RENMIN UNIVERSITY OF CHINA

MEMORANDUM FOR CLAIMANT

ON BEHALF OF	AGAINST
Phar Lap Allevamento	**Black Beauty Equestrian**
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
- CLAIMANT-	**- RESPONDENT -**

ERIC M. DAVID • GILBERT NICOLAS XAVIER A. • SUN RUILIN • ZHENG YANJI

YE HEMING • LIU XINYANG • GUO HAO • DONG ZHIHAO

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STATEMENT OF FACTS

CLAIMANT	**Phar Lap Alle**, seated in Capital City, Mediterraneo, operates the oldest and most renown stud farm in the State, covering all areas of the equestrian sports.
RESPONDENT	**Black Beauty Equestrian**, seated in Oceanside, Equatoriana, is famous for its broodmare lines.
24 Mar. 2017	CLAIMANT makes an offer to RESPONDENT for the sale of frozen racehorse semen for the price of 99.500 USD/dose. [*Cl. Ex. 2*]
28 Mar. 2017	RESPONDENT objects to the choice of law and the forum selection clause and insists on a delivery DDP. [*Cl. Ex. 3*] RESPONDENT expresses its intent to build a long-term relationship. [*Cl. Ex. 3*]
31 Mar. 2017	CLAIMANT replies that they can accept a delivery DDP on the condition of a price increase, the transfer of risks to RESPONDENT through the inclusion of a hardship clause. [*Cl. Ex. 4*]
10 Apr. 2017	RESPONDENT sends the first draft for the dispute resolution clause to CLAIMANT and asks for CLAIMANT's opinions. [*Re. Ex. 1*]
11 April 2017	CLAIMANT sends a proposal to change the seat of the arbitration and insists on the choice of the law of Mediterraneo as the governing law of the contract. [*Re. Ex. 2*]
12 Apr. 2017	The Parties have a discussion in which RESPONDENT's negotiator confirms the adaptation of the contract by the arbitrators. [*Re. Ex. 3*] On the same day, both prime negotiators of the Parties are injured in a car accident and are replaced for the finalization of the contract. [*Cl. Ex.8; Re. Ex. 3*]
6 May 2017	The Parties sign the FSSA. RESPONDENT purchases 100 doses of frozen semen from Nijinsky III in three shipments at the price of USD 100,000 per dose. [*Cl. Ex. 5*]

	The FSSA contains the agreed change of the delivery terms and a hardship clause. The arbitration clause of the FSSA stipulates Danubia as the seat of arbitration. [*Cl. Ex. 5*]`
	The FSSA confirms that the applicable law of the contract is the Mediterraneo. [*Cl. Ex. 5*]
20 May ; Oct. 2017	CLAIMANT sends the first two shipments. [*N. A. para. 9*]
15 Nov. 2017	The Government of Mediterraneo imposes a 25% tariff on agricultrual products by excutive order. [*PO2, p. 58, para. 23*]
19 Dec. 2017	The Government of Equatoriana unexpectedly abandons its consistent support of free trade and imposes a tariff of 30 percent on agricultural products from Mediterraneo including racehorse semen. [*Cl. Ex. 6*]
20 Jan. 2018	CLAIMANT initiates negotiations to adapt the price. [*Cl.Ex.7; Re.Ex. 4*]
21 Jan.y 2018	The Parties negotiate over the phone. CLAIMANT is given the reasonable impression that RESPONDENT accepts the need for a price increase due to the urgent circumstances. [*Cl. Ex. 8; Re. Ex. 4*]
23 Jan. 2018	CLAIMANT delivered the remaining 50 doses of semen. [*N.A. para.13; Cl. Ex. 8*]
12 Feb. 2018	RESPONDENT's CEO unilaterally terminates the negotiation process in anger and refuses to pay the tariffs. [*Cl. Ex. 8*]
31 July 2018	CLAIMANT initiates the arbitral proceedings before HKIAC.
2 Oct. 2018	CLAIMANT emails to inform Tribunal that its CEO heard from a regular cutomer's CEO about the RESPONDENT's previous arbitration in which it vigorously refused to adapt the contract under similar circumstaces and has been promised copies of relevant documents by an intelligence company. [*Letter by Langweiler, 2 Oct. ; PO2, p. 60, para.40*]
3 Oct. 2018	The REPONDENT emails to tribunal the evidence is obtained illegally and should not be admitted in the arbitration. [*Letter by Fasttrack, 3 Oct.*]

SUMMARY OF ARGUMENT

ISSUE I: The Tribunal has the jurisdiction to adapt the contract under the law of Mediterraneo. The choice-of-law clause contained in the FSSA [*Clause 14*] governs the entire contract, including the arbitration agreement [*Clause 15*], because the doctrine of separability does not apply. If the arbitration agreement is considered separate from the FSSA, *quod non*, the law of Mediterraneo still applies as it reflects the implied intent of the Parties. Under the law of Mediterraneo, which applies the UNIDROIT Principles and the CISG, the scope of the arbitration agreement encompasses the adaptation of the contract by the Tribunal.

ISSUE II: The CLAIMANT is entitled to submit the evidence because the evidence at issue is relevant to this case. Secondly, the confidentiality obligation of previous arbitration is not sufficient to bar the admissibility of the evidence. Since the personal scope is limited, neither the Tribunal nor the CLAIMANT is obligated by the rules governing the previous arbitration. Moreover, in many cases, confidential documents from other arbitrations have been admitted as evidence. Even if the Tribunal excludes the evidence due to the confidentiality obligation, the present case falls within an exception. Lastly, the evidence was not taken in way that denies its admissibility. The CLAIMANT was not involved in the illegal taking of evidence. But even if the evidence is illegally leaked, it's not sufficient to exclude the evidence.

ISSUE III: CLAIMANT is entitled to payment resulting from an adaptation of the Price. Under the contract, the Parties agreed upon a derogated DDP term and a hardship clause which determined the risk allocation of the agreement. The hardship clause is not strictly defined, but broadly qualified as to reflect the Parties' negotiations and particular circumstances. The imposition of the tariff, fitting squarely within the intended meaning of hardship in the contract, requires the parties to adapt the contract price. However, even if the sudden imposition of tariff is not covered by Clause 12 of the FSSA, the CISG, which triggers Article 6.2.3 UNIDROIT Principles, entitles CLAIMANT to a payment of USD 1,250,000 from an adaptation of the price. The CISG is silent on present circumstances in which the seller, disadvantaged by a hardship, completes its performance. However, pursuant to Article 7(2) CISG, this situation results in the application of Article 6.2.2 and 6.2.3 UNIDROIT Principles which will entitle CLAIMANT to the payment resulting from the adaptation of contract price.

ISSUE I: THE TRIBUNAL HAS JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

1 The Parties have agreed to resolve their disputes by arbitration under the 2018 HKIAC Rules. Article 19.1 of the 2018 HKIAC rules provides that the arbitral tribunal may rule on its own jurisdiction including any objections with respect to scope of the arbitration agreement.

2 The Tribunal is respectfully requested to find that it has jurisdiction to adapt the contract under the arbitration clause contained in Article 15 of the FSSA [*Cl. Ex. C5*]. The arbitration clause and its interpretation are governed by the Law of Mediterraneo which provides for a broad approach in interpreting the scope of arbitration agreements[**I**]. The wording of the clause "any dispute(s) arising out of this contract" clearly extends to the claim of adapating the price (II).

3 The Tribunal has power to adapt the contract under the hardship clause contained in Clause 12 of the FSSA, which will be addressed under ISSUE 3.

I. THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

4 The choice-of-law clause contained in Article 14 of the FSSA provides that the Sales Agreement is governed by the Law of Mediterraneo. This clause applies to the entire contract, including the arbitation agreement (*Art. 15*), because the latter is not considered as a legaly separate agreement from the FSSA in the present case [**A**]. However, should the arbitration agreement be considered as a separate agreement, it will be demonstrated that the Parties still intended for the law of Mediterraneo to govern it [**B**].

A. The law of Mediterraneo applies to the arbitration agreement because parties should only rely on the doctrine of separability when the validity of the arbitration agreement itself is challenged.

