**UNIVERSITAS KATOLIK PARAHYANGAN**
Bandung, Indonesia

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**16TH ANNUAL WILLEM C. VIS (EAST)**
**INTERNATIONAL COMMERCIAL ARBITRATION MOOT**
March-April 2019, Hong Kong SAR

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# MEMORANDUM FOR:
# CLAIMANT

ON BEHALF OF:

**PHAR LAP ALLEVAMENTO**

Rue Frankel 1
Capital City, Mediterraneo

**CLAIMANT**

AGAINST:

**BLACK BEAUTY EQUESTRIAN**

2 Seabiscuit Drive
Oceanside, Equatoriana

**RESPONDENT**

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**COUNSELS**:

Einar Fausta Elisabeth Tania Evelyn Tanissa

Jason Edgar Sherly

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| *Born* | Gary Born, *International Commercial Arbitration (Second Edition)* (Kluwer Law International 2014) | Paras. 46, 64 |
| *CISG Digest* | *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* (United Nations 2012) | Paras. 114, 115, 116 |
| *Chernykh* | Yulia. S Chernykh, *International Commercial Arbitration in Ukraine: Details Do Matter* (Kluwer Law International 2009) | Para. 48 |
| *Cohn* | Sherman L. Cohn, 'The Work-Product Doctrine: Protection, Not Privilege', 71 Geo.L.J.917 (1984) | Para. 63 |
| *DiMatteo* | Larry A. DiMatteo, 'Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines', 27 Pace Int'l L. Rev. 258 (2015) | Para. 119 |
| *DiMatteo* | Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment* (South Carolina Law Review 1997) | Paras. 37, 39 |
| *Dumberry* | Patrick Dumberry, 'State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award', JWIT (2016) | Para. 56 |
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| *Fletchner* | Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court* (University of Pittsburgh School of Law 2011) | Para. 122 |
| *Fucci* | Frederick R. Fucci, 'Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Practical Considerations in International Infrastructure Investment and Finance' (American Bar Association 2006) Can be accessed in: https://www.cisg.law.pace.edu/cisg/biblio/fucci.html | Para. 129 |
| *Girsberger/Zapolskis* | Daniel Girsberger and Paulius Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' p. 121-141 (Jurisprudencija 2012) | Para. 84 |
| *Graves* | Jack M. Graves, *CISG Article 6 and Issues of Formation: The Problem of Circularity* (Tuoro Law Center 2011) | Para. 114 |
| *Halfenger* | G. Michael Halfenger, *The Attorney Misconduct Exception to the Work Product Doctrine* (Chicago Law Review 1991) | Paras. 64, 65 |
| *Lew/Mistelis/Kroll* | Julian D. M. Lew, Loukas A. Mistelis, and Stefan Michael Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) | Para. 48 |
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| *Kotrusz* | Mgr. Juraj Kotrusz, *Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts* (Uniform Law Review 2009) | Para. 123 |
| *Mirabal/Derains* | Sicard-Mirabal and Derains, *Introduction to Investor-State Arbitration* (Kluwer Law International 2018) | Para. 48 |
| *Moser/Bao* | Michael J Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules, First Edition* (Oxford University Press 2017) | Para. 44 |
| *Paulsson/Bosman* | Jan Paulsson and Lise Bosman, *ICCA International Handbook on Commercial Arbitration* (Kluwer International Law 2011) | Para. 45 |
| *Pernt* | Victoria Pernt, 'How Much (More) Transparency Does Commercial Arbitration Really Need?' (*Kluwer Arbitration Blog, 2017*) | Para. 70 |
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| *Schlechtriem* | Prof. Dr. Peter Schlechtriem, Uniform Sales Law – The UN Convention on Contracts International Sale of Goods.<br>Can be accessed in:<br>https://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-08.html#b* | Para. 91 |
| *Schwenzer* | Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts* (Victoria University of Wellington Law Review 2008) | Paras. 94, 122 |
| *Waincymer* | Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) | Para. 52 |
| *Zaccaria* | Elena Christine Zaccaria, 'The Effects of Changed Circumstances in International Commercial Trade', IntBLawRw 6 (2004)<br>Can be accessed in:<br>http://classic.austlii.edu.au/au/journals/IntTBLawRw/2004/6.html#Footnote95 | Para. 83 |

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| *Pacific Carriers Case* | Pacific Carriers v. BNP Paribas [2004] High Court of Australia (HCA 35) | Para. 39 |
| *Woodside Case* | Woodside Energy Ltd v. Electricity Generation Corporation [2014] High Court of Australia (HCA 7) | Para. 39 |
| | **Belgium** | |
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| | **United Kingdom** | |
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| *Sulamérica Case* | Sulamérica CIA Nacional de Seguros SA v. Enesa Engenharia SA [2012] United Kingdom Court of Appeal (Civil Division) EWCA Civ 638 | Paras. 24, 25 |

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| | **Ad Hoc Tribunal** | |
| *Methanex v. U.S* | Methanex Corporation v. United States of America [2005] Ad Hoc Tribunal (UNCITRAL) 44 ILM 1345, Inside US Trade, 19 August 2005, 12, IIC 167 (2005) | Para. 54 |
| | **ICC Court of Arbitration** | |
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| *ICC Case No. 10021* | *Parties unknown* [2000] ICC Court of Arbitration 10021 | Paras. 105 |
| | **International Center for Settlement of Investment Dispute (ICSID)** | |
| *Caratube v. Kazakhstan* | Caratube international Oil Company LLP v. Republic of Kazakhstan [2009] ICSID Case No. ARB/08/12 | Paras. 49, 50, 56 |
| | **Permanent Court of Arbitration (PCA)** | |
| *Yukos Case* | Yukos Universal Limited v. The Russian Federation [2014] PCA Case No. A.A 227 | Para. 50 |

## LIST OF TREATIES, ARBITRATION RULES AND STATUTES

| Abbreviations | Full Text | Cited on |
|---|---|---|
| *CISG* | United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3 | Paras. 27, 91, 122 |
| *Codice Civile* | Italian Civil Code (Codice Civil) (entered into force 1865) | Para. 83 |
| *UNIDROIT Principles* | International Institute for the Unification of Private Law Principles of International Commercial Contracts, 2016 Edition, UNIDROIT | Paras. 30, 33, 83, 88, 94, 102, 119 |
| *HKIAC Arbitration Rules* | Hong Kong International Arbitration Centre on Administered Arbitration Rules 2018 | Para. 64 |
| *IBA Rules on Taking of Evidence* | International Bar Association Rules on the Taking of Evidence in International Arbitration (adopted by a resolution of the IBA Council 29 May 2010) | Para. 46 |
| *UNCITRAL Model Law* | The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, as revised 7 July 2006, [2006] Uniform Law Review 866, A/61/17 | Para. 45, 60 |
| *UNCITRAL Rules on Transparency* | UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) | Paras. 66, 73 |

## LIST OF ABBREVIATIONS

| Abbreviations | Full Text |
|---|---|
| & | And |
| AIS | The Philippines Agricultural Indicators System |
| Art. | Article |
| CEO | Chief Executive Officer |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| CLA | Claimant |
| DDP | Delivered Duty Paid |
| Ex. | Exhibit |
| FAO | Food and Agriculture Organization |
| HKIAC | Hong Kong International Arbitration Centre |
| IBA | International Bar Association |
| ICC | International Chamber of Commerce |
| ICSID | International Centre for Settlement of Investment Disputes |
| i.e. | *Id est* |
| Inc. | Incorporated |
| Memo | Memorandum |
| No. | Number |
| NoA | Notice of Arbitration |
| Off Cmt | Official Commentary |
| p. | Page |
| pp. | Page(s) |
| para. | Paragraph |
| paras. | Paragraph(s) |
| PGT Industries, Inc. SA | PGT Industries, Inc. Sales Agreement Model Contract |
| PO1 | Procedural Order No 1 |
| PO2 | Procedural Order No 2 |
| RNoA | Response to the Notice of Arbitration |
| UAB | Uzdaroji Akcine Bendrove |
| U.S | United States of America |

| | |
|---|---|
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL Rules on Transparency | UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration |
| UNIDROIT Principles | International Institute for the Unification of Private Law Principles of International Commercial Contracts (2016 Edition) |
| US$ | United States Dollar |
| USITC | United States International Trade Commission |
| v. | Versus |

**SUMMARY OF FACTS**

1. Phar Lap Allevamento, the CLAIMANT, is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport.

2. Black Beauty Equestrian, the RESPONDENT, located in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. Phar Lap Allevamento is famous for one if its stallions, Nijinsky III, being one of the most successful racehorses ever. It has won several awards in Danubia, Mediterraneo, and Equatoriana. This made Nijinsky III one of the most sought-after stallions for breeding,

4. On 21 March 2017, RESPONDENT contacted CLAIMANT for a potential addition of Nijinsky III to its newly started breeding program. At the time, Equatorianian Government had imposed a ban on the transportation of living animals due to severe problems with foot and mouth disease which had already lasted for two years. As a reaction to this and the powerful interests shown by the Equatoriana racehorse breeding industry, a temporary lifting of the ban was done for artificial insemination of racehorses.

