XVI ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT HONG KONG

YONSEI UNIVERSITY

MEMORANDUM FOR CLAIMANT

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

COUNSEL

Dongwook Kim • Sun Kim • Hyojung Roh • Sung Hyun Park • Shihoon Lee • Jin Hwan Jung • So Yeun Cho • Yeseul Han

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LIST OF ABBREVIATIONS

¶/¶¶	Paragraph/paragraphs of the Memorandum
Art. / Arts.	Article / Articles
CE	Claimant's Exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	*Exempli gratia*; for example
i.e.	*id est*; that is
Lex arbitri	The governing law applicable to the arbitration
PO	Procedural Order
Para.	paragraph
Parties	Phar Lap Allevamento and Black Beauty Equestrian
Problem	26th Annual Willem C. Vis International Commercial Arbitration Moot Problem
RE	Respondent's Exhibit
Tribunal	Arbitrators consisting of Ms. Wantha Davis, Dr. Francesca Dettorie, and Prof. Calvin de Souza for this arbitration
Arbitration Agreement	The arbitration agreement between Phar Lap Allevamento and Black Beauty Equestrian, signed on 6 May 2017 (included in Art. 15 of the Contract)
Contract	The Sales Agreement between Phar Lap Allevamento and Black Beauty Equestrian, signed on 6 May 2017

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STATEMENT OF FACTS

1. Phar Lap Allevamento (hereinafter: CLAIMANT) is the most renowned stud farm in Capital City, Mediterraneo covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot. It additionally offers frozen semen of its champion stallions for artificial insemination. Due to a unique storage technique of CLAIMANT, the semen is long-living and of superior quality.

2. CLAIMANT is particularly known for its breeding success regarding racehorses. Among them, Nijinsky III, as one of the most successful racehorses that also has successfully sired a number of up-and-coming racehorses, is one of the most sought-after stallions for breeding.

3. Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, (hereinafter: RESPONDENT) is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. Three years ago, RESPONDENT decided to establish a racehorse stable.

4. RESPONDENT contacted CLAIMANT on 21 March 2017, asking for the availability of Nijinsky III, particularly its frozen semen, for their new breeding programme [*CE1*]. This was in light of a temporary lift on artificial insemination for racehorses in Equatoriana. While the permission was temporary until the end of December 2018, RESPONDENT was confident that the lift will become permanent [*CE1*], and requested 100 doses of frozen semen.

5. CLAIMANT received explanation that the high number of doses requested was because under the relevant Equatorianian law all doses acquired during the lifting of the ban could be used. Although surprised at the sort and size of RESPONDENT's request, CLAIMANT did not question that information at the time, since it was a good opportunity to increase their revenues without any major additional risk.

6. CLAIMANT considered their interests sufficiently protected by the consent requirement in the contract for any other use of Nijinsky III's semen. Therefore, the risk of the usability of the semen would lie with RESPONDENT. CLAIMANT only later learned that RESPONDENT's investors were one of the biggest advocators of a permanent lift on artificial insemination for racehorses; and probably from the beginning had the intention to resell some doses, hoping to induce additional breeders to fight for the lift.

7. With email of 24 March 2017 CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in several installments, clearly prohibiting its resell to third parties without CLAIMANT's express consent [*CE2*]. RESPONDENT had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP [*CE3*].

8. Due to past experiences with extremely expensive tests due to changes in unforeseeable customs health requirements CLAIMANT was only willing to accept a delivery DDP with a moderate price increase, the transfer of certain risks to RESPONDENT and the inclusion of a hardship clause; to temper some of the additional risks including those associated with customs regulation or import restriction changes [*CE4*].

8. In the end, CLAIMANT and RESPONDENT agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving on 12 April 2017. They had to be replaced for the finalization of the contract which was signed on 6 May 2017 [*CE5*].

9. The Parties had agreed on three shipments [*CE5*]. RESPONDENT sent the first shipment of 25 doses on 20 May 2017; the second shipment of 25 doses on 3 October 2017. Two months before the last shipment of 50 doses, Mediterraneo's newly elected President announced 25 per cent tariffs on agricultural products from Equatoriana. This sudden measure came as a complete surprise as a 25 per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto.

10. Even more surprising was the reaction of the Equatorianian government, which has always been an ardent supporter of free trade and tried to resolve trade disputes amicably [*CE6*]. In the present case, however, the Equatorianian government retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo including on animal semen [*CE6*].

11. CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the tariff schedule as generally, racehorse breeding is categorized differently from pigs, sheep, or cattle.

12. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen [*CE7*]. RESPONDENT had made clear already during the contract negotiation that for its planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase, showing certainty on a solution to be found via negotiations, while emphasizing their interest in a long-term relationship and interest in future business with CLAIMANT's second stallion [*CE8*].

13. In light of the above facts and taking into account that RESPONDENT had created the impression of accepting the general need for a price adaptation, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

14. However, RESPONDENT unilaterally terminated further negotiations and failed to show cooperation. On a meeting of 12 February 2018, when RESPONDENT's CEO was confronted with the due price negotiations and also CLAIMANT's discovery that RESPONDENT was actually breaching the resale prohibition [*CE8*], RESPONDENT's CEO became extremely aggressive, refused any additional negotiations with CLAIMANT,

including the payment of additional amount of tariffs [*CE8*]. Resultantly, CLAIMANT suffers from a loss of 25 percent due to the imposition of the new tariff.

ARGUMENTS

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

I. THE ARBITRATION CLAUSE AND ITS INTERPRETATION ARE GOVERNED BY THE LAW OF MEDITERRANEO

1. RESPONDENT alleges that the Arbitral Tribunal lacks jurisdiction to decide this case on the grounds that RESPONDENT never agreed to have the arbitration agreement governed by the law of Mediterraneo, the governing law of the Sales Agreement. However, the Tribunal has the jurisdiction for the claim raised, for CLAIMANT expressed its intention to have the arbitration clause governed by the law of contract, to which RESPONDENT made no clear objection, thereby making the law of Mediterraneo the parties' choice of law (**1**). Furthermore, even if there was an incomplete takeover of the negotiations by RESPONDENT's successive negotiator after the car accident, the incomplete understanding is to be attributed to RESPONDENT's negligence, and thus does not affect the validity of the arbitration agreement (**2**).

1. CLAIMANT expressed its intention to have the arbitration clause governed by the governing law of the Sales Agreement, to which RESPONDENT made no clear objection

2. It is a clearly affirmed principle that the parties' choice of law based upon their freedom of contract is to be given the foremost consideration in determining the applicable law to the arbitration agreement [*Rubino-Sammartano, p. 323*]. Evidenced by the e-mail correspondence between the Parties in *RE1* and *RE2*, CLAIMANT expressed on 11 April 2017 its intention to have the arbitration clause governed by the law of Mediterraneo [*RE2*], clearly objecting to the first draft of the arbitration clause whereby RESPONDENT suggested the law of Equatoriana as the governing law of the arbitration clause [*RE1*]. RESPONDENT made no clear objection to CLAIMANT's new suggestion and thereafter signed the contract on 6 May 2017 by and between the

Parties [*CE5*]. The legal act of RESPONDENT is interpreted as implied consent to the offer of CLAIMANT.

2. Even if the failure to object to CLAIMANT's suggestion was due to an incomplete takeover of the negotiations by RESPONDENT's successive negotiator after the car accident, the validity of the arbitration agreement holds

3. RESPONDENT argues that there was not enough time for Julian Krone, the successor of the initial negotiator representing RESPONDENT, to clearly understand the issues that the initial negotiator had planned to address in the final contract. Contrary to this claim, it is reasonable to infer that the successive negotiator had plenty of time and the means to comprehend the intent of the initial negotiator. RESPONDENT's incomplete understanding of the arbitration agreement is attributed to its negligence, and thus has no effect on the validity of the arbitration agreement.

4. First, the takeover period lasted almost three weeks, since the date of the car accident was 12 April 2017 [*CE8*], whilst the final Sales Agreement was signed on 6 May 2017 [*CE5*]. Second, Mr. Antley, the predecessor of Julian Krone, had left notes regarding the issues that were left to be addressed after each round of negotiations [*RE3*]. It is clearly stated in the notes prepared after the meeting on 12 April that the "*neutral venue*" and "*applicable law*" should be clarified in the "*arbitration clause*" [*RE3*]. It is only reasonable here to interpret the words of Mr. Antley as referring to the law applicable to the arbitration, not the contract, since the note refers to the arbitration clause, not the entire Sales Agreement.

