidence as CLAIMANT acted in good faith in seeking to admit the Evidence. The duty of good faith requires a party to “search out and present tribunal all facts throwing any light on the claim’s merits” [Sabotage; William]. A party is in breach of this duty if it participates in an unlawful activity to disclose the evidence [Methanex]. Obtaining evidence in the public domain is not unlawful, and excluding such relevant evidence would be a “travesty of injustice” [ICSID ARB/07/30; O’Sullivan; Valcke]. The scope of public domain is “broad”, covering all information accessible by any person [Smeureanu, p.77].

78. If the Evidence was obtained by illegal hacking [PO1, p.53, §III(1)(b)], the Tribunal should still admit the Evidence. To fulfil its duty of good faith, CLAIMANT sought to adduce the relevant and material Evidence [Supra, §§62-69]. CLAIMANT did not breach good faith, as it lawfully learnt about the Other Arbitration at a conference from RESPONDENT’s former employee, who referred CLAIMANT to an intelligence company [PO2, p.60, §40]. That company “promised” to provide CLAIMANT with a copy of the Partial Interim Award but refused to disclose its source [PO2, p.60, §41]. Thus, CLAIMANT could not have known or verified that company’s means of obtaining the Evidence. Accordingly, CLAIMANT did not participate in any unlawful activity leading to the Evidence’s disclosure. Further, the public has access to the Evidence through the
company in the same way CLAIMANT has. As the Evidence is in the public domain, CLAIMANT’s act in adducing the Evidence is in good faith. Therefore, the Tribunal should admit the Evidence.

B. THE INTEREST IN PURSUING THE TRUTH OUTWEIGHS ANY VIOLATION OF RIGHTS IN OBTAINING THE EVIDENCE

79. The interest in pursuing the truth outweighs any violation of rights in obtaining the Evidence. An evidence’s relevance and materiality are still a tribunal’s primary concerns even if the evidence is obtained illegally [Methanex; Ma/Kaplan, p.659; Redfern/Hunter, p.296]. The tribunal must balance the interest of pursuing the truth against the violation of rights in obtaining the evidence [FFU; Metalist; Netzle]. The tribunal should do so by considering the evidentiary difficulties and a party’s right to contest the evidence’s authenticity and materiality [FFU; ICSID ARB13/13; Iranian Hostages; Metalist; Netzle].

80. CLAIMANT sought to obtain from the intelligence company the Evidence which may have been leaked to it by a hacker [PO2, pp.61,62, §41]. This hacking was possible only due to RESPONDENT’s outdated firewall [PO2, p.61, §42]. Even if the Evidence was obtained by illegal hacking, the Tribunal should admit the Evidence because it is relevant and material [Supra, §§62-69]. The interest in pursuing the truth outweighs any violation of RESPONDENT’s right. First, CLAIMANT faces evidentiary difficulties, as the Evidence is the only source that can prove RESPONDENT’s contradictory positions and its false factual allegations [Supra, §62]. Secondly, admitting the Evidence does not encroach upon RESPONDENT’s right to contest the Evidence’s authenticity and materiality. As RESPONDENT alleged that the Evidence “do not reflect reality” and “are taken out of context” [Fasttrack Email, p.50, §1], it can request the Tribunal to hold a hearing to contest it [Art.22.4 HKIAC Rules]. Therefore, the Tribunal should admit the Evidence.

81. Issue 2 Conclusion: The Tribunal should admit the Evidence as it is relevant and material. The Evidence obtained either in breach of a confidentiality obligation or by illegal hacking does not render the Evidence inadmissible. Therefore, the Tribunal should admit the Evidence.

MERITS ARGUMENTS

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 FROM CONTRACT ADAPTATION

82. The Parties agreed Mediterranean Law, including CISG, governs the Contract [CE5, p.14, c.14]. CLAIMANT is entitled to the payment of US$1,250,000 by contract adaptation. The third shipment was subject to the 30% tariff imposed by Equatoriana (“Tariff”). CLAIMANT paid the
Tariff of US$1,500,000. However, CLAIMANT is entitled the payment of US$1,250,000 by contract adaptation under the Contract [I], or alternatively, under CISG [II].

I. CLAIMANT IS ENTITLED UNDER THE CONTRACT TO THE PAYMENT OF US$1,250,000 BY CONTRACT ADAPTATION

83. Under the Contract, CLAIMANT is not responsible for the Tariff cost [A]. The Tribunal should adapt the Contract by raising the price by US$1,250,000 under Clause 12 [B]. Therefore, CLAIMANT is entitled to the payment of US$1,250,000 by contract adaptation.

A. CLAIMANT IS NOT RESPONSIBLE FOR THE TARIFF COST UNDER THE CONTRACT

84. CLAIMANT is not responsible for the Tariff cost under the Contract. The Parties adopted “standard DDP delivery terms” [PO2, p.56, §8]. However, the Parties modified “standard” DDP by Clause 12 [I]. Under Clause 12, CLAIMANT is not responsible for the Tariff cost [2]. If Clause 12 does not modify DDP, CLAIMANT is still not responsible for the Tariff cost under “standard” DDP [3].

1. Clause 12 modifies “standard” DDP

85. Clause 12 modifies “standard” DDP. The Parties adopted DDP “INCOTERMS 2010 edition” [PO2, p.56, §10]. DDP, as a trade term, allocates responsibility between the parties [Oberman, Ch.1, IIA, §2]. Under DDP, the seller must carry out, “at its own risk”, any customs formalities, such as tariffs [WTO Glossary], for the import of the goods [Incoterms, p.70, A2]. However, the parties can modify Incoterms in their contract [Incoterms, p.9]. Art.8 CISG governs a contract’s interpretation [Schlechtriem/Schwenzer II, p.144]. The Tribunal should apply Art.8 to determine if the Parties modified DDP by Clause 12. Art.8(1) CISG looks at the parties’ subjective intent [Schlechtriem/Schwenzer II, p.149]. Since it is difficult to discern such intent, Art.8(1) is rarely used in practice [Schlechtriem/Schwenzer II, p.152]. Under Art.8(2) CISG, a tribunal should interpret the parties’ objective intent according to a reasonable person’s understanding [Schlechtriem/Schwenzer II, pp.292,293]. It should consider all relevant circumstances, including parties’ pre-contractual negotiations [Art.8(3) CISG; CISG-AC Opinion No.3, §2.2].