5 The discussion of the choice-of-law principles governing international arbitration agreements is based on the doctrine of separability. This doctrine, sometimes referred to as the "separability presumption", provides that "an international arbitration agreement is (at least presumptively) separable from the underlying instrument with which it is associated" [*G. Born,*

SacLJ, p. 818]. However, this does not mean the arbitration agreement is *necessarily separate* from that governing the underlying contract. The separability presumption is fundamentally aimed at preserving arbitration agreements in circumstances in which the validity of the contract is challenged [**1**], and protecting them from challenges to their validity based on the law of the underlying contract [**2**]. Neither the validity of the FSSA nor the validity of the arbitration agreement are challenged under the law of Mediterraneo, so that the doctrine of separability does not apply.

1. The inherent purpose of the separability doctrine is to preserve the validity of the arbitration clause even in circumstances in which the validity of the contract is challenged.

6 Based on the separability doctrine, RESPONDENT argues that the interpretation of the arbitration agreement is governed by the law of the arbitration seat, *i.e.* Danubian Law, under which an arbitration clause must be interpreted narrowly. RESPONDENT's main objective is to challenge the jurisdiction of the Arbitral Tribunal to decide the case [*A.N.A., § 12-17*]. However, as noted by Moore-Bick L.J. in *Sulamérica*, separability does not "insulate the arbitration agreement from the substantive contract for all purposes" [*Sulamérica*, *§ 26*]. In the recent case of *BCY* Judge Steven Chong J. stated:

> "The doctrine of separability serves to give effect to the Parties' expectation that their arbitration clause [...] remains effective even if the main contract is alleged or found to be invalid. It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed. Resort need only to be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged" [*BCY, § 60*].

7 The inherent purpose of the separability presumption is to preserve the arbitration clause from challenges to the underlying contract in which it is contained. This "preserving role" is clearly expressed in Article 16 of the UNCITRAL Model Law and can be derived from the context of Article 19.2 of the HKIAC rules. The doctrine cannot lead to the conclusion that the Parties intended to enter into an arbitration agreement independent of the underlying contract [*BCY, § 61*]. On the contrary, it supports an intrinsic dependence between the clause and the related

contract, which leaves room for independence only when the arbitration agreement is threatened.

8 Because the validity of the FSSA is not challenged under the law of Mediterraneo, there is no reason to consider the application of the doctrine of separability.

2. The separability presumption has been applied by national and international Tribunals in order to safeguard international arbitration agreements from challenges to their validity based on the law of the underlying contract.

9 In some circumstances, the validity of the main contract is not challenged but the application of the law of the underlying contract to the arbitration clause would invalidate it. In these cases, tribunals have applied a law different than the law of the main contract, such as the law of the seat of arbitration, in order to uphold the validity of the clause.

10 The main idea behind the application of the doctrine remains the same: separability plays a "preserving role." In that regard, CLAIMANT follows Judge Steven Chong J.'s statement that "the governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement even though the Parties have themselves evinced a clear intention to be bound to arbitrate their disputes" [*BCY, § 74*]. In this sense, the arbitration agreement is "separable, not separate" [*A.Enderson, D. Waldek and D. Mills, p. 2*].

11 The separability presumption was designed as a tool to insure the enforceability of international arbitration agreements and the *efficacy of the arbitral process*. By proposing to rely on the theory in order to narrow the interpretation of the arbitration clause, affecting the conduct of the arbitral process, RESPONDENT not only mistakes the correct application of the doctrine - which should only be aimed at preserving the validity of the arbitration agreement - but also directly contradicts its spirit. Since the law of Mediterraneo does not invalidate the arbitration agreement, it cannot be considered as separate from the FSSA.

B. Should the separability presumption be considered, the law of Mediterraneo will prevail over the law of Danubia because the parties are presumed to have impliedly chosen the proper law of the underlying contract as the law of the arbitration agreement.

12 Should the clause be treated as separate from the main contract *quod non*, the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These rules require the court to recognise and give effect to the parties' choice of proper law, express or implied, failing which, it is necessary to identify the system of law with which the contract has the closest and most real connection [*Sulamérica, &9 ; Dicey, Morris & Collins, 14th ed., &16R-00]*.

13 In line with S*ulamérica*, the express choice of law governing the underlying contract, *i.e.* Mediterraneo law, creates a strong indication that the Parties intended for the proper law of the main contract to govern the arbitration agreement [**1**]. The opposite view, which proposes that the implied choice of law should presumptively be the law of the seat of arbitration, is inaccurate and based on false assumption [**2**].

14 Because it is clear that there was an implied choice made by the Parties pointing toward the application of Mediterraneo Law, there is no need to identify the system of law with which the FSSA has the closest and most real connection. Moreover, it should be noted that the "closest and most real connection" factor produces unpredictable and conflicting results [*G. Born, SacLJ, p. 47*].

1. The express choice of Mediterraneo Law to govern the FSSA creates a strong presumption that Parties intended for the proper law of the main contract to govern the arbitration agreement and no factor is sufficient to displace this presumption.

15 The Parties are presumed to have impliedly chosen the proper law of the FSSA, i.e. the law of Mediterraneo, as the law of the arbitration agreement [**a**], and no factors sufficiently rebut that presumption [**b-d**].

a. The "natural inference" is that the proper law of the main contract should also govern the arbitration agreement.

16 In *Sulamérica* the Court noted that "an express choice of law governing the substantive contract" operates as a "strong indication of the Parties' intention in relation to the agreement to arbitrate" [*Sulamérica, § 26*]. The basic assumption posed by the judges is that in the absence of any indication to the contrary, parties are assumed to have intended the whole of their relationship to be governed by the same system of law. The Tribunal will depart from the law of the underlying contract only in circumstances the application of that law endangered the validity of the clause [*Bond, Stephen R. p.70*]. This approach has recently been adopted by Singapore authorities [*CBY*, *CBO*].

17 This approach has also been supported by number of authorities which assume that parties' express choice-of-law provision normally ("likely", "in the absence of exceptional circumstances") extends to the separable arbitration agreement. [*G. Born Commercial Arbitration, p. 580; Sonatrach Petroleum Corp, p.627, § 32; Svenkska Petroleum Exploration AB, § 76; BMO § 39; Dyna-Jet § 31*]. This is based on a commercial logic - "when entering a contract, businessmen and businesswomen do expect that the law they choose to govern their contract will also apply to the arbitration clause contained within their contract."

18 Therefore, as there is no indication to the contrary, the Law of Mediterraneo governs the arbitration agreement with respect to the implied choice of the Parties.

b. The choice of Danubia as the seat of arbitration is not in itself sufficient to displace the basic presumption that the law of Mediterraneo governs the arbitration clause.

19 In *Sulamérica*, nevertheless, the presumption that the Parties intended the arbitration agreement to be governed by the same system of law as the substantive contract was displaced for two reasons. The first reason delineated by the Court was that the parties had expressely chosen a seat of arbitration that did not coincide with the law of the underlying contract, which "tended to suggest that Parties intended for English law [the law of the seat of the arbitration] to govern all aspects of the arbitration" [*Sulamérica, § 29*].

20 CLAIMANT does not deny that the designation of a seat of arbitration can be a factor displacing the original presumption. However, as pointed out in *BCY,* the choice of seat

"would be insufficient on its own to negate the presumption that Parties intended the governing law of the main contract to govern the arbitration agreement" [*BCY, § 55*]. This view has been widely adopted by Courts and Tribunals [*Habas § 101; Arsanovia § 21*].

21 Moreover, it is clear from the record of negotiations that Mr. Antley, RESPONDENT's representative, intended the arbitrators to adapt the contract in case of disagreement [*Cl. Ex. 8*]. It is contradictory to suggest that its implied intent was then to submit the clause to the restrictive interpretation conferred by Danubian Law, which requires an arbitral tribunal to be expressly empowered to adapt the contract [*A.N.A, § 13*].

22 Therefore, the designation of Danubia as the seat of arbitration is not sufficient by itself to displace the presumption that the Law of Mediterraneo governs the interpretation of the arbitration clause.

c. The basic assumption that the law of Mediterraneo governs the arbitration clause cannot be displaced because its application preserves the validity of the clause.

23 The second, and predominant, reason for displacing the presumption in *Sulamérica* was that the application of the law of the underlying contract would have lead to the non-application of the arbitration agreement. Therefore, the Court took the view that if an arbitration agreement is invalid or seriously restricted, preventing the parties from referring the dispute to arbitration, the "natural inference" mentioned above must be set apart.