II. CONTRARY TO THE ALLEGATIONS OF RESPONDENT, THE LAW OF MEDITERRANEO IS APPLIED UNDER THE DOCTRINE OF SEPARABILITY

1. Even if there is no agreement on the choice of law applicable to the arbitration clause between parties, CLAIMANT's claim is also supported by the doctrine of separability

5. Even if a choice of law applicable to the arbitration clause does not exist, which is not the case, it is consistent with the doctrine of separability to apply the same law to the arbitration clause as well as the main contract. RESPONDENT has argued that the law applicable to the main contract, the "*Sales Agreement*," does not refer to the arbitration clause and cannot be interpreted as an implicit choice for the arbitration clause under the doctrine of separability. However, even under the doctrine of separability, the law applicable to the arbitration agreement can be that of the main contract, for the purpose of the doctrine of separability is to facilitate arbitration, not to shun it (A). Moreover, the doctrine of separability does not mean that the contract and the arbitration clause therein have to be governed by different laws (B).

A. The purpose of the doctrine of separability is to facilitate arbitration as dispute resolution, not to shun it

6. The purpose of the doctrine of separability is to facilitate arbitration as dispute resolution. The doctrine originated from "*the intentions of rational commercial parties seeking good faith resolution of possible future international disputes*" [*Born, p. 399*]. That is, the doctrine is justified by, and intends to uphold the reasonable expectation of the parties to settle disputes under arbitration procedure. Thus, by enabling the arbitration clause to be governed by a different law to the governing law of the main contract, "*national and international tribunals have sought to safeguard international arbitration agreement against challenges to their validity based on local law*" [*Born, p. 476*].

7. The arbitration law of Mediterraneo provides for a broad interpretation of arbitration agreements, thereby facilitating arbitration to resolve dispute between parties. However, RESPONDENT refers to the doctrine of separability to shun the use of arbitration – through invoking Danubian law by which arbitration agreements are interpreted narrowly, which might lead to denying the jurisdiction of the Arbitral Tribunal. Thus, it is such RESPONDENT's allegations, not those of CLAIMANT, which contradicts with the fundamental intention of the doctrine.

B. The doctrine of separability does not mean that the arbitration clause and the main contract must be governed by different laws

8. The doctrine of separability does not mean that the arbitration clause and the main contract must be governed by different laws. Rather, it simply indicates that it is possible to be governed by different proper laws. In many cases, both the arbitration agreement and the main contract are governed by the same law notwithstanding the separability assumption [*ICC Award No. 6850, 6752, 6379*]. Hence, the doctrine of separability does not necessarily lead to the conclusion that the law applied to the main contract is excluded from that which is applied to the arbitration clause.

9. According to some French precedents, there is even a presumption that the law governing the contract is identical to that governing the arbitration clause [*Rubino-Sammartano, p. 326*]. In the same manner, according to the English High Court in Svenska: "*In the absence of exceptional circumstances, the applicable law of an arbitration agreement is the same as the law governing the contract of which its forms a part*" [*UK High Court Case, 2005*].

2. The law governing the arbitration clause is not necessarily the law applicable to the seat of arbitration

10. RESPONDENT argues that the law governing the arbitration agreement is that of Danubia, the place of arbitration. However, the law that governs the arbitration clause is not necessarily the law applicable to the seat of arbitration, as there are competing approaches to the choice of the law governing the arbitration clause in the absence of explicit agreement by parties. Applying the law of arbitral seat to the arbitration clause is merely one of many existing criteria. This approach in the absence of the parties' choice is analytically unsatisfactory **(A)**. Furthermore, the approach to applying the law governing the main contract to the arbitration clause has been valid in many cases where the main contract contains a choice of law clause **(B)**.

A. Rationale for applying the substantive law of arbitral seat to the arbitration agreement is analytically unsatisfactory

11. National court decisions [*Rotterdam ADR, 1995*] and arbitral awards [*ICC Award No. 7373*] that embraced this standard reasoned that by choosing the seating, "*the parties impliedly agreed that the arbitral clause should be governed by the law of the seat*" [*Born, p. 511*]. Other authorities and the New York Convention reasoned that arbitral agreements are subject to the law of the arbitral seat because of its procedural nature [*ICC Award No. 5832*]. However, the reasoning of the decisions and arbitral awards is analytically unsatisfactory, as criticized by authorities such as *Born*. It "*ignored the contractual character of arbitral agreements*" since there are particular cases where the arbitral agreement is integrally related to the underlying contract. This also "*mistakenly conflated the law governing the arbitral agreement with the law governing the arbitral proceedings*" [*Born, p. 517*].

B. The lack of a specific reference to the governing law of the arbitration agreement does not necessarily imply that the law of the arbitral seat governs the arbitration agreement

12. Contrary to RESPONDENT's argument, the law of the arbitral seat is not undoubtedly the governing law of the arbitration agreement. In practice, parties seldom specify the law applicable to the arbitration agreement, except in relatively rare cases with contracts involving large, highly complex transactions. Where parties do not specify the governing law of the arbitration agreement, "*international commercial contract generally contains choice-of-law clauses which apply to the underlying contract generally, without specific reference to the arbitration clause associated with that contract*" [*Born, p. 491*].

13. Applying the substantive law specified in the choice of law clause to the contract "*generally*" (to both the main agreement and the arbitration agreement) is the more valid approach than applying the law of the arbitral seat to the arbitration agreement. The former approach is frequently observed in cases where the underlying contract contains a choice of law clause [*Born, p. 515*]. This was repeatedly adopted in English Judicial decisions [*UK High Court Case, 2005*]. Other national courts in both civil and common law also reached similar conclusions [*OLG Hamburg, 2003; C Cas, 2000*], as well as a number of arbitral awards in cases where the underlying contract contained a

choice of law clause [*ICC Award No. 1869, 10044, 6752*]. Since the Sales Agreement between CLAIMANT and RESPONDENT contains such choice of law clause in clause 14, this approach is the most appropriate one.

3. Even if the intention of parties, agreeing for arbitration in a neutral country, can be interpreted as selecting the law of arbitral seat, the closest connection rule and *favor negotti* rule are widely accepted

14. There is a view that the intention of parties agreeing for arbitration in a neutral country, Danubia in this case, can be interpreted as selecting the law of arbitral seat due to its neutrality. However, in such cases, "*most significant relationship*" and "*closest connection*" standard is looked upon by a number of authorities [*Hague Gerechtshof, 1993; UK High Court Case, 1999*]. In the present case, the arbitration law of Mediterraneo is more closely related with the arbitration agreement between CLAIMANT and RESPONDENT than the law of Danubia.

15. In a case concerning a commercial dispute between a Swiss and an Arab company, whose seat of arbitration was Vienna, it was stated that *"It is also a widely accepted general principle that, of two legal solutions, the judge must choose the one in favour of the validity of the contract (favor negotii)"* [*ICC Award No. 4145*]. Applying the *favor negotii* rule, the law of the Mediterraneo is preferable to that of Danubia, for arbitration agreements are interpreted narrowly under the latter, which is highly likely to deny the jurisdiction of the Arbitral Tribunal.

16. Furthermore, according to Art. V, 1 lit. (a) New York Convention, "*recognition and enforcement of the award may be refused if the arbitration agreement is not valid under the law chosen by the parties or, failing any indication therein, under the law of the country where the award was made*" [*Rubino-Sammartano, p. 346*]. The article also indicates that the recognition and enforcement of the award depends on the validity of the arbitration agreement. Consequently, the law of Mediterraneo is proper as opposed to that of Danubia in order to achieve arbitration.

III. THE TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. The Parties have agreed to empower the arbitrators to adapt the contract

17. The parties have agreed to empower the arbitrators to adapt the contract. In cases where the parties agree to authorize the arbitrators to adapt a contract, the arbitrators can decide on adaptation claims raised by a party.

18. It is a generally accepted position by various commentators and case-laws that an arbitral tribunal has jurisdiction and powers for contract adaptation when the parties confer them the power to adapt the contract [*ICC Award No. 5754; Lew, p. 170*]. In such case, "pacta sunt servanda *would not speak against but in favor of arbitrators' competence*" [*Berger, Arb. Intl., p. 5*].

19. In the present case, RESPONDENT explicitly stated its intention that "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree*" [*CE8*]. CLAIMANT explicitly agreed with RESPONDENT's comment, thereby reaching an agreement to empower the arbitral tribunal to decide on the adaptation issue arising out of the Contract. Although such agreement was not written in the adaptation clause or the arbitration agreement due to their replacement following the unfortunate car accident, facts still stand that there has been a clear agreement between the parties to confer the power to the Tribunal to adapt the contract.

20. Given the explicit agreement between the Parties, this Tribunal has jurisdiction and power to decide on the adaptation claim arising out of the contract.

2. The law of Mediterraneo provides for the tribunal to adapt the contract

21. Assuming *arguendo* that there has been no clear agreement between the Parties to authorize the Tribunal to decide on the adaptation claim, the Tribunal still has jurisdiction and power to decide on the claim. First, the Arbitration Agreement incorporates the adaptation claim **(A)**. Second, even in the case that the Tribunal finds

unclear whether the arbitration agreement is interpreted to govern the adaptation claim, the *lex arbitri* – the arbitration law of Mediterraneo – empowers the arbitrators to adapt the contract at any rate **(B)**. Even in the case that the interpretation of the arbitration agreement and the *lex arbitri* do not provide a clear answer as to whether the Tribunal can adapt the contract, the *lex causae,* i.e., the contract law of Mediterraneo, confers the Tribunal jurisdiction and power to adapt the contract **(C)**.

