„**Team Silesia East** – raising the knowledge and skills of students from the University of Silesia concerning international commercial arbitration by participating in international competitions" as an external project "**The Best of the Best 3.0**"

16TH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG
31 MARCH - 7 APRIL 2019

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF SILESIA IN KATOWICE

ON BEHALF OF:

BLACK BEAUTY EQUESTRIAN
2 SEABISCUIT DRIVE
OCEANSIDE
EQUATORIANA

AGAINST:

PHAR LAP ALLEVAMENTO
RUE FRANKEL 1
CAPITAL CITY
MEDITERRANEO

COUNSELS

Olga Marcinkowska | Agata Zwolankiewicz

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STATEMENT OF FACTS

THE PARTIES TO THIS ARBITRATION ARE PHAR LAP ALLEVAMENTO, MEDITERRANEO (HEREINAFTER REFERRED TO AS "**PHAR LAP**" OR THE "**CLAIMANT**") WHICH IS ALSO **THE SELLER**, AND BLACK BEAUTY EQUESTRIAN, EQUATORIANA (HEREINAFTER REFERRED TO AS "**BLACK BEAUTY**" OR THE "**RESPONDENT**") WHICH IS ALSO **THE BUYER**.

1. In **2016,** Equestrian World took place where the Parties met for the first time.
2. On **21 March 2017**, the Respondent inquired about the availability of the Nijinsky III's frozen semen due to the temporary lift of the ban on artificial insemination for the racehorses in Equatoriana.
3. The Parties were in the negotiation process when on **12 April 2017** the main contract negotiators on the Claimant's and the Respondent's part were involved in a car accident.
4. On **6 May 2017** the Parties concluded the Sales Agreement. Under the Sales Agreement the Claimant was obliged to supply the Respondent with the frozen semen in three instalments.
5. Before the last shipment was sent, the government in Equatoriana introduced 30% tariffs on agricultural products.
6. On **20 January 2018**, the Claimant contacted the Respondent demanding the contract adaptation without justifiable grounds.
7. On **12 February 2018**, the Respondent's CEO justly refused to pay the outstanding price for the tariffs and stopped further negotiations.
8. On **6 July 2018**, the Respondent terminated the contracts of its two employees with immediate effect.
9. On **31 July 2018**, the Claimant submitted the Notice of Arbitration.
10. On **12 September 2018**, the Respondent's computer system was hacked.
11. On **2 October 2018**, the Claimant received information that the Respondent is involved in another arbitration in which it asked for an adaptation of the price due to the tariffs imposed on agricultural products by Mediterraneo.

INTRODUCTION

12. The change of circumstances is an inevitable part of business reality which must be taken into consideration by professional entities entering into a sales contract. The Parties were aware of that fact and decided to regulate certain risks in their Contract. Nevertheless, the Claimant is trying to take advantage of the situation, even though under the Contract, it is not entitled to contract adaptation.

    Firstly, the Arbitral Tribunal lacks jurisdiction and the powers to adapt the Contract under the Arbitration Clause. Despite the fact that the Parties did not explicitly choose the law of Danubia to govern the Arbitration Clause, the surrounding circumstances imply that the law of the seat of arbitration shall be applicable to the Arbitration Clause. Additionally, the Parties narrowed down the scope of the Arbitration Clause and the Claimant's allegation that the law of Mediterraneo governs the Arbitration Clause is merely a purposeful argumentation in order to pursue contract adaptation at all costs (**First Issue**).

13. **Secondly**, the evidence submitted by the Claimant shall be excluded by the Arbitral Tribunal due to the Claimant's involvement in obtaining the evidence. Furthermore, the evidence in question is immaterial and unnecessary and will not affect the outcome of the arbitration. Admitting the evidence would be contrary to the policy of confidentiality of the HKIAC (**Second Issue**).

14. **Thirdly**, the Claimant is not entitled to seek contract adaptation due to the introduction of tariffs by the government in Equatoriana. The claim for an increased remuneration is unjustified and consists in an attempt to shift the economic risk upon the Respondent. The narrowly worded Hardship Clause does neither apply to the imposed tariffs nor provides for a remedy such as contract adaptation. Additionally, the Respondent cannot invoke Article 79 CISG as it does not regulate hardship at all, and even if, the Parties agreed on a specific risk-allocation by which they excluded the application of Article 79 CISG (**Third Issue**).

FIRST ISSUE: ARBITRAL TRIBUNAL LACKS JURISDICTION TO ADAPT THE CONTRACT

15. The Arbitral Tribunal is not empowered to adapt the Contract. The Parties have agreed on the Arbitration Clause [*Cl. Ex. No 5, para. 15, p. 14*] which provides that disputes arising out of the Contract shall be conducted in accordance with the HKIAC Administered Arbitration Rules in the force when the Notice of Arbitration is submitted (hereinafter: HKIAC Rules). The Parties later decided to resolve the dispute according to the newest version of the HKIAC Rules 2018 [*P. O. No 1, para. II, p. 51*]. Due to the fact that the Arbitration Clause stipulates the seat of arbitration to be Danubia, the *lex arbitri* is the Danubian Arbitration Law (hereinafter: DAL). Additionally, as Danubia has adopted the UNICTRAL Model Law on International Commercial Arbitration with 2006 amendments (hereinafter: UNICTRAL Model Law) [*P. O. No. 1, para. III 4, p. 52*], it governs both the formal and substantial validity of the Arbitration Clause, as well as its interpretation. Accordingly, pursuant to the law governing the Arbitration Clause the adaptation of the Contract is not within the powers of the Arbitral Tribunal.

16. Contrary to the Claimant's allegations advocating the application of the law of Mediterraneo to interpretation of the Arbitration Clause, the Respondent will demonstrate that **firstly**: the Arbitration Clause is governed by the law of Danubia [**1**], **secondly**, that under the Danubian law the Arbitral Tribunal is not empowered to adapt the Contract [**2**] and **thirdly**, that in the event that this Arbitral Tribunal finds the law of Mediterraneo as applicable to the Arbitration Clause, it still lacks jurisdiction to adapt the Contract [**3**].

1. The law of Danubia governs the Arbitration Clause.

17. Under Articles V(1)(a) New York Convention and 36 (1)(a)(i) UNICTRAL Model Law the parties have the autonomy to choose the law governing the Arbitration Clause. In the present case, the Parties have not explicitly chosen the law applicable to the Arbitration Clause. Instead, the Parties have expressly subjected the Sales Agreement to be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG). However, contrary to the Claimant's allegations [*Cl. Memo, para. 2 et seq., p. 2*], all of the circumstances indicate that it is the Danubian law which should be applicable to the Arbitration Clause. Therefore, the Respondent will mirror the Claimant's three-step test [*Memo for Cl., para. 2, p. 2*] and prove that there are important factors which illustrate that the law of Danubia governs the Arbitration Clause [**1.1**]. Secondly, the Respondent will argue that

the Danubian arbitration law has the closest and most real connection to the Arbitration Clause [**1.2**].

1.1. Choice of the seat of arbitration indicates the Parties' intention to apply the Danubian law to the Arbitration Clause.

18. Due to the fact that the Parties have chosen another country as the seat of arbitration, *i.e.* Danubia, they must have envisaged that it implies that the law of this particular country will govern issues concerning present arbitral proceedings [*Sulamerica; Born II, para. 2.06 [C], p.56*]. Additionally, notwithstanding that the Parties have not expressly referred to the Danubian law as applicable to the Arbitration Clause, they must have been aware of the fact that the Danubian Arbitration Law will be applicable to any arbitral proceedings initiated under the Arbitration Clause. In the *Sulamerica* case, which was provided by the Claimant [*Memo for Cl., para. 2, p. 2*], the judges in similar circumstances have shared the same view and stated that the choice of the seat of arbitration "*[t]ends to suggest that the parties intended English law* [law of the seat of arbitration] *to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators*" [*Sulamerica*].

19. Furthermore, the choice of Danubia as the seat of arbitration was suggested by the Claimant [*R. Ex. No 2, para. 3, p. 34*]. The Respondent firstly provided the HKIAC Model Clause stipulating that both the law governing the arbitration agreement and *lex arbitri* should be the law of Equatoriana [*R. Ex. No 1, para. 2, p. 33*]. At the same time, the Respondent invited the Claimant to raise any objections against this provision. In response to this offer, the Claimant stated its position on the wording of the arbitration agreement in its email from 11th April 2017 [*R. Ex. No 2, p. 34*]. The Claimant's understanding of the law to the Arbitral Clause can be derived from the analysis of the mentioned email which will be provided in the next paragraph.

1.1.1. The Claimant on its own initiative chosen Danubia as the seat of arbitration.

20. To begin with the analysis of the 11th April 2017 email, it is crucial to provide an overview of the negotiations between the Parties. The Claimant provided the Respondent with its standard terms which included dispute resolution clause stipulating that disputes shall be resolved in Mediterraneo and in accordance with its law [*Cl. Ex. No 3, para. 3, p. 11*]. In return, the Respondent suggested the law of Mediterraneo to be applicable only if the courts of Equatoriana would have had jurisdiction [*Cl. Ex. No 3, para. 3, p. 11*]. Given the Claimant's objection to the jurisdiction of the courts of Equatoriana and its proposal of arbitration in Mediterraneo [*Cl. Ex. No 4, para. 5, p. 12*], the Respondent provided the Claimant with a consistent arbitration agreement based on the HKIAC Model Clause which referred the possible disputes to the

HKIAC and specified that the place of arbitration would be Equatoriana [*R. Ex. No 1, para. 2, p. 33*]. This proposal expressly provided also that the law of the arbitration agreement would be the law of Equatoriana, the English language to be the language of the arbitral proceedings and that the case should be decided by three arbitrators.