86. The Parties objectively intended Clause 12 to modify “standard” DDP by reallocating the risks of changes in import restrictions. CLAIMANT insisted that it was “unwilling” to “take over any further risks” of “changes” in “import restrictions” [CE4, p.12, §4]. CLAIMANT accepted DDP, only if a hardship clause was “included to address” these risks [CE4, p.12, §4]. RESPONDENT
agreed to include the “hardship reference”, in Clause 12, to govern these risks, leaving “other risks” to be governed by other contractual clauses [RE3, p.35, §4]. Therefore, a reasonable person in RESPONDENT’s position would understand that Clause 12 modifies “standard” DDP.

2. CLAIMANT is not responsible for the Tariff cost under Clause 12

87. CLAIMANT is not responsible for the Tariff cost under Clause 12, which provides: “Seller shall not be responsible for... hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous” [CE5, p.14]. The Tariff was “comparable” to “additional health and safety requirements” [a]. The Tariff was an “unforeseen” event [b]. The Tariff caused “hardship” to CLAIMANT, making the Contract “more onerous” [c]. Therefore, CLAIMANT is not responsible for the Tariff cost under Clause 12.

a. The Tariff was “comparable” to “additional health and safety requirements”

88. The Tariff was comparable to additional health and safety requirements under Clause 12 in its nature and effect. Under Art.8(2) CISG, the Parties objectively intended that events “comparable” to additional health and safety requirements have to be trade restrictions in nature, and destroy the Contract’s commercial basis in effect. First, tariffs are by nature comparable. Import tariffs are trade restrictions [WTO Principles]. Health and safety requirements that “hinder market access” are also trade restrictions [Motorcycle Trailers; Sandoz; UHT Milk; Craig/de Búrca, p.699]. From CLAIMANT’s past experience, its access to Danubian market was restricted by the prohibitive costs of additional tests under “new health and safety requirements” [CE4, p.12, §4; PO2, p.58, §21]. This was widely reported in the press [PO2, p.58, §21].

89. Secondly, the Parties objectively intended that tariff costs that destroy a contract’s commercial basis are comparable in effect to additional health and safety requirements. From that past experience, CLAIMANT had to bear 40% increase in cost for additional tests, which destroyed that contract’s “commercial basis” [CE4, p.12, §4]. Further, it “nearly resulted” in CLAIMANT’s insolvency [PO2, p.58, §21]. The Tariff also destroyed this Contract’s commercial basis. It amounts to 30% of the purchase price of the third shipment [NA, p.7, §18]. The Tariff would make it “very difficult” for CLAIMANT to negotiate a new credit line, financially endangering CLAIMANT and placing it at risk of insolvency [PO2, p.59, §29]. The Parties objectively intended that tariffs, as trade restrictions, are comparable in nature and in effect to health and safety requirements. Therefore, the Tariff was a “comparable” event under Clause 12.
b. **The Tariff was an “unforeseen” event**

90. The Tariff was an “unforeseen” event under Clause 12. The Parties objectively intended that an event is “unforeseen” if it is “unforeseeable” at the time of contracting [CE4, p.12, §4]. First, the imposition of Tariff is unforeseeable because it was in breach of WTO rules. Under WTO rules, WTO members can only impose tariffs in a non-discriminatory manner against all members states [Art.1(1) GATT]. Both Mediterraneo and Equatoriana are WTO members [PO2, p.61, §47]. Thus, it was unforeseeable that Mediterraneo would breach WTO rules and impose a discriminatory tariff only against Equatoriana. It was even more unforeseeable that Equatoriana would disregard WTO dispute resolution mechanism, and retaliate with the Tariff.

91. Secondly, the Tariff was unforeseeable because Equatoriana had always been an “ardent supporter of free trade” [CE6, p.15, §2]. Trade disputes with Equatoriana have “always” been resolved “amicably” [CE6, p.15, §2]. The Tariff shocked even “the informed circles”, let alone the Parties, when Equatoriana retaliated by imposing the Tariff [CE6, p.15, §2].

92. Thirdly, the Tariff applied to “all agricultural goods from Mediterraneo” [CE6, p.15, §1]. Racehorse breeding is generally categorised “differently from pigs, sheep or cattle” [NA, p.6, §11]. Also, the WTO definition of “agricultural” products does not include horse semen [AoA, Art.2, Annex I]. The Parties did not know, and were “astonished” to learn that the Tariff covered horse semen [NA, p.6, §11; PO2, p.58, §26]. When CLAIMANT told RESPONDENT about this, RESPONDENT still had to confirm this with the Equatorianian Ministry of Agriculture. Even the Ministry’s employees “were not certain” about that [RE4, p.36, §2]. Accordingly, the Parties could not have foreseen that the Tariff extended to horse semen. The Tariff was unforeseeable.

c. **The Tariff cost “caused” hardship to CLAIMANT, “making the Contract more onerous”**

93. The Tariff cost “caused” hardship to CLAIMANT, “making the Contract more onerous”. In determining the threshold of hardship, a tribunal should give primary consideration to the circumstances of an individual case [Schwenzer, p.716]. A reasonable person in RESPONDENT’s position would understand costs which financially endanger CLAIMANT are hardship. RESPONDENT knew that CLAIMANT bore prohibitive costs in its past hardship experience, which financially endangered it [Supra, §89; PO2, p.58, §21]. Now, CLAIMANT “has been making losses” for 4 years [PO2, p.59, §29]. The Tariff cost would financially endanger CLAIMANT, and even expose CLAIMANT to the risk of insolvency [Supra, §89]. Therefore, the Tariff cost would make Contract performance “more onerous”, and cause hardship to CLAIMANT.
3. Even if DDP was not modified by the Parties, CLAIMANT is not responsible for the Tariff cost

