DIPLOMATIC ACADEMY OF VIETNAM

MEMORANDUM FOR CLAIMANT

ON BEHALF OF	AGAINST
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1 CAPTIAL CITY MEDITERRANEO	2 SEABISCUIT DRIVE OCEANSIDE EQUATORIANA

PHUONG ANH DO • DIEU LINH NGUYEN • HA VAN PHAM THI ANH NGUYEN THI MINH • THUY DUONG VU

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&	and
¶/¶¶	para/paras
AAA	Amercian Arbitration Association
ANoA.	Respondent's Answer to Notice of Arbitration
Apr	April
Art./Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
DDP	Deliver Duty Paid (Incoterm 2010)
Dec	December
ed.	edition
emph.add.	emphasis added
et al.	and others
et seq.	et sequentes (and that which follows)
Ex.C	Claimant's Exhibit
Ex.R	Respondent's Exhibit
Feb	February
FSSA	Frozen Semen Sales Agreement
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
HKIAC	Hong Kong International Aribtration Centre
HKIAC Rules	HKIAC Administered Arbitration Rules 2018
I.	Issue
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration

ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Dispute
IUSCT	Iran-US Claims Tribunal
Jan	January
Jul	July
Let. Fast	Letter by Fasttrack
Let. Lang	Letter by Langweiler
Ltd	Limited
Mar	March
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)
No.	Number
NoA.	Notice of Arbitration
Oct	October
p./pp.	page/pages
PO.	Procedural Order
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts 2016
US$	United States Dollar
v.	versus
V.	Volume

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STATEMENT OF FACTS

1 This proceeding is between Phar Lap Allevamento Company ("Claimant") and Black Beauty Equestrian ("Respondent") (collectively "Parties"). Claimant is a company registered in Mediterraneo, whose business operations include all areas of equestrian sport. Respondent is a Equatoriana-based company in the same business sector and is planning to become a leading breeder for racehorses.

2 On **21 Mar 2017,** Respondent contacted Claimant to ask for an offer of 100 doses of semen from NIJINSKY III, one of Claimant's world class stallions. Following that, on **24 Mar 2017,** Claimant made an offer pursuant to Respondent's request.

3 In response, on **28 Mar 2017,** Respondent expressed its favor for DDP delivery term and another choice in dispute resolution. Claimant then on **31 Mar 2017** accepted the delivery term on a condition of a price increase. In order to safeguard against any further risks associated with delivery terms, Claimant insisted on an inclusion of hardship clause. Claimant also suggested arbitration in Mediterraneo. Later, Respondent provided Claimant with the first draft of arbitration clause based on HKIAC Model Clause on which Claimant changed the arbitration seat to Danubia but emphasized the application of Mediterraneo law applies to Parties' relationship. Claimant also suggested a hardship clause based on the ICC model clause

4 On **12 Apr 2017**, Claimant and Respondent met and agreed on Tribunal's power to adapt the contract. Unfortunately, their intended express reference was not included due to an accident and the absent-mindedness of the replacing negotiators. The Frozen Semen Sales Agreement is then signed on **6 May 2017** in Mediterraneo.

5 After a period of smooth execution of the contract, on **20 Jan 2018,** Claimant notified Respondent Equatoranian's 30% tariff applied to the horse semen, a fact so surprising to both Parties. Subsequently, Respondent promised to adapt the price later on and urged a timely delivery. Due to that promise, Claimant delivered the final shipment and paid for that tariff.

6 However, on **12 Feb 2018**, when Parties met to renegotiate with a view to adjusting the price. Much to Claimant's surprise, Respondent suddenly declared to stop renegotiation and refused to pay the tariff.

7 Having no other options, Claimant has no other options but to file a Notice for Arbitration on **31 Jul 2018**. During the course of proceeding, Claimant duly notified the Tribunal of a concurrent arbitration proceeding in which Respondent is in the same shoes as Claimant in this case.

SUMMARY OF ARGUMENT

8 Facing the surprising 30% tariff from Equatoriana, Claimant duly contacted Respondent to remind it of the fact that Claimant is completely exempted from paying for such tariff pursuant to Clause 12 of the Sales agreement between both parties. The circumstances require an immediate renegotiation of the price. Yet, in light of Respondent's request for a timely delivery, Claimant authorized the final shipment in reliance on Respondent's commitment to later successful adjustment of the price. Thus, Claimant is entitled to additional payment resulting from the adaption of the price under Clause 12 and Respondent's promise. However, in the rare event that the Tribunal come at a contrary conclusion, Claimant is still not responsible for the increased tariff under Art. 79 and is entitled to payment resulting from price adjustment under Art. 6.2.3 UPICC by virtue of Art. 7(2) CISG. The 25% adjustment of the price requested by Claimant is reasonable considering the impact of the tariff on both parties (**ISSUE 3**).

9 Before the Tribunal, however, Respondent challenged the jurisdiction of the Tribunal to adapt the contract. Respondent wrongfully alleged that the law governing the arbitration agreement is Danubian law, and purposefully misinterpreted the arbitration agreement so as to exclude the power to adapt the price of the Tribunal. In fact, Mediterranean law governs the arbitration agreement as Parties' impliedly choice or alternatively, the most appropriate law. Accordingly, the arbitration agreement as interpreted by Mediterranean law grants the Tribunal jurisdiction to adapt. Should the Tribunal find Danubian law to be applicable, it will be proven that Parties' arbitration agreement already authorized contract adaptation. (**ISSUE 1**)

10 To support its request for price adaptation, Claimant wishes to submit evidence regarding another arbitration involving Respondent under HKIAC Rules on largely similar facts. In that arbitration, like Claimant in this case, Respondent asked for price adjustment due to Mediterraneo's 25% tariff. Contrarily, Respondent objected to the submission of such evidence in the current arbitration on the grounds that it was obtained illegally, either through a breach of confidentiality or through a computer hack. Nevertheless, Tribunal should entitle Claimant to submit the evidence on the ground that the evidence is relevant and material, the means of obtaining evidence does not affect its admissibility and the admission of evidence respects due process principle (**ISSUE 2**).

ARGUMENT

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT UNDER CLAUSE 15

11 Respondent has raised erroneous objections to the Tribunal's jurisdiction with regard to the scope of the Arbitration Agreement ("***Clause 15***"), in particular, the jurisdiction to adapt the contract price [*ANoA, pp.31-32, ¶¶12-17*]. While objecting Tribunal's jurisdiction, Respondent does not rebut Tribunal's general jurisdiction, including the power to rule on the interpretation of the FSSA [*PO2, p.61, ¶48*]. Therefore, in this submission, Claimant will only address the jurisdiction of the Tribunal to adapt the price based on the interpretation of Clause 15. Claimant submits that Tribunal has the jurisdiction to decide on its jurisdiction to adapt, as pursuant to Art.19(1) HKIAC Rules and Art.16(1) Danubian Arbitration Law, "*the Tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement*" and the generally accepted principle of *Kompetenz-Kompetenz* [*Born, p.1237*]

12 In Clause 15 of the FSSA, Claimant and Respondent agreed to initiate arbitration under HKIAC Administer Arbitration Rules 2018 ("**HKIAC Rules**"). [*Ex.C5, p.14, Clause 15*]. Clause 15 contains no expressed choice of the law governing the arbitration agreement. The *lex arbitri* is the law of Danubia, which is the Model Law on International Commercial Arbitration with the 2006 amendments [*PO1, p.52, ¶4*] while the law governing the FSSA as a whole is the law of Mediterraneo [*Ex.C5, p.14, Clause 14*].

13 On 24 Aug 2018, Respondent alleged that the law governing the arbitration agreement is the law of Danubia, and objected to the Tribunal's jurisdiction to adapt the contract. Claimant will demonstrate that under Mediterranean law, Clause 15 is interpreted so as to confer on the Tribunal the power to adapt the contract pursuant to **(A).** Even in the event that the Tribunal finds that the law applicable to Clause 15 is the law of Danubia, the Tribunal still has the jurisdiction to adapt the contract (**B**).

A. The Tribunal has the jurisdiction to adapt the contract in accordance with Mediterranean law

14 Claimant submits that contrary to Respondent's allegation, the law governing the arbitration agreement is the law of Mediterraneo (**I**). In applying the law of Mediterraneo to the interpretation of the Arbitration Agreement, the Tribunal has the power to adapt the contract **(II).**

I. The law governing the Arbitration Agreement is the law of Mediterraneo

15 Claimant requests the Tribunal to decide that Mediterranean law is applicable to Clause 15 FSSA since the conflict of law rules consistently leads to the application of Mediterranean law to Clause 15

FSSA (**1**) and separability doctrines cannot be invoked in choosing the law governing the arbitration agreement (**2**).

1. Conflict of law rules consistently leads to the application of Mediterranean law to govern the Arbitration Agreement

16 The Parties chose HKIAC Rules as procedure rules applied in this arbitration. Art 36(1) HKIAC Rules, applied in choosing the substantive law of the dispute, can also extend to the law governing an arbitration agreement [*Born, p.579*]. Under this article, priority in determining the law applicable is (1) the parties' express choice; (2) their implied choice and (3) the most appropriate law in the absence of choice. This three-step test is frequently applied by tribunals [*Sulamérica; BCY v BCZ; Glick/Venkatesan, p.133; Magaret, p.65; Seyadi, p.35; Klara, p.75*].

17 In this case, as there is no express choice of law in Clause 15, Claimant requests the Tribunal to find that Mediterranean law is applicable, as Parties impliedly chose Mediterranean law to govern the Arbitration Agreement (**a**). In the event that the first prong is disregarded, Mediterranean law is the most appropriate law applicable to the arbitration agreement (**b**).

a. The Parties impliedly chose Mediterranean law to govern the Arbitration Agreement

18 The implied choice for the law applicable to the Arbitration Agreement by the Parties is established through their intention in the negotiation stage **(i)** and the wording of the FSSA **(ii).**

i. The Parties had the intention to choose the law of Mediterraneo to govern Arbitration Agreement in the negotiation stage

19 First, an implied choice of law is undeniable if there is a reference to a particular aspect of the law [*Pierre, p.855*]. In *Arsanovia*, the Court took the view that by specifically referring to a particular aspect of a national law, the Parties could be taken to have anticipated that national law to be otherwise applicable. The Tribunal should take into account in this case that Claimant indeed reiterated the application of Mediterranean law to the whole FSSA. Respondent was made aware that Mediterranean internal policy law excludes the application of foreign law and dispute resolution in the counterparty's jurisdiction unless otherwise approved by Creditor's Committee [*Ex.R2, p.34*]. In response, Respondent added only the last two sentences containing the number of arbitrators and the language of arbitration [*PO2, p.55, ¶6*] which Respondent found necessary [*PO2, p.55, ¶4*]. As such, the Tribunal should find that, in doing so, both Parties have indicated their intention for Mediterranean law to be applicable arbitration agreement.