5. During the negotiations, CLAIMANT was told that RESPONDENT's investor wanted to initiate the breeding program as soon as possible, utilising the temporary lifting of the ban and proceeded to order 100 doses of Nijinsky's semen. CLAIMANT was given the explanation that any semen obtained during this period can be used even under the relevant Equatoriana law, even if the ban was put down once again. CLAIMANT saw this as an opportunity to also increase their revenue without unnecessarily bearing heavy risks.

6. CLAIMANT and RESPONDENT both agreed on a contract of RESPONDENT purchasing 100 doses of frozen horse semen from CLAIMANT. While RESPONDENT agreed with most of the terms, they disagreed with the choice of law and forum clause, while also insisting on DDP delivery. CLAIMANT agreed to the DDP delivery terms with only a moderate increase in the price of the semen, to around US$ 100,000.

7. The negotiations for Clause 12 of the Sales Agreement, which forms the crux of the current dispute, started when RESPONDENT had insisted on applying a DPP delivery term. CLAIMANT, not willing to take unnecessary risks during the execution of the contract,

proposed an increase in the price to shift the burden of the price. Also, to offset the distribution of risk, CLAIMANT suggested to include a Hardship Clause. CLAIMANT had suggested that unforeseeable additional health and safety requirements can inflate the cost of the products up to 40% and destroy the commercial basis of the deal. CLAIMANT also had asked to provide a mechanism that may empower the Tribunal to adapt the contract. RESPONDENT made a note to follow this up and prepare a draft to that effect.

8. RESPONDENT from the start had requested to refer jurisdiction to Equatoriana's court and law. CLAIMANT disagreed and offered the option to use Mediterranean law even though Equatoriana court will still have jurisdiction, or to use arbitration instead. Opting to use arbitration, RESPONDENT prepared an Arbitration Clause that is applicable under Equatorianian law. CLAIMANT then proceeded to remove any express reference to Equatorianian law and was going to discuss the applicable law for the arbitration clause.

9. However, both principal negotiators were caught in an accident. The subsequent negotiators did not make any express changes to the negotiated draft and finalised the Sales Agreement on 6 May 2017.

10. Both parties had agreed to use instalments, divided into 3 separate payments. The first instalment of US$ 5,000,000 was due on 18 May 2017, and the second instalment of US$ 5,000,000 was due on 21 January 2018. CLAIMANT has agreed to deliver 3 shipments of the frozen semen. The first shipment of 25 doses on 20 May 2017, the second shipment of 25 doses on 3 October 2017, and the last shipment of 50 doses on 23 January 2018. No problems were found when shipping the first two shipments of frozen semen to Equatoriana.

11. Before the last shipment of 50 doses of the frozen semen, which was due on 23 January 2018, Mediterraneo's newly elected president enacted a 25% tariff on agricultural products coming from Equatoriana. Equatoriana, on the other hand, while normally an ardent supporter of free trade, retaliated by applying a 30% tariff on agricultural products coming from Mediterraneo. To CLAIMANT's and RESPONDENT's surprise, the list of affected products also included frozen semen from racehorses. Generally, racehorse's semen does not fall under the same category as cattles.

12. Considering that their shipment of the last 50 doses of frozen semen will become extremely expensive, CLAIMANT immediately approached RESPONDENT to start negotiations for

adjusting the price of the frozen semen. RESPONDENT emphasised the urgency of having the shipment and the expectation of having a long-term commercial relation with CLAIMANT. Due to RESPONDENT's urging, CLAIMANT authorised the shipment on 23 January 2018.

13. On a meeting dated 12 February 2018, to CLAIMANT's dismay, RESPONDENT refused to pay any additional amount for the tariff and terminated the contract. Following the failure of renegotiation, CLAIMANT requests the Arbitral Tribunal to adapt the contract under Clause 12 of the Sales Agreement and the CISG.

**SUMMARY OF ARGUMENTS**

14. **The jurisdiction under the Arbitration Clause to adapt the contract:** The Arbitral Tribunal has jurisdiction to adapt the contract under the law of Mediterraneo, as the law that governs the contract is presumed to be the governing law of the Arbitration Clause. Furthermore, the negotiating documents show that both parties have intended to apply Mediterranean law as the governing law of the Arbitration Clause. Under the law of Mediterraneo, an arbitration clause is to be interpreted broadly, hence allowing the arbitration clause to cover jurisdiction to the Tribunal to adapt the contract. This can also be seen from the broad wordings that was provided in Clause 12 to adapt the contract. The present dispute concerns the interpretation and application of Clause 12 of the contract, thus satisfying the Tribunal's jurisdictional scope.

15. Even if, as RESPONDENT has asserted, that the governing law of the Arbitration Clause is Danubian law, the Tribunal will still have power to adapt the contract. In interpreting the Arbitration Clause, Danubian law recognises the doctrine of Parol Evidence Rule. This doctrine adheres to the Reasonable Person's Test where the limited wordings of the arbitration clause is interpreted by a neutral third-party. This test will also lead to the Tribunal having the power to adapt the contract because it does not limit the Tribunal.

16. **The right of CLAIMANT to submit evidence:** CLAIMANT has the right to submit the evidence. This is because in international arbitration practice, tribunals allow parties to submit any evidence to prove their own case in order to protect their right to be heard. RESPONDENT has alleged that the evidence CLAIMANT intended to submit is illegal. However, the Tribunal have broad discretion to include or exclude the evidence, even in the event that there is an allegation of illegality with regards to the evidence. CLAIMANT should also be allowed to submit the evidence because CLAIMANT did not participate in the unlawful act which led to the disclosure of the evidence.

17. Additionally, the evidence should be deemed admissible as the principle of transparency applies in this Case notwithstanding the duty of confidentiality relied upon by RESPONDENT. In this vein, the UNCITRAL Rules on Transparency should be applied to commercial arbitration because even in commercial arbitration there can also be element of public interest, and there is a growing need to build a case precedent in the world of international commercial arbitration. Alternatively, the Tribunal may join the third-party in

RESPONDENT's other arbitration to submit the award produced in said arbitration pursuant to the UNCITRAL Rules on Transparency.

18. **The entitlement of CLAIMANT to an increase of payment from adaptation of the contract under Clause 12 of the Sales Agreement and Mediterranean Law:** CLAIMANT is entitled to an increase of payment from adaptation of the contract as a remedy for 'Hardship' under Clause 12 of the Sales Agreement. Clause 12 provides that Seller is not responsible for hardship. In the present Case, the sudden imposition of an additional 30% tariff by the Equatorianian government resulted in a situation of hardship for CLAIMANT. The negotiating documents that led to Clause 12 of the Sales Agreement show that the parties had intended to allow adaptation of the contract by the Tribunal in the event of hardship.

19. Even if Clause 12 of the Sales Agreement does not cover a situation of 'Hardship' and its resulting adaptation of the contract, CLAIMANT is still entitled to an increase of payment from adaptation of the contract under the general contract law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles. Under Art. 6.2.2 and 6.2.3 of the UNIDROIT Principles, CLAIMANT's situation has satisfied the requirements of 'Hardship' and hence CLAIMANT may request the Tribunal to adapt the contract.

20. **Alternatively, CLAIMANT is entitled to an increase of payment from adaptation of the contract under CISG:** Notwithstanding Clause 12 of the Sales Agreement, the situation of 'Hardship' and price adaptation as the remedy is also governed by the CISG because the parties have never expressly excluded the application of Art. 79 of the CISG which also covers a situation of 'Hardship'. In particular, the term *"impediment beyond control"* in Art. 79(1) of the CISG covers a situation of hardship. Even if Art. 79 of the CISG does not expressly govern hardship, the situation of 'Hardship' can still be invoked under the CISG through a gap-filling method pursuant to Art. 7(2) of the CISG. Under this Article, matters that fall within the scope, but not expressly addressed in the Convention can be filled by the general principles in which the Convention is based on. The general principle referred can be found in the UNIDROIT Principles, which expressly governs hardship.

21. Price adaptation should be the appropriate remedy for 'Hardship' under the CISG. Although Art. 79 of the CISG does not expressly provide contract or price adaptation as remedy, that remedy may be applied under CISG through a gap-filling method pursuant to Art. 7(2) of the CISG – leading to the application of remedy as set out in Art. 6.2.3 of the UNIDROIT

Principles. Under that provision, a party may request a court or tribunal, upon failure of renegotiation, to adapt the contract in the event of 'Hardship'.

## ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND/OR THE POWER TO ADAPT THE CONTRACT

### A. THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT UNDER MEDITERRANEAN LAW

#### I. The governing law of the Arbitration Clause is the law of Mediterraneo

22. RESPONDENT has alleged that the current Arbitration Clause is governed solely by the *lex loci arbitri* [*RNoA, p. 31, paras. 14-15*]. On the contrary, CLAIMANT submits that the governing law of the contract, namely the law of Mediterraneo, should also govern the Arbitration Clause. This is by virtue of: (i) the presumption that the governing law of the contract also governs the Arbitration Clause, and (ii) the parties have intended for Mediterranean law to be the applicable law of the Arbitration Clause.