24 Here, there is no doubt that this second exception is not relevant since the Law of Mediterraneo does not invalidate the arbitration clause and, more importantly, provides for a broad interpretation of its terms [*N.A, § 16*]. On the contrary, the law of the seat, *i.e.* the law of Danubia, restricts the scope of the arbitration clause and directly affects the arbitral procedure [*PO.1, §.II*]. Therefore, the second exception cannot be considered in the present case.

d. The Tribunal should extend the validation principle to the interpretation of the arbitration agreement

25 It appears that "the factor rebutting the presumptive position (established in *Sulamérica*), was *the court's reluctance to invalidate the arbitration agreement [emphasis added]*" [*Leong H., Tan J.-H, p. 80*]. This reluctance is the core of the "validation principle", which provides that "if an international arbitration agreement is substantively valid under any of the laws that may

potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable law" [*Nigel Blackaby, Constantine Partasides and Alan Redfern, p. 162*].

26 CLAIMANT endorses the view proposed by Leong and Tan that the validation principle should be incorporated into the second stage of the *Sulamérica* analysis as an indicator of the parties' implied intentions [*Leong H., Tan J.-H, p. 84]*. Indeed, this approach "adverts potential difficulties that may arise when substantive validity is not the issue at hand" [*Leong H., Tan J.-H, p. 84]* and can be extended to the interpretation of the arbitration agreement.

27 Therefore, the Parties should be considered to have impliedly intended for the law which preserves the venue of the arbitration to apply to the agreement. This is consistent with G. Born's contention that the validation principle "[gives] effect to the Parties' genuine commercial intentions and [establishes] a *pro-arbitration enforcement regime [emphasis added]*," [*G. Born, Commercial Arbitration, p. 542*].

28 It is inconsistent, on the other hand, to presume that the Parties intended their agreement to be interpreted according to the restrictive law of Danubia, especially since RESPONDENT's representative agreed that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*Cl. Ex. C8, p.17*]. Based on a commercial logic, there is no doubt that the Parties have given the power to adapt their contract to the Tribunal and that the law of Mediterraneo applies.

2. The view that the implied choice of law should presumptively be the law of Danubia is inaccurate and based on false assumption.

29 CLAIMANT contests the view that the implied choice-of-law regarding the arbitration agreement should presumptively be the law of Danubia. The arbitration clause is not a "free-standing agreement to arbitrate" to which this presumption applies [**a**]. Moreover, it cannot be held that the Parties intended their agreement to be governed by the law of Danubia for reasons of "neutrality" or "effectiveness" as those assumptions have proven to be inaccurate [**b & c**].

a. The arbitration clause is part of the FSSA and cannot be considered a free-standing agreement to which the law of Danubia applies.

30 In a "free-standing agreement to arbitrate" containing "no express choice of law,"

CLAIMANT agrees that "the significance of the choice of seat [...] would be "overwhelming" and the law of the seat would most likely be the governing law of the arbitration agreement" [*BCY § 44*]. However, free standing agreements to arbitrate only arise in "highly complex transactions" or in situations where the agreement is concluded by parties after a dispute has arisen [*BCY, § 66*].

31 The arbitration clause concluded by the Parties does not fall within the definition of a free-standing agreement. In that regard, the reference to an "Agreement" contained in the FSSA [*Clause 14*] is a strong indicator of the Parties intent. In *BCY*, Judge Chong J. noted that: "when a choice of law clause stipulates that the "agreement" is to be governed by one country's system of law, the natural inference should be that Parties intend the express choice of law to "govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement" [*BCY. § 59*].

32 This is also consistent with the Hong-Kong Court of First Instance decision which held that "only in circumstances where there is no express choice as the proper law of the contract will the court consider the implication that the law of the seat applies" [*P. Starr, A. Baykitch AM, p.4*].

33 Here, due to the absence of a free-standing agreement to arbitrate, the presumption that the law of Danubia governs the arbitration clause does not apply. On the contrary, the Parties intended for their entire relationship to be governed by the same system of law, the law of Mediterraneo. The fact that the Parties did not include a sentence concerning the law applicable to the arbitration agrement in the final draft of the arbitration agreement, although it was proposed by RESPONDENT in the first draft of the dispute resolution clause [*Res. Ex. 1*], illustrates the fact that the Parties intentend the choice-of-law clause contained in Article 14 of the FSSA to apply to the whole contract.

b. The law of the seat of arbitration is neutral from a procedural perspective but it does not follow that it is neutral from a substantive perspective.

34 In supporting the view that parties should be presumed to have intended that the arbitration be governed by the law of the seat of arbitration, it has been argued that this approach was driven by a need for neutrality [*Firstlink, § 13*]. Answering the "neutrality" issue raised in *FirstLink*,

Judge Steven Chong J. first recognized that the seat of arbitration was often chosen based on a desire for a neutral forum [*BCY, § 63*]. He pointed out that the seat of arbitration governs *the procedure of the arbitration* but that it would not necessarily follow that the seat's substantive law, governing the formation of an arbitration clause, would be neutral.

35 Moreover, it must be noted that "since the motivation behind the Parties' selection of the seat differs from case to case, neutrality should not be regarded as a universal overriding consideration *weighing on the minds of all commercial Parties"* [*Leong H., Tan J.-H., p. 77*]. Different reasons can trigger the Parties' decision to select a specific seat of arbitration. In that regard, CLAIMANT informed RESPONDENT of its internal policy procedure regarding dispute resolution in the country of the counterparty [*Res. Ex.* 2]. In CLAIMANT's mind, the reference to a "neutral country," a country which would not be the country of the counterparty, was primarily aimed at avoiding such a time-consuming procedure. This clearly shows that neutrality alone cannot, in and of itself, lend support to a presumptive rule as to Parties' intent [*Leong H., Tan J.-H., p.77*].

36 It is precisely because the substantive law of Danubia is not neutral regarding the interpretation of the arbitration clause that RESPONDENT relies on it to avoid the arbitral process. Therefore, it is contradictory to base its claim on a supposed desire for neutrality.

c. Validity of the arbitration agreement under the law of the seat is only relevant if there is no indication of the law to which the Parties have "subjected" the agreement.

37 The application of the law of the seat of arbitration has also been supported on the assumption that Parties would not take the risk of creating an unenforceable award [*FirstLink, § 14*]. In *FirstLink*, it was argued that an arbitral award may be set aside, or not enforced, if the arbitration clause is declared invalid either under the law to which the Parties have subjected it or, failing indication thereon, the law of the seat [*Article 34(2)(a)(i) and Article 36(1)(a)(i) of the UNCITRAL Model Law*]. It was pressumed that "rational business men" would have impliedly chosen the law of the seat to govern the arbitration clause in order to insure effectiveness.

38 Once again, this determination was based on a false assumption. Indeed, "validity under the law of the seat only arises for consideration *if there is no indication of the law the Parties have*

"subjected" the agreement to. The law that the Parties have subjected the agreement to would include their implied choice" [*BCY, §64*]. Both the New-York Convention and the UNCITRAL Model law instruct the Tribunal to give effect to any express or implied choice-of-law by the Parties and prescribe a default rule if such agreement cannot be found [*G. Born Commercial Arbitration*, § 526]. It does not support, however, a presumption in favor of the law of the seat.

39 The only question that the Tribunal should focus on is the "question of what the implied choice of law is and whether that should be the law of the main contract or the law of the seat" [*BCY, § 64*]. As it was made clear above, the answer to this question is the application of the law of Mediterraneo.

II. THE TRIBUNAL HAS JURISDICTION TO ADAPT THE CONTRACT PURSUANT TO THE LAW OF MEDITERRANEO WHICH GOVERNS THE ARBITRATION AGREEMENT

40 Under the law of Mediterraneo, the Tribunal has jurisdiction to adapt the contract in application of the CISG and UNIDROIT principles [**A**] and in line with the pro-arbitration principle [*N.A. § 16*] [**B**].

A. The scope of the arbitration agreement encompasses the adaptation of the contract by the Tribunal under the UNIDROIT principles and the CISG

41 The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT principles, which also governs the interpretation of the arbitration. Moreover, there is a consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, such as the FSSA [Art. 14], the ltater also applies to the conclusion and interpretation of the arbitration clause [*PO1, § III.4*].

42 Pursuant to the UNIDROIT Principles [*Art. 4.2*] and CISG [*Art. 8.1*], the statements and other conduct of a party shall be interpreted according to that party's intention where the other party knew or could not have been unaware what that intent was. In addition, Art. 8.3 CISG provides that "in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations."