21. In its email from 11th April 2017, the Claimant agreed to the Respondent's offer regarding the arbitration agreement, however, on its own initiative it suggested Danubia to be the seat of arbitration [*R. Ex. No 2, para. 2, p. 34*], as it had deemed Danubia to be a neutral country with a well-functioning judicial system [*P. O. No 2, para. 14, pp. 56-57*] and therefore suitable to conduct arbitral proceedings. Additionally, Mrs. Napravnik, who was at that time the Claimant's representative, was aware that Danubian Arbitration Law is a largely verbatim adoption of UNCITRAL Model Law [*P. O. No 2, para. 14, pp. 56-57*]. Therefore, the Claimant must have been aware that specification of the seat of arbitration results in application of its arbitration law, despite its argumentation that the "*mere amendment as to the place of arbitration cannot suggest Claimant referred to the law of Danubia at the same time*" [*Memo for Cl., para. 6, pp. 3-4*]. Such awareness of the Claimant who has chosen third different country as the seat of arbitration on its own initiative, implies that the Claimant have intended the other law to govern the proceedings, as well as the Arbitration Clause.

1.1.2. The Claimant has amended only a part of the Arbitration Clause.

22. The Claimant argues that it has deliberately removed the choice of law clause from the arbitration agreement [*Memo for Cl., para. 14, p. 6*] and it seems that Claimant is also purposefully misleading the facts of the case. As the Claimant's email from 11th April 2017 indicates, the Claimant (in response to the arbitration agreement proposed by the Respondent) stated: "*[w]e would largely accept your proposal with an amendment as to the place of arbitration, so that the clause would read in its relevant part…*" (emphasis added). Right underneath the acceptance of the Respondent's proposal, the Claimant iterated the first part of the arbitration agreement, which was immediately followed by the specification of the place of arbitration – Danubia. The Claimant omitted the provisions of included in the proposal of the arbitration agreement relating to the language of the proceedings and number of arbitrators [*R. Ex. No 2, para. 3, p. 34*]. Therefore, not only did the Claimant expressly state that most of the terms of the arbitration agreement are acceptable with the one and only amendment, but it also included the relevant part which had been changed – the place of arbitration.

23. The Claimant alleges that it has removed the choice-of-law clause [*Memo for Cl., para. 14, p. 6*] from the arbitration agreement. According to the Claimant, such a removal should be regarded as

the intention to put the Arbitration Clause in a legal vacuum which is an obvious fallacy. Following this logic, the Claimant would have also "removed" the specification of the number of arbitrators and the language of the proceedings. Such a reasoning would lead to preposterous conclusions that the Claimant intended to remove all these provisions as well. The provisions concerning number of arbitrators and language of arbitration, which should be regarded as allegedly "removed" from the Arbitration Clause as well, have remained unchanged since the Respondent's first proposal based on the HKIAC Model Clause [*Cl. Ex. No 5, para. 15, p. 14; R. Ex No 1, para. 2, p. 33*]. This is due to the fact that the successors of the two injured negotiators took the two parts of the arbitration agreements (although not very successfully) contained in both emails and combined them together without further discussion on this issue [*P. O. No 2, para. 7, p. 55*]. As the Parties have never referred to the provisions covering the language and the number of arbitrators at the later stage, it contradicts the Claimant's allegation that it intended to apply the law of Mediterraneo to the Arbitration Clause. It should be concluded that the successors have unintentionally omitted the provision concerning the law applicable to the Arbitration Clause, as the question of the law governing the Arbitration Clause was never negotiated by the Parties in the course of business relationship [*P. O. No 2, para. 6, p. 55*].

24. If the Claimant had intended to alter the law governing the arbitration clause, it should have provided it explicitly, as it had done with the seat of arbitration [*R. Ex. No 2, para. 3, p. 34*]. Furthermore, it cannot be assumed that the alleged "removal" or silence on the issue of the law governing the Arbitration Clause was an expression of the Claimant's intention to apply the law of Mediterraneo to the Arbitration Clause. The clause provided by the Respondent stated that the governing law should be the law of Equatoriana, which is the Respondent's place of business [*R. Ex. No 1, para. 2, p. 33*]. The Claimant's silence on this issue could actually lead to two implications: either the Claimant agreed for the arbitration clause to be governed by the law of Equatoriana, or the Claimant agreed that instead, the law of Danubia should apply as a consequence of altering the seat of arbitration. The first option, in favour of the law of Equatoriana, would be contrary to the Claimant's own internal policy. It results from the fact that such additions would require the Claimant's creditor's committee to approve the clause, which provides for dispute resolution in the country of the counterparty which Claimant tried to avoid [*R. Ex. No 2, para. 2, p. 34*]. For that reason, the only possible option was that the Claimant has proposed Danubia as the seat of arbitration as this choice did not require the creditor's committee to agree on a dispute resolution in a neutral country.

25. As a consequence, next to the Claimant's own initiative stipulating Danubia as the seat of arbitration, this is a second factor which indicates that the law of Danubia should be applicable to the Arbitration Clause.

1.1.3. The Claimant has expressly stated that the law of Mediterraneo governs only the Sales Agreement.

26. The Claimant argues that its offer was "*ON THE CONDITION that the whole Sales Agreement shall be governed by the law of Mediterraneo*" (emphasis added) [*Memo for Cl., para.14, p. 6*].

27. Nothing in the file suggests that the Parties during the negotiations have ever discussed the law applicable to the Sales Agreement. The two mainly discussed issues concerning the dispute resolution and the Hardship Clause. The only reference relating to the law governing the underlying Sales Agreement was provided by the Claimant below its proposal, altering the seat of arbitration from Equatoriana to Danubia and it reads as follows: "*That offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo*" [*R. Ex. No 2, para. 5, p. 34*]. Such a reference preceded by a proposal concerning the seat of arbitration and therefore stipulating the choice of *lex arbitri*, proves that the Claimant must have been aware that another law comes into play in the relationship between the Parties. It should be concluded that the "Mediterraneo condition" was an expression of the Claimant's intent to change the law applicable to Arbitration Clause, as it expressly stated the **only the law applicable to the Sales Agreement remains unchanged**. This is in line with the Claimant's internal policy requiring the creditor's committee to agree to submit the contract to a foreign law [*R. Ex. No 2, para. 34, p. 34*]. Such approval of the creditor's committee would not be required in terms of the arbitration agreement as long as the arbitration is submitted to the law of neutral country with a functioning judicial system [*P. O. No 2, para. 14, pp. 56-57*]. Thus, the Claimant expressed its approval for the application of a new arbitration law of another country (Danubia) and simply clarified that the principal Contract remains subject to the law of Mediterraneo.

1.2. The law of Danubia has the closest and most real connection with the Arbitration Clause.

28. Following the three-step test in the light of the aforementioned circumstances which indicate that the Parties have not impliedly chosen the law of the underlying Contract to govern their Arbitration Clause, it is essential to answer the question which law has the closest and most real connection with the Arbitration Clause [*Sulamerica*].

29. Despite the Claimant's allegations that choice-of-law clause is a strong indication that the Arbitration Clause shall be governed by the law of Mediterraneo [*Memo for Cl., paras 7-11, pp. 4-5*]

"*since the choice of the law of the underlying agreement is strongly related to the implied parties' intention of the governing law to the arbitration agreement…*" [*Memo for Cl., para. 9, pp. 4-5*], the Claimant fails to distinguish the relation between the principal contract and the law which governs thereof. As provided in the *Sulamerica case*, the arbitration clause has a close and real connection with the principal contract, however, "*its purpose and nature are very different*" [*Sulamerica*].The purpose of law governing the Sales Agreement is not related to dispute resolution, and thus, does not have juridical connection to the provisions of the Arbitration Clause which main objective is to secure a mechanism of resolving a dispute. In the judges' view, the closest and most real connection of the arbitration agreement "*is the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective*" [*Sulamerica; Bulbank*]. Consequently, the Danubian law has the most and closest real connection with the Arbitration Clause, as the Danubian law and not the law of Mediterraneo will ensure effectiveness of this arbitration.

1.2.1. The arbitration agreement shall be treated as separate agreement.

30. The Claimant disregards the fact that the Arbitration Clause is a separate agreement and purposefully misinterprets the doctrine of separability [*Memo for Cl., para. 10, p. 5*]. The Claimant alleges that separability of the arbitration agreements comes into play only in situations where the validity of the arbitration agreement is challenged.

31. Under Article 19(1) and (2) HKIAC Rules, arbitration agreements shall be treated as an agreement independent of the other terms of the contract in case of any objections with respect to the existence, validity or **scope of the arbitration agreement**. Therefore, not only does the HKIAC Rules recognise the doctrine of separability concerning the validity and existence of the arbitration agreements, but they also expressly provide that for the purpose of interpretation of arbitration agreements they shall be treated as independent. The concept of separability provided by the Claimant is merely one of the methods of analysing separability. The other one, is that the underlying contracts and arbitration agreements are two separate agreements with two different purposes: the underlying contract provides the parties' rights and obligations and has the primary function, while the arbitration agreement concerns the obligation to settle the dispute which arises from the commercial relationship shaped by the principal contract [*Redfern/Hunter, para. 2.103, p. 104*]. Accordingly, pursuant to the doctrine of separability the fact that Arbitration Clause should be treated separately from the Sales Agreement is another factor which indicates that the law of the seat of arbitration shall govern the Arbitration Clause.

32. To conclude, the Respondent submits that the Arbitration Clause is governed by the Danubian law as this law was chosen together with the seat and has the closest and most real connection with the Arbitration Clause as well as its application is compatible with doctrine of separability.

2. Under the Danubian law the Arbitral Tribunal is not empowered to adapt the Contract.

33. Under Article 28(3) Danubian Arbitration Law the Arbitral Tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so [*P. O. No 2, para. 36, p. 60*]. Also, Article 16 DAL recognises doctrine of separability [*Ans. NoA, para. 14, p. 31*]. Furthermore, the Danubian law adheres for the interpretation of contracts including arbitration agreements to the "four corners rules", which excludes external evidence during the interpretation of the clause [*Ans. NoA, para. 16, p. 32*].

Despite the fact that the Danubian Contract Law does not provide an explicit provision which law should be applied to arbitration agreements, there is consistent jurisprudence that the CISG cannot be applicable, as arbitration agreements are contracts of procedural nature [*P. O. No 2, para. 36, p. 60*].