94. CLAIMANT is not responsible for the Tariff cost under the Contract, even if DDP was not modified by the Parties. Standard DDP does not allocate the risk of the Tariff cost to CLAIMANT [a]. Under the Contract, CLAIMANT has not assumed such risk [b], but RESPONDENT has [c].

a. **Standard DDP does not allocate the risk of the Tariff cost to CLAIMANT**

95. Incoterms do not deal with unexpected or unforeseeable events [*Incoterms 2010 Guide*, p.17]. Under standard DDP, CLAIMANT is responsible for the risks associated with import tariffs [*Supra, §89*]. However, an unforeseeable change in policy beyond the obligor’s sphere of control excuses its obligation, unless the contract provides otherwise [*Brunner, p.127*]. The Tariff was an unforeseeable change in policy [*Supra, §§90-92*]. Further, the Tariff was beyond CLAIMANT’s sphere of control. On the only occasion that Equatoriana retaliated with import tariffs, the political party in power then was “critical” of free trade; but the political party in power now champions free trade [*NA, p.7, §19*]. CLAIMANT, as a seller in *Mediterraneo* [*NA, p.4, §1*], is not in a position to influence the political party in power in Equatoriana. Therefore, the Tariff imposed by Equatoriana is beyond CLAIMANT’s sphere of control.

96. Under DDP, the seller must satisfy any “customs formalities” for importing goods [*Incoterms, p.70, A2*]. Under Art.8(2) CISG, a reasonable person in RESPONDENT’s position would understand that DDP does not allocate the risk of changes in customs regulations to CLAIMANT. By its general terms which provide for EXW, CLAIMANT has all along rejected “any further risks” of “changes” in “import restrictions”. Under EXW, the buyer must satisfy any “customs formalities” for importing goods [*Incoterms, p.16, A2*]. RESPONDENT was aware that CLAIMANT’s general terms provide for EXW [*CE3, p.11, §2; PO2, p.56, §9*]. However, it insisted on DDP to benefit from CLAIMANT’s “experience” in shipping frozen semen, and handling “import documentation” [*CE3, p.11, §3*]. CLAIMANT agreed to DDP only on the condition that it does not assume “any further risks” of “changes” in “import restrictions” [*CE4, p.12, §4*]. Therefore, a reasonable person would understand DDP to only require CLAIMANT to make delivery to RESPONDENT’s premises, and to handle any “import documentation”, but not to assume the risks of any rise in import tariffs.

97. Further, it is against commercial reality for CLAIMANT to assume the risk of Tariff cost. The increase in price from EXW to DDP was US$500 per dose [*CE5, p.13, §1; CE2, p.10, §4*]. Assuming CLAIMANT makes no profit from switching to DDP, its costs structure is: US$200 as
“direct additional costs” for transportation [CE4, p.12, §3; PO2, p.56, §8], and US$300 for other costs, including any tariffs. Therefore, a reasonable person in Respondent’s position would understand that, for the third shipment of 50 doses, Claimant would expect to pay no more than US$15,000 for additional import documentation costs. The US$1,300,000 Tariff cost is far above that and would financially endanger Claimant [Supra, §89]. Therefore, the reasonable person would understand that DDP does not import tariff rises to Claimant.

b. **Claimant has not assumed the risk of the Tariff cost under the Contract**

98. Claimant has not assumed the risk of the Tariff cost under the Contract. A tribunal may look at the course of negotiations to decide on the parties’ risk allocation [Brunner, p.160; White/Summers p.146]. An unusually high profit margin indicates that the seller assumed a proportionately higher risk [Brunner, p.425]. The profit margin of natural covering for ordinary stallions is 10%; while that for Nijinsky III is 15% (i.e. 5% higher) [PO2, p.57, §19]. Claimant does not “normally” sell frozen semen [CE2, p.10, §2]. Under the Contract, Claimant only has a 5% profit margin for selling Nijinsky III’s frozen semen [NA, p.7, §18]. Thus, Claimant’s profit margin is much lower than as usual. The Tariff cost is 6 times of Claimant’s profit, and is far above Claimant’s expected costs for using DDP instead of EXW [Supra, §97]. Respondent knew that Claimant specifically rejected “any further risks” of “changes” in “import restrictions” [CE4, p.12, §4]. Therefore, Claimant has not assumed the disproportionate risk of the Tariff.

c. **Respondent has assumed the risk of the Tariff cost under the Contract**

99. Respondent has assumed the risk of the Tariff cost under the Contract. If the contract does not expressly allocate a particular risk, a tribunal should apply the rule of superior risk bearer to determine which party should be deemed to have assumed that risk [Brunner, p.143; Posner/Rosenfield p.90]. A party is a superior risk bearer if it is in a “more advantageous position to insure against loss” [Brunner, p.143]. A promisee will be in this position if: first, it was in a better position to estimate the event’s occurrence and its magnitude of loss; and secondly, it could have self-insured [Brunner, p.144; Schlechtriem/Schwenzer II, p.1056].

100. DDP does not allocate the risk of the Tariff cost to Claimant, and Claimant has not assumed such risk under the Contract [Supra, §98]. As such, the contract does not expressly allocate a particular risk under the Contract. The Tribunal should apply the rule of superior risk bearer. Respondent operates in Equatoriana, while Claimant operates in Mediterraneo [NA, p.4, §§1,4]. Since the Tariff was imposed by Respondent’s home country, the Tariff was “closer
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associated” with RESPONDENT [NA, p.7, §18]. Thus, RESPONDENT was in a better position than CLAIMANT to estimate the imposition of the Tariff and its magnitude. Further, RESPONDENT could have self-insured. Under the Contract, only RESPONDENT is “responsible” for “insurance fees” [CE5, p.14, c.13]. Therefore, RESPONDENT is in more advantageous position than CLAIMANT to insure against any rises in tariffs under the Contract. RESPONDENT, as the superior risk bearer, is deemed to have assumed the risk of the Tariff cost.

