Sixteenth Annual

William C. Vis (East) International Commercial Arbitration Moot

Hong Kong – 31 March to 07 April 2019

UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW

MEMORANDUM FOR CLAIMANT

Phar Lap Allevamento v. Black Beauty Equestrian

CLAIMANT • RESPONDENT

GWENLLIAN KERN-ALLELY | JOHN MYSLIWIEC | YVONNE RICARDO
STEPHEN WAINWRIGHT | ALEXANDER RUSSO | CHRISTOPHER CAMMISO | STEVEN BARNES
EMILY MILLER | MICHELLE PROPST | KATILYN FARRELL | ELVINA ROFAEL

Counsel for CLAIMANT

TABLE OF CONTENTS

Page

LEGAL INDEX

HKIAC Rules	Hong Kong International Arbitration Center Administered Arbitration Rules
Model Clause	HKIAC Model Arbitration Clause
CISG	United Nations Convention on Contracts for the International Sale of Goods
IBA Guidelines on Evidence	IBA Guidelines on the Taking of Evidence
IBA Rules on Ethics	IBA Rules of Ethics for International Arbitrators 1987
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2016

TABLE OF AUTHORITIES

Blair/Gojkovic	Blair, Cherie, Gojković, Ema Vidak, 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence', in: ICSID Review, Vol. 33, No. 1 (2018), pp. 235-259 Cited in: ¶ 58, 59, 61, 66, 67
Born	Born, Gary Treatise: International Commercial Arbitration (Second Edition), Cited in: ¶ 29, 32, 58
Briner	Briner, Robert, 'Special Considerations Which May Affect the Procedure (Interim Measures, Amiable Composition, Adoption of Contracts, Agreed Settlement), in: Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration Cited in: ¶ 49
Brown	Brown, Alexis C., 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration', in: American University International Law Review, Vol. 16 Issue 4 (2001), pp. 969-1025 Cited in: ¶ 62
Brunner	Brunner, Christopher, 'Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 11: Hardship as a General Principle of Law', in: Force Majeure and hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, pp. 391-420 Cited in: ¶¶ 85, 95, 111, 116, 119, 122

Chatterjee	Chatterjee, C., 'The Reality of The Party Autonomy Rule in International Arbitration' in: 20 Journal of International Arbitration, Issue 6 (2003), pp. 539-560 Cited in: ¶ 30
Delebecque	Delebecque, Philippe, 'Hardship Clauses and Exemption Clauses in Charter-Parties,' Available online at: http://docplayer.net/43416183-Hardship-clauses-and-exemption-clauses-in-charter-parties.html Cited in: ¶77
DiMatteo	DiMatteo, Larry A., 'Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines', in: Pace International Law Review, Vol. 27 Issue 1 (2015) Cited in: ¶ 96
Fesler	Fesler, Michael, 'The Extent of Confidentiality in International Commercial Arbitration in: 78(1) Arbitration Journal 48, 49 (2012) Cited in: ¶ 62
Gaillard	'Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract' in: Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration Cited in: ¶ 49
Garnet	Garnet, Richard et al., 'A Practical Guide to International Commercial Arbitration',

	in: New York: Oceana Publications, Inc. (2000), pp. 14 Cited in: ¶ 64
Ishida	Ishida, Yasutoshi, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness – Full of Sound And Fury, but Signifying Something' in: Pace International Law Review, Vol. 30 Issue 2 (2018) Cited in: ¶ 100
Kull	Kull, Andrew, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' In: Hastings Law Journal, Vol. 43, No. 1 (1991). Cited in: ¶85
Lew/Mistelis	Lew, Julian D.M; Mistelis, Loukas A, et al., 'Chapter 8: Drafting of the Arbitration Agreement', in: Comparative International Commercial Arbitration (Kluwer International Law 2003) pp. 168-169 Cited in: ¶ 54
Lindström	Lindström, Niklas, 'Changed Circumstances and Hardship in the International Sale of Goods', in: https://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html Cited in: ¶ 91, 94, 97, 100
Moses	Moses, M., 'The Principles and Practice of international Commercial Arbitration: Third Edition' in: Cambridge: Cambridge University Press (2017) Cited in: ¶ 82
Noussia	

	Noussia, Kyriaki, 'Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law' in: Heidelberg: Springer-Verlag (2010) Cited in: ¶ 62
Posner/Rosenfield	Posner, Richard A., Andrew M. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' In: The Journal of Legal Studies, Vol. 6, No. 1 (1977) Cited in: ¶85
Puelinckx	Puelinckx, A.H., 'Frustration, Hardship, Force majeure, imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances', in: 3 Journal of International Arbitration (1986) pp. 47-66 Cited in: ¶ 55
Redfern/Hunter	Blackaby, Nigel, et al., 'Chapter 6. Conduct of the Proceedings', in: Redfern and Hunter on International Arbitration (Sixth Edition) Cited in: ¶ 30, 35
Schlechtriem	Schlechtriem, Peter. '*Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods.'* Published in: https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html#a77 Cited in: ¶77
Schwenzer	Schwenzer, Ingeborg,

in: 'International Sales Law: A Guide to the CISG (2012),

Cited in: ¶ 35, 37

Schwenzer, Ingeborg, 'Force Majeure and Hardship in International Sales Contracts',

in: 39 Victoria U. Wellington L. Rev. 709 (2009)

Cited in: ¶ 77, 105

Stanivukovic — Stanivukovic, Maja, 'National Report for Serbia (2018)',

in: ICCA International Handbook on Commercial Arbitration, pp. 1-68

Cited in: ¶ 37

Van Den Berg — Van Den Berg, Albert Jan, 'International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea',

in: Yearbook Commercial Arbitration 1998 – Volume 23 (Kluwer Law International), pp. 1131-1207

Cited in: ¶ 96

Waincymer — Waincymer, Jeffrey, 'Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding'

in: Procedure and Evidence in International Arbitration (Kluwer Law International 2012), pp. 743-824

Cited in: ¶ 62

Ward — Ward, Roger K. 'The Flexibility of Evidentiary Rules in International Trade Dispute Arbitration Problems Posed to American-Trained Lawyers'

Published in: Journal of International Arbitration, 1996

Volume 13 Issue 3, pp. 5-20

Cited in: ¶67

Webster Dict.

Webster, Noah.
The Merriam-Webster Dictionary
New Edition 2016, Merriam-Webster, Inc.

Cited in: ¶ 85

Zeller

Zeller, Bruno, 'Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis',

https://www.cisg.law.pace.edu/cisg/biblio/zeller8.html

Cited in: ¶ 74

TABLE OF COURT DECISIONS AND ARBITRAL AWARDS

Court Decisions:

EUROPEAN UNION

Cited as	Reference
Persia International Bank v. Council	Judgment of the General Court (Fourth Chamber) of 6 September 2013 Persia International Bank plc v Council of the European Union. Case T-493/10 Cited in: ¶ 57

GERMANY

Cited as	
Chemical Products Case	Oberlandesgericht [Provincial Court of Appeal], 27 December 1999 Published in: http://cisgw3.law.pace.edu/cases/991227g1.html Cited in: ¶ 57

SWITZERLAND

Cited as	Reference
HG Zurich	Handelsgericht (M. F. S.r.l. v. A. & P. AG), (24 October 2003) Published in: http://cisgw3.law.pace.edu/cases/031024s1.html Cited in: ¶

UNITED NATIONS COMMISSION

ON INTERNATIONAL TRADE LAW

Cited as

Cattlemen	Canadian Cattlemen for Fair Trade v. The United States of America, Award on Jurisdiction, 28 January 2008 Published in: http://www.state.gov/documents/organization/99954.pdf Cited in: ¶

UNITED STATES

Cited as	**Reference**
Iranian Hostages	United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24) Published in: https://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf Cited in: ¶ 57
Marble Ceramic Case	MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A. 29 June 1998 Published in: https://cisgw3.law.pace.edu/cases/980629u1.html Cited in: ¶ 101 Cited in: ¶ 32

Arbitral Awards:

Cited as:	Source:
ConocoPhillips Case	ConocoPhillips Company et al v Bolivarian Republic of Venezuela Case No. ARB/07/30 Published in: https://uk.practicallaw.thomsonreuters.com/6-518-4171?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 Cited in: ¶ 55
Caratube v. Kazakhstan	Caratube International Oil Company LLP v. The Republic of Kazakhstan Case No. ARB/08/12 Published in: https://www.italaw.com/sites/default/files/case-documents/italaw3082.pdf Cited in: ¶ 62
Methanex	Methanex Corporation v. United States of America Published in: https://www.state.gov/s/l/c5818.htm Cited in: ¶ 57
Turkish Email Case	Libananco Holdings Co Ltd v Republic of Turkey Case No. ARB/06/9 Published in: https://uk.practicallaw.thomsonreuters.com/2-382-8609?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 Cited in: ¶ 55

