SIXTEEN ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 March –7 April 2019

MEMORANDUM FOR CLAIMANT

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

COUNSELS

Han Leyi♦ He Xinyue ♦Jiang Mengmeng ♦ Pan Yutang♦Wang Haowen ♦Wang Jing

Tang Jiayi♦ Shi Yedong ♦ Yang Baoyi ♦Zhang Lutao ♦ Zhong Jinghui

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TABLE OF ABBREVIATIONS

Sales Agreement	Frozen Semen Sales Agreement
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claim(ant)
Ex.	Exhibit
Resp.	Respondent
UNCITRAL	United Nations Commission on International Trade Law
HKIAC	Hong Kong International Arbitration Centre
No(s).	Number(s)
Ord.	Order
Proc.	Procedural
Art.	Article

STATEMENT OF FACTS

3.21. 2017 RESPONDENT emailed CLAIMANT to inquire about the available of Nijinsky III's frozen semen. Surprisingly, RESPONDENT came up with the proposal as much as 100 doses.

3.24 2017 CLAIMANT replied with a formal offer and attached its price terms general conditions. CLAIMANT chose EXW as its delivery term to avoid further risks.

3.28 2017 RESPONDENT replied and varied the delivery term into DDP, to take advantage of CLAIMANT's frozen semen storage technique.

3.31 2017 CLAIMANT agreed with the DDP term, and raised the price term accordingly but moderately. To clarify the usage of DDP, CLAIMANT wrote that it didn't want to shoulder any further risks, regarding health and safety test happened before.

4.10 2017 RESPONDENT proposed that the law of Equatoriana shall be the applicable law for arbitration agreement.

4.12 2017 Mr. Napravnik brought up with the incorporation of adaptation-clause and hardship-clause, to which Mr. Antley agree with, and promise to redraft the contract. However, before the car accident happened and left the two negotiators in coma.

5.6 2017 The two new negotiators agreed on "the conclusion of a narrow hardship reference into the force majeure clause". Thus, Art.12 is formed and contract is signed.

12.19 2017 The government of Equatoriana increased the tariff of "agricultural products" by 30%, and the frozen racehorse semen was included.

1.20 2018 Just before the third shipment, CLAIMANT found that the impact of "agricultural product" tariff actually involved racehorse semen. Mr. Napravnik stated that without any solution, CLAIMANT had to withhold the shipment. Convinced by the impression that there would be a solution, CLAIMANT released the third shipment.

PART I: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW GOVERNING THE ARBITRATION AGREEMENT SHALL BE THE LAW OF MEDITERRANEO.

1. The Arbitral Tribunal is competent to make the decision upon the objection of jurisdiction since it has the authority to rule on its own jurisdiction *[Art.19 HKIAC rules]*. Indeed, the jurisdiction over the contract adaptation is based on the scope of arbitration agreement. In regard to whether the Tribunal has the power to adapt the contract, it depends on parties' authorization through the arbitration agreement or governing law of the arbitration agreement. Therefore, determining which law governs the arbitration agreement is of priority. In the case at hand, the law of Mediterraneo is the governing law of the arbitration agreement **(I)**. Under the law of Mediterraneo, the tribunal has the jurisdiction over the contract adaptation and the power to adapt the contract **(II)**.

I. The law of Mediterraneo is the governing law of the arbitration agreement.

2. There is almost uniform acceptance of the parties' autonomy to choose the law governing an international arbitration agreement *[Born Practice]*. This position is also reflected in the New York Convention as well as UNCITRAL Model Law that parties' choice of law takes precedence over the law of the seat of arbitration *[Art. V(1)(a) NY Convention; Art. 36(1)(a)(i) Model Law]*. According to three-step test *[SULAMÉRICA case]*, when there is no express choice, parties' implied choice shall be taken into consideration. In the case at hand, the parties had made an implied choice that the law of Mediterraneo shall be the governing law of the arbitration agreement **(A)**. Further, there is no contrary indication which suggests that the parties intended to adopt the law of the seat of arbitration governing the arbitration agreement **(B)**.

A. The parties had made an implied choice that the law of Mediterraneo shall be the governing law of the arbitration agreement.