B. THE TRIBUNAL SHOULD ADAPT THE CONTRACT BY RAISING THE PRICE BY US$1,250,000 UNDER CLAUSE 12

101. The Tribunal should adapt the Contract by raising the price by US$1,250,000 under Clause 12. Under Clause 12, if the Parties’ renegotiation fails, the Tribunal should adapt the Contract [1]. The Tribunal should raise the price by US$1,250,000 [2].

1. If the Parties’ renegotiation fails, the Tribunal should adapt the Contract under Clause 12

102. If the Parties’ renegotiation fails, the Tribunal should adapt the Contract under Clause 12. The Parties objectively intended that, under Clause 12, the Contract is to first be renegotiated; and if that renegotiation fails, the Tribunal can adapt the Contract [a]. Contract adaptation is appropriate as the Parties’ renegotiation failed [b].

a. The Parties objectively intended the Contract to first be renegotiated, and if that renegotiation fails, the Tribunal can adapt the Contract

103. Under Clause 12, CLAIMANT “shall not be responsible” for the Tariff [Supra, §§87-93]. Under Arts.8(2),(3) CISG, the Tribunal should interpret Clause 12 having regard to pre-contractual negotiations [Supra, §85]. When the Parties negotiated Clause 12, RESPONDENT accepted that adaptation is “the task of the arbitrators” if “the Parties could not agree” on a price amendment [CE8, p.17, §4]. Thus, the Tribunal can adapt the Contract only after the Parties attempt to agree through renegotiation. Therefore, the Parties objectively intended that, under Clause 12, the consequences of a hardship event are: First, the Parties should renegotiate the Contract. Secondly, if that renegotiation fails, the Tribunal can adapt the Contract.

b. The Tribunal should adapt the Contract as the renegotiation failed

104. Contract adaptation is appropriate as the Parties’ renegotiation failed. When parties’ renegotiation fails, a party may request contract adaptation or termination [Brunner, p.488]. In exercising its discretion to allow adaptation or termination, a tribunal should prefer adaptation over termination if hardship is imposed [Brunner, p.510; Fucci, p.34].
105. After the Tariff was imposed, “upon CLAIMANT’s initiative”, the Parties met on 12 February 2018 in an attempt to renegotiate the Contract [PO2, p.60, §35]. RESPONDENT “stopped the negotiations” and “refused to pay” the Tariff cost [CE8, p.18, §9]. The Parties’ renegotiation failed and CLAIMANT requested relief through adaptation [PO1, p.53, §III(1)(c)]. Since CLAIMANT’s performance imposed hardship, the Tribunal should prefer adaptation. The Parties have largely discharged their contractual obligations. CLAIMANT delivered the third shipment [CE8, p.18, §9]. Although RESPONDENT has not paid the Tariff cost, it had already paid the original purchase price [CE8, p.18, §7]. Termination would not benefit either of the Parties. Therefore, the Tribunal should prefer Contract adaptation.

2. **The Tribunal should raise the price by US$1,250,000**

106. The Tribunal should raise the price by US$1,250,000. The Parties objectively intended that RESPONDENT bears the Tariff cost [a]. Nonetheless, the Tribunal should adapt the Contract by 25% on the basis of good faith [b].

   **a. The Parties objectively intended RESPONDENT to bear the Tariff costs**

107. Under Art.8(2) CISG, the Parties objectively intended that CLAIMANT should not bear any loss as a result of a hardship event which financially endangers it [Supra, §89]. To determine how to adapt a contract, a tribunal should look at the parties’ intent with regards to all relevant circumstances [Bartels, pp.111-115; Wolfgang, pp.35-37]. Under Clause 12, CLAIMANT “shall not be responsible” for the Tariff [CE5, p.14, c.12]. The Parties objectively intended, under Clause 12, to ensure CLAIMANT would not be at risk of insolvency again [Supra, §89]. The reason was that to satisfy the demands of CLAIMANT’s creditors, CLAIMANT must remain “profitable in 2017 and 2018” with profit “milestones” met. Otherwise, the creditors would cut off two main credit lines [PO2, p.59, §29]. RESPONDENT was “aware of” CLAIMANT’s strained financial position [PO2, p.58, §22]. RESPONDENT, on the contrary, would not be “financially endangered” if it bears the Tariff cost [PO2, p.59, §30]. Therefore, the Parties objectively intended that Clause 12 allows CLAIMANT not to bear any tariff costs that would make it unable to be profitable in 2018. RESPONDENT should bear such costs, including the Tariff cost.

   **b. The Tribunal should adapt the Contract by 25% on the basis of good faith**

108. A tribunal should adapt the contract on the basis of good faith [Ferrario, pp.73,113]. A party would be in breach of good faith if a “reasonable and honest” person would regard its act as “commercially unacceptable” [Yam Seng; Ferrario, p.157]. In adapting the Contract, the Tribunal should apportion the Tariff cost on the basis of good faith. Having RESPONDENT bear
all 30% Tariff cost [Supra, §82] means that CLAIMANT would be able maintain its 5% profit margin [NA, p.7, §18; CE8, p.17, §6]. If CLAIMANT profits from RESPONDENT’s loss, a reasonable and honest person would regard this as commercially unacceptable. CLAIMANT would be in breach of good faith. Therefore, the Tribunal should order RESPONDENT to bear 25% Tariff cost, and CLAIMANT to bear 5%. Accordingly, the Tribunal should adapt the Contract by raising the price by US$1,250,000, which is 25% of the third shipment value.

II. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 BY CONTRACT ADAPTATION UNDER CISG

109. CLAIMANT is entitled to the payment of US$1,250,000 by contract adaptation under CISG. Art.79 CISG applies to the Contract [A]. The Tribunal should allow CLAIMANT to rely on Art.79 [B]. The Tariff satisfies all Art.79 requirements [C]. Therefore, the Tribunal should adapt the Contract under Art.7(2) CISG by raising the price by US$1,250,000 [D]. The Tribunal should do so under Arts.6.2.2 - 6.2.3 UNIDROIT Principles [E].

