SIXTEENTH WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 7 APRIL 2019

UNIVERSITY OF BUCHAREST

MEMORANDUM FOR RESPONDENT

Phar Lap Allevamento	v.	**Black Beauty Equestrian**
Rue Frankel 1		2 Seabiscuit Drive
Capital City, Mediterraneo		Oceanside, Equatoriana
CLAIMANT		**RESPONDENT**

COUNSEL FOR RESPONDENT

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INDEX OF ABBREVIATIONS

AAA	American Arbitration Association
ANoA	Answer to Notice of Arbitration, dated 24 August 2018
art.	article/articles
BCCI	Bulgarian Chamber of Commerce and Industry
BV	*Besloten vennootschap* (private limited liability company)
CIETAC	China International Economic and Trade Arbitration Commission, Hong Kong Arbitration Center
CL Memo	South China Normal University Memorandum for Claimant
Claimant	Phar Lap Allevamento
Co.	Company
Contract	Frozen Semen Sales Agreement, concluded on 6 May 2017
Corp.	Corporation
DDP	Delivery Duty Paid
e.g.	*exempli gratia* (for example)
Ed.	publishing house
ed./eds.	editor/editors
et al.	*et alia* (and others)
et seq.	*et sequitur* (and the following)
Ex.	Exhibit
GmbH	*Gesellschaft mit beschränkter Haftung* (private limited liability company)
HKIAC	Hong Kong International Arbitration Center
i.e.	*id est* (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIASA	International Institute for Applied Systems Analysis
Inc.	Incorporated
infra	below
Ltd.	Private limited company
no.	number/numbers
NoA	Notice of Arbitration, dated 31 July 2018
NV	*Naamloze vennootschap* (public limited company)

p.	page/pages
par.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PO1	Procedural Order of the Tribunal, dated 5 October 2018
PO2	Procedural Order of the Tribunal, dated 2 November 2018
Record	The Willem C. Vis Problem 2018
Respondent	Black Beauty Equestrian
SA	*Société par actions* (joint-stock company)
SARL	*Société à responsabilité limitée* (limited liability company)
SAS	*Société par actions simplifiée* (joint-stock company)
SC	*Societate comercială* (commercial company)
SL	*Sociedad Limitada (limited liability company)*
SpA	*Società per Azioni* (joint-stock company)
supra	above
Tribunal	The arbitral tribunal in the present dispute
UCCI	Ukrainian Chamber of Commerce and Industry
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US$	U.S. Dollar, monetary unit of the United States of America
v.	versus (against)
vol.	volume/volumes
WTO	World Trade Organization

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CISG	United Nations Convention on Contracts for the International Sale of Goods, effective 1 January 1988
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts, adopted on 19 March 2015
HKIAC Rules	Arbitration Rules administered by the Hong Kong International Arbitration Center, as amended in 2018
HKIAC Rules 2013	Arbitration Rules administered by the Hong Kong International Arbitration Center, as amended in 2013
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, effective 29 May 2010
ICC Hardship Clause	International Chamber of Commerce Force Majeure and Hardship Clause, 2003
Incoterms	International Commercial Terms, International Chamber of Commerce, amended in 2010
NY Convention	Convention on the Recognition and Enforcement of Foreign Awards, New York, adopted on 10 June 1958, effective 7 June 1959
Prague Rules	Rules on the Efficient Conduct of Proceedings in International Arbitration, released on 14 December 2018
Rome I Convention	Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, adopted on 17 June 2008, effective 17 December 2009
UNCITRAL ML	Model Law on International Commercial Arbitration, adopted on 11 December 1985, as amended in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 4th edition, adopted on 20 May 2016

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STATEMENT OF FACTS

1. Phar Lap Allevamento ("**Claimant**") is a company located in Mediterraneo that runs the country's most renowned stud farm. Claimant's business covers all areas of equestrian sports. Black Beauty Equestrian ("**Respondent**") is a company from Equatoriana that covered show jumping and dressage until its recent establishment of a racehorse stable.
2. On **21 March 2017**, Respondent contacted Claimant to inquire about the availability of 100 doses of frozen semen from Claimant's best racehorse stallion, Nijinsky III [*Ex. C1, p. 9*].
3. On **24 March 2017**, Claimant made its initial offer of US$ 99,500 per dose, subject to its Standard Frozen Semen Sales Agreement and General Conditions [*Ex. C2, p. 10, par. 3*]. According to Claimant's terms, the contract would be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") and the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**"), and jurisdiction would be established in favor of the courts in Mediterraneo.
4. On **28 March 2017,** in its answer to Claimant's offer, Respondent objected to the proposed price and requested DDP delivery, at its premises, as opposed to EXW delivery, which was the delivery term included in Claimant's general terms [*PO2, p. 56, par. 9*]. Respondent agreed to have the law of Mediterraneo applicable to the contract, but it suggested that the courts of Equatoriana should have jurisdiction instead [*Ex. C3, p. 11*].
5. On **31 March 2017**, Claimant agreed to the DDP delivery, requesting in exchange a US$ 1000 price increase and arbitration in Meditteraneo. [*Ex. C4, p. 12, par. 4*].
6. On **10 April 2017**, Respondent sent the first draft of the arbitration agreement, which provided for arbitration in Equatoriana and the law of the seat as the governing law [*Ex. R1, p. 33*]. On **11 April 2017**, Claimant proposed its own version of the arbitration clause, which contained only one amendment: changing the place of arbitration from Equatoriana to Danubia [*Ex. R2, p. 34, par. 4; PO2, p. 56-57, par. 14*].
7. On **12 April 2017**, the two main negotiators, Ms. Napravnik (for Claimant) and Mr. Antley (for Respondent), were severely injured in a car accident [*Ex. C8, p. 17, par. 2; Ex. R3, p. 35, par. 1*]. Their substitutes, Mr. Ferguson and Mr. Krone, finalized and executed the contract on **6 May 2017** (the "**Contract**"). Mr. Ferguson and Mr. Krone had access to all the prior emails between the initial negotiators [*PO2, p. 55, par. 5, p. 56, par. 13*] as well as to an internal note of Mr. Antley [*Ex. R3, p. 35, par. 2*].
8. The Contract provided for three shipments and payment of the price of US$ 100,000 per dose in two installments. The third shipment (50 doses) had to be delivered DDP on **23 January**

2017. The second installment (US$ 5,000,000) was due on **21 January 2018** [*Ex. C5, p. 13-14; PO2, p. 56, par. 11*].

9. On **15 November 2017**, Mediterraneo imposed a 25% tariff on agricultural products from Equatoriana [*PO2, p. 58, par. 23*]. In retaliation, Equatoriana imposed a 30% tariff on products from Mediterraneo, including racehorse semen [*Ex. C6, p. 15, par. 1*]. Because the newly imposed tariff applied to the final shipment, on **20 January 2018**, Claimant contacted Respondent to propose a price adjustment.

10. On **21 January 2018**, Mr. Shoemaker, Respondent's employee, told Ms. Napravnik that he was not involved in the negotiation of the Contract and that he could not authorize an increase of the price. Mr. Shoemaker also mentioned that, "if the contract provides for an increased price", they would reach a solution [*Ex. R4, p. 36*].

11. On **31 July 2018**, Claimant initiated arbitration proceedings against Respondent before the Hong Kong International Arbitration Centre ("**HKIAC**"). Claimant that this Tribunal find that it has jurisdiction and power to adapt the Contract, that the 30% tariff represents hardship, and consequently to increase the contract price by US$ 1,250,000 [*NoA, p. 8*]. Claimant also requested to submit evidence from another pending HKIAC arbitration in which Respondent is involved, as seller [*PO2, p. 60, par. 39*].

SUMMARY OF ARGUMENTS

12. **Issue I**. This Tribunal does not have jurisdiction or power to adapt the Contract. The law applicable to the arbitration agreement is the law of Danubia, under which adaptation of the Contract is not possible, absent express conferral of powers. Even if the law of Mediterraneo applied, the parties' intent, interpreted according to art. 8 CISG, indicates that the parties did not agree to grant the arbitrators the power to adapt the contract in case of hardship.

13. **Issue II**. Claimant is not entitled to submit evidence from the other HKIAC arbitration. The evidence is not admissible. The evidence is also not relevant to the present proceedings and it does not meet the criteria of materiality and weight under art. 22.2 of HKIAC Rules.

14. **Issue III**. This Tribunal should not adapt the contract price. The DDP term mandates that Claimant must bear the 30% tariff. The tariff does not constitute a situation of hardship under clause 12 of the Contract, and hardship is not governed by the CISG. Moreover, even if this Tribunal were to decide that art. 79 CISG covers hardship, the 30% tariff does not meet the conditions and the UNIDROIT Principles cannot be used to supplement the Convention. In any event, this Tribunal should not grant Claimant the price increase of US$ 1,250,000, because it is not reasonable.

ISSUE I: THIS TRIBUNAL DOES NOT HAVE JURISDICTION OR POWER TO ADAPT THE CONTRACT

15. Claimant submitted that this Tribunal has jurisdiction and power to hear the present case, because the arbitration agreement and its interpretation are governed by the law of Mediterraneo [*NoA, p. 6-7, par. 14-15; CL Memo, p. 5, par. 7*]. To the contrary, the law applicable to the arbitration agreement and its interpretation is the law of Danubia.
16. Determining the law applicable to the arbitration clause is relevant to this dispute because of the differences between the legal system of Danubia and that of Mediterraneo.
17. The law of Danubia provides that the CISG does not apply to an arbitration agreement, as the latter is considered a separate, procedural contract [*PO2, p. 60, par. 36*]. Its interpretation is governed by the Contract Law of Danubia, which is, in most aspects, a verbatim adoption of the UNIDROIT Principles. However, contrary to the UNIDROIT Principles (and the CISG), art. 4.3 Contract Law of Danubia has adopted the parol evidence rule, under which a written contract is deemed complete and no extrinsic evidence is allowed to supplement it.
18. In contrast, according to case law in Mediterraneo, the CISG applies to the conclusion and interpretation of arbitration agreements when such agreements are contained in sales contracts which are governed by the CISG [*PO1, p. 53, par. 4*].
19. Regarding arbitrators' power to hear claims for contract adaptation, case law in Danubia established that art. 28(3) Arbitration Law of Danubia, which is a verbatim adoption of art. 28(3) UNICTRAL ML [*PO2, p. 60, par. 36*], should be interpreted in the sense that express conferral of powers is required for arbitral tribunals to adapt contracts [*PO2, p. 60, par. 39*].
20. Under the law of Mediterraneo, a standard arbitration agreement is sufficient to grant an arbitral tribunal the same powers as a court has under art. 6.2.3(4)(b) UNIDROIT Principles for contract adaptation [*PO2, p. 60, par. 39*]. Therefore, arbitrators do not necessarily require an express conferral of powers in order to adapt contracts.
21. Theoretically, each matter connected to the arbitration agreement, *e.g.* existence, validity or interpretation, may be subject to the application of a different law [*Born, p. 473*]. However, absent an express choice of law, the interpretation of the arbitration agreement is generally subject to the same law that governs its formation and substantive validity [*Born, p. 635*].
22. The law of Danubia governs the arbitration agreement and its interpretation (**I**). According to the law of Danubia, this Tribunal does not have jurisdiction or power to adapt the Contract in case of hardship (**II**). However, even if the law of Mediterraneo applied to the arbitration agreement, this Tribunal cannot adapt the Contract in case of hardship situations (**III**).