##### (i) *The law of Mediterraneo, as the law governing the contract, is presumed to be the law governing the Arbitration Clause*

23. With regards to questions concerning which law governs the arbitration clause in each case, the tribunal may elect to consider two options [*Leong/Tan, p. 72*]. This consists of both the *lex loci arbitri* as the law of the seat or the governing law of the contract itself. In practice, courts and tribunals have chosen to presume that the law applicable for arbitration clauses is the law governing the contract [*Leong/Tan, p. 72*].

24. The *Sulamérica Case,* decided by the English Court of Appeal, has adopted a three-step analysis in identifying the applicable governing law for the arbitration clause [*Sulamérica Case*]. Tribunals must first consider whether there is an express choice of law, before moving on to consider whether an implied choice was made. If both express and implied choice cannot be identified, the court would infer that the applicable law is the law of the contract [*Sulamérica Case; see also FirstLink Case*].

25. In this Case, the Arbitration Clause is governed by the law governing the contract, which is Mediterranean law. This presumption, however, can be overturned if it can be established that the parties have intended a different law to govern the Arbitration Clause [*Sulamérica Case*]. Nevertheless, we will establish below that in any case, the parties have intended Mediterranean law to also govern the Arbitration Clause.

**(ii)** ***In particular, the parties have intended for the law of Mediterraneo to also govern the Arbitration Clause***

26. Art. 8 of the CISG provides two approaches concerning the interpretation of a party's intent within a particular contract. Art. 8(1) of the CISG sets out the need to interpret the intent where the parties knew or could not have been unaware of the other parties' intention. Subsequently, Art. 8(2) of the CISG provides the need for interpreting a statement or a conduct made by the parties through the view of a reasonable person.

27. RESPONDENT has asserted that the governing law for the Arbitration Clause is Danubian law as Danubia is the seat of the arbitration [*RNoA, p. 31, para. 13*]. However, through the parties' statements during contract negotiations [*Art. 8 of the CISG*], it is clear that the parties intended to apply Mediterranean law as the governing law of the Arbitration Clause.

28. The negotiators from both sides have made it clear that there was a need to provide a mechanism to allow an express adaptation of the contract by the Tribunal [*Ex. C8, p. 17*]. This view was clearly reciprocated by Mr. Antley, RESPONDENT's negotiator, who had agreed with Ms. Napravnik's, CLAIMANT's negotiator, proposition. RESPONDENT's negotiator had consented that when the parties disagreed, then it should be "*the task of the arbitrator to adapt the contract if the parties could not agree*" [*Ex. C8, p. 17*].

29. It would have been impossible for RESPONDENT to be unaware of the negotiation attempt concerning the governing law of the Arbitration Clause. The wordings within the note made by RESPONDENT's negotiator had clearly stated that the parties were still looking for a neutral venue and applicable law [*Ex. R3, p. 35*]. Not only that, RESPONDENT's negotiator had expressly noted the need to establish a "*connection between Hardship Clause and Arbitration Clause"* [*Ex. R3, p. 35*]. In any case, it would show that at the very least, there was a need to establish a close connection between the two clauses by way of inclusion of the adaptation concept. As such, to realise the inclusion of the adaptation concept, one must infer that Mediterranean law is applicable as Mediterranean law recognises such concept.

## II. Under the law of Mediterraneo, the Arbitration Clause confers the Tribunal with the jurisdiction to adapt the contract

### (i) *The Arbitration Clause must be interpreted broadly under the law of Mediterraneo*

30. In interpreting the current Arbitration Clause, the Tribunal must first employ the tools utilised by the law. Mediterranean law is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts [*PO1, p. 53, para. 4*]. Under the UNIDROIT Principles, the tribunal must utilise the intention of the parties to make sense of the wordings within the contract [*Art. 4.1 of the UNIDROIT Principles*].

31. Under Art. 4.1 of the UNIDROIT Principles, the tribunal must first look broadly at the intention of the parties when they drafted the relevant clause [*Off Cmt 1 to Art. 4.1 of the UNIDROIT Principles*]. Through an analysis of the intention of the parties, including the relevant circumstances in which the contract were drafted, it will allow the tribunal to arrive at an understanding of the intention of the parties with regards to a certain clause [*Off Cmt 4 to Art. 4.1 of the UNIDROIT Principles*]. This would allow an interpretation truest to its own meaning [*Off Cmt 4 to Art. 4.1 of the UNIDROIT Principles*].

32. As the applicable law for the Arbitration Clause is Mediterranean law, the rule of interpretation which will be adopted is the analysis of the party's intention in a broad manner.

### (ii) *In particular, the parties have intended to confer the Tribunal with the authority to adapt the contract*

33. In order to ascertain the intention, the tribunal may look at the negotiation documents [*Art. 4.1.1 of the UNIDROIT Principles*]. In the present Case, CLAIMANT had suggested that *"it was important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment"* [*Ex. C8, p. 17*]. Following this suggestion, RESPONDENT themselves has prepared a proposal to address such issue [*Ex. R3, p. 35*]. In this context, RESPONDENT's negotiator left behind a note confirming that there was still a need to *"clarify in Arbitration Clause that neutral venue and the applicable law"* for the Tribunal [*Ex. R3, p. 35*].

34. This shows that even during the negotiation process of the contract itself, both principal negotiators have considered giving the Tribunal the authority to adapt the contract. Even if the witness statement is not conclusive enough, the fact shows that RESPONDENT's

negotiator was still willing to discuss the applicable law for the Arbitration Clause which would suggest he wants to avoid any uncertainty regarding this mechanism.

35. By looking again at the negotiation process of the parties, we can see that the parties had intended to give the power to adapt the contract to the Tribunal.

## B. EVEN IF THE TRIBUNAL DECIDES THAT THE GOVERNING LAW OF THE ARBITRATION CLAUSE IS THE LAW OF DANUBIA, THE TRIBUNAL REMAINS WITH THE JURISDICTION TO ADAPT THE CONTRACT

36. In the Case that RESPONDENT asserts that the governing law of the Arbitration Clause is the law of Danubia, Danubian law adheres to the "Parol Evidence Rule" when interpreting contracts [*RNoA, p. 32, para. 16*]. This means that the Arbitration Clause must be interpreted limited to the wording of the clause itself, in particular, *"any dispute arising out of this contract"* [*NoA, p. 6, para. 14; Yoshimoto Case*]. The "Parol Evidence Rule" also adheres to the "Reasonable Person's Test" where contractual provisions are to be interpreted according to the understanding of any neutral third person in the same circumstances.

### I. Following the Parol Evidence rule under Danubian law, the standard to interpret the Arbitration Clause is the "Reasonable Person's Test"

37. Under Danubian law, the Arbitration Clause is to be interpreted narrowly by using the Parol Evidence Rule [*RNoA, p. 32, para. 16*]. The primary method of this rule is simply to ascertain the meaning of the language of the contract itself and exclude any pre-contractual negotiations of the parties or their subsequent conduct [*Yoshimoto Case*]. The standard to be adopted in interpreting a contract under the Parol Evidence Rule is the Reasonable Person's Test [*Rowley, p. 17*]. The Reasonable Person's Test when interpreting the contract requires the Tribunal to adopt the understanding of the neutral third-party in the same circumstances with CLAIMANT and RESPONDENT [*DiMatteo, p. 302*].

38. Therefore, the Reasonable Person's Test is applicable in interpreting the Arbitration Clause under the Parol Evidence Rule.

**II. The wordings of the Arbitration Clause itself (in particular *"any dispute arising out of this contract"*), interpreted based on the Reasonable Person's Test, also allows the Tribunal to adapt the contract**

39. The language of the contract would lead a reasonable person to understand the meaning of the contract [*Alphapharm Case; Pacific Carriers Case; DiMatteo, p. 301*]. This includes the meaning of the term itself which can be interpreted according to the basic understanding of a reasonable person [*Woodside Case*]. In the present Case, the wordings "*any dispute arising out of this contract*" can be reasonably interpreted to allow question of adaptation to fall within the power of the Tribunal to decide [*Ex. C5, p. 13, Clause 15*].

40. Under the Reasonable Person's Test, the phrase *"any dispute arising out of this contract"* does not restrict the authority of a tribunal. Even if the parties had set out the possible jurisdiction conferred to the tribunal, this does not in any way mean that the list provided is exhaustive.

41. The current dispute concerns the difference between CLAIMANT and RESPONDENT in their interpretation over Clause 12 of the Sales Agreement. CLAIMANT is of the view that Clause 12 of the Sales Agreement includes a Hardship Clause which gives rise to power on the part of the Tribunal to adapt the contract if the parties fail to negotiate new terms on occurrence of 'Hardship' event, while RESPONDENT rejects such an interpretation of Clause 12. This would mean that the nature of the dispute itself arises out of a provision that is an integral part of the contract. This satisfies the requirement of a "*dispute arising out of this contract"* within the jurisdiction of the Tribunal.