20 Second, Respondent based on HKIAC Model Clause to draft the arbitration clause [*Ex.R1, p.33*].

HKIAC Model Clause contains a disclaimer which specifies law governing the arbitration agreement need to be indicated where the law of the substantive contract and *lex arbitri*are different. Despite Respondent's own awareness of the different interpretation of scope of arbitration clause under Mediterranean and Danubian law [*NoA, p.7, ¶15*], Respondent still gives this matter little importance [*PO2, p.55, ¶7*]. If Respondent did indeed intend for *lex arbitri* to be applicable law of Clause 15, it should have reiterated the significance for application of *lex arbitri* instead. However, Respondent totally ignored the sentence on the law governing Clause 15 and made no further amendment [*ANoA, p.30, ¶8*].

21 Rather, the FSSA was signed on 6 May, nearly one month after the last email sent between Parties on 12 Apr, the Parties still retained the same draft suggested by Claimant and made only necessary changes and additions to Clause 15 [*Supra, ¶19*].This clearly indicates that Respondent consented for Mediterranean law to be applicable to Clause 15 FSSA.

22 Third, a mere saying that Respondent "forgot to include the sentence concerning the law governing the arbitration agreement" [*ANoA, p.31, ¶15*] does not negate Parties' intent. Under Art.13.5 HKIAC Rules, the Tribunal and Parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration. In doing so, Tribunal must evaluate all circumstances of the case prompted it [*Lew/Mistelis/Kroll, p.132*]. Accordingly, it may impede this arbitration if Respondent's statement on forgetting to provide Danubia law as the applicable law to Clause 15, is made for the purpose of denying its own true intent. The Tribunal should find that the accident suffered by Mr. Antley from Respondent and Mrs. Napravnik has actually not affected the negotiation of the FSSA, as the person who finalized the Contract have access to all prior emails chain [*PO2, p.55, ¶5*]. Therefore, the negligence as such by the Respondent in forming a contract do not by any mean negate Parties' intent for Mediterranean law to be applicable law to Clause 15.

23 To sum up, the Tribunal should find that both Parties intended for Mediterranean as applicable law to Clause 15 FSSA.

ii. The language of Clause 15 and the FSSA expresses Parties' implied choice of Mediterranean law as the governing law of the arbitration agreement

24 First, Clause 15 should be understood to be equivalent to other clauses in the FSSA and must be read in conjunction with Clause 14 on the contract's governing law. An arbitration clause is merely a normal contract term, having no difference from other clauses, and the conclusion of which must follow the ordinary contractual concepts and principles [*Union of India v. McDonnell Douglas Corp*; *Rautray*; *M. R. Pvt. Ltd. v. SomDatt Builders Ltd*]. Without any exceptions made by Parties, every term

in the contract including the arbitration agreement shall be governed by the same law of the underlying contract [*Arsanovia Ltd v. Cruz City*].

25 Second, it is improper for Respondent to assume that Clause 14 is only applied to the "Sales" part of the FSSA [*ANoA, p.55, ¶14*]. The title of this Contract is "Frozen Semen Sales Agreement" and the word "Sales" is simply used to reflect the nature of the transaction (as there are many kinds of contract such as sales, construction, delivery, transferring, etc.) [*Goddard/Fellner/Orman, p.24*].

26 It is, thus, generally accepted that the choice of law applicable to the principal contract also tacitly applies to the arbitration agreement [*ICC Case No. 2626; ICC Case No. 6379; Channel Group v. Balfour Beatty Ltd.*]

b. Mediterranean law is the most appropriate law applicable to the arbitration agreement

27 Supposing that the implied choice of Parties is insufficient, the Tribunal must then apply the most appropriate law with which the case has the closest connection [*Markus, p.21; Bonython v Commonwealth; Amin Shipping Corp v Kuwait Insurance Co; Oceanic Sun Co Inc v Fay; Akai Pty Ltd v People's Insurance Co Ltd; Sulamérica*]. To satisfy the "closest connection" test, the Tribunal might consider several factors, including the nature of the evidence, where the particular document was created or the relevant communication occurred [*Pierre, p.860*].

28 Accordingly, the Tribunal should conclude that Mediterranean law has the closest connection and the most significant relationship to the Clause 15 in the present case as Mediterranean law is *lex loci contractus* of the arbitration agreement contained in the FSSA **(i)**. Moreover, it is also the most appropriate law in accordance with international arbitration practice **(ii)**.Finally, the application of lex arbitri would invalidate the arbitration agreement **(iii)**

i. Mediterranean law is lex loci contractus of the arbitration agreement contained in the FSSA

29 It is important to heed the law of the place of contract signing,*lex loci contractus,* in determining the law of closest connection or most significant relationship to the arbitration agreement [*Lew/Mistelis/Kroll, p.114; Born, p.305*; *ICC Case No.* 14667]. The facts and arguments submitted by the Parties should also conform with the law of the place where the arbitration agreement contained in the main Contract is concluded [*ICC Case No. 14667*]. In this case, Mediterranean law is not only the *lex contractus* but also the *lex loci contractus* [*PO2, p.56, ¶13*]. Established in this jurisdiction is the rule that the law of the place where the arbitration agreement is made governs [*Korea Technologies Co. Ltd. v. Hon. Alberto; Dietmar, p.83*].

ii. Mediterranean law is the appropriate law in accordance with international practice

30 In accordance with international practice, the law governing the contract expressly or implicitly selected by Parties is deemed to have the closest connection to the arbitration agreement [*Born, p.535-538; Redfern/Hunter, p.159; C v. D; Sulamérica; Miller v. Whitworth Ltd; Black Clawson Ltd v. Papierwerke, p.455*].

31 Specifically, in the case *BMO v. BMP*, Judge Belinda Ang Saw Ean found that the Parties had impliedly chosen Vietnam law for the underlying contract, consequently Vietnam law was determined as the governing law for the arbitration agreement as well [*BMO v. BMP*]. The idea favouring the law of the substantive agreement to govern the arbitration agreementis reasonable as it would raise less conflicts other than choosing a different one. [*Lew, ¶136; Sulamérica; Derains, p.16-17; ICC Case No. 2626; Sonatrach Petroleum Corporation v. BVD Ferrell International Limited; BCY v. BCZ, ¶392; Dyna-Jet Pte Ltd Wilson Taylor v. Asia Pacific Pte Ltd*]

32 In this case, Parties explicitly chose the Mediterranean law as the law governing the FSSA. Thus, the Tribunal should prioritise this law to be applicable to arbitration agreement.

iii. Danubian law shall not be applied to the arbitration agreement as it may invalidate the arbitration agreement

33 Respondent contended that in absence of an express choice of law, Danubian law, the law of the seat of arbitration, should be the one of closest connection to the arbitration clause, thus applicable to the arbitration clause [*ANoA, p.31, ¶15*]. However, this allegation is premature and parochial due to the fact that this application may invalidate the arbitration agreement.

For instance, in the *ICC Case No. 6162*, the tribunal refused to apply the parties' choice-of-law as this law would have invalidated the arbitration clause. In this light, it is indeed not a matter of *lex arbitri* or *lex contractus*, but the law that upholds the validity of arbitration clause, which is Mediterranean law.

34 Primarily, this would invalidate the arbitration clause, considering the fact that the formation of the contract under the foreign jurisdiction did not comply with the necessary procedure [*Ex.R2, p.34; PO2, p.56 – 57, ¶14*]. In this case, it cannot be assumed that Parties had intended Mediterranean law not to extend to Clause 15 FSSA where such a limitation would result in the application of Danubian law and consequently invalidate their agreement, leave them facing all the uncertainties and expenses that the arbitration agreement was meant to avoid [*Born, p.545*].

35 In conclusion, the Tribunal should deduce from the determination of law governing arbitration clause by conflict of law rules a homogeneous application of Mediterranean law to Clause 15 FSSA.

2. Separability doctrine cannot be invoked in choosing the law governing the arbitration agreement

36 Separability doctrine exists to grant the tribunal jurisdiction to consider its own jurisdiction [*Prima Paint Co. v. Flood & Conklin Manufacturing Corp; Harbour Assurance Co. (UK) Ltd. v. Kansa General International Assurance Co. Ltd.*]. It does so by isolating the arbitration agreement where there are challenges to its validity. This does not mean that the arbitration clause is separate for all purposes [*Dissenting opinion Judge Chong in BCY v. BCZ*]. Indeed, Art 16(1) Model Law stipulates that an arbitral clause shall be treated as an independent agreement, but only for the purpose of allowing the tribunal to rule on its own jurisdiction [*Lew, Mistelis and Kröll (2003), p.102; Prima Paint Co. v. Flood & Conklin Manufacturing Corp; Harbour Assurance Co. (UK) Ltd. v. Kansa General International Assurance Co. Ltd*]. For all other purposes, such as the assignment of the entire contract or the interpretation of the contractual clauses, the arbitral clause continues to be part of the main contract [*BCY v. BCZ*]. Otherwise, this would subvert the legitimate expectations of the Parties who had expressly inserted the arbitral clause as part of the main contract, and not as two separate documents [*Moore-Bick LJ in Sulamérica*].

37 Moreover, the separability presumption does not mean that the law applicable to the arbitration clause is *necessarily* different from that applicable to the underlying contract [*ICC Case No. 4131; ICC Case No. 3572*]. In many cases, the same law governs both the arbitration agreement and the underlying contract [*Born, p.476; ICC Case No. 5294*; *ICC Case No. 3572*].

To conclude, separability arguments by Respondent should not be upheld in this case. Otherwise, the Tribunal should decide that this principle does not prevent Mediterranean law applicable law to the arbitration agreement.

II. As a consequence, the Tribunal has the jurisdiction to adapt the contract

38 Contrary to Respondent's allegation, the Tribunal has the jurisdiction to adapt the contract, as Clause 15 as interpreted in accordance with Mediterranean law (**1**) and in accordance with the common intention of the Parties (**2**) confers upon the Tribunal the power to adapt.

1. The term ""[a]ny dispute arising out of the contract" in Clause 15 is to be interpreted broadly so as to include contract adaptation

39 The Parties drafted Clause 15 based on the model clause of the HKIAC, which provides for the power of the Tribunal to decide on "[a]ny *dispute* arising out of this contract" (*emph.add.*) [*Ex.C5, p.14, Clause 15*]. Clause 15 is shortened compared to the original HKIAC model clause, which sets out "[a]ny *dispute, controversy, difference or claim* arising out of or *relating to* this contract" (*emph.add.*) [*HKIAC*

Model Clause]. Claimant submits that, contrary to Respondent's contention, Clause 15 should be interpreted broadly so as to include a claim to adapt the contract in case the Parties cannot reach an agreement. Furthermore, it should be interpreted in accordance with the applicable substantive rules, such as the Meditteranean Contract Law.

40 As the law of Mediterraneo is the law governing the arbitration agreement [*Supra* ¶¶*16-37*], it shall also apply in the interpretation of the Arbitration Agreement [*Welser/Molitoris, p.18*]. Whether a claim of increase remuneration is within the jurisdiction of the Tribunal depends on the interpretation arbitration agreement [*ICCA's Guide, p.56*]. Under Mediterranean Arbitration Law, the arbitration agreements are interpreted broadly, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract" [*NoA, p.7, ¶16*].