43 Mr. Antley, RESONDENT's representative aknowledged that it should be the task of the arbitrators to adapt the contract if the Parties could not agree [*CL. Ex. 8*]. In addition, both Parties explicitly expressed that they would not accept the jurisdiction of the courts neither in Mediterraneo nor in Equatorianna [*Cl. Ex. 3, Cl. Ex. 4*], clearly extending the Tribunal's jurisdiction to every dispute arising out of the contract, including the aptation of contract.

B. The scope of the arbitration agreement encompasses the adaptation of the contract by the Tribunal in line with the pro-arbitration rule

44 The Law of Mediterraneo provides for a broad interpreatation of arbitration agreementS in line with the pro-arbitration rule. The "pro-arbitration" rule provides that a valid Arbitration Clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims [*G. Born, Commercial Arbitration, p.1326*]. This principle has been recognized by Courts and Tribunal worldwide [*Fiona Trust § 17, G. Born Commercial Arbitration, pp. 1331-1337*] and was clearly established by the US Supreme Court which ruled that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" [*Mitsubishi Motors § 626*].

45 Although the broad wording of the HKIAC model clause employed in the first draft of the dispute resolution clause was narrowed down [*Re. Ex. 1*], the liberal interpretation of the terms "any dispute arising out of this contract" extend to the dispute at issue, *i.e.* the adaptation of the price. This approach is consistent with the general pro-arbitration rule of interpretation [*G. Born Commercial Arbitration, p.1354*] and with the view that :

> "an arbitration clause should be construed in accordance with the presumption that the parties intended any dispute arising out of the relationship to be decided by the same tribunal, unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction [*Fiona Trust § 18, Premium Nafta Products Ltd § 13*].

46 In conclusion then, the arbitration clause covers the situation of adaptation of the contract in the present case under the broad interpretation allowed by the law of Mediterraneo.

CONCLUSION OF ISSUE I

47 For these reasons, the law Mediterraneo governs the arbitration agreement and the interpretation thereof, because it reflects the implied intent of the Parties and provides for an interpretive result in line with the validation principle. Therefore, under the Law of Mediterraneo, the Tribunal has the power and jurisdiction to adapt the contract.

ISSUE II: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS

48 The Tribunal is respectfully requested to find that the CLAIMANT is entitled to submit the evidence because evidence at issue is relevant to the case at hand [**I**]. The confidentiality obligation of the previous arbitration is not sufficient to bar the admissibility of the evidence [**II**]. Lastly, the evidence was not taken in way that denies its admissibility [**III**].

I. EVIDENCE AT ISSUE IS RELEVANT TO THE CASE AT HAND.

49 In terms of the relevance of evidence, the HKIAC Rules 2018 adopts a liberal approach evidenced in Article 22, which provides that "the arbitral tribunal shall determine the admissibility...of the evidence, including whether to apply strict rules of evidence". The Tribunal may find some guidelines from other arbitration for determining "relevance" in the present stage of proceedings. In an ICC case [*Virginia Hamilton, 2006*], the tribunal adopted a standard of "prima facie relevance" in ruling on a request for the production of documents. It stated that Arbitral Tribunal will rule "on the prima facie relevance of the requested documents having regard to the factual allegations made by the Parties" instead of being "in a position to make any ruling on the ultimate relevance of the requested documents to the final determination". This understanding was also adopted in an ICSID case [*Tidewater v. Venezuela*]. Thus, at the present stage of proceedings, any evidence of likely or prima facie relevance is sufficient to be "relevant" in light of the factual allegation of the party.

50 In the present case, CLAIMANT alleges that RESPONDENT and its counsel is acting inconsistently. In the other arbitration concerning the same case facts, affected by the same event of the imposed tariff, where the RESPONDENT is represented by the same counsel, the only difference is the fact that RESPONDENT is negatively affected by the tariff in the other dispute. But in that arbitration, RESPONDENT who vigorously deny any need to adapt the contract here has asked for an adaptation of the price invoking the unforeseeable change of

circumstances. This fact is directly evidenced by the documents CLAIMANT seeks to submit. Therefore, the evidence at issue is prima facie relevant to the case at hand.

II. THE CONFIDENTIALITY OBLIGATION IN THE PREVIOUS ARBITRATION DOES NOT BAR THE ADMISSIBILITY OF THE EVIDENCE.

51 The confidentiality obligation of the previous arbitration does not bar the evidence because neither the Tribunal nor the CLAIMANT is obligated by HKIAC Rules 2013 governing that arbitration [**A**]. Confidential documents from other arbitration proceedings are generally admitted in practice [**B**]. Even if the Tribunal deems the evidence to be excluded by the confidentiality obligation, the present case falls within an exception [**C**].

A. Neither the Tribunal nor the CLAIMANT is obligated by HKIAC Rules 2013 governing that arbitration.

52 The arbitration between the RESPONDENT and the other party was conducted under the HKIAC Rules 2013 [HKIAC 2013], which contains a limited confidentiality provision: Article 42. This article prohibits the arbitral tribunal and the secretary, parties, experts and witnesses from publishing, disclosing, or communicating information relating to the arbitration, under the arbitration, and the award made. It is evidenced in this Article that the personal scope under the confidentiality obligation is limited and cannot be arbitrarily extended to other persons. In the present case, the CLAIMANT received the information about that arbitration from a conference, not in conspiracy with any persons within the personal scope aforementioned. Similarly, none of the three arbitrators of present arbitration was involved in RESPONDENT's previous proceedings. Therefore, in disclosing and admitting the evidence at issue, neither the Tribunal nor CLAIMANT is in violation of the confidentiality obligation of the previous arbitration. Discipline under Article 42 of HKIAC 2013 should not be construed as to exclude any evidence engendered in this arbitration to be used in other procedures, as this would far exceed its wording.

B. Confidential documents from other arbitration proceedings are generally admitted in practice.

53 We acknowledge that in international arbitration, evidence may be excluded by a legal privilege according to Article 9.2(b) of the IBA Evidence Rules. However, the confidential nature of the arbitration proceedings does not amount to such legal privilege. Types of

confidentiality that may constitute a legal privilege suggested by Article 9.3 of the IBA Evidence Rules only contain the legal profession privilege and "without prejudice" privilege concerning documents of negotiation. To the contrary, admitting documents and information from a confidential arbitration proceedings as evidence in other proceedings is a common practice. One of the most cited cases is the Esso case [*Esso/BHP v. Plowman*] from Australian jurisdiction. In that case, the Australian Minister of Energy and Minerals claimed its right to inspect documents produced in arbitration proceedings between the Company named Esso and a third party, but Esso contended that the documents were confidential. The Australian High Court decided that the documentation cannot be covered by the veil of confidentiality. In a Swedish case [*Bulgarian Foreign Trade Bank Ltd. v. A.L. Trade Finance Inc*], the Supreme Court stressed that the private character of arbitration proceedings implies that third parties do not have the right, to attend hearings, or, obtain submissions, or petitions of the parties. But this did not hinder disclosure of information about the arbitration proceedings. Moreover, in an American case [*Urban Box Office Network v. Interfase Managers*], the Court looked beyond the confidentiality provision in an arbitration clause and rejected arguments that the evidence was shielded by the confidentiality provision. Therefore, the fact that the evidence at issue comes from a confidential arbitration proceedings can not be the reason for excluding it.

54 Moreover, the English courts stance is too rigid and inflexible to evolve with the latest development of international arbitration, inter alia, the principle of transparency, evidenced in the UNCITRAL Rules on Transparency. Although the principle of transparency thrives in sector of treaty-based arbitration, deliberations of this tribunal should shed necessary light on this development.

C. Even if the Tribunal finds an obligation of confidentiality that excludes the evidence, the present case falls within an exception.

55 Should the panel find otherwise, there are exceptions which can justify the admission of evidence from the other arbitration proceedings. Even the strictest stance held by the English courts provides some carve-outs to admit this kind of evidence. In the Dolling-Baker case [*Dolling-Baker v. Merrett*], Parker LJ concluded that, despite the implied confidential obligation, if the court contends that discovery and inspection of documents produced in arbitration are necessary for the fair disposal of the action, such inspection should be allowed. Another case [*Glidepath BV and Others v Thompson and Others*] also indicates that when the

documents from arbitration are necessary in the interest of justice, they may be admissible.