INDEX OF ABBREVIATIONS

&	And
§ / §§	Section / Sections
¶ / ¶¶	Paragraph / Paragraphs
%	Percent
Adv.	Advisory
Art. / Arts.	Article / Articles
CISG	Convention on Contracts for the International Sale of Goods
Cl.	CLAIMANT
Cl. Ex.	CLAIMANT's Exhibit
Cl. Not. of Arb.	CLAIMANT's Notice of Arbitration
Co.	Company
Dict.	Dictionary
e.g.	*Exemplum gratia* (for example)
et. al	*Et alia* (and others)
Etc.	*Et cetera* (and so forth)
Ex.	Exhibit
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	*Idem* (the same)
i.e.	Id est. (that is)
Inc.	Incorporated
Infra	Below
Int'l	International
L.J.	Law Journal
L. Rev.	Law Review
Memo.	Memorandum
Mr. / Ms.	Mister / Miss
n.	Footnote
No. / Nos.	Number / Numbers

Op.	Opinion
p. / pp.	Page / pages
Proc. Ord.	Procedural Order
Resp.	RESPONDENT
Resp. Ans.	RESPONDENT's Answer to Statement of Claim
Resp. Ex.	RESPONDENT's Exhibit
Sec.	Security
Stmt.	Statement
Supra	Above
TOR	Terms of Reference
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2016
US $	United States Dollars
v.	Versus
Vol.	Volume

STATEMENT OF THE FACTS

1. **Phar Lap Allevamento** ("CLAIMANT") is the oldest and most renowned stud farm in Mediterraneo. It is known for its superior quality of frozen horse semen and its ownership of Nijinsky III, one of the most sought-after stallions for breeding racehorses.
2. **Black Beauty Equestrian** ("RESPONDENT") is an equestrian center that established a racehorse stable in **2015** with the hope of starting a racehorse breeding program.
3. The Parties met at Equestrian World in **2016**, where RESPONDENT indicated its intention to become one of the leading breeders for racehorses.
4. On **21 March 2017**, RESPONDENT emailed CLAIMANT with news that the ban on artificial insemination in Equatoriana was temporarily lifted. In that email, RESPONDENT requested 100 doses of frozen semen from Nijinsky III.
5. On **24 March 2017**, CLAIMANT expressed concern at the unusually high number of doses requested by RESPONDENT. In the interest of creating a long-term business relationship, CLAIMANT agreed—under certain conditions—to supply the 100 doses requested at $99,500 USD per dose. CLAIMANT stated that the doses would have to be provided in several installments, picked up at CLAIMANT's premises, and could not be resold to third parties without CLAIMANT's express written consent.
6. On **28 March 2017,** RESPONDENT countered CLAIMANT's offer. The counteroffer requested a price reduction and changed the delivery terms to DDP, due to the urgency of the delivery and CLAIMANT's greater experience in shipping frozen semen. RESPONDENT also opposed a dispute resolution clause where the law of Mediterraneo applied and the courts of Mediterraneo had jurisdiction. RESPONDENT accepted the application of the law of Mediterraneo, provided that the courts of Equatoriana had jurisdiction.
7. On **31 March 2017**, CLAIMANT accepted DDP delivery contingent on a price increase for the doses. CLAIMANT expressed that it was unwilling to take over any further risks associated with the terms of DDP delivery—especially risks associated with changes in customs regulation or import restrictions—and requested the inclusion of a hardship clause in the contract. CLAIMANT denied RESPONDENT'S proposal that Equatoriana's courts have jurisdiction and instead suggested arbitration in Mediterraneo.
8. On **10 April 2017**, RESPONDENT drafted a dispute resolution clause that was based on HKIAC's model clause. RESPONDENT's draft selected Equatoriana as the seat of arbitration and the law of Equatoriana as the law of the arbitration clause.

9. On **11 April 2017**, CLAIMANT told RESPONDENT that it cannot submit to foreign law or to dispute resolution in the country of its counterparty without special approval. Instead, CLAIMANT drafted a dispute resolution clause that removed the law of Equatoriana as the law of the arbitration clause and named Danubia as the seat of arbitration. CLAIMANT expressed that this offer was on the condition that the law applicable to the entirety of the Agreement remains the law of Mediterraneo.
10. On **12 April 2017**, Ms. Napravnik of CLAIMANT and Mr. Antley of RESPONDENT met in Vindobona, Danubia, to negotiate the dispute resolution clause and the hardship clause. Mr. Antley told Ms. Napravnik that it should be the task of the arbitrators to adapt the contract if the Parties could not agree. Ms. Napravnik agreed and suggested that an express reference be included in the hardship clause or the arbitration clause to avoid any doubt. Mr. Antley promised to return with a proposal the next morning.
11. Unfortunately, that same day, Ms. Napravnik and Mr. Antley were in a terrible car accident. Neither Ms. Napravnik nor Mr. Antley recovered in time to finalize the contract.
12. Mr. Ferguson replaced Ms. Napravnik and Mr. Krone replaced Mr. Antley to conclude negotiations. The Sales Agreement ("the Agreement") was finalized and signed on **6 May 2017**.
13. RESPONDENT made its first payment of USD $5,000,000 on **18 May 2017**. CLAIMANT sent the first shipment of 25 doses on **20 May 2017** and the second shipment of 25 doses on **3 October 2017**.
14. On **19 December 2017**, the Government of Equatoriana imposed a tariff of 30% percent on all agricultural goods from Mediterraneo in retaliation for Mediterraneo's previously imposed tariff on agricultural products from Equatoriana. This retaliatory tariff came as a surprise even to informed circles, as Equatoriana has always been one of the biggest supporters of free trade. Retaliatory measures have only occurred once before in the country's history and neither Equatoriana nor Mediterraneo had ever imposed tariffs on agricultural goods or horse semen.
15. On **20 January 2018**, CLAIMANT was informed by customs authorities that the tariffs applied to the third shipment of horse semen. CLAIMANT left a message on RESPONDENT's voicemail and emailed RESPONDENT, requesting renegotiation of the price of the third shipment due to the tariff's 30% increase in shipping costs.
16. On **21 January 2018**, RESPONDENT urged CLAIMANT to authorize the third shipment, stating that it had already initiated payment while emphasizing its interest in further business. CLAIMANT

authorized delivery of the third shipment to RESPONDENT in reliance on RESPONDENT's statement that a solution would be found through negotiation.

17. On **2 February 2018**, CLAIMANT learned that RESPONDENT was reselling the doses of horse semen and that this resale was the reason RESPONDENT urged CLAIMANT to authorize the third delivery. This resale occurred without CLAIMANT's consent and at a price 20% higher than what RESPONDENT paid CLAIMANT.

18. On **12 February 2018**, the Parties had a meeting to renegotiate the price of the third shipment. At this meeting, CLAIMANT confronted RESPONDENT about the resale. RESPONDENT's CEO, Ms. Kayla Espinoza, became angry and aggressive with CLAIMANT, stopped negotiations, and refused to pay any additional amount for the tariffs.

19. Since **2014**, CLAIMANT has suffered losses due to high interest payments. The USD $1,250,000 tariff threatens CLAIMANT financially and if forced to bear this burden, CLAIMANT will likely have to sell many parts of its business.

20. RESPONDENT is aware of this extreme financial burden on CLAIMANT and would not be financially endangered if it bore the cost of the tariffs.

21. On **2 October 2018**, CLAIMANT learned from Mr. Kieron Velazquez at the annual horse breeder conference that, in another HKIAC arbitration, RESPONDENT asked for an adaptation of price. This adaptation request is based on Mediterraneo's imposition of a 25% tariff – the exact tariff that triggered Equatoriana's 30% retaliatory tariff that now burdens CLAIMANT. RESPONDENT is represented by the same counsel in both the other arbitration and this arbitration.

22. CLAIMANT has arranged to acquire the "Partial Interim Award" of that arbitration from a company that provides intelligence on the horseracing industry.

23. CLAIMANT brings this claim for adaptation of the price of the Agreement in response to CLAIMANT's hardship and RESPONDENT's failure to renegotiate.