41 Claimant submits that the term "any dispute arising out of the contract" extends to the adaptation of the price in case of hardship.The term "any dispute arising out of the contract" shall be understood as granting the broadest scope of jurisdiction possible to the arbitrator [*ICC Report 1991, p.115-116; ICCA Guide, p.57; Born, p.1326-1340; Tjong Very Sumito v. Antig Inv. Pte Ltd*]. Therefore, "dispute" would also include the adaptation of the contract, as there exists a conflict of opinion between the parties on if or how the price should be adjusted [*Brunner, p.497*].

42 Additionally, pursuant to the consistent jurisprudence in Mediterraneo, a standard arbitration agreement is sufficient to confer upon the Tribunal the power to adapt under Art.6.2.3 para 4b Mediterranean Contract Law [*PO2, p.60, ¶39*]. In the case at hand, Clause 15 is a standard arbitration agreement, submitting "[a]ny dispute arising out of the contract" to arbitration [*Ex.C5, p.14*]. Neither the wording of Clause 15 nor any statement and/or conduct during the negotiation process [*Claimant's Exhibit C8, p.17*] indicates any exclusion of the Tribunal's authority[*ICCA Guide, p.57; Fiona Trust v. Privalov; Compagnie Maritime Belge v. Distrigas*].

2. The common intention of the Parties confers upon the Tribunal the power to adapt

43 Pursuant to Art.8(1) CISG, in interpreting the contract, the common intention of the Parties shall be taken into account [*Schlechtriem/Schwenzer, Art 8, p. 113, ¶3; UNCITRAL Digest, Art. 8, p. 54, ¶3*]. Like other provisions of the contract, the interpretation of Clause 15 will also subject to the common intention of the parties pursuant to Art. 8(1) CISG [*Lew/Mistelis/Kroll, p. 150, ¶7-60; Born, p. 1326; Mitsubishi Motors Corp v. Soler Chrysler-Plymouth; Amco Asia Corporation v Republic of Indonesia*]. This is in line with the consistence jurisprudence of Mediterraneo law, as the FSSA at hand is governed by the CISG [*Ex C5, p. 14, Clause 14*], the CISG shall also apply to the interpretation of Clause 15 [*PO. 1, p. 53, ¶4*]. The determination of the common intention could be proved through relevant

circumstances stipulated under Art.8(3) CISG, in particular the negotiation process, as well as conducts of the Parties after the inclusion of the contract [*Art.8(3) CISG*].

44 In the meeting on 12 Apr 2017, Mr. Antley, at that time the lawyer representing Respondent, explicitly stated to Ms. Napravnik who was the prime negotiator on Claimant's side, that in case the Parties cannot agree, the arbitrators should adapt the contract [*Ex C8, p.17*]. In addition, in his written notes which contains issues to be negotiated following 12 Apr 2017, Mr. Antley mentioned "point 3: connection between hardship clause and arbitration clause". [*Ex R3, p.35*]. This "connection" could only refer to an empowerment for the Tribunal to adapt the contract into the arbitration agreement in case a hardship occurs.

45 In conclusion, the Parties have agreed to confer upon the Tribunal the power to adapt in case of disagreement pursuant to Art.8 CISG.

B. Even in the event that Danubia law applies to Clause 15, the Tribunal still has the jurisdiction to adapt the contract

46 Contrary to Respondent's allegation, Claimant submits that even under Danubian law, the Tribunal may adapt the contract "if authorize" by the Parties, rather than "expressly authorized" (**I**), and in this case, the Parties have indeed authorized the Tribunal to do so in case of hardship (**II**).

I. The Tribunal has the power to adapt the contract "if authorized" to do so

47 Pursuant to Art.28(3) Danubian Arbitration Law, Tribunals may only exercise exceptional powers to decide *ex aequo et bono* if the Parties expressly authorized them to do so [*PO2, p.60, ¶36*]. Claimant submits that contract adaptation in this case is not an exercise of the power to decide *ex aequo et bono* under Art.28(3) Danubian Arbitration Law (**1**). Furthermore, the Tribunal has synchronized competence with Danubian national Courts, which are vested the power to adapt "if authorized" (**2**).

1. The power to adapt contract is not an exceptional power under Art.28(3)

48 First, even though Model Law does not regulate the power to adapt contracts of Tribunals [*Secretariat Note A/CN.9/WG.II/WP.41, ¶13; Holtzmann/Neuhaus, p.1116*], it was generally agreed by Model Law Working Party that an express authorization is only required where a tribunal is requested to rewrite one or more terms of the contract [*WG Report A/CN.9/WG.II/WP.44, p.179, ¶8*]. A request for adaption of the contract price, however, is not to rewrite the whole term, but to reflect an increased remuneration only. Moreover, for cases in which a party claim a remedy or relief on the grounds of changed circumstances which have allegedly caused him undue hardship, no special authorization by the parties is needed [*WG Report A/CN.9/WG.II/WP.44, p.179, ¶9*]. This is the circumstances of the case at hand.

49 Second, Respondent may contend that the power to adapt is not within the traditional jurisdiction of Tribunals, which is limited to answering only yes or no questions concerning pre-established rights and obligations [*Berger, p.1-3*]. Claimant respectfully submits that in this case, claims of increased remuneration still falls within the scope of dispute settlement within the jurisdiction of the Tribunal, even under the traditional understanding of the term "dispute" [*Brunner, pp.496-497*].

50 A "dispute" is any difference of opinion or 'a disagreement on a point of law or fact, a conflict of legal views or interests between two persons' [*Tjong Very Sumito v. Antig Inv. Pte Ltd*, *Mavrommatis Jerusalem Concessions*]. In this case, after Respondent refused Claimant's request to adapt the price in the meeting of 12 Feb 2018 [*Ex.C8, p.18*], on 31 Jul 2018 Claimant submitted the dispute to arbitration. The prayer for relief is sufficiently specific [*Brunner, p.503; Beisteiner, p.96*], concerning the difference of opinions of the Parties on the obligation and the correct amount of price adaptation [*Brunner, p.497*], with a precise adaptation request of increased remuneration of 25% [*NoA, p.8*]. This is not a general request for adaptation for the tribunal to be 'creative' upon to be considered as an exceptional power.

51 In conclusion, the adaptation of the contract is this particular case is not an exercise of the power to decide *ex aequo et bono* under Art.28(3) Danubian Arbitration Law. Hence, the requirement of an "express authorization" does not have to be satisfied.

2. Under Danubian law, Tribunal has power to adapt the contract "if authorized"

52 Under the principle of synchronized competence, Tribunal's jurisdiction should not be restricted than that of the national court [*Holtzmann/Neuhaus, pp.1126, 1131; Berger, p.10, Kroll, p.19*]. Hence, if the national courts of Danubia can adapt the contract "if authorized" under the applicable substantive law, Tribunals should have the same power [*Brunner, p.495; Berger, p.10*]. This is in line with Art.1.11 Danubian Contract Law, which sets out that the reference to "courts" also includes arbitral tribunals [*Artile 1.11 UPICC*]. In this case, Art.6.2.3(4) (b) Danubian Contract Law provides national courts with the power to adapt contracts "if authorized" by the Parties. There is no consistent case law on the meaning of "if authorized" [*PO2, p.61, ¶45*]. Hence the powers provided for "courts" under this law are provided *multatis multadis* to Tribunals.

53 In conclusion, under Danubian law, the Tribunal has the jurisdiction to adapt the contract "if authorized", rather than "expressly authorized".

II. The Parties authorized the Tribunal to adapt the contract

54 Claimant submits that Tribunal has indeed been authorized by the Parties to adapt the contract. Pursuant to Art.4(2) Danubian Contract Law, as a part of the contract, the arbitration agreement

should be read within the whole context of the contract and taking into account other contract clauses [*Schlectrium/Schwenzer, p.124, ¶29*]. In this case, Clause 15, when read in conjunction with Clause 12, Clause 8 and Clause 14 FSSA indicates the empowerment of the Tribunal to adapt (**1**). Such interpretation of the FSSA is in line with the common intention of the Parties (**2**). Moreover, the fact that Clause 15 was shortened compared to the HKIAC Model Clause does not affect the power given to the Tribunal to adapt (**3**).

1. Reading Clause 12, Clause 8 and Clause 14 FSSA in conjunction indicates an authorization for the Tribunal to adapt the contract price caused by a hardship event

55 In this case, Claimant submits that the nature of the contract, coupled with the applicable substantive law, indicates the implied empowerment for contract adaptation for the Tribunal [*Bordacahar, p.2*]. The fact that there exists a hardship clause in the contract indicates an intention of Parties to renegotiate or, failing this, to subject the contract to adaptation by Tribunals [*Rimke, p.228; Fontaine/De Ly, p.460; Brunner, p.479; Horn, pp.175, 189*]. Renegotiation has failed in the case at hand, however [*Ex.C8, p.18*]. Furthermore, in contracts whose performance period is extended over a period of time, hardship is more likely to happen [*Fontaine/De Ly, p.455*; *Working Group Report A/CN.9/233, p.1128, ¶16*]. In those cases where there is no express adaptation clause, but a hardship clause and a period of contractual performance over a period of time, it can be inferred that the Parties intended to adapt the contract [*Ferrario, p.78*].

56 In addition, the procedural power of the Tribunal to adapt a contract may be reflected through the applicable substantive law's provision on contractual adaptation [*Beisteiner, pp.110-111; Kröll, p.20; Brunner, p.494*]. Even though the contract does not contain an adaptation clause, but if it includes a choice-of-law clause of an adaptation-friendly jurisdiction and a standard arbitration clause, one could infer that the Parties intended to empower the Tribunal to adapt the contract pursuant to the applicable substantive law governing the contract [*Beisteiner, p.111*]. The reliance on the substantive rules to determine the power to adapt is even more appropriate in this case [*Holtzmann/Neuhaus, p.1117*], as the applicable arbitration rules (Model Law [*PO2, p.57, ¶14*]) does not regulate the power to adapt contracts of Tribunals [*Secretariat Note A/CN.9/WG.II/WP.41, ¶13; Holtzmann/Neuhaus, p.1116*].

57 In the case at hand, the FSSA contains no express adaptation clause. However,Clause 8 of the FSSA sets out that the Claimant's contractual performance will be carried out in three installments over the period of six months [*Ex.C5, p.14, Clause 8*]. The contract also contains a hardship clause [*Ex.C5, p.14, Clause 12*]. The choice of law clause selected Mediterranean law as the law applicable to the

contract [*Ex.C5, p.14, Clause 14*], and Mediterranean Contract Law, Art.6.2.3 para. 4b expressly provides adaptation by Tribunals as a remedy in the event of hardship [*Art.6.2.3(4b) UPICC*]. It is also consistence jurisprudence of the courts in Mediterraneo that pursuant to Art.6.2.3 para. 4b Mediterranean Contract Law, once hardship is established an arbitral tribunal will have jurisdiction to adapt the contract [*PO2, p.60, ¶39*].

