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UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW

MEMORANDUM FOR RESPONDENT

Phar Lap Allevamento v. Black Beauty Equestrian

CLAIMANT RESPONDENT

GWENLLIAN KERN-ALLELY | JOHN MYSLIWIEC | YVONNE RICARDO
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TABLE OF CONTENTS

Page

LEGAL INDEX

Advisory Opinion No. 16	CISG Advisory Council Opinion No. 16
CISG	United Nations Convention on Contracts for the International Sale of Goods
HKIAC Rules	Hong Kong International Arbitration Center Administered Arbitration Rules
HKIAC Model Clause	HKIAC Model Arbitration Clause
IBA Guidelines on Evidence	IBA Guidelines on the Taking of Evidence
IBA Rules on Ethics	IBA Rules of Ethics for International Arbitrators 1987
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2016

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INDEX OF ABBREVIATIONS

&	And
§ / §§	Section / Sections
¶ / ¶¶	Paragraph / Paragraphs
%	Percent
Adv.	Advisory
Art. / Arts.	Article / Articles
CISG	Convention of the International Sale of Goods
Cl.	Claimant
Cl. Ex.	Claimant's Exhibit
Co.	Company
e.g.	Exemplum gratia (for example)
et. al	Et alia (and others)
Etc.	Et cetera (and so forth)
Ex.	Exhibit
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	Idem (the same)
i.e.	Id est. (that is)
Inc.	Incorporated
Infra	Below
Int'l	International
L.J.	Law Journal
L. Rev.	Law Review
Memo.	Memorandum
Mr. / Ms.	Mister / Mistress
n.	Footnote
No. / Nos.	Number / Numbers
Op.	Opinion
p. / pp.	Page / pages

Proc. Ord.	Procedural Order
Resp.	Respondent
Resp. Ans.	Respondent's Answer to Statement of Claim
Resp. Ex.	Respondent's Exhibit
sec.	Section
Stmt.	Statement
Supra	Above
TOR	Terms of Reference
UNCITRAL	United Nations Convention on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD $	United States Dollars
v.	Versus
Vol.	Volume

STATEMENT OF THE FACTS

1. **Black Beauty Equestrian** ("RESPONDENT") is a world-renowned equestrian center in Oceanside, Equatoriana, recognized for producing world champion show jumpers and international dressage champions from its broodmare lines. RESPONDENT seeks to broaden its business and develop a breeding program for award-winning racehorses.
2. **Phar Lap Allevamento** ("CLAIMANT") is a stud farm in Capital City, Mediterraneo, which is well-known for breeding successful racehorses, particularly the highly sought-after stallion, Nijinsky III. CLAIMANT uses a specialized freezing technique to preserve horse semen, resulting in a long-living, superior-quality product.
3. On **21 March 2017**, RESPONDENT requested 100 doses of Nijinsky III's frozen semen from CLAIMANT. Due to a severe outbreak of foot and mouth disease, the government of Equatoriana lifted its ban on artificial insemination and RESPONDENT sought to use this opportunity to benefit its new expansion into racehorse breeding.
4. On **24 March 2017**, CLAIMANT proposed a purchase price of USD $99,500 per dose, with the doses to be picked up by RESPONDENT at CLAIMANT's facility. CLAIMANT also proposed the use of its Standard Frozen Semen Sales Agreement, which applied the law of Mediterraneo to the Sales Agreement and gave the courts of Equatoriana jurisdiction over dispute resolution.
5. On **28 March 2017,** RESPONDENT countered CLAIMANT's offer. Due to both the urgency of the delivery and CLAIMANT's experience in the shipment of frozen horse semen, Respondent requested the delivery terms of Delivery Duty Paid ("delivery DDP"). RESPONDENT agreed to CLAIMANT's request for the law of Mediterraneo to govern the Sales Agreement, but only if the courts of Equatoriana had jurisdiction, so that Mediterraneo would not have the benefit of both applicable law and jurisdiction.
6. On **31 March 2017**, CLAIMANT conditioned acceptance of delivery DDP on a hefty price increase of USD $1,000 per dose. The price increase is to cover additional costs associated with the change in delivery terms. CLAIMANT also requested the inclusion of a hardship clause. CLAIMANT objected to the jurisdiction of the courts of Equatoriana and instead suggested arbitration in Mediterraneo.
7. On **10 April 2017**, RESPONDENT acknowledged that the law of Mediterraneo would govern the sales agreement and proposed an arbitration agreement based on the model clause suggested by the HKIAC. The proposed arbitration agreement selected Equatoriana as the seat of arbitration and the law of Equatoriana as the law of the arbitration agreement.

8. On **11 April 2017**, CLAIMANT proposed an arbitration agreement with Danubia, a neutral country, as the seat of arbitration. CLAIMANT proposed Danubia as the seat because RESPONDENT did not wish to submit to the jurisdiction of Mediterraneo. CLAIMANT countered with the modification of the seat of the arbitration to Danubia and suggested reliance on the ICC Hardship Clause.
9. On **12 April 2017**, Ms. Napravnik, for CLAIMANT, and Mr. Antley, for RESPONDENT, met in Vindobona, Danubia, to negotiate the arbitration agreement and the hardship clause. Mr. Antley told Ms. Napravnik that the ICC Hardship Clause proposed by CLAIMANT was too broad. Mr. Antley acknowledged the need for further negotiations, which were to continue the next morning.
10. Unfortunately, that same day, Ms. Napravnik and Mr. Antley were in a terrible car accident. Neither Ms. Napravnik nor Mr. Antley recovered in time to finalize the contract. John Ferguson, for CLAIMANT, and Julian Krone, for RESPONDENT, replaced Ms. Napravnik and Mr. Antley, respectively, to conclude negotiations.
11. On **25 April 2017**, Mr. Bouckaert won the presidential election in Equatoriana.
12. On **05 May 2017**, President Bouckaert appointed Cecil Frankel, one of the most ardent critics of free trade, as the "superminister" for agriculture, trade, and economics. Ms. Frankel had been an outspoken protectionist for years, advocating for limiting the access of foreign agricultural products to the Mediterranean market.
13. On **06 May 2017**, Mr. Ferguson and Mr. Krone signed the finalized Frozen Semen Sales Agreement (the "Sales Agreement"). The Parties agreed to a series of three shipments to deliver the 100 doses of horse semen to RESPONDENT.
14. On **18 May 2017**, RESPONDENT made its first payment of USD $5,000,000. CLAIMANT sent the first shipment of 25 doses on **20 May 2017** and the second shipment of 25 doses on **3 October 2017**.
15. Shortly after his election, President Bouckaert imposed a 25% tariff on all agricultural products from Equatoriana.
16. On **19 December 2017**, the Government of Equatoriana imposed a tariff of 30% percent on all agricultural goods from Mediterraneo in retaliation for Mediterraneo's previously imposed tariff on Equatoriana (the "tariff").
17. On **20 January 2018**, CLAIMANT was informed by export authorities that the tariff applied to the third and final shipment of frozen horse semen. CLAIMANT suspended delivery and informed

RESPONDENT that the shipment would not be completed until the Parties came to a solution. CLAIMANT sought to transfer responsibility for the 30% tariff to RESPONDENT.

