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WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
31 MARCH - 7 APRIL 2019

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF CINCINNATI COLLEGE OF LAW

On Behalf of:	**Against:**
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&	And
¶	Paragraph
HKIAC Rules	HKIAC Administered Arbitration Rules
Cl. Ex.	CLAIMANT's Exhibit
Sales Agreement	Sales Agreement
ibid.	*ibidem* (in the same place)
No.	Number
p.	Page
ICC	International Chamber of Commerce in Paris, France
PONo.__	Procedural Order Number __
Res. Ans.	RESPONDENT's Answer to Request for Arbitration
Res. Ex.	RESPONDENT's Exhibit
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
St. of Claim	Statement of Claim (CLAIMANT's Request for Arbitration)
St. of Def.	RESPONDENT's Statement of Defense (Answer to Request for Arbitration)

STATEMENT OF FACTS

1. CLAIMANT is Phar Lap Allevamento (Phar Lap), a company that operates a stud farm and a farrier school located in Capital City, Mediterraneo. In addition to providing its world class studs to breeders around the world, Phar Lap also offers for sale the frozen semen of its champion stallions for artificial insemination. [Notice of Arbitration, ¶¶ 1- 3]

2. RESPONDENT is Black Beauty Equestrian (Black Beauty) of Oceanside, Equatoriana. Black Beauty, which has for many years been famous for its broodmare lines, has recently established a racehorse stable. [Notice of Arbitration, ¶4]

3. On 21 March 2017, Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for RESPONDENT's new breeding program. At the time, the government of Equatoriana had prohibited the transportation of living animals into the country, which prevented Black Beauty from naturally breeding its broodmares with Phar Lap's stallions. [Cl. Ex. C1]

4. Because of the living animal bar, Equitoriana had also temporarily lifted in prohibition on artificial insemination for racehorses in Equatoriana. This led to Black Beauty being interested in purchasing frozen semen and inquiring on whether frozen semen from Nijinsky III for 100 doses could be available. [Cl. Ex. C1]

5. CLAIMANT was not concerned about the large number of doses sought by RESPONDENT because its standard Frozen Semen Sales Agreement (Sales Agreement) required CLAIMANT's consent should RESPONDENT wish to transfer or sell any of the doses of Nijinsky III's semen to another party. [Cl. Ex. C2]

6. In response to the request from RESPONDENT's Chris Antley to CLAIMANT's Julie Naprovnik, Ms. Naprovnik on 24 March 2017 offered to sell Respondent 100 doses of Nijinsky III's frozen semen for the price of US$99,500 per dose based on the CLAIMANT's Standard Frozen Sales Agreement. [Cl. Ex. C2]

7. In an email on 28 March 2017, Mr. Antley responded by insisting on delivery on the basis of DDP with the applicable law being that of Mediterraneo provided that Equatoriana courts have jurisdiction for any disputes. [Cl. Ex. C3]

8. Although CLAIMANT was reluctant to agree to DDP delivery terms, it ultimately acquiesced provided that RESPONDENT would agree to increase the price per dose to US$100,000 and the contract include a hardship clause in the parties' contract that would eliminate any additional risks from the DDP term. [Cl. Ex. C1; Cl. Ex. C5; & Cl. Ex. C8]

9. The parties also decided that any dispute would be arbitrated before the Hong Kong International Arbitration Centre (HKIAC) under its Administered Arbitration Rule, although the Sales Agreement's arbitration clause, Clause 15, the wording of which was initially proposed by Respondent, read in pertinent part "[a]ny dispute arising out of this contract," omitted the words "or related to" that ordinarily inserted between "of" and "this." [Res. Ex. R1; Cl.Ex. C5, Claus 15; Cl. Ex. C8]

10. On 12 April 2017, Ms. Napravnik and Mr. Antley met in person to complete the final terms of the Sales Agreement. During this meeting, they discussed inclusion of a hardship clause that would provide for adaptation of the price in the contract in the event the DDP delivery term caused additional costs to CLAIMANT. Mr. Antley expressed general agreement in concept and promised to come back with a proposal for the hardship clause the next morning. [Cl. Ex. C8]

11. Unfortunately, both Ms. Napravnik and Mr. Antley were involved in a serious auto accident on their way to dinner on the night of 12 April 2017 in which both were seriously injured. [Cl. Ex. C8; Res. Ex. R3]

12. Neither Ms. Napravnik nor Mr. Antley was able to complete the Sales Agreement between CLAIMANT and RESPONDENT. Instead, two others, John Ferguson for CLAIMANT and Julian Krone for RESPONDENT, neither of whom had been previously involved with negotiations, completed the contract and respectively signed the Sales Agreement on 6 May 2017. [Cl. Ex. C8; Res. Ex. R3; Cl. Ex. C5]

13. Due to their injuries, neither Ms. Napravnik nor Mr. Antley was able to provide any meaningful input to Mr. Ferguson or Ms. Krone for completion of the Sales Agreement, although both did have access to the emails and negotiation notes that had been previously exchanged between Ms. Napravnik and Mr. Antley. [Cl. Ex. C8; Res. Ex. R3]

14. One of Mr. Antley's negotiation notes dated 12 April 2017, the day of the accident, was reviewed by Ms. Krone. It had three bullet points stating that there needed to be clarification of the arbitration clause, that the ICC hardship clause was too broad, and that the hardship clause needed connection with the arbitration clause. However, the meaning of Mr. Antley's notes was not clear to Ms. Krone, especially as to points one and three. In the end, Ms. Krone and Mr. Ferguson agreed to include a narrow hardship reference into the force majeure clause and dealt with other risks directly in the contract. [Res. Ex. R3]

15. Under the contract as executed, there were to be three shipments of frozen semen: 25 on 20 May 2017, another 25 on 3 October 2017 and the remaining 50 doses on 23 January 2018 with the half paid on 18 May 2017 and the other half on 21 January 2018. [Cl. Ex. C5]

16. Unexpectedly, Equatoriana imposed a retaliatory 30 percent tariff against Mediterraneo' s agricultural products on 19 December 2017. Although the tariff was announced in December 2017, Ms. Napravnik did not become aware until 20 January 2018 that its upcoming 50 dose shipment of frozen semen shipment to RESPONDENT was actually subject to the tariff. In addition, Equatoriana's imposition of the tariff in retaliation to a similar tariff that had been instituted by Mediterraneo by its then newly-elected President in April 2017 caught even those in informed circles by surprise. [Cl. Ex. C6; PO No. 2, ¶25]

17. Upon finding out that the tariff would be imposed on its then upcoming shipment, Ms. Napravnik emailed RESPONDENT's Greg Shoemaker on 20 January 2018 to advise him that CLAIMANT would not be shipping the last 50 doses on 22 January 2018 unless a solution was found to adapt the price so as to cover the additional costs that would be incurred by CLAIMANT as a result of the tariffs. [Cl. Ex. C7]

18. At the time, CLAIMANT was having significant financial difficulties and, if CLAIMANT were required to shoulder the 30 percent tariff on the shipment of the last 50 does, it would suffer considerable financial hardship, which in turn would be impossible for CLAIMANT to shoulder. It was therefore essential to CLAIMANT that there be an adaptation of the price for the last 50 doses. [Cl. Ex. C8; Res. Ex. R3; Cl. Ex. C5]

19. In response to Ms. Napravnik's email, Mr. Shoemaker phoned Ms. Napravnik on the morning of 21 January 2018 for the main purpose of persuading her to make the shipment of the last 50 doses. Although the evidence as to what was actually said by Mr. Shoemaker and Ms. Napravnik is somewhat conflicting, Ms. Napravnik made clear that CLAIMANT would not ship unless RESPONDENT agreed that it would negotiate an adaptation to the price for the last 50 doses in good faith. [Cl. Ex. C8; Res. Ex. R4]

20. As reflected in his written notes regarding the conversation, Mr. Shoemaker, hoping to induce CLAIMANT to ship, read a pre-prepared written stating: "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on price." [Res. Ex. R4]

21. As an additional inducement to CLAIMANT, Mr. Shoemaker mentioned that RESPONDENT was interested in establishing a long-term relationship and that it was planning to purchase 50 doses from CLAIMANT's second world class stallion, Empire's State. [Cl. Ex. C8; Res. Ex. R4]

22. After hearing Mr. Shoemaker pleas, Ms. Napravnik told Mr. Shoemaker that, based on her understanding that RESPONDENT was willing to negotiate over an adaption of the price and that he was certain that a solution could be found given the parties' good relationship and interest in future business, she would authorize making the shipment of the last 50 doses that evening. [Cl. Ex. C8]

23. Shortly after the final shipment had been made, CLAIMANT on 2 February 2018 discovered that RESPONDENT had breached the resale prohibition in the Sale Agreement by selling at least 15 of the Nijinski III's semen doses to 10 different breeders without CLAIMANT's consent at a price of US$120,000 each (or 20 percent higher than the price CLAIMANT had received under the Sales Agreement). [Cl. Ex. C8; PO No. 2, ¶20]

24. On 12 February 2018, there was meeting between the parties that included RESPONDENT's CEO, Kayla Espinoza, to address the open issues between the parties. When confronted with the discovery that RESPONDENT had been selling doses to third parties in violation of the Sales Agreement, Ms. Espinoza got angry and aggressive and announced that Respondent would refuse to make any additional payments toward the cost of the tariffs. [Cl. Ex. C8; PO No. 2, ¶20]

25. During the course of the arbitration proceedings on 2 October 2018, CLAIMANT's lawyer, Joseph Langweiler informed the Arbitral Tribunal that CLAIMANT had received reliable information about another arbitration before the HKIAC in which RESPONDENT had asked for an adaptation of its price concerning its sale of a promising mare to a customer in Mediterraneo because that sale triggered the 25 percent tariff that had been imposed by Mediterraneo. RESPONDENT immediately objected to use of evidence of such arbitration the next day on the basis that any evidence from arbitration would violate confidentiality obligations. RESPONDENT further asserted that the disclosure of material from the other arbitration had been obtained by illegal means, either from former employees or a hack. Significantly, RESPONDENT does not claim that CLAIMANT had any involvement in obtaining the material. [Langweiler Letter to Tribunal of 2 October 2018; PO No. 2, ¶¶39-42]

SUMMARY OF ARGUMENT

1. This dispute arises from RESPONDENT's refusal to honor its contractual obligation towards CLAIMANT. RESPONDENT and CLAIMANT entered into agreement. In good faith, CLAIMANT fulfilled its end of the contract. However, RESPONDENT unjustly refuses to pay the increased purchase price for the semen delivered to RESPONDENT.