3. Based on the three-step test, when it comes to the first step, there is no express choice of law contained in the arbitration agreement **(1)**. However, Clause 14 of the Sales Agreement is a

strong indication that the arbitration agreement shall also be governed by the law of Mediterraneo **(2)**. Moreover, the offer and acceptance suggest that the law applicable to the arbitration agreement shall be the law of Mediterraneo **(3)**.

(1) There is no express choice of law contained in the arbitration agreement.

4. Generally, the law of seat of arbitration differs from the law of the arbitration agreement **(a)**. Thus, the mere reference of the seat of arbitration is not equivalent to parties' expressly choosing the law of the seat of arbitration as the governing law of the arbitration agreement **(b)**.

(a) The law of seat of arbitration differs from the law of the arbitration agreement.

5. The law of the arbitration agreement covers issues pertaining to the arbitration agreement, such as its validity and interpretation. The law of the seat, on the other hand, applies to issues relating to the arbitration proceeding itself *[Born 2014]*. Given the UNCITRAL Model law, as the arbitration law adopted by Danubia, is silent on the issue of arbitral tribunal's power of adaptation *[Yearbook of the UNCITRAL, 1986]*. The question of whether the arbitral tribunal is entitled to adapt the contract in the current case is subject to the interpretation of the arbitration agreement. It is evident that parties' different stances on the applicable law of the arbitration agreement stems from the fact that Mediterraneo and Danubia have divergent rules of interpretation regarding the arbitration agreements. In view of the law of seat come into play in procedural issues which are not involved with the interpretation, the law applicable to interpretation of the arbitration agreement requires a closer examination.

(b) The mere reference of the seat of arbitration is not equivalent to parties' expressly choosing the law of the seat of arbitration as the governing law of the arbitration agreement.

6. Under Art. 8(1) CISG, parties' intentions shall be examined thoroughly when interpreting the agreement *[Art. 8 CISG]*. Refrained from its "internal policy", CLAIMANT chose Danubia, a neutral country, as the seat of arbitration. Meanwhile, CLAIMANT iterated that "the law applicable to the Sales Agreements remains the law of Mediterraneo" *[Resp. Ex. 2]*. Thus, the mere amendment as to the place of arbitration cannot suggest CLAIMANT referred to

the law of Danubia at the same time, especially the consent from creditor's committee would be required if the contract was to subject to a foreign law *[Resp. Ex. 2]*. Therefore, it would be untenable for RESPONDENT to rely upon the arbitration agreement is subject to the law of the the seat of arbitration.

7. Furthermore, according to the suggested model clause from HKIAC, the parties shall choose "The law of this arbitration clause shall be ..."and "The seat of arbitration shall be..." separately, which also suggests that, the express choice of seat of arbitration cannot refer to the express choice of the governing law of the arbitration agreement automatically.

(2) Clause 14 of the Sales Agreement is a strong indication that the arbitration agreement shall also be governed by the law of Mediterraneo.

8. To say that the word "agreement" contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning *[BCY case],* which is also evidenced by the fact that the acceptance of the contract entails acceptance of the clause, without any formality *[Yves Derains]*. Therefore, when a choice of law clause (such in the current case) 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 governing the underlying agreement to "govern and determine the construction of **all *[emphasis added]*** the clauses in the agreement which they signed including the arbitration agreement" *[Arsanovia case]*. As well as proposed by authoritative scholars *[Redfern and Hunter],* if the parties expressly choose a particular law to govern their agreement, why should some other law-which the parties have not chosen-be applied to one of the clauses in the agreement, simply because it happens to be the arbitration clause.

9. Apart from that, the parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract in commercial practice *[Born International Perspective]*. The approach that when the arbitration agreement itself does not contain a specific choice of law clause, the choice of law of the underlying agreement apply as a strong indication is widely adopted in court decisions *[SulAmérica case; Arsanovia case; Habas case*; *BCY case]*. As concluded in multiple court decisions, since the choice of the law of the underlying agreement is closely related to the implied parties' intention of the governing law to the

arbitration agreement, the mere choice of seat of arbitration cannot in itself sufficiently override it *[Arsanovia case; Habas case; BCY case]*.