A. The arbitration agreement includes adaptation claim to be adjudicated by the tribunal

22. As aforementioned, the arbitration agreement shall be interpreted according to the law of Mediterraneo. When interpreting the arbitration agreement based on the law of Mediterraneo, the arbitration agreement clearly authorizes contract adaptation by the Tribunal. The contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles. Art. 4.1 UNIDROIT Principles provides interpretation rules so that "*a contract shall be interpreted according to the common intention of the parties [Art. 4.1. UNIDROIT Principles]*." When determining the common intention of the parties, "*regard shall be had to all the circumstances*," including "*preliminary negotiations between the parties*" and "*the conduct of the parties subsequent to the conclusion of the contract*." Various case-laws based on the UNIDROIT Principles have incorporated a substantial amount of factual material to assist the interpretation of a contract, particularly incorporating evidence of pre-contractual negotiations. [*UK High Court Case 2005; UK Court of Appeal Case*] As aforementioned, the parties have made explicit pre-contractual negotiations to confer power to the Tribunal to decide on contract adaptation.

23. Furthermore, there is a trend in international arbitration to broadly interpret the term 'dispute' to include "*differences of opinion*" or "*a disagreement on a point of law or fact, a conflict of legal views or interests between two persons*" [*Berger, Vand. J. Transnat'l, p. 1376; 1925 PCIJ No. 5*]. According to this understanding of the term 'dispute', the Tribunal has the jurisdiction and power to adapt the contract, because arbitrators adapting a contract in a situation of hardship is essentially the same as arbitrators resolving a 'dispute,' i.e. *a disagreement on interests between two persons.*

24. Thus, in light of the interpretation according to Art.4 UNIDROIT Principles and the growing trend in international arbitration to interpret the term ‘dispute’ broadly, the arbitration agreement confers jurisdiction and power on the Tribunal to adapt the contract.

B. Even in the case that the Tribunal finds the arbitration agreement unclear in its scope, the arbitration law of Mediterraneo allows the Tribunal to adapt the contract at any rate

25. The arbitration law of Mediterraneo allows the arbitrators to adapt the contract, even in a hypothetical scenario where the arbitration agreement is unclear whether it grants power for an arbitral tribunal to decide on the adaptation claim.

26. In the hypothetical scenario as mentioned above, it is advised to refer simultaneously to other legal sources: the law applicable to the arbitration – lex arbitri (B) – and the law applicable to the substance of the dispute, lex causae (C) [Berger, Arb. Intl., p. 7-8]. In other words, the power of an arbitral tribunal to adjust a contract can be determined according to lex arbitri.

27. Such position is not only supported by the authorities such as Berger but also accepted by case-laws including the Swiss Supreme Court. The court ruled that an arbitral tribunal has power to fill a gap in the disputed contract less an explicit authorization from the parties, as long as the lex arbitri grants the arbitral tribunal to fill the gaps [N.V. Distrigas Case].

28. In the present case, the arbitration law of Mediterraneo is largely a verbatim adoption of UNCITRAL Model Law [PO2]. Art. 7(1) UNCITRAL Model Law confers on an arbitral tribunal jurisdiction to decide a ‘dispute.’ It is a shared jurisprudence that the word ‘dispute’ should denote an all-embracing jurisdiction, including the power to fill gaps and amend the contract [N.V. Distrigas Case; Berger, Arb. Intl., p. 2-3]. A few scholars have argued that a dispute only indicates a ‘yes or no’ decision in light of a party’s non-performance. However, it is ungrounded and counterintuitive to restrict the scope of ‘dispute’ to such narrow circumstances.

29. Thus, given that the arbitration law of Mediterraneo empowers the Tribunal to adapt the contract, the Tribunal undoubtedly has jurisdiction and power to decide on the adaptation claim raised by CLAIMANT.

C. Assuming *arguendo* that the arbitration law of Mediterraneo is ambiguous as to whether the Tribunal can adapt the contract, the lex causae, the contract law of Mediterraneo, grants the Tribunal power to adapt the contract

30. Even in the case that the arbitration law of Mediterraneo is ambiguous as to whether the Tribunal can adapt the contract, the *lex causae*, i.e., the contract law of Mediterraneo, grants the arbitrators to adapt the contract.

31. It is a widely accepted jurisprudence that when an arbitration agreement or the *lex arbitri* is silent on whether arbitral tribunals are authorized to adapt contracts, the *lex causae*, i.e., the law applicable to the substance of the dispute, may deal with the issue of contract adaptation [*Berger, Arb. Intl., p. 7-8*]. More specifically, if the substantive law grants possibility of a contract adaptation, then an arbitral tribunal should have power to adapt the contract. This principle stems from '*the principle of synchronized competences*.' If the state courts are given the power to adapt a contract pursuant to the substantive law, then an arbitral tribunal should be given the same power, as it should not be treated differently [*Berger, Vand. J. Transnat'l, 1375; Brower, p. 18*].

32. In the present case, the *lex causae*, the contract law of Mediterraneo explicitly provides for the possibility of contract adaptation in its Art. 6.2.3. In case of hardship, upon failure to reach agreement within a reasonable time either party may resort to the court, and the court can adapt the contract with a view to restoring its equilibrium [*Art. 6.2.3.(4) lit. (b).*] Thus, provided that the state court is authorized to adapt the contract, the Tribunal in the present case should also be authorized to adapt it.

3. The Tribunal has jurisdiction and power under the arbitration agreement to adapt the contract even in the case that Danubian Law is applied

33. Even in the most unlikely circumstance that Danubian law is applied, the Tribunal, nevertheless, has jurisdiction and power under the arbitration agreement to adapt the

contract.

34. It is worth reiterating that the Parties have explicitly agreed that it is "*the task of the arbitrators to adapt the contract*" in the case of disagreement [*CE8*]. This implied agreement is not excluded by the 'four corner rule' specified in Art. 4.3. of the Danubian Contract Law, for the implied agreement does not contradict with the terms of the arbitration agreement. Arbitration clauses providing for arbitration of "*any*" dispute "*arising out of*" a contract are usually interpreted very broadly, and there is a trend in contemporary decisions in favor of a liberal interpretation in accordance with the pro-arbitration rule of interpretation [*Born, p. 1354*]. In light of such tendencies, the adaptation claim based on clause 12 of the Sales Agreement undoubtedly falls under the scope of 'dispute arising out of this contract' in the arbitration agreement.

35. In conclusion, the Tribunal has jurisdiction and power to adapt the contract in light of the Parties' mutual agreement, the terms of the arbitration agreement, and the stances of *lex arbitri* and *lex causae*. RESPONDENT's allegation to deny the jurisdiction and power of the Tribunal to adapt the contract is merely a litigation strategy; evasive of the Parties' responsibilities to adapt the contract pursuant to the mutually agreed hardship clause.

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ISSUE 2: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

IV. CLAIMANT'S DOCUMENTS SHOULD NOT BE EXCLUDED ON THE GROUNDS OF BEING ILLEGALLY COLLECTED EVIDENCE

36. A distinction must be made between illegally collected evidence that exists only because it was collected illegally, such as illegal photographs or audio/video records of conversations, etc., and illegally collected evidence that already existed prior to collection; for example, documents that remained confidential and unreleased to the

public.

37. The Exclusionary Rule that rules out the use of illegally collected evidence was by principle designed to protect people against illegal procedures carried out by the police, the prosecution, and other investigative branches of the government. Thus, by the principle of party autonomy, private parties are free to collect whatever information they find beneficial to their case and the Exclusionary Rule should not apply. However, more recently, the Exclusionary Rule has been expanded into the private realm, ultimately to the field of international arbitration, and was put at the centre of attention in the wake of Wikileaks [*Blair, p. 236*].

38. The IBA Rules have articles on the acceptability of evidence. However, the IBA Rules do not apply to this case; they are by nature a suggestion provided by the IBA. The IBA Rules themselves provide in their 'Foreword' that "*if the parties wish to adopt the IBA Rules in their arbitration clause it is recommended that [it should be made clear in text]*." In comparison, the LCIA Rules and the UNCITRAL Model Law have far broader and permissive admissibility standards and leave the issue of taking of evidence to the tribunal.

39. In this case CLAIMANT first attempted to obtain evidence via Mr. Velazquez, but when that attempt failed, contacted a third-party company with the intention of purchasing a copy of the Partial Interim Award. While it is true that the third-party company is of ill repute, especially regarding the source of its information, this is insufficient ground to argue that the copy was obtained illegally. The burden of proof lies with RESPONDENT to show that this information was obtained through illegal means.