2. CLAIMANT brings this arbitration to recover payment for the adapted price of the semen which RESPONDENT has refused to pay. CLAIMANT wants to secure an award for the amount due as soon as possible. However, RESPONDENT is attempting to delay these proceedings by challenging the jurisdiction of the Arbitral Tribunal.

3. As is set forth in Procedural Order No.1 [PO No. 1], the Tribunal has ordered that this memorandum address three specific issues, namely:

> a. Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;
> b. Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system.
> c. Is CLAIMANT entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price
>
> i. under clause 12 of the contract,
> ii. or under the CISG?

ISSUE ONE: THE TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF MEDITERRANEO SHOULD GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

4. CLAIMANT argues that the law of Mediterraneo should govern the contract between the parties and should also govern the arbitration clause and its interpretation. In earlier negotiations, RESPONDENT suggested that the applicable law should be Equatoriania law, which was rejected by CLAIMANT. Ultimately, the parties agreed to apply the law of Mediterraneo, which is specified as the law governing the Sales Agreement.

5. Because its law has the closest connection to the agreement, the Tribunal should apply the law of Mediterraneo as the law governing interpretation of the entire Sales Agreement, including its arbitration clause.

6. Furthermore, the parties discussed an adaptation clause during the negotiations between Ms. Napravnik and Mr. Antley. Due to the unfortunate car accident involving both parties'

representatives in the negotiations, others ended up completing the final contract, and the adaptation clause that had been earlier discussed was not included, evidently because the new representatives were not clear on what had been previously discussed during the earlier negotiations.

7. Under CISG Art. 8, the Tribunal can look into the parties' prior discussions to interpret intent from which it can draw the power to adapt the contract. Moreover, CLAIMANT's claim for adaptation of the contract price arises directly "out of this contract" which makes it clear that such claim is within the scope of the arbitration clause at Clause 15 of the Sales Agreement.

8. Therefore, the tribunal has the jurisdiction to award CLAIMANT up to the US$1.25 million it claims in this arbitration due to the unanticipated imposition the tariff on its last shipment of 50 doses of frozen semen to RESPONDENT in January 2018.

ISSUE TWO: THE PARTIAL AWARD FROM RESPONDENT'S SECOND ARBITRATION SHOULD BE ADMITTED INTO EVIDENCE REGARDLESS OF ITS CONFIDENTIALITY OR ALLEGATIONS OF ILLEGAL CONDUCT BY THIRD PARTIES.

9. Under the HKIAC Rules, 22.2, the Tribunal has the power to determine the admissibility of evidence.

10. CLAIMANT has discovered evidence that RESPONDENT is a party to another arbitration before a tribunal of the HKIAC in which it has already recovered a partial award in which it was awarded an adaptation to the contract price for the cost it incurred from imposition of an unexpected tariff on its sale of a brood mare to a customer in Mediterraneo.

11. The Tribunal should therefore find that CLAIMANT's evidence regarding RESPONDENT's inconsistent position taken in its other arbitration involving essentially the same issue as is presented here is not only highly relevant but potentially dispositive and that it accordingly should be received into evidence.

12. Furthermore, while RESPONDENT has objected to the evidence on confidentiality grounds, the evidence should nonetheless be admitted because its probative value far outweighs any issue of confidentiality, especially where there is no showing that CLAIMANT has acted improperly in obtaining the evidence.

13. Finally on this issue, it would be most unfair to CLAIMANT if RESPONDENT is allowed to hide behind unfounded allegations of wrongdoing by third parties in an attempt to protect its position. The UNCITRAL Model Law, Art. 18, calls for equal treatment of the parties. In addition, it imposes an obligation on the Tribunal to allow both parties to equally present their case.

Exclusion of the evidence of the partial award from RESPONDENT's other arbitration case would violate the rule entitling CLAIMANT to present its case.

14. As such, the Tribunal must allow CLAIMANT to introduce evidence it obtained from the other arbitration case in which RESPONDENT has taken inconsistent positions.

ISSUE THREE: CLAIMANT IS ENTITLED TO AN ADAPTATION OF THE PRICE DUE TO IT UNDER BOTH CLAUSE 12 OF THE PARTIES' CONTRACT AND THE CISG AS SUPPLEMENTED BY CHAPTER 6, SEC. 2 (THE HARDSHIP CLAUSE) OF THE UNIDROIT PRINCIPLES.

A. Clause 12 of the Sales Agreement (i.e., Hardship Clause) must be interpreted to allow for adaptation of the price to protect CLAIMANT from substantial loss where there were unforeseen events or circumstances that rendered CLAIMANT's performance exceedingly onerous or costly.

15. The parties' Sales Agreement included an adaptation clause at Clause 12 that provided for "unforeseen events making the contract more onerous." CLAIMANT maintains that this clause may be interpreted to require adaptation of the contract price to cover that additional cost incurred by CLAIMANT caused by the unforeseen imposition of the 30 percent tariff on the last 50 doses of frozen semen shipped by CLAIMANT in January 2018.

16. Applying CISG Art. 8(1) and 8(2), the evidence in the record regarding the parties' negotiations leading to the Sales Agreement demonstrates that Clause 12 was intended to allow adaptation of the contract price for unforeseen events that made the contract more onerous. In particular, CLAIMANT had made it very clear during negotiations that it was not willing to bear the risks associated with the requested DDP delivery terms and insisted that an adaptation clause be included in exchange for inclusion of such terms.

17. The unexpected imposition of the 30 percent tariff by Equatoriana on frozen semen which created substantial financial hardship on CLAIMANT is exactly the kind of event making the contract more onerous that Clause 12 was intended to cover and to provide CLAIMANT with relief. Accordingly, Clause 12 of the Sales Agreement allow for adaptation of the price due the unexpected costs arising from imposition of the Equitoriana tariff on the last 50 doses of the frozen semen.

B. The CISG, supplemented by the UNIDROIT Principles under applicable Mediterraneo law, allows the Tribunal to adapt the price under the circumstances in this case.

18. CLAIMANT is also entitled to an adaptation of the price due it under the CISG.

19. Under the CISG, parties to a contract for the sale of goods have a mutual obligation to deal with one another in good faith.

20. Moreover, CISG Art. 7(2) directs that, where the CISG does not expressly address particular matters, such matters are to be settled in conformity with the general principles of applicable law, here the law of Mediterraneo, which under its general contract law is based on the UNIDROIT Principles. Art. 6.2.3 of the UNIDROIT Principles allows for adaptation of the price in a contract where, as here, there is hardship caused by unforeseen events that were unknown at the time the contract was concluded.

21. The tariff imposed on the last 50 doses of frozen semen is the precise kind of hardship for which the CISG and the UNIDROIT Principles cover.

22. In addition, CISG Art. 79(1) would have allowed CLAIMANT to refuse to ship the last 50 doses of frozen semen because of imposition of the tariff that could not have been taken into account at the time the contract had been concluded. However, RESPONDENT induced CLAIMANT to perform by representing that it would negotiate in good faith regarding the price.

23. In accordance with CISG Art. 8(1), RESPONDENT knew or at least could not have been unaware that CLAIMANT believed that RESPONDENT would negotiate an adaptation of the price in good faith and in reliance thereon, CLAIMANT shipped the final 50 doses to RESPONDENT. RESPONDENT is therefore estopped to deny that the contract price should be adapted to reflect the additional cost to CLAIMANT from the tariff.

24. Therefore, RESPONDENT breached its duty in good faith. As a result, CLAIMANT is entitled to an adaptation of the price under the CISG.

ARGUMENT

ISSUE ONE: THE TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF MEDITERRANEO SHOULD GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

1. CLAIMANT argues that the law of Mediterraneo governs both the contract and the arbitration clause and its interpretation because under the HKIAC Rules, Art. 36.(1), the Tribunal shall decide the substance of the dispute "in accordance with the rules of law agreed upon by the parties." Further, under Art. 36(1), any designation of the law or legal system of a given jurisdiction "shall be construed," unless otherwise "expressed," as "directly referring to the substantive law" of that jurisdiction and not to its conflict of law rules. "Failing such designation by the parties, the arbitral

tribunal shall apply the rules of law which it determines to be appropriate." [*IBID*].

2. Additionally, under both the Model Law Art. 16(1) and HKIAC Art. 19.1, the Tribunal may rule on its own jurisdiction, which includes the scope of the arbitration clause and Clause 15 of the Sales Agreement. Therefore, the Tribunal has the jurisdiction and power under the HKIAC Rules, as well as the Arb. Rules, to adapt the contract as requested by CLAIMANT and decide it in accordance with Section 14, in the additional amounts it contains herein.

3. Clause 14 of the FSSA states that it "shall be governed by the law of Mediterraneo," including the arbitration clause as it must be interpreted under Mediterranean law. Moreover, Mediterranean law has the closest connection and/or the most significant relationship to the parties' agreement. The parties submitted to the contract after long discussions to the law of Mediterraneo which consequently governs the interpretation of the arbitration agreement contained therein. Thus, it is irrelevant whether under the law of Danubia arbitration agreements have to be interpreted narrowly and within the function of the parol evidence rule, which is the argument made by RESPONDENT.