18. On **21 January 2018**, RESPONDENT urged CLAIMANT to authorize the third shipment as RESPONDENT had upheld its obligations by initiating payment.

19. On **02 October 2018**, Joseph Langweiler, for CLAIMANT, informed the Tribunal of immaterial information concerning RESPONDENT's involvement in a separate arbitration. Mr. Langweiler learned of the existence of the other arbitral proceedings from Mr. Kieron Velazquez, an employee of the other party to the arbitration. He was neither involved in the arbitration nor was privy to the detailed matters discussed during the arbitration. Mr. Velazquez discussed the rumors with CLAIMANT at the annual breeder conference.

20. On **03 October 2018**, Julia Clara Fasttrack, for RESPONDENT, objected to the submission of such misleading information in the present arbitration. RESPONDENT informed the Tribunal of the existence of an express confidentiality agreement and that RESPONDENT had conducted an initial investigation concerning CLAIMANT's allegations and found that the information was obtained either through a breach of confidentiality by RESPONDENT's former employees or through illegal means.

SUMMARY OF THE ARGUMENTS

Argument on Procedure

21. This Tribunal lacks the requisite jurisdiction to adapt the contract because the Parties intended for Danubian law to apply to the Arbitration Agreement, not Mediterraneo law (**I**). When the Parties agreed that the seat of arbitration should be Danubia, they also agreed that the Arbitration Agreement should be governed by Danubian law. Even if this Tribunal determines that the Parties did not intend for Danubian law to expressly or impliedly govern the Arbitration Agreement, this Tribunal should find that Danubian law governs the Arbitration Agreement under the closest connection test.

22. Because Danubian law governs and requires an express written conferral of power to adapt in the agreement, the Arbitration Agreement does not empower this Tribunal to adapt the contract. In the alternative, even if this Tribunal finds that Mediterraneo law governs, the Arbitration Agreement still does not grant authority to this Tribunal to adapt the Agreement.

23. This Tribunal should exclude any evidence regarding RESPONDENT's other arbitrations because the evidence is not relevant to the current proceedings (**II**). Additionally, presenting the evidence is more prejudicial than it is probative to the current arbitration because the evidence involves confidential arbitral proceedings conducted by the HKIAC. Additionally, the evidence may have been obtained through a confidentiality breach or an illegal hack.

Argument on the Merits

24. Should this Tribunal find it has the jurisdiction to adapt the Sales Agreement, this Tribunal still does not have the authority to adapt the Sales Agreement, because neither Clause 12 of the Sales Agreement, nor the CISG provide for adaptation (**III**)

25. Even if this Tribunal finds that adaptation is a plausible remedy, the 30% retaliatory tariff does not fit within the narrow scope of the hardship clause, is not an impediment within the meaning of the CISG, and is not severe enough to warrant adaptation through general contract principles.

ARGUMENT ON PROCEDURE

I. THIS TRIBUNAL IS WITHOUT JURISDICTION TO ADAPT THE AGREEMENT BECAUSE UNDER DANUBIAN LAW, THIS TRIBUNAL CANNOT ADAPT ABSENT THE EXPRESS AGREEMENT OF THE PARTIES.

26. The doctrine of separability is a universally accepted principle where arbitration agreements are viewed as separate contracts from the substantive contracts in which they are included. [*Born, p. 356*]. Thus, under the doctrine of separability, it is possible for two different sets of laws to apply to one proceeding, meaning one set of laws can apply to the underlying substance of the contract itself, while a different set of laws applies to the arbitration agreement. [*Id.; Lew/Mistelis/ Kröll, p. 100; Jones, p. 912*]. This was exactly the intention of the parties in this case. While the substance of the law of Mediterraneo applies to the substance of the Sales Agreement, the law of Danubia governs the Arbitration Agreement.

27. CLAIMANT does not generally dispute that different law can apply to different portions of a contract. CLAIMANT does, however, argue Mediterraneo Law applies to the Agreement. To reach this conclusion, CLAIMANT asserts that this Tribunal should consider the "Three Stages Doctrine" which directs a tribunal to consider: first, whether the parties expressly or impliedly chose *the law of the arbitration agreement* and, in the absence of express or implied choice, which country's law has the closest and most real connection to the arbitration agreement. [*Cl. Brief ¶¶ 4-5; Sulamérica*; *Redfern/Hunter, p. 160*].

28. While RESPONDENT does not disagree with CLAIMANT's *Three Stages* approach, RESPONDENT strongly opposes the outcome of CLAIMANT's analysis.

29. Applying the Three Stages Doctrine, Danubian law should govern the Arbitration Agreement. First, the Parties expressly chose Danubia as the seat of the arbitration, in contrast to specifically agreeing to Mediterraneo law for governing the sales contract (**A**). Second, even absent an express selection, the Parties impliedly selected Danubian law as the law governing the Arbitration Agreement by naming Danubia as the seat of arbitration and not expressly providing a different law for the Arbitration Agreement (**B**). Third, should this Tribunal find that the Parties intent is unclear, Danubia has the closest and most real connection to the Arbitration Agreement because it has a physical tie to the Arbitration Agreement (**C**). As Danubian law applies to the Arbitration Agreement, this Tribunal does not have jurisdiction to adapt this Agreement because Danubian law requires an express agreement by the parties conferring the tribunal the power to adapt (**D**).

A. THE PARTIES EXPRESSLY SELECTED THE SEAT OF THE ARBITRATION AS DANUBIA RATHER THAN MEDITERRANEO, MAKING CLAIMANT FULLY AWARE THAT DANUBIAN LAW SHOULD APPLY TO THE ARBITRATION AGREEMENT.

30. The Parties expressly selected Danubia as the seat of the arbitration knowing that in doing so, Danubian law would serve as the governing law of the Arbitration Agreement. Generally, tribunals determine that the express selection of a law of the seat that is different from the law of the main contract, is also a clear indication that the seat's law is applicable to the arbitration agreement. [*Sulamérica; Black Clawson; Tamil Nadu Electricity Board; UST-Kamenogorsk Hydropower Plant JSC; Atlas Power; FirstLink; India No. 47*]. When further examining the parties express or implied intention, the Tribunal is not without guidance.

31. Generally, the Tribunal should look to "the common intention of the parties." [*UNIDROIT 4.1(1)*]. Stated differently, the "statements made by… a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." [*CISG Art. 8(1)*]. If the subjective intention of the parties cannot be determined, the Tribunal should look to the "the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances." [*UNIDROIT 4.1(2); CISG 8(2)*]. This approach is particularly appropriate here because both Mediterraneo law and Danubian law adopt a similar approach.

32. Both Danubian and Mediterraneo Arbitration Law enforce the doctrine of separability presumption, providing that "an arbitration clause… shall be treated as an agreement independent of the other terms of the contract." [*DAL Art. 16(1); MAL Art. 16(1)*]. Thus, while the Parties do not dispute that the law of Mediterraneo would apply to a dispute regarding the Parties' contractual obligations, the Parties knew or could not have been unaware that under the doctrine of separability, the law of Danubia covers the Arbitration Agreement.