1. Even if it were the case that previous employees of RESPONDENT were in breach of a confidentiality agreement, this alone is insufficient to deem the evidence illegal

40. Because CLAIMANT was not part of the previous arbitration nor had any connection to the employees in question, neither the confidentiality agreement concerning RESPONDENT's arbitration nor the confidentiality agreement between

RESPONDENT and its previous employees apply to CLAIMANT. Art. 42 HKIAC rules and Art. 7 (Exceptions to Transparency) UNCITRAL Transparency Rules refer only to the confidentiality obligations of the parties involved in the arbitration and are thus irrelevant to the current issue. CLAIMANT's submission of the said documents is not a violation of any confidentiality agreement and cannot be considered an act of bad faith.

41. Unless the third-party company knowingly persuaded, coerced or otherwise interfered with the confidentiality agreement between RESPONDENT and RESPONDENT's former employees, while the former employees could be found in violation of their contract, there exists no grounds for the said documents to be illegal. Even if that were the case, the third-party company's actions would simply amount to tortious interference, which is not the same as illegality in criminal procedures, the basis upon which the Exclusionary Rule is founded.

42. In accordance with the "*Clean Hands*" doctrine, because CLAIMANT was not directly engaged in the act of obtaining the said documents through a breach of confidentiality, it would be an obstruction of justice to deny admissibility of the evidence. Even in criminal procedures there exists an exception of good faith which allows even unlawfully collected evidence to be used if its illegality was not caused on the part of the police or the prosecution [*Blair, 2017 Bergsten Lecture*].

2. The exclusionary rule should not apply even if there is evidence of an illegal hack

43. Even if it can be proved that there was an illegal hack of RESPONDENT's computer system, this is not a reason for the documents to be deemed inadmissible as evidence. Adhering to the "*Clean Hands*" doctrine, CLAIMANT was not directly acting unethically or in bad faith, so the documents should not be excluded.

44. In the *Methanex v. the United States of America Case*, Claimant, Methanex, trespassed into the office of the head of a lobbying organization and searched through internal trashcans and dumpsters, and in doing so obtained personal notes, private correspondence and material regarding the case. The Tribunal ruled that because both parties owed each other and the Tribunal a duty to act in good faith and adhere to the

principles of equal treatment and procedural fairness imposed by the UNCITRAL Rules, Methanex had violated these standards and thus the evidence collected unlawfully could not be accepted. However, CLAIMANT did not directly collect any illegal evidence and did not partake in any illegal activity, so the basis on which the *Methanex Case* decided to exclude evidence is absent in the present case. In another case, the Tribunal set forth a standard that illegally accepted evidence would be excluded if the presenter of the said evidence had been directly involved in the illegal activity [*ICSID Case No. ARB/06/8*].

45. In a separate case, the Tribunal ruled that leaked emails and documents could in principle be admitted as evidence as long as the weight of interests being in favor of admitting the evidence exceeded the weight of denying its submission – taking into account factors including fairness and equality between the parties, the extent to which the information was known to the public domain, and the deterrence of cyber-crime [*ICSID Case No. ARB/13/13*]. In the present case, CLAIMANT was already aware of the previous arbitration via Mr. Velazquez. He has not been involved in the arbitration as such but knew the main issues in dispute, i.e. that due to the tariffs imposed, RESPONDENT was only willing to deliver the mare if the price has been increased to reflect the tariff. This highly suggests that the information was already available to the public, meaning that regardless of what source the information was obtained from, it should be acceptable to the Tribunal.

46. It is clear that the exclusion of illegal evidence must be applied in a less stringent manner in matters of private law as compared to criminal law. Even in criminal law there exist certain exceptions of the Exclusionary Rule; for example, as held in the *Nix v. Williams Case* [467 U.S. 431], if evidence obtained unlawfully would have been found eventually even without unlawful methods, that evidence should be accepted in court, in accordance with the concept of inevitable discovery. In the current case, even if the Interim Award were obtained through an illegal hack, the existence of such an award was already available to certain members of the breeding society, and as aforementioned CLAIMANT was not directly involved in any illegal activity, making it a travesty of justice to deny the admissibility of the evidence.

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ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD RESULTING FROM AN ADAPTATION OF THE PRICE

V. CLAUSE 12 OF THE SALES AGREEMENT ALLOWS FOR PRICE ADAPTATION BY THE ARBITRAL TRIBUNAL

1. Clause 12 of the Sales Agreement is applicable to the present hardship caused by the tariff imposition

A. The CISG governs the Sales Agreement and guides the interpretation of its terms

47. The CISG applies to the Sales Agreement. Art. 1(1) lit. (a) CISG stipulates that the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States. First, Mediterraneo and Equatoriana are undisputedly Contracting States of the CISG [*PO1, para. 53*]. Second, the Sales Agreement is a contract of sale of goods (i.e. frozen semen of Nijinsky III) between the Parties in terms of Art. 1(1) CISG.

48. Even if the applicability of Art. 1(1) lit. (a) CISG is disputed for any reason, the CISG is applicable since the Parties have expressly chosen the CISG as the governing law of the Sales Agreement and conversely have shown no clear intention to exclude the application of the CISG or derogate from any of its provisions. First, the principle of party autonomy as a main principle of the CISG grants the Parties the authority to "*choose the CISG as applicable law in the event that it is not otherwise applicable to the contract*" [*Gül, p. 81*]. The Parties expressly agreed in clause 14 of the Sales Agreement that the contract shall be governed by the law of Mediterraneo, including the CISG [*CE5*]. Second, parties may exclude the application of the CISG or derogate from any of its provisions pursuant to Art. 6 CISG by showing clear intent to do so [*AC Opinion No. 16 §3,4*]. In the present case there was evidently no such clear intention of the parties at the time of or after the conclusion of the contract. Thus, the CISG governs the Sales Agreement.

49. RESPONDENT alleges that clause 12 of the Sales Agreement is not applicable to the

present case because it is "*narrowly worded*" [*Problem, p. 32*]. Contrary to the allegation, an interpretation of clause 12 of the Sales Agreement guided by the CISG provides that the hardship clause is applicable to the impediment suffered by CLAIMANT due to the tariff imposition.

50. Extrinsic evidence such as oral statements or previous correspondence of the Parties is to be considered in interpreting the terms of the Sales Agreement. Under Art. 11 CISG, a contract of sale need not to be concluded in or evidenced by writing but may also be proved by any other means including witnesses. Art. 8(3) CISG further stipulates that due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties when determining party intent or a reasonable person's understanding of the contractual term in question. In line with Art. 8(3) CISG, most academics and court decisions hold that recourse to the *parol evidence rule*[1] or the *plain meaning rule*[2] is impermissible where the contract is governed by the CISG [*Huber/Mullis, p. 13-14; AC Opinion No.3 §1, 2*].

51. Parties may derogate from such norms of interpretation and evidence in the CISG only through an express agreement to exclude the use of extrinsic evidence.[3] Such an agreement is clearly absent in the present case. Thus, extrinsic evidence is to be considered to interpret the terms of the Sales Agreement in accordance with the norms in the CISG.

52. Art. 8 CISG guides the interpretation of the terms of the Sales Agreement. Whilst the wording of the provision only refers to the interpretation of the Parties' statements and conduct, the provision further applies to the interpretation of the contract to determine its content [*Huber/Mullis, p. 12; AC Opinion No.3 §1.1.1.*]. The Swiss Bundesgericht (Federal Supreme Court of Switzerland) showed this in practice by concurring with the

[1] A rule in several common law jurisdictions that prevents the use of extrinsic evidence to contradict the written agreement

[2] A US law doctrine which bars the use of extrinsic evidence to interpret terms found in the contract unless the term in question has first been deemed sufficiently ambiguous

[3] Such an agreement may take the form of a Merger Clause (also termed Entire Agreement Clause) [*AC Opinion No. 3 §3*]

decision made in the Court of First Instance wherein the parties' agreement on the content of the contract was assessed by interpreting the parties' statements under Art. 8(2) CISG [*Roland Schmidt GmbH Case*].[4] Likewise, the applicability of clause 12 of the Sales Agreement to the present case must be determined by assessing the parties' statements regarding the content of the clause during their negotiations.

B. Respondent knew or at least could not have been unaware that by including the hardship clause, CLAIMANT intended to avoid any risks associated with changes in delivery terms including tariff impositions

53. RESPONDENT knew that the hardship clause was included to exempt CLAIMANT from any risks associated with unanticipated changes in delivery terms, including any changes in customs regulation or import restrictions such as the tariff imposition in question. Under Art. 8(1) CISG, the statements or conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. In response to RESPONDENT's request for DDP delivery, CLAIMANT had clearly and specifically expressed its unwillingness to take over any risks associated with changes in the delivery terms, "*in particular not those associated with changes in customs regulation or import restrictions*" [*CE4*]. CLAIMANT insisted on a hardship clause to address such subsequent changes, resulting in the inclusion of clause 12 into the Sales Agreement [*CE4*].