4. Because the law of Mediterraneo applies to the arbitration agreement, the arbitration agreement may be ready broadly to authorize this tribunal to hear and decide CLAIMANT's claim of contract adaptation. Moreover, the terms in the arbitration clause itself begin with the words "any" disputes "arising out of this contact," indicating the parties' intent to resolve all the disputes through arbitration. There can be no question that CLAIMANT's claim that the price due to it under the contract, "arises" out of the contract.

5. Even if the Law of Mediterraneo were to not apply, the Arbitral Tribunal should have the jurisdiction as well as the power under the arbitration agreement to adapt the contract because the parties agreed in their Sales Agreement, that "any dispute that arises should be resolved 'by arbitration administrated by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administrated Arbitration Rule.'" [Sales Agreement. ¶15]. Under Art. 19(1) of the HKIAC rules, the arbitral tribunal "may rule on its own jurisdiction," including any objections with respect to the "existence, validity or *scope*" of the arbitration agreement. (Emphasis added). Whether adaptation of the contract falls into the "scope" of the contract must therefore be decided by the Tribunal. Because most jurisdictions construe an arbitration agreement by interpreting the intent of the parties and reading the entire contract as a whole, regardless of the presumption of the separability doctrine, which will be addressed in the second sub-part of this issue, the parties intended to make the adaption of the contract falls within the scope of the Arbitration Agreement.

A. The law of Mediterraneo governs the arbitration agreement and its interpretation.

1. The law of Danubia, the *lex arbitri* of the arbitration, should not apply regarding the interpretation of the arbitration clause but rather only applies regarding the conduct of the arbitration itself.

6. There is no conflict between the specified law that governs interpretation of the arbitration clause and a *lex arbitri*, because the *lex arbitri*, here Danubian law, only governs the manner in which the arbitration is conducted.

7. For example, in Hong Kong, the Court has not laid down a strict rule as to which law applies to the arbitration agreement in the absence of an express provision. The Court of First Instance in *Klöckner Pentaplast Gmbh & Co Kg v Advance Technology (H.K.) Company Limited*, 14/07/2011, HCA1526/2010, stated:

"There is no doubt that the proper law of the contract and the *lex arbitri* of the arbitration may be different. There is no doubt too, that practical difficulties may arise when the *lex arbitri* is different to that of the seat of the arbitration", but that "there is no rule that the *lex arbitri* must be the law of the seat of the arbitration. That is especially so where the law is chosen by the parties."

8. In *Klöckner Pentaplast Gmbh*, the Court examined a number of decisions from different jurisdictions where it was concluded that "the law of the seat of the arbitration is the appropriate law to govern the parties' arbitration agreement" but stated that "the starting point must be the terms of the particular clause and the contract in question." [*IBID*].

9. Therefore, only in circumstances where there is no express choice as to the proper law of the contract, which is regarded as a 'surrounding circumstance' of the arbitration or of the law governing the arbitration agreement, will the court consider the implication that the law of the seat applies. However, in the instant case, the law expressly mentioned and agreed by both parties in Sales Agreement, saying that such Agreement shall "be governed by the law of Mediterraneo." [Sales Agreement, ¶14]. With explicitly referring to the applicable law, the doctrine of *lex aribitri* should not be applied in this case.

2. The doctrine of separability does not preclude the law governing the entire contract from also applying to Clause 15, the parties' arbitration agreement.

10. Although the doctrine of separability is of central significance in international commercial arbitration, in reality, the arbitration clause is closely connected to the parties' main contract and has an interrelated, supportive function for that contract. [Gary B. Born, *International Commercial*

Arbitration, Volume I,§3.01, P352, (2d ed. 2014)]. While the arbitration agreement should presumptively be "separated" from the underlying contract, for various purposes, it is never entirely or necessarily "autonomous" or "independent" from the underlying agreement. [*IBID*]. The key point as set forth in HKIAC Rule 19.2 is that the separability doctrine allows the Tribunal to retain its jurisdiction to decide a case even when it finds the underlying contract null and void.

11. Meanwhile, the term "separability" can also imply a lack of relation or connection between the arbitration clause and underlying contract, and the concept is one of degree, rather than nature. [*IBID*, *See also* W. Craig, W. Park & J. Paulsson, *international Chamber of Commerce Arbitration* ¶5.04 n.11 (3d ed. 2000) ("It may be argued that the word 'severability' reflects a more modest vision…, in that it denotes merely *potential* or *occasiona*l as opposed to *invariable* distinctness.") (Emphasis in original); Mayer, *Les limits de law separabilite de la clause compromissore*, 1998 Rev. Arb. 359 ("'[S]verability' suggests that if the fate of the arbitration clause can be dissociated from the fate of the rest of the contract when there may be good reasons for this, this is not always the case.")].

12. Additionally, the term "separability" more accurately directs attention to the central role of the parties' intentions, as a contractual matter, in forming a "separate" arbitration agreement, rather than to external legal rules imposing a particular conception of an "autonomous" arbitration agreement upon the parties. [*International Commercial Arbitration*,§3.01, P353, (2d ed. 2014)].

13. Therefore, the presumption of separability is not in necessary in the instant case. Hence, CLAIMANT argues that Art. 19(2) only applies to the interpretation in regard to the existence, validity or scope of the arbitration agreement on the jurisdiction issue, instead of regarding the interpretation of the clause itself. Otherwise, there will also be inconsistency with the interpretation of Art. 36.1 of HKIAC Rules, which will be addressed below.

14. The separability doctrine does not mean that the law applicable to the arbitration clause is *necessarily* different from that applicable to the underlying contract. [*See, e.g.*, XXII Y.B., ("arbitration agreement and the main contract *can be* subject to different laws") (emphasis added)]. It instead means that differing law *may* apply to the main contract and the arbitration agreement.

15. Under Clause 15 of the Sales Agreement, the parties agreed that any disputes regarding the arbitration should be resolved by the arbitration administered "by the *Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules*." [Sales Agreement, ¶15]. Per PO No. 1, the 2018 version of the HKIAC Rules are to be applied.

16. Therefore, according to Art. 36.1 of the HKIAC Rules, the Arbitral Tribunal shall "apply the rules of law agreed upon by the parties." In addition, it states, "Failing such designation by the

parties, the arbitral tribunal shall apply the law which it determines to be appropriate." It offers the Tribunal power to decide which law is applicable. [HKIAC Rules, Art. 36.1].

17. Hence, the Rules expressly empower the Tribunal to take all terms in the contract into consideration. In the instant case, the party has already agreed in the Sales Agreement that the applicable law should be the law of Mediterraneo. Such interpretation was also consistent with the foregoing provisions of the HKIAC Rules.

18. Accordingly, the Tribunal does have the jurisdiction to decide CLAIMANT'S claim on its merits and to adopt the contract in order to award CLAIMANT up to the US $1,250.000 it seeks herein.

B. The law of Mediterraneo governs both the contract and the arbitration clause and its interpretation as it is the law with the closest connection and/or the most significant relationship to the Parties agreement.

19. RESPONDENT claims that the laws of Danubia govern the arbitration clause and its interpretation, however, this is not correct. Article 19, Sec. 2 of the HKIAC provides that, "The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 19, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration clause." Therefore, the Arbitral Tribunal has jurisdiction to determine whether the contract is valid, as stated in the HKIAC section.

20. The law of Mediterraneo governs both the contract and the arbitration clause and its interpretation, as it is the law with the closest connection and/or the most significant relationship to the parties' agreement. The parties submitted to the contract after long discussions to the law of Mediterraneo which consequently governs the interpretation of the arbitration agreement contained therein. Thus, it is irrelevant whether under the law of Danubia arbitration agreements have to be interpreted narrowly and within the function of the parol evidence rule, which is the argument made by RESPONDENT.

21. RESPONDENT argues that the Arbitral Tribunal lacks jurisdiction to hear the case, because the claim raised, in their words, "does not merely require the arbitrators to order a payment on the basis of an interpretation of the contract but actually asks for its adaptation." RESPONDENT writes that Danubian law would have jurisdiction rather than the Arbitral Tribunal, because Danubian law recognizes that arbitrators may adopt contracts, but requires an express empowerment for that.

RESPONDENT says that the present contract does not connote such an empowerment. However, HKIAC 19.2 is clear that arbitrators do have the power to adopt contracts for which the arbitration clause forms a part. Therefore, this argument by RESPONDENT is invalid.

22. As CLAIMANT has mentioned previously, RESPONDENT also agreed to have the arbitration agreement governed by the law of the contract. The contract explicitly states that, "this Sales Agreement is governed by the law of Mediterraneo." Although RESPONDENT argues that this was not valid due to the doctrine of separability, this choice of law clause is inseparable, and therefore valid. According to the CISG, as addressed in *Filanto, S.p.A. v. Chilewich Intern. Corp.,* 789 F.Supp. 1229 (1992), the arbitration agreement is binding upon a party who agrees to it when it is within the contract. The doctrine of separability means only that differing laws can apply to both the underlying contract and the arbitration agreement, but it does not preclude the contract's law from applying to the arbitration agreement in our case.

23. In the present matter, the choice of law for the contract is the law of Mediterraneo, and no choice of law exists specifically for the arbitration agreement. While RESPONDENT suggested Equatoriana law as the law applicable to the arbitration agreement on April 10, 2017, the final agreement had this provision removed. The parties submitted to the contract after long discussions to the law of Mediterraneo which consequently governs the interpretation of the arbitration agreement contained therein.

24. When looking to the drafting history, it is clear that RESPONDENT agreed that the Arbitral Tribunal would have jurisdiction as the seat of arbitration to hear the case. Although RESPONDENT would note that a supposed seat of arbitration was Equatorania, that provision was never included within the final version of the contract, and therefore cannot be taken as truth. It is for these reasons that the Arbitral Tribunal has jurisdiction to hear the case and should be the seat of arbitration.