33. Here, the Parties understood that the law governing the Sales Agreement and the law governing the Arbitration Agreement are different. Indeed, in the Arbitration Agreement proposed by Respondent on 10 April 2017, while governed by the HKIAC rules, both the law of the Arbitration Agreement and the seat of arbitration were the same, namely, Equatoriana:

> Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.
> The seat of arbitration shall be Equatoriana.
> The law of this arbitration clause shall be the law of Equatoriana.

> The number of arbitrators shall be three.
> The arbitration proceedings shall be conducted in English.
> [*Resp. Ex. 2*].

34. CLAIMANT seemed to agree and endorse this approach. As CLAIMANT stated in Ms. Napravnik's 11 April 2017 email that they could "agree on arbitration in a neutral country." [*Resp. Ex. 3*]. Ms. Napravnik expressly agreed that "[CLAIMANT] would largely accept your [10 April 2017] proposal with an amendment as to the place of arbitration." [*Id.*]. No other amendments were identified in Ms. Napravnik's email; CLAIMANT never stated that the law of the arbitration clause should revert to Mediterraneo or otherwise be disconnected from the seat. Instead, by accepting RESPONDENT's proposal, with the only amendment to the place of arbitration, CLAIMANT agreed to a natural governing law as well.

35. Therefore, because the Parties expressly chose the law of Danubia as the seat of arbitration, Danubian law should also apply to the Arbitration Agreement.

B. THE PARTIES IMPLIEDLY SELECTED DANUBIAN LAW RATHER THAN MEDITERRANEO LAW BECAUSE THEY SELECTED DANUBIA AS THE SEAT OF ARBITRATION AND DID NOT SELECT ANOTHER LAW TO GOVERN THE ARBITRATION AGREEMENT.

36. In the absence of an express choice of Danubian law as the law that governs the substantive part of the Arbitration Clause, the Parties lack of express intent indicates their implied intent for Danubian Law to apply to the Arbitration Agreement. When parties select a law other than the law governing the sales contract as the seat of arbitration, it shows that the parties implied that the law of the seat should also govern the Arbitration Agreement. [*Barraclough/Waincymer, p. 231; Born, p. 312*]. The seat of the arbitration is meant to be the legal center of gravity of the proceedings. [*Redfern/Hunter, pp. 173, 176, 220*]. Just as when one chooses to enter a new country it is implied that they follow those laws, when one chooses a seat of arbitration, they imply that the arbitration agreement will also follow those laws. [*Redfern/Hunter, pp. 173, 176, 220]*. Leaving aside the Parties negotiations, the standard of a reasonable person should apply to interpret the Parties' Agreement. [*UNIDROIT Art. 4.2.2.; CISG Arts. 7, 8(2), 9*].

37. A reasonable person would generally presume in international arbitration that the law governing the Arbitration Clause is the extension of the law of the seat when an express selection of a seat has been made as generally, both the New York Convention and its precursor, the Geneva Protocol,

deem this the appropriate extension absent an express choice of law, [*Bělohlávek, p. 266; NYC Art. V(1)*], and it is the reason why the selection of a seat for the arbitration is of prime importance. [*Bělohlávek, p. 266*].

38. In the initial drafting of the Parties' Arbitration Agreement, the clause initially provided for an express selection of law – that of Equatoriana. [*Resp. Ex. 1*]. In the initial clause, both the seat and the law of the arbitration matched. [*Resp. Ex. 1*]. With CLAIMANT's removal of the choice of law provision, and its selection of Danubia as the seat, a reasonable person would understand the intent to have Danubian law apply to both the seat as well as the applicable law. This is emphasized by the nature of arbitration clauses where the law of the seat is regularly extended to the law of the arbitration when this mandatory designation is not expressly made. [*HKIAC Model Clause*]. In opting for the international default in these situations, the Parties knew that Danubian law, as the law of the seat, would govern the Arbitration Agreement, not a law governing an entirely separate clause of the contract. Applying the separability principle to the facts here, the Parties impliedly selected Danubia as the applicable law of the arbitration agreement, given that either party could have expressly selected another applicable law to the contrary, but did not.

39. Further, RESPONDENT made clear to CLAIMANT that it desired a long-term relationship for the mutual benefit of both Parties and did not find it "appropriate that [CLAIMANT's] law applies and [CLAIMANT's] courts have jurisdiction." [*Cl. Ex. 3*]. When RESPONDENT suggested Danubia serve as the seat of arbitration, RESPONDENT implied that any arbitration would be subject to Danubian law as well. It is reasonable to assume that the attorneys for each party that negotiated the Arbitration Agreement would be familiar with the principles of international law, [*Cl. Ex. 8*], and that they would be aware that the law of the seat also applies to the Arbitration Agreement.

C. DANUBIA HAS THE CLOSEST AND MOST REAL CONNECTION TO THE ARBITRATION AGREEMENT BECAUSE IT HAS A PHYSICAL TIE TO THE ARBITRATION.

40. Should this Tribunal determine that the intent of the Parties is not clear, the Arbitration Agreement should be governed by the country that has the most real and substantial relationship to the Arbitration Agreement. [*Sulamérica; BCY v. BCZ; Habas Sinai v. VSC Steel Co.; Redfern/Hunter, p. 160*]. This is commonly understood to be the closest connection test. [*Id.*]. In instances where the parties have not agreed on a provision, the Tribunal is empowered to use international norms to determine the appropriate law. [*Rome Convention Art. 4*]. While there are numerous factors a Tribunal may consider in the closest connection test, common factors include looking to the

circumstances surrounding the execution of the contract, the circumstances of the case and the submissions of the parties, and other post-contract behavior. [*Waincymer, pp. 996-997*]. The seat of the arbitration is usually given great weight as an express selection by the parties. [*Sulamérica*]. Some of the other factors that tribunals and courts consider are: the domicile and the residence of the parties; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted (e.g. whether the language is appropriate to one system of law but inappropriate to another); and the fact that a certain stipulation is valid under one law but void under another. [*Fawcett/Carruthers, p. 190*].

41. It is generally held that the national law which has the closest link to arbitrability is the law of the seat of the arbitration. [*ICC Award No. 6719*]. This is especially true if the seat of arbitration was mutually agreed to by the parties. [*Id*.]. Danubia, as the seat of arbitration, is the location with the closet link to arbitrability. As such, Danubian law should be viewed as the most appropriate law for the application of the Arbitration Agreement.

42. The arbitration of the Parties is set in Danubia. The Arbitration Agreement was principally negotiated in Danubia, as Mr. Antley and Ms. Napravnik traveled to Danubia for the purpose of negotiating the Arbitration Agreement at the annual colt auction. [*Cl. Ex. 4*].

43. The new negotiators, Mr. Ferguson and Mr. Krone, never discussed the arbitration and choice of law clauses further and never again met in person. [*Proc. Ord. 2, ¶ 8*]. Danubia also has a real relationship and interest in having its own law applied, as it is the seat of the arbitration. This, along with the obvious desire to have a neutral disputes resolution forum [*see supra*] shows that Danubia has the most real and substantial relationship to the Arbitration Agreement and thus should be the law that governs the Arbitration Agreement.