34. Furthermore, in view of the Danubian courts, the tribunal's power to adapt the contract should be explicitly expressed by the parties. In order to determine whether the parties have explicitly empowered the arbitral tribunal to adapt the contract, the interpretation of the Arbitration Clause is limited only to its wording and no further evidence may be relied upon according to the Danubian "four corners rule". In the present case, the wording of the Arbitration Clause, despite being based on the HKIAC Model Clause, lacks such a conferral of the powers of the Arbitral Tribunal. Furthermore, the wording of the clause is narrower than the HKIAC Model Clause as can be visually demonstrated by the table below.

HKIAC Model Clause	Arbitration Clause
"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 non-contractual obligations arising out of or relating to it***	*Any dispute* *arising out of this contract, including the* *existence,* *validity,* *interpretation,* *performance,* *breach or termination thereof*

shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.	*shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted."*
*The law of this arbitration clause shall be ... (Hong Kong law). **	
The seat of arbitration shall be ... (Hong Kong).	*The seat of arbitration shall be Vindobona, Danubia.*
*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." ***	*The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English.*
Note: ** Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.* *** Optional*	

35. As demonstrated in the table the Parties have removed from the HKIAC Model Clause the part which stipulates that non-contractual obligations are within the jurisdiction of the Arbitral Tribunal, *i.e.* "*or any dispute regarding non-contractual obligations arising out of or relating to it*". Article 7 DAL provides that through the arbitration agreements the parties may submit both contractual and non-contractual disputes to be settled in arbitral proceedings. However, the procedural notion of the arbitration "*is incompatible with the creative character of decisions required in cases of adaptation and gap-filling which involve the evaluation of economic issues and the rewriting of the parties' contract*" [*Rubin/Nelson, pp. 29, 36*]. As a result, the wording of the Arbitration Clause clarifies that adjusting the Contract by the Arbitral Tribunal is excluded from its jurisdiction.

3. Even if the Arbitral Tribunal finds that the law of Mediterraneo governs the Arbitration Clause, still, the Arbitral Tribunal lacks jurisdiction to adapt the Contract.

36. Under the law of Mediterraneo a standard arbitration agreement is regarded as empowering arbitral tribunals to adapt the contract in accordance with Article 6.2.3. para 4b Mediterranean Contract Law [*P. O. No 2, para. 39, p. 60*]. However, as provided above (*see paras 34-35*) the Arbitration Clause significantly differs from a **standard arbitration agreement**.

37. As the Mediterranean jurisprudence provides, if the sales contract is governed by the CISG, it is also applicable to the conclusion and interpretation of the arbitration agreement contained in this Contract [*P.O. No 1, para. 4, p. 52*]. The reference contained in Article 19(3) CISG provides that interpretation of arbitration agreements is governed by Article 8 (CISG) [*Schwenzer/Schlechtriem, p. 148*]. Article 19(3) CISG provides that "*additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially*". Under Article 8(1) CISG, both statements and other conduct of the party are to be interpreted in accordance with its intent where the other party knew or could not have been unaware what that intent was. In accordance with Article 8(2) CISG if the mutual intent of the parties is undeterminable, the statements and other conduct of the parties should be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Further, according to Article 8(3) CISG, in search of the Parties' intention or the understanding of a reasonable person, the adjudicator should take into consideration all the relevant circumstances of the case, thus all the negotiations, any practices which the Parties have established between themselves, usages and any subsequent conduct of the parties [*Bianca/Bonell, para. 2.3, p. 98; Schwenzer/Schlechtriem, para 1, p. 146; UNCITRAL Digest, paras 4-7, p. 34*].

38. The Respondent submits that both the subjective and objective tests required by the CISG lead to a conclusion that this Arbitral Tribunal lacks jurisdiction and is not empowered to adapt the Contract. In this respect, the Respondent will demonstrate that **firstly**, the Arbitration Clause does not allow for contract adaptation in accordance with Article 8(1) CISG [**3.1**] and s**econdly**, that the reasonable third-party test supports the Claimant's line of reasoning [**3.2**].

3.1. The standard of interpretation under Article 8(1) CISG does not empower the Arbitral Tribunal to adapt the Contract.

39. In order to determine that the Arbitral Tribunal lacks jurisdiction and all necessary powers to adapt the Contract, it is crucial to answer the question of the Parties' mutual understanding under

Article 8(1) CISG. This understanding shall be taken into consideration with all the relevant circumstances of the case, such as negotiations, pursuant to Article 8(3) CISG.

40. As discussed above (*see paras 34-35*), not only does the Arbitration Clause lack the Parties' express provision conferring the powers to adapt to the Arbitral Tribunal, but it also was intentionally narrowed down by the Parties. The Respondent informed the Claimant that the HKIAC Model Clause had been narrowed down [*R. Ex. No 1, para. 1, p. 33*]. The Claimant has agreed to Respondent's proposal and amended only the part of the Arbitration Clause concerning the seat of arbitration [*R. Ex. No 2, para. 3, p. 34*].

41. The Claimant tries to argue that the lawyer representing the Respondent, Mr. Antley, has acknowledged the power of the Arbitral Tribunal to decide on contract adaptation [*Memo for Cl., para. 36, p. 10*]. Nevertheless, Mr. Antley stated that *"it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" [*Cl. Ex. No 8, para. 4, p. 17*] (emphasis added). Then, Mr. Antley promised to provide a proposal on the day when the accident happened and never managed to do so [*Cl. Ex. No 8, para. 4, p. 17*].

42. The actual intention of the Respondent cannot be interpreted on the basis of the fact, that the Respondent's representative has preliminary expressed its "probable" understanding for the Claimant's position on that issue. Mr. Antley intended to address the issue of connection of Hardship Clause with Arbitration Clause [*R. Ex. No 3, p. 35*], however, later in the negotiations his successors never addressed that issue. The Claimant states that it was of significant importance to secure a mechanism which would allow for contract adaptation in the case of the Parties' lack of agreement [*Cl. Ex. No 8, para. 4, p. 17*]. Should the Claimant had been so concerned about the adaptation mechanism, it would have put an emphasis on this issue during the negotiations. Nothing in the case file suggest that the Parties have discussed it, except for one reference to the Hardship Clause, when the Parties have agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in a Contract [*R. Ex. No 3, para. 4, p. 35*].

3.2. The application of the objective test under Article 8(2) CISG does not grant the Arbitral Tribunal the power to adapt the contract.

43. If it is not possible to determine the mutual intent of the parties under Article 8(1) CISG, the reasonable third-party test puts emphasis on the understanding that would be shared by a hypothetical reasonable business party under Article 8(2) CISG [*Schwenzer/Schlechtriem, para. 25, p. 157; UNCITRAL Digest, paras 4-7, p. 34*].

As provided in the table, the Arbitration Clause has been narrowed down by the Parties (*see paras 34-35*). The Mediterranean law provides that a standard arbitration clause is sufficient to grant the arbitral tribunal the power to adapt the contract [*P.O No 2, para. 39, p. 60*]. It must be emphasised that Mediterraneo is the Claimant's place of business and at the beginning of negotiations the Claimant opted for arbitration in Mediterraneo [*Cl. Ex. No 4, para. 5, p. 12*]. The choice of law clause was also a part of standard terms of the Claimant. These facts lead to the conclusion that Claimant must have been familiar with the law of Mediterraneo.

44. Consequently, Claimant must have been aware of the fact, that the Respondent's proposal is narrower than the standard arbitration clause (used in the Mediterraneo), as the Respondent explicitly provided: "*the proposal has narrowed down and streamlined a little the fairly broad wording of the clause*…" [*R. Ex. No 1, para. 1, p. 33*]. It can be assumed that any reasonable person in the Claimant's position knowing that the standard arbitration clause which had been "narrowed down" would have concluded that it is no longer a standard clause and therefore does not benefit from the presumption of granting the power to adapt.

CONCLUSION ON THE FIRST ISSUE

45. The Arbitral Tribunal lacks jurisdiction and necessary powers to adapt the Contract due to the fact that the Arbitration Clause is governed by the law of the seat of arbitration, i.e. the law of Danubia. Even if the Arbitral Tribunal finds that the Parties' choice of law is applicable to the Arbitration Clause and the law of Mediterraneo shall be applied, it is still not empowered to adapt the Contract.

SECOND ISSUE: THE ARBITRAL TRIBUNAL SHALL NOT ADMIT THE EVIDENCE SUBMITTED BY THE CLAIMANT

46. The Arbitral Tribunal is respectfully requested to find that the evidence submitted by the Claimant is inadmissible for three following reasons: **firstly**, the Claimant was involved in the suspicious process of obtaining the evidence [**1**], **secondly**, the evidence is immaterial [**2**], **thirdly**, the evidence was obtained unlawfully from the Respondent [**3**], and **fourthly**, international arbitration interest favour the evidence as inadmissible [**4**].