58 Therefore, when read cumulatively with Clause 12 on hardship, Clause 14 on the choice of the law applicable to the contract that advocates the power to adapt the price of Tribunal, and Clause 8 demonstrating the prolonged character of the contract, it could be inferred that Parties have empowered the tribunal to adapt the contract in case of hardship.

2. The power of the Tribunal to adapt is consistent with the common intention of the Parties

59 Claimant submits that the implied authorization of the Parties for the Tribunal to adapt the contract is supported by the common intention of the Parties. Pursuant to Art.8(1) CISG, in interpreting the contract, the common intention of the Parties shall be taken into account [*Schlechtriem/Schwenzer, Art 8, p.113, ¶3; UNCITRAL Digest, Art.8, ¶3*]. The determination of the common intention could be proved through relevant circumstances stipulated under Art.8(3) CISG, in particular the negotiation process [*Art.8(3) CISG*].

60 In the meeting on 12 Apr 2017, the Parties discussed and agreed on including an adaption clause empowering the tribunal to adapt the contract. Respondent's Mr. Antley explicitly stated to Claimant's Ms. Napravnik that in case the Parties cannot agree, the Tribunal should adapt the contract [*Ex C8, p.17*]. In addition, in his written notes which contains issues to be negotiated following 12 Apr 2017, Mr. Antley mentioned "*point 3: connection between hardship clause and arbitration clause*". [*Ex R3, p.35*]. Based on connection between hardship clause and the arbitration agreement as demonstrated hereinabove [*Supra ¶¶56-57*], this "connection" could only refer the inclusion of an empowerment for the Tribunal to adapt the contract in case a hardship occurs.

61 Even if Respondent alleges under Danubian Contract Law which contains the four corners rule has to be applied instead of Mediterranean law, Claimant respectfully submits that prior statements and agreements can still be used to interpret the contract [*Art.2.1.17 Model Law, sentence 2*]. A contract may need interpretation if it is not sufficiently clear [*CISG-AC Opinion No.3; Farnsworth, p.476,¶7.12*]. Usually, a hardship clause always contains two main part: the hypothesis (i.e. what may constitute hardship) and the effects of hardship (i.e. renegotiation, contract termination, or third party's adaptation) [*Rimke, p.277*; *Fontaine/De Ly, 460*].

62 In this case, however, Clause 12 only provides that seller "shall not be responsible" in case of hardship [*Ex.C5, p.14, Clause 12*]. This does not provide a legal consequence for hardship.Such wording, on the other hand, usually indicates the right to disclaim liability for non-performance in the case of *force majeure* event [*Rimke, p.230*]. Incidentally, as Clause 12 is originally a *force majeure* clause as part of Claimant's standard template, while the hardship part was made in addition to this clause [*Ex.R3, p.35; PO2, p.55, ¶3*], it is highly likely that the Parties forgot to include the effects for hardship event. Hence, the contract is unclear and needs interpretation.

3. The fact that Clause 15 was shortened has no legal consequence on the scope of jurisdiction

63 Contrary to Respondent's contention, the fact that Clause15 was shortened compared to the HKIAC Model clause has no legal consequence on the scope of the jurisdiction of the Tribunal.

It should be noted that HKIAC Model clause was not drafted with a view to differentiate between the components in the formulae. The *rationae* behind the HKIAC model clause, as well as other model international arbitration clauses is to apply expansively to all disputes relating to a particular contract, regardless of legal formulation [*Born, p.1345; Webster, p.609; Bond, p.160; J.J. Ryan Sons, Inc. v. Rhone Poulenc Textile*]. Accordingly, the HKIAC model clause was drafted so as to encompass "any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings, regardless of the wording differences" [*Mustill/Boyd, p.128-129; Brunner, p.496; Tjong Very Sumito v. Antig Inv. Pte Ltd*]. Fine verbal distinctions are artificial considering the Parties are businessmen who are unlikely to consider it [*Born, p.1346; Fiona Trust v. Privalov; Fili Shipping Company Ltd v. Premium Nafta Products Ltd*] and might go contrary to the assumption that once parties agree to arbitrate, they intended to have all disputes resolved through arbitration instead of the domestic courts [*Born, p.1346; Kaplan v. First Options of Chicago*].

64 In this case, neither when negotiating the draft of an arbitration agreement, nor when Clause 15 was included into the FSSA did Parties pay attention to the fine wording formulae. Limited importance was attributed to Clause 15 at the time [*PO2, p.55, ¶¶6, 7*], let alone acknowledging its legal consequence on the jurisdiction of the Tribunal. To say that Clause 15 was shortened with a will to exclude power of tribunal to adapt would contradict the common intention of the parties.

CONCLUSION OF ISSUE 1

The Tribunal has the jurisdiction to adapt the price under Mediterraneo law.Both the intention of parties and the examination the law most appropriate to lead to the application of Mediterranean law.

Thus, applying the rules of Mediterranean law which allows a broad interpretation of arbitration agreement in interpreting Clause 15, the Tribunal has been empowered to adapt the contract. Such empowerment is also reflected in the common intention of the Parties. Even in the unfortunate event that the law governing Clause 15 shall be the law of Danubia, the Tribunal still has the jurisdiction to adapt the contract. The power as such requires a "if authorized" only, not an express authorization by Parties. Such jurisdiction of the Tribunal can be properly deduced from the accumulation of Clause 8, Clause 12, Clause 14 and Clause 15 FSSA.

ISSUE 2: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE OBTAINED EITHER THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL COMPUTER HACK

65 While preparing for the Case-Management-Conference with Respondent and the Tribunal, Claimant received information about another arbitration to which Respondent is a party. In that arbitration, since Respondent was negatively affected by 25%-tariff of Mediterraneo, it requested price adaptation [*Let. Lang, p.50*]. Noting the similarities between two cases, Claimant intended to submit the Partial Interim Award ("**the Award**") from the other arbitration to support its claim. Respondent, however, objected to the admissibility of the Award as evidence, assuming that the documents had been obtained either through a breach of confidentiality agreement or through an illegal computer hack. The Tribunal, thus, is respectfully requested to entitle Claimant to submit the Award as evidence because it is relevant to the case and material to the outcome of this proceeding (**A**) and the means of obtaining evidence does not render such evidence inadmissible (**B**). Furthermore, the admission of evidence respects due process (**C**).

A. The Tribunal should entitle Claimant to submit the Award because it is relevant to the case and material to the outcome

66 According to Clause 15 of the FSSA, Parties agreed to choose HKIAC Rules as the applicable procedural rules [*Ex.C5, p.14*]. Also, since Danubia, the seat of arbitration, has adopted Model Law [*PO1, p.53,* ¶*4*], this Law governs the proceeding. Besides, the IBA Rules on the Taking of Evidence ("**IBA Rules**") should be taken into consideration as a persuasive non-binding source of authority designed to supplement the rules that apply to the conduct of arbitration [*IBA Rules, Preamble, p.4; Born, p.2212; Railroad Development case,* ¶*15*].

67 Art.22(3) HKIAC Rules stipulates that the arbitral tribunal may allow a party to produce evidence that it determines to be "*relevant* to the case and *material* to its outcome" (*emph.add.*). Similarly,

Art.3(3)(b) of the IBA Rules also requires Parties to submit evidence "*relevant* to the case and *material* to its outcome" (*emph.add.*), and this expression holds the "most significant limitation" of evidence [*Blackaby/ Partasides et al., p.382*]. Hence, the common elements for an evidence to be admissible before the Tribunal are its relevance to the case (**I**) and its materiality to the outcome (**II**).

I. The Award is relevant to the case

68 "Relevant evidence" means "having a tendency to make a fact more or less probable than it would be without the evidence" [*Ashford, p.71*], or in other words, having a logical connection with the claim evidence is used to prove [*Pilkov, p.148*].

69 In this case, the Award is relevant as it provides information about Respondent's request to adapt the price in the other arbitration. In details, both cases use HKIAC Rules as the applicable procedural rules [*Let. Lang, p.5*0] and Mediterraneo law is applied to both the contract and the arbitration agreement [*PO2, p.60, ¶39*]. Additionally, the fact of both cases are similar as all involving parties are in the horse industry. Being affected by a new tariff, either from Equatoriana or Mediterraneo, Claimant in this case and Respondent in the other arbitration both request adaptation of the price, invoking change of circumstances [*Let. Lang, p.50*]. Therefore, the Award, as evidence, is relevant to Claimant's request for price adjustment on the grounds that if in the other arbitration, the Tribunal has power to adapt the contract should the tariff result in hardship, and Respondent succeeds in its request, it will greatly strengthen Claimant's argument in the current arbitration. In addition, it is confirmed in the Caratube Case that leaked documents related to a party to the arbitration are "particularly relevant" [*Caratube Case*].

II. The Award is material to the outcome

70 Being "material" means ultimately connected with the sufficiency of evidence. Once the tribunal is provided with sufficient evidence, any other relevant evidence of the same fact is no more material to the outcome of the case [*Ashford, p.71; Pilkov, p.149*].

71 The new evidence that Claimant put forward is material to the outcome because this dispute has yet been supported by any similar evidence. Claimant, when requesting for adaptation of the price, has based mainly on the FSSA and correspondence between the parties, with the latter only demonstrate parties' intent. Hence, the Award from the other arbitration will be an additional objective evidence which makes Claimant's argument more persuasive and undermines that of Respondent. The evidence shows that despite Respondent's strong objection to the adaptation of .the price, Respondent would actually take the same course of action if they were in the position of being negatively affected by a tariff.

72 Respondent argued that the allegations and new evidence put forward by Claimant "do not reflect reality and are taken out of context" [*Let. Fast, p.51*]. However, the authenticity of evidence does not affect the admissibility of evidence, and such a challenge can only be raised after the evidence has been admitted [*Caratube Case*].

B. The means of obtaining the evidence does not affect its admissibility

73 According to Art.22(2) HKIAC Rules, the arbitral tribunal is not bound by strict rules of evidence. In other words, the Tribunal is not bound by national evidentiary rules or formalities [*Born, p.2310; UNCITRAL Sec-Gen Report*]. Even though Danubia is a common law country [*PO2, p . 61, ¶44*], it is not mandatory for the Tribunal to apply common law rules on evidence, under which the greatest weight and importance is attached to oral testimony of the parties and their respective witnesses, rather than documentary evidence [*Debesu/ Eshetu*].

74 Respondent opposed to the measures of taking the Award, claiming that it was illegally obtained. However, regardless of whether the Award may have been obtained through a breach of confidentiality (**I**) or an illegal hack (**II**), the Tribunal should still entitle Claimant to submit the evidence.

I. The breach of confidentiality does not affect the admissibility of evidence

75 Respondent disregards the admissibility of evidence based on the allegation that the Award could have been obtained through a breach of confidentiality of two Respondent's former employees.. However, a breach of confidentiality in Art.45 HKIAC Rules does not affect the admissibility of evidence because an express provision on confidentiality does not exclude the production of the Award (**1**) and the evidence is not excluded under Art.9(2)(e) IBA Rules (**2**).