56 In the present case, disclosing the documentation on RESPONDENT's contradictory behavior is necessary to preserve the interests of justice and the fair disposal of this arbitration. In the other arbitration, RESPONDENT vigorously denied the need to adapt the contract as a result of changed circumstances and now in this arbitration totally reverses its stance when such adaptation to the contract is in its favor. Evidently, it is the RESPONDENT not acting in good faith before the Tribunal, treating the Tribunal as anything but the pursuit of justice. It will be a thorough nullification of the interest of justice if the tribunal is manipulated by the RESPONDENT. For this reason, and for the sake of the fair settlement of the dispute, the evidence from the other arbitration should be admitted in the arbitration.

III. THE EVIDENCE IS NOT OBTAINED IN A WAY DENIES ITS ADMISSIBILITY.

57 The Tribunal is respectfully requested to admit the evidence because the CLAIMANT did not communicate with former employees of the RESPONDENT or participate in the hacking [**A**]. Even if the evidence is illegally leaked, this is not sufficient to exclude the evidence [**B**].

A. The CLAIMANT was not involved in the illegal taking of evidence.

58 In the case at hand, at the annual breeder conference CLAIMANT's CEO heard about that arbitration from Mr. Kieron Velazquez, the CEO of one of CLAIMANT' s regular customers, who was not involved in RESPONDENT' s arbitration. Through Mr. Kieron Velazquez, CLAIMANT got in touch with a company which provides intelligence services in the horseracing industry and is able to provide the copy of the award. There is no evidence indicating that the way the company obtains the copy of the award is illegal, let alone any knowledge of CLAIMANT of such alleged illegality. In this thorough process, CLAIMANT did not communicate with former employees of RESPONDENT or hack RESPONDENT' s computer in breach of any law or regulation.

59 Notably, it is RESPONDENT's burden to prove that the illegal taking of evidence was conducted by CLAIMANT. Each party shall have the burden of proving the facts relied on to support its claim or defense [*HKIAC 2018, Article 22.1*]. RESPONDENT's conclusion regarding the source of the information is without any evidence that is related to CLAIMANT.

B. Even if the evidence is illegally leaked as assumed, it is not sufficient to exclude the evidence.

60 Even if the information is leaked illegally, it can still be admitted as evidence by the Tribunal. Recent cases have dealt with this issue. One of the most cited case that discusses the admissibility of illegally obtained evidence is Methanex case [*Methanex v. USA*]. In that case, Methanex obtained the documentation by means of trespassing, only to find it excluded by the Tribunal who determined CLAIMANT' s failure to conduct in good faith. However, that case is not comparable to the one at hand, where the party disclosing the documents did not obtain the evidence illegally. This distinction can be more apparent in considering another case [*Yukos v. Russia*], which was decided long after the Methanex case. In Yukos case, the Tribunal relied heavily on evidence from Wikileaks cables. Wikileaks obtain the confidential cables from the company Private Bradley Manning, which was determined to have violated the United States's Espionage Act. The major distinction between the Methanex and Yukos case is that none of the claimants in the Yukos arbitration breached the duty of good faith. It is exactly such a case at present in which no breach of any laws or the duty of good faith by the CLAIMANT has been demonstrated.

61 Another case dealing with Wikileaks, the Caratube case [*Caratube and Devincci v. Kazakshstan*] adopted a similar approach. In making its decision, the Tribunal considered the documentation from the Wikileaks. Despite the illegal obtaining of the documents, the tribunal found the balance tipped in favor of admitting the documents based on two considerations: first, the relevance of the evidence and second, the fact that the leaked documents were in the public domain, i.e. publicly accessible. In the present case, the relevance of the documents at issue has been shown above. Furthermore, these documents are also publicly available because they are provided by a normal and open company in horseracing industry from which anyone interested could get the information. Therefore, by referring to similar jurisprudence of the *Yukos* and *Caratube* cases, the evidence from RESPONDENT's other arbitration is admissible.

CONCLUSION OF ISSUE II

62 Therefore, CLAIMANT is entitled to submit the evidence because it is relevant to the case at hand; the confidentiality obligation of the previous arbitration is not sufficient to bar the admissibility of the evidence; and the evidence was not taken in way that denies its admissibility.

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

I. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT.

63 The Parties agreed to modify the standard DDP delivery term by including a hardship clause in the final contract [*Clause 8, 10, and 13 Cl. Ex. 5, p. 14; Art. 8.1 CISG*] [**A**]. The tariff constitutes a hardship accourding to the language of the contract and the intent of the Parties [**B**]. In the event of a hardship, the Parties intended for adaptation of the contract to be an available remedy [**C**].

A. The Parties agreed to modify the standard DDP delivery term by including a hardship clause in the final contract.

64 The Parties' intent to shift certain costs of standard DDP to the RESPONDENT is made clear by the language of the contract [**1**]. The Parties intended to avail themselves of CLAIMANT's shipping expertise, but rejected the risk allocation of standard DDP with the inclusion of the hardship clause [**2**].

1. The Parties' intent to shift certain costs of standard DDP to the RESPONDENT is evidenced by the language of the contract.

65 Statements made by and other conduct of the party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was [*Art. 8.1 CISG*].

66 Although Clause 8 of the contract provides that "Seller will ship 3 installments DDP," the Incoterm was derogated by some specific clauses in the contract, such as Clause 10, 12 and 13 [*Cl. Ex. 5 p. 14*]. It is well settled that the precise meaning of any Incoterm in a contract is subject to alteration upon agreement of the parties [*Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp*]. In considering these clauses, it is clear that the Parties intended to avail themselves of the established DDP Incoterm, but made major derogations from the term in order to satisfy the unique circumstances of the bargain.

2. The Parties intended to avail themselves of CLAIMANT's shipping expertise, but rejected the risk allocation of standard DDP.

67 Where the Parties' intent is otherwise unknown, an objective reasonable person standard should be applied to determine the intent of the Parties [*Art. 8.2 CISG*]. All relevant circumstances of the case, including negotiations and the interests of the parties, should be considered in determining the intent of the parties or the understanding that a reasonable person would have had [*Art. 8.3 CISG*].

68 In an email to CLAIMANT dated 28 March 2017, RESPONDENT insisted on a DDP delivery term citing the urgency of delivery and CLAIMANT's much greater experience in the shipment of frozen semen. In reply, CLAIMANT proposed a USD 1,000 increase in unit price to cover the costs of DDP shipping. In the same email, CLAIMANT also made clear that it was unwilling to bear "any further risks associated with DDP delivery" [*Cl.Ex.4*]. CLAIMANT specifically noted "changes in customs regulation or import restrictions" as well as "unforeseeable additional health and safety requirements" as risks that they would not accept. Furthermore, in RESPONDENT's A.N.A paragraph 4, the risk allocation of standard DDP was not acceptable for this transaction, and thus, the Parties elected to include a hardship clause.

B. The tariff constitutes a hardship according to the language of the FSSA and the intent of the Parties.

69 Clause 12 constitutes a hardship clause which contains the Parties' agreement on risk allocation, derogated from standard DDP. The term "hardship," is not strictly defined, but broadly qualified [**1**]. Pursuant to this clause, the tariff is a hardship [**2**].

1. In the contract, "hardship" is not strictly defined, but broadly qualified.

70 The Parties included "additional health and safety requirements" in the contract to demonstrate a typical hardship according to trade custom [**a**]. The contract language evidences the intention of the Parties to merely qualify the generally accepted definition of "hardship" [**b**]. The Parties included "comparable unforeseen events…making the contract more onerous" with the intention that it would be sufficient to cover hardships which were not specifically ascertainable at the completion of the contract [**c**].

a. Additional Health and Safety requirements were a typical, but unforeseeable, hardship according to trade custom.

71 As clearly shown in the negotiation history, CLAIMANT was particularly cautious about this risk because it learned from previous transactions that "unforeseeable additional health and safety requirements may make highly expensive tests necessary which can … destroy the commercial basis of the deal." [*Cl. Ex. 4*].

b. The contract language shows the intention of the Parties to qualify the generally accepted definition of "hardship".