1. The Claimant's involvement in obtaining the evidence justifies exclusion of the evidence.

47. Under Article 22(2) HKIAC Rules 2018 the Arbitral Tribunal is given a broad discretion regarding to admissibility of evidence. Nonetheless, this discretion is not of an absolute character and the limits to this discretion are to be derived from the principles of general application in international arbitration, such as due process and procedural fairness [*EDF v. Romania*]. The Respondent will present that the Claimant's conduct and involvement in obtaining the evidence presents serious doubts as to its "clean hands" in relation to obtaining the disputed evidence. Contrary to the Claimant's reasoning [*Memo for Cl., paras 43-45, pp. 12-13*], the Claimant has been involved in obtaining the evidence to the extent which justifies its inadmissibility.
48. The evidence submitted by the Claimant is the partial interim award issued in the other arbitral proceedings (hereinafter: Other Arbitration, Other Proceedings, Other Case), which the Respondent is the party to. The Other Arbitration has been conducted in accordance with the HKIAC Rules 2013 and Article 42 of these rules provides an explicit obligation of confidentiality of the proceedings [*Letter Fasttrack, para. 1, p. 50*].
49. Furthermore, there is no doubt that the evidence had been obtained either through an illegal hack of the Respondent's computer system or through a breach of confidentiality obligation by one of the Respondent's former employees [*Letter Fasttrack, para. 3, p. 50; P. O. No 2, para. 41, pp. 60-61*]. The Claimant alleges that it has never itself been involved in obtaining the evidence and that it was a coincidence that it had received an information about the Other Arbitration at the annual breeder conference [*Letter Langweiler, para. 2, p. 49*]. However, it must be emphasised that after receiving that information the Claimant started proactively seeking the evidence.
50. When it became clear that Mr. Velazquez (who is a CEO of one of Claimant's regular customers but and a former employee of the Respondent's opponent in the Other Arbitration) for the Mediterranean buyer in the other arbitration was not able to provide the copy of the Partial

Interim Award neither from his previous employer, nor the Respondent's submission in the Other Arbitration, the Claimant had taken an opportunity and contacted a company which promised to sell an illegal copy of the award [*P. O. No 2, para. 41, pp. 60-61*]. At that time the Claimant was aware, that the Other Proceedings were conducted under the HKIAC Rules which impose a confidentiality obligation [*Letter Langweiler, para. 2, p. 49*]. As the Claimant has been itself involved in the proceedings conducted in accordance with the HKIAC Rules, that is the present arbitration before the Arbitral Tribunal, it must have been aware of the obligation of confidentiality imposed on all of the HKIAC proceedings [*Article 45 HKIAC*]. Nonetheless, the Claimant disregarded this obligation and decided to pursue the evidence, *i.e.* to buy it from the company of a doubtful reputation which refused to disclose the information concerning the source of obtaining the evidence [*P. O. No 2, para. 41, pp. 60-61*]. There is no doubt that the evidence was provided either by the hacker of the Respondent's computer system or the Respondent's former employee(s) [*P. O. No 2, para. 41, pp. 60-61*].

51. The Claimant misleadingly relies on the *Ahongalu Fusimalohi v. FIFA* case, presenting it as "a match-fixing case" to the case at hand [*Memo for Cl., para. 45, p. 13*]. The Claimant provides that the Court of Arbitration for Sport (CAS) found that "*FIFA transparently solicited and received such evidentiary material from the Sunday Times immediately after the publication of the article on 17 October 2010 and the disclosure of important portions of the recordings' content*" [*Memo for Cl., para. 45, p. 13; Ahongalu*]. The Claimant purposefully fails to distinguish between these two cases, which in any case are not "match-fixing". In the *Ahongalu* case, the material was published by the Sunday Times, which is a British newspaper. In that case the evidentiary material was not only obtained illegally by the other unrelated party, but also it was published and became a part of public domain. In comparison, in the present case the evidence was obtained by the Claimant who is entirely involved in the arbitral proceedings. Additionally, the Partial Interim Award has not been published by any person who has obtained it and has not become a part of a public domain. It therefore required far more proactive conduct from the Claimant to obtain this evidence (*i.e.* acquiring specific intention, contacting the company and payment) than from the parties in the *Ahongalu* case where all they had to do was to read the news. Similarly, the other cases which allowed for admission of evidence obtained through illegal means were based on the fact that the evidentiary material was published and accessible [*Yukos v. Russia; El Masri v. Macedonia*]

52. The Claimant may not have been directly connected and involved in disclosing this evidence, however its active conduct in pursuing the document indicates that, in fact, it does not have "clean hands" in obtaining the evidence.

2. The evidence is immaterial to the issue in the case at hand.

53. Contrary to the Claimant's argumentation [*Memo for Cl., paras 46-48, pp. 13-15*], the evidence in question is immaterial to the issue in the case at hand.

Materiality of evidence is the second question that has to be answered in order to decide that the evidence shall be admitted [*Boykin/Havalic, pp. 33-34*]. Materiality invokes the tribunal's view regarding the evidence and whether, in the eyes of the tribunal, it "*[w]ill affect its deliberations in reaching a final award*" [*O'Malley, para. 9.13, p, 272*]. Whenever the evidence helps in consideration of the case, it is material [*Kaufmann-Köhler/Bärtsch, p. 18*].

54. There are several significant differences between the case at hand and the Other Arbitration which will clarify that the evidence submitted by the Claimant is immaterial to the case at hand and will not in any way affect the Arbitral Tribunal's view.

The Claimant argues that the evidence in question will prove the Respondent's actual point of view on the issue of contract adaptation [*Letter Langweiler, para. 2, p. 49*]. The Claimant also submits that the two arbitrations share similarities as to the procedure and substantive aspects [*Memo for Cl., paras 47-49, pp. 14-15*].

55. The Claimant alleges that two cases are "highly similar" [*Memo for Cl., para. 47, p. 14*], however it only *prima facie* may seem that both of the arbitrations share common circumstances.

To begin with, the other arbitration is conducted in accordance with HKIAC 2013 Rules based on the model HKIAC-Arbitration Clause with all additions providing for the law of Mediterraneo to govern the arbitration agreement and Mediterraneo as the seat of arbitration [*P. O. No 2, para. 39, p. 60*]. Furthermore, the underlying contract is governed by the law of Mediterraneo, provides for DDP Mediterraneo (Incoterms 2010) and contains an ICC Hardship Clause 2003 [*P. O. No 2, para. 39, p. 60*].

56. It is therefore clear, how outstandingly distant the relationship between the two arbitrations is. The only similarities between the arbitrations is the party involved (*i.e* the Respondent) and the fact that the Other Case is related to contract adaptation. The law governing the arbitration differs, which in the Other Case is the law of Mediterraneo. What follows from this difference is the fact that, the law of Mediterraneo considers a standard arbitration clause as sufficient to grant arbitral tribunals the power to adapt the contract [*P. O. No 2, para. 39, p. 60*]. There is no information provided in the case file which would clarify the scope of the other arbitration agreement. However, it must have been at least a standard arbitration agreement, as the proceedings are governed by the Mediterranean law and are still pending [*P. O. No 2, para. 39, p. 60*]. As discussed above, the Arbitration Clause in the present case has been narrowed down by

the Parties in order to exclude the possibility of contract adaptation through an arbitration (*see paras 15-45*), so the two arbitration clauses have significantly different scopes.

57. The parties have the autonomy to shape contracts to their needs due to the freedom of contract. The Respondent has exercised this autonomy differently in two separate and unrelated transactions. Both of the cases of the Respondent have their own peculiarities, but most importantly, they are underpinned by contracts which include different provisions. Therefore, even if the evidence was to be admitted, it would not have any influence on the Respondent's understanding and intention of the adaptation of the Sales Agreement.

3. The evidence is not the only available and necessary way for the Claimant to prove its case.

58. The evidence which was obtained unlawfully from the files of a party, although at no fault of the party which intends to introduce the evidence, should be admissible if it is **the only** evidence available and necessary to the party to prove its case [*Boykin/Havalic, p. 35*].

59. The Claimant argues that the evidence will prove that the Respondent shares the same understanding of contract adaptation, as it seeks for such adaptation in the other arbitral proceedings [*Letter Langweiler, para. 2, p. 49*]. However, the Claimant disregards the fact that the circumstances of these arbitrations differ significantly. Nevertheless, as the Sales Agreement is governed by the law of Mediterraneo and CISG so that the Claimant's has plenty of other tools at its disposal to prove whether the Respondent shares the same understanding of contract adaptation. The most commonly used are the subjective and objective tests under Article 8 CISG. The Claimant's urge to submit the evidence is most probably driven by the fact that these tests prove the Parties' intention to be unfavourable for the Claimant current position. Therefore, as a last resort, the Claimant seeks to submit the evidence. During these arbitral proceedings the Claimant has stated for numerous times that it was essential to secure an adaptation mechanism, however, as it is not able to prove that via means of contractual interpretation, it intends to submit an evidence which not only was obtained through illicit means and is immaterial to the case, but also is not in any case necessary for the Claimant to present its case.

4. Public interest favour rejection of the unlawfully obtained evidence.

60. Pursuant to Articles 9(2)(e) and 9(2)(f) IBA Rules on the Taking of Evidence in International Arbitration (hereinafter: IBA Rules), the Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence any document on the grounds of special political or

institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling.

61. Although the IBA Rules allow for production of some internal documents in a broader way comparing to state courts in some jurisdictions, they do also recognise that certain types of documents may be subject to such commercial of technical confidentiality concerns that they should be excluded from evidence [*IBA Committee Commentary in Ashford, p. 145*]. Since the evidence submitted by the Claimant is a partial interim award from the Other Arbitration conducted under the HKIAC Rules 2013, which expressly impose the confidentiality obligation on the parties, it should be assumed the evidence should be excluded on that ground. The parties to the Other Arbitration have entrusted resolution of their dispute to the HKIAC in accordance with the HKIAC Rules 2013 and therefore, they intended to ensure that their dispute will remain confidential, as not only the parties are bound by confidentiality provision, but also the arbitral tribunal and other individuals involved in that Other Proceedings [*Art. 42.2 HKIAC 2013 Rules*].

62. By entering the Other Arbitration, not only did the Respondent become empowered to request confidentiality from the tribunal and its opponent, but it also agreed to take responsibility that it itself will not disclose any information concerning the Other Proceedings. Therefore, the Respondent does not object to the admissibility of the evidence submitted by the Claimant just for the sake of objection, but primarily in order to fulfil its obligation towards its opponent. Additionally, confidentiality obligation was imposed also by the institutional arbitration rules, *i.e.* HKIAC Rules 2013 and therefore the HKIAC is obliged to refrain from publishing, disclosing and communicating any information concerning the Other Arbitration [*Articles 42.1, 42.2*]. Accordingly, it would be against the purpose of the confidentiality policy of the HKIAC to admit the document which the Parties intended to remain confidential and to decide the dispute based on the evidence, which has been obtained against their will.