42. As such, the Tribunal should be of the view that they have the power to adapt the contract under Danubian law.

## ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

43. RESPONDENT objects to the admissibility of the evidence that CLAIMANT intend to submit because, according to RESPONDENT, it was procured illegally and should not be admitted by the Tribunal [*Letter Fasttrack dated 3 October 2018, p. 51, para. 3*]. On the contrary, CLAIMANT submits that it has the right to submit the evidence as: (a) international arbitral practice shows that tribunals still admit evidences alleged to be unlawful, (b) every party in International Arbitration is entitled to submit evidence in order to prove its own case and RESPONDENT does not have any legal grounds for their objection, and (c) the Principle of Transparency in International Commercial Arbitration allows for the submission of the award in RESPONDENT's other arbitration.

### A. THE TRIBUNAL HAS BROAD DISCRETION TO INCLUDE THE EVIDENCE

44. Under Art. 22(2) of the HKIAC Arbitration Rules, the arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence, including whether to apply strict rules of evidence [*Art. 22(2) of the HKIAC Arbitration Rules*]. This provision clearly shows that the tribunal is not bound by any strict rules of evidence and can exercise its ***discretion*** to determine the admissibility, relevance, materiality, and weight of the evidence [*Moser/Bao, para. 9.153*].

45. Apart from the HKIAC Arbitration Rules, Art. 19(2) of the UNCITRAL Model Law also provides that the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence [*Art. 19(2) of the UNCITRAL Model Law*]. Under this rule, when the tribunal conducts the arbitration proceeding, the arbitral tribunal is not bound by the rules of evidence and it may receive any evidence that it considers to be appropriate in the proceeding [*Paulsson/Bosman, p. 26, para. 3*].

46. Other than the HKIAC Arbitration Rules and UNCITRAL Model Law, similar discretion is also provided in Art. 9(1) of the IBA Rules on Taking of Evidence which states that the tribunal shall determine the admissibility, relevance, materiality, and weight of evidence [*Art. 9(1) of the IBA Rules on Taking of Evidence*]. This provision regulates in a similar manner as Art. 22(2) of the HKIAC Arbitration Rules by providing that the tribunal clearly has a discretion in making such determinations. The IBA Rules may not be binding in this arbitration

proceeding. However, the IBA Rules are widely used by international arbitral tribunals as a supplement to the relevant applicable arbitral rules [*Born, p. 2212, para. 1*].

47. Hence, CLAIMANT submits that the Tribunal does have the power or discretion to include or exclude any evidence submitted by the parties in arbitration proceedings. Therefore, in the present Case, the evidence that is submitted by CLAIMANT is well within the scope of the discretion of the Tribunal to include.

## B. IN GENERAL, ARBITRAL TRIBUNALS STILL ADMIT EVIDENCE NOTWITHSTANDING ITS ALLEGED ILLEGALITY

48. As established above, in international commercial arbitration there are generally no specific restrictions on the admissibility of the evidence which makes the tribunal will admit almost any evidence submitted to them [*Lew/Mistelis/Kroll, p. 561, para. 4; Chernykh, p. 304, para. 3*]. Due to the absence of any binding rules with regards to the criteria of the admissible evidence, the discretion is given to the tribunal to also include the power to admit even allegedly illegal evidence [*Mirabal/Derains, p. 208, para. 1*]. This reflects general arbitral practice.

49. In *Caratube v. Kazakhstan*, decided by ICSID, the tribunal decided as follows: *"Therefore, the Tribunal provisionally admits all documents submitted by the Parties up to now, and the two letters submitted by Mr. Rashid Farah forwarded to the Parties by the Tribunal's Secretary at ICSID by e-mail of 19 January 2011"* [*Caratube v. Kazakhstan*]. There, the claimant relied on evidence from documents that were published on a website after the Kazakhstan government's computer was illegally hacked. This case shows that the tribunal can admit evidence notwithstanding the illegal nature of the evidence.

50. Furthermore, in *Yukos Case*, the tribunal extensively cited the *Wikileaks* cables in the award without addressing the admissibility of the documents despite clear question on the legality of the *Wikileaks* sources. There, the tribunal held that the third-party source may be admitted to the tribunal when the evidence it has disclosed is relevant [*Yukos Case*]. Similar to *Caratube v. Kazahkstan*, in the *Yukos Case*, the evidence can still be admitted despite its illegal nature.

51. Therefore, in the present Case, even if the evidence from the other arbitration proceedings is considered to be illegally obtained, that evidence may still be considered as admissible.

52. Furthermore, in accordance with international arbitration practice, it is recognised that relevant evidence is admissible [*Pilkov, p. 148, para. 1*]. The term *"relevant evidence"* means that the evidence can establish the existence of any fact that is of consequences in the case [*Pilkov, p. 148, para. 4*]. It has been suggested that the prevailing liberal practice of international tribunal is to admit virtually any evidence, subject to an evaluation of the relevance of the evidence [*Waincymer, p. 793, para. 1*].

53. In the present Case, CLAIMANT's evidence is relevant because the information regarding RESPONDENT's other arbitration shows that the RESPONDENT is acting inconsistently in these two cases and hence their arguments are without merit [*Letter Langweiler dated 2 October 2018, p. 50, para. 2*]. Even though RESPONDENT alleged that the evidence is obtained by illegal means [*Letter Fasttrack dated 3 October 2018, p. 51, para. 3*], as long as the evidence is relevant to the present Case, it is still admissible despite an allegation of illegal means to obtain them.

## C. FURTHERMORE, CLAIMANT MAY SUBMIT THE EVIDENCE BECAUSE CLAIMANT COMES WITH CLEAN HANDS

54. In *Methanex v. U.S*, decided by the UNCITRAL Ad Hoc Tribunal, the tribunal adopted three-step approach to determine whether the evidence alleged to be illegal may nevertheless be admissible. The tests are: (a) the party did not participate in the unlawful act that lead to its disclosure, (b) the evidence is material to the case at hand, and (c) the evidence was not obtained from the files of the party to the arbitration. This is because each disputing parties owed a general legal duty to each other and to the tribunal to conduct themselves in good faith during the arbitral proceeding [*Methanex v. U.S*]. CLAIMANT will establish that these tests are satisfied here so that the evidence is admissible.

### I. CLAIMANT did not participate in an unlawful activity that led to the evidence's disclosure

55. CLAIMANT is made aware of the award from the other proceeding by Mr. Velazquez, who is a customer of CLAIMANT and has been working for the Mediterranean buyer in the other arbitration [*PO2, p. 60, para. 40*]. Notwithstanding any allegation of a breach of nondisclosure agreement by RESPONDENT, it is not CLAIMANT who has breached such agreement. Therefore, CLAIMANT may submit the evidence as CLAIMANT comes with "Clean Hands".

56. This reflects the doctrine of "Clean Hands", where it is essential to establish the fact that CLAIMANT did not participate in any unlawful activity as the doctrine itself will not permit evidence to be admitted if the relevant party does not have "Clean Hands" [*Dumberry, p. 231*]. For example, in *Caratube v. Kazakhstan*, the claimant did not participate in hacking of the Kazakhstan's government computer that led to the evidence's disclosure and the tribunal decided to admit the evidence [*Caratube v. Kazakhstan*].

### II. The award from the other arbitration is material to the Case at hand

57. In international arbitration practice, the "materiality" criterion is considered mostly in relation to its connection to the outcome of the case. However, in some legal traditions, the concept of "materiality" is merged into the concept of "relevance" [*Pilkov, p. 149, para. 3*]. As established in the previous section, relevance means that the evidence can establish the existence of any fact that is of consequences in the case. In the present Case, the award is material because CLAIMANT has a particular need for the award to prove its case in the current proceeding.

58. This is because that award will show that RESPONDENT had asked for an adaptation of the contract relying on the Hardship Clause [*Letter Langweiler dated 2 October 2018, p. 50, para. 2]*. Hence, it is materially critical for CLAIMANT to submit the award as evidence in this proceeding because it would show that RESPONDENT had actually taken the same position as CLAIMANT in that other arbitration proceeding while taking a contradicting position in this Case.

### III. CLAIMANT does not unlawfully obtain the evidence from the files of RESPONDENT

59. In the present Case, the award that will be submitted as evidence to the proceeding, if any, does not come from the files of RESPONDENT. Instead, it was from Mr. Velasquez who notified CLAIMANT about RESPONDENT's other arbitration proceeding [*PO2, p. 60, para. 40*]. Furthermore, RESPONDENT sent an email stating "*the only other arbitration in which RESPONDENT has been involved in, has been conducted also under the HKIAC 2013 Rules"* [*Letter Fasttrack dated 3 October 2018, p. 51, para. 1*]. This statement showed that the RESPONDENT have conceded about the existence of the other proceeding.

## D. THE SUBMISSION OF THE EVIDENCE SHOULD ALSO BE ALLOWED IN ORDER TO PROTECT THE CLAIMANT'S RIGHT TO BE HEARD

60. In international arbitration, tribunals must afford the parties the *"full opportunity of presenting his case"* [*Art. 18 of the UNCITRAL Model Law*]. This also includes the party's right to be heard by submitting evidence that they consider to be relevant [*Trustees Case*].

61. In that context, where an evidence is alleged to be illegal, the "work-product" doctrine allows the tribunal to balance whether the probative value of the disclosure of material sought overshadows its potential for prejudice [*Poorooye/Feehily, p. 316*]. Thus, the CLAIMANT's right to be heard has to be protected through the application of the "work-product" doctrine.