54. The tariff imposition in question is undoubtedly an unanticipated change "*in customs regulation*". Although the term was not explicitly included into the written Sales Agreement, CLAIMANT had clearly intended for the hardship clause to cover "*changes in customs regulation or import restrictions*" as "*unforeseen events*" comparable to "*additional health and safety requirements*" [*CE5*]. Since the persons who finalized the

[4] As stipulated in the sales contract between the Parties, the [Seller] was required to guarantee all the qualities in the goods sold which the [Buyer] was entitled to expect. The Court of First Instance held that the [Buyer] was not entitled to expect that the acquired machine would be able to print a rapport length of 1018mm since the [Buyer] was an expert and knew that the machine offered was not new, but one which was built fourteen years ago and consequently did not conform to the latest technical expectations. Accordingly, the Court of First Instance held that the [Seller] was entitled to expect that the [Buyer] had concluded the contract in full knowledge of the technical possibilities of the machinery and its equipment. The Bundesgericht affirmed that this decision was undoubtedly compatible with Art. 8(2) CISG.

contract had access to the prior emails chain [*PO2, para. 5*], it is reasonable to infer that in drafting and signing the Sales Agreement, RESPONDENT knew or at least could not have been unaware of CLAIMANT's intent to cover tariff impositions with the hardship clause.

55. Since both Parties had been fully aware that the hardship clause was included to cover tariff impositions, clause 12 of the Sales Agreement is applicable to the present case.

C. A reasonable person of the same kind as RESPONDENT would expect clause 12 of the Sales Agreement to cover unanticipated tariff impositions as "*unforeseen events*"

56. Even if RESPONDENT denies that there was a "*subjective meeting of the minds*" upon the content of the hardship clause, Art. 8(2) CISG provides for an "*objective*" standard of interpretation [*Huber/Mullis, p. 12*]. Pursuant to Art. 8(2) CISG, in the case that the Parties' intent is indeterminable under Art. 8(1) CISG, the statements or conduct of the Parties are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. A reasonable person of the same kind as RESPONDENT would expect the hardship clause in the Sales Agreement to cover unanticipated tariff impositions as "*unforeseen events*" comparable to "*additional health and safety requirements*".

57. First, given CLAIMANT's clear intent to cover "*changes in customs regulation or import restrictions*" with clause 12 of the Sales Agreement, a reasonable person of the same kind as RESPONDENT would have expected the hardship clause to cover unanticipated tariff impositions such as the one in the present case, even though the term was not explicitly included into the written contract [*CE4*]. When drafting the written Sales Agreement, the Parties had no reason to believe that an explicit reference to "*changes in customs regulation or import restrictions*" in the hardship clause would be necessary, since no tariffs had been imposed on agricultural goods or horse semen in either Equatoriana or Mediterraneo until 2018 [*PO2, para. 25*]. Nevertheless, given CLAIMANT's express reference to its unwillingness to be burdened with any risks associated with changes in delivery terms, it is only reasonable to infer that clause 12 of

the Sales Agreement was included to cover unanticipated tariff impositions such as the one in the present case.

58. Second, a reasonable person of the same kind as RESPONDENT would expect the unanticipated tariff imposition in the present case to be interpreted as an "*unforeseen event*" comparable to "*additional health and safety requirements*" that CLAIMANT had explicitly referenced in its correspondence to RESPONDENT. CLAIMANT had specifically explained to RESPONDENT the hardship it had suffered in the past due to "*unforeseeable additional health and safety requirements*" which increased the cost of delivery by "*up to 40%*" and thereby destroying the commercial basis of the deal [*CE4*]. The hardship clause in the Sales Agreement was included to address any circumstance comparable to such unforeseeable changes in delivery terms [*CE4*].

59. The tariff imposition in the present case is comparable to the hardship caused by the additional health and safety requirements in two respects. First, the tariff imposition was completely unanticipated even to informed circles, being announced only days before it took effect [*CE6; PO2, para. 23*]. Second, the tariff imposition made the third shipment of the semen 30 percent more expensive than anticipated [*CE8*]. This not only destroyed CLAIMANT's profit margin of 5 percent but caused considerable hardship for CLAIMANT who made a loss of 25 percent from its performance [*CE8*]. Thus, it is only reasonable to understand the tariff imposition in question as an unforeseen event comparable to "*additional health and safety requirements*".

60. The tariff imposition in the present case clearly rendered unanticipated changes to delivery terms which in turn caused hardship for CLAIMANT. In accordance with a reasonable person's understanding, clause 12 of the Sales Agreement is applicable to the present hardship suffered by CLAIMANT.

2. Claimant is entitled to ask for an adaptation of the contract in case of hardship

A. In case of hardship, the parties had intended to amend the contract and, in the unlikely event that the parties could not agree on an amendment, resort to arbitration for an adaption of the contract

61. The Parties' had a tentative agreement to include an adaptation clause into the contract which provides for adaptation by the Arbitral Tribunal in the event that the Parties could not agree on an amendment [*CE8*]. In response to CLAIMANT's request for an express reference of an adaptation clause into the hardship clause or the arbitration clause to avoid any doubts, RESPONDENT had "*promised that he would come back with a proposal the next morning*" [*CE8*]. The proposal was never made only because of the accident that prevented the prime negotiator of the contract on RESPONDENT's side from resuming back to work [*CE8*].

62. The Parties could not reach an agreement on an amendment following the newly imposed tariffs despite CLAIMANT's prompt request for price adjustments due to RESPONDENT's refusal to negotiate [*CE8*]. Since the Parties are now presented with a situation wherein they cannot agree on an amendment, their tentative agreement to resort to the Arbitral Tribunal for adaptation of the contract entitles CLAIMANT to ask for an adaptation.

B. A reasonable person of the same kind as RESPONDENT would expect the hardship clause to necessarily assume a concomitant adaptation clause

63. Even if RESPONDENT denies that there had been an agreement to resort to the Arbitral Tribunal for adaptation of the contract, a reasonable person of the same kind as RESPONDENT would expect the hardship clause to necessarily assume a concomitant adaptation clause in the case that the Parties fail to renegotiate, given the Parties' intent to maintain a long-term business relationship and avoid the termination of the contract.

64. Both Parties showed mutual intent to maintain a long-term business relationship with each other. RESPONDENT had explicitly mentioned its high interest in a "*long-term cooperation*" with CLAIMANT, "*going clearly beyond this single purchase*" [*CE3*]. CLAIMANT similarly showed its "*interest in entering into a long-term mutually beneficial relationship*" with RESPONDENT [*CE2*]. From this it is reasonable to infer that both Parties had intended to avoid the termination of the contract in case of disagreement regarding hardship cases.

65. Other than the termination of the contract, renegotiation or adaptation of the contract by the Arbitral Tribunal are naturally the only two reasonable solutions for the Parties in resolving disagreements arising from hardship cases. In the present case, the parties had failed to renegotiate due to RESPONDENT's refusal [*CE8*]. This failure to renegotiate has left the Arbitral Tribunal's contract adaptation as the only reasonable solution. Even though the Parties' tentative agreement on an adaptation clause was not included into the written contract due to the unforeseen accident, a reasonable person of the same kind as RESPONDENT who intended to avoid the termination of the contract would have expected the hardship clause to necessarily assume a concomitant adaptation clause in the case that the Parties fail to renegotiate.

66. Thus, in accordance with a reasonable person's understanding of the hardship clause, CLAIMANT is entitled to resort to the Arbitral Tribunal for an adaptation of the contract.

VI. IF CLAUSE 12 OF THE SALES AGREEMENT DOES NOT PROVIDE A GROUND FOR PRICE ADAPTATION, PARTIES CAN RESORT TO CISG FOR PRICE ADAPTATION

1. CISG applies as the governing law of the Sales Agreement between CLAIMANT and RESPONDENT

67. "*It is undisputed between the Parties that Eqautoriana, Mediterraneo and Danubia are Contracting States of the CISG*" [*PO1, para. 4*]. Hence pursuant to Art. 1(1) lit. (a) CISG it is established that CISG is the governing law of the contract between CLAIMANT and RESPONDENT.

68. No clear or express agreement to exempt the application of CISG exists, but the question of whether or not an implicit exclusion of CISG remains, particularly in regard to Clause 12 of the Sales Agreement which states, "*this Sales Agreement shall be governed by the law of Mediterraneo*." Although parties enjoy the freedom to exclude

the application of CISG[5], a "*clear intent to exclude should not be inferred merely from, for example the choice of the law of a Contracting State*," and can only be inferred from "*express exclusion of the CISG, choice of the law of a non-Contracting State, or choice of an expressly specified domestic statue or code where that would otherwise be displaced by the CISG's application*" [*AC Opinion No. 16*]. Therefore, simply stating that the law of Mediterraneo applies will not lead to the exclusion of CISG in interpreting the Sales Agreement.