1. The Tribunal has the jurisdiction to decide whether CLAIMANT'S claim for the contract falls within the scope of the Arbitration Agreement.

25. Regarding the interpretation of the scope of an arbitration agreement, most international arbitration conventions do not expressly address questions concerning such issue. (E.g., New York Convention, Art. V(1)).

26. On the other hand, national arbitration legislation recognizes the need for interpreting the scope of arbitration agreements, but generally without prescribing any specific rules of construction. For example, under Article 8 of the UNCITRAL Model Law provides for the dismissal or suspension of

litigation of "*a matter which is the subject of an arbitration agreement*," referring to matters falling within the arguable scope of the parties' arbitration agreement. [UNCITRAL Model Law, Art. 8(1)].

27. Additionally, Art. 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law contemplate that determinations need to be made as to what matters the parties have and have not agreed to submit to arbitration. Nonetheless, none of these provisions further address issues of construction of the arbitration agreement.

28. As a consequence of the silence of international conventions and national legislation, the interpretation of international arbitration agreements has in most cases been a matter for national courts and arbitral tribunals. For example, Art. 19(5) of the HKIAC states that "any question as to the jurisdiction of the arbitral tribunal shall be decided by the arbitral tribunal once constituted. Art. 19(1) further states, that the arbitral tribunal "may rule on its own jurisdiction under this Rules," including any objections with respect to the existence, validity or "scope" of the arbitration agreement.

29. Therefore, whether adaptation of the contract falls into the "scope" of the contract should be decided by the Tribunal.

2. The adaptation falls into the scope of the arbitration agreement.

30. National courts in both common law and civil law jurisdictions almost uniformly begin their analysis of the scope of an international arbitration agreement by applying ordinary rules of contract interpretation. [*See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*; *Fleetwood Enters. Inc. v. Gaskamp*, 1073; *EEOC v. Frank's Nursery & Crafts, Inc.*, 460 ("Because courts are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the FAA.")]. Applying the UNCITRAL Model Law, a well-reasoned Singaporean appellate decision concluded:

> An arbitration agreement … should be construed like any other commercial agreement. … The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document. … A commercially logical and sensible construction was to be preferred over another that was commercially illogical.

[*Insiigna Tech. Co. Ltd v. Alstom Tech. Led*, ¶¶30, 33].

31. There are various approaches to interpret the contract, as by using good faith approach or customary usage. Moreover, to a greater extent than many other contractual provisions, arbitration clauses are relatively standard and formulaic, but must inevitably deal with often unforeseen and widely varying circumstances and claims. Therefore, it is fundamental that the scope of an agreement to arbitrate is a matter of contract, subject to the parties' will, which will be given effect

by Art. II of the New York Convention and the provisions of national arbitration statutes.

32. Conclusively, in the instant case, the parties' will could be found reliable and authentic expressed by their choice of international arbitration to resolve their disputes. Such choice carries with it a presumptive desire for a single, neutral, efficient and competent dispute resolution mechanism, in order to avoid jurisdictional disputes and litigation. Considering the three-time shipping lasting for the long period, these expectations are materially advanced through an expansive interpretation of the scope of international arbitration agreements. At the same time, letting the adaptation of the intent falling into the scope of the arbitration, also serves the public interest by avoiding costly and unproductive litigation over the scope of arbitration agreements and by encouraging international commerce by facilitating the efficacy and efficiency of the arbitral process.

33. Therefore, it is the parties' intent by applying a good faith for a long-term shipping, to let the adaptation of the contract fall into the scope of the arbitration agreement.

ISSUE TWO: THE PARTIAL AWARD FROM RESPONDENT'S SECOND ARBITRATION SHOULD BE ADMITTED INTO EVIDENCE REGARDLESS OF ITS CONFIDENTIALITY OR ALLEGATIONS OF ILLEGAL CONDUCT BY THIRD PARTIES.

34. Pursuant to Article 22.2 of the HKIAC, the admissibility of evidence is a question left to the discretion of the Arbitral Tribunal. This discretion includes the ability to decide whether to enforce strict evidence rules. [Art. 22.2 HKIAC]. Furthermore, the Tribunal has the authority to admit any piece of evidence into proceedings. [Art. 22.3 HKIAC].

35. CLAIMANT respectfully requests the Tribunal use their discretion to admit into evidence a partial award granted to RESPONDENT in a separate Arbitration. This partial award demonstrates that RESPONDENT, which is currently arguing that CLAIMANT, in this case, is not entitled to any adaption of the contract price based on the unforeseen implementation of tariffs, has successfully argued that the arbitral tribunal must adjust the contract based upon essentially the same circumstances caused by the imposition of tariffs against its sale of a horse to Mediterraneo. [PO No. 2, ¶39]. In that case, RESPONDENT argued that its contract should be adapted under Art. 6.2.3 of the UNIDROIT Principles. [Id.].

36. The Tribunal has the obligation under HKIAC Art. 13.5 to "do everything necessary to ensure the fair and efficient conduct of the arbitration." [HKIAC Art. 13.5]. In keeping with this obligation, the Tribunal should exercise its discretion to admit RESPONDENT's partial award into evidence.

37. RESPONDENT contends that the Tribunal should not admit the partial award into evidence on the basis that the other arbitration proceedings are confidential and that the award was allegedly

stolen from them by a third party. [Email: 3 Oct 2018]. This argument far overstates the extent of confidentiality in evidence, especially where there is no evidence that CLAIMANT participated in any wrongdoing.

38. This section will discuss why: (1) the partial award allows CLAIMANT to make an issue preclusion claim against RESPONDENT; (2) the Tribunal should admit the partial award to allow CLAIMANT to make the issue preclusion claim; (3) the confidentiality of the partial award should not preclude its admission into evidence; (4) the confidentiality of the partial award, even if found to be compelling by the Tribunal, can still be admitted with procedural safeguards; and (5) the alleged illegal taking of the award by an unknown third party should not preclude its admission into evidence based on the clean hands doctrine.

A. The Tribunal should allow submission of the partial award to allow CLAIMANT to show that RESPONDENT's inconsistent conduct in the other arbitration precludes it from contending that CLAIMANT here is not entitled to an adaptation of the contract price.

39. The partial award should be admitted because it is necessary for CLAIMANT to make an issue preclusion claim against RESPONDENT. Issue preclusion estops parties from re-litigating the same issues determined in a final decision in subsequent litigation [Interim Report: 'Res judicata' and Arbitration at 7].

40. Arbitral awards carry issue preclusive effects on the parties that are bound to them. According to the Restatement 2d Judgements, the final determinations of the issues by Arbitral tribunals should be considered to have the same preclusive effects as the determinations of a court. [Restatement 2d Judgements §84, Comment C].

41. Whether issue preclusion can be used be used by a party in a subsequent litigation if they were not a party in the previous litigation varies from country to country. [Interim Report: 'Res judicata' and Arbitration]. This difference in domestic law has led national courts to differ in their view of the mutuality requirement. [Id.]

42. However, Gary Born argues that the domestic law of the arbitral seat should not determine the technical aspects of issue preclusion in international arbitration. [Gary Born, 3769]. Instead, tribunals should look towards international standards for preclusion found from the New York Convention and the objectives of arbitration. [Id.].

43. This analysis would involve a consideration of the party's objective in arbitration to reach a final, binding decision and the New York Convention's objective to provide binding arbitration awards. [Gary Born, 3770]. This method reflects the common decision of arbitral tribunals to act

pragmatically in deciding preclusion issues by focusing on issues of "fairness" and "good procedural order" instead of applying technical domestic law. [Id.; Final award in ICC Case no. 3267].

44. The partial award in favor of Respondent by another HKIAC tribunal that Claimant seeks to introduce as evidence carries issue precluding effects. Arbitral awards include issue estoppel when issued through institutional arbitration rules that include provisions making award's final and binding and require that award's state the reason for the award's issuance. [Interim Report: 'Res judicata' and Arbitration at 22-23]. Since Art. 35.2 of the HKIAC rules provides that awards are final and binding on the parties and Art. 35.4 states that the award must state the reasons why it was awarded, awards issued through the HKIAC rules carry an issue preclusion effect.

45. Additionally, partial awards that finally determine a part of the dispute carry issue preclusive effects. In ICC Case No. 3267 (1984), an ICC Tribunal found that a partial award carried a preclusive effect for the parts of the dispute the partial award resolved.

46. Allowing the partial award into evidence would enable CLAIMANT to make a claim that RESPONDENT should be precluded from re-litigating the contract adaptation issue finally determined by the partial award. This issue preclusion claim would be based upon the notions of "fairness" and "good procedural order", arguing that allowing RESPONDENT should be estopped from benefitting from the partial award he is bound to and then re-litigating issues crucial to the final resolution of the award in the current arbitration.

B. The Tribunal should admit the partial award in order to fulfill their duty of fair and equal treatment to the parties.

47. This issue preclusion argument could only be advanced and further developed by CLAIMANT by allowing the partial award to be submitted to the Tribunal. Therefore, the Tribunal should admit the partial award to allow CLAIMANT the opportunity to fully make its case in this arbitration.

48. The Tribunal is obligated under the HKIAC to "do everything necessary to ensure the fair and efficient conduct of the arbitration." [Art. 13.5 HKIAC]. This obligation of fairness is further reflected in the UNCITRAL model law which requires the Tribunal to treat the parties equally and provide a full opportunity to each party to present its case. [UNCITRAL Model Law Art. 18].

49. The Tribunal satisfies its obligation of equal treatment when a party is provided a reasonable opportunity to argue its case with evidence. [*Trustees of Rotoaira Forces Trust v. Attorney Gen*]. The Art. 18 requirement that each party have a full opportunity to be heard is a fundamental procedural right in international arbitration. [Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, at 8-9]. Furthermore, the right to

be heard extends to every issue "relevant to the resolution of a dispute." [*Soh Beng Tee & Co. v. Fairmont Dec. Pte.*].