1. An express provision on confidentiality in Art.45 HKIAC Rules does not exclude the production of the Award

76 Respondent based on Art.42 HKIAC Rules 2013 to argue as regards to confidentiality obligation [*Let. Fast, p.51*]. However, as Parties have agreed to conduct the proceedings on the basis of HKIAC Rules 2018 [*PO1, p.52, ¶II*], and the substantive obligation of Art.42 HKIAC Rules 2013 and Art.45 HKIAC Rules 2018 are similar, this submission would later refer to Art.45 HKIAC 2018 only. Respondent contended that an express obligation provision in HKIAC Rules to keep the proceedings confidential excludes disclosure of evidence under principle of transparency [*Let. Fast, p.51*]. However, this is erroneous. First, Claimant is not bound by the provision of confidentiality of the other arbitration. Art.45(1) and (2) of HKIAC Rules stipulates that the obligation to keep the Award confidential only binds parties, parties' representatives and other involving actors including

the Tribunal or witnesses, etc. In this case, Claimant does not involve in the other arbitration and hence, it is not bound by and does not have the duty to conform with the obligation to keep the Award confidential.

77 Second, Art.45(3) HKIAC Rules states the exceptions to confidentiality obligation, stipulating that the obligation prohibiting disclosure of arbitration Awards does not prevent a party or party representative from disclosing the Award to "protect or pursue a legal right or interest of the party". Indeed, a party to an arbitration can disclose the existence or outcome of that arbitration to protect a right against a third party [*Meza-Salas*]. Respondent can use the Award to protect and pursue its right against Claimant in this case. If it is later proven that there is no inconsistencies in Respondent's attitude towards price adaptation when there is a change of circumstances, Respondent would not be at harm if the Award is used by the current Tribunal. Also, even if Claimant wins the current case, it would create a precedent under HKIAC Rules that is in favor of Respondent. Therefore, it is inappropriate when Respondent invokes Art.42(3) HKIAC Rules 2013 to exclude disclosure of the Award, when the Art.itself allows for disclosure and Respondent can use this for their own benefits.

78 Third, transparency does not necessarily mean making the Award public. In fact, it is narrower in scope and entails providing information about a decisional process for *interested parties* (emph.add.) [*Rogers, p.1307*]. Claimant is an interested party, as it wants to use the Award from the other arbitration to support its arguments for price adaptation.

2. The evidence is not excluded under Art.9(2)(e) IBA Rules

79 Art.9(2) IBA Rules lists out situations in which the Tribunal may exclude evidence. Out of all situations, the most relevant reason to exclude the Award from the other arbitration is clause (e), which excludes evidence on "grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling". Nevertheless, Respondent cannot invoke this ground. A commercial or technical confidentiality, aiming to protect sensitive business or technical information, includes financial history, tax records, know-how, or trade secrets [*O'Malley, p.301*].

80 The Award in this case is only a Partial Interim Award, that is an award made prior to the final award and is a binding determination on one or more, but not all, of the substantive issues [*ICC Digital Library*]. The Award only renders jurisdiction of the Tribunal, not the merits of the case [PO2, *p.60, ¶39*]. Therefore, it is unlikely that it would contain any specific or sensitive financial information of Respondent since in order to decide on jurisdiction, the Tribunal would mainly base on the arbitration agreement and use intent of the parties to interpret the arbitration agreement. Even if the

Award contains some sensitive information, the Award can still be disclosed pursuant to Art.45(5) HKIAC Rules which stipulates that the award published must delete "all references to the parties' names and other identifying information", which will prevent revelation of sensitive business information.

II. The illegal computer hack does not affect admissibility

81 Respondent made another argument that the evidence obtained illegally through an illegal hack should not be admitted. However, Claimant should be endowed with the right to submit the Award since it did not directly take part in obtaining the evidence (**1**) and the evidence has already been made public (**2**).

1. Claimant did not directly take part in the breach of confidentiality or the illegal hack

82 The Preamble of the IBA Rules states that Parties must act in good faith when conducting the taking of evidence, which can be viewed as preventing the submission of evidence knowingly obtained by improper means [*Ashford, p.17, ¶P-20*]. In addition, with regards to illegally obtained evidence, Tribunals tend to rely on the "clean hands" doctrine, which means that a party should not be permitted to profit from its own misconduct in obtaining evidence [*O'Sullivan; Methanex Case; Libananco Case*]. In other words, "[h]e who comes into equity for relief must come with clean hands" [*Llamzon, p.316*] or otherwise the claim may be barred [*Brownlie, p.503*] . However, Claimant stands at a completely opposite position, it is by no means involved in the hacking. The act was carried out by an unknown third party [*PO2, pp.60, 61, ¶41*]. Claimant only knew about the Award from Mr. Velazquez, the CEO of one of Claimant's regular customers [*PO2, p.60, ¶40*]. Claimant did not even know about the means of taking the Award until this matter was first raised by Respondent [*Let. Fast, p.51*].

2. The evidence that Claimant obtained has already been made public

83 The Award is no longer a confidential evidence because it has been made public. The Tribunal in the *Caratube Case* state that once the documents have been made "widely and freely" available to the public, the confidential nature of the document is lost, and the unlawful way of obtaining those documents is not determinative of its admissibility [*Ross*]. The Tribunal then concludes that it should take the evidence into account since "ignoring such information would risk leading to an award that is artificial and factually wrong when considered in light of the publicly available information" [*Caratube Case*]. The Award in this case is promised to be provided by an intelligence company in the field of horseracing [*PO2, pp 60, 61, ¶41*]. This is public in the sense that anyone who knows about the other arbitration between Respondent and the third party can get hold the the Award. Also, not

only the intelligence company, but it is suggested that Mr. Velazquez, the employer of the Mediterraneo buyer in the other arbitration or former employees of Respondent can get hold of and publish the Award [*Id.*].

C. The admission of evidence respects due process

84 "Due process" is a broad phrase referring to the requirement for a fundamentally fair procedure in any legal adjudicatory process, that aims to provide minimum procedural protections [*Martin, pp.3,4*]. Art.13 HKIAC Rules states that the procedures must "ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case". Art.18 Model Law also ensures equal treatment of the parties, entailing that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". The principles of giving parties the opportunity to present one's case (**I**) and ensuring equality between the parties (**II**) are two common and recurring principles of due process [*Waincymer, p.16*].

I. The admission of evidence does not affect parties' opportunity to present their case

85 The essential of the opportunity to present one's case lies in the assurance that parties be kept informed at every stage of the proceedings and be given an opportunity to refute any evidence that is raised in the process [*Martin, p.6*].

86 First, it is clear in this case that parties are kept informed of every stage of the proceeding, and neither side raised objection to that. After Claimant sent their claim on Respondent's other arbitration under the HKIAC Rules, Respondent's immediate response show that they were fully notified of any new evidence or claims throughout the process [*Let. Fast, p.51*]. Second, Claimant has the right to present and support their argument. Art.16(3) HKIAC Rules states that "[t]he Claimant shall annex to its Statement of Claim all supporting materials on which it relies" and Art.18(1) allows for a party to supplement its claim during the course of the arbitration. Art.23 Model Law also allows the parties to submit or "add a reference to the documents or other evidence they will submit" and provides that unless agreed otherwise by the parties, either party may "supplement his claim or defence during the course of the arbitral proceedings", which means that a party is not obliged to state all of its point at one stage of the proceeding [*Holtzmann/ Neuhaus, p.653; WG Report A/CN.9/245*]. Although Claimant did not submit the Award immediately as an answer to any of Respondent's defences, they notified the Tribunal and Respondent and referred to the Award as soon as they became aware of the other arbitration [*Let. Lang, p.50*]. Third, Respondent has the chance to prepare to contradict the new evidence. Indeed, the new evidence allows Respondent to make defence as stipulated under Art.23 Model Law, which allows parties to "supplement his claim

or defence during the course of the arbitral proceedings", and the requirements of Art.23 extend as well to refutation [*Holtzmann/ Neuhaus, p.649*]. This ensures the fairness of the proceeding. If Claimant can supplement or make amendments to its claims, Respondent enjoys the same right to make counterclaim or defences.

II. The admission of evidence does not affect equality between the parties

87 This principle of equality between the parties does not mean that the parties need to be treated identically, but that both parties be treated in a way that does not disadvantage them in the circumstances [*Martin, p.7; Waincymer, pp.16, 17, 19*]. In this case, Claimant informed the Tribunal and Respondent of the evidence that it was going to submit. Also, Respondent was already granted later submission of memorial to present its arguments regarding the Award [*PO1, p.52, ¶II*].

CONCLUSION OF ISSUE 2

Tribunal should entitle Claimant to submit the Partial Interim Award from the other arbitration as evidence, despite the assumption that the evidence has been obtained either through a breach of confidentiality or an illegal hack. The evidence put forward by Claimant should be admitted because it is relevant to the case and material to the outcome of proceeding. Furthermore, the means of obtaining the evidence does not affect its admissibility. Finally, the admission of the Award respects due process.

ISSUE III: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1.250.000 RESULTING FROM AN ADAPTATION OF THE PRICE

88 Claimant respectfully requested the Tribunal to hold that Claimant is entitled to payment of US$ 1.250.000 resulting from the adaptation of the price of the third delivery of 50 doses of Nijinsky III's frozen semen. Firstly, the increase tariff of 30% imposed by Equatoriana is hardship from which consequently, Claimant is entitled to the payment resulting from the adaptation of the price (**A**). And secondly, the adaptation of the price must be US$ 1.250.000, which is 25% of the price of the third shipment(**B**).

A. Claimant is entitled to the payment resulting from adaptation of the price

89 To support this claim, Claimant pleads that: Claimant is not responsible for Equatoriana's increased tariff of 30% as hardship under Clause 12 of the FSSA. This leads to the adaptation of the price which Respondent has promised and Claimant has reasonably relied on(**I**).Alternatively, Equatoriana's increased tariff of 30% is hardship under the applicable law and accordingly, the Tribunal should adapt the price (**II**).

I. Claimant is entitled to the payment resulting from clause 12 of the FSSA and Respondent's acts it reasonably relied on

90 Respondent argued that Clause 12 is of limited scope that does not encompass an increase tariff and does not provide for contract adaptation [*ANoA, p.32, ¶19*]. However, the Tribunal should dismiss such contention because Equatoriana's increased tariff is hardship according to the textual interpretation of Clause 12 (**1**) and such interpretation is in conformity with Parties' intent (**2**). Accordingly, the price must be adjusted based on Respondent's acts which were reasonably relied on by Claimant (**3**).

1. Equatoriana's new tariff is hardship pursuant to the textual interpretation of Clause 12

91 Pursuant to Clause 14 of the FSSA, the law governing the FSSA is MediterraneanContract Law (UPICC) and CISG [*Ex.C5, p.14*]. Accordingly, the interpretativefjoin rules applicable are Art.8 CISG and Chapter 4 UPICC [*Hoogenboom BVBA v. Nijmegen B.V*]. In line with the principle of objective interpretation under the applicable law Art.8 CISG [*Schlechtriem/Schwenzer Art.8, p.132, ¶47; Huber/Mullis, p.15*] and Art.4.6 UPICC, Clause 12 should be interpreted *contra proferentum*. In particular, Clause 12, drafted by Respondent, should be read as follows:

> "Seller shall not be responsible … for hardship, caused by additional health and safety requirements or **comparable unforeseen events** making the contract **more onerous**" (*emph.add.*)

92 Among all possible formations of a hardship clause, Parties agreed on the term "**making the contract more onerous**", which indicates a low threshold required for hardship [*Brunner, p.515; Fleury, p.6*]. Equatoriana's tariff increase is indeed the sole reason that makes the Claimant's cost of performance rose by 30%, thus satisfies this threshold.