69. The designation of Mediterranean law as the governing rule by CLAIMANT and RESPONDENT is further significant in terms of its use to supplement the interpretation of CISG, while CISG remains the governing rule of law. "*Most court decisions and arbitral awards […]*" have decided "*that the parties' choice [of the law of a Contracting State] remains meaningful because it identifies the national law to be used for filling gaps in the Convention*" [*UNCITRAL Digest, p. 34 para. 11*]. Thus, Mediterranean law will be used to supplement the interpretation of CISG, while CISG remains the governing rule of law between CLAIMANT and RESPONDENT.

70. RESPONDENT claims that Art. 79 CISG is not applicable to the present hardship case [*Problem, p. 32*]. However, according to UNCITRAL Digest of CISG, "*the party alleging the exclusion of the Convention bears the burden of proof*" [*UNCITRAL Digest, p. 34 para. 16*]. Pursuant to this rule, RESPONDENT bears the burden of proof regarding the agreement between the Parties to exclude Art. 79 CISG from the present Sales Agreement. Since RESPONDENT has failed to provide any relevant proof, Art. 79 CISG is applicable to the present hardship case.

2. Art. 79 is applicable to the onerous circumstances for CLAIMANT caused by the unforeseen tariff imposition

A. There is no partial derogation from Art. 79 CISG

71. Unlike RESPONDENT's claim that the incorporation of the force majeure and hardship clause into the contract constitutes a derogation from Art. 79 CISG, parties have not met

[5] Art. 6 CISG provides: "*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*" (Principle of party autonomy)

the conditions of derogation from specific provisions of the CISG.

72. "*Art. 6 CISG [...] entitles the parties to derogate from or vary the effect of any of the provisions of the CISG*." The opting out from a certain provision of CISG, "*a derogation [of] a more limited scope*," may be done both explicitly and implicitly. It is clear that there is no explicit derogation from certain provisions in the Sales Agreement.

73. However, an implicit derogation from certain provisions of the CISG is also absent in the present case. An implicit derogation can be made when "*the parties choose the law of a non-Contracting State or agree on contractual terms inconsistent with specific provisions of the CISG*" [*Gül, p. 89*]. Clause 12 of the Sales Agreement stipulates that "*Seller shall not be responsible for [situations of] hardship, caused by […] unforeseen events making the contract more onerous*." Such language strongly provides that Art. 79 CISG is *consistent* with clause 12 of the Sales Agreement; in fact the former can be seen as an equivalent to the latter. As the "*most difficult questions concerning the application of Art. 79 CISG*" involves whether it can be used to cover "*situations of hardship*" – the exact subject matter of clause 12 of the Sales Agreement – this further suggests there is no inconsistency between clause 12 of the Sales Agreement and Art. 79 CISG [*Flambouras, §2*]. Thus, in respect to such equivalence in the subject matter, there is no derogation in the sense of Art. 6 CISG and RESPONDENT's claim does not hold.

B. Art. 79 CIG is applicable to circumstantial changes of reasonable unforeseeability

74. According to the CISG Advisory Council, "*a change of circumstance that could not reasonably be expected to have been taken into account, rendering performance excessively onerous, may qualify as an "impediment" under Art. 79(1) […] Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Art. 79*" [*AC Opinion No. 7, §3*].

75. A sudden and significant increase in tariff was not specified for resolution in any part of the Sales Agreement, and this reflects that neither party expected such measures to arise. Mediterraneo's decision of 25% tariffs on agricultural products and a subsequent

retaliatory measure on part of Equatorianian government of imposing 30% tariffs on selected goods including racehorse semen was completely out of the blue that happened only 2 months before the last shipment. The two parties may not have reasonably expected such measures to occur, since "*the Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals*" [*Problem, p. 7*]. Therefore, with the unforeseeable nature of circumstances surrounding CLAIMANT and the onerousness on the part of CLAIMANT (**3. B. a**), Art. 79 CISG can be applied to the present case.

3. UNIDROIT Principles guide the interpretation of Art. 79 CISG

A. UNIDROIT Principles are applicable to the present Sales Agreement governed by the CISG

76. The CISG, the undisputed governing law of the Sales Agreement, provides in Art. 7(2) that "*questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based*."

77. Such language of Art. 7(2) of CISG provides that when parties encounter a situation "*within the legal scope of the CISG without there being a specific CISG rule on the problem at hand*" [*Huber/Mullis, p. 34 fn. 111*], they must first "*check whether there is a general principle underlying the CISG that provides the answer to the problem before resorting to the applicable (domestic) law*" [*Huber/Mullis, p. 34*].

78. UNIDROIT Principles successfully reflect such "*general principle underlying the CISG*" and thus can be used to supplement the legal vacuum that occurs with regard to the CISG. It is well understood that the exact language of Art. 7 (2) only suggests recourse to principles within the CISG itself when there is no specific CISG rule applicable to a case. However, in light of not only the drafting nature of the UNIDROIT Principles (as the UNIDROIT Preamble reads it "*may be used to interpret or supplement international uniform law instruments*"), many commentators and scholars [*Bonell, p. 26-39*] strongly

argue that the Principles share the same general principles that constitute the basis of the CISG, or as "*additional principles in the context of the CISG*" [*Magnus,§ 6(b)*].

79. More specifically, UNIDROIT Principles can "*corroborate a principle … that [can be] deduced*" [*Huber/Mullis, p. 36*] from the CISG. This view has been supported by arbitral practice [*ICC Award No. 9117; ICC Award No. 8817*] and also by one state decision [*Cour d'appel No. 205*]. Namely, UNIDROIT Principles have been used to "*confirm the results reached by applying the rules of the CISG*" [*Ferrari, p. 170*].

80. Thus, with the applicability of the UNIDROIT Principles in interpreting, supplementing, or corroborating principles of the CISG established, hardship provisions of UNIDROIT Principles can be applied to the present case.

B. Hardship provisions of UNIDROIT Principles corroborate Art. 79 CISG and thus provide for adaptation of the contract by the arbitral tribunal

a. CLAIMANT's situation qualifies as hardship provided in UNIDROIT Principles

81. Arts. 6.2.1, 6.2.2, and 6.2.3 UNIDROIT Principles are hardship provisions. Art. 6.2.2. UNIDROIT Principles provides "*there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract*" which includes when "*the cost of a party's performance has increased.*" In the present case, CLAIMANT is suffering from a "*[dis]equilibrium*" of the original contract, due to a sudden and unanticipated increase of 30 percent in performance cost.

82. Although international practice shows that "*an alteration [from the original contractual terms] of less than 50 percent*" will be exceptional to "*be qualified as hardship*," scholarly writings and arbitral cases strongly suggest "*there can be no universal alteration threshold*" to apply "*as a general standard for all cases*" [*Girsberger/Zapolskis, p. 136*]. There is also confusion in recent case law that complicates the determination of a specific alteration threshold [*Himpurna Case; Scafom Case*].

83. In addition, some scholars argue alternative criteria that may determine hardship include "*risk assumption*" [*Brunner, p. 433*] by the parties. That is, the alteration threshold "*should be lowered [when the disadvantaged party] has assumed a smaller risk*" [*Girsberger/Zapolskis, p. 128*]. In the present case, not only does CLAIMANT's profit margin of 5 percent "*indicate [he] assumed [a low] risk with regard to contingencies*" [*Brunner, p. 433*], but Clause 12 of the Sales Agreement clearly provides CLAIMANT is exempt from any kind of risk associated with change in delivery terms. Thus, the absence of risk assumption by CLAIMANT strongly suggests a 30 percent increase in tariffs can constitute as hardship in the present case.

84. Furthermore, a more "*flexible approach towards alteration [of the fundamental equilibrium] threshold*" may occur when "*performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor*" [*Girsberger/Zapolskis, p. 131*] [*Brunner, p. 435-437*]. Unlike previous cases which involved "*profitable*" or "*large enough*" [*Der Bunde 1977, 2622; Petrobas case*] enterprises, the potential "*financial ruin*" of CLAIMANT provides possible grounds for the application of hardship exemption.

85. Thus, employing a strict, rigid, or numerical threshold cannot embrace all hardship situations, as "*hardship is a flexible legal concept*" [*Girsberger/Zapolskis, p. 130*] that become manifested in different ways. Rather than a numerical threshold, a "*regard should be given to the circumstances surrounding the contract*" [*Girsberger/Zapolskis, p. 129*] to determine hardship. It is undisputed that the tariff imposition of 30 percent to CLAIMANT's detriment significantly increased the cost of CLAIMANT's performance. However, what is more noteworthy is that such increased performance cost completely destroyed the expected 5 percent profit margin towards an additional loss of 25 percent for CLAIMANT, which endangers his restructuring plan and likely impedes any further negotiations of a new credit line [*PO2, para. 29*]. Conclusively, circumstances surrounding CLAIMANT altogether provide a basis for hardship exemption to restore the equilibrium of the original contractual obligations.

b. The requirements of Arts. 6.2.2 and 6.2.3 UNIDROIT Principles are met in the present case

86. CLAIMANT's circumstances satisfy the four requirements of hardship under Art. 6.2.2 of UNIDROIT Principles in that: (a) the events occur[ed] or [became] known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

87. The change in circumstances between CLAIMANT and RESPONDENT occurred after the conclusion of the contract. The final negotiations and the signing of the Agreement took place on 6 May 2017 [*PO2, para. 13*], whereas Equatoriana's newly imposed tariffs for agricultural products including semen used for artificial insemination was learned of by CLAIMANT in January 2018 [*CE8*].