SUMMARY OF THE ARGUMENTS

Arguments on Procedure

24. RESPONDENT's attempt to alter the agreed upon meaning of the Arbitration Agreement should not be permitted. The Parties expressly selected the law of Mediterraneo as the law applicable to the entirety of the contract and RESPONDENT now attempts to alter the law solely to avoid adaptation of the contract, even though adaptation was part of the Agreement's negotiations. Mediterraneo law is the applicable law for this arbitration and under Mediterraneo law, this Tribunal has the power to adapt the contract (**Issue I**).

25. In examining the evidence in support of adaptation of the Agreement, this Tribunal should view evidence obtained from RESPONDENT's ongoing arbitration where RESPONDENT itself has requested an adaptation of its sales agreement due to a tariff. As CLAIMANT brings this evidence with clean hands and it would be prejudicial to CLAIMANT for the Tribunal not to consider it, the evidence should be admitted to these proceedings (**Issue II**).

Arguments on the Merits

26. This Tribunal should adapt the Agreement as the retaliatory tariffs of Equatoriana constitute an unavoidable and unforeseen hardship. In their negotiations and in their Agreement, the Parties contemplated the necessity of adaptation in case of hardship and CLAIMANT expressed that it would not bear any further risks associated with DDP delivery. As such, this Tribunal should adapt the contract because Clause 12 of the Agreement and all applicable laws provide for adaptation in situations such as the one CLAIMANT now finds itself (**Issue III**).

ARGUMENT

I. ISSUE 1: THIS TRIBUNAL HAS THE JURISDICTION TO ADAPT THE AGREEMENT BECAUSE THE PARTIES INTENDED FOR THE LAW OF MEDITERRANEO TO GOVERN THE INTERPRETATION OF THE ARBITRATION CLAUSE

27. Despite the Parties' intent to apply Mediterraneo law to the entire Agreement, RESPONDENT now contends, months after the execution of the Agreement, that Danubian law applies as the substantive law of the Arbitration Agreement. [*Cl. Ex. C5, ¶15*].

28. CLAIMANT respectfully submits to this Tribunal the following requests. First, this Tribunal has proper authority to determine its own jurisdiction under the Hong Kong International Arbitration Centre Administered Arbitration Rules ("HKIAC Rules") **(A)**. Second, the Parties intended for the law of Mediterraneo to apply to the interpretation of the Arbitration Agreement because the Parties agreed that Agreement is governed by the law of Mediterraneo and no other substantive law would apply to the Arbitration Agreement [*Cl. Ex. C5, ¶¶14–15*] **(B)**. Third, this Tribunal's power to adapt the contract is provided by the Arbitration Agreement under Mediterraneo Law [*Cl. Not. of Arb., ¶16*] **(C)**.

A. THIS TRIBUNAL HAS THE AUTHORITY TO RULE ON ITS OWN JURISDICTION

29. The Parties expressly selected the HKIAC Rules to govern arbitral proceedings. [*Cl. Ex. C5, ¶15*]. According to the HKIAC Rules, a tribunal may rule on its own jurisdiction and on any objections in regard to the scope of an arbitration agreement. [*HKIAC Art. 19.1*]. This aligns with the universally recognized principle of Kompetenz-Kompetenz, which states that a tribunal has the authority to consider and decide disputes over its own jurisdiction. [*Born, p.1066; HKIAC Art. 19.1*]. Therefore, this Tribunal has the authority to determine the applicable law of the Arbitration Agreement.

B. MEDITERRANEO LAW APPLIES TO THE AGREEMENT AND TO THE INTERPRETATION OF THE ARBITRATION AGREEMENT

30. The Parties chose the law of Mediterraneo to apply to the Agreement, including the Arbitration Agreement. The universal principle in determining which law governs international contracts is that of party autonomy. [*Redfern/Hunter, p.164*]. Party autonomy provides disputing parties with the assurance that an arbitration will proceed according to their choices. [*Chatterjee, p.539*].

31. The Parties chose the law of Mediterraneo to govern the Agreement in its entirety. [*Cl. Ex. C5,* ¶¶*14*-15]. Mediterraneo, Equatoriana, and Danubia contract law adopt the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"), with exceptions applied by Danubian Contract Law. [*Proc. Ord. 2*, ¶*45*]. The Parties also base the language of the Arbitration Agreement on the HKIAC Model Clause ("Model Clause"). [*Cl. Ex. C5, ¶15; Resp. Ex. R1*].

32. The doctrine of severability views arbitration agreements as severable from their host contract to ensure the validity of the arbitration agreement in the event the contract is void. [*Born, p.2*]. Because neither Party contends the Agreement to be void, the doctrine of severability need not be considered in the resolution of this dispute. [*Resp. Ans., ¶14*].

33. The CISG and UNIDROIT Principles provide similar approaches in determining party intent; first, an analysis of what the other party knew or could not have been unaware of and second, an analysis of what a reasonable party in the same position would have understood. [*CISG Art. 8; UNIDROIT Art. 4.1*]. Therefore, irrespective of whether this Tribunal analyzes the party intent under Mediterraneo contract law or the contended Danubian contract law, this Tribunal will find that the Parties intended to apply the law of Mediterraneo to the Arbitration Agreement.

34. Because the Parties intended for the law of Mediterraneo to apply to the Arbitration Agreement, this Tribunal may look to the CISG to determine whether RESPONDENT subjectively understood that the law of Mediterraneo applied to the Arbitration Agreement (**1**), or alternatively, that a reasonable party in the same position as RESPONDENT would objectively understand that the law of Mediterraneo applied to the Arbitration Agreement (**2**).

1. The Parties intended to apply the law of Mediterraneo to the Agreement and Arbitration Agreement

35. Under the HKIAC Rules, parties may choose different laws which govern the contract and the arbitration agreement, however if the parties intend for the laws to be different, the choice of law should be expressly written into the arbitration agreement. [*HKIAC Rule Model Clause*]. It is widely recognized that a contract must be interpreted in accordance with the parties' actual intent and that the scope of the agreement is determined by reference to the parties' intent. [*Schwenzer, p.60; Redfern/Hunter, p.78*].

36. Here, the Parties selected only one law, which governs the Agreement and the Arbitration Agreement. [*Cl. Ex. C5, ¶¶14-15*]. Neither CLAIMANT nor RESPONDENT agreed to apply any other

substantive law to the Agreement. [*Cl. Ex. C5, ¶¶14-15*]. The absence of a designation of a separate law governing the Arbitration Agreement demonstrates that the Parties' intended to incorporate the law of Mediterraneo into the Agreement by reference. [*Resp. Ans., ¶14*].

37. The Arbitration Agreement should be interpreted according to the subjective intent of the Parties. [*CISG Art. 8(1); Schwenzer et. al., p.60; Stanivukovich, p.20; Marble Ceramic Case*]. The statements and conduct between the Parties indicate that RESPONDENT knew or was not unaware of CLAIMANT's intent to apply the law of Mediterraneo to both the Agreement and Arbitration Agreement.

38. CLAIMANT continuously rejected the application of any law other than Mediterraneo contract law to the Agreement. [*Cl. Ex. C4; Resp. Ex. R2*]. RESPONDENT incorporated CLAIMANT's suggested arbitration clause into the final Agreement without revision, thereby accepting CLAIMANT's choice of law for the Arbitration Agreement. [*Cl. Ex. C5, ¶15*].

39. The Parties' conduct further suggests that RESPONDENT was aware that the law of Mediterraneo applied to the Arbitration Agreement. [*Resp. Ex. C1*]. Should the law governing the arbitration agreement and the seat of the arbitration be different, the parties to a contract should expressly provide for which law governs the arbitration agreement within its terms. [*HKIAC Model Clause*]. The Parties deviated from the HKIAC Model Clause by removing the provision designating the governing law of the Arbitration Agreement. [*Resp. Ex. R2; HKIAC Model Clause*].

40. When an arbitration agreement does not designate a substantive law, the law of the contract is generally extended to the arbitration clause. [*Blackaby/Partasides/Constantine, p.2*]. RESPONDENT allowed the governing law of the Arbitration Agreement to be silent because RESPONDENT knew the law of Mediterraneo, as the substantive law of the Agreement, applied to the Arbitration Agreement. [*Cl. Not. of Arb., ¶14; Cl. Ex. C5, ¶15*].

41. CLAIMANT agreed to designate the seat of arbitration as Danubia, a neutral country to the Parties, on the express condition that Mediterraneo law applied to the Agreement in its entirety. [*Resp. Ex. R2*]. The Parties intended to use Danubia as the seat of arbitration, not as the law which would govern any part of the Agreement. [*Resp. Ex. R2*]. Due to the conditional acceptance of Danubia as the seat of arbitration, RESPONDENT knew the law of Mediterraneo was to be applied to both the Agreement and Arbitration Agreement. [*Cl. Ex. C5, ¶¶14-15*].