62. There are two elements that serves as exceptions to confidentiality as established by the "work-product" doctrine. First is the Substantial Need Principle which demonstrates a significant necessity for the material. Second is the Undue Hardship Principle showing an inability to acquire such information elsewhere [*Poorooye/Feehily, p. 316*]. These two elements are satisfied in the present Case, as elaborated below.

### I. There is a substantial need for CLAIMANT to introduce this evidence

63. There is substantial need for CLAIMANT to introduce the evidence in the present Case. One court has equated "substantial need" with "critical materiality" of the information [*Cohn, p. 929, para. 4*]. Under this principle, CLAIMANT has a particular need for the award in RESPONDENT's other arbitration proceeding to prove its case in the current proceeding. CLAIMANT submits that the evidence is materially critical for CLAIMANT [*Letter Langweiler dated 2 October 2018, p. 50, para. 2*].

### II. CLAIMANT cannot obtain the evidence without undue hardship

64. Undue Hardship in this context means that the evidence can only be disclosed when it cannot be obtained elsewhere [*Halfenger, p. 1081*]. In the present Case, the partial interim award as the evidence is only available to RESPONDENT and the disputing party in the other arbitration [*Born, p. 2782*]. The award which was promised to CLAIMANT, would qualify as evidence that cannot be obtained elsewhere unless both parties to the arbitration agreed to publish them [*Art. 42 of the HKIAC Arbitration Rules; Born, p. 2804*]. Since RESPONDENT obviously do not agree to publish the award, this creates an undue hardship for CLAIMANT.

65. The inability without undue hardship to obtain the award by other means will fulfil the needed requirement in order to waive the protection of the "work-product" doctrine with request to the award [*Halfenger, p. 1079*]. Clearly, the award produced is only available to the parties in the other arbitration as it is protected under the duty of confidentiality. CLAIMANT cannot obtain this award without experiencing undue hardship. As such, the duty of confidentiality must be overcome, and CLAIMANT submits that the award can be submitted as evidence.

## E. THE EVIDENCE SHOULD ALSO BE DEEMED ADMISSIBLE IN LINE WITH THE PRINCIPLE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION

### I. The principle of transparency, as reflected in the UNCITRAL Rules on Transparency, also applies in International Commercial Arbitration

66. One of the main questions in international arbitration is whether the principle of transparency is applicable in the practice of international commercial arbitration, with the UNCITRAL Rules on Transparency being one of the principal body of rule that governs this area. Although the UNCITRAL Rules on Transparency on its face is applicable with respect to investor state arbitration [*Art. 1(1) of the UNCITRAL Rules on Transparency*], CLAIMANT submits that it should also be applied in international commercial arbitration.

67. One reason raised by practitioners to contend that the UNCITRAL Rules on Transparency should not apply to commercial arbitration is the absence of a public interest [*Argen, p. 209, para. 2*]. However this notion is false [*Argen, p. 228*]. International Commercial Arbitration *"can, and do, impact profoundly important issue of public policy"* as much as an investor-state arbitration would [*Argen p 235; Rogers, p. 1327*]. To add, issues dealt with under International Commercial Arbitration may have considerable influence on the decision making process of the state [*Pooroye/Feehily, p. 312*].

68. One such example can be seen in *Mitsubishi Motors Case*, with regards to how the case affected the application of the U.S Sherman Act on Anti-trust [*Argen, p.* 239, *para. 1*]. The court in that case highlights that "*private actions help enforce the Act and bring to light antitrust violations that would otherwise go undetected by government authorities, which in turn serves the public interest in protecting market competition*" [*Mitsubishi Motors Case*].

69. Furthermore, many authors have pushed for greater transparency due to a need to build consistent precedents in international commercial arbitration [*Pislevik, p. 258; Pooroye/Feehily,*

*p. 313*]. If arbitrations are to be confined within the principle of confidentiality, this would lead to awards differing wildly for circumstances which are similar in application [*Pislevik, p. 255*]. Therefore, the principle of transparency which would result in awards being made available to non-parties should be applied. In practice, arbitral institutions such as the ICC have made it possible to build a body of precedents based on published arbitral awards [*Pislevik, p. 253*].

70. Surveys have also uncovered what practitioners think is the next step for arbitration with regards to transparency [*Queen Mary 2015 Survey; Pernt, paras. 9-12*]. For instance, in a survey conducted during the 2017 Vienna Arbitration Day, Kluwer Arbitration found three points where Transparency is considered important which includes: (a) organisational transparency, (b) legal transparency, and (c) transparency of proceedings. In short, most practitioners agree that more transparency is needed in international commercial arbitration [*Pernt, paras. 9-12*].

71. Ideally, a new set of rules should be implemented to govern transparency for international commercial arbitration. However, given the current lack of such specific body of rule available, the Tribunal should look at the already available provisions, which is the UNCITRAL Rules on Transparency.

72. Consistent with Art. 3 of the UNCITRAL Rules on Transparency, the award from the other arbitration has to be made public. Therefore, in this Case, the award in RESPONDENT's other arbitration should be made available for submission in this proceeding by CLAIMANT.

## II. The UNCITRAL Rules on Transparency prevails over the HKIAC Rules which require confidentiality in HKIAC arbitration

73. When a conflict arises between the Rules on Transparency and the actual Arbitral Procedural Law, then the Rules of Transparency should prevail [*Art. 1(7) of the UNCITRAL Rules on Transparency*]. CLAIMANT has established that the Rules on Transparency must be applied in the present Case. Regardless of the confidentiality provision in the HKIAC Arbitration Rules, by virtue of Art. 1(7) of the Rules of Transparency, the Tribunal should emphasise transparency and permit the submission of the arbitral award in RESPONDENT's previous arbitration.

### III. Alternatively, the other party in RESPONDENT's other arbitration can be joined in the present arbitral proceedings in order to properly submit the evidence to the Tribunal

74. Under Art. 1(5) of the UNCITRAL Transparency Rules, the tribunal has the discretion to establish transparency by accepting submissions regarding any matter of the dispute from a third-party. The submission must be relevant for it to be disclosed [*Radin v. Kleinman*]. The award in RESPONDENT's other arbitration is relevant as it can establish the fact that RESPONDENT has asked for adaptation of the contract by the tribunal in similar circumstances when it is in their favour to do so [*Letter Langweiler dated 2 October 2018, p. 50, para. 2*].

75. There is precedent for a tribunal to allow submission of evidence from a third-party. For example, one case had provided that disclosure made by a third party to an arbitration may be impliedly permitted [*Am. Fed of Television and Radio Artists, AFL- CIO v. WJBK-TV*]. Furthermore, another precedent goes as far as to add that "*arbitrators may order and conduct such discovery as they find necessary"* with regards to production of evidence from a third-party [*Stanton v. Paine Webber Jackson & Curtis, Inc.*].

76. Therefore, in the present Case, the Tribunal may join the third-party in RESPONDENT's other arbitration proceeding in order for them to submit the award in that proceeding to the Tribunal.

**ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE BASED ON CLAUSE 12 OF THE CONTRACT AND/OR THE CISG**

## A. CLAIMANT IS ENTITLED TO AN INCREASED PAYMENT UNDER CLAUSE 12 OF THE SALES AGREEMENT

77. Clause 12 of the Sales Agreement includes a 'Hardship' concept. Even if Clause 12 of the Sales Agreement does not cover a situation of 'Hardship', CLAIMANT may still invoke 'Hardship' under the general contract law of Mediterraneo. Hence, under Clause 12 of the Sales Agreement and the general contract law of Mediterraneo, CLAIMANT may request the Tribunal to adapt the contract following the failure of the parties' renegotiation.

### I. Clause 12 of the Sales Agreement includes a 'Hardship' as concept which should cover the situation where an additional 30% tariff is imposed in the present case

#### (i) *Clause 12 of the Sales Agreement includes a 'Hardship' concept and is not merely a 'Force Majeure' clause*

78. The express inclusion of the word "*hardship*" in the Sales Agreement [*Ex. C5, p. 14, Clause 12*] shows the parties' intentions to deal with a hardship situation within the scope of Clause 12. Under Art. 8(1) of the CISG, both parties' intentions are reflected first and foremost in the text of the contract itself [*Greenfields v. Philles Records, Inc.*], where their initial negotiators had discussed the inclusion of a Hardship Clause before the accident [*Ex. C8, p. 17, Ex. R3, p. 35*], followed by RESPONDENT's consent to include a hardship wording in the existing Clause 12 of the Sales Agreement [*RNoA, p. 30, para. 4*].

79. That is enough to conclude that the Hardship Clause was intended to be included in the Sales Agreement. In any event, even if there is no express intention from the RESPONDENT, they knew or could not have been unaware of CLAIMANT's intention to cover a situation of hardship in Clause 12 of the Sales Agreement.