44. Therefore, Danubia has the closest connection to the contract and Danubian law should govern the Arbitration Agreement.

D. THE PARTIES' ARBITRATION AGREEMENT DOES NOT EMPOWER THIS TRIBUNAL TO ADAPT THE AGREEMENT.

45. RESPONDENT agrees that the Tribunal has the authority to determine its own jurisdiction. [*Cl. Brief ¶¶ 11-14*]. Under the HKIAC, and the law of the seat, this Tribunal may determine is own jurisdiction. [*HKIAC 19.1; DAL Art. 16(1)*]. These rules are consistent with the universally acknowledged doctrine of *kompetenz-kompetenz*. [*Born, p. 1066*]. However, because the Tribunal's power is derived from the agreement of the Parties, it is not unlimited. Party autonomy

is the foremost general principle to be evaluated by tribunals in evaluating a dispute. The Parties did not agree to an adaptation clause in the Agreement. Tribunals are limited to the powers conferred upon them by the parties' agreement and the applicable law. [*Wigwe, p. 243*; *Horn, p. 179*].

46. There is no express clause in the Agreement that gives this Tribunal the power or authority to adapt the Agreement. [*Cl. Ex. 5*]. Without an express written clause giving this Tribunal authority to adapt the Agreement, the Tribunal, even if it was allowed to adapt the contract in theory, would not have the authority to adapt the Agreement without this grant of authority. [*Proc. Ord. 2, ¶ 36*]. First, Danubian law does not allow for the Agreement to be adapted because Danubia uses the "four corners rule" which limits the authority of Tribunals (**1**). Second, should this Tribunal determine that Mediterraneo law applies to the Arbitration Agreement, this Tribunal still cannot adapt the Agreement because the hardship clause, as written, does not allow for adaptation under the present circumstances (**2**).

1. Danubian law does not allow for the Agreement to be adapted.

47. Danubian law uses the "four corners rule," i.e. that the interpretation of the Arbitration Agreement is limited to its wording and no external evidence may be relied upon. "In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear." [*Resp. Ans. ¶ 16*]. Contract adaptation by a Tribunal is not permitted under Danubian law without an express conferral of the power to adapt. [*Proc. Ords. 1, 2*].

48. In the present case, the Arbitration Agreement, which is to be treated as a separate contract for its interpretation under the four corners rules, contains no words indicating agreement regarding adaptation. [*Cl. Ex. 2*]. Further, the type of Sales Agreement concluded between the Parties would not regularly include an adaptation clause as it was a short-term contract.

49. This Tribunal should not permit CLAIMANT to impose significant extra burdens on RESPONDENT nearly one year after the conclusion of the contract.

50. Therefore, this Tribunal cannot adapt the Agreement

2. Even if this Tribunal determines that the law of Mediterraneo applies to the Arbitration Agreement, the Arbitration Clause does not allow for adaptation.

51. If this Tribunal decides that Mediterraneo law applies to the Arbitration Agreement, Mediterraneo law still does not allow for adaptation of the Agreement, because this is not a situation of hardship.

Moreover, Mediterraneo law only allows a standard Arbitration Agreement to grant an arbitral tribunal the same powers as a court has under the provision. [*Proc. Ord. 2, ¶ 39*]. Because of the significant changes made to the Arbitration Agreement, it should not be considered a standard arbitration agreement as understood under Mediterraneo law to allow for adaptation in circumstances such as these.

CONCLUSION ON ISSUE I: The law of Danubia is both the seat of the arbitration and the law that governs the Arbitration Agreement. As the law of Danubia does not allow for the adaptation of contracts, this Tribunal may not adapt the Agreement.

II. THIS TRIBUNAL SHOULD EXCLUDE THE EVIDENCE OFFERED BY CLAIMANT REGARDING RESPONDENT'S OTHER ARBITRATIONS BECAUSE THE EVIDENCE IS NEITHER RELEVANT TO THE CURRENT PROCEEDING AND SERVES ONLY TO PREJUDICE RESPONDENT.

52. CLAIMANT seeks to admit irrelevant, confidential evidence for consideration by this Tribunal, regarding another arbitration administered by the HKIAC to which RESPONDENT is a party. The prejudice RESPONDENT faces should this evidence be admitted substantially outweighs the probative worth of the information improperly presented to this Tribunal by CLAIMANT. This Tribunal has the authority to declare such evidence inadmissible (**A**). The Tribunal should preclude the admittance of irrelevant evidence as it and bears no significant relation to this proceeding (**B**) and serves only to prejudice RESPONDENT (**C**).

A. THIS TRIBUNAL HAS THE DISCRETION TO DECIDE THE ADMISSIBILITY OF EVIDENCE.

53. The Parties selected the HKIAC Rules to serve as the procedural rules for the present arbitration. [*Cl. Ex. 5, ¶ 15*]. The HKIAC Rules guarantee arbitral proceedings that afford each party with a fair opportunity to present its case and ensures the equal treatment of the parties. [*HKIAC Rules 13.1; HKIAC 13.5*]. Under the rules selected by the Parties, this Tribunal has the discretion to determine the admissibility or the exclusion of relevant evidence during the proceedings and has the authority to admit or exclude relevant evidence from being produced during the proceedings. [*Cl. Ex. 5, ¶ 15; HKIAC 22.3; HKIAC 22.2*].

54. For evidentiary matters not expressly provided for by the Parties, the Tribunal should act in the spirit of the procedural rules selected by the Parties for this proceeding. [*HKIAC 13.9; HKIAC 22.3; Born, p. 2825*]. At the heart of the HKIAC Rules, the Tribunal shall do everything which may be necessary to ensure the fair and efficient conduct of the arbitration. [*HKIAC 13.5*].

55. By allowing evidence, which RESPONDENT reasonably expected to be kept confidential, this Tribunal would be acting contrary with the principles of equity and fairness of the HKIAC in the administration of this proceeding. Therefore, this Tribunal should exclude the information proffered by CLAIMANT from consideration because of the unfair prejudice RESPONDENT would following the admittance of the information.

B. THE INFORMATION PROFFERED BY CLAIMANT IS NEITHER RELEVANT TO THE CURRENT PROCEEDINGS NOR DOES IT AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES TO THIS PROCEEDING.

56. The information which CLAIMANT contends is representative of RESPONDENT'S behavior is irrelevant and immaterial to this matter. [*Letter by Langweiler, p. 49; Cl. Brief ¶ 31; Cl. Brief ¶ 40*]. RESPONDENT agrees with CLAIMANT'S position, *i.e.,* that not all evidence can be declared admissible to the proceeding, as the admission of every piece of evidence would diminish the efficacy of the arbitral process. [*Cl. Brief ¶ 31*]. However, CLAIMANT has no substantiated evidence to support its assertions that the information CLAIMANT proffers to the Tribunal is crucial to the present proceeding. [*Cl. Brief ¶ 30; Cl. Brief ¶ 39*].