A. ART.79 CISG APPLIES TO THE CONTRACT

110. Contrary to RESPONDENT’s submission [ANA, p.32, §20], Art.79 CISG applies to the Contract. Under Art.6 CISG, the parties may derogate from or exclude a CISG non-mandatory provision, like Art.79 [Bridge, p.60; Kröll/Mistellis/Perales, pp.103,105]. Even if the parties intend that a contractual clause derogates from a CISG provision governing the same matter, such clause merely “take[s] precedence” [ICAC 174/2003]. First, nothing in the Contract states that Art.79 does not apply. Secondly, Clause 12 consists of two parts: one for force majeure and one for hardship [ANA, p.30, §4; RE2, p.34 §5; RE3, p.35, §5]. Art.79 exempts a party from liability for damages if there is a force majeure or a hardship event [Schwenzer, p.725]. As Clause 12 and Art.79 both govern the same matter of hardship, Clause 12 merely takes precedence over Art.79. Therefore, Art.79 applies to the Contract.

B. THE TRIBUNAL SHOULD ALLOW CLAIMANT TO RELY ON ART.79 CISG

111. The Tribunal should allow CLAIMANT to rely on Art.79 CISG. When interpreting a CISG provision, the starting point is a literal interpretation [Janssen/Meyer, pp.53,61; Kröll/Mistellis/Perales, p.127; Schlechtriem/Schwenzer II, p.129]. Interpreting Art.79 literally, only non-performing party may invoke this provision [Rimke, p.223]. However, in interpreting a CISG provision, a tribunal must invoke into account uniformity in CISG’s application and good faith [Art.7(1) CISG; Kröll/Mistellis/Perales, p.116]. The Tribunal should interpret Art.79 flexibly for two reasons. First, the Tribunal should interpret Art.79 flexibly to avoid using
domestic law to deal with hardship to promote uniformity in CISG’s application [1]. Secondly, the Tribunal should not permit RESPONDENT to rely on a literal interpretation of Art.79 to uphold good faith in international trade [2].

1. The Tribunal should prevent the use of domestic law to deal with hardship to promote uniformity in CISG’s application

112. Under Art.7(1) CISG, to “promote uniformity” in CISG’s application, a tribunal should “look for solutions within the ‘Four Corners’ of the CISG” as far as possible [Zeller, Ch.3]. Applying “potentially disparate” domestic law would frustrate the very purpose of CISG: to adopt “uniform rules” to govern international trade [CISG-AC Opinion No.7, §35; Flambouras, §2].

113. The word “Impediment” in Art.79 CISG is not defined in CISG [Nagy, p.27]. If the wording is unclear, a tribunal should look at CISG’s drafting history [Schlechtriem/Schwenzer II, p.129]. CISG drafters excluded the expression “hardship” in Art.79 only to avoid domestic law from influencing its interpretation [Bund, pp.393, CISG Official Records, pp.134,138; Maskow, p.658; Zeller, p.153]. This is consistent with their intent to adopt a “unitary conception” [CISG-AC Opinion No.7, §29]. Thus, even though CISG drafters used the word “impediment”, they did not oppose the “hardship” concept [Maskow, p.658]. Rather, CISG is a “living instrument”; as such, a tribunal should also consider “current thought and practices” [Janssen/Meyer, p.138]. Art.79’s wording of “impediment” is “sufficiently flexible” to include hardship [CISG-AC Opinion No.7, §§3.1,26; Scafom]. Accordingly, it should be interpreted in the “broadest sense” [Schwenzer, p.719].

114. CLAIMANT has performed by delivering the third shipment [NA, p.6, §13]. However, the wording of Art.79 CISG only governs impediment which makes performance impossible [Bund, pp.387,394; Honnold, p.626]. This is inconsistent with the concept of hardship, where performance is still possible [Bund, p.388; Reiley, p.144]. To interpret hardship flexibly in the broadest sense and yet restrict Art.79’s application to a non-performing party, a tribunal would have to resort to domestic law for appropriate reliefs [CISG-AC Opinion No.7, §§31,34; LG Aachen; Scafom CCT; Schwenzer/Hachem/Kee, p.670]. Doing so would frustrate CISG’s very purpose of adopting “uniform rules” to govern international trade. Therefore, to promote uniformity in CISG’s application, the Tribunal should flexibly interpret Art.79.
2. The Tribunal should not permit RESPONDENT to rely on a literal interpretation of Art.79 CISG to uphold good faith in international trade

115. Under Art.7(1) CISG, in interpreting CISG provisions, a tribunal should consider the “observance of good faith in international trade”. The parties should observe good faith in performing contracts [Mushrooms; DiMatteo/Dhooge, p.319]. The good faith principle should apply when a party, who relies on CISG provision, acts in breach of good faith [CLOUT 277; Ferrari/Flechtner, p.251]. First, there is a duty to renegotiate based on a general duty to act in good faith [Brunner, pp.480,481; Schwenzer, p.721]. Secondly, estoppel principle is a specific application of the good faith principle [CLOUT 230; Enderlein/Maskow, p.59]. It prevents a party from deviating from conduct on which the other party relied [Honnold, p.140].

116. Before contracting, RESPONDENT represented to CLAIMANT that it was “highly interested” in a “long-term cooperation” [CE3, p.11, §1]. After the Tariff was imposed, CLAIMANT put the third shipment “on hold” [CE7, p.16, §3]. CLAIMANT, in good faith, offered to deliver if the Parties “find a solution” for the Tariff cost [CE7, p.16, §§2,3]. RESPONDENT promised that it would find a solution “through negotiation”, and reiterated its intent of long-time cooperation [CE8, p.18, §7]. However, RESPONDENT unexpectedly “stopped the negotiations” and declared it was “no longer interested in a further cooperation” [CE8, p.18, §9]. Thus, RESPONDENT failed to act in good faith: it was in breach of its promise, its duty to renegotiate, and its representation of a long-term cooperation. “[R]elying on RESPONDENT’s promise”, CLAIMANT delivered and paid the Tariff cost [CE8, p.18, §8]. Without RESPONDENT’s promise, CLAIMANT could have put the shipment on hold or refused to deliver, and invoked Art.79 as literally interpreted. Therefore, RESPONDENT should be estopped from relying on a literal interpretation of Art.79.