80. During the negotiation of the agreement on 28 March 2017, RESPONDENT insisted on a Delivery DDP term for this contract due to the greater experience of CLAIMANT in shipment of frozen semen [*Ex. C3, p. 11*]. CLAIMANT agreed to a Delivery DDP term with the increase of US$ 1,000 per dose in the pricing but has also expressly stated that *"CLAIMANT is not willing to take over any risks associated with a change in delivery terms"* [Ex. C5, p. 14, Clause 12], by providing as an example an unforeseeable additional health and safety

requirement which could cause an increase in cost of up to 40%. At a minimum, CLAIMANT requested for a Hardship Clause to be included in the contract [*Ex. C4, p. 12*]. RESPONDENT then agreed to include a Hardship Clause regarding the increase in cost. Thus, the Hardship Clause was then formed.

81. To conclude, the word *"hardship"* in Clause 12 of the Sales Agreement should be considered as a Hardship Clause. In that respect, Clause 12 should not be interpreted merely as a *Force Majeure* Clause.

**(ii) *The imposition of an additional 30% tariff which is unforeseen and beyond the control of the parties is a situation of 'Hardship'***

82. Before the last shipment of 50 doses of frozen semen, to CLAIMANT's dismay and surprise, the government of Equatoriana imposed a 30% tariff on agricultural goods including horse semen on 19 January 2018 [*NoA, p. 6, para. 10; Ex. C6 p. 15; PO2, p. 58, para. 25; Ex. C7, p. 16*]. Therefore, CLAIMANT submits that this constitutes a situation of 'Hardship'.

83. 'Hardship' occurs when the performance of the contract becomes excessively onerous for one of the parties [*Zaccaria, p. 1; Art. 1467 of the Codice Civile*] and there is an unforeseen event which may result in a fundamental change of the equilibrium of the contract [*Art. 6.2.2 of the UNIDROIT Principles*; *Flambouras, p. 283*].

84. It is known that establishing a universal and mathematically precise alteration threshold is not advisable [*Girsberger/Zapolskis, p. 129*], and hence for the tariff to be considered as 'Hardship' should be discussed on the perspective of the effect of the tariff on CLAIMANT should be considered.

85. The imposition of tariff by the Equatorianian government had made the performance excessively onerous for CLAIMANT, taking into account CLAIMANT's current financial difficulties [*Ex. C8, p. 17; PO2, p. 59, para. 29*] of which RESPONDENT was aware of from the rumors and during negotiations [*PO2, pp. 58 & 59, paras. 22 & 28*].

86. CLAIMANT had made an agreement with its creditors in 2014 to prolong its two main credit lines where such extension is only possible if CLAIMANT is profitable in 2017 and 2018 [*PO2, p. 59, para. 29*]. With the imposition of the tariff, CLAIMANT's initial profit prediction of US$ 300,000 would be endangered if CLAIMANT had to bear the US$ 1,250,000 of additional tariff [*PO2, p. 59, para. 29*]. This would wipe out CLAIMANT's profit by over

360% and would impede CLAIMANT's ability to obtain credit. This also constitutes an alteration of the contract equilibrium and may be considered as 'Hardship'. The additional tariff would result in a devastating loss for CLAIMANT, making the contract excessively burdensome for CLAIMANT.

87. Similar circumstances occurred in another 'Hardship' case, decided by the ICC. In that case, claimant, a French company, entered into a license and sales agreement with defendant, a US company. After a period of time claimant had to considerably increase the price of the human placentae, the raw material supplied by claimant, due to regulations imposed by a governmental agency. This situation obviously caused claimant to bear the burden to pay the raw material [*ICC Case No.* 9994]. Similarly, by bearing the additional tariff, it may be extremely burdensome for CLAIMANT to request for credits to its creditors due to the loss that they had to endure because of the tariff.

88. One of the essential factors to determine 'Hardship' is unforeseeability [*Art. 6.2.2 of the UNIDROIT Principles*]. In particular, Clause 12 of the Sales Agreement also requires that the 'Hardship' is unforeseeable. Under the same case as mentioned above, the imposition of new regulations that resulted to claimant to increase the cost of its raw material was unforeseeable [*ICC Case No. 9994*]. In the present Case, Equatorianian government's action to impose a 30% tariff on horse semen is unforeseeable due to the respective government being widely known to be the biggest supporters of free trade [*Ex. C6, p. 15*]. Furthermore, it had surprised the parties that horse semen is considered to be an "*agricultural good*" for it was generally known that racehorse breeding is categorised differently from pig, sheep, or cattle breeding [*NoA, p. 6, para. 10*], and is not recognised as part of "*agricultural goods*" [*The USITC; FAO; AIS*]. This shows that the Equatorianian government's action was unforeseen by both parties.

89. In conclusion, the imposition of the additional 30% tariff by the Equatorianian government must be considered as a situation of 'Hardship'.

**(iii) *Adaptation of the contract is a remedy for 'Hardship' under Clause 12 of the Sales Agreement***

**a. CLAIMANT is not responsible for a situation of 'Hardship' under Clause 12 of the Sales Agreement**

90. Clause 12 of the Sales Agreement expressly provides that *"Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller… neither for hardship…"* [*Ex. C5, p. 14, Clause 12*]. This clearly means that CLAIMANT, acting as the Seller in the contract [*Ex. C5, p. 13*], is not responsible for any situations relating to 'Hardship'. This also means that CLAIMANT shall not be responsible for bearing the additional costs which has risen due to the tariff which, as established above, constitute a situation 'Hardship'.

**b. The parties have intended for an adaptation of the contract as remedy for a situation of 'Hardship'**

91. While the express wording of Clause 12 of the Sales Agreement does not contain any reference to an adaptation of the contract as a remedy, that clause should be interpreted in light of the intention of the parties. To understand the statements or other conducts by the parties, the parties have to determine their actual intent [*Art. 8(1) of the CISG; Schlechtriem, p. 39*]. A contract may be interpreted from their pre-contractual negotiations [*Proforce Recruit Ltd v. The Rugby Group Ltd*], also known as negotiating documents.

92. In the present Case, both parties' negotiators discussed, prior to the conclusion of the contract, regarding the adaptation of the contract. CLAIMANT's negotiator stated that *"it was important to have a mechanism in place which would ensure an adaptation of the contract"* [*Ex. C8, p. 17*]. In response, RESPONDENT's negotiator mentioned that it should be *"the task of the arbitrators to adapt the contract"* and promised he would come back with a proposal the morning following their negotiations [*Ex. C8, p. 17*].

93. Notwithstanding the fact that the accident prevented any subsequent follow-up (including RESPONDENT's proposal as mentioned above), CLAIMANT submits that there already was formed a common understanding and intention of the parties to allow an adaptation of the contract in case of 'Hardship' situation. Thus, it was consistent with the intention of the parties that the adaptation of the contract may be considered as remedy under *"hardship"* in Clause 12 of the Sales Agreement.

## II. Even if Clause 12 of the Sales Agreement does not cover a situation of 'Hardship', CLAIMANT may still invoke 'Hardship' under the general contract law of Mediterraneo

### (i) *The principle of 'Hardship' applies to the current situation under the general contract law of Mediterraneo (i.e. the UNIDROIT Principles)*

94. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 53, para. 4*], wherein the current situation is considered a situation of hardship. Under the UNIDROIT Principles, 'Hardship' is a situation where the occurrence of an event fundamentally alters the equilibrium of the contract [*Art. 6.2.2 of the UNIDROIT Principles*]. Whether or not an event can be described as 'fundamental' depends on the facts and circumstances of the particular case [*Off Cmt 7 to Art. 6.2.2 of the UNIDROIT Principles*]. An increase in cost of performance may lead to a 'Hardship' situation [*Art. 6.2.2 of the UNIDROIT Principles*], and in cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered [*Schwenzer, p. 716; UAB "Europa Group" v. UAB "Kleta"*].

95. As already established in the previous section [*CLA Memo, p. 22, para. 88*], the current situation in this Case is a situation of hardship, as it alters the equilibrium of the contract by 30%, which destroys the commercial basis of the deal [*NoA, p. 7, para. 18*]. Instead of gaining a 5% profit, CLAIMANT had to suffer a loss of 25%. Even if it is debatable whether an increase of 30% in cost shifts the equilibrium enough to invoke hardship, CLAIMANT, in the present Case, is on the verge of bankruptcy [*PO2, p. 59, para. 29*] which makes this Case a clear one where 'Hardship' can be properly invoked.

96. Therefore, even if Clause 12 of the Sales Agreement does not cover a situation of 'Hardship', section 6.2 of the UNIDROIT Principles could be utilised in the present Case.

### (ii) *The imposition of an additional 30% tariff constitutes 'Hardship' under Article 6.2.2 of the UNIDROIT Principles*

97. Pursuant to Art. 6.2.2 (a) to (d) of the UNIDROIT Principles, in order to invoke 'Hardship': (a) the particular event must have occurred after the conclusion of the contract, (b) could not have been taken into account by the disadvantaged party at the time of conclusion of the contract, (c) are not within the party's control, and (d) the risk was not assumed by the disadvantaged party.

98. The contract was signed on 6 May 2017 [*Ex. C5, p. 13*], while the implementation of a 30% tariff was imposed only after the first and second shipment had been delivered [*NoA, p. 6, para. 10*]. This clearly proves that the event causing 'Hardship' occurred after the conclusion of the contract. The situation could not have been taken into account by the disadvantaged party as the Equatorianian government has always been an ardent supporter of free trade and there was no political issue at the time of the conclusion of the contract [*NoA, p. 6, para. 10*].