88. Such events could not have been reasonably taken into account by CLAIMANT, mainly based on the liberalist trade history of RESPONDENT's state. Equatoriana has always been one of the biggest supporters of the existing system of free trade, and never but in one exceptional case, has implemented direct retaliatory measures in response to previous restrictions imposed by other countries [*CE6*]. Furthermore, until 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo [*PO2, para. 25*].

89. Such retaliatory tariff imposition was not within the control of CLAIMANT. CLAIMANT had no power or authority to stop RESPONDENT's state from imposing the retaliatory tariff on horse semen. Rather, albeit the fact that various dispute resolution mechanisms exist via the WTO [*CE6*], RESPONDENT's state has not fully exhausted these measures.

90. Risk of the events was not assumed by CLAIMANT both implicitly and explicitly. Neither was CLAIMANT's shipment associated with "*speculative*" [*UNIDROIT Principles 2016, p. 221*] nature nor was CLAIMANT expected to accept any degree of risk prior to the contract. Further, some scholars state "*a higher profit margin may indicate that the supplier assumed a greater risk with regard to contingencies*" [*Girsberger/Zapolskis, p. 129*]. However, the profit margin of CLAIMANT which

remains to be merely 5%, further suggests that there was no assumption of risk on the part of CLAIMANT.

91. CLAIMANT's past business experience with Danubia in 2014, only about 3 years prior to business with RESPONDENT, nearly resulted in the insolvency of CLAIMANT by the partner country's abrupt imposition of strict health and safety requirements. The cost was increased by 40% and destroyed the commercial basis of the deal between CLAIMANT and the Danubian counterparts [*PO2, para. 21*]. This was the very basis CLAIMANT proposed the inclusion of a hardship clause upon which CLAIMANT had explicitly sought to not assume the risks of the events. CLAIMANT had expressly shown its unwillingness to assume any risks associated with changes in delivery terms [*CE4*]. If there was any risk assumption, it was on the part of RESPONDENT by agreeing to the terms of Clause 12 of the Sales Agreement.

92. Art. 6.2.3 UNIDROIT Principles para. 1 provides that "*in case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based*." CLAIMANT has clearly sought to reach a solution promptly in response to information of the newly imposed tariffs [*CE7*]. Phone calls, voice mails, and email of CLAIMANT altogether indicate reasonable efforts made to renegotiate the original terms of the contract, all in which CLAIMANT clearly provided grounds for request.

93. Art. 6.2.3 UNIDROIT Principles para. 2 provides that "*the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance*." CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached [*Problem, p. 6, para. 13*]. Thus, CLAIMANT has fully performed its obligations.

94. Art. 6.2.3 UNIDROIT Principles para. 3 reads "*upon failure to reach agreement within a reasonable time either party may resort to the court*." Due to RESPONDENT's unilateral termination of negotiations [*CE8*] the parties have failed to reach agreement, thus authorizing "*either party to resort to court*" [*UNIDROIT Principles 2016, p. 225*]. Such failure of RESPONDENT to "*refrain from any form of obstruction*" or conduct

"*renegotiations in a constructive manner*" violates Arts. 1.7 and 5.1.3 UNIDROIT Principles, which mandate renegotiation between parties to adapt the contract to new circumstances in light of the "*general principle of good faith and fair dealing*" [*UNIDROIT principles 2016, p. 225*].

95. Thus, in light of CLAIMANT's faithful compliance to requirements entailed to Art. 6.2.3 UNIDROIT Principles and its surrounding circumstances being established above, the court has the power to adapt the contract "*with a view to restoring its equilibrium*" [*UNIDROIT principles 2016, p. 226*]. This will include a "*fair distribution of the losses between the parties, ... involv[ing] price adaptation*" [*UNIDROIT principles 2016, p. 226*].

4. Even if UNIDROIT Principles cannot be applied, the law of Mediterraneo can be used to interpret Art. 79 CISG

96. Even if UNIDROIT Principles, specifically the hardship provisions cannot be applied in interpretation of Art. 79 of CISG, price adaptation is still allowed pursuant to the law of Mediterraneo. Art. 7 (2) CISG clearly provides that "*in the absence of [underlying principles of the CISG]*" legal gaps within the CISG will be filled via "*the law applicable by the virtue of private international law*", or in other words "*applicable domestic law*" [*Huber/Mullis, p. 34*]. Clause 14 of the Sales Agreement explicitly designates the law of Mediterraneo as the governing law of the Agreement. Not only does this reflect mutual intention of the Parties to be bound by the law of Mediterraneo, but also meaningful in the sense that "*it identifies the national law to be used for filling gaps*" [*UNCITRAL Digest, p. 34, para. 11*] in CISG.

97. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [*PO1, para. 4*].

98. Thus, applying the law of Mediterraneo to the "*gap-filling*" of CISG produces the same legal effect as applying the UNIDROIT Principles, particularly its hardship provisions in Art. 6.2.3. Thus, in virtue of the effects of hardship provided in UNIDROIT Principles, the law of Mediterraneo further allows price adaptation by the arbitral tribunal in the present case.

5. Even if Art. 79 is inapplicable, Art. 7 (1) CISG allows for price adaptation under good faith

99. CISG Art. 7, para. 1 requires that the Convention be interpreted in a manner that promotes the observance of good faith in international trade [*UNCITRAL Digest, p. 43*]. The drafting process of Art. 7 reflects a uniform understanding of good faith as a "*general duty based on judicial interpretation of community standards, reasonableness and fair play*" [*Zeller, p. 9*].

100. Good faith involves "*an expectation and obligation to act honestly and fairly in the performance of one's contractual duties. A certain amount of reasonableness is expected from the contracting parties*" [*Powers, p. 335*]. Further, there is common understanding that "*under the CISG the good faith principle also applies to the interpretation of the individual contract*" but also "*to the relationship of the entire contractual relationship*" [*Magnus 2, p. 91*].

101. Therefore, CLAIMANT AND RESPONDENT, as contracting parties to the CISG, have an obligation to maintain their relationships faithful to the underlying principles of the CISG, *inter alia*, the principle of good faith. That is, the Parties are "*require[d] to cooperate in carrying out the interlocking steps of an international sales transaction*" [*Zeller, 221*].

102. A renegotiation process subsequent to the meeting of 12 February 2018 remained crucial in restoring a balance of the Parties' performances under good faith. However, efforts of CLAIMANT were unrequitedly foundered by RESPONDENT's failure to observe the principle of good faith. RESPONDENT failed to show interest in "*further cooperation*" [*CE8*] and unilaterally cutoff all potential negotiation channels while "*refus[ing] to pay any additional amount for the tariffs*" [*CE8*]. This was notwithstanding the RESPONDENT's awareness of CLAIMANT's financial situation and how the repercussions of the addition 30% tariff will fall to its detriment [*PO2, para. 28*]. CLAIMANT has been making losses since 2014, and promised its creditors to be profitable from 2017 onwards; for which the additional revenues from the frozen semen were crucial [*PO2, para. 29*]. Achieving a mutually agreed adaptation of price is

necessary for the parties to remain faithful to their original contractual relationship, in light of CLAIMANT's financial endangerment.

103. Tribunal practice supports the principle of estoppel as also "*one of the general principles upon which [the CISG] is based*," "*specifically [as] a manifestation of the principle of good faith*" [*Goods case; OLG Karlsruhe, 1997; SCH-4318; SCH-4366; Shoes case*]. In the other arbitration RESPONDENT is involved in, based on the "*Partial Interim Award*," RESPONDENT requested renegotiation of the price under the ICC Hardship Clause 2003 and Mediterranean Contract Law (UNIDROIT Principles) and refused delivery of the mare to its buyer in Mediterraneo [*PO2, para. 39*]. Such circumstances strongly suggest RESPONDENT as taking "*inequitable advantage*" [*Talya, 163*] by contradicting himself, as he is arguing the opposite for the present case to CLAIMANT's detriment.

104. Thus, with due regard to the lack of good faith on the part of RESPONDENT, most significantly manifested through noncooperation, interpreting Art. 79 in accordance to Art. 7(1) further allows the Court to "*determine what is owed to each other*" and thus necessarily adapt the price agreed in the Sales Agreement.