C. The Tariff satisfies all the requirements under Art.79 CISG

117. The Tariff satisfies all the requirements under Art.79 CISG. CLAIMANT gave the required notice to invoke Art.79 within a reasonable time. On 19 January 2018, CLAIMANT realised that the Tariff applied to horse semen [CE8, p.17, §6; PO2, p.58, §26]. On the next day, CLAIMANT gave notice of the Tariff cost to RESPONDENT by email [CE7, p.16, §1], and RESPONDENT received it [PO2, p.59, §34]. Given the timely notice, Art.79 applies if three requirements are satisfied [CISG-AC Opinion No.7, §1; Honnold, p.637]: the Tariff is an impediment beyond CLAIMANT’s control [1]; at the time of contracting, CLAIMANT could not reasonably be expected to have taken the Tariff into account [2]; CLAIMANT could not have reasonably avoided or overcome the Tariff or its consequences [3].
1. **The Tariff is an impediment beyond CLAIMANT’s control**

118. The Tariff is an impediment beyond CLAIMANT’s control. First, impediment includes an economic impossibility [Schwenzer, p.713]. Hardship is an “impossibility from a practical viewpoint”, which makes performance “excessively onerous” [CISG AC-Opinion No. 7, §3.1]. There is an economic impossibility if performance exceeds the “limit of sacrifice” [Berger II, p.489; CISG-AC Opinion No.7; Schlechtriem/Schwenzer I, p.822; Schlechtriem/Schwenzer II, p.1142]. Performance exceeds the “limit of sacrifice” if it is “truly exorbitant” to the disadvantaged party [Berger II, p.488; Schlechtriem/Schwenzer I, p.822]. Such limit depends on the type of industry and the inherent risks of a particular market [CLOUT 277]. A highly speculative sector raises that limit [Schwenzer, p.715]. To determine the “limit of sacrifice”, a tribunal should have regard to the surrounding circumstances [Berger II, p.488; CISG-AC Opinion No.7, §38; Schlechtriem/Schwenzer II, p.1076].

119. The Tariff cost is an impediment. The Tariff cost is an economic impossibility as Contract performance exceeds CLAIMANT’s limit of sacrifice. CLAIMANT’s sale of frozen semen under the Contract is not a speculative business. This is because: first, CLAIMANT had never sold semen for racehorse breeding before the Contract [PO2, p.57, §15]; secondly, there is “no real market” for the resale of semen [PO2, p.57, §19]. Thus, CLAIMANT operates a low risk business and the “limit of sacrifice” should not be high. Requiring CLAIMANT to bear the Tariff cost would be “truly exorbitant” to CLAIMANT, as it would expose CLAIMANT to the risk of insolvency [Supra, §89]. It is economically impossible for CLAIMANT to bear the Tariff cost from a practical viewpoint. Accordingly, the Tariff cost is an impediment.

120. Secondly, the imposition of the Tariff was beyond CLAIMANT’s control. State interventions lie outside the parties’ sphere of control [Schlechtriem/Schwenzer II, p.1137]. The Tariff was imposed by Equatoriana [CE6, p.15, §1]. CLAIMANT was not in a position to influence Equatorianian trade policy [Supra, §95]. Hence, the Tariff is an impediment beyond its control.

2. **CLAIMANT could not reasonably be expected to have taken into account the Tariff and its cost at the time of contracting**

121. CLAIMANT could not reasonably be expected to have taken into account the Tariff and its cost at the time of contracting. The Parties concluded the Contract on 6 May 2017 [CE5, p.13, §1]. More than 6 months later, Equatoriana imposed the Tariff [CE6, p.15, §1]. By that time, CLAIMANT had already delivered two shipments. Given Equatoriana’s long-standing free trade policy [Supra, §91], CLAIMANT could not have reasonably expected any retaliatory measures,
including the Tariff, imposed by Equatoriana. Consequently, CLAIMANT could not have expected the Tariff cost when the Parties concluded the Contract.

3. **CLAIMANT could not have reasonably avoided the Tariff or overcome the Tariff cost**

122. CLAIMANT could not have reasonably avoided the Tariff or overcome the Tariff cost. If a company’s existence is threatened by “draconian fines or measures”, an impediment is unavoidable [Schlechtriem/Schwenzer I, p.818]. First, CLAIMANT could not have obtained an exemption or reduction in the Tariff charged for the third shipment [PO2, p.58, §27]. Secondly, CLAIMANT was not in a position to influence Equatoriana’s trade policy [Supra, §95]. Thus, CLAIMANT had no choice but to pay the Tariff to deliver the third shipment. Thirdly, CLAIMANT could not have reasonably overcome the consequences of the Tariff cost. The consequence of the Tariff cost is that CLAIMANT would be at the border of financial ruin and at risk of insolvency [Supra, §89]. CLAIMANT’s existence would thus be threatened by the Tariff cost. Therefore, CLAIMANT could not have reasonably overcome the Tariff and its consequence.

D. **The Tribunal should adapt the Contract by raising the price by US$1,250,000 under Art.7(2) CISG**

123. The Tribunal should adapt the Contract by raising the price by US$1,250,000 under Art.7(2) CISG. Under Art.7(2), a matter “governed but not settled” by CISG is a gap in CISG. A tribunal should fill this gap by CISG’s general principles [Schlechtriem/Schwenzer II, p.132]. On a literal interpretation, Art.79 CISG only governs hardship preventing performance [Supra, §113], and provides only for an exemption from damages [Schwenzer, p.722]. However, on a flexible interpretation, Art.79 governs all hardships, including performance imposing hardship [Supra, §113]. Adaptation is a relief “specially tailored” for hardship governed by Art.79 [CISG-AC Opinion No.7, §3.2; Lookofsky, p.162]. However, Art.79 does not expressly provide for adaptation as a relief. Thus, there is a gap of adaptation as a relief for performance imposing hardship governed by Art.79. Therefore, the Tribunal should adapt the Contract under favor contractus [1], and raise the price by US$1,250,000 to restore the Contract’s equilibrium [2].