93 Additionally, contrary to Respondent's assumption, Parties did not narrow the scope of Clause 12 to exclude tariff increase by the wording "**hardship,** caused by additional health and safety requirements or comparable unforeseen events". Hardship is in itself a broad notion [*Horn/Kroll, pp.444- 445]*. In fact, the practice of combining specific with general circumstance is common in drafting international contract[*Fontaine/De Ly, pp.469 – 470*]. Hence, Parties cannot be said to have narrowed down future changed situations by mere reference to "additional health and safety requirements.

94 In this case, Parties includes the open-ended term "**comparable unforeseen events**". Thus, an event would fall within the scope of Clause 12 if it was unforeseen at the conclusion of the FSSA and is comparable to "additional health and safety requirements". Parties could not have foreseen

the increase of tariff by May 2017 as this increase was only announced on 19 Dec 2017 and took effect from 15 Jan 2018, more than seven months since the conclusion of the FSSA [*Ex.C6, p.15; PO2, p.58,* ¶*25*]. Besides, it is clear that tariff increase and additional health and safety requirements are comparable. Both regulations on tariff and health, safety requirements are rules relating to market access and can potentially restrict trade [*Bossche, p.376*].

95 In short, textual interpretation of Clause 12 clearly favors the inclusion of Equatoriana's 30% increase tariff as hardship.

2. Such interpretation is in accordance with the intent of the Parties

96 In line with Art.8(3) CISG as well as Art.4(1) and 4(3) UPICC, intent is established by, amongst other things, evidence of negotiation process and subsequent conducts. Here, Parties' exchange of communication and their subsequent conducts both prove Parties' common intention to treat Equatoriana's increased tariff as hardship.

97 Regarding the negotiation process, firstly, Parties used ICC Hardship Clause 2003 for reference purpose [*Kessedjian, pp.423-424; Ex.R2, p.34; Ex.R3, p.35].* Instead of the original ICC's threshold which requires contractually duties to be "excessively onerous" [*ICC Hardship Clause 2003*], Parties agreed on a lower threshold of "more onerous" [*Ex.C5, p.14*]. Secondly, the fact that Parties specifically spelt out "hardship, caused by additional health and safety requirements" is not in order to limit the scope of hardship clause but rather to guarantee that Claimant would be released from liability. Before concluding the FSSA, Claimant explicitly mentioned its previous bad experience to Respondent and Respondent was generally aware of Claimant's situation [*PO2, p.58,* ¶*22*]. Claimant emphasized it would not take "**any** further risks associated with such a change in the delivery terms, **in particular not those associated with changes in customs regulation or import restrictions**" (*emph.add.*) [*Ex.C4, p.12*]. Such intention of Claimant was understood and agreed by the Respondent, evinced by the inclusion of a hardship clause into the FSSA and the borrowed wording "additional health and safety requirements" of Clause 12 from Claimant's email [*PO2, p.55,* ¶*5*]. Lastly, from the discussion between Parties on delivery term and price, Respondent agreed to relieve Claimant of all risks in exchange for a lower price. In details, Respondent only paid Claimant an addition of US$ 500 per dose instead of the original price requested by Claimant which might entail higher risks for Claimant [*Ex.C4, p.12; Ex.C5, p.13; PO2, p.56,* ¶*8*].

98 Regarding Parties' subsequent conducts, both Parties deemed that Equatoriana's increased tariff would not apply even after they read the news about it, therefore, such increase is unforeseen at the conclusion of the FSSA [*Ex.C6, p.15; PO2, p.58,* ¶*26*]. Also, Respondent acknowledged the existence

of hardship and even entered into renegotiation with the view to adapt the price for Claimant [*Ex.C8, p.18; PO2, p.60,* ¶*35*].

99 To summarize, Parties' negotiation and subsequent conducts confirms that tariff increase is hardship under Clause 12 and accordingly, Claimant is not responsible.

3. Respondent's promise to adapt the price must be upheld as it was reasonably relied on by Claimant

100 In accordance with the prohibition of *venire contra factum proprium* as an expression of the principle of good faith under Art.7 CISG and its parallel provision Art.1.8 UPICC, party cannot act inconsistently with an understanding other party reasonably relied on [*Furniture leather case; Lookofsky I, p.49,*¶*77*]. Along this line, a party can reasonably rely on other party's inaction [*Lemire v Ukraine, p.29,* ¶¶*134-135*].

101 Here, Respondent made a promise for future adjustment of the price. During the conversation on morning 21 Jan 2018, after Claimant insisted that that it is obliged to pay for the increased tariff under the FSSA, Respondent's representative Mr. Shoemaker stated "… we will certainly find an agreement on the price" and emphasized on future cooperation between Claimant and Respondent [*Ex.C8, p.18*]. Although the FSSA has no specific provision on price adjustment, Mr. Shoemaker's statement reading in line with previous statements of Respondent' s representative Mr. Antley on 12 Apr 2018 [*Ex.C8, p.17*] confirmed Claimant's belief on Parties' shared intention to adapt the contract. Mr. Shoemaker alsomentioned that he would clarify the situation with Respondent's legal department, however, no further notice was given to Claimant before the deadline of authorizing delivery on 21 Jan evening [*Ex.C7, p.16;Ex.C8, p.18; Ex.R4, p.36*]. Cumulatively those actions created an understanding for Claimant that Respondent will adjust the price and for that, Claimant paid the additional tariff, despite not being responsible under Clause 12. Therefore, Claimant is entitled to price adjustment due to Respondent's acts it reasonably relied on.

102 Respondent may reason that Mr. Shoemaker lacks the authority to commit price adaptation. However, pursuant to Art.2.2.5 (b) UPICC, unauthorized person may still have apparent authority. In this case, Claimant can reasonably rely on Mr. Shoemaker's apparent authority as the person in charge of all matters relating to the FSSA introduced by Respondent [*UPICC, Art.2.2.5 comment, p.76, 77; Ritthuemer; Conant, pp.681 – 682; PO2, p.59,* ¶*32*]. Alternatively, an unauthorized act of agent may be binding due to the principal's subsequent act of ratification under Art.2.2.9 UPICC. The silence of Respondent and the subsequent presence of its CEO in the meeting on 12 Feb 2018 ratified Mr.

Shoemaker's promise [*UPICC Art.2.2.9 comment, p.91; D& J Hatchery, Inc. v. Feeders Elevator, Inc.; Ex.C8, p.18*].

II. Claimant is entitled to payment resulting from price adaptation under the applicable law

103 In the unusual circumstance that the Tribunal finds Clause 12 of the FSSA is of limited scope and therefore, does not cover Equatoriana's increased tariff, the Tribunal is respectfully requested to entitle Claimant to payment in accordance with the applicable law, which are CISG and Mediterranean Contract law (UPICC). Claimant's submission shall be first based on CISG as it is an international convention which prevails over Mediterranean law [*Bell, pp.5 – 8*].

104 It should be noted that "Impediment" under CISG Art.79 extends to hardship [*Scafom International BV v. Lorraine Tubes S.A.S; Electronic Hearing Aid Case; Honnold; Lindström; Schwenzer/Hachem/Kee,p.652, ¶45.14,p.669, ¶45.95; CISG-AC Opinion No.7*]. It will be demonstrated that: Parties did not derogate from Art.79 of the CISG by incorporating clause 12 (**1**), following that Claimant is not responsible for tariff increase because Equatoriana's tariff increase met all the requirements of an "impediment" under Art.79 (**2**) and consequently, the Tribunal should adapt the contract (**3**).

105 Alternatively, should the Tribunal find that CISG cannot resolve hardship, then the chosen domestic law of Mediterraneo (UPICC) applies. The reasonings of this section still remain *mutatis mutandis*, to prove that the increased tariff is hardship under UPICC Art.6.2.2 and Art.6.2.3.

1. Parties did not derogate from Art.79 of the CISG by incorporating clause 12.

106 Respondent argued that with the existence of Clause 12, Parties derogated from Article 79 CISG [ANoA., p.32, ¶*20*]. Yet, according to Art.6 CISG, parties can "vary the effect" of any provision. The mere incorporation of a force majeure/hardship clause in the FSSA does not amount to derogation of Art.79 [*Schlechtriem/ SchwenzerArt.6 p.84, ¶3; van Houtte, p.110; UNCITRAL Digest, p.379, ¶23*]. In contrast, Parties are even advised to include a force majeure/hardship clause in order to invoke Art.79 [*Scaforn&Orion v. Exma*].

107 Respondent may even contend that pursuant to Art.2(2)(b) Hague Principles, Parties can apply to different laws to different parts of FSSA and accordingly, Clause 12 is not governed by CISG. However, such contention is baseless. Pursuant to Art.36(1) of HKIAC Rules, the Tribunal can only apply the substantive law of Mediterraneo, not its conflict of law rules. Thus, Respondent cannot invoke Hague Principles [*PO2, p.61, ¶43*]. Furthermore, Parties did not specify any distinction of law applicable to different parts of the FSSA [*Ex.C5, pp.13-14*]. Even if they impliedly did so, a choice of law of CISG Contracting Party, in this case Mediterraneo, allows application of CISG [*UNCITRAL*

Digest, p.34, ¶11]. Thus, CISG also applies when Parties chose Mediterranean law to govern Clause 12.

108 The application of CISG provision can only be excluded if it is incompatible with Parties' agreed term [*UNCITRAL Digest, p.34, ¶15*]. As Art.79 also encompassed force majeure and hardship [*Advisory opinion No.7*], Art.79 does not contradict Clause 12 in the Parties' contract. Even if the Tribunal find that Parties did derogate, such finding does not exclude the application of Art.79 as the applicable law in dealing with unresolved issues under the FSSA [*Ferrari*].

2. Tariff increase is impediments under Art.79 CISG

109 A causal link is required between the event and claim of hardship [*Tallon, p.582, ¶2.6.6*]. In this case, the tariff increase is the sole reason for the increase performance cost that satisfies all the elements of "impediment" under Art.79 [*Ex.C7, p.16*]. The elements for an impediment to be proven are: *first*, it is beyond the control of the Parties, *second*, it is reasonably unforeseeable and *third*, it is reasonably unavoidable [*Schwenzer, pp.714 - 715*].

a. Tariff increase is beyond control of the Parties

110 Parties cannot be exempted for events fall under their sphere of control [*Schlechtriem/Schwenzer, Art 79, page 814-816*].It is accepted that State's intervention, including import – export restrictions, are beyond the control of Parties [*Azeredo da Silveira, p.216; Flambouras, pp.266-267*].Additionally, a government measure with virtually no notice is undoubtedly beyond the control of the Parties [*MacromexSrl. v. Globex International Inc.*].