VII. AS A RESULT OF THE ARBITRAL TRIBUNAL'S PRICE ADAPTATION UNDER CLAUSE 12 OF THE SALES AGREEMENT AND/OR THE CISG, CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD

1. Claimant now makes a loss of 1,250,000 USD due to the imposition of the new tariff

105. CLAIMANT had originally agreed to sell and ship horse semen to RESPONDENT at a price of 100,000 USD per dose, while CLAIMANT's fixed and variable costs amount to 95,000 USD per dose; this results in a profit margin of 5 percent. [*PO2, para. 31*]. However, the tariff made the shipment 30 percent more expensive than anticipated, not only entirely destroying CLAIMANT's profit margin of 5 percent but also resulting in a newly incurred loss for CLAIMANT [*CE8*]. Due to the new tariff, CLAIMANT now

makes a loss of 25 percent from the third shipment of 50 doses of semen, which amounts to 1,250,000 USD.

2. Only the payment of 1,250,000 USD to CLAIMANT constitutes a "*fair distribution of the losses*"

106. According to Art. 6.2.3(4) lit. (a) UNIDROIT Principles, in case of hardship, the court may adapt the contract with a view to restoring its equilibrium. Further elaborating on the ways to restore equilibrium, the commentary of UNIDROIT Principles states that the court will seek to make a "*fair distribution of the losses*" between the parties.

107. Even if UNIDROIT Principles cannot be applied for adapting the Sales Agreement of the present case, price adaptation is still allowed pursuant to the law of Mediterraneo (¶¶96 ~ 98).

108. Various commentaries and scholars have suggested a few guidelines in determining "*fair distribution of the losses*" when adapting the contract in case of hardship. It is only reasonable that CLAIMANT be entitled to the payment of 1,250,000 USD following any one of the guidelines laid out below.

A. The hypothetical intention of the parties in the present hardship case would be to adapt the price to accommodate for the 25 percent loss suffered by CLAIMANT

109. The hypothetical intention of the parties is one of the primary reference points used when adapting the contract in case of hardship. The question to be addressed in determining the parties' hypothetical intention is "*what the parties would have provided if they had considered the change of circumstances*" [*Brunner, p. 500*].

110. The email correspondences between CLAIMANT and RESPONDENT shed some light on what the Parties would have decided had they been aware of the increase in tariff. CLAIMANT makes it clear in its email that CLAIMANT is "*not willing to take over any further risks associated with such a change in the delivery terms*" [*CE4*]. It is only reasonable to believe that such risks which CLAIMANT had expressly intended to

avoid include the 30 percent cost increase of CLAIMANT's performance caused by the unanticipated tariff imposition. CLAIMANT had even made a specific reference to its past experiences with Danubian farms to illustrate an example of the kind of risk associated with DDP delivery that CLAIMANT intended to avoid [*CE4; PO2, para. 21*]. The past experiences were comparable to the present case since in both cases, CLAIMANT was faced with unforeseen changes of circumstances that significantly increased the cost of CLAIMANT's performance, destroying the commercial basis of the deal [*CE4; PO2, para. 21*]. The reference a fortiori provides that CLAIMANT would never have decided to bear the 30 percent increase in the cost of performance had it been aware of the tariff imposition.

111. RESPONDENT, on the other hand, asks CLAIMANT to take responsibility for delivery only because of "*the urgency of the delivery and [CLAIMANT's] much greater experience in the shipment of frozen semen*" [*CE3*]. Therefore, RESPONDENT's intention was for CLAIMANT to be held accountable for the logistics of the delivery, and not necessarily for the increased cost in delivery. The cost of delivery, clearly, was of less concern to RESPONDENT than to CLAIMANT.

112. Therefore, it is in accordance with the parties' hypothetical intention to have RESPONDENT bear the increased cost in delivery due to the imposition of tariff.

B. The tribunal must adapt the price term to include 1,250,000 USD to eliminate excessive onerousness of CLAIMANT's performance

113. The extra costs incurred due to unforeseen circumstances should be fairly distributed to the parties, and not be placed solely on one of them [*Uribe, p. 262*]. In compliance with this guideline, CLAIMANT only asks for the 25 percent increase in the price term, and not for the full damage caused by the tariff imposition, which amounts to 30 percent.

114. When adapting the contract in case of hardship, only the costs that can be considered "*beyond the limit of sacrifice*" must be shared by the parties [*Uribe, p. 262*]. The limit of sacrifice is the highest cost reasonably acceptable to pay in order to overcome the consequences of the impediment [*Schwenzer, Art. 79, para. 14*]. This limit is to be

determined by a case-to-case analysis and is not restricted by greatly increased costs [*Schwenzer, Art. 79, para. 14*].

115. Given CLAIMANT's financial circumstances and the detrimental effect of the tariff increase on CLAIMANT's standing, it is undoubtedly "*beyond the limit of sacrifice*" for CLAIMANT to suffer from the unanticipated tariff imposition. If CLAIMANT had to bear the 1,250,000 USD, CLAIMANT's financial restructuring plan will be seriously endangered. CLAIMANT has been making losses since 2014, and the restructuring plan which CLAIMANT had agreed upon with its creditors provided that CLAIMANT would be profitable again from 2017 onwards. With the burden of 1,250,000 USD, CLAIMANT can no longer make profit in 2018 and thus negotiations of a new credit line will most likely be very difficult [*PO2, para. 29*]. On the other hand, RESPONDENT would not be financially endangered if it bore the 1,250,000 USD [*PO2, para. 30*].

116. CLAIMANT is willing to sacrifice the damage to its profit margin in entirety. CLAIMANT only asks to be remunerated for the 25 percent loss incurred from its performance. As established, the 25 percent loss makes CLAIMANT's performance not only "*more onerous*" but "*excessively onerous,*" since it endangers the credit lines that are critical for the survival of CLAIMANT's business. Thus, the 25 percent loss is beyond the limit of sacrifice for CLAIMANT.

C. Considering the extent to which RESPONDENT benefits from CLAIMANT's performance, a price adaption by the arbitral tribunal is a fortiori necessary to restore the equilibrium of the contract

117. Commentary of UNIDROIT Principles guides that, when adapting the contract to restore its equilibrium, consideration is to be given to the extent to which the party entitled to receive a performance may still benefit from that performance [*UNIDROIT Principles, Art. 6.2.3*].

118. RESPONDENT acquired the initially anticipated business benefits by receiving CLAIMANT's performance. Despite the increased cost of performance, CLAIMANT

performed the third and last shipment of 50 doses. The swift delivery allowed RESPONDENT to acquire the necessary semen for their new breeding programme during the tentative lifting of the ban on artificial insemination for race horses in RESPONDENT's home country [*C1*].

119. RESPONDENT additionally made undue profit by breaching the agreement that RESPONDENT may not re-sell the frozen semen to third parties without CLAIMANT's express written consent [*C2*]. The Sales Agreement stipulates that the frozen semen is to be used for the enlisted mares, and the semen may be used for others only after CLAIMANT is informed of the usage by RESPONDENT [*C5; PO2 para. 16*]. RESPONDENT breached the express information requirement by re-selling 15 doses of the frozen semen to 10 different breeders without informing CLAIMANT [*PO2, para. 20*]. Since the frozen semen was resold at a price 20 percent higher than the initial price at which RESPONDENT had paid CLAIMANT, RESPONDENT as far as known has made an additional benefit of 300,000 USD by breaching the Sales Agreement.

120. The extent to which RESPONDENT benefited from CLAIMANT's performance is evidently so huge compared to the impact upon CLAIMANT as to fundamentally alter the equilibrium of the contract. CLAIMANT suffers from considerable hardship in terms of Art. 6.2.2. UNIDROIT Principles due to the 25 percent loss incurred from its performance (¶¶86-95). On the other hand, RESPONDENT has enjoyed undue monetary benefits by breaching the Sales Agreement. It is only reasonable for the Arbitral Tribunal to restore the equilibrium of the contract by entitling CLAIMANT to the payment of 1,250,000 USD to cover the 25 percent loss incurred from its performance.

REQUEST FOR RELIEF

In light of the foregoing submissions on behalf of CLAIMANT, Counsel respectfully requests the Tribunal the following:

TO DECLARE THAT:

1. It has the jurisdiction and powers under the arbitration agreement to adapt the contract [**Issue 1**].

2. CLAIMANT should be entitled to submit evidence from the other arbitration proceedings [**Issue 2**].

3. CLAIMANT is entitled to the payment of 1,250,000 USD resulting from an adaptation of the price [**Issue 3**].

AND ORDER RESPONDENT TO:

1. Pay the additional amount of 1,250,000 which is 25 per cent of the price for the third delivery of semen

2. Bear all costs of this arbitration, including CLAIMANT's expenses for legal representation.

On behalf of Phar Lap Allevamento,

Dongwook Kim Sun Kim Hyojung Roh Sung Hyun Park

Shihoon Lee Jin Hwan Jung So Yeun Cho Yeseul Han