50. For CLAIMANT to fully state its issue preclusion claim, it is necessary for the Tribunal to allow the submission of the partial award. This issue is relevant to the resolution of the current dispute because it concerns whether RESPONDENT should be precluded from arguing against the availability of contract adaptation based on the UNIDROIT Principles. To disallow the submission of the partial award, the Tribunal would be violating their duties of fairness under HKIAC Art. 13.5 and their obligation to treat parties fairly and allow parties to fully present their argument under Art. 18 of the UNCITRAL model law.

C. The confidentiality afforded to the partial award under the HKIAC does not preclude its admission into evidence.

51. RESPONDENT argues that since arbitral awards are confidential under Art. 45.1(b), the partial award should not be admitted into evidence. [Email: 3 Oct. 2018, ¶2] However, confidentiality is not an absolute bar to the admissibility of evidence in international arbitration and should not prevent the admission of the partial award.

52. Since the admissibility of evidence is left to the discretion of the Tribunal under the HKIAC rules, the Tribunal can decide whether confidentiality concerns are significant enough that a piece of evidence should be protected from disclosure. [Art. 22.2 HKIAC]. In *Jardine Lloyd Thompson Canada Inc. v. SJO Caitlin*, the Alberta Court of Appeals upheld an Arbitral Tribunal's decision to allow discovery of a confidential mutual co-operation agreement that the Plaintiff had entered. [*Jardine*]. The Tribunal argued that, since the agreement was not "privileged" then they had the authority to order disclosure to determine its relevance. [Id.]

53. The difference between confidential and privileged evidence is similarly reflected in the IBA Rules on the Taking of Evidence. The IBA evidence rules were created by the IBA to help provide a framework to be adopted by tribunals in order to fill the gaps in evidence rules in institutional arbitration rules. [Commentary on 2010 IBA Evidence Rules, 1-2]. Privileged information is completely excluded from the production of evidence according to the evidence rules while, in contrast, confidential information is only excluded if the Tribunal finds the confidentiality to be compelling. [Art. 9(2)(b) of IBA Rules; Id. at Art. 9(2)(c)].

54. As in *Jardine*, the Tribunal should not find the confidentiality of the partial award compelling enough to justify enforcement. As previously explained, the partial award is highly significant evidence that CLAIMANT must be allowed to use for it to make an important issue preclusion

claim. Since the partial award is such a significant piece of evidence, it should be admitted regardless of confidentiality by the Tribunal as an exercise of their discretion on evidentiary issues. [Art. 22.2 HKIAC].

55. Additionally, it is likely that the confidentiality provided by the partial award is not relevant to whether CLAIMANT can seek to submit it as evidence. Typically, arbitral confidentiality does not extend to third parties and only restricts the parties of the arbitration. [*Esso Australia Res. LTD v. Plowman*]. As such, third parties can disclose materials from arbitral proceedings so long as not bound by an additional confidentiality agreement. [Gary Born, 2789].

56. Since CLAIMANT is a third party to the arbitration that produced the partial award, he is under no burden of confidentiality that would prevent disclosure of the partial award. The company that is providing the award to CLAIMANT is also a third party to RESPONDENT'S second arbitration and therefore not bound by the confidentiality of that arbitration.

D. Even if the Tribunal finds that RESPONDENT has a compelling confidentiality interest, the Tribunal should still admit the evidence after imposing procedural safeguards.

57. If the Tribunal finds that RESPONDENT nonetheless has an interest in preventing disclosure of its confidential partial award, the Tribunal could still admit the partial award but with safeguards to protect RESPONDENT's interest in confidentiality. Generally, the Tribunal can place safeguards on the production of evidence to protect the confidentiality of documents. [Gary Born, 2387]. Therefore, the Tribunal could allow the partial award in with conditions such as the redaction of identifying information or making CLAIMANT sign a confidentiality agreement preventing it from publicly disclosing the partial award.

58. This solution would be in line with the norms of international arbitration found in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Art. 7 of the Transparency rules require the Tribunal to consult with the parties and make appropriate protective arrangements when admitting confidential information. [UNCITRAL Transparency Rules Art. 7]. The Tribunal should adopt this procedure through their Art. 22.2 HKIAC discretion.

59. By allowing the partial award to be admitted with appropriate protections for its confidentiality, the Tribunal would fulfill its obligation to allow CLAIMANT to fully state its case and still reasonably protect RESPONDENT's interests.

E. The Award should not be excluded based on the assumption that it was initially obtained illegally by a third party because CLAIMANT lacks moral culpability and the Tribunal has an interest in obtaining relevant materials.

60. RESPONDENT additionally seeks to prevent submission of the partial award because it had been illegally taken from them by a third party. They alleged that the award had been obtained either through a hacking of their computer system or a former employee's breach of confidentiality.

61. Notably, neither of these potential scenarios involves improper or unlawful actions by CLAIMANT. Since CLAIMANT did not act improperly or unlawfully in obtaining the arbitral award, the fact that the award was otherwise improperly or unlawfully taken from RESPONDENT should not preclude its admission.

62. While there is no clear standard for the admission of illegally obtained evidence in international commercial arbitration, Cherie Blaire QC proposed a two step-admissibility test for illegally obtained evidence at a 2017 lecture in Vienna. [Nikki O'Sullivan, "Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?" Thomson Reuters Arbitration Blog] This equitable test forbids the submission of evidence if (1) the party seeking admission committed wrongdoing in obtaining the evidence (the "clean hands" doctrine) or (2) if the information is privileged. Since the partial award is not privileged, only confidential, it is only necessary to discuss the clean hands doctrine. [Id.]

63. The principle of the clean hands doctrine is demonstrated in *Methanex Corp. v. the United States.* [*Methanex v. US*]. In *Methanex*, the Tribunal refused to admit evidence obtained by Methanex through its agents' civil trespass into US government property. [Id]. The Tribunal's decision was based upon the general duty of good faith owed by both parties under the UNCITRAL Arbitration Rules. [Id.]. Additionally, the Tribunal cited general principles of fairness, stating that it would be improper to allow Methanex to benefit from its unlawful activities. [Id.].

64. In *Caratube International Oil Company and Mr. Devincii Saleh Hourani v. Kazakhstan*, an ICSID Tribunal admitted into evidence confidential documents that had been initially hacked and made publicly available by a third party. [*Caratube v. Kazakhstan*]. The Tribunal reasoned that they had a need to be able to consider publicly available information relevant to the issues in dispute. [*Id.*].

65. Unlike in *Methanex*, CLAIMANT is not seeking to submit and benefit from evidence that it obtained unlawfully since CLAIMANT played no role in any initial improper acquirement of the partial award. Rather, it is submitting evidence that it became aware of through no affirmative action of its own by being informed of the award without solicitation at the annual breeder conference.

[PO No. 2, ¶40].

66. The only affirmative action that CLAIMANT took to obtain the arbitral award was to reach out to the intelligence company that Mr. Velazquez mentioned had obtained the arbitral award in order to arrange its purchase. [PO No. 2, ¶41]. While RESPONDENT may argue that CLAIMANT should not have agreed to purchase the award after being informed that it may have been stolen at some point, the decision to purchase the award should not be held against CLAIMANT in determining admissibility.

67. Since RESPONDENT had not presented conclusive evidence that the award had been illegally obtained and the intelligence company has not shared its source, CLAIMANT had to decide whether to obtain the award based on minimal information. Considering that the award represents a crucial piece of information, showing that RESPONDENT should be precluded from contesting a major substantive issue of the dispute, it was more than reasonable for CLAIMANT to make the decision to acquire the award.

68. Since CLAIMANT has clean hands, the Tribunal should admit the confidential partial award into evidence. As in *Caratube*, the Tribunal has an interest in being able to consider all relevant information in a dispute. Since the partial award is relevant to the main substantive issue of the current dispute, the ability to adapt to the contract price, the Tribunal should admit it into evidence.

ISSUE THREE: CLAIMANT IS ENTITLED TO AN ADAPTATION OF THE PRICE DUE TO IT UNDER BOTH CLAUSE 12 OF THE PARTIES' CONTRACT AND THE CISG AS SUPPLEMENTED BY CHAPTER 6, SEC. 2 (THE HARDSHIP CLAUSE) OF THE UNIDROIT PRINCIPLES.

69. In this arbitration, CLAIMANT seeks payment of the 25 per cent increase for the price for the third and last shipment of the semen delivered to RESPONDENT pursuant to the parties' contract. After accepting and promising delivery of the semen, RESPONDENT has refused to pay any increased price, even though CLAIMANT, as seller, incurred a 30 percent increase in its cost due to the unforeseen imposition of a tariff by the Sales Agreement's Hardship Clause, Clause 12, which expressly recognizes that relief is to be afforded to CLAIMANT where "unforeseen events make the contract more onerous." In addition, an adaptation of the price on 21 January, 2018 that would induce CLAIMANT to ship the last 50 doses estops RESPONDENT from denying that CLAIMANT is entitled to an adaptation that restores the contract's equilibrium per Art. 6, 2.3 of the UNIDROIT Principles.

A. Clause 12 of the Sales Agreement (i.e., Hardship Clause) must be interpreted to allow for adaptation of the price to protect CLAIMANT from substantial loss where

there were unforeseen events or circumstances that rendered CLAIMANT's performance exceedingly onerous or costly.

1. Under a subjective interpretation of Clause 12 in accordance with CISG Article 8(1), RESPONDENT is responsible for all unforeseen additional costs due to unforeseen events or circumstances that make "the contract more onerous."