I. The law of Danubia governs the arbitration agreement and its interpretation

23. Claimant submitted that the law governing the arbitration agreement is the same as that governing the Contract, namely the law of Meditteraneo [*CL Memo, p. 5, par. 7*]. Claimant's argument is not supported by the wording of the Contract or by the circumstances of the case.

24. Claimant stated that the principle of separability is not relevant in the present case for determining which law governs the arbitration agreement [*CL Memo, p. 6, par. 8-10*]. To the contrary, art. 16(1) UNCITRAL ML and art. 19.2 HKIAC Rules recognize that an arbitration agreement "which forms part of a contract […] shall be treated as an agreement independent of the other terms of the contract". One of the main consequences of the separability presumption is the possibility that the arbitration agreement has a different law than the one governing the underlying contract [*Born, p. 351*]. This duality is commonly encountered and recognized in practice [*Born, p. 473*]. Therefore, this Tribunal should not begin its analysis from the assumption that the law applicable to the substantive contract also applies to the arbitration agreement [*Redfern/Hunter, p. 157, par. 3.10*].

25. In determining the law applicable to the arbitration agreement, this Tribunal should analyze whether an express or implied choice of law was performed by the parties. If no choice was made, the applicable law is that which presents the closest and most real connection with the arbitration agreement. This three-stage inquiry was performed by various courts [*Sulamérica case*; *FirstLink case*; *BCY v. BCZ; Arsanovia case; Habas case; Klöckner Pentaplast case*].

26. Claimant and Respondent agree that no express choice of law can be found in the final version of the arbitration agreement. The Contract does, however, contain an implied choice of law in favor of the law of Danubia (**A**). The negotiations of the parties confirm that no choice was made in favor of the law of Mediterraneo **(B)**. This interpretation is substantiated by the existing connections between the law of Danubia, the parties and the Contract (**C**).

A. An implied choice of law was made in the Contract, in favor of the law of Danubia

27. Clause 14 of the Contract (the applicable law clause) provides the following: "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)".

28. However, the law of Mediterraneo only governs clauses 1-13 of the Contract. This interpretation is confirmed by the structure of the contract and by the wording of clause 15.

29. The choice of law clause usually refers only to the "substantive issues in dispute" and not to disputes that are likely to arise concerning the arbitration agreement itself [*Redfern/Hunter, p. 157, par. 3.10*]. This is particularly accurate in the present case, as the arbitration clause is a

separate clause, which follows (as opposed to preceding) the choice of law clause. Furthermore, the template on which the Contract is based represents a basic industry template in which clause 14 has a conclusory role [*PO2, par. 3, p. 55*].

30. Clause 15 of the Contract (the arbitration agreement) was based on the HKIAC Model Clause. The main changes made to the HKIAC Model Clause by the parties are shown below:

> Any dispute~~, controversy, difference or claim~~ arising out of ~~or relating to~~ this contract, including the existence, validity, interpretation, performance, breach or termination thereof ~~or any dispute regarding noncontractual obligations arising out of or relating to it~~ shall be referred to and finally resolved by arbitration administered by the [HKIAC] under the [HKIAC] Rules in force when the Notice of Arbitration is submitted.
> ~~The law of this arbitration clause shall be ... (Hong Kong law).~~
> The seat of arbitration shall be ~~... (Hong Kong)~~ Vindobona, Danubia.
> The number of arbitrators shall be ~~... (one or~~ three~~)~~. The arbitration proceedings shall be conducted in ~~... (insert language)~~ English.

31. Contrary to Claimant's submission [*CL Memo, p. 10, par. 25*], this Tribunal should not find that, absent an express choice of law in the arbitration agreement, the most relevant indicator is the express choice of the law governing the Contract. This approach may be suited for situations in which the parties treat the dispute resolution clause as a "champagne clause". However, in the present case, the arbitration clause is the result of specific negotiations. Its final wording should therefore be the starting point in the search for the governing law.

32. The seat of arbitration represents "a legal construct, not a geographical location" [*Born, p. 1537*]. This means that choosing the seat of arbitration has mainly legal consequences and does not represent the place where the hearings are held [*Redfern/Hunter, p. 166, par. 3.46*]. In particular, the seat of arbitration can be an indication of an implied choice of law made by the parties to govern the arbitration agreement [*Commentary on the Rome I Convention, p. 409, par. 01.1050; Akai case; Nissho case*; *ICC Case no. 7373*].

33. Consequently, the parties' choice of seat in favour of Danubia should be the primary factor taken into account. The final negotiators of the Contract made almost no changes to the language of the arbitration agreement that they had found in the emails exchanged by the original negotiators on 10 April 2017 and 11 April 2017 [*Ex. R1, p. 33; Ex. R2, p. 34; PO2, p. 55, par. 6*]. However, one change that was made was to add the city where the arbitration would take place (Vindobona), in front of the country (Danubia) [*Ex. C5, p. 14, par. 15*]. This shows that the final negotiators reassessed and reconfirmed Danubia as the seat of the arbitration and that they too, like the previous negotiators, were familiar with Danubia, not only from a geographical point of view, but also from a legal point of view.

34. Therefore, this Tribunal should find that the arbitration agreement does contain an implied choice of law for the law of Danubia.

B. There was no implied choice of law in favor of the law of Mediterraneo

35. As a preliminary remark, Respondent would like to emphasize that Claimant's allegations regarding Respondent's inconsistencies in relation to the admissibility of "extraneous" evidence [*Record, p. 50*] are unfounded.

36. While this Tribunal should not draw the power to adapt the Contract from circumstances outside of it because recourse to extraneous evidence is excluded under the parol evidence rule, this Tribunal *is* allowed to look at the negotiations between the parties in order to determine the applicable law. This approach is in line with the international practice of other common law countries observing the parol evidence rule, such as the United Kingdom and Singapore [*see supra, par. 25*]. However, once the Tribunal determines that the law of Danubia applies to the arbitration agreement, it should no longer resort to the negotiations between the parties in order to interpret the arbitration clause.

37. Regarding the negotiations between the parties, contrary to Claimant's submission [*CL Memo, p. 10, par. 24*], there is no indication that a choice was made regarding the application of the law of Mediterraneo to the arbitration agreement.

38. The Hague Principles are the conflict of laws rules applicable in all the countries connected to the present case [*PO2, p. 61, par. 43*]. Although they exclude arbitration agreements from their scope of application, courts and arbitral tribunals have used the basic principles of similar instruments, such as the Rome I Convention, to assess the law governing arbitration agreements [*Born, p. 504; see also Sulamérica case; Sonatrach v. Ferrell; Owerri case*]. Art. 4 Hague Principles requires an implied choice of law to "appear clearly from the provisions of the contract or the circumstances". An implied choice must reflect "a real intention of both parties" [*Commentary on the Hague Principles, p. 44, par. 4.6*].

39. No such real intention can be ascertained in the present case regarding the law of Mediterraneo. The initial draft of the Contract came from Ms. Napravnik and included Claimant's general conditions [*Ex. C2, p. 10, par. 5*]. Respondent accepted the law of Mediterraneo as the governing law of the Contract. However, Respondent rejected the proposal that the law applicable to the dispute resolution clause should be the same as that of the Contract. Respondent stated that it did not find it appropriate for the law of Mediterraneo to govern both the Contract and the court proceedings [*Ex. C3, p. 11, par. 3*].

40. Claimant did not agree to submit to the courts in Equatoriana and suggested arbitration in Mediterraneo [*Ex. C4, p. 12, par. 5*]. This proposal was not accepted by Respondent either.

41. If the parties had opted for arbitration in Mediterraneo, the law of Mediterraneo would govern both the Contract and the arbitral proceedings. This scenario did not present the main characteristic and advantage of an international commercial arbitration, *i.e.* striking a balance between each party's national law. If Claimant's national law governed both the Contract and the dispute resolution proceedings, the Contract would be severely imbalanced towards Claimant, which is precisely what Respondent deemed inappropriate [*Ex. C3, p. 11, par. 3*].

42. Respondent proposed a reasonable compromise – submitting any dispute to arbitration in Equatoriana, while the law of the Contract remained the law of Mediterraneo. Mr. Antley sent the first draft of the arbitration agreement following the HKIAC Model Clause, including an express provision that the law of the seat, *i.e.* the law of Equatoriana, governed the arbitration agreement [*Ex. R1, p. 33, par. 1*].

43. Claimant rejected this proposal [*Ex. R2, p. 34, par. 2*]. When Claimant proposed Danubia as a neutral seat of arbitration without also inserting a distinct choice of law provision (as Respondent had done in its proposal), all the circumstances surrounding the case led Respondent to the impression that the law of Danubia would govern the arbitration agreement. This interpretation ensured a balance between both parties' requirements.

44. Ms. Napravnik did mention in her last email that the arbitration clause provides for arbitration in Danubia under the condition "that the law applicable to the Frozen Semen Sales Agreement remains the law of Mediterraneo" [*Ex. R2, p. 34, par. 3*]. However, the wording of Ms. Napravnik's email indirectly shows that she understood that the Contract and the arbitration agreement are different contracts, governed by different laws.

45. The email only purported to amend the arbitration agreement "in its relevant part" [*Ex. R2, p. 34, par. 2*]. Had Ms. Napravnik considered that the same law governed both the Contract and the arbitration agreement, she would not have felt the need to restate that the law of Mediterraneo remains applicable to the Contract [*Ex. R2, p. 34, par. 4*]. She would certainly not have done so in the final part of her email, only after having presented her concerns regarding the law applicable to the dispute resolution clause and the proposed clause.

46. In this respect, this Tribunal should take into consideration that the parties' negotiators at that point were both senior attorneys, with significant experience in arbitration and international contract drafting [*Ex. C8, p. 17, par. 1; Ex. R3, p. 35, par. 1*]. It is therefore unlikely that the wording and structure of Ms. Napravnik's email is accidental.

47. Moreover, Claimant's creditors' committee had already declared in the context of a different contract that there was no need for approval of arbitration agreements subject to foreign laws, as long as the place of arbitration was in a neutral country, and that Danubia specifically was such an appropriate neutral country [*PO2, p. 56-57, par. 14*].
48. As such, the negotiations surrounding the conclusion of the Contract support the view that the law of the seat governs the arbitration agreement [*see infra, par. 69-73*].

C. The law of Danubia is closely connected to the parties and the Contract

49. In the present case, the choice of the seat of arbitration was substantiated from both an objective point of view and a subjective one. Therefore, the final stage of the tests suggested by case law, namely determining the law which presents the closest and most real connection to the dispute [*see supra, par. 25*], also points towards the law of Danubia.
50. Absent an express choice of law in the arbitration agreement, the latter is "more likely" to be governed by "the law of the seat of arbitration than the law of the underlying contract" because the arbitration agreement "will normally have a closer and more real connection with the place of the seat" [*C v. D; see also Daewoo case; YCA case; Bulbank case; Akai case; Nissho case; Dozco case; Expert report case*].
51. From an objective point of view, Danubia is "a neutral country with a functioning judicial system" [*PO2, p. 57, par. 14*]. The reach for a seat of arbitration with a functioning judicial system is not by accident, because the law of the seat is relevant for recognition and enforcement of arbitral awards. The NY Convention references "the law of the country where the award was made", "the law of the country where the arbitration took place" and "the country in which, or under the law of which, that award was made" [*art. V(1)(a), (d), (e) NY Convention*]. Also, national arbitration laws typically provide that courts from the seat of arbitration are competent to set aside arbitral awards [*see art. 6 and art. 34 UNCITRAL ML; examples of national laws*]. For these reasons, every arbitration must conform to at least the mandatory laws of the seat of arbitration [*Moses, p. 61*].
52. The law of Danubia is predictable, being a verbatim adoption of the UNCITRAL ML, as is the law of Mediterraneo [*PO1, p. 53, par. 4*]. In this sense, there are no statutory differences between the law Respondent considers applicable (law of Danubia) and the law Claimant is urging this Tribunal to apply (law of Mediterraneo).
53. From a subjective point of view, Claimant was very familiar with law of Danubia. Its creditors' committee had already analyzed arbitration agreements with the place of arbitration in Danubia and ruled that there was no need for Claimant to seek approval when concluding such

agreements [*PO2, p. 56-57, par. 14*]. Ms. Napravnik, Claimant's attorney, was also generally familiar with law of Danubia [*PO2, p. 57, par. 14*].