10. Further, the doctrine of separability, which is alleged by the RESPONDENT, may ratify the circumstances that different laws may govern the underlying contract and the arbitration clause *[Answer to the Notice of Arbitration]*. However, the doctrine treats the arbitration agreement as a 'distinct agreement' in the context of a challenge only to the validity of that agreement while it does not treat it as a distinct agreement more generally, such as choice of law *[Glick & Niranjan]*. This is also clear from Art. 16(1) of the Model Law as well as Art. 19.2 of HKIAC 2018 Rule*s*, that resort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged *[BCY case]*. Thus, it does not mean that the arbitration clause is insulate from the underlying contract for all purpose *[SulAmérica case]*. Otherwise, this would subvert the legitimate expectations of the parties who had expressly inserted the arbitration clause as part of the main contract, and not as two separate documents *[Renato Nazzini]*.

11. In this case, there is an express choice in Clause 14 that the law of Mediterraneo shall govern the Sales Agreement, which serves as a strong indication. Meanwhile, the validation of the arbitration agreement is not questioned. Therefore, there is no necessity to subject the arbitration agreement to a different system of law. In addition, the fact that the law of the arbitration agreement is the same as the law governing the underlying agreement is by no means incompatible with the doctrine of separability, for the reason that it is not a result of a direct application of the choice of law clause, but the outcome of parties' implied declaration of intention.

(3) The offer and acceptance suggest that the law applicable to the arbitration agreement shall be the law of Mediterraneo.

12. Based on the three-step test, when there is no express choice, parties' implied intention shall be examined at the second step. To determine the governing law of the arbitration agreement, we must ascertain the parties' shared intention at the time of conclusion of the contract. To identify such intention, written instruments as well as non-written instruments, including preliminary negotiations should be referred to. Given the parties' negotiation process, Parties

agreed upon the law of the arbitration agreement by implication **(a)**. Even though the RESPONDENT had no such intention, the agreement shall be interpreted objectively **(b)**.

(a) Parties agreed upon the law of the arbitration agreement by implication.

13. When RESONDENT first introduced the HKIAC Model Clause as the arbitration agreement, it chose Equatoriana as both the seat and its law as the governing law *[Resp. Ex. 1]*. But RESPONDENT did not show the intention that it preferred the law of the seat simultaneously be the applicable law of the arbitration agreement.

14. However, CLAIMANT wanted the law of Mediterraneo applies. To show its intent, CLAIMANT put forward a counteroffer. Apart from changing the seat to Danubia, CLAIMANT removed the choice of law clause in the proposed arbitration agreement in response and expressly stated that this offer is ON THE CONDITION that the whole sales agreement shall be governed by the law of Mediterraneo *[Resp. Ex. 2]*.

15. Besides, CLAIMANT also informed the RESPONDENT their unwillingness to let the arbitration agreement governed by a foreign law since it would need special approval from its creditors' committee *[Resp. Ex. 2]*.

16. Thus, the offer proposed by CLAIMANT that the law of Mediterraneo be the applicable law to the arbitration agreement was clear, and it was accepted by the RESPONDENT.

(b) Even though the RESPONDENT had no such intention, the agreement shall be interpreted objectively.

17. RESPONDENT may claim that such choice of law went against their true intention, however, the offer and acceptance which formed the agreement shall be interpreted objectively *[Art.8 CISG]*. And when adopting an objective interpretation of the agreement, RESPONDENT has accepted CLAIMANT' s offer.

18. On the one hand, after receiving CLAIMANT's counteroffer, RESPONDENT raised no objection. Mr. Antley, the RESPONDENT's negotiator, has not mentioned it throughout his discussion with CLAIMANT on the drafting of the contract *[CL. Ex. 8]*.Mr. Kone, the

successor of Mr. Antley after the car accident did not argue the governing law either *[Resp. Ex. 3]*.

19. On the other hand, at the time of conclusion of the contract, parties have access to the prior negotiation mails *[PO2. Q5]*. RESPONDENT's negotiator should have noted that the arbitration agreement has been modified. However, after carefully scrutinizing the agreement, parties only added the last two sentences containing the number of arbitrators and the language of arbitration as found in the email of 10 April 2017 *[Resp. Ex. 1]*. It is clear that by omitting such a choice of law subparagraph which would lend strong support to RESPONDENT's so-called intent, RESPONDENT actually shared the same understanding with CLAIMANT that the applicable law of the arbitration agreement be the law of Mediterraneo.

20. It is therefore the Parties' consensus not to submit the arbitration agreement to a set of rules different from the remaining parts of the contract, and such common intention that the law of Mediterraneo governs the arbitration agreement should be respected by the arbitral tribunal.