99. The imposition of 30% tariff is beyond the control of either party, as neither party has a control or a say with regards to the government's regulation. [*Off Cmt 14 to Art. 6.2.2 of the UNIDROIT Principles*]. The risk of imposition of 30% tariff could not have been assumed by the CLAIMANT as there was no tariff when the contract was signed.

100. Therefore, the imposition of 30% tariff fulfills all the requirements required for an event to be considered as a situation of 'Hardship' set forth by Art. 6.2.2 of the UNIDROIT Principles.

## III. Under Clause 12 of the Sales Agreement and the general contract law of Mediterraneo, CLAIMANT may request the Tribunal to adapt the contract following the failure of the parties' renegotiation

101. Due to RESPONDENT's blatant refusal to adapt the contract under the general contract law of Mediterraneo [*Ex. C8, p. 17*; *RNoA, p. 30, para. 10*], it is justified for CLAIMANT to request the Tribunal to exercise its power to adapt the contract to take into account the hardship that CLAIMANT had to bear.

102. Art. 6.2.3(3) of the UNIDROIT Principles provides that either party may resort to the court if the parties failed to reach agreement on adapting the contract within a reasonable time [*Off Cmt 4 to Art. 6.2.3 of the UNIDROIT Principles*]. To request the court for an adaptation of the contract, a party must first make a request to renegotiate without undue delay [*Art. 6.2.3(1) of the UNIDROIT Principles*]. In particular, the disadvantaged party must request for renegotiations at the earliest opportunity possible [*Off Cmt 2 to Art. 6.2.3 of the UNIDROIT Principles*].

103. CLAIMANT requested renegotiation of the contract on 20 January 2018, one day after CLAIMANT's discovery that the imposition of tariff also covers horse semen [*NoA, p. 6,*

*para. 12*; *Ex. C7, p. 16*]. This satisfies the requirement under Art. 6.2.3(1) of the UNIDROIT Principles.

104. The UNIDROIT Principles does not expressly define the standard for the 'reasonable time' for a failed renegotiation. However, an ideal common practice in relation to a sales contract is that the parties may have 30 days to resolve a dispute [*PGT Industries, Inc. SA*]. In the present Case, it can be seen that the parties have failed to come to a solution regarding the imposition of the additional tariff due to RESPONDENT's immediate refusal to negotiate further to cover the tariff expenses that CLAIMANT was forced to bear [*Ex. C8, p. 17*]. This situation is sufficient to request the Tribunal to adapt the contract, similar to *ICC Case No. 9994* in which the claimant was granted adaptation of the contract by the arbitral tribunal because of the respondent's immediate termination before entering renegotiation [*ICC Case No. 9994*]. This may constitute as 'reasonable time' in Art. 6.2.3 of the UNIDROIT Principles.

105. Furthermore, the word "*court"* in Art. 6.2.3 of the UNIDROIT Principles may be substituted with 'arbitral award' or 'arbitration', meaning that the Tribunal may adapt the contract. In this vein, one tribunal has referred to Art. 6.2.3(4) of the UNIDROIT Principles as the basis to adapt the contract [*Iran v. Cubic Defense Systems*], and in another case, an ICC tribunal relied on Art. 6.2.3 of the UNIDROIT Principles, stating that *"only if the renegotiations fail may the disadvantaged party resort to the arbitral tribunal, which will decide whether to terminate the agreement or to adapt it"* [*ICC Case No. 10021*]. Likewise, the Tribunal in this Case may, for the purposes of Art. 6.2.3 of the UNIDROIT Principles, substitute the court.

106. In conclusion, CLAIMANT is entitled to request the Tribunal to adapt the contract in the present circumstances.

## IV. RESPONDENT cannot act inconsistently after indicating that it is open to adapting the contract

107. Pursuant to Art. 1.8 of the UNIDROIT Principles, a party cannot act inconsistently with an understanding that it has caused the other party to have and upon which that other party has reasonably acted in reliance on to its detriment. The requirements set forth are that: (a) one party has caused an understanding to be had by another party, (b) the other party reasonably acted in reliance on that understanding, (c) there is an inconsistent behaviour on the part of the first party, and (d) the inconsistent behaviour causes detriment to the other party.

108. CLAIMANT submits that all these requirements have been satisfied here, as RESPONDENT has acted inconsistently after having caused an understanding that it was willing to negotiate a solution to the sudden changes in the parties' commercial equilibrium – to the detriment of the CLAIMANT – and hence RESPONDENT is now barred from denying that the contract should be adapted.

109. The notion "*understanding*" is meant to be understood very broadly [*Off Cmt 5 to Art. 1.8 of the UNIDROIT Principles*]. The other party must have acted in reliance on the understanding [*Off Cmt 9 to Art. 1.8 of the UNIDROIT Principles*]. The subsequent conduct of the first party must then contradict its previous conduct [*Off Cmt 11 to Art. 1.8 of the UNIDROIT Principles*], and the other party must have acted in reliance to its detriment [*Off Cmt 12 to Art. 1.8 of the UNIDROIT Principles*].

110. After the imposition of a 30% tariff [*NoA, p. 6, para. 10*], CLAIMANT immediately contacted RESPONDENT to discuss a solution regarding the problem [*Ex. C7, p. 16*]. RESPONDENT, through Mr. Shoemaker, gave an impression that RESPONDENT would bear the payment of US$ 1,250,000 [*Ex. C8, p. 17*]. Mr. Shoemaker emphasised the urgency of the delivery and said that he was *"certain that a solution would be found given the good relationship between the parties"* [*Ex. C8, p. 17*]. He also emphasised the interest of RESPONDENT in a long-term relationship [*Ex. C8, p. 17*]. CLAIMANT relied on the impression given by RESPONDENT and shipped the third instalment [*Ex. C8, p. 17*]. To CLAIMANT's dismay, RESPONDENT terminated the contract instead [*Ex. C8, p. 17*], which caused detriment to CLAIMANT because CLAIMANT must bear the additional cost of US$ 1,250,000.

111. All the elements of Art. 1.8 of the UNIDROIT Principles having been satisfied, RESPONDENT cannot act inconsistently with its representation that it would be willing to find a solution in the face of the sudden imposition of additional tariff. This would include the possibility to renegotiate and adapt the contract.

## B. ALTERNATIVELY, CLAIMANT IS ALSO ENTITLED TO AN INCREASED PAYMENT UNDER THE CISG

112. Even if the Arbitral Tribunal should conclude that there is no remedy for CLAIMANT under Clause 12 of the Sales Agreement, the price should be increased under the CISG. A price adaptation as the remedy in this Case is governed by the CISG and can be applied in this current situation through different methods. Each will be elaborated below.

## I. Article 79 of the CISG is still applicable irrespective of the specific 'Force Majeure'/'Hardship' Clause in the Sales Agreement

113. RESPONDENT submitted that with the existence of the '*Force Majeure*'/'Hardship' Clause, Art. 79 of the CISG should not be applicable, relying on Art. 6 of the CISG [*RNoA, p. 32, para. 20*]. That assertion cannot stand.

114. Art. 6 of the CISG governs the exclusion and derogation of the application of the CISG or of certain provision(s) of the Convention (the so called 'opt-out') [*Graves, p. 125*], where the exclusion of the Convention or certain provisions of the CISG is made by a *"clear, unequivocal and affirmative agreement of the parties"* [*CISG Digest, p. 33, para.* 2]. This agreement can be made implicitly and explicitly [*CISG Digest, pp. 33-34, paras. 7*-17] as affirmed by the drafters of: (a) the Convention's non-mandatory nature, and (b) the primary source of rules for international sales contracts is party autonomy [*CISG Digest, p. 33, para.* 3].

115. The express exclusion of the Convention or derogation of certain provisions of the CISG can be done in two ways: exclusion with and exclusion without indication by the parties of the law applicable to their contract [*CISG Digest, p. 33, para.* 7]. Obviously in this Case, the parties have never expressly excluded or derogated the application of Art. 79 of the CISG.

116. By choosing the law of a Non-Contracting State as the law applicable in the contract may amount to implicitly excluding the Convention or derogate from certain provisions of the CISG [*CISG Digest, p. 34, para. 10*]. Some arbitral award and several court decisions also consider that choosing the law of a Contracting State to govern their contract amounts to implicit exclusion [*CISG Digest, p. 34, para. 11*]. However, no such implicit exclusion or derogation of Art. 79 of the CISG occurs in this Case.

117. In conclusion, Clause 12 of the Sales Agreement does not represent a derogation of Art. 79 of the CISG despite the specific *'Force Majeure'*/'Hardship' Clause.

## II. The CISG covers a situation of 'Hardship'

118. A situation of 'Hardship' is governed under the CISG. Although not explicitly stated, the term *"impediment beyond control"* in Art. 79(1) of the CISG covers a situation of 'Hardship'. Even if Art. 79 of the CISG does not expressly govern 'Hardship', the situation of 'Hardship' can still be governed through a gap filling method pursuant to Art. 7(2) of the CISG.