54. Moreover, back in 2014, Claimant's problems regarding a sale of three mares DDP Danubia, required it to become familiar with health and safety regulations and other legal requirements in Danubia [*PO2, p. 58, par. 21*]. The incident in Danubia was actually the starting point for the drafting of the hardship clause included in the parties' Contract [*see infra, par. 135*].

55. Lastly, two out of the three mares for which the semen purchased by Respondent by means of the Contract was to be used, namely Azeri and Ta Wee, were registered in Danubia [*Ex. C5, p.13, par. 3*]. Only one of the mares – Zenyatta - was registered in Equatoriana. This indicates that Respondent was also familiar with Danubia and its legal requirements.

56. In conclusion, law of Danubia is the parties' implied choice of law to govern the arbitration agreement and, at the same time, the system with which the arbitration agreement has a strong connection and one with which the parties and the Contract are closely connected.

II. Under the law of Danubia, this Tribunal does not have jurisdiction or power to adapt the contract in case of hardship

57. In the telephone conference of 4 October 2018, when Claimant and Respondent discussed the further conduct of the proceedings, both parties agreed that under the law of Danubia, which contains the parol evidence rule, "there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation" by this Tribunal [*PO1, p. 52, section II, 3rd bullet*]. That is because, under the law of Danubia, this Tribunal cannot adapt the Contract absent an express conferral of powers [*PO2, p. 60, par. 36*].

58. The arbitration clause does not expressly empower this Tribunal to adapt the Contract (**A**). Moreover, this Tribunal could not be expressly conferred powers to adapt the Contract otherwise than through the arbitration agreement (**B**).

A. The arbitration clause does not confer this Tribunal powers to decide on adaptation

59. The arbitration agreement represents a source for the powers of the arbitral tribunal [*Redfern/Hunter, p. 118, par. 1.58*]. These powers must be established taking into account the parties' explicit or implicit conferral of powers, together with any additional powers conferred by the law governing the arbitration [*Redfern/Hunter, p. 118, par. 1.58*]. However, the main question that arises is "whether the parties did actually confer a power of adaptation on the arbitrators" [*Fouchard/Gaillard/Goldman, p. 28, par. 41*]. In the present case, the parties did not confer such powers on the arbitrators.

60. Clause 15 of the Contract establishes the matters that can be submitted to arbitration: "[a]ny dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination" [*Ex. C5, p.14, clause 15*].

61. The adaptation of the contract represents a mechanism of contractual gap filling, which exceeds the framework of the initial contract between the parties. This Tribunal is not simply requested to rule on the specifically enumerated matters related to the existence, validity, interpretation, performance, breach or termination of the Contract (which are matters governed by the arbitration clause), but to modify the Contract itself.

62. Even if clause 15 of the Contract uses the word "including", this should not be interpreted as extending to claims beyond the framework of the initial contract. Courts held that when a general statement is followed by the phrase "including but not limited to" and then an enumeration of specific examples, the descriptive language serves to limit the scope of the preceding general statement. The rationale behind these decisions is that if everything would be included, there would be no point in mentioning a few examples [*Shelby Bank v. Van Diest; Clark case; Horse Cave v. Nolin*].

63. As such, there was no express conferral of powers on this Tribunal to adapt the Contract.

B. This Tribunal could not be expressly conferred powers to adapt the Contract otherwise than through the arbitration agreement

64. According to the law of Danubia, the Contract cannot be supplemented by evidence of prior statements or agreements [*PO2, p. 61, par. 4.5*]. This view is followed in other jurisdictions, such as England, that have adopted the rule [*Azpetrol case*]. The policy underlying the parol evidence rule is that evidence outside the contract can be untrustworthy because negotiations between the parties evolve [*Morrissey/Graves, p. 86*]. Therefore, no extraneous evidence should be taken into consideration when analyzing the extent of the powers of this Tribunal.

65. Under art. 22.2 HKIAC Rules, this Tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence, *including whether to apply strict rules of evidence*" [*emphasis added; see also art. 34(1) and 34(2)(f) English Arbitration Act; art. 182(2) CPIL Switzerland; art. 1460 CCP France; art. 1036 and art. 1039 CCP Netherlands*].

66. Claimant might argue that this Tribunal is not bound by the parol evidence rule because such rule is "in the grey zone between substance and procedure" [*Lew/Mistelis/Kröll, p. 559; see also Tan/Ng, p. 2; Veeder, p. 228*]. While some tribunals considered it as being procedural [*BQP v. BQQ; see also Hartsfield, p. 361-362; Rosseel v. Oriental; Oriental v. Rosseel; Oriental v. Oriental*], the parol evidence rule is widely regarded as a substantive rule [*MCC-*

Marble case; see also Daniel, p. 235; Andreason, p. 357]. This is because, although it indirectly renders extrinsic evidence inadmissible, it essentially makes certain legal facts immaterial, therefore prohibiting the party from establishing the fact altogether. As such, the rule operates as a rule of substantive law [*Daniel, p. 235*].

67. Consequently, this Tribunal must give effect to the parol evidence rule, as a substantive rule, and not exercise its discretion with respect to evidentiary matters. Otherwise, the award might risk unenforceability in front of national courts of Danubia [*Dallah case; GPF case*].

68. Under the parol evidence rule, the written arbitration agreement is the only evidence that must be analyzed by this Tribunal in order to interpret the parties' intent and, as discussed above, it does not confer this Tribunal express powers to adapt the Contract.

III. Even if the law of Mediterraneo is deemed applicable, this Tribunal does not have jurisdiction or power to adapt the Contract

69. Claimant argued that, according to the interpretation of the arbitration clause pursuant to art. 8 CISG the parties did grant this Tribunal jurisdiction to adapt the Contract in hardship scenarios [*CL Memo, par. 46-47, p. 15*].

70. Claimant argued that the negotiations that took place on 12 April 2017 between Ms. Napravnik and Mr. Antley represent an undisputed indicator that the parties' intent was to confer this Tribunal the power to adapt the Contract [*CL Memo, par. 47, p. 15*].

71. However, the negotiations did not result in an agreement regarding adaptation, but rather in a consensus regarding which matters need further negotiations. Adaptation of the contract was one of the points the parties did not manage to clarify in their "short discussion" on 12 April 2017 [*Ex. C8, p. 17, par. 3*]. Ms. Napravnik explained that the parties agreed to include the adaptation of the contract amongst the powers of the Tribunal and that Mr. Antley "promised that he would come back with a proposal the next morning". Contrary to Claimant's allegation that this proves a clear intention to adapt [*CL Memo, par. 47, p. 15*], this at most proves that the parties had the intent to negotiate an express clause referring to adaptation of the contract by the arbitrators. However, the parties ultimately did not include such a clause.

72. The intent to further discuss the matter is also reflected in Mr. Antley's note, which mentions "connection of hardship clause with arbitration clause" as an issue that required further consideration [*Ex. R3, p. 35, note*].

73. Moreover, Respondent did not agree, nor promise, to adapt the Contract following Claimant's request in January 2018. During the phone conversation between Ms. Napravnik and Mr. Shoemaker, the latter stated that "if the contract provides for an increased price in the case of

such a high additional tariff, we will certainly find an agreement on the price" [*Ex. R4, p. 36, par. 4*]. Mr. Shoemaker did not agree to the adaptation of the Contract. He had actually sought legal advice precisely in order to avoid making any concessions, as he was not a lawyer and had not been involved in the negotiations of the Contract [*Ex. R4, p. 36, par. 4*]. Mr. Shoemaker's conditional statement can therefore be interpreted, at most, as a promise to enter into negotiations with a view of *the parties* potentially amending the contract. Therefore, there was no agreement between the parties on adaptation of the Contract.

74. **Conclusion.** The law that governs the interpretation of the arbitration agreement is the law of Danubia, under which this Tribunal does not have jurisdiction or power to adapt the Contract. Even if the law of Mediterraneo applied, the parties' negotiations would not lead to an agreement regarding the jurisdiction and power of this Tribunal to adapt the Contract.

ISSUE II: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

75. On 2 October 2018, Claimant requested to be allowed to submit a copy of the Partial Interim Award from another HKIAC arbitration where Respondent is a party, as well as with Respondent's submission in that arbitration [*Record, p. 50*]. Since then, Claimant learned that it would not be able to obtain a copy of Respondent's submission [*PO2, p. 60-61, par. 41*]. For this reason, Claimant only referenced the award in its written memorandum [*CL Memo, p. 16-26, par. 51-90*]. As such, the evidentiary issue is limited to the Partial Interim Award.

76. Claimant does not possess the award yet. Claimant first learned about the other HKIAC arbitration from Mr. Velazquez, who used to work for Respondent's opponent in the other arbitration and who then became the CEO of one of Claimant's regular customers [*PO2, p. 60, par. 40*]. When Mr. Velazquez could not obtain a copy of the award from his former employer, Claimant arranged to obtain the award from a company that provides intelligence in the horseracing industry, against payment of US$ 1,000 [*PO2, p. 60-61, par. 41*]. The intelligence company "has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand" [*PO2, p. 61, par. 41*].

77. Pursuant to art. 22.2 HKIAC Rules, this Tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence". Similar provisions exist in most arbitration rules, and they are in line with both art. 19(2) UNCITRAL ML and art. 9(1) IBA Rules. Art. 22.3 HKIAC Rules further emphasizes the discretion of this Tribunal, by providing that it "shall have the power to admit or exclude any documents, exhibits or other evidence".

78. With respect to the IBA Rules, while Respondent agrees that they are not binding for this Tribunal, it does not agree with Claimant's submission that "parties wishing to adopt the IBA Rules should provide for this in their arbitration agreement" [*CL Memo, p. 17, par. 53*].

79. Contrary to Claimant's allegations [*CL Memo, p. 17, par. 53-54*], this Tribunal should take the IBA Rules into consideration, because they are considered to be "an internationally applicable standard" [*Finizio/Speller, p. 63; Marghitola, p. 32*] or "best practices" [*Waincymer, p. 760; Noble Ventures v. Romania; Biwater Gauff v. Tanzania; Railroad Development v. Guatemala; Moses, p. 173*]. They are frequently used in practice irrespective of the legal background of the parties [*Böckstiegel et al., p. 13; Marghitola, p. 32*]. The IBA Rules, even though not binding, are commonly adopted or referred to in HKIAC arbitration [*Guide to HKIAC Rules, p. 191, par. 9.155*].