57. CLAIMANT merely learned of broad information concerning Respondent's involvement in the other arbitration from Mr. Kieron Velazquez. [*Proc. Ord. 2, ¶ 40*]. Mr. Velazquez was neither involved in the arbitral procedures nor is qualified to discuss the substantive matters addressed in the arbitration; yet, Mr. Velazquez discussed broad rumors of the other arbitration with CLAIMANT at the annual breeder conference. [*Proc. Ord. 2, ¶ 40*]. CLAIMANT has twisted this information to portray RESPONDENT as "opportunistic" instead of recognizing the independent nature of contractual obligations between parties in privity. [*Cl. Brief ¶ 40; Ahmed, p. 519*].

58. The fact of the matter is RESPONDENT is a party to two different arbitrations, which involve two separate contracts entered into with two different parties. [*Letter by Fasttrack, p. 50*; *Cl. Brief ¶ 35*]. The Agreement currently in dispute was specifically tailored to meet the needs of CLAIMANT and RESPONDENT and was created independently from other contracts to which RESPONDENT is a party to. [*Cl. Ex. 1-8; Resp. Ex. 1-4*].

59. RESPONDENT is under no obligation to enter into the same contract with CLAIMANT as it has entered into with any other of its business relationships. CLAIMANT has offered to submit the arbitral award of the other arbitration, conducted between RESPONDENT and another party, to this Tribunal for consideration. [*Letter by Langweiler, p. 49*]. In the present matter at hand, the Agreement does

not allow for adaptation. [*Cl. Ex. 5*]. Unless CLAIMANT wishes to argue that all contracts made by a party be created under the same terms, then CLAIMANT has no substantiated claims against RESPONDENT. Therefore, contracts RESPONDENT entered into with another party are not relevant to this matter concerning CLAIMANT.

60. Generally, commercial arbitration is concerned with objective evidence that may allow logical inferences to be made from extrinsic evidence. [*Waincymer, p. 787*]. Here, the only inference which may be made by the evidence is that RESPONDENT has been involved in multiple arbitrations over the recent implication of tariffs. [*Letter by Fasttrack, p. 50; Cl. Ex. 6*]. The fact that RESPONDENT is involved in another arbitration concerning tariffs does not lead to a logical inference which may be made from the production of the evidence that may materially affect the outcome of the present matter.

61. Because CLAIMANT has made only unsubstantiated allegations against RESPONDENT, RESPONDENT requests this Tribunal find the evidence from RESPONDENT'S other arbitration to be irrelevant and inadmissible. Therefore, this Tribunal should find the information offered by CLAIMANT to be irrelevant to the present matter and the information should not be considered for evaluation by this Tribunal.

C. THIS TRIBUNAL SHOULD DETERMINE THAT THE EVIDENCE IS HIGHLY PREJUDICIAL TO RESPONDENT AND HAS NO PROBATIVE WORTH.

62. The HKIAC has set out express confidentiality rules which describe the scope and limits of confidentiality regarding arbitral proceedings. [*HKIAC 45; Smeureanu/Lew, p. 73*]. Confidentiality refers to the disclosure or communication of the parties and participants in the proceeding which concerns the arbitration, including, documents tendered in arbitration, or observations of conduct by parties, witnesses, and arbitrators during the course of the arbitration, to third parties. [*Born, p. 2782*].

63. Here, the confidential information being disclosed by CLAIMANT is regarding an arbitration conducted under by the HKIAC, and is subject to the HKIAC rules concerning confidentiality, to which RESPONDENT is a party. [*Letter by Langweiler, p. 49; Letter by Fasttrack, p. 50*]. It is specifically adverse to the HKIAC's interests to permit CLAIMANT to present such evidence for consideration as the information gathered is confidential (**1**). Further, the information may have been obtained through illegal means (**2**).

1. Admitting the proffered evidence conflicts with the HKIAC rules and undermines the HKIAC assurance of confidential arbitral proceedings.

64. The confidential and private nature of international commercial arbitration is considered to be a main advantage of international arbitration. [*Lew/Mistelis/Kröll, p. 660; Born, p. 2169; Reuben, p. 1256*; *HKIAC 45.5*]. Confidentiality refers to the parties' obligations not to disclose information which concerns the arbitration to third parties. [*Born, p. 2782*].

65. Participants of an arbitration conducted by the HKIAC are obligated to keep information relating to the arbitration confidential unless disclosure is agreed upon by the parties. [*HKIAC 45.1; HKIAC 45.2; HKIAC 45.4*]. Unless otherwise agreed by the parties, no party or party representative, or Tribunal may publish, disclose or communicate any information relating to the arbitration under the arbitration agreement unless the specific requirements as outlined in the express exceptions to the confidentiality protections are met. [*HKIAC 45.1; HKIAC 45.2; HKIAC 42.3*].

66. The HKIAC permits disclosure of confidential information should a party act to protect and/or pursue a legal right. [*HKIAC 42.3]*. RESPONDENT has been authorized, according to the HKIAC rules of disclosure, to refute CLAIMANT'S misleading allegations which have been taken out of context and do not reflect reality. [*HKIAC 42.3*; *Letter by Fasttrack, p. 50; Cl. Brief ¶ 40*]. While CLAIMANT correctly contends that it is not bound to keep the confidentiality of RESPONDENT'S other arbitration, the tribunal administered by the HKIAC is bound by its own rules of confidentiality. [*Cl. Brief ¶ 36*; *HKIAC 45.1; HKIAC 45.2; HKIAC 42.3*]. Permitting confidential information to be admitted to the Tribunal is a matter of the integrity and seriousness of the enforceability of the confidentiality rules and renders the express rules to be void if an opposing party can somehow obtain information it was not in privity to.

67. Under both arbitrations to which it is a party, RESPONDENT selected the HKIAC as the arbitral institution. [*Cl. Ex. 5*]. In the other arbitration, the contract involved contains an express confidentiality provision. [*Letter by Fasttrack, p. 50*]. RESPONDENT reasonably expected that with the express confidentiality rules of the HKIAC, coupled with an express confidentiality made between the parties, would duly maintain the confidentiality of the arbitral proceedings would remain confidential. [*Letter by Fasttrack, p. 50; Born, p. 2817*].

68. The admission of confidential information from another HKIAC arbitration is a violation of the HKIAC's own rules of confidentiality. [*HKIAC 45*]. Should this Tribunal permit a confidential

arbitration under its own rules to be admitted into evidence in another, non-related arbitration, the Tribunal's own rules of confidentiality would be thrown into question. [*HKIAC 45*].

2. If the information was obtained through an illegal hack of Respondent's systems, the information should not be admitted as it encourages foul play and denies Respondent the procedural protections of the HKIAC.

69. A key objective of international commercial arbitration is procedural fairness. [*Born, p. 2123; HKIAC 13.5*]. Should this Tribunal permit confidential information to be admitted, which was obtained through an illegal technological hack, this Tribunal would undercut an essential aspect of the arbitral proceedings and would act contrary to the expectations of the parties and adverse to the purpose of the arbitral process to which the parties have agreed. [*Born, p. 2817*].