B. There is no contrary indication which suggests that the parties intended to adopt the law of the seat of arbitration governing the arbitration agreement.

21. CLAIMANT proposed the seat of arbitration shall be Danubia without choosing law of Danubia as the law of arbitration agreement and iterated that the law applicable to the Agreement remains the law of Mediterraneo *[Resp. Ex. 2]*, to which RESPONDENT raised no objection.

22. It indicates that the intention of the CLAIMANT has always been the Law of Mediterraneo shall govern the contract as a whole, and the arbitration clause is no exception. Choosing Danubia as a neutral seat of arbitration is merely a middle ground.

23. Consequently, since parties never agreed to choose the law of the seat of arbitration to govern the arbitration neither during the negotiation nor in the contract, there is no contrary indication that parties were intended to subject the arbitration agreement to the law of Danubia.

II. The Tribunal has the jurisdiction over the case and the powers under the arbitration clause to adapt the contract.

24. The arbitration clause defines the scope of arbitration, hence the question whether the arbitral tribunal has been authorized by the parties to adapt the contract shall be determined through the interpretation of the arbitration clause. In order to determine the actual meaning of the arbitration clause, the wording of which should be interpreted in the light of the all relevant circumstances. Firstly, contract adaptation qualifies as a "dispute arising out of this contract" **(A)**. Secondly, through interpretation, the arbitration clause encompasses the contract adaptation by arbitral tribunals **(B).**

A. Since the arbitration agreement is to be understood broadly, "disputes arising out of this contract" shall include adaptation.

25. The arbitration agreement stipulates that "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..." *[Cl. Ex. 5]*. The wording 'including' suggests that the issues mentioned subsequently are only part of the disputes that are capable of being submitted to arbitration.

26. The Arbitration Law of Mediterraneo provides a rule in interpreting the arbitration agreements, which supports a broad interpretation of them *[Notice of Arbitration]*. Therefore, unless parties expressly exclude certain issues as not arbitrable, the arbitration agreement shall be generally understood as conferring the arbitral tribunals all the powers that are necessary. Even though the issue may not be expressly mentioned in the arbitration agreement, as long as it constitutes a dispute arising out of the contract, the arbitral tribunal shall have the jurisdiction and the power to adjudicate upon it.

27. In a case judged by the English Court of Appeal, it had been discussed whether a claim for rescission for bribery could be a claim 'under and out of' the contract. Finally, the Court concluded that "the words 'arising out of' should cover every dispute except a dispute as to whether there was ever a contract at all". Moreover, the Court also held the view that the arbitration clause in an international commercial contract should be construed liberally, and

if any businessman did want to exclude some disputes, it would be simple to say so, instead of "debating whether a particular case falls within one set of words or another very similar set of words." *[Fiona Trust]*

28. Pursuant to the reasoning of this case and the provision of Mediterraneo law, we submit that adaptation shall qualify as a dispute arising out of the contract, thus being included in the scope of arbitration.

29. This understanding is also in line with the opinion shared by scholars that the concept of dispute refers to any conflict between the parties on a subject which cannot be resolved by mutual agreement, and the conflict over how to adjust certain terms of a contract under supervening events is so included *[Ferrario; Brunner]*.

30. It is even more so when the contract contains an arbitration clause and the arbitrators are asked to give effect to a hardship clause (as the situation is the current case), the dispute can be found between the parties *[Fouchard Gaillard Goldman]*. As once been observed by Yves Derains according to an ICC Award, in situation where the parties provided for a revision clause, the clause has to be applied in the largest manner *[Yves Derains Note]*.

31. RESPONDENT may claim that its reduction of the words of the Model Clause provided by the HKIAC would preclude an empowerment for contract adaptation. However, during the negotiation process, the RESPONDENT never had showed that the purpose of the elimination of the words. Therefore, the CLAIMANT cannot perceive the true intention of the RESPONDENT, nor can a reasonable third person. Since adaptation of contract constitutes a dispute arising out of this contract, the RESPONDENT's assertion is baseless.

B. The negotiation process also indicates that the arbitration agreements encompass the contract adaptation.

32. Following the prerequisite that the adaptation is a dispute arising out of the contract, the arbitration clause should be interpreted as encompassing the contract adaptation by arbitral tribunals. In interpreting the arbitration clause, all relevant circumstances are to be given due consideration **(1)**. The negotiation process indicates that both parties regard adaptation by arbitrators as a due mechanism **(2)**.