CONCLUSION ON THE SECOND ISSUE

63. The evidence submitted by the Claimant shall not be admitted by the Arbitral Tribunal for the reason that the Claimant has actively been pursuing the evidence from a doubtful source which has obtained partial interim award either through an illegal hack or from the Respondent's former employee(s). The evidence is immaterial and will not have any impact on the Arbitral Tribunal's reasoning and the Claimant has on its disposal different means to prove its case. Lastly, admitting the evidence would be contrary to the public interest.

THIRD ISSUE: THE CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL PAYMENT FROM THE RESPONDENT

64. The Arbitral Tribunal is respectfully requested to find that the Claimant is not entitled to the additional payment from the Respondent resulting out of contract adaptation. Before presenting its core arguments, the Respondent wishes to make a preliminary observation on the case at hand.

On **6th May 2017**, the Parties concluded the Sales Agreement which provided for the shipment of 100 doses of frozen semen from the stallion Nijinsky III in three instalments [*Cl. Ex. No 5, pp. 13-14*]. Despite the car accident on **12th April 2017** during the contract negotiations, the Parties proceeded with the conclusion of the Sales Agreement [*NoA, para. 8, p. 5*].

65. It is indeed accurate that after the second shipment the government in Equatoriana introduced a 30% tariffs on agricultural products [*Cl. Ex. No 6, p. 15*]. Despite the Claimant's unjustified attempts to re-negotiate the purchase price, the Respondent refused to enter into futile arguments with the opposing party who was trying to shift the economic risk upon the Respondent without any grounds to do so [*Cl. Ex. No 7, p. 16*].

66. With the benefits of the hindsight, it is now clear that the Claimant has been attempting to find a way to recover its losses in order to improve its poor financial situation. The Claimant did not voice its concerns regarding the financial difficulties it had before it sought price adaptation [*P.O. No 2, para. 22, p. 58*]. The Claimant's restructuring plan with its creditors would be endangered if it was to bear the additional payment in the amount of USD 1.250.000 [*P.O. No 2, para. 29, p. 59*]. Nonetheless, the imposed tariffs were within the contractual risk of the Claimant and should have been taken into consideration prior to entering into the Sales Agreement.

67. Accordingly, the Respondent submits that the Claimant shall be estopped from seeking contract adaptation due to the following reasons: **firstly,** the purchase price cannot be adapted under the provisions of the Sales Agreement **[1]**. **Secondly**, the Claimant cannot seek contract adaptation under the CISG **[2]**. **Last but not least**, the Claimant is not entitled to seek contract adaptation under the UNIDROIT Principles **[3]**.

1. The purchase price cannot be adapted under the provisions of the Sales Agreement.

68. Contrary to the Claimant's audacious statement as "*the contract suggests that CLAIMANT is entitled for a price adaptation*"(emphasis added), the Respondent will prove that it is quite the opposite [*Memo for Cl., para. 58, p. 17*].

69. In general, the Respondent does agree with the Claimant as to the possibility to define the respective spheres of risk in a contract as well as to the statement that the Hardship Clause was of mixed nature since it regulated both *force majeur* and hardship [*Memo for Cl., paras 63-66, p. 18*]. However, the Claimant seems to be drawing inaccurate legal conclusions in the case at hand.
In the negotiation phase, the Parties decided to include such a hardship clause into the Sales Agreement in order to regulate a number of possible risks. Initially, the Claimant suggested the inclusion of ICC Hardship Clause, which in the Respondent's view was too broad [*Ans. NoA, para. 4, p. 30; P.O. No 2, para. 12, p. 56*]. The negotiations resulted in a narrowly drafted Hardship Clause which directly regulated specific risks. The clause reads: "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added) [*Cl. Ex. No 5, para. 12, p. 14*]. The Hardship Clause was included into the Sales Agreement due to the Claimant's past experiences with unforeseeable additional health and safety requirements, which ultimately increased the costs by 40 per cent [*P.O. No 2, para. 21, p. 58*].

70. *In casu*, it must be concluded that the Claimant shall bear the additional tariffs due to the outlined reasons: **firstly**, the Parties included the Hardship Clause into the Sales Agreement which provided for a specific risk-allocation **[1.1]**. **Secondly**, the Claimant assumed the risk under the Sales Agreement **[1.2]**.

1.1. The Parties included the Hardship Clause into the Sales Agreement which provided for a specific risk-allocation.

71. The Respondent submits that the Parties included a narrowly drafted Hardship Clause into the Sales Agreement which provided for a specific risk-allocation. As underlined in legal writing, the starting point of dealing with risk for fundamental change of circumstances has to be the contract itself. Based thereon, one party may expressly or implicitly assume certain risks or alternatively some risks may be excluded. Such contractual provisions shall be naturally assessed with the use of contract interpretation directives under the relevant law [*Schwenzer, p. 715*].

72. In the case at hand, the CISG together with the UNIDROIT Principles constitute the substantive law governing the dispute as pursuant to the choice of law clause in the Sales Agreement, the Contract is governed by the law of Mediterraneo [*Cl. Ex. No 5, para. 14, p.14*; *P.O. No 1, para. 4, p. 53*].

73. Regarding the contract interpretation, Article 8 CISG should be applied. It provides two interpretative criteria and also sets the hierarchy of their application. The first step set forth by

Article 8 (1), *i.e.* a subjective test, concerns the parties' actual intentions. If it fails to determine the parties' common understanding, the adjudicator should resort to the objective test, *i.e.* a hypothetical understanding of a reasonable person of the same kind, as provided by Article 8 (2). Both of the tests are applied having regard to Article 8 (3) and thus all the circumstances underlying the contract [*Schwenzer/Schlechtriem, para. 1, p. 146; Bianca/Bonell, para. 2.3, p. 98*].

74. In the following, the Respondent will demonstrate that both of the interpretative tests lead to a conclusion that the imposed tariffs are not within the scope of the meaning of hardship under the Sales Agreement. That is due to the fact that **firstly**, the imposed tariffs are beyond the scope of the meaning of hardship under the Sales Agreement pursuant to Article 8 (1) CISG **[1.1.1]**. **Secondly,** in accordance with the reasonable third person standard under Article 8 (2) CISG, the tariffs are not covered by the Hardship Clause **[1.1.2].**

1.1.1. The imposed tariffs are beyond the scope of the meaning of hardship under the Sales Agreement pursuant to Article 8 (1) CISG.

75. It is the Respondent's position that pursuant to the subjective test of interpretation under Article 8 (1) CISG, the imposed tariffs are not within the scope of hardship.

Article 8 (1) CISG provides that the parties' statements and other conducts are to be interpreted according to "*the intent where the other party knew or could not have been unaware what that intent was*" [*Art. 8(1) CISG*], which is to be applied taking into account the surrounding circumstances in line with Article 8(3) CISG, *inter alia* including negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

76. Contrary to the statement presented by the Claimant, the Parties' subjective intent had not exempted the Claimant from tariff risk [*Memo for Cl., para. 72 , p. 20*]. The Hardship Clause clearly provided the exemption only in specific circumstances as the seller was not liable "*for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added) [*Cl. Ex. No 5, p. 15*].

77. In order to establish the meaning of the provided terms, the mutual understanding, so-called **meeting of the minds**, should be distinguished [*Schwenzer/Schlechtriem, p. 151*].

The Claimant raises that in the correspondence between the Parties it used a "*distinctive word that <we are not willing to take over any further risks associated with such a change… in particular not those associated with changes in customs regulation or import restrictions>*" which was to be an alleged proof that all the risks were to be assumed by the Respondent [*Memo for Cl., para. 70, p. 20*].

Nonetheless, one shall take a look at a bigger picture and interpret the provided statements in a wider context. Therefore, the Respondent would like to shed more light on the circumstances of the case.

78. Having in mind the mutual understanding of the Parties with regard to the Hardship Clause, it needs to be pointed out not only how but also **why** the Parties decided to include it into the Sales Agreement. In its previous dealings, the Claimant had sold three mares. During the shipment process, Danubia imposed strict new health regulations, which resulted in the increase of 40% of the sales price [*P.O. No 2, para. 21, p. 58*]. Thus, in order to prevent that scenario in the future, the Claimant proposed to share such risks. It did mention that it was not "*willing to accept further risks associated with such a change in delivery*", however it also elaborated on its intention regarding the risk-allocation. The Claimant explained its previous experience with the introduction of rigorous health regulations underlining that "*a hardship clause should be included into the contract to address such subsequent changes*" [*Cl. Ex. No 4, p. 12*]. The mutual intention of the Parties has been reflected in the Hardship Clause, which precisely addresses "*additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Cl. Ex. No 5, p. 15*]. The Parties arrived at this particular wording which specifically concerns the events they discussed in the negotiation process. The discussions were caused by the fact that the initially proposed by the Claimant ICC Hardship Clause was considered too broad for the Respondent [*R. Ex. No 2, p. 34; R. Ex. No 3, p. 35*]. Whilst suggesting a new wording, the Respondent pointed to the risks mentioned by Ms. Napravnik in their e-mail correspondence, and thus *health and safety requirements* (emphasis added)[*P.O. No 2, para. 12, p. 56*]. Additionally, even in the Notice of Arbitration, the Claimant itself reiterates that the Sales Agreement provided for transfer merely of **certain risks** [*NoA, para. 6, p. 5*].

79. The imposed tariffs were not in any aspect linked to health or safety requirements but were a result of a protectionist approach to legal trade, and hence beyond the scope of the Hardship Clause [*Cl. Ex. No 6, p. 15*].

Therefore, the Claimant shall be estopped from purporting that it was the Parties mutual intent to exempt it from the risk concerning the tariffs.

1.1.2. In accordance with the reasonable third person standard under Article 8 (2) CISG, the tariffs are not covered by the Hardship Clause.

80. In its Memorandum, the Claimant further alleges that "*the objective intent was shown in the moderate price increase under DDP*" [*Memo for Cl., para. 73, p. 21*]. The Respondent submits that the Claimant's reasoning lacks legal and factual grounds on which it made such an allegation.

Article 8 (2) CISG refers to an understanding of *a reasonable person of the same kind as the other party in the same circumstances,* which is to be applied where the mutual understanding between the parties cannot be distinguished [*Huber/Mullis, p. 12; Lookofsky, para. 84*].