70. Permitting hacked information to be admitted for consideration in the proceedings would encourage wrongdoers to make efforts to discover or obtain evidence through unethical methods. Evidence which has been obtained by methods and which casts doubt on the reliability of the evidence, or which damages the integrity of the proceedings should be excluded from consideration by the tribunal. [*Lebanon Tribunal*]. Here, the information was obtained against RESPONDENT's efforts to keep it confidential and although CLAIMANT may or may not have been involved in the hack, CLAIMANT is a clear beneficiary of the information. [*Letter by Fasttrack p. 50; Proc. Ord. 2 ¶ 42; Cl. Brief ¶ 46*]. Permitting the hacked information to be admitted to the proceeding would cast doubt on the integrity of the HKIAC proceeding.

71. The admission of the confidential information serves to prejudice RESPONDENT more than it would add probative worth to the proceedings and would deny RESPONDENT the procedural fairness the HKIAC assures it. [*Letter by Fasttrack p. 50; HKIAC 45.1; HKIAC 45.2; HKIAC 45.4*]. Therefore, the Tribunal must use its discretion to preclude CLAIMANT's request to present the confidential evidence for consideration.

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

ARGUMENT ON THE MERITS

III. CLAIMANT IS NOT ENTITLED TO A PAYMENT OF USD $1,250,000 UNDER THE CISG OR CLAUSE 12 OF THE SALES AGREEMENT.

72. The Sales Agreement made between the Parties should be preserved. A basic and universally accepted principle of contract law is that agreements are to be kept. [*Rimke, p. 197; Maskow, p. 658; Zaccaria, p. 135*]. This principle is crucial to international economics and natural justice by binding parties to their promises, which protects the interests of the parties, strengthens predictability in the law, and keeps faith in contracts. [*Rimke, p. 197; Maskow, p. 658; Zaccaria, p. 135*].

73. Adaptation is an extreme measure to be performed by a court or arbitrator. Adaptation is not readily available as a remedy, because it must be explicitly stated in a contract or enumerated by a statute. Therefore, this Tribunal would be empowered to adapt the Sales Agreement only if it were granted the authority by the governing law or the contract. Here, it is not.

74. CLAIMANT is not entitled to adaptation of the price of the Sales Agreement. The CISG does not grant this Tribunal authority to adapt the Agreement (**A**), nor does Clause 12 of the Sales Agreement provide for adaptation (**B**). Moreover, Equatoriana's retaliatory tariff is not a sufficient hardship to justify the need for a remedy (**C**).

A. CLAUSE 12 OF THE AGREEMENT PROVIDES FOR ADAPTATION AS A REMEDY IN SITUATIONS OF HARDSHIP.

75. This Tribunal is not entitled to adapt the Sales Agreement through the CISG. Under Art. 79, adaptation is not an allowable remedy (**1**). Nor does Art. 29 grant adaptation of the Sales Agreement as CLAIMANT alleges (**2**). Because the Tribunal is limited to the CISG in terms of applicable law (**3**), this Tribunal is not empowered to adapt the Sales Agreement. In order to include the remedy of adaptation, the Parties would have had to derogate from the CISG, which they did not (**4**).

1. CISG Art. 79 does not allow for adaptation as a remedy for hardship.

76. Contrary to CLAIMANT's contentions, [*Cl. Brief ¶ 75*], there is no remedy of adaptation under the CISG. The language of Art. 79(1) is very specific: "[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control." [*CISG Art. 79*]. An obligor is simply relieved from having to pay damages for a failure to perform.

[*CISG Art. 79*]. But here, the entire contract has been performed, [*Cl. Ex. 8*], and therefore, there is no basis for relief.

77. Adjustment of a contract in response to hardship is a relatively new occurrence in the law and the CISG is conservative in that it does not provide for it in any provision. [*Enderlein/Maskow, p. 317*]. The Convention does not expressly allow a judge to adapt a contract, so adaptation must be considered impossible. [*Tallon, p. 592; Flambouras, sec. 6; Rimke, p. 243*]. Therefore, the only available remedy under Art. 79 is avoidance. [*Tallon, p. 592; Flambouras, sec. 6; Rimke, p. 243*]. This Tribunal is not granted the authority to adapt the Sales Agreement under CISG Art. 79, nor any other article within the CISG.

2. CLAIMANT is not entitled to adaptation under CISG Art. 29.

78. The Parties did not expressly, nor impliedly, decide to adapt the price of the Sales Agreement. Under Art. 29, a contract may be modified by agreement of the parties. [*CISG Art. 29*]. However, the failure to object to a party's unilateral attempt to modify a contract is not an agreement to modify a contract. [*Wine Corks Case; Soy Lecithin Case*]. In this case, Ms. Napravnik's unilateral attempt to modify the price of the third shipment was not an arrangement to adapt the Sales Agreement, as Mr. Shoemaker did not agree to any form of adaptation. [*Resp. Ex. 4*]. In fact, RESPONDENT ultimately objected to adaptation of the price of the Sales Agreement. [*Cl. Ex. 8*].

79. CLAIMANT contends that it was reasonable for it to assume that the Parties impliedly agreed to adaptation during the conversation between Ms. Napravnik and Mr. Shoemaker. [*Cl. Brief ¶ 68*]. However, any assumption made by CLAIMANT lacked reasonable support. CLAIMANT solely relies on Mr. Shoemaker's statement to Ms. Napravnik: "*if* the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." [*Resp. Ex. 4*]. This statement is contingent upon what the *Sales Agreement* allows, but does not suggest any consent by Mr. Shoemaker to alter the terms of the Sales Agreement. In fact, Mr. Shoemaker repeatedly reminded Ms. Napravnik that he was not involved in the negotiations and would have to clarify the Sales Agreement's obligations and allowances with his legal department. [*Resp. Ex. 4*]. Considering that Ms. Napravnik is a sophisticated party, [*Cl. Ex. 8*], Mr. Shoemaker's relative inexperience with the Sales Agreement, explicit denials of authority, and expressed need to consult with his superiors should not have led Ms. Napravnik to assume otherwise.

80. A reasonable person would not infer from these statements that Mr. Shoemaker and Ms. Napravnik collectively agreed to modify the Sales Agreement. His failure to object to

CLAIMANT's unilateral attempt to alter the price of the shipment does not constitute an agreement. CLAIMANT argues that Mr. Shoemaker has the authority to adapt the contract, because he is responsible for the racehorse breeding program, including all questions concerning the Sales Agreement. [*Cl. Brief ¶ 69*]. Authority to adapt the Sales Agreement does not follow from Mr. Shoemaker's position, because his influence in the development of the breeding program is completely unrelated to authorization to modify legal obligations. [*Resp. Ex. 4*]. Nor does fielding her questions concerning the Sales Agreement give Mr. Shoemaker legal authority, because he is simply a contact, not a lawyer. [*Resp. Ex. 4*]. Furthermore, even if Mr. Shoemaker had the authority to adapt the Sales Agreement, his statements to Ms. Napravnik do not constitute any acceptance to adapt it.