70. As shown by the communications between Ms. Napravnik and Mr. Antley, the Hardship Clause, Clause 12 of the Sales Agreement, was intended by the parties to cover not only unexpected health and safety requirements but also other unexpected risks that would make CLAIMANT performance exceedingly onerous, including the 30% tariff in this case.
71. The contract must therefore be read and interpreted according to the parties' actual intent, including their subjective intent in accordance with CISG Art. 8 (1).
72. CISG Art. 8, Sec. 1 states that the statements and actions of the parties ought to be interpreted when the other party "knew or could not have been unaware of what the intent was." [CISG Art.8(a)].
73. "The acting party has not clearly expressed his intent, or even disguised it, but the addressee knew of the real intent. It would, however, be up to the acting party to prove this…Such proof is made easier for him by a certain objectiveness in regard to the knowledge of the other party which is based on the fact that it suffices that the other party 'could not have been unaware"' [ENDERLEIN/MASKOW, P. 63, ¶ 3.1].
74. In Mr. Antley's 28 March 2017 email to Ms. Napravnik, RESPONDENT requested that the shipping and delivery method be according to the DDP Incoterm.
75. In her email of 31 March 2017, CLAIMANT's Ms. Napravnik made it clear to RESPONDENT'S Mr. Antley that unforeseen additional costs would destroy the commercial basis of the sale and that the contract would, "at minimum" require inclusion of "a hardship clause to address such unforeseen circumstances."
76. She specifically added, "we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions."
77. CLAIMANT thus made it very clear that any additional costs besides what was agreed on between themselves and RESPONDENT should be RESPONDENT'S obligation. Therefore, knew or could not have been unaware of CLAIMANT'S intent.

78. In her witness statement, Ms. Napravnik said that she told Mr. Antley on the morning of 12 April 2017 (the morning before the auto accident) that it was important to CLAIMANT to have a mechanism in place to ensure an adaptation of the contract if the parties could not agree to an amendment.

79. As shown in Ms. Napravnik's witness statement, Mr. Antley had agreed to incorporate the hardship clause in the agreement. However, he was unable to draft the actual clause due to the unfortunate accident that took place later in the day on 12 April 2017, which left him in a coma for four weeks.

80. Therefore, CLAIMAINT'S evidence that is before the Tribunal can demonstrate, at a minimum, that RESPONDENT could not have been unaware of what CLAIMANT'S intent was regarding the meaning of the Hardship Clause, Clause 12. And that meaning was that CLAIMANT would be entitled to an adaptation of the price in addition to the DDP Incoterm that caused unexpected additional costs to CLAIMANT, as seller.

81. Consequently, the Hardship Clause, Clause 12 of the Contract, must be interpreted to require that the contract price be adapted to avoid loss from the unexpected additional costs arising from the Equatoriania 30% tariff on the semen delivered in January 2018.

2. The actual language added to Clause 12, in italics, shows that the phrase "neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" requires that the price be adapted to protect CLAIMANT, as seller, from bearing the cost of the tariff.

82. Even an objective interpretation of the language in Clause 12 per CISG 8(2) requires an adaptation of the price of the semen.

83. According to PO No. 2, ¶3, the fact that this portion of Clause 12 that is in italics means that it was added to the standard industry semen agreement template used by CLAIMANT and that the italicized language completed the portion of the template's Clause 12 in language added by Mr. Ferguson for CLAIMANT and Ms. Krone for RESPONDENT after the accident that occurred on 12 April 2017.

84. Although an analysis under the subjective intent standard compels an adaptation of the price of the semen, an analysis under CISG 8(2)'s objective standard in determining meaning of the language of Clause 12, taken as a whole, shows that CLAIMANT is entitled to an adaptation of the price for the last 50 doses due to the unanticipated costs caused by imposition of the Equitoriana tariffs.

85. Thus, when properly interpreted, the operative language of Clause 12 should be read as: "Seller shall not be responsible . . . for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous."
86. CISG Article 8(2) presents an objective standard of reasonableness. Under 8(2), the acts and statements of the other party need to be interpreted as "the reasonable person of the same kind as the other party would have had in the same circumstances". [CISG ART. 8]. Here, the standard should be applied to reasonable people in the same type of business.
87. Further bolstering CLAIMANT'S position regarding the authority of the Tribunal to adapt the price of the last 50 doses, UNIDROIT Principles Article 6.2.2 states:

> 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.

88. The undisputed facts show that after the contract was formed, and before and two months before the last shipment of the 50 doses of semen was due in January 2018, the Equitoriana government imposed its 30 percent tariffs on selected products included animal semen. CLAIMANT's cost to perform unexpectedly increased by 30 percent on the last 50 doses, making it significantly more.
89. Although the contract had become onerous, CLAIMANT in good faith and relying on Ms. Shoemaker's representations, sent RESPONDENT the remaining 50 doses, trusting that RESPONDENT would honor the Hardship Clause and pay an adaptation of the price due to the tariffs.
90. CLAIMANT unfortunately later found out on 12 February 2018 that not only did RESPONDENT have no intentions of paying an adaptation for the 50 doses, RESPONDENT was also acting in bad faith by violating its commitments to CLAIMANT by selling some of the doses to contracting third parties which is in direct violation of the contract between the parties. The italicized language in Clause 12, "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous,"* makes clear that the Hardship Clause was intended to cover any unforeseen event that makes the contract more "onerous" for CLAIMANT.

91. After examining the exchanges and all of the evidence in the record, any reasonable person would conclude that CLAIMANT wanted to ensure that they did not bear any additional costs due to unforeseen events in the process of delivering the semen.

3. RESPONDENT is estopped from denying that Clause 12 required an adaptation of the contract.

92. Clause 12 of the Sales Agreement makes clear that the seller (CLAIMANT in this case) shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as hardship caused by unforeseen events making the contract more onerous.
93. Clause 14 stipulates that the sales agreement be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (CISG).
94. While the parties' negotiations between CLAIMANT'S Ms. Napravnik and RESPONDENT'S Mr. Antley envisioned an adaptation clause that expressly referenced an adaptation in the event of hardship caused by inclusion of the DDP Incoterm, such a clause did not make the final Sales Agreement, because neither Ms. Napravnik nor Mr. Antley were able to complete the final Sales Agreement due to their accident.
95. On 12 April 2017 Ms. Krone, acting as RESPONDENT's new substitute representative included the language that is now Clause 12, even though she was unable to communicate with Mr. Antley, who remained in a coma until after the Sales Agreement was signed on 6 May 2017.
96. In order to interpret the hardship clause, Article 7 of the CISG (the "gap-filler" article) allows for questions concerning matters governed by the CISG "which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." In this case, the applicable principles under Mediterranean law are the UNIDROIT Principles.
97. UNIDROIT Article 6.2.2 states there is hardship where the occurrence of events fundamentally alters equilibrium of the contract because of the cost of a party's performance increased.
98. The unforeseen tariffs imposed by each parties' respective government created undue hardship on CLAIMANT, not only destroying CLAIMANT's profit margin of 5% but also significantly increased the cost to deliver the final 50 doses to RESPONDENT.
99. Article 8(1) of the CISG provides that a party's actions and statements ought to be interpreted as to his intent when the other party "knew or could have not been unaware what the intent was." On 21 January 2018, RESPONDENT's Mr. Shoemaker specifically assured CLAIMANT's Ms.

Napravnik in a telephone conversation that a solution would be found and an adaptation of the contract price would be achieved through good faith negotiations between the parties.

100. Mr. Shoemaker made such representations in order to induce CLAIMANT to ship the final installment of 50 doses, but Mr. Shoemaker confirms that he not only knew that the "animal products" tariffs covered frozen race horse semen but also that CLAIMANT would not deliver if he were to reject their request to adapt the price. Yet Mr. Shoemaker's language indicated to Ms. Napravnik that RESPONDENT would certainly negotiate in good faith to reach an agreement on the increase in price. This failure to disclose was a material omission that would also have justified CLAIMANT'S refusal to ship the final installment of semen to RESPONDENT.

101. In said telephone conversation with Ms. Napravnik, Mr. Shoemaker also concealed that RESPONDENT also needed immediate shipment of the final installment in order to fulfill its commitment to sell 15 doses to a third parties in breach of the sales agreement.

102. Based on such assurances, Mr. Shoemaker's assurances and also relying on the Sales Agreement's Hardship Clause at Clause 12, CLAIMANT shipped the final installment of 50 doses on the evening of 21 January 2018.

103. Article 6.2.3 of the UNIDROIT Principles states that, once hardship has been shown, the disadvantaged party is entitled to request renegotiations. And under Article 54 of the CISG, the buyer (RESPONDENT in this case) has an obligation to pay the price that "complies with formalities required under the contract," including the formality of complying with the hardship clause and adapt the contract to account for the unforeseen tariffs.

104. At a meeting on 12 February 2018 at which CLAIMANT confronted RESPONDENT with its discovery that RESPONDENT has breached the contract by selling a number of the doses to third parties without CLAIMANT's prior written consent, RESPONDENT in bad faith refused to negotiate at all regarding an adaptation to the price for the semen shipped on 21 January 2018.

105. Consequently, Clause 12 affords CLAIMANT the right for a price adaptation sufficient to cover its losses caused by imposition of the tariff by Mediterraneo, as is fair and equitable.

B. The CISG, supplemented by the UNIDROIT Principles under applicable Mediterraneo law, allows the Tribunal to adapt the price under the circumstances in this case.

106. Contrary to RESPONDENT's contention, the CISG does not preclude the claims for relief sought here by CLAIMANT in this matter arising from the imposition of the of the 30 percent tariff on CLAIMANT's semen shipments to RESPONDENT. The CISG embodies the mutual

obligation of contracting parties to deal with one another in good faith **[1]**. CISG Art. 7(2) directs that, where the CISG does not expressly address particular matters, such matters are to be settled in conformity with the general principles of the applicable law, which under the general contract law of Mediterraneo is based on the UNIDROIT Principles **[2]**. And CLAIMANT only shipped the last 50 doses of frozen semen as a result of RESPONDENT's promise to negotiate in good faith adaptation of its the contract for an increase in the price that would bear the bulk of the additional costs incurred by CLAIMANT due to imposition of the tariff by Equatoriana **[3]**.