111 The new tariff imposed by Equatoriana's Government is naturally a trade restriction measure of the State which was applied by a country that is until 19 Dec2018, among the biggest supporters of free trade [*Ex.C6, p.15; PO2, p.61, ¶47*]. There is also no evidence of any notice that tariff will increase and such increase will be applied to horse semen, for racehorse breeding has generally been categorized separately from other agricultural products [*NoA., p.6, ¶11*].Therefore, the increased tariff is beyond the control of Claimant.

b. Tariff increase is reasonably unforeseeable and even if it is foreseeable, Claimant did not assume the risk

112 "Impediment" under Art.79 might be denied only if it is reasonably foreseeable and the party made no reservation at the conclusion of the contract [*Azeredo da Silveira, p.223*].

i. Tariff increase was reasonably unforeseeable at the conclusion of the FSSA

113 An impediment is not foreseeable unless it exists at the time of contracting [*Coal case; Corn* case*; Malaysia Dairy Industries v. Dairex Holland*]. Relevant criteria for the foreseeability of an impediments

are: the length of time between the date of conclusion of contract and the date of the impediment, the circumstance of normal performance before the impediment, early signs of the impediment obvious at the conclusion of the contract, expertise as well as prior experience of the party claiming impediments [*Lee, pp.297-298; Azeredo da Silveira, pp.224-226; Steel bars case*; *MacromexSrl. v. Globex International Inc.*]. The assessment of foreseeability includes not only the possibility of the occurrence of the event but also the its scale [*Uribe, pp.203*–204]. Besides, the standard for the unforeseeability test is reasonableness, which examines the conduct of one party in accordance with person of the same trade, not a perfect omniscient businessman [*Dimatteo,pp.303-304; Kritzer*].

114 In light of the circumstances, Equatoriana's new tariff regime was unforeseeable *firstly*due to the fact that it was not until six months later from the conclusion of the FSSA was Equatoriana's tariff announced [*Ex.C5, p.13; PO2, p.58, ¶25*].*Secondly*, Claimant had no problems with prior delivery installments and would continue to be so provided that the 0% tariff remains the same [NoA.,p.6, ¶9; PO2, p.58, ¶25]. *Thirdly*, there is absolutely no sign of retaliatory tariff from Equatoriana at the time of contract conclusion. The scale, scope of application and timing of the new tariff was a surprise to the general public and even to the informed circle within Equatoriana's government, taking into account the exemplar position of Equatoriana as WTO supporter. [*Ex.C6, p.15; NoA, p.6, ¶11*] Similarly, Claimant cannot reasonably expect that the tariff would apply to horse semen. Based on information it received from Respondent, under Equatoriana's law, horse semen is regulated by distinct specific regulations [*Ex.C1, p.9*]. Therefore, even if Equatoriana imposes retaliatory tariff in parallel with Mediterraneo's tariff on "living animals" [PO2, p.58, ¶*24; NoA., p.6, ¶11*], such retaliation cannot be expected to applied to horse semen. *Forthly*, Claimant cannot have foreseen the tariff increase on the ground of its non-existent experience and expertise in the sale of frozen horse semen, especially with Equatoriana due to its prior ban on artificial insemination [*Ex.C2; p.10; PO2, p.55, ¶1, p.57, ¶15*].

115 Respondent might have argued that Claimant should have foreseen 30% increase in cost of performance as it once experienced a similar increase. However, such argument has no merit since the increase Claimant previously suffered was a Danubia's countermeasure for a breakout of disease [*PO2, p.58, ¶21*], unlike Mediterraneo and Equatoriana's political movements. Even Respondent, as businessman in the same sector, also claimed hardship for Mediterraneo's 25% tariff increase notwithstanding early sign of President Bouckaert's protectionism attitude [*Ex.C6, p.15; PO2, p.58, ¶23*].

116 Cumulatively, there is no way Claimant could have reasonably expected Equatoriana's retaliatory tariff.

i. Claimant did not assume the risk of the tariff increase by accepting DDP delivery term

117 Even if the Tribunal surprisingly find that Equatoriana's increase tariff is foreseeable, it should not be assumed that Claimant bear the risk of such increase tariff. Contrary to what Respondent might have reasoned, delivering in DDP does not mean to assume all risk of changes of circumstances [*ANoA., p.30, ¶4; Ex.R4, p.36*]. While Claimant did bear the cost of delivery by accepting DDP deliver term, INCOTERM actually left the risk of changes of circumstance to the Parties and the applicable law [*Ramberge, pp.17-19; Coetzee, p.4*]. However, in this situation, Parties allow an exemption of risk for Claimant for changes of circumstance by explicitly incorporated Clause 12 [*Ex.C5, p.14*]. Even if the Tribunal find that Claimant had at least assumed some risks due to its acceptance of DDP delivery, such assumption must not be beyond US$ 300 per dose [*PO2, p.56, ¶8*]. In this case, the tariff increase of US$ 30.000 per dose is far beyond the amount Claimant might have assumed [*Ex.C7, p.16*].

c. Claimant cannot reasonably avoid or overcome the tariff increase

118 The third element of Art.79 is satisfied when the disadvantaged party take every step provide a commercially reasonable substitute to prevent the occurrence of the impediment or its consequences [*Secretariat commentary, ¶7*]. The same standard of "reasonable" as in the unforeseeability test applies [*Art.79(1) CISG*]. However, there is no commercially reasonable substitute if the way of performance in the contract is exclusive, in other word, if a party to is only required to comply with obligations under the contract [*Brunner, pp.221, 323 -324; Agristo N.V. v. Macces Agri B.V.,¶3.8*]. Even if there might be substitute performance, such performance must be suggested by Respondent [*HilaturasMiel, S.L. v. Iraq*]. *Furthermore*, no one should be expected to perform his obligations at the cost of his existence [*Liu*].

119 Herein, Parties agreed to "to abide by the terms and conditions as set forth in this Agreement" which specify for the DDP delivery on very specific date and place [*Ex.C5, p.14; PO2, p.56, ¶10*]. Respondent, who has better access to Equatorianian law compared to Claimant, should have suggested alternatives but it did not. Consequently, Claimant cannot deliver DDP to Respondent on agreed date without paying the increased tariff [*PO2, p.58, ¶27*]. Respondent itself, similarly, claimed that it cannot avoid or overcome the tariff increase of 25%, let alone the increase of 30% suffered by Claimant. Not to mention, Claimant would possibly be bankrupt if it bears such tariff [*Infra ¶¶139-140*].

3. The applicable law provide for adaptation of the contract

120 Contrary to Respondent's contention that Art.79 does not allow the remedy of price adaptation, the Tribunal should decide in the adverse on the grounds that: firstly, contract adaptation is a relief under the CISG by virtue of Art.7(2) CISG (a); secondly, Claimant's right to rely on an impediment remains intact (b) and lastly,it is reasonable for the tribunal to adapt the price (c).

a. Consequent to a finding of impediment under Art.79 CISG, by virtue of Art.7(2) CISG, Claimant is entitled to request contract adaptation under Art.6.2.3 UPICC

121 While Art.79 covers hardship, itsconsequence is a matter "governed but not expressly settled" [*Garro, pp.245-246; Kessedjian, pp.418-420*]. Pursuant to Art.7(2) CISG, the Tribunal should resolve the effect of hardship under general principles which CISG base on, or failing that, Mediterranean law - the applicable law in accordance with rules of private international law [*PO2, p.61, ¶43, Hague Principles, Art.2.1; Ex.C5, p.13, Clause 14*].

122 First, the general principles under the CISG includes the UPICC [*Netherlands 10 Feb 2005 Case; Scafom International BV v. Lorraine Tubes S.A.S; UPICC, Preamble Comment, pp.4-5; Uribe pp.214 -215; Magnus*]. Alternatively, should the Tribunal find the UPICC cannot represent general principles of the CISG in the sense of Art.7, the existence of other principles, including the principles of good faith, allow the adjustment of the contract [*Azeredoda Silveira, pp.341-345, ¶516,520; Schlechtriem'ssuggestion,CISG-AC Opinion No.7*].

123 In the rare event that the Tribunal cannot determine the remedy under the general principles of CISG, pursuant to Art.7 (2) CISG second sentence, Mediterranean law (UPICC) applies.

Under all circumstances, Claimant is entitled to invoke hardship effects under Art.6.2.3 UPICC, including right to request contract adaptation.

b. Claimant's right remains intact

124 Upon the existence of tariff increase as an impediment, Claimant has exercised its rights in accordance with Art.6.2.3 UPICC, thus its right remains intact.

i. Claimant duly notified Respondent of its inability to perform the FSSA and requested renegotiation

125 Art.79(4) requires the disadvantaged party to inform other party within reasonable time after it knew or ought to have known of the impediment. What's important is the receipt of notice [*Lookofsky, p.165, ¶306; Tallon, pp.585-586, ¶2.8*]. Also, Art.6.2.3(1) UPICC stipulates duty to request renegotiation. Here, Claimant immediately notified Respondent that the new tariff is applicable to horse semen and requested renegotiation. Claimant also stressed the significance of the increased

tariff in the format of the email and reiterated renegotiation request during subsequent discussion on 20 Jan 2018 [*Ex.C7, p.16; Ex.C8, p.18*]. In fact, Claimant's message was received and understood by Respondent [*Ex.C8, p.18; Ex.R4, p.36*].

126 Even if Claimant's notice or request is found to be undue, Claimant does not lose its right to rely on an impediment [*UPICC, Art.6.2.3 comment, p.2224*].

ii. Claimant did not waive its right to invoke hardship by delivering the last shipment

127 The principle of party autonomy under Art.6 CISG allows for the possibility of waiver [*Butler, p.26, ¶8.06[b]*], waiver of its right to invoke Art.79 and hardship is possible. As there is no specific mention of waiver of exemption, by virtue of Art.7 (2), analogy [*Felemegas, pp.26-27*] should be made to waiver in other provisions i.e. Art.40, Art.44 [*Huber/Mullis, pp.167 – 168*]. There must be clear intent to waive and party is deemed to tacitly waive its right by acting without reservations [*Surface protective film case; Tiller case*].

128 In this case, Claimant never intended to waive its right to invoke hardship.On the contrary, Claimant's act of delivery is an act of good faith given the looming deadline for delivery and the request of Respondent. Claimant only delivered the last shipment based on Respondent promise to renegotiate [*Ex.C8, p.18*] and later initiated a meeting for the purpose of price renegotiation. Additionally, Claimant is required to observed the FSSA and not even allowed to withhold performance [*UPICC, Art 6.2.1; Comment 6.2.3*], thus it would be contradictory to conclude Claimant's lawful act as waiver and deprive its right.

iii. After the failure in renegotiation Claimant waited for a reasonable period pursuant to Art.6.2.3 (3) before requesting contract adaptation by the Tribunal

129 Pursuant to Art.6.2.3 UPICC, following a finding of hardship, Parties shall first renegotiate before request contract adaptation. In this case, Parties renegotiated on 12 Feb 2018 and Respondent conclusively refused to continue renegotiation and solve the dispute [*Ex.C8*].