3. The Parties may not apply any law other than the CISG.

81. The Parties are limited to the CISG in terms of the Sales Agreement's applicable law. UNIDROIT may not be applied to the Sales Agreement under CISG Art. 9(2). Nor may domestic law be applied to the Sales Agreement under Art. 7(2).

82. Under CISG Art. 9(2), parties are considered to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is common and widely known to parties involved in the particular trade concerned. [*CISG Art. 9*]. Contrary to CLAIMANT's contention, [*Cl. Brief ¶ 71*], UNIDROIT Art. 6.2.3(4) does not constitute a widely known international usage in the sense of Article 9(2). [*Brunner, p. 219, fn. 1112; ICC Award No. 8873*].

83. CISG Art. 7(2) allows questions concerning matters that are governed but not settled by the CISG to be settled in conformity with its general principles on which it is based or, otherwise, in conformity with private international law. [*CISG Art. 7(2)*]. Contrary to CLAIMANT's contention, [*Cl. Brief ¶ 79*], the CISG does not contain a gap regarding adaptation. Art. 79's history demonstrates that hardship was deliberately omitted from the CISG, thus, there is no gap to be filled by domestic law. [*Enderlein/Maskow, p. 317; Schwenzer, p. 713; Rimke, p. 220*].

84. Art. 7(1) stresses "the need to promote uniformity in [the CISG's] application." [*CISG Art. 7(1)*]. In fact, the ultimate goal of the CISG is the uniform application of uniform rules. [*Rimke, p. 211*]. Therefore, recourse should not be had under any domestic law because it jeopardizes the uniformity that the application of the CISG creates. [*Enderlein/Maskow, p. 317; Schwenzer, p. 713*].

85. The Parties may not resort to domestic law to authorize adaptation, nor does the CISG allow adaptation. Therefore, in order to avail themselves of the remedy of adaptation, the Parties would have to derogate from the CISG, which they did not.

4. The Parties did not derogate from the CISG.

86. RESPONDENT agrees that the Parties did not derogate from Art. 79 in accordance with Art. 6. [*Cl. Brief ¶ 83*]. Clause 12 of the Sales Agreement is not a derogation from the CISG, because a derogation under CISG Art. 6 must be expressly made. [*CISG Adv. Op. 16*]. Here, the Parties did not exclude application of the CISG or any of its articles, rather, they expressly *included* the CISG in their choice of law. [*Cl. Ex. 5, ¶ 14*]. Because the CISG does not allow for adaptation, in order to include the remedy, the Parties would have to derogate from the CISG and provide for the contractual remedy of adaptation, which they do not. [*Cl. Ex. 5*].

B. CLAUSE 12 DOES NOT EMPOWER THIS TRIBUNAL TO ADAPT THE AGREEMENT.

87. This Tribunal is not entitled to adapt the Sales Agreement under Clause 12. The hardship clause was not intended to allow for adaptation (**1**). Nor does its language permit adaptation (**2**).

1. Clause 12 was not intended to allow for adaptation.

88. RESPONDENT did not intend for the hardship clause to provide for adaptation. The Parties ultimately decided in Clause 12 of the Sales Agreement that the "[s]eller shall not be responsible for lost semen shipments or delays in delivery . . . or acts of God . . . or comparable unforeseen events." [*Cl. Ex. 5, ¶ 12*]. This language is comparable to the language of Art. 79(1) in that it simply relieves the seller from liability for a failure to perform. This Clause was intended to preclude damages, but not to grant adaptation.

89. In order to understand party intent, a party's statements and conduct are to be interpreted according to its subjective intent where the other party knew or could not have been unaware of that intent. [*CISG Art. 8(1); Chemical Products Case; Mattress Case; Zeller, p. 631; Lookofsky, ¶ 84*].

90. After the meeting between Mr. Antley and Ms. Napravnik on 12 April 2017, Mr. Antley noted that the issue of the hardship clause required further negotiations, because RESPONDENT found the ICC Hardship Clause suggested by CLAIMANT to be too broad. [*Resp. Ex. 3*]. The ICC Hardship Clause does not provide for adaptation, but rather, renegotiation between the parties with termination of the contract being the ultimate remedy if the parties are unable to agree. [*ICC Hardship Clause*]. CLAIMANT was aware that RESPONDENT rejected its suggestion to use the ICC Hardship Clause because it was too broad. [*Resp. Ex. 3; Proc. Ord. 2, ¶ 12*]. As RESPONDENT already found the

ICC Clause to be too broad, RESPONDENT certainly did not intend to further expand the scope of it by allowing for adaptation as a remedy. [*Resp. Ex. 3*]. In fact, in the negotiation following that meeting, both Parties agreed to include a narrower hardship reference in the Sales Agreement. [*Resp. Ex. 3*].

91. CLAIMANT knew or could not have been unaware that RESPONDENT did not intend for Clause 12 to permit this Tribunal to adapt the Sales Agreement. Even if RESPONDENT's intent is considered ambiguous, a reasonable person would not interpret Clause 12 as granting this Tribunal the power of adaptation.

2. The contractual language of Clause 12 does not provide for adaptation.

92. Even if CLAIMANT contends that it was not or could not be aware of RESPONDENT's disapproval of adaptation, a reasonable person would not understand Clause 12 to allow for the remedy of adaptation. If the subjective intent of a party is unclear, then interpretation is determined according to what a reasonable person under the same circumstances would understand. [*CISG Art. 8(2); Lindström, ¶ 4.3; Lookofsky, p. 47; Zeller, p. 631*]. Art. 8(2) mandates that the drafter of an agreement must clearly communicate its purpose in the language of the agreement. [*Honnold, ¶ 107.1*].

93. Here, CLAIMANT is the drafter of the Sales Agreement. [*Cl. Ex. 2; Cl. Ex. 5; Proc. Ord. 2, ¶ 3*]. Therefore, CLAIMANT has the burden of clearly communicating its intent. [*Honnold, ¶ 107.1*]. Clause 12 does not state, nor even suggest, that adaptation of the Sales Agreement is permissible. [*Cl. Ex. 5*]. The language of the Sales Agreement is clear in that the "[s]eller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller . . . or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Cl. Ex. 5, ¶ 12*].

94. This language corresponds with the language of CISG Art. 79, where "a party is not liable," meaning that the party is simply exempt from damages for a failure to perform. [*CISG Art. 79; Enderlein/Maskow, p. 319; Ishida, p. 350*]. Here, the statement "[s]eller shall not be responsible for" does not allow for adaptation, but rather, absolves the seller from liability for damages. [*Cl. Ex. 5, ¶ 12*]. Considering that the Sales Agreement is based on CLAIMANT's Standard Frozen Semen Sales Agreement, [*Cl. Ex. 2; Cl. Ex. 5; Proc. Ord. 2, ¶ 3*], then modified through negotiations between the Parties, [*Resp. Ex. 3; Proc. Ord. 2, ¶ 33*], if CLAIMANT intended for

adaptation, then it should have been clearly provided for. Reading Clause 12, a reasonable person would not understand the Sales Agreement to authorize adaptation.