80. Respondent submits that the evidence is inadmissible because it was illegally obtained (**I**) and that it is not sufficiently relevant to this arbitration or material to its outcome (**II**).

I. The evidence is inadmissible because it was illegally obtained

81. Pursuant to the fact-finding mission of this Tribunal, additional information about the other HKIAC arbitration was provided to this Tribunal by both parties [*PO2, p. 60-61, par. 37-42*]. As such, although Respondent objects to the admission of the evidence, it wishes to emphasize that it provided its full assistance to this Tribunal.

82. In particular, the undisputed additional facts revealed show that the award will be obtained by Claimant either from a breach of confidentiality by two former employees of Respondent, who were witnesses in the other HKIAC arbitration, or from an illegal hack of Respondent's computer system [*PO2, p. 60-61, par. 41*]. The burden is on Claimant to prove otherwise [*Srinivasan et al., p. 140*]. Illegally obtained evidence that originated from a breach of confidentiality (**A**) or from a computer hack (**B**) is inadmissible. Allowing the evidence would amount to a breach of procedural fairness (**C**).

A. The evidence was obtained in breach of confidentiality obligations

83. One of the reasons why parties choose arbitration is confidentiality. Arbitration is a private proceeding, in which the parties may air their differences and grievances without exposure to the gaze of the public [*Kröll/Mistelis/Viscasillas (2011), p. 110, par. 3.1; Redfern/Hunter, p. 219, par. 2.196*; *McKendrick, p. 400*]. Certain institutional arbitration rules impose a duty of confidentiality expressly [*Born, p. 46*], the HKIAC Rules being among them.

84. Pursuant to art. 45.1 HKIAC Rules, "[u]nless otherwise agreed by the parties, no party or party representative may publish, *disclose* or *communicate* any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration" [*emphasis added*]. The other party in Respondent's arbitral proceedings did not consent to the disclosure of the partial interim award, and neither did Respondent.

85. A particular aspect of the HKIAC Rules is that the duty of confidentiality extends to any arbitral tribunal, expert, *witness*, tribunal secretary and HKIAC [*art. 45.2 HKIAC Rules*]. The other arbitration was conducted under the HKIAC Rules 2013, containing a similar provision covering witnesses [*art. 42.2 HKIAC Rules 2013*]. As such, the two former employees of Respondent (as witnesses in the other HKIAC arbitration) were bound by this statutory duty of confidentiality. Furthermore, they were also bound by contractual duties of confidentiality [*Record, p. 51; PO2, p. 60-61, par. 41*]. Therefore, the statutory duty of confidentiality which surrounds the other arbitration is doubled by specific contractual confidentiality obligations.

86. There are no specific rules in the relevant national arbitration laws on how to handle evidence obtained in breach of contractual obligations or by illicit means [*PO2, p. 61, par. 46*]. However, this Tribunal should not condone breaches of the HKIAC Rules or of contractual duties of confidentiality and should declare evidence obtained through such breaches inadmissible, especially where confidentiality is particularly protected under the IBA Rules [*art. 9(2)(b) IBA Rules (excluding evidence for "legal impediment or privilege"); art. 9(2)(g) IBA Rules (excluding evidence on "grounds of commercial or technical confidentiality"*]. Other tribunals reached the same conclusion, under similar factual and legal frameworks.

87. For example, in *Methanex v. USA*, the claimant trespassed in order to search through internal trashcans and dumpsters, obtaining personal notes, private correspondence and material expressly subjected to legal professional privilege. The tribunal declared the evidence to be inadmissible, holding that the parties had a general legal duty to the other and to the tribunal to conduct themselves in good faith and to respect the equality of arms between them [*Methanex v. USA, par. 54*]. An important factor in the tribunal's decision, which is also met in the present case [*see infra, par. 110-120*] was the marginal significance of the evidence to the claimant's case by the time of the main hearing on the case [*Methanex v. USA, par. 56*].

88. Additionally, contrary to Claimant's allegations, none of the exceptions to the duty of confidentiality apply. In particular, it is irrelevant that Claimant did not itself commit the breach (**1**), and none of the exceptions set forth in art. 45.3 HKIAC Rules are applicable (**2**).

1. It is irrelevant that Claimant did not itself commit the breach

89. Claimant might argue during the oral proceedings that it obtained the initial information about the other HKIAC arbitration from Mr. Velazquez of free will, and without any requests by it. Respondent is not disputing this. However, the evidence that Claimant is now seeking to admit is not the initial information received from Mr. Velazquez, but the award itself. As such, it is irrelevant that Claimant obtained the initial information in good faith.

90. Claimant might also argue, more generally, that it is not itself liable for any breach of confidentiality. However, legal scholars noted that "[a] criterion which arbitrators must not use [...] is whether the illegally obtained evidence was obtained by the other party itself or a third party" [*Segesser, p. 3; Imerman v. Tchenguiz; but see Persia v. Council*]. Claimant hired and will pay the intelligence company. In this sense, Claimant's hands are unclean. The "clean hands doctrine" requires that "[he] who comes into equity must come with clean hands" [*Dumberry, p. 230; see also Srinivasan et al., p. 137, par. 3.1; Anenson, p. 1837*]. This doctrine has been applied by various international courts and tribunals [*Eastern Greenland case; Factory at Chorzów case; Plama v. Bulgaria; Inceysa v. El Salvador; see also Yukos case*]. Similarly, this Tribunal should find that a party that was, directly or indirectly, involved in a chain of illicit acts, such as Claimant, should not be allowed to benefit from them.

2. No exceptions from the duty of confidentiality are applicable

91. Derogations from the duty of confidentiality are allowed only in a few exceptional cases. None of the exceptions allowed by the HKIAC Rules are applicable in the present case (**a**) and neither the public domain (**b**) nor the public interest exception (**c**) are triggered.

a. The exceptions set forth in art. 45.3 HKIAC Rules are not applicable

92. Derogations from the duty of confidentiality are allowed only in a few exceptional cases provided in art. 45.3 HKIAC Rules. The exceptions should be strictly interpreted and "are intended to strike a balance between protecting confidentiality in arbitration and the need for disclosure of information in certain exceptional cases" [*Guide to HKIAC, p. 283, par. 12.32*].

93. The present case does not cover any of those exceptions. In particular, Claimant attempted to rely on the new exception introduced in paragraph (d) during the 2018 revision of the HKIAC Rules: disclosure "to any party or additional party and any confirmed or appointed arbitrator for the purposes of Articles 27, 28, 29 or 30".

94. Art. 27 HKIAC Rules refers to the joinder of additional parties. In its 2 October 2018 letter, Claimant stated that "the other Party in that arbitration may also be joined to the [present]

proceedings as the proceedings have also been conducted under the HKIAC Rules" [*Record, p. 50, par. 3*]. However, the requirements for joinder under art. 27 HKIAC Rules are not met. Generally, a request for joinder should be raised no later than in the Statement of Defence [*art. 27.3 HKIAC Rules*], which in our case is contained in the Answer to the Notice of Arbitration, submitted in August. Claimant referenced joinder only in October. The other requirements of art. 27.1 HKIAC Rules are not met either, *i.e.* the party in the other arbitration is not bound by the same arbitration agreement [*Guide to HKIAC Rules, p. 210, par. 10.18*]. Also, neither Respondent, nor the party in the other arbitration, agreed to joinder.

b. The public domain exception is not applicable

95. One of the classical exceptions to confidentiality is where the information falls into the public domain, by being accessible to the public. For example, art. 4.8 of the newly adopted Prague Rules provides that "any document submitted or produced by a party in the arbitration and *not otherwise in the public domain* shall be kept confidential by the arbitral tribunal and the other party" [*emphasis added*].

96. Claimant might argue during the oral hearings that the information regarding the other HKIAC arbitration is in the public domain, because Mr. Velazquez, although "not [...] involved in the arbitration [...] knew the main issues in dispute" [*PO2, p. 60, par. 40*], because of the computer hack and/or because the intelligence company can obtain a copy of the award.

97. However, the award is not in the public domain. Under art. 45.5 HKIAC Rules, as modified in 2018, only HKIAC can publish an award and only if no party objects. Respondent would object to any such initiative. The fact that Claimant itself is not (yet) in possession of the award emphasizes that the award is not in the public domain. The present situation can easily be distinguished from a line of cases that involved documents revealed by Wikileaks [*Caratube v Kazakhstan; ConocoPhillips v. Venezuela; Opic Karimum v. Venezuela; Persia v. Council*].

98. Moreover, the adoption of the HKIAC Rules represents a safeguard to the duty of confidentiality [*Guide to HKIAC Rules, p. 282, par. 12.29*]. While trying to balance "the value of arbitral awards as a meaningful source of development of arbitration practice and the importance of protecting the confidential information of the parties", the HKIAC Rules contain "some of the strictest requirements for the publication of arbitral awards in comparison to other arbitral institutional rules" [*Guide to HKIAC Rules, p. 284, par. 12.37*].

c. The public interest exception is not applicable

99. Claimant argued that in some international practices illegally obtained evidence was admitted [*CL Memo, p. 25, par. 85*]. However, this represents an exception to confidentiality. Unlawfully obtained evidence was only occasionally admitted in arbitrations in which there was a genuine public interest [*Redfern/Hunter, p. 213, par. 2.170*]. Moreover, some of the cases cited by Claimant [*Caratube and Devincci v. Kazakhstan; Corfu Channel Case*] represent high-profile cases which implied a genuine public interest.

100. Moreover, even the presence of a public interest in the case does not always lead to the admissibility of the evidence. For example, in *Libananco v. Turkey*, the respondent, Turkey, had procured privileged and/or confidential emails exchanged between the claimant and its counsel, as part of court-ordered surveillance directed at the investigation of certain money laundering activities. The ICSID tribunal ordered the exclusion from evidence of all privileged and confidential communications after weighing the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith.

101. The present case involves a relatively low monetary amount and is between two medium-sized private companies. As such, the case is of little interest to the public. The evidence proposed by Claimant does not reveal any questionable action of Respondent or its agents. Moreover, Claimant does not have evidentiary difficulties, given the facts that have already become part of the record [*see infra, par 117-120*]. Claimant is trying to submit the evidence solely for its individual interest, *i.e.* to reinforce its request for adaptation.

102. Consequently, the evidence is inadmissible because it would be obtained in breach of statutory and contractual confidentiality obligations, and no exceptions apply.

B. The evidence was obtained through a hack of Respondent's computer system

103. Hacking a computer system is an illicit act. Hacking represents a criminal act in most legislations [*Appudurai/Ramalingam, p. 8, par. 2; see also, e.g., art. 502(c)(2) California Penal Code; art. 156.05 New York Penal Code*]. While disclosure of confidential information can occur by accident, hacking requires criminal intent. For this reason, evidence obtained through hacking should always be considered illegal and be declared inadmissible for the same reasons as those pertaining to the first hypothesis, breach of confidentiality [*see supra, par. 83-102*]. Hacking a computer system is an illicit act, much like the trespassing and searching in internal trashcans and dumpsters that occurred in *Methanex v. USA*.

104. Moreover, it is irrelevant that Respondent's firewall was outdated [*PO2, p. 61, par. 42*]. This simply made it "easy" for the hackers to enter the system. Respondent is under no obligation to

maintain the most up to date firewall (the "Hand rule"). Powerful firewalls also have disadvantages, such as increase in costs and strain placed on the IT infrastructure [*Katyal, p. 1087*].