**(i) *'Hardship' is recognised under Article 79 of the CISG***

119. Art. 79(1) of the CISG's use of the neutral term *"impediment"* ranges between strict impossibility to a 'Hardship' situation [*DiMatteo, p. 18; Petsche, p. 153*]. What was once a requirement of impossibility has been watered down to one of impracticability [*DiMatteo, p. 21; Farnsworth, p. 25*]. 'Hardship' is considered as an *"impediment"* pursuant to Art. 79 of the CISG when the performance is unreasonably expensive for the disadvantaged party and leads to an unreasonable loss [*Art. 6.2.2 of the UNIDROIT Principles*]. An excuse is granted if it is determined that the cost of performance is disproportionate to the benefits of the relevant performance referred [*DiMatteo, p. 21*].

120. The situation in this Case is a situation of an *"impediment"* pursuant to Art. 79 of the CISG. It is a 'Hardship' situation where the cost of performance has risen to the point where CLAIMANT not only no longer gains profit, but instead suffers a loss of US$ 1,250,000, which wipes out the profit by over 360% [*Ex. C8, p. 17*]. Moreover, the performance has been unreasonably expensive for CLAIMANT as the imposition of tariff has destroyed the commercial basis of the contract, taking into account as well the fact that CLAIMANT is on the verge of bankruptcy [*PO2, p. 59, para. 29*].

121. CLAIMANT submits that the 'Hardship' situation in this Case is a situation of "*impediment*" pursuant to Art. 79 of the CISG, wherein the cost is disproportionate to the benefit of the performance.

**(ii) *Even if Article 79 of the CISG does not explicitly cover a situation of 'Hardship', it should be interpreted in accordance with Article 7 of the CISG***

122. Pursuant to Art. 7(2) of the CISG, a gap in the Convention exists if a particular issue falls within the material scope of the CISG without being expressly addressed [*Petshce, p. 151*]. The CISG provides two methods of filling any possible gaps. The first method requires that it be filled in conformity with the general principles upon which the CISG is based [*Petsche, p. 151; Schwenzer, p. 132; Fletchner, p. 9*]. In the absence of such principles, the gap should be filled in conformity with the law applicable by virtue of the rules of private international law [*Art. 7(2) of the CISG*]. In instances where the methods mentioned are not applicable, the last resort would be by filling the gaps with the application of domestic law [*Klepac, p. 28; Schwenzer, p. 132*].

123. 'Hardship' falls within the material scope of Art. 79 of the CISG, but is not expressly addressed therein, which constitutes as a gap in the CISG [*Petshce, p. 151*]. External sources can be used to discover the general principles on which the CISG is based [*Kotrusz, p. 27*]. The general principle referred to are found in the UNIDROIT Principles, which expressly regulates 'Hardship' [*Scafom International v. Lorraine Tubes SA; Petsche, p. 153; Klepac, p. 34*]. In cases where the law determined as applicable would be a uniform legal instrument, the applicable law determined by rules of private international law would ensure uniform application of the Convention [*Kotrusz, p. 33*]. The general principles here coincidentally also represent the domestic law of Mediterraneo, which adopts the UNIDROIT Principles as its general contract law [*PO1, p. 53, para. 4*].

124. Hence, even if the Tribunal does not consider 'Hardship' as falling within the scope of Art. 79 of the CISG, 'Hardship' may still be governed by the CISG through Art. 7(2) of the CISG.

## III. CLAIMANT may ask the Tribunal to adapt the contract as a remedy under Article 79 of the CISG

125. After being led to understand that RESPONDENT would renegotiate, CLAIMANT attempted to renegotiate the contract [*Ex. C8, p. 18*]. However, RESPONDENT terminated the contract instead [*Ex. C8, p. 18*]. Due to the failure of renegotiation, CLAIMANT requests a remedy under Art. 79 of the CISG. Even if Art. 79 of the CISG does not govern a price adaptation as remedy, the remedy set out in Art. 6.2.3 of the UNIDROIT Principles is applicable through a gap filling method.

### (i) *The applicable remedy under Article 79 of the CISG is not exhaustively set out*

126. Art. 79(5) of the CISG states *"nothing in this article prevents either party from exercising any rights other than to claim damages under this Convention."*

127. On its wording, it is clear that the remedies provided under Art. 79 of the CISG is not exhaustive because it does not prevent a party from seeking to enforce any rights other than claiming damages. As such, an adaptation of the contract by the Tribunal may be requested by CLAIMANT as a remedy for 'Hardship' under the CISG.

**(ii) *The remedies in the case of 'Hardship' may be drawn from the principles set out under Article 6.2.3 of the UNIDROIT Principles***

128. Similar to the point made above, in the event that there is a gap in a CISG provision, under Art. 7(2) of the CISG such gap can be filled by reference to the general principles underlying the CISG or the relevant domestic law [*CLA Memo, p. 30, para. 123*].

129. Accordingly, in the event that Art. 79 of the CISG does not expressly elaborate any particular remedy other than damages which a party may claim, a party may claim a remedy as set out under Art. 6.2.3 of the UNIDROIT Principles. In the event of 'Hardship', the disadvantaged party is entitled to request renegotiations and the parties are subject to a duty to cooperate [*Off Cmt 1 to Art. 6.2.3 of the UNIDROIT Principles*]. In requesting renegotiations, the disadvantaged party is advised to request it at the earliest possible opportunity [*Off Cmt 2 to Art. 6.2.3 of the UNIDROIT Principles*]. Price adaptation of the contract should be adopted with a view to restoring its equilibrium [*Fucci, p. 43*]. Thus, the Tribunal will have to consider the extent to which one of the parties has taken a risk, as well as the extent to which the party entitled to receive performance may still benefit from that performance [*Fucci, p. 43*].

130. Immediately after the 'Hardship' situation was known to CLAIMANT, CLAIMANT tried to approach RESPONDENT through a call and left a voicemail, but both attempts were unsuccessful [*Ex. C7, p. 16*]. CLAIMANT emailed RESPONDENT, attempting to discuss the renegotiation [*Ex. C7, p. 16*]. Mr. Shoemaker left the impression that a negotiation would occur, and also expressed to CLAIMANT's representative the urgency of the shipment. In good faith, CLAIMANT sent the third shipment while anticipating for a renegotiation of the terms [*Ex. C8, p. 17*]. Following this, a meeting was held to discuss both the renegotiation and resale of the semen. RESPONDENT's CEO, Kayla Espinoza, however unilaterally terminated the contract with the reason that she was *"fed up with the permanent additional requests from Phar Lap which had no basis in the contract*" [*Ex. C8, p. 18*]. Due to the failure of renegotiation, CLAIMANT requests the Tribunal to adapt the price in the contract as a remedy.

131. Since the very beginning, RESPONDENT requested 100 doses of frozen horse semen as it was then anticipated that the lifting of the ban was only temporary [*NoA, p. 5, para. 6*]. At first, CLAIMANT was hesitant to sell such large amount of doses to a single breeder. On the understanding that RESPONDENT was interested in a long-term relationship between them, CLAIMANT agreed nevertheless [*Ex. C2, p. 10*]. However, CLAIMANT expressly

wanted to be informed about the use of every dose and noted that the goods should not be sold to a third party without CLAIMANT's written consent [*Ex. C2, p. 10*]. RESPONDENT disregarded this understanding and proceeded to sell 15 doses to their own client, unbeknownst to CLAIMANT, with an added increase of 20% in price [*NoA, p. 8, para. 20*]. Furthermore, CLAIMANT wanted the goods to be picked up at their premises [*Ex. C2, p. 10*], but RESPONDENT insisted on a Delivery DDP terms [*Ex. C3, p. 11*]. Once again, CLAIMANT agreed to RESPONDENT's demands [*Ex. C4, p. 12*].

132. The facts above clearly show that CLAIMANT has always compromised and acted reasonably throughout this transaction, but CLAIMANT had always been clear that they do not bear the risk for 'Hardship' events and hence it is only fair for RESPONDENT to bear the additional costs of US$ 1,250,000. Furthermore, it would not result in a financial difficulty for RESPONDENT if it bears the US$ 1,250,000. On the contrary, if that financial burden goes to CLAIMANT, it is likely that CLAIMANT will go into bankruptcy [*PO2, p. 59, para. 29*].

133. In conclusion, price adaptation as the remedy pursuant to Art. 6.2.3 of the UNIDROIT Principles is applicable in the present Case, wherein CLAIMANT is entitled to a payment of US$ 1,250,000.

**REQUEST FOR RELIEF**

134. In light of the above submissions, CLAIMANT respectfully requests that the Arbitral Tribunal finds that:

a) The Tribunal should have the jurisdiction and/or the powers under the arbitration clause to adapt the contract, which includes in particular the question of Mediterranean law to govern the arbitration clause and its interpretation.

b) CLAIMANT is entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that the evidence has been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT's Computer System.

c) The Arbitral Tribunal should decide to adapt the contract under Clause 12 of the Sales Agreement and under the CISG.

135. Respectfully submitted by counsels on Thursday, 6 December 2018

On behalf of **PHAR LAP ALLEVAMENTO**

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JASON EDGAR SHERLY