1. An overriding principle embodied in the CISG is the obligation of good faith, especially on matters of hardship and unanticipated change in circumstances.

a. In determining the parties' obligations under a contract, their mutual intent regarding such obligations is paramount.

107. The parties' intention should be used as a primary reference point with respect to their obligation to deal with one another in good faith. The question to be addressed in determining intention is to what the parties would have provided for in their contract had they at the time known that there would have been a 30 percent tariff imposed on frozen semen shipments into Equatoriana.

108. Determination of the parties' intentions under CISG Art. 8 requires an examination of the language of the contract itself alongside all of the other evidence, such as the contemporaneous communication documents and witness statements regarding the circumstances both before and after the conclusion of the contract. Only in the absence of any indications about the true subjective intentions of the parties may a purely objective be applied.

109. Importantly, under the law of Mediterraneo, the law governing the Sales Agreement, the so-called "four-corners rule" is not applied. Therefore, all relevant evidence may be considered by the Tribunal in interpreting the contract, including the parties' actual intent at the time of contracting.

110. Here the evidence in the record shows that the parties would have or were at least in the process of providing for a price adaptation by including a hardship by inserting a hardship clause in the Sales Agreement that would have done so fairly and equitably.

b. The CISG may allow a party to obtain hardship relief for unforeseen events that fundamentally alter the party's obligations under a contract.

111. There is a plethora of authority to the effect that courts and arbitral tribunals have employed innovations in contract law under the changed circumstances doctrine to resolve equitably disputes where the transaction has become "impracticable" due to a factor that has made performances

sufficiently different from what the parties had both contemplated at the time of contracting [Knapp, Crystal, Prince 7th Ed, pp 688 – 691, UNCITRAL SECRETARIAT COMMENTARY pp. 3 ¶1].

112. The Belgian decision in *Scafom International BV v. Lorraine Tubes S.A.S. of 2009* is a leading case in matters of hardship and changed circumstances for contracts governed by the CISG. In this case, Scafom International BV (buyer) had contracted several times with the French Company, Lorraine Tubes (seller), for the delivery of steel tubes. The market price of steel unexpectedly rose by 70%, thereby making the contract price inaccurate and impractical in business due to the altered circumstances. The trial court in this case acknowledge that indeed the sudden rise on the price of goods to be delivered had caused a serious economic imbalance that could result harmful to the seller.

113. Of particular importance to the present matter is that the court in *Scafom* established that the CISG was the applicable law to the contract and that the CISG did not expressly settle the issue of hardship; thus, renegotiation of the price pursuant to the seller's request was not directly permitted by the CISG. The court, however, decided to invoke general equitable principles and ordered the buyer to pay half of the price increase demanded by the seller.

114. Further, the CISG does not implicitly exclude allowing relief for changed circumstances. The convention, moreover, must be read holistically. For example, the CISG makes specific provision for a reduction of the contract price in Art. 50 where the goods fail to conform with the requirements of the contract. In other words, there is to be an adjustment of the contact price to reflect a disturbed balance between performance on one side and obligation on the other side.

115. Although the aforementioned article speaks directly about defects or other nonconformities regarding the goods, as elements which constitute a disturbance of the equilibrium or balance of the exchanges performance, changed circumstances similarly result in a disturbance of contractual equilibrium and even potential commercial impracticability. Accordingly, the CISG recognizes that in certain circumstances an adjustment of contractual obligations may be warranted where there is unanticipated hardship caused by a change in circumstances from the situation that existed at the time of contracting.

116. This principle is also embodied in Art. 79(1), which excuses nonperformance under certain circumstances in cases of hardship.

117. In *Scafom*, court established that "the non-acceptance of the of a price adjustment and the buyer's reluctance to renegotiate contravened the principle of good faith" under the rules of private

international law, including the UNIDRIOT Principles. See CISG Ar. 7(1) and 7(2). Likewise, RESPONDENT's refusal to negotiate in good faith for an adaptation of the price certainly constitutes a breach of the promise Mr. shoemaker made to Ms. Napravnik on 21 January, 2018.

118. Significantly, the Belgian Court in *Scafom*, ordered the adaptation of the contract due to the change of circumstances. The remedy was the result of the application of the good faith provision of the underlying French Law, which was applied to fill the "gap" under the CISG. The court stated that renegotiation of the contract is a process by which the principle of *Pacta Sunt Servanda* and good faith are balanced together. The parties have the power to adapt the contract and restore the lost equilibrium.

119. The cases where courts been unwilling to grant relief under CISG Art. 79 have generally found the party seeking relief was deemed to have assumed the risk of market fluctuations and other similar cost factors. [UNCITRAL Digest ¶15].

120. As evidenced by their negotiations, the DDP INCOTERM was added at the behest of RESPONDENT so as to facilitate the first transaction for RESPONDENT because CLAIMANT was much more acquainted with customs regulations, administrative requirements and forms for transportation of the highly perishable product – i.e., the frozen semen from the prize stallion, Nijinsky III.

121. Indeed, in this case, CLAIMANT made it clear that it was reluctant to assume any increased risk that might result from adding the DDP term to the contract. Ms. Napravnik's email message to Mr. Antley of 31 March 2017 unequivocally related that CLAIMANT was not willing to assume responsibility for "any further risks associated with such change in the delivery terms." [Cl. Ex. C4] This most significant evidence is bolstered by Ms. Naprovnik's subsequent witness statement [Cl. Ex. C8], in which she related that Mr. Antley, on the morning prior to the accident on 12 April 2017, had agreed with her that the contract allow for an adaptation of the price should the addition of the DDR INCOTERM result in addition material cost to CLAIMANT.

122. CLAIMANT recognizes that Mr. Shoemaker's witness statement [Res. Ex. R4] asserts that he had understood that the DDP term indicated that import tariffs would ordinarily fall on CLAIMANT, as seller.

123. However, that assertion is particularly hollow under the circumstances here because, considering the witness statements of both Ms. Napravnik and Mr. Shoemaker together, shows definitively that Mr. Shoemaker fully understood that, based on his representations to her, Ms. Naprovnik believed that RESPONDENT was committing to negotiate an adaptation of the price

for the last 50 dose shipment and that, in exchange for such commitment, CLAIMANT would agree to ship the last shipment.

124. Accordingly, under CISG Art. 8(1), the subjective understanding of Ms. Naprovnik (and thus CLAIMANT) that CLAIMANT would accept no significant new risk by adding the DDP delivery term governs the proper interpretation of the Sale Agreement's Clause 12.

2. CISG Art. 7(2) directs that, where the CISG does not expressly address particular matters, such matters are to be settled in conformity with the general principles of the applicable law, which under the general contract law of Mediterraneo is based on the UNIDROIT Principles.

125. Article 7(2) of the CISG states that matters that are not expressly stated in the convention are to be settled with the "general principles on which it is based" or "the rules of private international law." In the case at hand the UNIDROIT Principles should be applied if the CISG is found not to expressly settle the question of whether CLAIMANT is entitled to adaptation of the contract price for the last 50 doses of the frozen semen.

126. Clause 14 of the Sales Agreement states that the agreement is to be governed by the law of Mediterraneo. [Cl. Ex. C 3, Cl. 14.]. Mediterraneo has adopted the UNIDROIT Principles verbatim and also applies the CISG. [PO No. 1; ¶4]. Therefore, the UNIDROIT Principles is the applicable law to apply.

127. Art. 6.2.2 of the UNIDROIT Principles provides that "hardship" exists "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 of a party receives has diminished". This is shown in the case at hand. Instead of a 5% profit, CLAIMANT will suffer a 25% loss unless the Tribunal awards the adaptation of the price sought herein by CLAIMANT.

128. Once there has been the occurrence of events that alterd the contract's "equilibrium," UNIDROIT Art. 6.2.2 lays out four requirements needed for adaptation due to hardship: **(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.

a. CLAIMANT did not become aware that the tariff had been imposed until January 2018, well after conclusion of the contract.

129.The tariff was not in effect at the time the Sales Agreement was signed on 6 May 2017. Moreover, the tariff did not go into effect until just prior to CLAIMANT's final shipment of the last 50 does of the frozen semen became on 22 Janaury 2018.

b. The possibility that the tariff would be imposed during the term of the Sales Agreement could not reasonably have taken into account by CLAIMANT at the time of the conclusion of the contract.

130. Neither party had any reasonable basis to believe that a tariff would be imposed on CLAIMANT's sale of frozen semen as of the time the contract was executed on 6 May 2017.

131. While the government of Mediterraneo's newly-elected President had imposed tariffs on certain aggricultural products in April 2017, there was no expectation even in informed circles that this would lead to retliatory tariffs by Equitoriana. Moreover, Equatoriana, being a member of the WTO, would have ordinarily followed the GATT dispute settlement mechanism. Under WTO, retaliation, like was the basis for Equtoriana's 30 percent retaliatory tariff is typically the type of trade sanction that is imposed only as last resort. [See, Cl. Ex. C6; *Peak Business News*, 20 December 2017]

132. Further, in the past, Equatoriana had not directly retaliated with respect to the trade restrictions of other countries. Moreover, this tariff was also surprising because it also included racehorse semen, a commodity that was usually not included within the classification of agricultural products. [*Id.*]

c. Imposition of tariffs by one country against another country's products are obviously beyond the control of any private party, including CLAIMANT in this case.