C. Allowing the evidence would amount to a breach of procedural fairness

105. Procedural fairness is considered one of the most important policy limitations on the liberal evidentiary standard [*Reisman/Freedman, p. 741, par. 2*]. This principle is reflected in art. 13 HKIAC Rules and art. 18 UNCITRAL ML [*see also art. 1.4 Prague Rules*]. Parties must be treated equally and similar standards must be applied to all parties throughout the arbitral process [*Digest Model Law, p. 97, par. 5*]. Specifically, art. 9(2)(g) IBA Rules provides that the tribunal shall exclude from evidence or production any document for considerations of procedural fairness and equality of the parties that the tribunal determines to be compelling.

106. By admitting the evidence, this Tribunal would encourage parties to arbitration to ignore the rightful evidence production procedure and Claimant would be privileged. This might represent grounds for setting aside the award [*Henderson/Waldek/Satryani, par. 3; Triulzi case; CCG case; Hui case*]. With respect to evidentiary matters, both parties must play by the rules [*Cooper, p. 8*].

107. Because the evidence was illegally obtained by the intelligence company, Claimant's position is akin to that of a receiver of stolen goods. This is true if the award will be obtained through a breach of confidentiality obligations and even more so if it will be obtained as a result of the hack. Claimant knows that these are the only two possibilities [*see supra, par. 82*]. That means that the award that Claimant will obtain will represent, from an evidence point of view, a "fruit of the poisonous tree" [*Silverthorne v. US; Nardone v. US*]. Evidence that derives from an illicit or illegal act is often excluded, for considerations of procedural fairness [*Mosteller, p. 962-963 (US perspective); but see Cooper, p. 1; Amole/Colston, p. 1 (English perspective)*]. For example, evidence obtained as a result of committing the tort of trespassing [*Lifely v. Lifely*] or a result of unauthorized computer access [*Imerman v. Tchenguiz*] was excluded.

108. Consequently, the evidence is inadmissible, irrespective of which of the two hypotheses apply (breach of confidentiality or computer hacking).

<u>II. The evidence is irrelevant and immaterial to the present case</u>

109. Even if this Tribunal considers that the evidence is admissible, the criteria of relevance to the case (**A**) and materiality to the outcome of the case (**B**) are not met.

A. The evidence is irrelevant

110. The requirement of relevance prevents parties from attempting to submit evidence which is not directly relevant to the present dispute [*Sattar, p. 7, par. 4*]. The evidence must contribute to

the clarification of the dispute [*Born, p. 2362*]. In common law, relevant evidence determines the probability of existence or non-existence of a fact, but both civil and common law consider relevance a matter of common sense and reasoning [*Pilkov, p. 149, par. 1*].

111. Claimant argued that the award from the other HKIAC arbitration presents relevance to the present dispute [*CL Memo, p. 17, par. 65*] because in that arbitration Respondent asked for adaptation of the price as a result of a 25% tariff on agricultural products imposed by Mediterraneo, which, in turn, led to the imposition of the 30% tariff by Equatoriana that is at the core of the present arbitration.

112. First, nothing prevents a party from adopting different legal positions in different proceedings in order to best protect its economic interests. Respondent is the buyer in the present arbitration and the seller in the other HKIAC arbitration. Given that its economic interests are fundamentally different, it is irrelevant that Respondent is represented by the same counsel in the two arbitrations [*PO2, p. 60, par. 38*].

113. Second, there are major factual and legal differences between the two arbitrations. In the other HKIAC arbitration, the seat is Mediterraneo and the parties expressly chose the law of Mediterraneo to govern the arbitration agreement. As such, the award is not instructive in the present case, where this Tribunal must determine the implied choice of law.

114. Moreover, in the other HKIAC arbitration, the contract contains the HKIAC Model Clause, which is considerably broader in its wording than clause 15 of the Contract, particularly because it contains the phrase “any dispute regarding noncontractual obligations arising out of or relating to [the contract]” [*see supra, par. 30*]. Respondent intentionally narrowed down the HKIAC Model Clause in the present case [*ANoA, p. 31, par. 13*]. As such, the award would not be instructive on the issue of express conferral of powers to the Tribunal.

115. Finally, the partial interim award only confirms the jurisdiction and power of the other HKIAC tribunal to adapt the contract. An award on the merits has not yet been rendered and will only be rendered in August 2019 [*PO2, p. 60, par. 39*]. For this reason, the evidence proposed by Claimant also bears no persuasive value on the merits of the present arbitration.

116. Consequently, the other arbitral award would not be relevant to the present dispute.

B. The evidence is immaterial

117. Materiality is closely related to the relevance of the evidence. Facts corroborated by evidence may be relevant, in that they relate to the subject matter, but may be immaterial, in that they do not affect the outcome of the case. Case law suggests that facts may seem material at one point of the proceedings and subsequently become immaterial [*Methanex v. USA*].

118. Extensive information about the other HKIAC arbitration is already in the record, as a result of the parties' cooperation and exchanges with this Tribunal [*Record, p. 50-51*] and the extensive fact-finding mission of this Tribunal reflected in Procedural Order no. 2 [*PO2, p. 60-61, par. 37-42*]. Consequently, because this Tribunal already took such a proactive role with respect to this evidentiary matter, in line with the modern trend in arbitration [*art. 2 Prague Rules],* admission of the award itself into the evidence would not add much to the facts already known. Moreover, the legal reasoning of the other HKIAC tribunal is not binding on this Tribunal even if the cases were identical [*Kaufmann, p. 363, par. 1*].

119. For the same reasons, if this Tribunal decides that it would like to review the award from the other HKIAC arbitration, little to no weight should be given to it. The weight of the evidence concerns its persuasive effect [*Pilkov, p. 153*]. At most, this award would have the same value as any of many other awards from unrelated arbitrations cited by both parties.

120. Consequently, even if this Tribunal deems the evidence admissible, the criteria of relevance and materiality are not met. Alternatively, little to no weight should be given to the award.

121. **Conclusion**. This Tribunal should find that Claimant is not entitled to submit evidence from the other HKIAC arbitration, because it was illegally obtained and because such evidence is not sufficiently relevant and material to the outcome of the present arbitration.

ISSUE III: THIS TRIBUNAL SHOULD NOT ADAPT THE CONTRACT PRICE

122. Claimant requested adaptation of the price because it was required to pay the import tariff imposed by Equatoriana [*CL Memo, par. 91*]. Respondent demonstrated that this Tribunal does not have jurisdiction or power to adapt the Contract. Nevertheless, even if adaptation were possible from a procedural standpoint, this Tribunal should not adapt the Contract in the present case because Claimant bears the cost of import tariffs under the DDP term (**I**). Moreover, the 30% tariff does not fall under the hardship clause (**II**) and the Tribunal cannot resort to the CISG or to the UNIDROIT Principles as a basis for adaptation (**III**). Lastly, this Tribunal should not grant Claimant the requested amount of US$ 1,250,000 (**IV**).

I. Claimant bears the cost of import tariffs under the DDP term

123. The parties agreed on DDP, Seabiscuit Drive, Oceanside, Equatoriana as a delivery term [*PO2, p. 56, par. 10; Ex. C5, p. 14, par. 8*], without adding any additional wording. Claimant argued that the DDP term does not prevent it from invoking hardship if a tariff meets the requirements of clause 12 of the Contract [*CL Memo, par. 101-102*]. To the contrary, under this specific

Incoterm, Claimant bears the responsibility of import clearance under DDP (**A**). No derogation from this obligation was agreed to by means of clause 12 of the Contract (**B**).

A. The DDP term includes Claimant's obligation to clear the goods for import

124. Clause 8 of the Contract, in its relevant part, reads as follows: "[s]eller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen […]". Under the DDP term, Claimant was required to undertake all measures in order for the goods to reach the place of delivery.

125. The term encompasses an obligation for the seller to clear the goods for import, pay any import duty and carry out any import customs formalities [*Ramberg, p. 61, par. 2*]. The seller undertakes the costs and risks involved in bringing the goods to the place of destination. Moreover, the seller has an obligation to clear the goods for export and import, to pay *any duty for both export and import* and to carry out all customs formalities [*Schlechtriem/Schwenzer, p. 1366; see also Ramberg, p. 149, par. 2*].

126. Under a DDP term, "[t]he seller also bears any difference between the amount of customs duties estimated at the time of conclusion of the contract and the amount calculated by the customs authorities, without being able to claim from the buyer, in the event of a difference, a price increase or a compensatory payment" [*Gaston Schul case (ECJ)*]. As such, the DDP term places the seller in a position where it is still held by its import-related obligations even if performance may become more expensive than contemplated as a result of unforeseeable circumstances [*Ramberg, p. 150, par. 9*]. If the parties intend to adjust the scope of the DDP term, wording such as "*not cleared for import*" or "*exclusive of duty, VAT and other import charges*" should be added after "DDP" [*Ramberg, p. 151, par. 2, p. 61, par. 7*].

B. Clause 12 does not derogate from Claimant's obligation to pay all import costs

127. Claimant also argued that it made its intent clear that it will not bear any risk of changes in custom regulations because the parties agreed on clause 12 of the Contract [*CL Memo, par. 101-102*]. However, this argument is without merit.

128. As a preliminary remark, according to case law, "the will of the parties only has to be taken into account in so far as the contract has no clear provision" [*Lothringer v. Fepco*]. In the present case, clause 8 of the Contract is unambiguous and states that Claimant should deliver the goods under a standard DDP term.

129. No additional wording (such as "*not cleared for import*") was added after the DDP acronym. Therefore, any intent that Claimant may have had to derogate from its obligations under the DDP term as regards import duties was not reflected in the Contract. In particular, clause 12 is

not such a derogation. The clause simply contains an exemption from liability in certain limited situations, which can be distinguished from the present case [*see infra, par. 135*].

130. Moreover, the interplay between the DDP Incoterm and other contractual stipulations must be analyzed [*Coetzee, p. 206, par. 3, p. 307 par. 2; see also Oil case*]. All clauses laid down in a contract should be interpreted in such a way that they can be given effect, rather than in a manner which deprives some of them of effect [*Art. 4.5 UNIDROIT Principles; see also Berger, p. 283*]. This rule is a component of the principles of *favor contractus* ("prevalence of the parties' agreement") and *effet utile* ("giving the parties' agreement the purpose and outcome sought by them"), which are part of *lex mercatoria* and fully compatible with the CISG [*Luttrell, p. 272; see also Audit, p. 175*].

131. Claimant's interpretation of the DDP clause partially renders the provision void of effect because, if the parties had intended to limit Claimant's responsibility for import duties, they could have selected another delivery term. For example, the DAP Incoterm, which also requires the seller to bear all risks involved in delivering the goods and clearing them for export, but under which the seller has no obligation to clear the goods for import, pay any import duty or bear any import customs formalities [*Ramberg, p. 137, par. 4*].

132. Furthermore, Claimant has worked with Incoterms in the past. Its General Conditions, which are usually inserted in its contracts, provide delivery EXW Capital City [*PO2, p. 56, par. 9*]. It is reasonable to assume that Claimant had significant expertise in this area, in particular seeing as it previously owned a transport division [*PO2, p. 56, par. 9*]. Therefore, under the standard provided by art. 8(3) CISG, a reasonable person of the same kind as Claimant would be expected to know both the effects of selecting a certain delivery term and the proper manner of derogating or adjusting Incoterms.