1. **The Tribunal should adapt the Contract under favor contractus**

124. Favor contractus is a general principle of CISG [Magnus, §5(b)(9); Schlechtriem/Schwenzer II, p.136]. In a hardship event, it is within a tribunal’s discretion to choose between termination and adaptation [Brunner, p.510]. A tribunal should prefer a relief that favours the contract’s valid existence and is against its premature termination [Bonell II, p.81]. CLAIMANT has
performed the Contract by delivering the third shipment [\textit{Supra, §105}]. However, \textsc{respondent} is still subject to the Contract’s resale prohibition [\textit{Infra, §§133,134}]. Terminating the Contract now is premature and inappropriate, as it would release \textsc{respondent} from this prohibition. Thus, the Tribunal should prefer adaptation over termination.

2. \textbf{The Tribunal should raise the price by US$1,250,000 to restore the Contract’s equilibrium}

125. The Tribunal should raise the price by US$1,250,000 to restore the Contract’s equilibrium. To adapt the Contract, the Tribunal should first decide the price adjusting mechanism. UNIDROIT Principles can be used as CISG’s general principles, if it governs the same matter as CISG [\textit{Bonell I, pp.317,318; Garro, p.1156; Magnus, §6(b); Janssen/Meyer, p.303}]. \textit{Restoring a contract’s equilibrium} by contract adjustment is a CISG’s general principle [\textit{Schlechtriem in Flechtner, p.237}]. Art.6.2.3(4)(b) UNIDROIT Principles \textit{restores a contract’s equilibrium} by adaptation. CISG’s general principle and Art.6.2.3(4)(b) provide for the same adaptation mechanism: \textit{restoring the contract’s equilibrium}. Under Art.6.2.3(4)(b), the Tribunal should raise the price by US$1,250,000 to restore the Contract’s equilibrium [\textit{Infra, §135}].

E. \textbf{The Tribunal should adapt the Contract by raising the price by US$1,250,000 under Arts.6.2.2 - 6.2.3 UNIDROIT Principles}

126. Assuming the Tribunal interprets Art.79 CISG literally, \textsc{claimant} can still rely on Arts.6.2.2 - 6.2.3 UNIDROIT Principles. The Tribunal should adapt the Contract by raising the price by US$1,250,000 under Arts.6.2.2 - 6.2.3. The Tribunal should apply Arts.6.2.2 - 6.2.3 [1]. \textsc{claimant} suffered a hardship under Art.6.2.2 [2]. Contract adaptation is the appropriate relief under Art.6.2.3 [3]. The Tribunal should raise the price by US$1,250,000 [4].

1. \textbf{If the Tribunal interprets Art.79 CISG literally, the Tribunal should apply Arts.6.2.2 - 6.2.3 UNIDROIT Principles}

127. If the Tribunal interprets Art.79 CISG literally, it should apply Arts.6.2.2 - 6.2.3 UNIDROIT Principles. First, the Tribunal should apply Arts.6.2.2 - 6.2.3 as CISG’s general principles. On a literal interpretation, Art.79 governs hardship only when the party has not performed [\textit{Supra, §113}]. The absence of CISG provisions on performance imposing hardship creates a gap in CISG [\textit{Reiley, p.145}]. Arts.6.2.2 - 6.2.3 UNIDROIT Principles govern performance imposing hardship [\textit{Reiley, p.144}]. Therefore, under Art.7(2) CISG [\textit{Supra, §123}], the Tribunal should apply Arts.6.2.2 - 6.2.3 UNIDROIT Principles as CISG’s general principles.
128. Alternatively, if the Tribunal finds that Arts.6.2.2 - 6.2.3 UNIDROIT Principles are not general principles of CISG, under Art.7(2) CISG, it should apply Arts.6.2.2 - 6.2.3 as domestic law. If no CISG general principles can fill a gap in CISG, a tribunal can fill it by domestic law as determined by the forum’s conflict of laws rules [Janssen/Meyer, p.295; Schlechtriem/Schwenzer II, p.132]. Danubia adopts The Hague Principles verbatim as its conflict of laws rules [PO2, p.61, §43]. Under Art.2(1) The Hague Principles, the parties’ chosen law governs a contract. Thus, UNIDROIT Principles, adopted verbatim as Mediterranean Contract Law, governs the Contract [CE5, p.14, c.14; PO1, p.53, §III(4)]. Therefore, the Tribunal should apply Arts.6.2.2- 6.2.3 as domestic law.

2. CLAIMANT’s hardship satisfies Art.6.2.2 UNIDROIT Principles

129. The hardship suffered by CLAIMANT satisfies the five requirements under Art.6.2.2 UNIDROIT Principles: the Tariff fundamentally altered contractual equilibrium; the imposition of the Tariff occurred after the Contract was concluded [CE5, p.13; CE6, p.15, §1]; the Tariff was beyond CLAIMANT’s control [Supra, §118]; CLAIMANT did not assume the risks of the Tariff cost under the Contract [Supra, §98]; CLAIMANT could not have reasonably taken the Tariff and its cost into account at the time of contracting [Supra, §121].