72 The Parties did not rigidly define "hardship" as to exclude the possibility of expansion. Party autonomy being the supreme principle in contract law, the Parties had the freedom to define this term on the basis of the particular features of this specific transaction. This practice is recognized by the UNIDROIT Principles in Comment 7 under Article 6.2.2, which provides that "the parties may therefore find it appropriate to adapt the content of this Article so as to take account of the particular features of the specific transaction." [*Comment of Art. 6.2.2 of UNIDROIT Principles*]. That is what the Parties intended in the present case. According to the wording of the email sent to the RESPONDENT dated 31 March 2017 [*Cl. Ex. 4*], CLAIMANT referred to "health and safety requirements" to *illustrate* hardship, but not to restrict the meaning of "hardship" to such a narrow extent. Furthermore, as will be discussed below, the use of the expression "…or comparable unforeseen events making the contract more onerous" also stands for this point [*Cl. Ex. 5*].

c. The Parties included "comparable unforeseen events…" with the intention that it would be sufficient to cover hardships which were not specifically ascertainable at the completion of the contract.

73 The existence of this language in the contract apparently indicates that the meaning of hardship is not limited to "additional health and safety requirements." It is a common practice to draft a hardship clause in this way since it is impractical to require every possible hardship event to be listed in the contract. This expression also makes clear the requirements necessary for an event to constitute "hardship" as intended by the Parties.

2. Pursuant to Clause 12 of the Contract, the tariff is a hardship.

74 The tariff is a hardship as defined by Clause 12 of the contract because it is comparable to hardships caused by additional health and safety requirements [**a**], was unforeseen [**b**], and made the contract more onerous [**c**].

a. The tariff is comparable to hardships caused by additional health and safety requirements.

75 The specific, intended meaning of the contract language "hardships caused by additional health and safety requirements," relies on an understanding of trade customs in shipping frozen horse semen and reference to the negotiation of the Parties. The record of negotiations will help define this term. CLAIMANT's email to RESPONDENT on 31 March 2017 makes clear that CLAIMANT was particularly unwilling to bear the risks "associated with changes in customs regulation or import restriction" [*Cl. Ex. 4 p. 12*].

76 The Witness Statement of Julian Krone contains Mr. Antley's note which specifically provides, "ICC hardship clause suggested by CLAIMANT too broad." [*Re. Ex. 3 p. 35*]. In relevant part, the ICC Hardship Clause defines hardship as "events that have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract." [*ICC Hardship clause 2003*].

77 Interpreters should understand the language of the contract's hardship clause to be the product of these negotiations. Where the ICC's Hardship Clause broadly defines hardship as arising out of any "event," the Parties intended to direct this definition to circumstances specifically contemplated in negotiations, namely, additional health and safety requirements, which is named in the contract, and customs regulation and import restriction which is reasonably inferred to be covered in the contract under "comparable unforeseen events making the contract more onerous."

78 Apart from customs regulations and import restrictions, it would be difficult to imagine what the Parties meant by "comparable unforeseen events." It is reasonable to infer that the intention of the Parties behind qualifying the ICC definition of hardship was to exclude events of *non-governmental* acts such as acts of third parties or market inflation, while still including language that reflected the bargain.

79 The tariff is clearly a customs regulation which fits it precisely within the intended definition of a hardship, comparable to additional health and safety requirements, in the contract.

b. The tariff was unforeseen.

80 It is undisputed by RESPONDENT that the imposition of the tariff was unforeseen. At the time of the contract, there were no signs that would have reasonably lead the Parties to believe that the tariff would be imposed. Even more, there is no plausible way that either party could have discovered that the tariffs would be imposed during the contract. As reported by Peak Business News, "the size of the tariffs came as a big surprise even to informed circles," and "surprised most analysts." [*Cl. Ex. 6 p. 15*]. "A 25 per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto." [*N.A., p. 6, para.9*]. Where as the contract was signed on 6 May 2017 [*Cl. Ex. 5 p. 14*], the retaliatory tariff was not announced until 19 December 2017 [*PO2, Q25, p. 58*]. The mere speculation of policy changes is far too tenous to imbue the tariff with the quality of "foreseeability" and thus, the tariff was unforeseen.

c. The tariff made the contract more onerous.

81 The contract language of "*onerous"* is easily understood as anything making performance of obligations under the contract more difficult, strenuous, and/or burdensome. The Parties qualified the word "onerous" with "more" because they were only concerned with describing circumstances which merely had an onerous effect, not the degree to which those circumstances made performance onerous or not. In other words, even if a circumstance made performance 1% more burdensome to the CLAIMANT, under the contract, it would still meet the definition of "more onerous."

82 Here, Equatoriana's imposition of a 30% tariff on animal products caused CLAIMANT to bear a 25% loss of profit in the contract. The payment of this tariff will have a destructive effect on the financial standing of CLAIMANT [*PO2, Q29, p. 59*] and, notably, this was not totally unknown to RESPONDENT [*PO2, Q22, p. 58*]. Professor Schwenzer writes that, "In ascertaining whether any alteration amounts to hardship, primary consideration is to be given to the circumstances of the individual case and in cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered." *[Ingeborg Schwenzer,*

p.716]. Thus, the tariff fits squarely within the contract's definition of circumstances making performance "more onerous."

C. The Parties intended for adaptation of the contract to be an available remedy for hardship.

83 The record of negotiations shows the Parties agreement that adaptation would considered an available remedy for hardship under the contract [**1**]. Furthermore, the Parties understood that the FSSA was founded upon the UNIDROIT Principles which provide for adaptation [**2**].

1. The Parties agreed on adaptation during the negotiations.

84 The intent of the Parties to adapt the contract can be shown by the negotiation history. As argued above, the Parties chose not to apply the risk allocation mechanism provided in standard DDP delivery term. Instead, they included Clause 12 of the contract to allocate the risks of this specific transaction.

85 The Parties intended for Clause 12 to function as a hardship clause. As evidenced by the witness statement of Julie Napravnik, her and Mr. Antley, RESPONDENT's previous lawyer in charge of the negotiation, reached a consensus on the effect of the hardship clause [*Cl. Ex. 8*]. They agreed that the Parties would negotiate the adaptation of the contract in the event of a hardship and "if the Parties could not agree," arbitrators would have the authority to adapt it [*Cl. Ex. 8*]. Furthermore, the statement, "…from a legal point of view that was not necessary" clarifies any perceived ambiguity in the contract because it indicates the existence of a common legal foundation for the hardship clause in both countries [*Cl. Ex. 8*].

2. The UNIDROIT Principles provide for the remedy of adaptation.

86 Indeed, the general contract law in both countries is "a verbatim adoption of the UNIDROIT Principles" [*see PO1*], which contains a "hardship" section providing a highly similar solution as described above [*Chap. 6 Sec. 2 UNIDROIT Principles*].

Even though the lawyers in charge of the negotiation were replaced, the continuous use of the term "hardship" is sufficient to manifest their intent to adopt this mechanism when it comes to disputes concerning hardship. The allegation of RESPONDENT in the A.N.A. that "hardship" is merely wording added to the existing force majeure clause is not convincing, considering the clear separation between hardship and force majeure in UNIDROIT Principles.

This separation appears also in other international judicial instruments like PECL and ICC clauses [*Art. 6:111 and Art. 8:108 PECL; ICC Clauses*]. Even from the perspective of a reasonable person in the same circumstance, RESPONDENT's interpretation is abnormal and lacks the support of evidence.

87 Secondly, with due respect to the principle of good faith, the Parties shall at least enter into the renegotiation of the contract price [*Art.1.7 UNIDROIT Principles*]. During the call between Mr. Shoemaker and Ms. Napravnik on 21 January 2018, Ms. Napravnik clearly requested the adaptation of the price caused by the sudden imposition of the tariff [*Cl. Ex. 8*]. Although Mr. Shoemaker declared that he "never committed to any adaptation of the price and would also not have had the required authority to do so," he certainly expressed the importance of the timely arrival of the final shipment, and the necessity of maintaining a long-term relationship, which gave CLAIMANT a reasonable basis to believe that this situation would be resolved. Based upon this impression, Ms. Napravnik authorized the delivery.

88 It should be observed that CLAIMANT performed all due obligations under the hardship clause and the principle of good faith. On the contrary, RESPONDENT's vague, misdirecting promise, along with the breach of the resale prohibition obligation, blatantly violates the principle of good faith and cooperation in contract law. In order to protect the interest of the performing Party, the first step of renegotiation should be taken to positively settle this dispute, at the very least.

89 Based upon what discussed above, an intent of the Parties to renegotiate the price, and to empower the tribunal to adapt the contract when renegotiation fails is proven through the negotiation history along with the legal circumstance of these two countries.

II. CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CISG.

90 The CISG is stipulated as the governing law of the contract [*Art. 14 FSSA*] [**A**], however, the Convention is silent on the circumstances in which CLAIMANT is disadvantaged by a hardship but still completes performance [**B**]. Pursuant to the CISG, this situation leads to the application of the UNIDROIT Principles, which will entitle CLAIMANT to payment from the

adaptation of the price [**C**].

A. In Clause 14 of the FSSA, the Parties stipulated to the CISG as the governing law of the contract.

91 The FSSA concluded by CLAIMANT and RESPONDENT stipulated clearly that the contract shall be governed by the CISG [*Art. 14 FSSA*].

B. The CISG is silent on the circumstances in which a seller of goods, disadvantaged by a hardship, successfully completes performance.

92 Art. 79 CISG only applies to circumstances in which a party fails to perform its obligation(s) due to an impediment [**1**], which precludes the application of Art.79 in present case as CLAIMANT has performed its obligations under the FSSA [**2**].

1. Art. 79 CISG only applies to circumstances in which a party, disadvantaged by an impediment, fails to perform its obligation(s).

93 Art. 79 is only article in the CISG that stipulates the situations which seem similar to the ones in the present case, however, it's evident that it's not applicable. Art.79 deals with "the effects of the impossibility to perform the obligation(s) of the contract" [*Tallon*]. According to the literal analysis of the article, "for an exemption to be granted, the non-performance of the contract must be due to an impediment" [*Tallon*].

94 Pursuant to the Article 79, an impediment is reasonably impossible to overcome and indeed induces the non-performance of the party [*Art. 79(1) CISG; Tallon*]. Therefore, Art. 79 CISG is applicable only when an impediment exists.

95 In determining the definition of an impediment, many decisions have suggested that Art. 79 requires the satisfaction of something akin to an "impossibility" standard [*UNCITRAL Digest of Case Law, Art. 79, p. 374*]. In the case *Nouva*, the court stated that Art. 79 only provides for "release from an obligation made impossible by a supervening impediment" [*Nouva Fucinati S.p.A*]. The *Iron molybdenum* case reveals a consistent attitude of the court that a seller can be exempt from liability for failure to deliver only if suitable goods were no longer available in the market [*Iron molybdenum*]. In another case named *Tomato Concentrate*, the court similarly denied the seller's declaration of inability to deliver the goods due to a bad harvest. The court

believed that the goods were "undoubtedly not exhausted" [*Tomato Concentrate*]. The interpretations of Art. 79 given by the courts indicate that a party cannot be exempted as long as performance had not been made physically impossible [*Carlsen, p.5*].

96 Moreover, the fact that it actually results in the non-performance of the party is also significant to the proper invocation of Article 79. Art. 79 is only applicable in cases in which a party has already breached the contract [*Carlsen, p.7*].

97 In conclusion, Art. 79 CISG is limited to impediments that result in the impossibility of the performance, excluding the circumstances where performance is possible but unduly burdensome and difficult [*Jenkins*]. The Article only applies to situations in which non-performance of the party has become a solid fact. Hence, there is no explicit clause on hardship in the Convention.

2. CLAIMANT has performed all obligations under the contract and thus, Article 79 is not applicable.

98 CLAIMANT delivered the remaining 50 doses on 23 January 2018 and thus, the total 100 doses of frozen semen was delivered to RESPONDENT [*N.A., §13*] even under the extremely burdensome imposition of the 30 percent tariff on the frozen semen [*Cl. Ex. 6*]. Therefore, CLAIMANT fully performed its obligations, despite changed circumstances making the performance unexpectedly and unreasonably onerous. Pursuant to the previous analysis, Art. 79 CISG is not applicable and whole convention is silent in such situation.

C. Pursuant to the CISG, the UNIDROIT Principles are applicable and entitle CLAIMANT to payment resulting from an adaptation of the contract price.

99 There is no hardship clause in the text of the CISG, however, Article 7 of the Convention triggers the application of relevant clauses in UNIDROIT Principles [*Art.7 CISG*] **[1]**. Under Chapter 6 Section 2 of the UNIDROIT Principles, the sudden imposition of the tariff in RESPONDENT's country constitutes a hardship [*Art. 6. 2. 2 UNIDROIT Principles*], thus CLAIMANT is entitled to the payment of US$1,250,000 from an adaptation of price [*Art. 6. 2. 3 UNIDROIT Principles*] **[2]**.

1. Art. 7 CISG provides that matters not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based, which includes the UNIDROIT Principles.

100 The above analysis concludes that the CISG does not contain an equivalent provision on hardship, which reveals the fact that the CISG is not complete [*Kessedjian*]. Therefore, Art. 7 CISG serves as a mechanism to supplement its provisions when necessary.

101 Art. 7(2) CISG provides the settlement of questions concerning matters "*governed by this Convention*" and "*not expressly settled in it*." Hardship satisfies these two conditions. First, hardship falls under the general scope of the application of the CISG and is governed by the Convention. Pursuant to Art. 4 CISG, the scope of the Convention merely excludes issues concerned with the validity of the contract or of its provisions and the effect which the contract may have on the property in the goods sold. Evidently, hardship is not contemplated by this exclusion. With reference to the UNIDROIT Principles, hardship is regulated in Chapter 6 on Performance, which provides that "hardship" is directly relevant to the rights and obligations of the sellers and buyers arising from the contract [*Art. 4 CISG*]. Secondly, because the Convention is lacking an explicit provision defining hardship's scope, consequences, or solutions, it follows that this issue is "*not expressly settled*" in the Convention.

102 Pursuant to Art. 7(2) CISG, the filling of internal gaps in the Convention must first be done by recourse to the general principles on which it was based. The UNIDROIT Principles are qualified as "*general principles*" due to their nature and purpose, and the Principles are the choice of priority adopted in judicial practice.

103 The preamble of the UNIDROIT Principles stipulates that the Principles set forth are general rules for international commercial contracts. Considering the sphere of the Principles' application and purpose, the Principles can be regarded as "*general principles*." Further, the preamble clarifies that the Principles may be used to interpret or supplement international uniform law instruments which may have gaps, and in the official comments to this article, Art. 7 CISG is given as a typical example of this approach [*Comment of Preamble UNIDROIT Principles*].

104 In various precedents, pursuant to the Art.7, the UNIDROIT Principles can be applied to fill the gaps present in the CISG. The Netherlands Arbitration Institute explicitly held that the

Principles are "principles" in the sense of Art. 7(2) [*NAI, 10 Feb 2005*]. The Supreme Court Belgium also held that there is a gap in the CISG to be filled by general principles and these principles are "incorporated *inter alia* in the UNIDROIT Principles" [*Scaforn International v. Lorraine Tubes S.A.S*]. The ICC International Court of Arbitration held, in an almost identical opinion, that pursuant to Art. 7, the CISG may be supplemented by those general principles which have inspired its provisions and particularly those which have been substantiated and codified in the UNIDROIT Principles [*ICC Case No.12460/2004*].

105 In conclusion, pursuant to Art. 7(2) CISG, the UNIDROIT Principles are applicable to circumstances of hardship for the filling of gaps in the CISG. Therefore, the Principles are applicable to the present case for the settlement of the hardship.

2. Pursuant to UNIDROIT Article 6.2.2 and 6.2.3, CLAIMANT, disadvantaged by a hardship, is entitled to the payment of USD 1,250,000 resulting from the adaptation of the contract price.

106 Chapter 6 Section 2 of the UNIDROIT principles addresses the exceptional situation in which changing circumstances lead to a fundamental alternation of the equilibrium of the contract. The phenomenon of hardship has been accepted by various legal systems and also by international trade practice. In present case, the sudden imposition of the 30 percent tariff in Equatoriana constitutes a hardship [**a**], and therefore the Tribunal has the power to adapt the price of the contract [**b**].

a. The imposition of the tariff constitutes hardship under the Conditions of Article 6.2.2 UNIDROIT Principles.