Failing the renegotiation, one party may resort to the Tribunal to request adaptation provided that it waited for a reasonable time in accordance with Art.6.2.3(3). The waiting period shall be determined on a case by case basis [*UPICC, Art.6.2.3 Comment, p.225*]. Roughly six-month-wait since one party gets the refusal from the other has been found reasonable [*Agricultural Products case; J.G. v. AB SEB bankas*]. Indeed, Claimant waited for a reasonable period of nearly 6 months and only initiated proceeding on 31 Jul 2018 [*Let. Lang, p.3*].

c. It is reasonable for the tribunal to adapt the price

130 The Tribunal upon the finding of an impediment have the options to order Parties to resume renegotiation, keep the contract in its original term, terminate or adapt the contract [*UPICC Art.6.2.3 Comment, p.226; Jenkins, p.2028*]. Among these choices, the adaptation of the contract, specifically price adjustment, is the most reasonable one. Contract adaptation is the preferred choice for cases of hardship and in this case, it was also requested by Claimant [*Doudko, p.504*].

131 Besides, other options following the finding of hardship are not feasible. First, ordering Parties to resume renegotiation would be meaningless as Respondent definitely refused to renegotiate [*Ex.C8, p.18*]. Second, as contract is made based on the "mutual beneficial reallocation or sharing of risk" [*Shavell, p.296*], keeping the contract in its original term would contradict the whole idea of hardship [*Dawwas, pp.19-21*]. Third, termination of the contract has no significance since all the obligations have been fully performed by both Parties [*Understanding Contract termination*]. Furthermore, termination is only allowed if adaptation is not viable [*Kofod; Maskow, p.663*].

B. The adaptation of the price must be US$ 1.250.000, which is 25% the price of the third delivery of semen

132 On 23 Jan 2018, Claimant delivered the third shipment of 50 doses to Respondent, despite a loss of 25% due to the new tariff of 30% imposed by Equatoriana. On the grounds that the Tribunal has the jurisdiction to adapt the contract [*supra* ¶¶*11-64*] and the FSSA should be adapted to entitle Claimant to price adjustment because Claimant is not responsible for the tariff increase in accordance with Clause 12 or alternatively, the applicable law [*supra* ¶¶*88-131*]. Claimant respectfully requests the Tribunal to adapt the contract to the amount of US$ 1.250.000 which is 25% of the price for the third delivery of semen.

133 The purpose of adaptation is to "restore the equilibrium of the contract" and the degree of price adaptation is determined on a case-by-case basis" [*UPICC, Art.6.2.3 Comment, p.226; Girsberger/ Zapolskis, pp.122,127; Schwenzer, p.716; Zaccaria, p.150; Lookofsky, p.440; Brunner, p.426; Rimke, p.239*].Considering wuch degree need notbe exactly the degree of change [*UPICC, Art.6.2.3 Comment, p.226*], the requested 25% is reasonable. Claimant requested such degree to balance parties' share of performance (**I**), to prevent Claimant's financial ruin (**II**) and to restore Claimant's loss of opportunity from Respondent unjust enrichment of resale (**III**)

I. 25% price adjustment would balance Parties' share of performance in the event of Equatoriana's tariff increase

134 In line with the purpose of adaptation which is to "restore the equilibrium of the contract", the impact of change of circumstances should be equally born by both parties [*Lithuaniaad hoc award*]. Profit margin is the first indicator of the degree of price adaptattion [*Schwenzer, p.716]*. Accordingly, degree of alteration should reflect the measurement of the *expected costs* against the *cost following the change of circumstance* [*Brunner, pp.432 -433*]. In this case, Claimant's costs of performance, profit and loss before and after the tariff increase are compared in details as follow:

US$/dose	**Cost of performance**	**Price**	**Profit**	**Loss**
Before	**95.000** (expected cost)[*PO2, p.58, ¶31*]	100. 000	5.000	0
After	**125.000** Calculated by sum of expected cost and increased cost due to tariff increase (= 95.000 + 100.000 x 30%) [*PO2, p.59, ¶31*]	100.000	0	25.000

135 Thus, Equatoriana's new tariff regime clearly destroyed Claimant's profit margin, raised the cost of Claimant's performance and ultimately, made Claimant lose US$ 25.000 per dose (equivalent to US$ 1.250.000 for the third shipment). *A fortiori*, a contract's aim is mutual benefit [*Shavell, p.296*]. Should the Tribunal deny Claimant's request, it would void the meaning of the whole FSSA for Claimant. In this case, the expected profit for Claimant generated by the FSSA is US$ 500.000 (5% of the value of 100 semen doses sold at US$ 100.000 each). Yet, Equatoriana's tariff costs Claimant US$ 1.500.000 (calculated by 30% value of the third delivery).

136 Also, from the above calculation, by requesting the additional amount of 25% of the price (US$ 25.000/dose), Claimant gave up its 5% profit margin and shouldered its share of the burden created by the increased tariff. Due to Respondent's continuous urgent demand for breeding season and commitment to bear the cost, Claimant acted in good faith to temporarily bear the tariff to deliver the shipment in due date [Ex.*C8, p.18*].

137 Furthermore, asthere was no mathematic calculation to decide precisely the contract equilibrium in every case [*Gisberger/Zapolskis, p.129*], thus, circumstances surrounding the contract must be taken into account, including whether and how the supervening events burdened the counter-performance **[***Uribe, pp.202-203*]. Unlike Claimant, Respondent would not be burdened by bearing an additional amount of 25% of the price [*PO2, p.59, ¶30*].

138 To sum up, the adjustment of 25% of the price would even the share of performance between parties in this case of tariff increase.

II. 25% price adjustment would prevent Claimant's financial ruin

139 Since the overall financial situation must always be considered [*Dalhuisen, p.110*], it is crucial to take into account the criteria of an imminent and permanent financial ruin [*Brunner, p.436; Schwenzer, p.716*]. In other words, the contract should be adapted so as to not cause harm to one of the parties [ICC *No. 9994; Girsberger/Zapolskis, p.131*]. A party' financial ability may be badly damaged especially if the affected contract accounts for a major part of its revenue [*Brunner,p.435; Girsberger/Zapolski, pp.131-132*].

140 At hand, the third shipment in 2018 is a major part of Claimant's expected revenue (US$ 250.000 out of the total US$ 300.000) [*Ex.C5, p.13; PO2, ¶¶29,31*]. A financial ruin with lasting effects is looming upon Claimant as Claimant has been on the verge of insolvency since 2014 [*PO2,p.58, ¶21*]. Claimant had gone great length to convince the Creditors Committee to authorize new loans in order to continue operating [*PO2, p.58, ¶21*]. Furthermore, before the negotiations about the price adaptation, Respondent was aware of Claimant's financial difficulties and had been losing money over the last years [*PO2, p.58, ¶22*]. During the negotiation, Respondent did have knowledge of the impact of the 30% tariff on Claimant's financial situation [*PO2, p.59, ¶28*]. With the sacrifice of profit [*Supra ¶¶134-138*], an additional loss of US$ 25.000 per dose (US$ 1.250.000) in total would, at minimum, cause Claimant to lose its dressage part or more dreadfully, go bankrupted.

III. 25% price adjustment would restore Claimant's loss of opportunity from Respondent unjust enrichment

141 When one party unjustly enriched itself at the other's expense, the balance the interests must be re-established [*Sea-Land Service v.IPSOI; S.E.E.E. v. Yugoslavia; Reisman/Crawford/Bishop, p.731et seq*]. The enrichment of one party on the detriment of another must arise out of the same event [*Sea-Land Service v.IPSOI]*. Additionally, there must be no contractual remedy for the disadvantaged party [*Schlegel Co v. NICIC*].

142 In this case, although there is no contractual remedies for Claimant against resale prohibition in the FSSA, Parties had a mutual understanding and specified in the FSSA that the semen was only to be used for specific mares as notified to and accepted by Claimant [*Art.8 CISG; Ex.C5, p.13; Ex.C2, p.10; Ex.C8, p.17; PO2, p.55, ¶¶3,4*]. Thus, Claimant is still entitled to price adjustment due to Respondent's unjust enrichment Yet, due to unfortunate accident, there's neither express

prohibition of resale nor penalties in case of violation [*Ex.C5,p.13*]. Thus, Claimant has no express contractual remedy against the resale of Respondent.

143 Through the resale of semen doses and Claimant timely delivery, Respondent gained at the expense of Claimant's loss of opportunity, which is the difference between the contractually agreed price and the possible price one party could sell to a third party at current market conditions [*Brunner, p.435; Girsberger/Zapolskis, p.133*].

144 On the one hand, Respondent planned to resell at least 50 semen doses and indeed successfully did so without informing Claimant [*PO2, pp.56,57, ¶¶11,20*]. Due to Claimant's timely delivery, Respondent also successfully avoided all the damages might be caused by late delivery under other semen resale contracts contrary to Parties' agreement and unknown to Claimant [*Ex.C2*, p.10; *PO2, pp.56, 57, ¶¶11,20*]. On the other hand, Claimant acted in good faith and even temporarily bore the increase tariff to deliver the third shipment timely [*Ex.C8, p.18*]. In other words, for every semen dose delivered in the third shipment, Respondent unjustly profited US$ 20.000/dose, took away potential clients from Claimant whereas Claimant lost US$ 30.000/dose for tariff [*NoA., p.8, ¶20; PO2, p.57, ¶20*]. Therefore, a simple calculation of averageRespondent's gain and Claimant's loss equals to US$ 25.000/dose, supporting an adjustment of 25% of the price.

CONCLUSION OF ISSUE 3

Claimant is entitled to the payment of US$ 1.250.000 which is 25% the price for the 3rd delivery of semen. Pursuant to Art.12 of the Parties' FSSA, Claimant is not obliged to pay for Equatoriana's increased tariff. Thus, Claimant is entitled to price adjustment as reasonably relied on Respondent's promise. In the alternatives, Claimant is not liable for such tariff under Art.79 CISG and has the right to request contract adaptation under, Art.6.2.3 UPICC. Either way, 25% price adaptation should be granted as it restores the contract equilibrium by balancing share of Parties' performance in changed circumstances, preventing Claimant's financial ruin as well as remedying Respondent's unjust enrichment due to semen resale.

PRAYER FOR RELIEF

In light of the above submissions, Claimant respectfully requests the Tribunal to find that

- The Tribunal has jurisdiction to adapt the FSSA under the arbitration clause **(Issue 1)**
- Claimant is entitled to submit evidence obtained either through a breach of confidentiality agreement or through an illegal computer hack **(Issue 2)**
- Claimant is entitled to the pay of US$ 1.250.000 resulting from an adaptation of the price both under the FSSA and CISG **(Issue 3)**

Hanoi, 06 December 2018

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose signatures below.

We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

PHUONG ANH DO

DIEU LINH NGUYEN

HA VAN PHAM THI

ANH NGUYEN THI MINH

THUY DUONG VU