133. As such, because the parties knowingly agreed to the DDP term, which includes Claimant's obligation to clear the goods for import, and because they did not add any derogation from this term into the Contract, Claimant bears the burden of paying the tariff.

II. The 30% tariff does not fall under the hardship clause

134. Claimant stated that the tariff imposed by the Government of Equatoriana constitutes hardship under clause 12 of the Contract [*CL Memo, par. 93*]. However, this is incorrect.

135. Clause 12 of the Contract states that the "[s]eller shall not be responsible for […] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex, C5, p. 14, par. 12*].

136. In the negotiation process, Ms. Napravnik suggested reliance on the ICC Hardship clause [*Ex. R2, p. 34, par. 6*]. However, Mr. Antley, according to his note, which included all the issues remaining open for further negotiations, considered the ICC Hardship clause too broad [*Ex. R3, p. 35, par. 2*]. Respondent's negotiator, Mr. Krone, drafted a narrow hardship provision into the force majeure clause, and Claimant's subsequent negotiator, Mr. Ferguson agreed to the final version which is now reflected in clause 12 of the Contract [*PO2, p. 56, par. 12*].

137. The final wording of the clause contains a particular circumstance that amounts to hardship (health and safety requirements) and lists the conditions that must be met in order for other circumstances to be included in the scope of the clause. The 30% tariff does not meet these conditions. The tariff is not comparable to health and safety requirements (**A**) it is not unforeseeable (**B**) and is below the required threshold (**C**).

A. The tariff is not comparable to health and safety requirements

138. Clause 12 does not specify a list of events in which it is applicable. It mentions "health and safety requirements" and uses a general statement: "comparable events". However, tariffs are not comparable to health and safety requirements because they are of a different nature.

139. The *ejusdem generis* principle ("of the same nature") should be given effect. The principle states that if "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" [*City Stores v. Adams; see also Maharashtra v. Satchikitsa*].

140. Therefore, in the present case, the general statement added to the hardship section of clause 12 ("comparable events") is limited to circumstances similar in nature with health and safety requirements. Import tariffs have a fundamentally different nature. This is because the imposition of health and safety requirements qualifies as a *non-tariff barrier*, similar to import quotas, subsidies, price-control measures or procurement restrictions.

141. These measures can potentially have an economic effect on international trade in goods by changing the quantities traded, the prices, or both [*UNCTAD, p. 1; Vinokurov et al., p. 2*]. They do not directly aim to restrict imports or promote exports because they do not impose taxes on the import of foreign products [*Brauer, par. 3; Vinokurov et al., p. 2*]. Moreover, the aim of non-tariff barriers is to achieve public policy objectives, while tariffs are introduced in order to realize economic and trade objectives [*Ronen, p. 46; Herghelegiu, p. 3; Lu, p. 74-75*]. Consequently, the 30% tariff imposed by the Government of Equatoriana is not comparable to health and safety requirements and does not fall under the scope of the hardship clause.

B. The tariff should have been foreseen

142. Claimant argued that the 30% tariff was unforeseen [*CL Memo, par. 94-97*]. However, the tariff could have been and should have been foreseen.

143. Respondent agrees with Claimant [*CL Memo, par. 107*] that, in order to assert the foreseeability of an impediment, the relevant test is whether a reasonable person ought to have foreseen the impediment's initial or subsequent existence, in light of "the actual circumstances at the time of the conclusion of the contract and taking into account the trade practices" [*Schlechtriem/Schwenzer, p. 1134, par. 14; see also Lindström, p. 1, 8; Brunner, p. 156 et seq.; Tallon, par. 2.6.3; Zeller, p. 157; Staudinger/Magnus, art. 79, par. 5.3*].

144. However, Claimant could have reasonably been expected to take into consideration tariffs at the conclusion of the Contract. The tariffs imposed by Claimant's country, Mediterraneo, were expected from President Bouckaert [*Ex. C 6, p. 15, par. 3*]. President Bouckaert's April 2017 election occurred prior to the conclusion of the Contract. Moreover, his election program had been available since January 2017 [*Ex. C6, p. 15, par. 3; PO2, p. 58, par. 23*].

145. Mr. Bouckaert had announced in his program a more protectionist approach to free trade [*Ex. C6, p. 15, par. 2*]. Additionally, Ms. Cecil Frankel, of the most ardent critics of free trade, had been appointed as the Minister for agriculture in Mediterraneo [*PO2, p. 56, par. 23*]. She had advocated limiting the access of foreign products to the Mediterranean market. Therefore, Claimant should have foreseen the imposition of trade tariffs by Mediterraneo.

146. Equatoriana's response was also foreseeable. Retaliatory measures are common practice in the global trading world. A country retaliates with its own tariffs in order to rebalance its position. This has been previously demonstrated by the tariffs imposed by the United States.

147. President Trump announced that the United States would impose a 25% tariff on US$ 50 billion of imported Chinese goods. The Chinese authorities responded that, "in order to safeguard China's own legitimate rights and interests", China would apply a 25% additional tariff to a list of American products, including agricultural products [*Hong Kong Information Note, p. 10, par. 2.12(c)(i), p. 7, par. 2.11(c)(i)*]. The United States also imposed tariffs on goods coming from countries such as Canada, India and the European Union. These countries immediately retaliated with tariffs that revolve around the 30% mark.

148. Moreover, Mediterraneo and Equatoriana are members of the WTO [*PO2, p. 61, par. 47*]. The WTO allows a country to retaliate when the imposition of the first round of tariffs does not have a legal basis [*Bown, par. 3; see also EC-US Banana case; US Gambling case*].

149. In the present case, the justification for the tariff imposed by Mediterraneo was "more a mockery of the system than a good faith effort to justify the controversial tariffs within the boundaries of the existing system" [*Ex. C6, p. 15, par. 2*]. The measure taken was unjustified, therefore, it was reasonable to assume that other countries would take action. A commercially aware businessperson should have taken the risk into consideration.

150. Additionally, it was not the first time that the Government of Equatoriana retaliated, despite its reputation regarding its respect for free trade [*Ex. C6, p. 15, par. 2*]. Claimant argued that in the past, the retaliation was due to the National Party, whereas now the prime minister comes from the Progressive Liberals [*NoA, p. 7-8, par. 19*]. However, a more protectionist approach to free trade was announced, which makes the doctrines of the two parties similar.

151. Lastly, Equatoriana is not the only country that reacted with retaliatory measures to the 25% tariff, "other governments have indicated comparable measures" [*Ex. C6, p. 15, par. 3*]. Protectionist and retaliatory measures were expected even before the parties concluded the Contract and, therefore, Claimant should have foreseen the imposition of both tariffs.

C. The tariff did not make the Contract more onerous

152. Claimant argued that the 30% tariff constitutes hardship because it made the Contract more onerous [*CL Memo, p. 19-20, par. 75*]. Claimant further argued that the Contract became more onerous on two levels: it deprived Claimant of its 5% profit margin and it made Claimant incur a loss of 25% [*CL Memo, p. 30, par. 110*].

153. Clause 12 of the Contract only requires that the event make the contract "more onerous". However, that phrase must be read in the context of the entire phrase in which it appears and is, therefore, qualified by the concept of hardship: "hardship [...] making the contract more onerous". Claimant's loss does not amount to hardship.

154. Hardship is generally defined as instances where the original contract equilibrium was fundamentally disturbed [*FeMo Alloy case; Interest rate case; CISG-AC Op. 7, par. 3.1; Schlechtriem/Schwenzer, p. 90, par. 42; Brunner, p. 322, par. 4; Tallon, par. 3.2; Lindström, p. 25; Fucci, p. 3*]. Not any event which makes the contract more onerous for one party represents hardship. If minor changes would determine adaptation, then the contract as a binding legal agreement would lose its importance [*Steel bars case*]. Several opinions exist regarding what would be an appropriate threshold.

155. One opinion is that the alteration of the equilibrium of the contract should amount to 50% or more of the cost or the value of the performance in order to be fundamental [*UNIDROIT Principles Commentary (1994), p. 147, par. 1*]. The 1994 Official Commentary on the

UNIDROIT Principles adopted a general threshold test of "an alteration amounting to 50% or more of the cost or the value of the performance". This standard was subsequently removed from the newer editions of the commentary because the Working group for the preparation of the UNIDROIT Principles, found that "a 50 percent alteration was considered too low and rather arbitrary" [*Girsberger/Zapolskis, p. 126-128*].

156. Another opinion is that the alteration should be of at least 100% or even 150-200% [*Schwenzer (2008), p. 717, par. 1; Brunner, p. 432, par. 1; Girsberger/Zapolskis, p. 126; Melis, p. 218*]. In international commercial arbitration cases, a cost increase by 13%, 30%, 44% or 25-50% was considered too low to qualify as hardship [*Brunner, p. 427; see also Steel bars case; Nuova Fucinati v. Fondmetall; Rolling machine case; Petroleum case*].

157. In an ad hoc arbitration, the tribunal (despite the strong dissent of one of the arbitrators, Charles Molineaux) qualified a 35% increase in cost of performance to be a changed circumstance, justifying hardship [*Icori Estero v. Kuwait*].

158. However, this Tribunal should not follow a similar approach. First, hardship is applicable only to long-term contracts [*UNIDROIT Principles Commentary (2016), p. 222*] as opposed to the one in the present case (less than 1 year from signing to performance). Second, hardship should only be granted where the obligation becomes "excessively onerous", threatening and exorbitant loss. Claimant did not incur such a loss [*see infra, par. 193-194*]. Third, hardship provisions should not be applied to monetary obligations [*Brencius v. Ukio Investicine*].

159. In the present case, the cost expected by Claimant for the entire Contract was US$ 9,500,000 [*PO2, p. 59, par. 31*]. The final cost after the payment of the tariff was US$ 11,000,000. This amounts to a cost increase by 16%. This percentage does not even remotely approach the thresholds recognized by case law and legal scholars. Moreover, this percentage is not similar to those contemplated in the statements of the parties, which can be taken into consideration under art. 8(3) CISG [*Schlechtriem/Schwenzer, p. 158, par. 32; Macromex v. Globex*]. Ms. Napravnik referred in her email from 31 March 2017 to unforeseeable requirements that "can increase the cost by up to 40%" [*Ex. C4, p. 12, par. 4*]. A 16% increase in costs is significantly lower than a 40% increase in costs.

160. Claimant might argue that the threshold should be lowered because the impact of the tariff must be analyzed in conjunction with Claimant's financial situation. However, when hardship is assessed, the parties' financial situation should not be considered. The only relevant standard is the equilibrium between the parties' obligations under that particular contract. An exception is sometimes recognized, but only if the impediment leads to the financial ruin of the party

facing it [*Schwenzer (2008), p. 716, par. 3; Brunner, p. 438, par. 3*]. In the present case, Claimant was not financially ruined because it had to bear the tariff.

161. First, Claimant's financial problems preceded the Contract with Respondent, and they were the effect of a decision to invest in new stables in 2013 and of Claimant failing to properly protect itself in an arms' length commercial transaction back in 2014 [*PO2, p. 59, par. 29; PO2, p. 58, par. 21*]. As such, any financial difficulties that Claimant is now experiencing are neither directly nor solely caused by the fact that Claimant chose to pay the import tariff.