42. As evidenced by the plain language of the Agreement, the Parties intended to apply the law of Mediterraneo to both the Agreement and the Arbitration Agreement. [*Cl. Not. of Arb., ¶15*].

RESPONDENT now takes advantage of the contractual silence and asserts that the Arbitration Agreement is governed by Danubian law because Danubian law effectively insulates RESPONDENT from its contractual obligations to CLAIMANT. [*Resp. Ans., ¶14*]. Accordingly, CLAIMANT requests this Tribunal find that the negotiations and conduct of the Parties demonstrate that RESPONDENT was aware of the fact that Mediterraneo law applied to the Arbitration Agreement. [*Cl. Not. of Arb., ¶15*].

2. A reasonable party of the same kind and situation as RESPONDENT would have understood that Mediterraneo law applied to the Arbitration Agreement

43. A reasonable party in the same situation as RESPONDENT would certainly not assume a law other than Mediterraneo law applied to the Arbitration Agreement. [*CISG Art. 8(2)*]. Because a choice of law must be made expressly, the mere conferral of jurisdiction upon a tribunal in a certain location does not amount to a choice of law for that location. [*Hague Art. 4*].

44. Generally, parties may choose a neutral seat of arbitration to eliminate doubt as to the equal treatment of the parties. [*Behlohlavek, p.275*]. While drafting the Arbitration Agreement, RESPONDENT initially selected Equatoriana as the seat of arbitration and the law applicable to the arbitration; CLAIMANT instead suggested Danubia, a neutral country, as the seat of the arbitration and excluded a choice of law in the proposed arbitration agreement. [*Resp. Ex. R1; Resp. Ex. R2*].

45. CLAIMANT emphasized that the offer to choose Danubia as the seat was contingent on the application of Mediterraneo law. [*Resp. Ex. R2*]. Because no other law was considered at the time of this proposal and this clause was the final version that was ultimately included in the Agreement, a reasonable person would understand that Mediterraneo law was the law applicable to both the Agreement and the Arbitration Agreement. [*Resp. Ex. R2*].

46. The law of Mediterraneo is the only law expressly designated in the Agreement. [*Cl. Ex. C5*]. The contention that Danubian contract law applies solely because Danubia is the seat of the arbitration contradicts what the Parties could have reasonably anticipated from the Arbitration Agreement. [*Cl. Ex. C5, ¶¶14-15*].

47. Therefore, this Tribunal should recognize that the Parties designated the law of Mediterraneo as the governing law of the Agreement and Arbitration Agreement.

C. UNDER MEDITERRANEO CONTRACT LAW, THIS TRIBUNAL HAS THE JURISDICTION TO ADAPT THE AGREEMENT

48. Under Mediterraneo contract law, tribunals have the authority to adapt an agreement when the incorporation of a standard arbitration agreement provides the tribunal with this authority. [*Proc. Ord. 2, ¶39*]. The Parties included the Hardship Clause in their Agreement to allow this Tribunal to adapt the Agreement. [*Cl. Ex. C4; Cl. Ex. C8*].

49. A tribunal may adapt an agreement when the governing law permits adaptation and when a hardship has occurred, even if adaptation is not expressly stated as a remedy by the parties. [*Briner, p.370*]. Parties may include a hardship clause within the terms of a contract to expressly permit a tribunal to adapt the contract. [*Gaillard, p.27*].

50. As Mediterraneo law governs the Arbitration Agreement, this Tribunal has the authority to adapt the Agreement (**1**). Additionally, the Parties intended for this Tribunal to adapt the Agreement as a contractual remedy (**2**).

1. The Parties gave this Tribunal the power to adapt the Agreement

51. Under Mediterraneo law, tribunals retain the power to adapt a contract through the incorporation of a standard arbitration agreement. [*Proc. Ord. 2, ¶39*]. The law of Mediterraneo was chosen by the Parties to govern the Agreement because it allows for contractual adaptation. [*Cl. Not. of Arb., ¶16*]. The Parties incorporated the Hardship Clause into the Agreement to allow this Tribunal to adapt the Agreement. [*Cl. Ex. C8; Resp. Ex. R3*]. RESPONDENT is aware of this procedure as RESPONDENT has requested the adaptation of its own contract under Mediterraneo law. [*Proc. Ord. 2, ¶39*].

52. RESPONDENT is aware of the incorporation of the Hardship Clause in the Agreement, evidenced by the fact that RESPONDENT drafted the Agreement and by Julian Krone's statement that the Parties agreed on the Hardship Clause. [*Resp. Ex. R3*]. Accordingly, RESPONDENT is aware that the incorporation of the Hardship Clause allows for adaptation of the Agreement. [*Resp. Ex. R3]*.

53. Therefore, this Tribunal may adapt the Agreement based on the express conferral of authority included within the Agreement. [*HKIAC Art. 19.1; Cl. Ex. C5, ¶15*].

2. Adaptation is permitted because adaptation is a contractual remedy

54. The Agreement provides this Tribunal with the authority to resolve any dispute arising under the contract and in no way limits this Tribunal's ability to decide contractual remedies. [*Cl. Ex. C5, ¶15*]. The broad wording of the Agreement allows the Tribunal to link disputes of the Agreement to the Arbitration Agreement for resolution. [*Lew/Mistelis, pp.168-169*].

55. Adaptation is a contractual remedy that restores economic balance to the contract. [*Puelinckx, p.51*]. Because the Hardship Clause is contained within the Agreement and not within the Arbitration Agreement, adaptation is permitted as a contractual remunerated remedy and is expressly governed by the law of Mediterraneo. [*Cl. Ex C5, ¶12*].

CONCLUSION ON ISSUE I: This Tribunal should find that the law of Mediterraneo governs both the Agreement and the Arbitration Agreement. Because the law of Mediterraneo allows for the adaptation of contracts, this Tribunal may adapt the Agreement.

II. ISSUE 2: THIS TRIBUNAL SHOULD ADMIT THE EVIDENCE FROM RESPONDENT'S OTHER ARBITRATION BECAUSE IT WAS FORTUITOUSLY GIVEN TO CLAIMANT AND IS RELEVANT TO THESE PROCEEDINGS

56. RESPONDENT's contention that this Tribunal lacks the power and jurisdiction to adapt the Agreement under the present circumstances is in direct conflict with RESPONDENT's request for adaptation in a comparable situation. [*Resp. Ans.*; *Cl. Not. of Arb.*; *Proc. Ord. 2, ¶40*]. CLAIMANT has received evidence that shows RESPONDENT is currently engaged in another HKIAC arbitration with a different party from Mediterraneo and has asked that tribunal to adapt a sales agreement based on the hardship suffered by the newly enacted tariffs. [*Cl. Not. of Arb.*]. RESPONDENT's position in the other case confirms its full awareness and assertions of adaptation of a contract in like circumstances, but only when RESPONDENT is the disadvantaged party.

57. CLAIMANT requests this Tribunal find that the Partial Interim Award from RESPONDENT's other arbitration be admitted as evidence to these arbitral proceedings. Under HKIAC Art. 22.3, the Tribunal may determine what evidence to include, regardless of its legal status. [*HKIAC Rule 22.3*]. Here, the evidence that CLAIMANT obtained shows RESPONDENT's conflicting positions regarding adaption of the price based on an unforeseeable change of circumstances due to tariffs. [*Cl. Not. of Arb.*]. It is highly contradictory that in a case where an additional tariff of 25% is sufficient to justify a request for adaption when it is to RESPONDENT'S benefit, while an even less predictable, retaliatory tariff of 30% does not justify an adaptation when it is to RESPONDENT's determinant. [*Cl. Not. of Arb.*].

58. At present, there is no clear view in international arbitration whether illegally obtained evidence should be admitted and relied upon by tribunals. [*See Turkish Email case; ConocoPhillips Case; Methanex case*]. Scholars *Blair* and *Gojkovic* provide a proposed admissibility test for illegally

obtained evidence after analyzing the major cases discussing the issues. [*Born, p.10*; *Blair/Gojkovic, p.256*]. Applying their three-part Admissibility test, the present evidence should be admissible because the evidence was not unlawfully obtained by CLAIMANT (**A**); public interest does not reject admissibility (**B**) and; interest of justice favors admission (**C**).