81. In the present circumstances, in case the Arbitral Tribunal finds that the mutual intent of the Parties cannot be distinguished, it shall take into consideration a reasonable-third-person test with regard to the interpretation of the Hardship Clause. Contrary to the position of the Claimant, the final price and acceptance of DDP delivery supports the restrictive interpretation thereof [*Memo for Cl., paras 73-77, p. 21*].

82. During the Sales Agreement negotiations, the Parties have agreed on DDP delivery instead of EXW [*Cl. Ex. No 4, p. 12*]. Whilst the EXW represents the minimum obligation for the seller, DDP represents the maximum one. *"Delivered duty paid means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared form importation"* [*Gabriel, para. 5.5*]. Therefore, it means that the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities [*Incoterms 2010*]. The parties may exclude some risks but such an exclusion must be clearly indicated [*Gabriel, para. 5.5*]. In the case at hand the Parties decided to merely exempt the Claimant from its responsibility in case of "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Cl. Ex. No 5, p. 15*]. Transfer of all the risks to the Respondent, as alleged by the Claimant, would deprive DDP delivery method of any significance.

83. Moreover, the price increase indicated that the Claimant took on the risks. Initially, the price for a dose was USD 99.500, which was to be increased by USD 1000 for DDP delivery [*Cl. Ex. No 2, p. 10; Cl. Ex. No 4, p. 12*]. Finally, the Parties arrived at a total price of USD 100.000 per dose [*Cl. Ex. No 5, p. 13*]. The Claimant incorrectly states that "*the Claimant took the step back and reduced it into USD 200*" [*Memo for Cl., para. 76, p. 21*]. The maths clearly points to USD 500 increase even though the direct additional costs only amounted to USD 200 [*P.O. No 2, para. 8, p. 56*]. It means that the Claimant demanded a higher price increase than delivery costs, which indicates assumption of risks.

84. Finally, taking an approach of a business perspective in the horse breeding industry, it was only reasonable for the Claimant to be burdened with the transportation risk as well as unforeseen events except for the health and safety regulations. Since the Sales Agreement conclusion, the Respondent was the weaker party, taking into consideration that it bore the risk of usability of the

semen with regard to the temporary lift of the ban on insemination [*NoA, para. 6, p. 5*] as well as the risk of the insemination process itself as the Sales Agreement did not provide live foal guarantee [*Cl. Ex. No 5, para. 7, p. 14*]. Concerning artificial insemination, the tests show that it has approx. 80% success rate [*Crowe*], which means that at least 20 out of 100 doses would not be useful to the Respondent, each costing USD 100.000. The Respondent was also responsible for tank rental as well as insurance and registration of foals conceived [*Cl. Ex. No 5, paras 9, 10, 13, p. 14*]. Moreover, the Hardship Clause burdened the Respondent with the risk of health and safety regulations. With such a distribution of costs and risk, any reasonable business person would conclude that tariffs imposed by the government of Equatoriana would fall under the Claimant's sphere of risk.

Therefore, the imposed tariffs cannot be considered as hardship in line with the standard of reasonableness under Article 8 CISG.

1.2. The Claimant assumed the risk under the Sales Agreement.

85. It is the Respondent's submission that the Claimant assumed the risk under the Sales Agreement. As previously remarked, the parties are able to freely distribute (expressly and impliedly) the risks under the contract [*Schwenzer, p. 715; Brunner, p. 119*]. Three indicators of distribution of risk have been distinguished in the legal writing: express/implied assumption under the contract, nature of the transaction, or other relevant circumstances of the case [*Uribe, para. 3.2.5*]. It must be emphasised that invoked hardship cannot fall within the sphere of risk of the obligor [*Schwenzer, p. 714*].

86. In the case at hand, the Hardship Clause directly addressed certain risks that were to be within the sphere of the Respondent (*see para. 69*). At the same time, the Parties have agreed on DDP delivery method in the Sales Agreement whereunder the Respondent assumed all the risks concerning the shipment process (*see paras 81, 82*).

Therefore, as the imposed tariffs were within the Claimant's sphere of risk, it shall be estopped from invoking hardship.

2. The Claimant cannot seek contract adaptation under the CISG.

87. Contrary to the position presented by the Claimant in its Memorandum, the Claimant cannot seek contract adaptation under the CISG [*Memo for Cl., paras 97-101, pp. 25-26*]. The Claimant's reasoning lacks legal grounds as it points out that hardship must have been included in the scope of Article 79 CISG as other legal instruments do provide such a regulation, such as PICC, PECL,

DCFR [*Memo for Cl., para. 99, p. 25*]. That is not necessarily the case as CISG's drafting history demonstrates (*see paras 89-91*).

88. The Respondent will prove that the Claimant cannot seek contract adaptation under the CISG based on three reasons. **Firstly**, Article 79 CISG does not regulate hardship. **Secondly**, even if the CISG regulates hardship, the Parties impliedly derogated from its provisions. **Thirdly**, the Respondent did not violate the good faith principle.

2.1. The CISG does not regulate hardship.

89. The issue whether the CISG regulates hardship still remains dubious as opposed to the view presented by the Claimant [*Memo for Cl., para. 101, p. 26*].

There are various approaches to hardship under the CISG. It has been found that in order to assess whether or not the hardship is governed by its provisions, one shall answer the question whether it falls under the notion of an impediment under Article 79. It was argued that "hardship impediments" (lacking the strength of force majeure) are never reasonably foreseeable and do not render the performance impossible. Therefore, they should not be classified as an impediment under the CISG. In order to support such a position most scholars rely on the fact that parts of the legislative history of CISG states that a hardship clause was expressly rejected [*Jenkins, p.2024; Kofod, para. 3.1.2; Rimke, pp. 197-243, Uribe, pp. 240-241; Ironchrome case*]. In the *Ironchrome case*, the court held that Article 79 CISG does not deal with situations of excessive onerousness but only with impossibility. It also added that issues of hardship are not explicitly excluded from the scope of matters governed by the CISG **and therefore cannot be resolved with resort to provisions of domestic law** [*Ironchrome case*]. It was therefore concluded that if the contract is governed by the CISG, a disadvantaged party **cannot seek relief for hardship** based on other legal instruments [*Silveira, para. 1*].

90. Moreover, it has been underlined in legal writing that the general obligation to act in good faith, serving as basis for remedy such as contract adaptation (which in not known in the CISG's provisions), "*appears to be at least one step to far*" [*Lookofsky, p. 22ff*].

In the present case, the Contract is governed by the law of Mediterraneo, *i.e.* the CISG and the UNIDROIT Principles [*Cl. Ex. No 5, para. 14, p.14*; *P.O. No 1, para. 4, p. 53*]. Nonetheless, the CISG will apply automatically to contracts for the sale of goods between parties with places of business in two different ratifying countries, which is the case in the present circumstances [*Spagnolo, p.142; McMahon, para. 2*]. Hence, due to the primacy of the CISG and the fact that hardship was intentionally excluded from Article 79 CISG (*see para. 92*), the Claimant shall be

estopped from seeking relief of change of circumstances that does not satisfy the conditions of Article 79 CISG.

91. Therefore, the Arbitral Tribunal is respectfully asked to find that the Claimant cannot seek contract adaptation under the CISG as Article 79 CISG only applies to the impediment rendering the contract impossible to be performed, and also due to the fact that the CISG does not provide for a remedy such as contract adaptation.

2.2. Alternatively, even if the CISG is deemed to regulate hardship, the Parties impliedly derogated from its provisions.

The Respondent strongly contests the Claimant's position as to the lack of derogation from Article 79 CISG [*Memo for Cl., para. 95, p. 24*]. In case the Arbitral Tribunal finds that Article 79 CISG also includes the notion of hardship, this Tribunal is respectfully asked to find that the Parties impliedly derogated from the CISG's provisions.

92. The legal grounds which allow the Parties to derogate from specific provisions of the CISG can be found in Article 6 CISG [*Huber/Mullis, p. 66*]. It has been widely acknowledged that the Parties may exclude or derogate from the CISG expressly or impliedly [*Schwenzer/Schlechtriem, para. 3, p. 103; Bianca/Bonell, para. 2.3, p. 55; Boiler case*]. It was found that such derogation is especially common with regard to Article 79 CISG and the inclusion of the so-called *force majeur* and hardship clauses in international trade [*Schwenzer/Schlechtriem, para. 58, p.1152*].

There are two arguments that support the Respondent's standpoint concerning the implied derogation from Article 79 CISG: **firstly**, the Parties agreed on a specific risk-allocation in the Hardship Clause, and **secondly**, the Parties agreed on DDP delivery method.

2.2.1. The Parties agreed on a specific risk-allocation in the Hardship Clause.

93. The Respondent submits that the Parties agreed on a specific risk-allocation in the Hardship Clause by which they derogated from Article 79 CISG.

There is a general acceptance that despite the lack of explicit indication in Article 6 CISG, the parties may derogate from the CISG or any of its provision **impliedly** [UNCITRAL *Digest, Article 6, para. 6; Bianca/Bonell, para. 2.3, p. 55; Shoes case*]. "*An implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear*" [*Gasoline and gas oil case*]. Moreover, it has been noted that Article 79 is not excepted from the general rule expressed in Article 6 CISG, which empowers the parties to "derogate from or vary the effect of" provisions of the Convention [*UNCITRAL Digest, Article 79, para. 23*].

94. In one of the cases, a tribunal denied a buyer's claim to exemption to perform due to the fact that the hardship clause conveyed in the agreement did not include the circumstances the buyer was relying on. Despite the fact that the CISG was the law governing the contract, the tribunal did not take into consideration its provisions, and only the *force majeur* clause agreed upon by the parties [*Automatic diffractameter case*]. Therefore, the tribunal considered that the contractual provisions trumped any applicable laws.