162. Second, Claimant planned to make a profit of US$ 300,000 in 2018. This plan was not ruined, it was simply "endangered" [*PO2, p. 59, par. 29*]. That is because Claimant has other solutions for resolving its financial difficulties, such as selling the dressage part of its business to a buyer that already showed interest [*PO2, p. 59, par. 29*].

163. Third, Claimant argued a situation of borderline insolvency, but waited six months to commence this arbitration. Moreover, Claimant had no trouble funding this arbitration, without recourse to third party funding. It promptly paid the registration fee of HK$ 8,000 [*Record, p. 19*] and US$ 19,170 as deposits for the fees and expenses of this Tribunal and HKIAC's administrative fees [*Record, p. 21, p. 46*]. Consequently, as of the date of this memorandum, more than one year passed since Claimant paid the tariff, and the facts indicate that Claimant is still in business. Claimant, on which the burden rests, presented no evidence to the contrary.

164. Therefore, the tariff imposed by Equatoriana does not activate the hardship mechanism provided in clause 12 of the Contract.

<u>III. This Tribunal should not resort to the CISG or the UNIDROIT Principles as a basis for adaptation</u>

165. Claimant argued that this Tribunal could adapt the contract under the CISG or the UNIDROIT Principles [*CL Memo, par. 114-117*]. However, the existence and wording of clause 12 of the Contract excludes the application of art. 79 CISG (**A**). Furthermore, even if the parties had not derogated from art. 79 CISG through clause 12 of the Contract, this Tribunal should deny Claimant's request for adaptation because art. 79 CISG does not govern hardship (**B**) and because, even if it did, the conditions set forth in art. 79 CISG are not met (**C**). Lastly, this Tribunal should not decide the adaptation of the price under the UNIDROIT Principles (**D**).

A. Clause 12 of the Contract excludes the application of art. 79 CISG

166. Contrary to Claimant's submission [*CL Memo, par. 111*], art. 79 CISG is not applicable to the Contract. The inclusion of a force majeure and hardship clause into the Contract amounts to a

derogation from art. 79 CISG. Clause 12 of the Contract provides for a special regime in case of changed circumstances and constitutes a derogation in the sense of art. 6 CISG.

167. The general principle of party autonomy enables parties to exclude the applicability of the CISG in whole or in part, under art. 6 CISG [*Schletriem/Schwenzer, p. 115, par 27; Huber/Mullis, p. 66, par. 3; CISG-AC Op. 16, par. 1. 1*; *Coetzee, p. 227, par. 1*].

168. According to the Secretariat Commentary, the parties may exclude the application in part, derogate from or vary the effect of any of the provisions included in the CISG, by adopting provisions in their contract providing solutions different from those in the Convention. Such exclusions may be express or implied [*Secretariat Commentary art. 6*].

169. The inclusion of a force majeure and hardship clause into the Contract (in the present case, clause 12) amounts to a derogation from art. 79 CISG, under art. 6 CISG [*Corn case*]. Clause 12 of the Contract contains specific qualifiers of force majeure ("missed flights, weather delays, failure of third-party service, or acts of God") and hardship ("additional health and safety requirements") scenarios. In contrast, art. 79 CISG allows for any event to qualify as an "impediment beyond [the party's] control".

170. Therefore, clause 12 of the Contract governs the same matter as art. 79 CISG (*i.e.*, force majeure) and offers a solution which differs from the provisions of art. 79 CISG (by narrowing the scope of the limitation of liability to only certain types of events). As such, this Tribunal should find that the parties derogated from art. 79 CISG by means of clause 12 of the Contract and that, as a result, art. 79 CISG is not applicable in the present case.

B. Art. 79 CISG does not govern hardship

171. Contrary to what Claimant argued [*CL Memo, par. 112*], the question of whether art. 79 CISG governs hardship or not is far from settled. Legal scholars note that art. 79 CISG does not govern hardship [*Flambouras, p. 261; Audit (1990), p. 174, par. 182; Zeller (2009), p. 164-165*], observing that hardship was deliberately omitted from the CISG, which "seems to work with a strict interpretation of the *pacta sunt servanda* principle" [*Kröll/Mistelis/Viscasillas (2018), p. 1072, par. 78-80*].

172. Art. 79(1) CISG provides that "[a] party is not liable for failure to perform any of [its] obligations if [it] proves that the failure was due to an *impediment* beyond his control and that he could not *reasonably* be expected to have taken the impediment into account" [*emphasis added*]. Claimant stated that the word "impediment" used in art. 79(1) CISG does not only refer to an event that makes performance absolutely impossible [*CL Memo, par. 112*].

173. The CISG does offer a more flexible standard than that of traditional force majeure. However, the standard encompassed in art. 79 CISG refers only to barriers to performance (delivery or payment) and, as such, the standard remains stricter than the theory of frustration, impracticability or hardship [*Tallon, p. 592; DiMatteo, p. 297; Honnold, p. 544; CISG-AC Op. 7, par. 28; FeMo Alloy case; Vital Berry v. Dira-Frost; Steel ropes case*].

174. Furthermore, according to the drafting history of art. 79 CISG, "there is some type of consensus among the members of the Working Group against the doctrine of hardship". The *travaux préparatoires* illustrate that the word "impediment" was used in order to attempt a unitary conception of the exemption, in order to set aside theories such as *rebus sic stantibus, imprévision,* or hardship which already had an established legal regime in their respective jurisdictions [*CISG-AC Op. 7, par. 29; Schwenzer (2008), p. 712, par. 2; Honnold, p. 185, p. 252; Flechtner (2011), p. 4, par. 2; Nagy, p. 27*].

175. It is also worth mentioning that the Working Group rejected a proposal which permitted a party to request avoidance or adaptation of a contract in case of unpredicted "excessive damages" [*CISG-AC Op. 7, par. 29; Honnold (1989), p. 350; Schwenzer/Leisinger, p. 273; Nuova Fucinati v. Fondmetall; Sunflower seed case*].

176. Art. 7(1) CISG defers to the international character of the CISG and the need to promote uniformity in its application. Hardship is a concept well-established in some countries (such as Germany, Austria, The Netherlands, Italy, Greece, Portugal). However, that is not the case in other countries (such as France, India, South Africa). If this Tribunal were to apply art. 79 CISG to an alleged hardship scenario, uniformity in the application of the CISG could be threatened by the application of legal theories specific only to certain domestic legal systems [*see infra, par. 189*].

177. Claimant also argued that the remedy of adaptation is available under art. 79(5) CISG or art. 7 CISG [*CL Memo, par. 114-116*]. However, art. 79(5) CISG is not compatible with adaptation, particularly in hardship cases [*Kröll/Mistelis/Viscasillas (2018), p. 1072, par. 80*].

178. The remedies provided by art. 79(5) CISG are used to assist the aggrieved party in case of non-performance or receipt of non-conforming goods. Possible remedies are avoidance, specific performance, claims of interest or a reduction in price [*Lookofsky, p. 166, par. 307*]. In the present case, Claimant's only available remedy under art. 79 CISG would have been an exemption of liability, had Claimant been unable to perform. This was, however, not the case.

179. Therefore, this Tribunal should find that hardship situations and their corresponding remedies (including renegotiation and adaptation) do not fall under the scope of art. 79 CISG.

C. The 30% tariff does not constitute hardship under art. 79 CISG

180. Even if art. 79 CISG allowed for hardship situations, the underlying conditions are not met by the 30% tariff imposed by the Government of Equatoriana.

181. Pursuant to art. 79 CISG, in order for an impediment to be considered hardship it must be unforeseeable, uncontrollable and unavoidable.

182. Respondent acknowledges that the second condition is indeed met. A measure taken by a Government cannot be controlled by private parties. However, the conditions set forth in art. 79 CISG have to be fulfilled cumulatively [*Zeller, p. 153, par. 4*]. In this respect, the first condition is not met, because the 30% tariff was foreseeable [*see supra, par. 142-151*].

183. The third condition is also not met. Under art. 79(1) CISG, the impediment must be such that the promisor could not reasonably avoid it or overcome it or its consequences [*Brunner, p. 337, par.* 3]. As a rule, "the promisor can be expected to overcome an impediment in order to perform the contract in the agreed manner, even when this incurs greatly increased costs and even a loss resulting from the transaction" [*Schlechtriem/Schwenzer, p. 1136, par. 15*].

184. Claimant paid the tariff and it fulfilled its obligations. Therefore, it overcame the impediment. Claimant might point out that additional efforts were required on its part in order to overcome the impediment. However, the additional efforts are only relevant when the "ultimate limit of sacrifice has been exceeded" [*Schlechtriem/Schwenzer, p. 1136, par. 15*]. This limit was not exceeded in the present case. Claimant was able to pay and to still continue its business [*see supra, par. 161-163*]. Consequently, the 30% tariff does not amount to hardship.

D. This Tribunal should not decide adaptation under art. 6.2.3 UNIDROIT Principles

185. Contrary to what Claimant argued [*CL Memo, p. 35, par. 117*], if this Tribunal determines that art. 79 CISG does not provide for the remedy of adaptation, Claimant is not entitled to rely on the application of the UNIDROIT Principles - the domestic contract law of both Equatoriana and Mediterraneo [*PO1, p. 53, par. 4*] - to supplement art. 79 CISG or the Contract.

186. Art. 79 CISG does not allow for the application of art. 6.2.2 and art. 6.2.3 UNIDROIT Principles. The provisions of the UNIDROIT Principles may serve as a means of interpretation or supplementation to the CISG if there is a gap with respect to situations of hardship, or if the matter would fall completely outside the scope of the CISG.

187. Regarding the first scenario, the purpose of art. 79 CISG is to establish definite limits as to a promisor's responsibility for breach. As such, there is no gap to be filled under art. 7(2) CISG. This is also confirmed by the legislative history of the CISG [*see supra, par. 174*].

188. Regarding the second scenario, hardship is not explicitly excluded from the matters governed by the CISG through art. 4 CISG. Therefore, they should not be dealt with by resort to domestic law [*Silveira, p. 329, par. 498; Nuova Fucinati v. Fondmetall*].

189. As such, while art. 79 CISG may be "the convention's least successful part of the half-century of work towards international uniformity" [*Honnold, p. 484*], the interpretation of art. 79 CISG against the background of national laws should nevertheless be avoided [*Zeller (2009), p. 170; Kessedjian, p. 417; Raw materials v. Manfred*]. Recourse to domestic laws would endanger the uniformity of the CISG [*Schwenzer (2008), p. 718; CISG-AC Op. 7, par. 36; Kröll/Mistelis/Viscasillas (2018), p. 1072, par. 78-80; Viscasillas, p. 5, par. 2; Enderlein/Maskow, p. 316, p. 320; Ferrari (2008), p. 419*].

190. Claimant invoked the *Scafom v. Lorraine Tubes* case in order to assert hardship under the UNIDROIT Principles [*CL Memo, par. 100*]. However, the decision of the Belgian Supreme Court is often criticized because it undermines the international character of the CISG and the importance of its uniform application and because it clearly privileges the civil law approach to the matter [*DiMatteo, p. 26, par. 2; Flechtner (2011), p. 13, par. 2*].

IV. In any case, Claimant is not entitled to the entire amount of US$ 1,250,000

191. The imposition of the tariffs does not amount to hardship under the Contract or under the CISG and Claimant cannot rely on the remedy of adaptation [*see supra, par. 134-190*]. However, if this Tribunal finds that there is a situation of hardship and that it can adapt the Contract, the price increase requested by Claimant is not reasonable (**A**). Moreover, the arguments used by Claimant do not justify a price increase of US$ 1,250,000. Respondent's profit is not relevant (**B**) and neither is the conduct of Respondent's representatives (**C**). This Tribunal should, in any case, reach a reasonable solution for both parties (**D**).