A. THE PROPOSED EVIDENCE WAS ACQUIRED FORTUITOUSLY, NOT FROM ANY UNETHICAL CONDUCT BY CLAIMANT

59. CLAIMANT did not unlawfully obtain the evidence and has clean hands when it requests the admittance of evidence to this Tribunal. The clean hands principle is understood to be that "one cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith." [*Black's Law Dict., p.227*]. The clean hands principle has been applied in many international cases. [*Iranian Hostages; Persia International Bank v. Council; Methanex*]. If a relevant document is presented to the tribunal through the hands of a third, disinterested party, despite the fact that it was originally obtained through unlawful conduct, such evidence should be considered admissible. [*Blair/Gojkovic, p.256*].

60. Here, CLAIMANT received reliable information at the annual breeder conference about RESPONDENT's other arbitration under the HKIAC-Rules from one of CLAIMANT'S regular customers, Mr. Kieron Velazquez. [*Proc. Ord. 2, ¶40*]. There is no claim being brought that CLAIMANT illegally obtained the evidence of RESPONDENT's other arbitration. [*Cl. Not. of Arb.; Resp. Ans.*]. The circumstances of CLAIMANT's obtaining awareness of the proposed evidence provide no taint for its learning of its existence, which satisfies the threshold of the Admissibility Test here.

B. PUBLIC INTEREST FAVORS ADMITTING THE EVIDENCE

61. Public interest favors allowing the evidence to be admissible even if it was obtained illegally. Because the admissibility of evidence is largely a discretionary matter for tribunals, policy arguments will play a large role in shaping decisions. [*Blair/Gojkovic, p.257*]. In international arbitration practice, contractual and statutory rights to confidentiality do not favor inadmissibility (**a**). Knowledge within the public domain is not considered confidential (**b**).

1. *There is no legal privilege for confidentiality*

62. RESPONDENT argues that because there is legal privilege, namely a contractual and statutory right to confidentiality, the documents should not be disclosed. While arbitration is considered a

private process that does not necessarily mean it is a confidential situation. [*Noussia, p.24*]. Parties to arbitration often erroneously believe that their disputes will remain confidential due to the private nature of the proceedings. [*Brown, pp.974-75*]. There is a lack of consensus on the extent to which the private nature of arbitration creates a duty of confidentiality. [*Fesler, p.49*]. Some scholars believe there is a general duty of confidentiality in arbitrations because it protects parties from bad publicity and keeps technology and business know-how protected. [*Waincymer, p.23*]. Others argue that an undue concern for confidentiality comes at the expense of transparency and the ability to promote consistency through adoption of similar logic to other arbitral tribunals. [*Id.*].

63. RESPONDENT's position regarding its full awareness and assertions of adaptation of a contract in like circumstances is not confidential information. [*Proc. Ord. 2, ¶40*]. This Tribunal may accept the evidence without revealing the nature of the evidence to the rest of the world. All the parties to the dispute are aware of RESPONDENT's claims for adaptation of a contract in the other arbitral proceedings.

2. *Public domain knowledge is not confidential.*

64. Even though the other arbitration in which RESPONDENT has been involved in contains an express obligation to keep the proceedings confidential under Art. 42 of the HKIAC 2013 Rules, it is no longer a requirement as to the information sought by CLAIMANT because the knowledge of RESPONDENT's position is within the public domain. If information is already in the public domain, it will not be rendered confidential simply because it has been incorporated in an arbitration. [*Garnet, p.14*]. In the *Caratube case*, the government of Kazakhstan suffered an IT hack, and many documents were made publicly available on the internet. [*Caratube v Kazakhstan*]. The tribunal decided that all non-privileged documents would be allowed, but any privileged documents would be excluded. [*Id.*]. The tribunal reasoned that the parties alleged the documents were material and relevant to the dispute and that they were now in the public domain. [*Id.*]. The tribunal found on the balance the documents were lawfully available to the public, which precluded them from the protection of privileged information. [*Id.*].

65. Here, CLAIMANT has been offered an opportunity to acquire the Partial Interim Award from a company which provides intelligence on the horseracing industry. [*Proc. Ord. 2, ¶41*]. CLAIMANT did not pursue any effort to obtain the information but instead learned of it

fortuitously. [*Id.*]. This information is within the public sphere of knowledge, is not privileged, and should therefore be admitted to the arbitration.

C. JUSTICE IS BEST SERVED THROUGH ADMISSION OF THE EVIDENCE

66. The interest of justice favors the admission of evidence obtained by CLAIMANT. Tribunals are required to balance the multitude of principles and interests which may clash on the facts of any particular case. [*Blair/Gojkovic, p.258*]. Principles such as the need to discharge the tribunal's function fairly and justly, and in a way that results in a manifestly right decision, as well as interests of procedural integrity and equality of arms, would all need to be weighed. [*Blair/Gojkovic, p.258*].

67. The parties have agreed to abide by the HKIAC Rules 2018 which provides that the parties have a reasonable opportunity to present their case. [*HKIAC Arb. Rule 2018*]. Art. V(1)(b) of the New York Convention also established a uniform international standard of procedural fairness which requires that an international arbitral tribunal have provided each party "proper notice of the appointment of the arbitrator and the arbitration proceedings and an opportunity to present his case. [*New York Convention, Art. V(1)(b)*]. Moreover, well recognized norms of due process and general procedural discretions requires both parties are given an adequate or full opportunity to presents his case. [*Blair/Gojkovic*]. If this Tribunal does not allow the evidence to come in, there could be issues as to whether a reasonable opportunity was given. Allowing a party the opportunity to present all evidence it deems relevant serves an important part of the arbitration process. [*Ward, p.15*].

68. A refusal to consider the evidence prevents the CLAIMANT from presenting critical and relevant evidence on a primary issue – the adaptation of the contract. While RESPONDENT could not control the actions of either Mediterraneo or Equatoriana when they enacted tariffs, RESPONDENT should not be able to profit by making contradictory claims regarding adaption of its sales agreements. CLAIMANT must be afforded the opportunity to fully present its case which includes the evidence that RESPONDENT does in fact believe that the unforeseen nature of the tariffs merit an adaptation of a sales agreement due to hardship.

69. The evidence that CLAIMANT wishes to bring into these proceedings is a highly relevant piece of evidence to its case regarding the adaptation of the Agreement. [*Resp. Ans.*]. Moreover, by forcing CLAIMANT to bear a burden RESPONDENT itself is unwilling to face, it is only natural to apply the principle of good faith and fair dealing here. Here, it was RESPONDENT's responsibility

to keep its computer system safe from hacks. Because it was not using the most up to date firewall software, it was more susceptible to attacks. [*Proc. Ord. 2, ¶41*]. As both disputes are being held in HKIAC Arbitrations, this Tribunal should not allow RESPONDENT to contradict itself and accept the evidence from the other arbitration in this proceeding.

CONCLUSION ON ISSUE II: The evidence of RESPONDENT's other arbitration request should be admitted as it is relevant to the current case and RESPONDENT should not be permitted to plead hardship due to tariffs in one instance and deprive CLAIMANT of the same right in this case.

III. ISSUE 3: THIS TRIBUNAL SHOULD EXERCISE ITS POWER TO ADAPT THE PRICE OF THE AGREEMENT

70. On 6 May 2017, the Parties agreed upon the production and delivery of 100 doses of horse semen. [*Cl. Ex. C5*]. The delivery of the doses was separated into three shipments that were delivered on 20 May 2017, 3 October 2017, and 23 January 2018. [*Cl. Ex. C5*].

71. CLAIMANT's proposal for RESPONDENT to pick up the doses was rejected based on RESPONDENT'S need for urgent delivery. [*Cl. Ex. C3*]. Given CLAIMANT's experience with shipping frozen horse semen, the Parties agreed on a change in delivery terms to DDP. [*Cl. Ex. C3*]. This change was accompanied by the inclusion of a hardship clause in the Agreement and a price increase for the doses. [*Cl. Ex. C4*].

72. The assumption that RESPONDENT is free from the burden of the tariff contradicts the Parties' intent expressed in the inclusion of the Hardship Clause. CLAIMANT is entitled to an adaption of the price of the Agreement in the amount of US $1,250,000 for the 30% tariff, according to both the Agreement and the CISG.

73. CLAIMANT respectfully requests this Tribunal adapt the Agreement for two reasons: first, the tariff imposed by Equatoriana triggered the hardship portion of Clause 12, absolving CLAIMANT from any liability (**A**) and second, CLAIMANT is entitled to adaptation under the CISG and the UNIDROIT Principles (**B**).