As any rule in the Convention can be altered or rejected by the parties [*Schlechtriem, para. H*], in the case at hand, the Parties decided to deviate from the mechanisms provided under Article 79 CISG. Whilst negotiating the risk-allocation under the Sales Agreement, the Parties finally arrived at the particular wording stating that the seller was not liable "*for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" (emphasis added)[*Cl. Ex. No 5, p. 15*]. The initially proposed ICC Hardship Clause by the Claimant was rejected as the Respondent considered it to be too broad given the purpose it was concluded for [*R. Ex. No 2, p. 34; R. Ex. No 3, p. 35*]. The Respondent only agreed to be burdened with the risk resulting out of the introduction of rigorous health and safety regulations, which the Claimant raised in the e-mail correspondence "*a hardship clause should be included into the contract to address such subsequent changes*" [*Cl. Ex. No 4, p. 12*] (*see paras 75-84*).

95. Therefore, as the Parties agreed on a specific mechanism concerning risk-allocation, the Arbitral Tribunal is respectfully asked to recognise that the general exemption under Article 79 CISG was derogated from.

2.2.2. The Parties agreed on DDP delivery method.

96. The Respondent submits that the fact that the Parties chose DDP delivery method, also indicates that the Parties derogated from Article 79 CISG.

Even though the choice of Incoterms has been found insufficient to establish the intent to exclude the application of CISG as a whole, it has been pointed out that the selection of Incoterms may constitute derogation from some of its provisions, such as risk, documentation, and payment terms [*AC Opinion No 16, para. 4.12*].

Contrary to the Claimant's contention, the choice of DDP delivery method meant the assumption of risk by the Claimant (*see paras 81-83*). Hence, it can be used as a single ground proving that the Parties deviated from Article 79 CISG.

97. However, DDP delivery method shall also be assessed from a different angle - as an element of a bigger picture. In order to determine whether the parties impliedly derogated from the provisions of the CISG, Article 8 CISG shall be used, *i.e.* the tests of interpretation of the parties' statements

[*AC Opinion No 16, para. 3*]. In doing so, the Tribunal needs to take into consideration all relevant circumstances surrounding the case in line with Article 8 (3) CISG [*Bianca/Bonell, para. 2.3, p. 98*]. DDP delivery method must be taken into account together with the Hardship Clause into the Sales Agreement, as they are inextricably linked. Based on the type of delivery, the Claimant assumed all the risks except for "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" as specified in the Hardship Clause [*Cl. Ex. No 5, p. 15*]. As proven hereinabove, the imposed tariffs did not fall under its scope (*see paras 75-88*).

Even though both of the examples could serve as separate grounds justifying the implied derogation of Article 79 CISG, together they constitute a strong reflection of the Parties mutual intent.

To conclude, it must be found that the Parties derogated from Article 79 CISG.

2.3. The Respondent did not violate the good faith principle.

98. The Claimant wrongfully alleges that the Respondent violated the principle of good faith by "*creating the convincing impression that adaptation was available whenever certain risk occurs and (a) the price had been adapted during the telephone call (b)*" [*Memo for Cl., para. 123, p. 31*].

The Respondent recognises that one of the main obligations of the parties is the obligation to perform their duties in light of principle of good faith [*Powers, para. 2*]. It is regarded as "*the rule according to which each party is bound to cooperate with the other to the extent that such cooperation is necessary in order to enable that other party to properly perform his contractual obligations"* (emphasis added)[*Felemegas, p. 404; Magnus/Haberfellner, par. 11*; *Fashion products case*].

99. In light of such principle, it is clear that the Respondent fulfilled its obligation. When it was contacted by the Claimant with regard to the import restrictions, the Respondent handled the situation in the best way that it could, given the time-sensitivity and the fact that the management was not available at that time [*R. Ex., No 4, p. 36*]. Contrary to the allegations of the Claimant, the Respondent did not adapt the price during the phone call [*Memo for Cl., para. 123, p. 31*].

Mr. Shoemaker, the representative of the Respondent, merely 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*". Additionally, Mr. Shoemaker reiterated several times that he was not a lawyer and that he would need to clarify the situation with the legal department. Mr. Shoemaker also indicated that in his view DDP meant that all the risks were to be borne by the seller [*R. Ex., No 4, p. 36*].

Therefore, the Respondent did not create any alleged illusion of contract adaptation as it expressly stated that the agreement on the price would be found only if the contract actually provided for it.

100. Moreover, the Respondent denies further allegations concerning "bad faith" on its part [*Memo for Cl., para. 125, p. 31*]. With regard the other proceedings that the Respondent has been involved into, brought up by the Claimant, it must be stressed that the opposing party obtained the information illegally and it should not be admitted by this Tribunal. The Claimant is now attempting to use to its advantage the fact that in these proceedings the Respondent was seeking contract adaptation itself (*see paras 46-63*). However, in order to briefly remark on such accusations, it needs to be emphasised that the mentioned proceedings vary significantly from the present circumstances. The starting point would be that the hardship clause that was included in a contract in dispute was the ICC Hardship Clause that was rejected by the Parties as being considered too broad [*P.O. No 2, para. 39, p.60; R. Ex. No 2, p. 34; R. Ex. No 3, p. 35*].

101. Additionally, the Respondent would like to highlight that it has been in fact the Claimant who was breaching the obligation of good faith and is now pointing fingers. The Claimant failed to observe his duty to cooperate and act in accordance with good faith principle by not informing the Respondent about its poor financial situation prior to Contract conclusion [*P.O. No 2, para. 22, p. 58*]. The Respondent is now attempting to take advantage of the situation, using the argument of the tariffs putting its business in jeopardy as the grounds for contract adaptation despite the fact that it only informed the Respondent about it during the price negotiations [*Memo for Cl., para. 110, p. 28; P.O. No 2, para. 28, p. 59*].

In conclusion, the Respondent has been acting in accordance with the principle of good faith contrary to unfounded allegations of the Claimant.

3. The Claimant is not entitled to seek contract adaptation under the UNIDROIT Principles.

102. This Tribunal is respectfully asked to find that the Claimant is not entitled to seek contract adaptation under the UNIDROIT Principles.

The Respondent does not contest the general application of the UNIDROIT Principles in the case at hand. Both the CISG and the UNIDROIT Principles constitute the substantive law governing the dispute as pursuant to the choice of law clause in the Sales Agreement, the Contract is governed by the law of Mediterraneo [*Cl. Ex. No 5, para. 14, p.14*; *P.O. No 1, para. 4, p. 53*].

103. In the following, the Respondent will demonstrate that **firstly**, the Claimant cannot resort to the UNIDROIT Principles **[3.1]**. **Secondly**, even if the UNIDROIT Principles were applicable to the issue of hardship, the imposed tariffs remain beyond its scope **[3.2]**.

3.1. The Claimant cannot resort to the UNIDROIT Principles.

104. In accordance with the above submissions, as the Parties did agree on a risk-allocation in the Hardship Clause in the foregoing case (*see paras 71-74*) as well as on the account of the CISG having a priority over other applicable substantive laws (*see paras 89-90*), the Tribunal should dismiss the Claimant's allegation concerning the applicability of UNIDROIT Principles regarding the alleged hardship [*Memo for Cl., paras 102-105, pp. 26-27*]. The Respondent respectfully asks the Arbitral Tribunal to find that UNIDROIT Principles shall not be applied to resolve the present dispute.

The Claimant properly pointed out the obvious fact that the hardship issue is not expressly governed by CISG [*Memo for Cl., para. 103, p. 26*].

105. The Claimant, however, draws erroneous conclusions from that fact since it persistently ignores that the Parties allocated risk contractually, therefore precluding the application of UNIDROIT Principles in the foregoing matter [*Cl. Ex. No 5, p. 15*]. The Claimant shall be estopped from shifting its argumentation and resorting to the application of UNIDROIT Principles, which in this case, are of a last resort nature. The Parties may not rely on UNIDROIT Principles since the priority before the UNIDROIT Principles, has the Sales Agreement itself and further the provisions of the CISG, which constitute a primary source of provisions governing the contract's performance [S*pagnolo, p.142; McMahon, para.2*]. Pursuant to the principle of party autonomy contained in Article 6 CISG, the parties may freely structure their contractual relationship. It "*affirms and preserves the absolute freedom of the parties to determine the content of their contract*" [*Kröll, para. 1, p. 99*].

106. Additionally, even in the event this Tribunal found that the imposed tariffs were beyond the scope of the Hardship Clause, the CISG has a priority over the application of the UNIDROIT Principles (*see paras 89-90*). Contrary to the Claimant's position, the Respondent raises that there is no gap in the CISG regarding hardship, irrespective whether internal or external [*Memo for Cl., para. 103, p. 26*]. It was found in the case-law that issues of hardship are not explicitly excluded from the scope of matters governed by the CISG and **therefore cannot be dealt with resort to provisions of domestic law** [*Ironchrome case*]. It was concluded that in case the contract is governed by the CISG, a party **shall be estopped from seeking relief** for hardship under other legal instruments [*Silveira, para. 1*].

Therefore, there is no need, and even more importantly, it would be contrary to the Parties agreement, to resort to the UNIDROIT Principles before the Hardship Clause, and before the CISG itself.

3.2. Alternatively, even if the UNIDROIT Principles were applicable to the issue of hardship, the imposed tariffs remain beyond its scope.

107. If the Arbitral Tribunal was to find that the UNIDROIT Principles were to be applied in the foregoing case, the imposed tariffs still remain beyond the scope of provisions regulating hardship invoked by the Claimant [*Memo for Cl., para. 103, p. 26*].

In casu, irrespective whether this Arbitral Tribunal finds that the gap concerning hardship in the CISG is of internal (*lacuna praeter legem*) or external (*lacuna intra legem*) nature [*Viscasillas, p. 5*], both instances would lead to the application of the UNIDROIT Principles, which were invoked by the Claimant.

108. The Claimant asserts that it is entitled to contract adaptation based on Article 6.2.3 UNIDROIT Principles. Nevertheless, it did not successfully prove that the prerequisites under hardship regulations were met.

The UNIDROIT Principles provide that "*there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party" [*Article 6.2.2 UNIDROIT Principles*].

If all the prerequisites are met, an aggrieved party is entitled to seek contract renegotiation or its adaptation pursuant to Article 6.2.3 UNIDROIT Principles.