95. In addition to the fact that this Tribunal is not granted the authority to adapt the Parties' Sales Agreement, the tariff that CLAIMANT contends is a hardship does not meet the high standard of burden such that would warrant a remedy

C. THE TARIFF DOES NOT MEET THE STANDARD OF HARDSHIP TO INVOKE A REMEDY.

96. CISG Art. 79 concerns impediments, which are not specifically defined, but must be an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility, or excessive onerousness. [*Chinese Goods Case*].

97. Comparably, hardship is not universally or consistently defined, but the circumstances in which hardship exists typically incorporate three elements: first, the hardship must be beyond the control of the party and therefore cannot be self-induced; second, the event must be unforeseeable; and third, the hardship must be fundamental in character. [*Rimke, p. 200-201*].

98. Equatoriana's retaliatory tariff is not a proper hardship for the following reasons: it was reasonably foreseeable (**1**), it does not fit within the parameters outlined in Clause 12 (**2**), it is not a hardship considered by the CISG (**3**), and it is not sufficiently onerous under general contract principles (**4**).

1. Equatoriana's retaliatory tariff was reasonably foreseeable.

99. The retaliatory tariff imposed by Equatoriana would be conceivable to a reasonable party. A party may only be exempt from liability for hardship if the event causing the impediment could not reasonably be taken into account at the time of the conclusion of the contract. [*Schwenzer, p. 719; Schlechtriem, p. 101; DiMatteo, p. 298; Raw Materials Case*]. If an impediment is foreseeable at the time of contracting, it is presumed that the obligor has assumed the risk of its occurrence. [*Brunner, p. 157; Rimke, p. 216*]. Observable signs of uncertainty in a market present at the time of contracting should be taken into account by the drafting parties and therefore preclude hardship. [*CAMP Award 1179*].

100. It was reasonably foreseeable that Mediterraneo would impose a tariff upon agricultural goods from Equatoriana. In January of 2017, the President of Mediterraneo campaigned with a preference for a more protectionist approach to international trade, especially in regard to agricultural products. [*Cl. Ex. 6*]. Following that campaign platform, he won the election in April.

[*Cl. Ex. 6*]. Prior to the conclusion of the Parties' Sales Agreement, the new president hired one of the most ardent critics of free trade as the superminister for agriculture, trade, and economics, who had been outspoken for years on limiting the access of foreign agricultural products to the Mediterranean market. [*Proc. Ord. 2, ¶ 23*].

101. It was also foreseeable that Equatoriana would impose a retaliatory tariff upon agricultural goods from Mediterraneo. In response to restrictions on imports, Equatoriana has resorted to retaliatory measures before. [*Cl. Ex. 6*].

102. These observable signs of uncertainty in the market should have been taken into account by CLAIMANT and therefore, the foreseeability of the tariff precludes a finding of hardship.

2. The retaliatory tariff does not fit within the narrow scope of Clause 12.

103. Equatoriana's retaliatory tariff does not fall under Clause 12's narrow parameters for hardship. A retaliatory tariff is not a hardship caused by a health and safety requirement, or even a comparable event. Contrary to CLAIMANT's contention that tariffs are comparable to health and safety requirements in that both intend to protect a country, [*Cl. Brief ¶ 58*], a retaliatory tariff is not protectionist, it is punitive. [*Nossal, p. 321*]. Economic sanctions are intended to cause economic harm to the target state to pressure a change in undesirable policies. [*Shahani, p. 859*]. Here, the Government of Equatoriana announced that it imposed the 30% tariff on Mediterraneo in retaliation for Mediterraneo's tariff on Equatoriana. [*Cl. Ex. 6*].

3. The tariff is not a hardship within the meaning of the CISG.

104. The tariff, an economic impediment, does not qualify under the CISG. Art. 79 excludes mere economic hardship. [*van Houtte, p. 107*]. Drafters of Art. 79 intended to exclude relief for situations where performance merely became more difficult or unprofitable. [*Rimke, pp. 222-223*].

105. CLAIMANT argues that the 30% increase in cost destroyed the commercial basis of the deal between the Parties, which constitutes a hardship. [*Cl. Brief ¶ 55*]. However, when the purpose that a party intended to achieve through a contract is frustrated, there is still no impediment within the meaning of Art. 79. [*Da Silveira, p. 317; ICC Award No. 8486*]. An obligor generally guarantees his financial capability to procure and produce the promised goods, so as a rule, increased costs to supply contractual goods do not amount to an exempting impediment. [*Schlechtriem, p. 102; Chinese Goods Case*]. In this case, CLAIMANT must be financially able to perform its contractual obligations and a mere 30% increase in cost does not absolve it of that responsibility.

106. An economic impairment in the form of a tariff or an increase in cost does not qualify as an impediment under the CISG. Under general contract law, while an economic impediment may qualify as a hardship, it must be extreme.

4. The tariff is not sufficiently onerous under general contract principles.

107. The retaliatory tariff imposed by Equatoriana is not adequately severe to be considered a hardship. For an event to trigger a hardship clause, it must be outside the normal economic risks of contracting, [*Maskow, p. 662; Chinese Goods Case*], which means that the material change in economic conditions must be beyond the "limit of sacrifice." [*Rimke, p. 224*].

108. As a general guideline, at minimum, the economic impediment must be greater than 50% to relieve the aggrieved party of its contractual liability. [*Carlsen, sec. III; Maskow, p. 662; Girsberger, p. 126*]. Some scholars support a higher standard of 100% to 125%, [*Brunner, p. 432*], or even 150% to 200%. [*Schwenzer, p. 717*]. In practice, a 43.7% increase in price was not justifiable as "supervening excessive onerousness." [*Nuova Fucinati v. Fondmetall International*]. Nor was triplication of the market price of a good considered in excess of the absolute limit of sacrifice. [*Iron Molybdenum Case*].

109. Here, the economic burden placed on CLAIMANT does not rise to the standard of hardship required by the international community. The retaliatory tariff imposed on CLAIMANT's shipment was a mere 30%. [*Cl. Ex. 6; Cl. Ex. 7*]. Under general contract principles, this is well within the limit of sacrifice, making it a normal economic risk. This increase in cost is far below a level of onerous such that CLAIMANT should be absolved of the responsibility it contracted for.

110. The Sales Agreement made between the Parties should be preserved. CLAIMANT drafted the Sales Agreement and is now attempting to adapt it in order to require RESPONDENT to pay for CLAIMANT's own responsibility.

CONCLUSION ISSUE III : Equatoriana's retaliatory tariff is not a sufficient hardship to justify the need for a remedy. Nor is a remedy of adaptation available to CLAIMANT. This Tribunal is not granted the authority to adapt the Sales Agreement by the CISG or by Clause 12.

REQUEST FOR RELIEF

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

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

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

Oceanside, Equatoriana, 24 January 2019

Counsel for RESPONDENT, Black Beauty Equestrian, confirms this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Respectfully submitted,

(*Signed*)	(*Signed*)	(*Signed*)
Gwenllian Kern-Allely	John Mysliwiec	Yvonne Ricardo
(*Signed*)	(*Signed*)	(*Signed*)
Stephen Wainwright	Christopher Cammiso	Steven Barnes
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