A. CLAUSE 12 OF THE AGREEMENT ALLOWS FOR ADAPTATION

74. The Parties intended for Clause 12 of the Agreement to provide for a remuneration of the price resulting from an adaptation of the contract due to hardship. [*Cl. Ex. C5, ¶12*]. In Clause 14 of the Agreement, the Parties selected the CISG to govern the contract. [*Id.*]. CISG Art. 8

systematically sets out the steps and criteria by which statements and other conduct concerning the formation of the contract are interpreted. [*Zeller, p.631; Chemical Products Case*].

75. Under CISG Art. 8(1), this Tribunal may first look to what RESPONDENT knew or could not have been unaware of (**1**). [*CISG Art. 8(1)*]. Should RESPONDENT's understanding be indeterminable, this Tribunal may interpret the contract under the understanding that a reasonable person of the same kind as RESPONDENT would have under the same circumstances (**2**). [*CISG Art. 8(2)*]. For the sake of fairness and equality between the Parties, this Tribunal should adapt the contract (**3**).

1. Clause 12 expresses the Parties' intent to adapt the Agreement

76. The Parties contracted for a change in delivery terms to DDP delivery solely for RESPONDENT'S urgent need of frozen horse semen, not for a total shift of responsibilities. [*Cl. Ex. C3*]. CLAIMANT should not bear the price increase imposed by the retaliatory tariff because the Parties intended for the contract to be adapted in cases of hardship.

77. Contracts should be interpreted according to the actual intent of the declaring party, which is known by the other party. [*CISG Adv. Op. No. 3, p.2.2, Schlechtriem*]. The presence of a hardship clause in a contract signals to the tribunal that the parties intended for adaptation. [*Schwenzer, p.715; Delebecque, p.2]*.

78. CLAIMANT made clear the Agreement was to be adapted in case of hardship. CLAIMANT expressed the importance of adaptation to RESPONDENT if circumstances arose in which the Parties could not agree on an amendment. [*Cl. Ex. C8*]. RESPONDENT replied that it should be the task of the arbitrators to adapt the Agreement. [*Cl. Ex. C8*]. Once the Parties agreed that adaptation was proper in the case of unforeseen events, CLAIMANT suggested the use of a hardship clause to avoid any uncertainties. [*Cl. Ex. C*8]. The inclusion of a hardship clause demonstrates the Parties' intent to adapt the contract in case of specific circumstances, because the presence of a hardship clause signals forethought.

79. Due to the tragic car accident, the exact manifestation of the Parties' intent was not incorporated into the Agreement: the Hardship Clause that was ultimately included is not as expansive as previously negotiated, because of the new negotiator's inexperience and misunderstanding. [*Cl. Ex. C5, ¶12*; *Resp. Ex. R3*]. Nevertheless, during negotiations, the Hardship Clause was inserted into the Agreement to empower the Tribunal to adapt it. [*Cl. Ex. C8*].

80. This Tribunal should respect the intent of the Parties during negotiations and adapt the Agreement.

2. A textual analysis of Clause 12 demonstrates that the CLAIMANT is not responsible for the retaliatory tariff

81. A reasonable person would interpret Clause 12 of the Agreement to absolve CLAIMANT from liability in the case of hardship.

82. The price should be adapted because the Parties' choice of wording in the Agreement prevents RESPONDENT from shifting the burden of the tariff to CLAIMANT. [*Cl. Ex. C5, ¶12*]. The contract set forth by parties is the governing framework for a dispute between those parties. [*Moses, p.7; Cattlemen*]. Special weight is given to clear, specific wording used by the parties. [*HG ZURICH*]. A textual analysis of the Agreement will illustrate that the seller does not assume the risk of the retaliatory tariff.

83. Under a reading of Clause 12, CLAIMANT is precluded from liability for the cost of the tariff. Clause 12 of the Agreement removes all liability from CLAIMANT in the statement "Seller shall not be responsible . . . for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Cl. Ex. C5*]. Special weight should be given to this removal of liability because Clause 12's language clearly and specifically absolves CLAIMANT from responsibility. Clause 12 expressly states that the Seller is not responsible for safety requirements or comparable events. Import tariffs are similar to health and safety requirements because both are laws set in place by sovereign nations to protect their economies from trade imports.

84. A reasonable reading of the Agreement absolves CLAIMANT from liability deriving from the tariff.

3. Adaptation is warranted pursuant to Clause 12 of the Agreement because the retaliatory tariff made CLAIMANT's performance more onerous, while RESPONDENT is in the best financial situation to absorb the burden

85. The retaliatory tariff made CLAIMANT'S performance under the contract more onerous. In the context of international law, "onerous" has been defined as imposing burdens or making a task more troublesome. [*Webster Dict.*]. Situations where performance becomes radically more difficult or less profitable for a party during commercial transactions can be classified as more onerous. [*Azerdo Da Silveira, p.323*]. Further, under the international custom of superior risk bearer, non-performance should be excused—or allocation of risk should be granted—if the obligee is better able to bear the risk. [*Brunner, p.143; Posner/Rosenfield, p.90; Kull, p.45*].

86. CLAIMANT'S performance is made more onerous by the retaliatory tariff and RESPONDENT is in the best position to bear the burden of the tariff. The imposition of the retaliatory tariff eliminated CLAIMANT's 5% profit margin and increased the cost of CLAIMANT'S cost of performance by 25%. [*Cl. Letter to Tribunal*]. While CLAIMANT's financial situation continues to deteriorate, RESPONDENT gained a 20% profit from the resale of the frozen semen. [*Proc. Ord. 2*, ¶¶*20,22*]. RESPONDENT knew of CLAIMANT's weakened financial state and would not be financially endangered itself if it were to bear the cost of the tariff at US $1,250,000. [*Proc. Ord. 2*, ¶¶*28,30*]. The retaliatory tariff made CLAIMANT's performance under the contract more onerous, while RESPONDENT is in the best financial position to absorb the burden of the tariff because it has no risk of dissolution. [*Proc. Ord. 2*, ¶*30*]. To promote fairness, RESPONDENT should suffer this cost because it is acting against the CLAIMANT's wishes and reselling the doses at a 20% increase. [*Proc. Ord. 2*, ¶*20*].

87. In the interest of fairness and equality, CLAIMANT should not bear the burden of the tariff as it is financially crippling for CLAIMANT. Instead, RESPONDENT should bear the additional costs associated with its requested change in delivery terms, because RESPONDENT is in a financial position where the tariff will not harm its business. CLAIMANT is equally entitled to the payment of US $1,250,000 under the CISG.

B. THE APPLICABLE LAWS TO THE AGREEMENT ALLOW FOR ADAPTATION

88. This Tribunal is empowered to adapt the Agreement under CISG Art. 79 (**1**). Further, CISG Art. 9 allows the Tribunal to adapt the Agreement under UNIDROIT Art. 6.2.3 (**2**).

1. This Tribunal can adapt the Agreement under the CISG

89. Contrary to RESPONDENT's contention, Clause 12 of the Agreement is not a derogation from the CISG, because a derogation under CISG Art. 6 must be expressly made. [*Resp. Ans.*, ¶*20; CISG Adv. Op. 16*]. Here, the Parties did not exclude application of the CISG or any of its articles, rather, they expressly *included* the CISG in their choice of law. [*Cl. Ex. C5*, ¶*14*].

90. This Tribunal is empowered to adapt the Agreement under CISG Art. 79. First, adaptation is an allowable remedy for hardship under Art. 79 (**a**). Second, CLAIMANT is entitled to adaptation as a remedy for its hardship under Art. 79 (**b**).

a. Art. 79 allows for adaptation as a remedy for hardship

91. CISG Art. 79 allows for the remedy of adaptation in case of hardship. CISG Art. 79(1) states that "[a] party is not liable for a failure to perform any of his obligations if he proves that the

failure was due to an impediment beyond his control." [*CISG Art. 79*]. Hardship, a change of circumstances that renders performance excessively onerous and cannot reasonably be expected to have been taken into account, qualifies as an "impediment" under Article 79(1). [*CISG Adv. Op. 7*]. More specifically, economic impediments can be relevant impediments under Art. 79. [*Lindström, p.9*]. Therefore, a party may invoke hardship as an exemption from liability under CISG Art. 79. [*CISG Adv. Op. 7*].