A. The price increase requested is not reasonable

192. Pursuant to art. 6.2.3(4)(b) UNIDROIT Principles "[i]f the court finds hardship it may, if reasonable, […] adapt the contract with a view to restoring its equilibrium". The adaptation should result in an "adequate adjustment of the parties' respective obligations" [*Fontaine/Ly, p. 478, par. 5; Chevron v. Ecuador*]. In the present case, ordering Respondent to pay 25% of the import tariff is not adequate and is not proportional to Respondent's obligations.

193. First, Claimant's loss should not be calculated only in relation to the third shipment. It should be calculated in relation to the total Contract price of US$ 10,000,000. This means that the alleged loss incurred, of US$ 1,250,000, is equivalent to only 12.5% of the Contract price.

194. Moreover, Claimant voluntarily waived requesting US$ 250,000 (Claimant's profit margin) out of the US$ 1,500,000 representing the 30% tariff. This waiver should extend to the entirety of the tariff, because the tariff is unique and there is no reason to distinguish between Claimant's profit margin and the remainder of Claimant's loss. As a result, it would be inappropriate for this Tribunal to proceed to such an apportionment.

195. Furthermore, as Claimant has been dealing with a strained financial situation since 2014, its financial difficulties are not related to the import tariff [*Ex. C8, p. 17, par. 7; PO2, p. 56, par. 29*]. Any financial difficulties of Claimant are not directly caused by the payment of the import tariff. Claimant chose to pay the tariff, at its own risk, presumably in order to determine Respondent to continue the long-term business relationship envisioned, instead of attempting to rely on an exemption from performance under art. 79 CISG. Given the amount claimed, Claimant's request for price adaptation appears an attempt to improve its financial situation by claiming a far from reasonable amount from Respondent.

196. Consequently, it would not be reasonable, nor proportional, to force Respondent to pay a 25% tariff, which translates to US$ 1,250,000.

B. Respondent's profit is not relevant for the price adaptation

197. Claimant argued that Respondent breached the Contract by reselling 15 of the 100 doses and that this would justify granting the former the proposed price increase [*NoA, p. 8, par. 20*].

198. The final clause added to the Contract only contains the following: "The semen is to be used for the following mares: (and others after information of the Seller)" [*Ex. C5, p. 13, par. 3*]. Claimant failed to prove that Respondent had an obligation not to resell to third parties. The Contract only provides for an obligation to inform.

199. Even if Respondent were bound by a resale prohibition clause, the alleged breach would still not justify the prices increase of US$ 1,250,000. First, the applicable remedy available to Claimant would be a claim for damages, pursuant to art. 74 CISG. Second, the profit that Respondent made has no connection with Claimant, its country or its possible clients.

200. Regardless of whether Respondent had the obligation or not and of whether it breached the Contract or not, Claimant does not demand damages and did not prove its loss. Moreover, it based its claim of US$ 1,250,000 on the alleged US$ 300,000 profit made by Respondent and it completely ignores that it made a profit of US$ 250,000 from the first shipment. Therefore, Respondent's alleged profit of US$ 300,000 is irrelevant to the claim of price adaptation.

C. The conduct of Respondent's representatives does not justify the price adaptation

201. Mr. Shoemaker was responsible for Respondent's racehorse breeding program and he was in charge of all questions concerning the Frozen Semen Sales Agreement [*PO2, p. 59, par. 32*]. During the conversation between Mr. Shoemaker and Ms. Napravnik on 21 January 2018, the former stated that "if the contract provides for an increased price in the case of such a high additional tariff [they] will certainly find an agreement on the price" [*Ex. R4, p. 36, par. 4*].

202. Claimant argued that Mr. Shoemaker accepted the adaptation of the price and urged Claimant to make the delivery [*CL Memo, par 109; Ex. C8, p. 18, par. 10*]. To the contrary, Mr. Shoemaker's statement does not represent an agreement to adapt the Contract.

203. Mr. Shoemaker was informed about the tariff by Ms. Napravnik on a Sunday morning. Because of the unfortunate timing, he could not reach the members of Respondent's legal department to further discuss the issue. As he was not involved in the negotiations, he specifically limited himself, during the conversation with Ms. Napravnik, to language that would not be interpreted as a concession, but only as confirmation that the Contract will be performed as the parties agreed to [*Ex. R4, p. 36, par. 4*]. Consequently, Mr. Shoemaker's conduct does not justify a price increase.

D. Any adaptation mechanism should result in a reasonable solution for both parties

204. Claimant's proposal is that its business would not suffer any loss because most of the tariff would be paid by Respondent [*CL Memo, p. 31, par. 112*]. Specifically, Claimant's proposal is that the import tariff be paid 83% by Respondent (US$ 1,250,000 out of US$ 1,500,000) and 17% by Claimant (US$ 250,000 out of US$ 1,500,000). Such a proposal should not be followed. Adaptation means to modify the contract "with a view to restoring its equilibrium" [*art. 6.2.3(4)(b) UNIDROIT Principles*]. It should result in an "adequate adjustment of the parties' respective obligations" [*Fontaine/Ly, p. 478, par. 5; Chevron v. Ecuador*].

205. Ordering Respondent to pay an additional US$ 1,250,000 is not an adequate adjustment of the parties' obligations. Claimant bears the entire burden of the import tariff, under the DDP term [*see supra, par. 123-133*]. Such tariffs are routinely allocated in commercial transactions to one party, and not apportioned between the parties in some percentages [*Ramberg, p. 149*]. Moreover, Claimant voluntarily waived requesting US$ 250,000 (Claimant's profit margin) out of the US$ 1,500,000 representing the 30% tariff.

206. Alternatively, this Tribunal should require Claimant to further substantiate its profit margin, conveniently set at 5% pursuant to self-serving calculations. If a higher profit margin is found to exist, the higher amount should be deducted from the full amount of the tariff. In particular,

Respondent notes that Claimant's calculations are unrealistic in that the fixed costs for the production of one dose of frozen semen (US$ 80,000) are equal to the fixed costs for a natural covering [*PO2, p. 59, par. 31*].

207. The amount requested by Claimant does not reflect the risk allocation regarding the import tariff, nor the general risk allocation under the Contract. Case law and legal scholars note that "unlike the risks which result from total impossibility, the risks of unforeseen events are to be shared" [*Lando/Beale, p. 327; Beer case*] and that "an equal distribution of the risk should be envisaged" [*Kröll/Mistelis/Viscasillas (2018), p. 1074, par. 86; Loan agreement case*].

208. Respondent did not undertake more risks than Claimant under the Contract. Claimant might emphasize in particular clauses 2 and 7 of the Contract, which place the risk of the fertilizing capacity of the semen and the risk of "no live foal guarantee" on Respondent [*Ex. C5, p. 14*].

209. However, these are standard clauses in the industry and the parties made no changes to them [*PO2, p. 55, par. 3*]. Second, although the language is broad, the actual risks involved are minor. First, stud owners carefully analyze the pedigree of the inseminated mares because the price depends highly on the success of the offspring [*PO2, p. 57, par. 19*]. Second, mares younger than 16 years old have a higher chance to give birth to successful offspring than older mares [*O'Sullivan, p. 27*]. In our case, the three mares inseminated are aged 8-10 years. Third, Respondent has a strong guarantee of progressive motility of 35% under clause 1 of the Contract. The minimum post-thaw "progressive motility" generally recommended for commercial distribution of frozen semen is 30% [*Loomis, par. 1*]. Fourth, Nijinsky III has sired several racehorse champions [*NoA, p. 5, par. 3*]. Even though Nijinsky's semen had not been used for artificial insemination [*PO2, p. 55, par. 4*], Claimant's evaluations show a perfect match for Respondent's mares [*Ex. C2, p. 10, par. 1, 2*]. Therefore, Respondent assumed a minimum risk of the fertilizing capacity of Nijinsky's semen.

210. Moreover, clause 9 (registry compliance), clause 10 (tank rental and handling fees) and clause 11 (inspection) represent obligations that buyer usually assume in international sales of goods. Similarly, clause 13 (insurance) is not a risk assumed by Respondent, but merely an obligation of limited monetary value. It is also not a derogation from the standard DDP term because the DDP term does not regulate insurance fees [*Ramberg, p. 155*].

211. Consequently, on the one hand, the risks undertaken by Respondent are low and well-considered. On the other hand, Claimant undertook the majority of risks by agreeing to DDP [*see supra, par. 123-133*]. Therefore, the general risk allocation in the Contract does not justify Claimant's demand. It also does not reflect the reality that contracts are mutual enterprises, which can, in some respects, be analogized to partnerships [*Harrison, p. 573*]. This is

particularly true in the present case where the parties envisioned a long-term mutually beneficial relationship [*Ex. C2, p. 10, par. 3; Ex. C3, p. 11, par. 1; Ex. C8, p. 18, par. 1*]. Respondent informed Claimant from the beginning of its intent to make further purchases, "going clearly beyond this single [one]" [*Ex. C3, p. 11, par. 1*] and even accommodated Claimant's request to split the payment in two equal installments in order to meet the latter's conditions imposed by its creditors [*PO2, p. 56, par. 11*]. Further, Mr. Shoemaker told Ms. Napravnik that Respondent was interested in buying 50 doses of frozen semen from Empire's State, Claimant's second stallion of world reputation [*Ex. C8, p. 18, par. 1*].

212. Consequently, Respondent suggests that a more reasonable approach, which the parties could discuss during the oral hearings in April 2019, would be towards an equal allocation of Claimant's loss under the Contract (US$ 1,250,000). Respondent would have to pay US$ 625,000 (50% of Claimant's loss), representing an additional 6.25% over the Contract price.

213. **Conclusion.** The Tribunal should not adapt the Contract because the import tariff imposed by the Government of Equatoriana should be borne by Claimant as it agreed to the DDP term. Furthermore, the conditions for hardship are not met under the hardship clause, nor under the CISG. In the alternative, if this Tribunal finds that the tariff does constitute hardship and that it should adapt the contract, it should not grant Claimant the price increase of US$ 1,250,000.

REQUEST FOR RELIEF

214. With respect to the three issues identified by this Tribunal for purposes of the first procedural phase, counsel for Respondent respectfully requests this Tribunal to:

1. Find that the Tribunal does not have the jurisdiction or the power to adapt the Contract;
2. Not admit the evidence from the other HKIAC arbitration; and
3. Not order Respondent to pay US$1,250,000 as an increase of the price.

On behalf of Black Beauty Equestrian

Cezara Diaconescu	Voica Lupașcu	Claudia Mihalcea	Ana Negrea
Daria Pătrășcoiu	Ciprian Pozderie	Bianca Radoslav	Andreea Radu

CERTIFICATE AND CHOICE OF FORUM

We, the undersigned, members of the team of the University of Bucharest, hereby certify that this 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.

☐ 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.
- ☐ 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
  - ☐ Vis East Moot
  - ☐ Vienna Vis Moot

Cezara Diaconescu	Voica Lupașcu	Claudia Mihalcea	Ana Negrea
Daria Pătrășcoiu	Ciprian Pozderie	Bianca Radoslav	Andreea Radu