In the following, the Claimant will demonstrate that: **firstly**, the imposed tariffs did not make the Sales Agreement utterly burdensome for the Claimant **[3.2.1]**. **Secondly**, the imposed tariffs were not impossible to foresee **[3.2.2]**. **Thirdly**, the Claimant assumed the risk under the Sales Agreement **[3.2.3]**.

3.1. The imposed tariffs did not make the Sales Agreement utterly burdensome for the Claimant.

109. One of the prerequisites that allow for an event to be classified as hardship under the UNIDROIT Principles is the fundamental alteration of the equilibrium of the contract because the cost of a party's performance has significantly increased [*Vogenauer, p. 814*].
Contrary to the Claimant's position, the increase of costs was not fundamental [*Memo for Cl, para. 106, p. 27*]. After the Sales Agreement was concluded and the Claimant shipped two out of three instalments of frozen semen, the new regulation has been introduced in Equatoriana, imposing a tariff of **30 %** upon all agricultural goods from Mediterraneo. The imposed tariffs related merely **to 50 doses**, *i.e.* half of the ordered goods [*Cl. Ex. No 7, p. 16*].

110. In has been well established in legal writing as well as upheld by courts and tribunals that alteration amounting to at least **50%** or more can be considered as fundamental [*Brunner, p. 427; UNIDROIT Commentary, p. 147*]. Some suggest that a 100% price increase threshold should be demanded [*Enderlein/Maskow, Art. 79 CISG para. 6.3*], or even 150-200% [*Davies/Snyder, p. 334*]. The courts and tribunals in numerous cases found that alteration of merely 30-50% was not sufficient to invoke hardship [*Ironchrome case; Steel bars case; ICC Case No. 2508 of 1976*].
Therefore, a price increase amounting to **30%**, and **only to half of the goods ordered**, cannot be regarded as a fundamental alteration justifying hardship defense.

111. Moreover, the Claimant shall be estopped from invoking its financial situation [*Memo for Cl., para. 110, p. 28*]. It was the Claimant who in fact failed to observe his duty to cooperate and act in accordance with good faith principle by not informing the Respondent about its poor financial situation prior to contract conclusion [*P.O. No 2, para. 22, p. 58*]. The Claimant hid this information before the Parties entered into the Sales Agreement and such behaviour contradicts the spirit of the Convention as "*a theme that underlies numerous articles of the Convention is the duty to communicate information needed by the other party*" [*Honnold, p. 107*].
As a general rule, "*the sphere of liability of the seller is interpreted as being extensive. It comprises in particular the financial ability which is necessary for the contractual performance*". It stems from the liability of the seller to deliver goods according to the contract and to transfer the property in the goods [Stolen car case].

112. Therefore, the Respondent should not be born with the liability due to the fact that the Claimant created a distorted picture before the Sales Agreement was concluded, and now, when it is convenient, it is invoking its financial background in order to take advantage of the situation.
In conclusion, the equilibrium of the Sales Agreement was not fundamentally altered as 30% price increase is not sufficient to prove that the contract performance became too onerous.

3.2.2. The imposed tariffs were not impossible to foresee.

113. Furthermore, the requirement that the changed circumstances could not have been reasonably foreseen at the time of the conclusion of the Sales Agreement was not met either as opposed to the position of the Claimant [*Memo for Cl., para. 111, p. 28*].

It is correctly stated that the tariffs in Equatoriana were introduced after the conclusion of the Sales Agreement. Nevertheless, what needs to be pointed out that they were a result of retaliation policy against the actions of Mr. Bouckaert, the newly elected President of Mediterraneo who initially imposed restrictive import regulations on products from Equatoriana [*Cl. Ex. No 6, p. 15*].

114. In Mediterraneo, the newly elected President, Mr. Bouckaert introduced the tariffs on foreign agricultural products, which have been effective from 15 November. He also appointed Ms. Cecil Frankel as his "superminister" for agriculture, trade and economics on 5 May 2017, who has been an outspoken protectionist for years [*P.O. No 2, para. 23, p. 58*]. As a retaliatory action, the government in Equatoriana imposed the tariffs in question which took effect from 15 January 2018 onwards [*P.O. No 2, para. 25, p. 58*].

115. Even though the Sales Agreement was concluded in May 2017, *i.e.* before either of the regulations were imposed, the fact that the President of Mediterraneo would be implementing more protectionist approach, which could lead to the strong reactions from other countries was known from January 2017 and was clear from April 2017 when he was elected [*Cl. Ex. No 6, p. 15*], *i.e.* **prior to the contract conclusion**. It was not only the government in Equatoriana that retaliated but also other governments [*Cl. Ex. No 6, p. 15*]. Also, other countries have been introducing tariffs of comparable size in the past in order to protect their farmers [*P.O. No 2, para. 23, p. 58*], which demonstrates that these regulations were not impossible to be predicted.

Therefore, the Claimant should be estopped from alleging that the new regulations could not have been foreseen. Even though they came as a surprise, the Claimant, being a professional conducting business activity in the relevant field, should have taken such possibilities into account prior to contract conclusion.

3.2.3. The Claimant assumed the risk under the Sales Agreement.

116. The Claimant wrongfully purports that the risk of newly imposed tariffs was not assumed by the Claimant [*Memo for Cl., para. 114, p. 29*].

The assumption of risk does not have to be express as it can be inferred from the circumstances or nature of the contract [*Vogenauer, para. 18, p. 815*].

In casu, the Claimant assumed the risk by agreeing on a specific risk-allocation clause, i.e. the Hardship Clause, and acceptance of DDP delivery method. The Claimant assumed all the risk except for "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" as specified in the Hardship Clause [*Cl. Ex. No 5, p. 15*] (*see paras 85-86*).

In conclusion, the Claimant did assume the contractual risk with the exception for circumstances excluded by the Parties in the form of the Hardship Clause.

CONCLUSION ON THE THIRD ISSUE

117. The Claimant has been attempting to take advantage of the changed circumstances between the Parties, presenting a distorted picture of the events in the foregoing case.

Promises must be kept and contracts strictly observed, pursuant to the *pacta sunt servanda principle*. The Respondent strongly denies the possibility of contract adaptation both under the Sales Agreement and the relevant law as the imposed tariffs do not fall within the scope of the Hardship Clause, nor the notion of hardship, in case would be found to be regulated under the provisions of the CISG; or regulated under the UNIDROIT Principles. The Claimant is now unjustly seeking ways to shift its liability onto Respondent without any justifiable grounds to do so.

REQUEST FOR RELIEF

In light of these submissions, the counsels for the Claimant respectfully request the Arbitral Tribunal to find that**:**

1. The Arbitral Tribunal lacks jurisdiction to adapt the Contract for the reason that the law of Danubia governs the Arbitration Clause.
2. The evidence submitted by the Claimant shall not be admitted by the Arbitral Tribunal.
3. The Claimant is not entitled to seek contract adaptation pursuant to hardship.
4. The Claimant is not entitled to an additional payment of USD 1,250,000 which is 25 per cent of the price for the third delivery of semen.
5. The Claimant must bear the costs of these arbitral proceedings.

CERTIFICATE

Katowice, 24 January 2019

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

O. Marcinkowska

A. Zwolankiewicz

TABLE OF ABBREVIATIONS

ABBREVIATION	CITATION
&	and
Arbitral Tribunal	Arbitral Tribunal constituted in the present Case
Arbitration Clause	Arbitration Clause contained in the Sales Agreement
Ans. NoA	Answer to Notice of Arbitration
Art. / Arts.	Article / Articles
Case	16th Annual Willem C. Vis East International Commercial Arbitration Moot case problem
cf.	confer
Cl. Ex.	Claimant's Exhibit
Claimant	Phar Lap Allevamento
Contract	The Frozen Semen Sales Agreement concluded between the Parties on 6 May 2017
DAL	Danubian Arbitration Law
e.g.	for example (*exempli gratia*)
ed.	edition
Ed.	editor
et seq. / et seqq.	and the following (*et sequens* / *et sequentes*)
etc.	and so forth (*et cetera*)
Hardship Clause	Clause no 12 in the Frozen Semen Sales Agreement concluded between the Parties on 6 May 2017
HKIAC	Hong Kong International Arbitration Centre

Letter Fasttrack	Letter by J. C. Fasttrack, 3 October 2018
Letter Langweiler	Letter by J. Langweiler, 2 October 2018
i.e.	that is (*id est*)
Memo for Cl.	Memorandum for Claimant
Memo for Resp.	Memo for Respondent
NoA	Notice of Arbitration
Mr.	Mister
Ms	Miss
No	Number
Other Arbitration	HKIAC arbitration between the Respondent and third party
p. / pp.	page / pages
para. / paras	paragraph /paragraphs
Parties	Phar Lap Allevamento and Black Beauty Equestrian
P. O. No 1	Procedural Order
P. O. No 2	Procedural Order No 2
R. Ex.	Respondent's Exhibit
Respondent	Black Beauty Equestrian
Sales Agreement	The Frozen Semen Sales Agreement concluded between the Parties on 6 May 2017
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	US Dollars
v.	versus

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GREAT BRITAIN

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BULBANK	Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc SWEDISH SUPREME COURT 27 October 2000 *Found on:* https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1083535&propId=1578	29

TABLE OF LEGAL SOURCES

ABBREVIATION	CITATION
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
HAGUE PRINCIPLES	Hague Principles on Choice of Law in International Commercial Contracts
IBA RULES	2010 IBA Rules on the Taking the Evidence in International Arbitration
HKIAC 2013 RULES	2013 HONG KONG INTERNATIONAL ARBITRATION CENTRE Administered Arbitration Rules
HKIAC RULES	2018 HONG KONG INTERNATIONAL ARBITRATION CENTRE Administered Arbitration Rules
UNCITRAL MODEL LAW	UNCITRAL Model Law on International Commercial Arbitration, 1985 (with 2006 Amendments)
UNIDROIT PRINCIPLES	UNIDROIT Principles of International Commercial Contracts, 2010