92. The CISG permits adaptation to remedy hardship under Art. 79. Art. 79(5) states that "[n]othing in this article prevents either party from exercising any right other than to claim damages." [*CISG Art. 79*]. This allows for an arbitral tribunal to determine what is owed to each party, thus "adapting" the terms of the contract to the changed circumstances. [*CISG Adv. Op. 7*]. This Tribunal can adapt the Agreement as a remedy for hardship under CISG Art. 79.

b. CLAIMANT is entitled to a remedy under Art. 79

93. The Agreement between the Parties should be adapted. CISG Art. 79 provides relief from liability if a party proves that the liability was caused by an impediment beyond the party's control (**i**), which the party could not reasonably be expected to have taken into account at the time of the conclusion of the Contract (**ii**), or to have avoided or overcome (**iii**). [*CISG Art. 79*].

i. The tariff was an impediment beyond CLAIMANT's control

94. An economic impediment is an impediment within the meaning of Art. 79. [*Lindström, p.9*]. A change in circumstance that renders performance excessively onerous can also qualify under Art. 79. [*CISG Adv. Op. 7*]. Here, Equatoriana's tariff made CLAIMANT's third shipment of horse semen 30% more expensive, which not only destroyed CLAIMANT's profit margin of 5%, but increased CLAIMANT's cost by 25%. [Cl. Ex. C8]. This is an economic burden that makes CLAIMANT's performance excessively onerous, considering that CLAIMANT is already operating at a loss and risks having to sell part of its business. [*Proc. Ord. 2, ¶29*].

95. The retaliatory tariff that Equatoriana placed on agricultural products was beyond CLAIMANT's control. Acts of public authorities are outside of a party's sphere of control. [*Brunner, p.264*]. A trade sanction is not within the obligor's sphere of control, because state interventions are likened to wars, riots, terrorist acts, and natural disasters, all of which are beyond the control of the obligor. [*Azerdo Da Silveira, p.216*]. Here, the tariff imposed upon agricultural goods from Mediterraneo was executed by the Government of Equatoriana. [*Cl. Ex. C6*]. Thus, the state intervention of Equatoriana's retaliatory tariff was beyond CLAIMANT's control.

ii. CLAIMANT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Agreement

96. CLAIMANT could not have taken Equatoriana's retaliatory tariff into account at the time of the conclusion of the Agreement. The Doctrine of Unforeseen Events alleviates obligations of contracting parties when extraordinary circumstances arise, which were not foreseen when the contract was made. [*Van Den Berg, p.1167*]. A natural disaster or government intervention would generally be considered an extraordinary event. [*DiMatteo, p.293*].

97. Because any occurrence may be deemed foreseeable, even if the occurrence is remote and unlikely, the obligor need only prove that it could not "reasonably" be expected to have taken the impediment into account at the time of the conclusion of the contract. [*Azerdo Da Silveira, p.224; Lindström, p.29*]. CISG Art. 79 requires an objective assessment on a case-by-case basis of what may be expected from a party, considering concrete facts of the circumstances surrounding the conclusion of the contract. [*Azerdo Da Silveira, p.224*].

98. Historically, Equatoriana has always been one of the more prominent supporters of free trade. [*Cl. Ex. C6*]. Previous restrictions on imports from Equatoriana by other countries have virtually never resulted in retaliatory measures, with only a single exception in the country's history. [*Cl. Ex. C6*]. Equatoriana's retaliatory tariff came as a shock even to informed circles and exceeded analysts' worst expectations. [*Cl. Ex. C6*].

99. As parties close to the Government of Equatoriana did not expect a retaliatory tariff, CLAIMANT could also not reasonably be expected to have foreseen the tariff. The tariff's inclusion of horse breeding products as an agricultural good was equally unforeseeable. Neither Equatoriana nor Mediterraneo had ever imposed a tariff on horse semen [*Proc. Ord. 2, ¶25*] and racehorse breeding is generally categorized differently from agricultural animals such as pigs, sheep, or cattle. [*Cl. Not. Arb., ¶11*]. CLAIMANT could not have taken the tariff into account at the time of the conclusion of the Agreement.

iii. CLAIMANT could not avoid the tariff or its consequences

100. CLAIMANT could not avoid or overcome Equatoriana's retaliatory tariff or the resulting consequences. This requirement obliges a party who is under an obligation to do everything in his power to carry out that obligation and not await events that may later justify his non-performance. [*Sec. Comm., ¶7*]. If the impediment is a trade sanction, the consequences of the impediment cannot reasonably be avoided or overcome. [*Azerdo Da Silveira, p.235*]. An impediment

occurring close to the agreed delivery date can be even harder to overcome. [*Lindström*, p.7]. An impediment must be deemed reasonably insurmountable if overcoming the impediment would entail unreasonable additional expenses or if the seller would receive less than the value of the contract. [*Azerdo Da Silveira, p.233; Ishida, p.372*].

101. CLAIMANT could not have avoided the consequences of the tariff. CLAIMANT is financially endangered by the cost of the tariff at US $1,250,000 because CLAIMANT has already been operating at a loss since 2014 [*Proc. Ord. 2 ¶29*] and after this tariff increases that loss, it is unlikely that CLAIMANT will receive further credit. [*Id.*].

102. RESPONDENT is aware of CLAIMANT's extreme financial burden caused by the tariff [*Proc. Ord. 2, ¶ 28*]. Conversely, RESPONDENT would not be financially endangered if it bore the cost of the tariff. [*Proc. Ord. 2, ¶ 30*]. Yet, RESPONDENT still reneged on its agreement to renegotiate the price of the third shipment. [*Cl. Ex. 8*].

103. CLAIMANT could not have avoided Equatoriana's retaliatory tariff prior to sending the third shipment, did not await events to later justify its non-performance, sent the shipment in reliance on RESPONDENT's agreement to renegotiate, and could not overcome the financial hardship as a consequence of the impediment once RESPONDENT abruptly refused to renegotiate. Therefore, this Tribunal should adapt the Agreement under CISG Art. 79 in favor of CLAIMANT due to this unavoidable hardship.

2. This Tribunal can adapt the Agreement under the UNIDROIT Principles

104. This Tribunal is empowered to adapt the Agreement under UNIDROIT Art. 6.2.3(4) because the UNIDROIT Principles apply to the Agreement (**a**), CLAIMANT has suffered a hardship under Art. 6.2.2 (**b)**, and CLAIMANT is entitled to adaptation as a remedy for its hardship under Art. 6.2.3 (**c**).

a. The UNIDROIT Principles apply to the Agreement under CISG Art. 9

105. CISG Art. 9(2) provides that parties are considered to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is common and widely known to parties involved in the particular trade concerned. [*CISG Art. 9*]. UNIDROIT Art. 6.2.3(4) constitutes an international usage in the sense of Article 9(2) of the CISG, which can be relied upon for the remedy of adaptation. [*Schwenzer, p.724*].

106. In Clause 14 of the Agreement, the Parties establish that "[t]his Agreement shall be governed by the law of Mediterraneo." [*Cl. Ex. C5*]. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. [*Proc. Ord. 1,*

¶*4*]. Additionally, RESPONDENT's home state of Equatoriana also uses a verbatim adoption of the UNIDROIT Principles. [*Proc. Ord. 1, ¶4*]. Therefore, the UNIDROIT Principles are widely known to the Parties and thus, UNIDROIT is applicable to the Agreement.

b. CLAIMANT is entitled to a remedy for its hardship under Art. 6.2.2

107. Under UNIDROIT Art. 6.2.2, hardship occurs when an unforeseeable event beyond the control of the disadvantaged party fundamentally alters the equilibrium of the contract after its conclusion, as long as the disadvantaged party did not assume the risk of the event. [*UNIDROIT Art. 6.2.2*]. This Tribunal should adapt the price of the Agreement to cover the cost of the tariff at US $1,250,000, because CLAIMANT's position satisfies all of the requirements for hardship under UNIDROIT Art. 6.2.2. First, Equatoriana's tariff fundamentally altered the equilibrium of the Agreement (**i**). Second, the tariff was unknown to and unforeseen by the Parties at the time of contracting (**ii**). Third, the tariff is beyond CLAIMANT's control (**iii**). Finally, CLAIMANT did not assume the risk of the tariff, rather, CLAIMANT expressly declined such a risk (**iv**).

i. The tariff fundamentally altered the equilibrium of the Agreement

108. The tariff significantly increased the cost of CLAIMANT's performance and fundamentally altered the equilibrium of the Agreement. The equilibrium of a contract is altered when the cost of a party's performance has increased. [*UNIDROIT 6.2.3*].