133. The imposition of the 30 percent tariff by Equitoriana against agricultural products originating in Mediterraneo, including frozen horse semen, was undoubtedly beyond the control of CLAIMANT, as it was a purely political political decision by the government of Equitoriana.

d. CLAIMANT did not assume the risk of the tariff.

134. Clause 12 of the Sales Agreement expressly states that CLAIMANT is not assuming the risk of any inforeseen circumstances that would make the agreement more onerous. This is also exhibited Ms. Napravnik's email of 20 January 2018 in which CLAIMANT makes it clear that the

parties would need to work out a new agreement on price befor CLAIMANT would be willing to deliver to RESPONDENT the last 50 doses of frozen semen.

135. Therefore, CLAIMANT is requesting that the Tribunal grant it an adaptation of the price in accordance as provided under Art. 6.2.3 of the UNIDROIT Principles, which applies in this case under "gap filling" provision of CISG Art. 7(2) pursuant to Mediterraneo law.

3. CLAIMANT only shipped the last 50 doses of frozen semen as a result of RESPONDENT's promise to negotiate in good faith adaptation of its the contract for an increase in the price that would bear the bulk of the additional costs incurred by CLAIMANT due to imposition of the tariff by Equatoriana.

a. Article 79(1) of the CISG relieves a party of liability for failure to perform its obligations under a contract where such failure is due to an impediment beyond the control of the party and where such party could not reasonably have been expected to have taken the impediment into account at the time of contracting.

136. CLAIMANT had the right to refuse to ship the last 50 doses of frozen semen under CISG Art. 79(1) due to the unexpected imposition of the 30 percent Equitoriana tariff on the semen.

137. Claimant's Ms. Napravnik had informed RESPONDENT on 20 January 2018 that it would not ship the last 50 doses unless there was a solution regarding the unexpected additional expense caused by the 30 percent tariff. [Cl. Ex. C7].

138. Under Art. 79(1), a party is not liable for failure to perform its contractual where the failure was due to circumstances beyond its control. In that CLAIMANT would be unable to perform its contractual obligation of delivering the last 50 doses without incurring devastating financial losses, Art. 79(1) would have allowed CLAIMANT to avoid having to perform, or deliver the final 50 doses.

139. In his phone call to Ms. Napravnik on 21 January 2018, RESPONDENT's Mr. Shoemaker, having receive Ms. Napravnik's message, knew that CLAIMANT would not ship the last 50 doses unless he persuaded Ms. Napravnik that a reasonable adaptation increasing the price for the that shipment would thereafter be negotiated by RESPONDENT in good faith. Because Mr. Shoemaker also knew, but concealed from Ms. Napravnik, that RESPONDENT needed a timely shipment in order avoid its own default in delivering part of this shipment to its own buyers, he gave such assurances to Ms. Napravnik to induce her to authorize the shipment. Moreover Mr. Shoemaker knew that CLAIMANT would rely on its assurances to authorize shipment and has done

so to its detriment. Mr. Shoemaker testifies to that effect, that he "knew that CLAIMANT would not deliver if [he] were to reject their request outright." [Res. Ex. R4].

b. By falsely representing that RESPONDENT would negotiate a reasonable adaptation of the price for the 50 doses in good faith, RESPONDENT is legally estopped from denying that the Tribunal should adapt the price due CLAIMANT for shipment of the last 50 doses.

140. RESPONDENT is estopped from denying that the lack of an express adaptation clause in the contract precludes CLAIMANT from obtaining a price adaptation because Mr. Shoemaker's representations assuring that RESPONDENT would negotiate in increase in price to cover the cost of the tariff in good faith induced CLAIMANT to deliver the last 50 doses.

141. Mr. Shoemaker additionally induced CLAIMANT to authorize shipment by promising that RESPONDENT intended to establish a long-term relationship with CLAIMANT and that RESPONDENT was already planning soon to buy 50 doses of frozen semen from "Empire State," another one of Phar Lap's stallions that had a world reputation [Cl. Ex C8].

142. Under *Lex Mercatoria,* which consists of general principles of private international contract law, there is the rule of *non con-cedit venire contra factum propium* which can be translated as "no one may set himself in contradiction to his own previous conduct". Although the word "estoppel" is not a part of the language of the CISG, it may be accepted that it lives in the shadows of the several Articles of the Convention.

143. CLAIMANT further submits that the principle of good faith which under lies behind the doctrine of estoppel is also a common principle of *Lex Mercatoria.* That is to say, the parties have and always had a duty to negotiate and contract honestly in fact and deal with each other fairly.

144. The foregoing evidence shows that RESPONDENT has not dealt in good faith with regarding to negotiating an adaptation to the price in the Sales Agreement and that RESPONDENT is guilty of the bad faith concealment that it was re-selling at least 6 of the doses to their parties without CLAIMANT's consent. [Res. Ex. R4].

145. Moreover Mr. Shoemaker knew that CLAIMANT would be relying on his assurances to authorize shipment and would do so to its detriment because, by shipping, CLAIMANT would have to pay the cost of the 30 percent tariff. In recognition of this, Mr. Shoemaker admits in his witness statement that he "knew that CLAIMANT would not deliver if [he] were to reject their request outright." [Res. Ex. R4]

146. Relying on Mr. Shoemaker's assurances, Ms. Napravnik authorized the timely shipment of the last 50 doses with CLAIMANT advancing the additional cost represented by the 30 percent tariff.

147. In that regard, RESPONDENT must be estopped from asserting that the lack of an adaptation clause precludes CLAIMANT from price adaptation in that CLAIMANT's decision to ship the last 50 doses was based entirely on Mr. Shoemaker's assurances that RESPONDENT would negotiate in adaptation of the price in good faith.

148. In addition to promising to negotiate about and increase in the price for the 50 doses, Mr. Shoemaker added as a further inducement for CLAIMANT to ship the final shipment the promise that RESPONDENT intended to establish a long-term relationship with CLAIMANT and that it was then already planning to buy 50 more doses from the stallion Empire's State, another of CLAIMANT's champion stallions having a world reputation [Cl. Ex C8].

149. *Lex Mercatoria* has a rule of *non con-cedit venire contra factum propium,* which can be translated as "no one may set himself in contradiction to his own previous conduct". Although the word "estoppel" is not a part of the language of the CISG, it may be accepted that it lives in the shadows of the several Articles of the Convention. In particular, RESPONDENT should not be allowed to renege on Mr. Shoemaker's promise to negotiate an adaptation of the contract price made to induce CLAIMANT to make the final shipment, a shipment for which it had a bone fide excuse to refuse under CISG Art. 79(1).

150. CLAIMANT further submits that the principle of good faith which underlies the doctrine of estoppel is also a common principle of *Lex Mercatoria.* That is to say, the parties have and always had a duty to negotiate and contract honestly in fact and deal with each other fairly.

151. To conclude, CLAIMANT maintains that RESPONDENT has failed to deal with CLAIMANT in good faith and that RESPONDENT's conduct is marred by its bad faith refusal to negotiate an adaptation of price with CLAIMANT and also for concealing its intent to violate the contract by selling a number of doses to their parties.

152. In *Rechtbank Arnem (Minibus case)* the Court invoked the gap filling provisions of Art. 7 CISG and held that there is ample reason to interpret the provisions in Articles 73, 85 and 86 CISG extensively. The District Court concluded that even though the CISG does not provide for a general right to suspend performance, in the present circumstances, there was a sufficient connection between the respective obligations of seller and buyer to justify a suspension of the performance in

this case. The Court then consulted the domestic contract law to dispose of the issue of suspension of performance.

153. The situation that this tribunal is confronted with having been clearly contemplated by the UNIDROIT Principles, the Tribunal should defer to the UPCC to the extent that the provisions of the CISG are unclear. "Naturally ….. the UNIDROIT Principles address issues also covered by CISG, they follow the solutions found in that Convention, with such adaptations as were considered appropriate to reflect the particular nature and scope of the Principles [Preamble of the UNIDROIT Principles, pp. XXIII (Commentary)].

154. To determine whether there is a case for hardship, the starting point is Art. 6.2.2 of the UNIDROIT Principles which provides that hardship exists "where the occurrence of the 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 of a party receives has diminished".

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to determine that:

1. The Tribunal has jurisdiction and power under the arbitration agreement to adapt the contract;

2. The law of Mediterraneo governs the Sales Agreement, including the arbitration clause at Clause 15 of that agreement and its interpretation;

3. CLAIMANT should be entitled to submit evidence from RESPONDENT's other arbitration proceedings, including the partial award entered therein and the Tribunal should reject RESPONDENT's contention that such evidence, even though relevant, should be excluded from these proceedings because they may have been obtained through breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system;

4. CLAIMANT is entitled to an adaptation of the price due it under the parties' Sales Agreement both under the contract's hardship clause at Clause 12 and under the CISG and the Unidroit Principles, Art. 6.2.3; and

5. The Tribunal should award CLAIMANT and order RESPONDENT to pay CLAIMANT an additional amount of US$1,250,000 representing CLAIMANT's financial loss from paying the Equatoriana tariff on the 50 doses of frozen semen delivered to RESPONDENT in January 2018; and

6. The Tribunal also award CLAIMANT all of the costs of this arbitration, including its legal costs and expenses incurred herein.

Respectfully Submitted,

Kennedy P. Womack

On Behalf of Phar Lap Allevamento

For herself and for: Ed-Petra Adarquah-Yiadom, Fengming Jin, Kitso Matlhape, Ian McManus, Ronnie Kenley, and Caleb Williamson

University of Cincinnati College of Law Vis Moot Team

6 December 2018

Certificate and Choice of Forum

To be attached to each Memorandum

I, John B. Pinney, on behalf of the Team for the UNIVERSITY OF CINCINNATI, COLLEGE OF LAW

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

Check off the boxes as appropriate:

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

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

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

Or

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

Authorised Representative of the Team for University of Cincinnati College of Law

Name: John B. Pinney

Signature