130. The Tariff fundamentally altered the Contract’s equilibrium. This equilibrium is fundamentally altered if a party’s cost of performance substantially increases [Official Comment, Art.6.2.2, §2(a); Vogenauer, Art.6.2.2, §2]. This threshold is lower if that party has not assumed a greater risk under the contract, or if its “financial ruins” are “imminent” [Brunner, pp.433,435,437]. The original Contract’s equilibrium is: CLAIMANT has a 5% profit margin, while RESPONDENT should use the frozen semen only for artificial insemination, and must not profit by resale [CE5, p.13; CE8, p.17; Infra, §§133-134]. The Tariff cost substantially increased CLAIMANT’s costs of delivering the third shipment. Not only would the Tariff cost deprive CLAIMANT of its 5% profit margin, it would also destroy the Contract’s commercial basis, placing CLAIMANT at risk of insolvency [Supra, §89]. Further, CLAIMANT has not assumed a greater risk under the Contract [Supra, §98]. Therefore, the Tariff fundamentally altered the Contract’s equilibrium.

3. Contract adaptation is appropriate under Art.6.2.3 UNIDROIT Principles

131. Adaptation is the appropriate relief under Art.6.2.3 UNIDROIT Principles. Under Art.6.2.3(1), the party suffering hardship may request renegotiation. Under Art.6.2.3(2), it must request renegotiation “without undue delay”, and indicate the grounds for such request [Vogenauer, pp.819,820]. Under Arts.6.2.3(3)-(4), when renegotiation fails, it is within a tribunal’s
discretion to choose termination or adaptation, considering the parties’ interests [ICC 16369; Brunner, p. 510]. The tribunal should prefer adaptation over termination where possible [Vogenauer, pp. 820, 821]. Once CLAIMANT knew the Tariff applied to the third shipment, it informed RESPONDENT that the Tariff would make the shipment “30% more expensive” and requested renegotiation [CE7, p. 16, §§ 2, 3]. Parties’ renegotiation failed [Supra, §§ 104, 105]. Since termination has no practical effect [Supra, § 124], the Tribunal should prefer adaptation.

4. **THE TRIBUNAL SHOULD RAISE THE PRICE BY US$1,250,000 TO PREVENT RESPONDENT FROM PROFITING FROM ITS BREACH OF THE CONTRACT**

132. RESPONDENT made profits in breach of the resale prohibition under the Contract [a]. To restore the Contract’s equilibrium, the Tribunal should raise the price by US$1,250,000 [b].

   a. **RESPONDENT breached the resale prohibition and made profits**

133. RESPONDENT breached the resale prohibition under the Contract and made profits. The Contract provides that the “semen is to be used for the following mares (and others after the information of the Seller)” [CE5, p. 13]. The Tribunal should interpret this clause under Art.8(2) CISG [Supra, § 85]. A reasonable person in RESPONDENT’s position would understand this clause as restricting RESPONDENT’s use of the semen to “the following mares” named below the clause. CLAIMANT added in italics “(and others after the information of the Seller)” to the “standard” template [CE2, p. 10, § 5]. A reasonable person would understand these added words as requiring RESPONDENT to seek CLAIMANT’s “express written consent” for any other use of the semen, including use for other mares and resale [CE2, p. 10, § 3; PO2, p. 57, § 16]. Thus, a reasonable person would understand that RESPONDENT cannot resell without CLAIMANT’s consent.

134. In breach of this prohibition, RESPONDENT resold, or attempted to resell the horse semen. Contrary to RESPONDENT’s representation [CE3, p. 11, § 1], it is established that RESPONDENT “planned to sell” at least 25 doses to other breeders every year [PO2, p. 56, § 11]. In fact, RESPONDENT already resold 15 doses to other breeders at a 20% higher price in 2018 [PO2, p. 57, § 19]. RESPONDENT profited in breach of the resale prohibition.

   b. **The Tribunal should raise the price by US$1,250,000**

135. The Tribunal should raise the price by US$1,250,000 to restore the Contract’s equilibrium. Under Art.6.2.3(4)(b), in adapting a contract, a tribunal should restore its equilibrium, by fairly distributing the losses between the parties [Official Comment, Art.6.2.3, § 7]. Considering RESPONDENT’s 20% resale profits, it is fair for the Tribunal to distribute a part of the Tariff cost
amounting to 25% of the third shipment’s price to Respondent [Table 1]. Originally, the Contract’s equilibrium is: a 5% difference between the Parties’ profit margins. Now, the Tariff cost altered the Contract’s equilibrium [Supra, §130], and Respondent’s profits from breach of the resale prohibition [Supra, §§133,134]. The Contract’s disequilibrium is an actual difference of 15% between the Parties’ profit margins. To restore the Contract’s equilibrium, the Tribunal should raise the price by 25% for the third shipment, as Respondent’s contribution to the Tariff cost. Therefore, the Tribunal should raise the price by US$1,250,000.

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<td>Respondent</td>
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<td>15%</td>
<td>-15%</td>
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<tr>
<td>Equilibrium</td>
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<td>5%</td>
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<td>Equilibrium</td>
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<td>5% (USD 250,000)</td>
</tr>
</tbody>
</table>

Table 1

136. **Issue 3 conclusion**: Claimant is entitled to the payment of US$1,250,000 under the Contract and CISG. The Tribunal should adapt the Contract by raising the price by US$1,250,000.

**REQUEST FOR RELIEF**

For the above reasons, Counsel for Claimant respectfully request the Tribunal to:

(a) ORDER Respondent to pay the sum of US$1,250,000 to Claimant; and

(b) ORDER Respondent to bear the costs of this arbitration.

Respectfully signed and submitted by Counsel on behalf of Phar Lap Allevamento on 6 December 2018:

/s/ Alex Chan  /s/ Bobo Chan  /s/ Jasmine Chan  /s/ Esther HO  
/s/ Vanessa Hung  /s/ Aaron Kwong  /s/ Sharon Lee  /s/ Ben Poon  
/s/ Nicole Xiao  /s/ Tricia Yu  /s/ Yuki Yung  /s/ Jenny Y. Zhang
Certificate and Choice of Forum
To be attached to each Memorandum

I, Peter Rhodes, on behalf of the Team for The Chinese University of Hong Kong 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.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☐ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☐ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for The Chinese University of Hong Kong

Name: Peter Rhodes

Signature: [Signature]

[Signature]