109. Equatoriana's tariff made CLAIMANT's third shipment of horse semen 30% more expensive, which destroyed CLAIMANT's profit margin of 5% and increased CLAIMANT's cost by 25%. [*Cl. Ex. C8*]. The two previous years have been financially difficult for CLAIMANT, making it impossible for CLAIMANT to shoulder this additional cost. [*Cl. Ex. C8*]. Conversely, RESPONDENT would not be financially endangered if RESPONDENT bore the cost of Equatoriana's tariffs. [*Proc. Ord. 2, ¶30*].

110. The tariff fundamentally altered the equilibrium of the Agreement because CLAIMANT's performance has significantly increased in cost.

ii. The tariff could not reasonably have been taken into account by CLAIMANT and occurred after the conclusion of the Agreement

111. Equatoriana's tariff could not have been taken into account by CLAIMANT at the time of the conclusion of the Agreement. The obligor is assumed to have adopted a risk of the occurrence of

a legal impediment if that risk was reasonably foreseeable at the time of contracting. [*Brunner, p.290*].

112. Here, CLAIMANT could not have reasonably taken the retaliatory tariff into account because Equatoriana is and always has been, a prominent supporter of free trade. [*Cl. Ex. C6*]. Tariffs imposed on Equatoriana by other countries have virtually never resulted in retaliatory measures, with only a single exception in the country's history. [*Cl. Ex. C6*]. Equatoriana's retaliatory tariff came as a shock even to informed circles. [*Cl. Ex. C6*].

113. If parties close to the Government of Equatoriana did not expect a retaliatory tariff, then CLAIMANT could not be expected to foresee the tariff either. The tariff's inclusion of horse breeding products was equally unforeseeable. Neither Equatoriana nor Mediterraneo had ever imposed tariffs on agricultural goods or horse semen. [*Proc. Ord. 2, ¶25*]. Further, racehorse breeding is generally categorized differently from agricultural animals such as pigs, sheep, or cattle. [*Cl. Not. Arb., ¶11*].

114. The retaliatory tariff imposed by Equatoriana occurred after the conclusion of the Agreement. The Agreement was signed on 06 May 2017. [*Cl. Ex. C5*]. The Government of Equatoriana announced the imposition of a 30% tariff on all agricultural goods from Mediterraneo on 19 December 2017. [*Cl. Ex. C6*].

115. As the tariff was not typical for Equatoriana and occurred after the conclusion of the Agreement, neither CLAIMANT nor RESPONDENT could have foreseen the imposition of such a harsh trade impediment.

iii. The tariff was beyond CLAIMANT's control

116. The retaliatory tariff Equatoriana placed on Mediterraneo's agricultural products was beyond the control of CLAIMANT. Acts of public authorities are outside of a party's sphere of control. [*Brunner, p.264*]. A trade sanction is not within the obligor's sphere of control, because state interventions are likened to wars, riots, terrorist acts, and natural disasters, all of which are beyond the control of the obligor. [*Azerdo Da Silveira, p.216*].

117. Here, the import restriction imposed upon all agricultural goods from Mediterraneo was executed by the Government of Equatoriana. [*Cl. Ex. C6*]. As CLAIMANT is not a citizen of Equatoriana, CLAIMANT has no control over any aspect of the Equatoriana government. [*Cl. Not. of Arb.*]. Therefore, the tariff was not influenced by CLAIMANT in any way.

118. As the Equatorianian government's tariff was beyond the control of CLAIMANT, this Tribunal should adapt the contract to reflect this hardship.

iv. The risk of the tariff was not assumed by CLAIMANT

119. CLAIMANT did not assume the risk of an unanticipated trade war. A party which is not willing to undertake the risk of the occurrence of an event may contract for a lesser obligation and exclude the assumption of a particular risk. [*Brunner, p.117*].

120. CLAIMANT communicated to RESPONDENT during negotiations that it is "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." [*Cl. Ex. C4*]. Consequently, at the conclusion of the Agreement, the Parties agreed that the seller shall not be responsible for hardship caused by unforeseen events that make the contract more onerous. [*Cl. Ex. C5*].

121. CLAIMANT's express statement to RESPONDENT that CLAIMANT was unwilling to bear the risk of delivery impediments, followed by the allocation of risk to RESPONDENT, demonstrates that CLAIMANT did not assume the risk of the impediment.

c. Art. 6.2.3 allows for adaptation as a remedy for hardship

122. UNIDROIT Art. 6.2.3(4) provides that once a court finds hardship, it may adapt the contract to restore its equilibrium. [*UNIDROIT Art. 6.2.3(4)*]. Mediterraneo's adoption of the UNIDROIT Principles empowers the court to adapt the Agreement between the Parties. [*UNIDROIT Art. 6.2.3(4)*]. Therefore, this Tribunal has the same power. [*Brunner, p. 495*].

123. In this case, CLAIMANT has suffered a hardship. Under UNIDROIT, CLAIMANT is entitled to request renegotiation but not withhold performance (*i*). If, within a reasonable time, the parties fail to reach an agreement, then either party may resort to the court to adapt the contract (*ii*).

i. CLAIMANT requested renegotiation and did not withhold performance

124. CLAIMANT requested renegotiation without delay. On 20 January 2018, immediately upon being informed by customs authorities that the tariff applies to the third shipment of horse semen, CLAIMANT initiated contact with RESPONDENT. [*Cl. Ex. C7*]. CLAIMANT could not reach RESPONDENT by phone but left a message on RESPONDENT's voicemail and emailed RESPONDENT. [*Cl. Ex. C7*]. CLAIMANT requested renegotiation of the price of the third shipment and indicated that this request was based on the tariff, which increased the cost of the shipment

by 30%. [*Cl. Ex. C7*]. In accordance with UNIDROIT Art. 6.2.3(1), CLAIMANT requested renegotiation without undue delay and indicated the grounds on which the request is based.

125. CLAIMANT did not withhold performance. Even before coming to an agreement on the renegotiation of the price of the third shipment, CLAIMANT authorized delivery and sent the third shipment to RESPONDENT in reliance on RESPONDENT's statement that a solution would be found through negotiation. [*Cl. Ex. C8*]. In accordance with UNIDROIT Art. 6.2.3(2), CLAIMANT did not withhold performance on account of the request for renegotiation.

ii. CLAIMANT may resort to this Tribunal because renegotiation failed

126. The Parties failed to reach an agreement in terms of the renegotiation of the price. On 12 February 2018, the Parties met to renegotiate the price of the third shipment. [*Cl. Ex. C8*]. At that meeting, RESPONDENT's CEO, Ms. Kayla Espinoza, became angry and aggressive with CLAIMANT, stopped negotiations and refused to pay any additional amount for the tariffs. [*Cl. Ex. C8*]. In accordance with UNIDROIT Art. 6.2.3(3), the parties failed to reach an agreement within a reasonable time and therefore, CLAIMANT may resort to the arbitral tribunal.

127. This Tribunal is empowered to adapt the Agreement under UNIDROIT Art. 6.2.3(4) because the UNIDROIT Principles apply to the Agreement between the Parties. This Tribunal should adapt the price of the Agreement according to UNIDROIT Art. 6.2.3(4) to restore the Agreement's equilibrium, because hardship exists for CLAIMANT and RESPONDENT failed to renegotiate.

CONCLUSION ON ISSUE III: Clause 12 of the Agreement and the CISG both provide for adaptation as a remedy for CLAIMANT's hardship. This Tribunal should adapt the price of the Agreement, entitling CLAIMANT to an additional payment of US $1,250,000.

REQUEST FOR RELIEF

In light of the above submissions, CLAIMANT respectfully requests the Tribunal

(1) Grant CLAIMANT's request for an additional payment of US $1,250,000;

(2) Grant CLAIMANT's request for RESPONDENT to bear the cost of the Arbitration.

Capital City, Mediterraneo, 06 December 2018

Counsel for CLAIMANT, Phar-Lap Allevamento, confirms this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Respectfully submitted,

(*Signed*)	(*Signed*)	(*Signed*)
Gwenllian Kern-Allely	John Mysliwiec	Yvonne Ricardo
(*Signed*)	(*Signed*)	(*Signed*)
Stephen Wainwright	Christopher Cammiso	Steven Barnes
(*Signed*)	(*Signed*)	(*Signed*)
Michelle Propst	Elvina Rofael	Emily Miller
(*Signed*)	(*Signed*)	
Alexander Russo	Katilyn Farrell	

Counsel for CLAIMANT

Certificate and Choice of Forum

To be attached to each Memorandum

I Yvonne Ricardo, on behalf of the Team for the University of San Diego 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 (School name) University of San Diego School of Law

Name Yvonne Ricardo

Signature