107 Article 6.2.2 defines hardship as a situation where the occurrence of an event fundamentally alters the equilibrium of the contract [**i**], provided that those events meet the four conditions in subparagraphs (a) through (d) of the Article [**ii-v**].

i. The sudden imposition of the tariff in Equatoriana fundamentally altered the equilibrium of the contract caused by the increased cost of the performance

108 According to Article 6.2.2, the fundamental alteration of the equilibrium of the contract could have two forms: a substantial increase in cost of performance, or a substantial decrease in value of the performance received by one party. Here, the sudden imposition of the tariff

caused a substantial increase in cost of performance for CLAIMANT. The Comment for Article 6.2.2 shows that the increase of costs may be caused by "the introduction of new safety regulations requiring far more expensive production procedures" [*Comment of Art.6.2.2 UNIDROIT Principles*], which is quite similar to the case at hand in at least two aspects. First, both the tariff and the introduction of new regulations are government acts. Second, both add costs for the performance of the seller.

109 In the present case, the new tariff imposed by the RESPONDENT's country made the costs 30% higher than before. Consequently, CLAIMANT suffered a 25% loss on the contract, which completely destroyed the commercial basis of the deal [Cl. Ex. 8]. According to an arbitral award of ICC, the adaptation of a contract, of which the equilibrium has been broken, is to ensure that the performance of a contract would "not cause...the ruin of one of the parties" [ICC Case No. 9994/2001]. The last two years have been financially difficult for CLAIMANT which had to carry out extensive restructuring and cut its work force [Cl. Ex. 8]. CLAIMANT's financial situation will be seriously endangered if it has to bear the 1,250,000 USD. [PO2, para. 29]. The increase of costs totally altered the equilibrium of the contract and put CLAIMANT in a unfavorable, commercially threatened, position.

ii. The sudden imposition of the tariff occurred after the conclusion of the contract.

110 According Article 6.2.2 (a), an event is a hardship only if it "occurs or becomes known after the conclusion of the contract." On 6 May 2017, the FSSA was finally concluded [*Cl. Ex. 5*], and it was not until 19 December 2017 that Equatoriana declared the imposition of a tariff of 30% upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction policy imposed by Mediterraneo [*Cl. Ex. 6*].

iii. The tariff could not reasonably have been taken into account by the CLAIMANT at the time of the conclusion of the contract.

111 According Article 6.2.2 (b), an event is a hardship only if it "could not have been reasonably taken into account by the disadvantaged party at the time of the conclusion of the contract." As argued above in para.79, the imposition of the tariff on the semen was unforeseeable by the CLAIMANT at the time of the conclusion of the FSSA.

112 First, the imposition of tariff on agricultural products by Mediterraneo for such a huge size

was unforeseeable. Although the new president has shown some preference for protectionism, however, a 25% tariff had never been part of any election manifesto [*N.A, para. 9*]. Even more, only few countries had used a tariff of comparable size to protect their farmers, Meditterraneo was never one of them [*PO2, para. 23*].

113 Second, the drastically increased tariff as a retaliation was unpredictable. Equatoriana has never used tariffs as a direct retaliation with only one exception [*Cl. Ex. 6*]. CLAIMANT had full reason to believe that Equatoriana would always support free trade and maintain its tariffs at a stable level.

114 Lastly, it was unforeseeable that racehorse semen would be included on the list of agricultural products. Generally, racehorse breeding, which is related to the sport industry, is categorized differently than typical agricultural animals. For example, in the *FAO Draft*, only horse *meat* is on the list of agricultural commodities [*FAO Draft*]. Obviously, racehorses are not used as slaughter animals.

iv. The tariff is beyond the control of the CLAIMANT.

115 According Article 6.2.2 (c), an event is a hardship only if "it is beyond the control of the disadvantaged party." This standard is the same as the requirement for "impediment" under Art.79 CISG. Moreover, "no event within a party's sphere of control, such as events relating to a party's employees, can exempt a party from its contractual liability." [*Lindstrom, p.8*]. Obviously, CLAIMANT had no power to affect the tariff policy of Equatoriana, the home country of RESPONDENT.

v. Risks were not assumed by the CLAIMANT.

116 According Article 6.2.2 (d), an event is a hardship only if "the risk of the event(s) is not assumed by the disadvantaged party." Although the Parties agreed to use DDP delivery, from the Witness Statement of Julie Napravnik [*Cl. Ex. 8*] and RESPONDENT's A.N.A, it is clear that both parties agreed that CLAIMANT should not bear all the risks. By incorporating Clause 12 into the contract, the Parties derogated from the risk allocation rule of standard DDP. As was previously analyzed, tariff is a "comparable event with additional health and safety requirements" as they are both imposed by the government and both made performance under the contract more onerous. Thus, the risk was not assumed by CLAIMANT.

b. The Tribunal has the power to adapt the price of the contract according to Art.6.2.3 UNIDROIT Principles.

117 Under Article 6.2.3, CLAIMANT is entitled to request renegotiation in good faith and has made the request without undue delay [**i**]. Upon the failure of such renegotiation, the Tribunal has the power to adapt the contract [**ii**].

i. CLAIMANT is entitled to request renegotiation in good faith and has made the request without undue delay.

118 It is clearly stipulated in Article 6.2.3 (1) of the UNIDROIT Principles that the disadvantaged party is entitled to request renegotiation upon the occurrence of a hardship. The request shall be made without undue delay and indicate the grounds upon which it is based.

119 As shown in the e-mail [*Cl. Ex. 7*] and the witness statement of Julie Napravnik [*Cl. Ex. 8*], CLAIMANT fulfilled these two conditions when it contacted the RESPONDENT on 20 January 2018 shortly after it was informed by the Equatorianan officials that the imposed tariff should be applied to racehorse semen on 19 January [*PO2, para. 26*]. Thus, CLAIMANT was entitled to a renegotiation, subject to the general principle of good faith and fair dealing [*Art.1.7 UNIDROIT Principles*] and to the duty of cooperation [*Art.5.1.3 UNIDROIT Principles*].

ii. The Tribunal has the power to adapt the contract upon the failure of the renegotiation between CLAIMANT and RESPONDENT.

120 Upon the failure of renegotiation, the UNIDROIT Principles provides that either party may resort to the court and if reasonable, the court may choose to adapt or terminate the contract [*Art. 6.2.3 (4) UNIDROIT Principles*]. To be sure, Article 1.11 provides "arbitral tribunal" is included in meaning when "court" is mentioned in the UNIDROIT Principles.

121 In the present case, the Parties failed to arrive at an agreement on the adaptation of the price. Therefore, the Tribunal is free to choose reasonable measures, which includes the adaptation of contract price, to restore the equilibrium between the Parties.

122 As illustrated in the UNIDROIT Principles [*Comment of Art. 6.2.3 UNIDROIT Principles*], termination of the contract could be viewed as an ultimate cure to the hardship where the performance of contract is highly ineffective. It represents the attitude of encouraging

economic transactions. Therefore, in the present situation, adaptation of price would be a more reasonable option since the transaction is still practical and CLAIMANT has duly performed its contractual obligations.

CONCLUSION OF ISSUE III

123 For these reasons, CLAIMANT is entitled to the payment of USD 1,250,000 resulting from the adaptation of the price by the Tribunal.

REQUEST FOR RELIEF

Pursuant to the Tribunal's Procedural Orders, Counsel submits this memorandum on behalf of the CLAIMANT. With respect, and in accordance with the aforementioned reasons, Counsel requests the Arbitral Tribunal to find that:

1. The Tribunal has the jurisdiction and power under the arbitration agreement to adapt the contract pursuant to the law of Mediterraneo;
2. CLAIMANT is entitled to submit evidence from other arbitration proceedings; and
3. CLAIMANT is entitled to the payment of USD 1,250,000 resulting from the adaptation of the price under both Clause 12 of the contract and the CISG.

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New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PECL	The Principles of European Contract Law 2002
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts

TABLE OF ABBREVIATION

Cited as	Reference
&	and
§	Paragraph(s)
A.N.A	Answer to the Notice of Arbitration
Cl. Ex.	CLAIMANT's Exhibit Number
Co.	Company
Corp.	Corporation
DDP	Delivery Duty Paid
FAO	Food and Agriculture Organization of the United Nations
FSSA	Frozen Semen Sales Agreement
i.e.	Id est (that means)
ICC	International Chamber of Commerce and Industry
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporate
Incoterm	International Commercial Term
Ltd.	Limited
N.A.	Notice of Arbitration
No.	Number
p.	Page(s)
para.	paragraph(s)
PO1	Procedural Order NO 1 of 5 October 2018
PO2	Procedural Order NO 2 of 2 November 2018
quod non	Something that is not true
Re. Ex.	RESPONDENT's Exhibit Number
SacLJ	Singapore Academic of Law Journal
USD	United States Dollar
v.	versus

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