(1) In interpreting the arbitration agreement, all relevant circumstances are to be given due consideration.

33. It is common that the starting point for the interpretation of arbitration agreements is the applicable contract law and its principles of contract interpretation *[Born Practice]*. In this particular case, it is subject to the law governing the arbitration clause, which is the law of the Mediterraneo as being illustrated above.

34. As a rule enshrined in both CISG and UNIDROIT Principles, all relevant circumstances of the case including negotiations need to be taken into account for the determination of the intent of the parties, or the understanding of a reasonable person would have had *[Art. 8 CISG; Art. 4.3 UNIDROIT Principles]*.

35. Under the current case, it is further evidenced by the fact that the Agreement does not include a merger clause. Thereby, extrinsic evidence supplementing the written contract is admissible *[Art. 2.1.17 UNIDROIT Principles]*.

(2) The negotiation process indicates that both parties agreed on adaptation by arbitrators as a due mechanism.

36. During the process of negotiation, Ms. Julie and Mr. Antley, as the negotiators representing both parties, once had a discussion about the adaptation of the contract. Mr. Antley suggested that such issue should probably be submitted to the arbitration and adjudicated by the arbitrators. This view is shared by Ms. Julie *[Cl. Ex. 8]*. Moreover, upon the request made by Ms. Julie, Mr. Antley promised to come up with a clear reference the next day.

37. The above is supported by the note written by Mr. Antley soon after the discussion. It lists "connection of hardship clause with arbitration clause" as one of the issues need to be further clarified in the future *[Resp. Ex. 3]*. Even though the severe accident happened to the two negotiators prevented the express wording from being inserted into the contract, the fact that the adaptation carried out by the arbitrators is due in the eyes of the negotiators is an important factor to be considered in determining the true meaning of the arbitration clause.

38. In light of the above, the discussion sufficiently suggests that adaptation by arbitral tribunals was considered appropriate by the two negotiators, which makes the adaptation within the

reasonable expectation of the parties. Although the final agreement was concluded by different people, the succeeding negotiators did not concern themselves with this regard. Therefore, the intention of the prior negotiators was not amended or superseded. The arbitration clause should thus be interpreted as encompassing the adaptation by arbitrators.

PART II: CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS EVEN ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED THROUGH IMPROPER MEANS.

39. Under the HKIAC 2018 Rules, the Tribunal was granted a wide discretion to determine the admissibility of evidence **(I)**. Under its discretion, the Tribunal would better take into consideration the following factors：even on the assumption that the evidence had been obtained illegally, there still are reasonable grounds for CLAIMANT to submit it **(II)**; though the evidence is related to another arbitration, CLAIMANT's submission will never violate any confidentiality obligations **(III)**.

I. Under the HKIAC 2018 Rules, the Tribunal was granted a wide discretion to determine the admissibility of evidence.

40. Art. 22.2 HKIAC 2018 Rules grants the Tribunal wide discretion on admitting evidences **(A)**, and this kind of discretion is also confirmed by other relevant evidence rules and commentaries **(B)**.

A. Art. 22.2 HKIAC 2018 Rules grants the Tribunal wide discretion on admitting evidences.

41. RESPONDENT alleged that the evidence should not be admitted in the arbitration because it has been obtained by illegal means *[Letter by Fasttrack (3 October 2018)]*. However, it is a common and consistent jurisprudence that the Exclusionary Rule is available primarily in criminal trials or quasi-criminal proceedings as punitive administrative hearings *[Merriam-Webster's Dictionary of Law]* but do not apply in civil cases, including commercial arbitrations to which this case is belong. On the contrary, in the case at hand, the HKIAC 2018 Rules chosen by the parties never explicitly prohibit the submission of the evidence

previously obtained in an illegal manner. Instead, it grants the tribunal the discretion to determine the admissibility of the evidence, including whether to apply strict rules or not *[Art. 22.2 HKIAC 2018 Rules]*. This is also confirmed by HKIAC's official statement, which notes arbitral tribunal is not necessarily bound by strict rules of evidence, but can decide what evidence to admit and how that evidence should be weighed while reaching its findings of fact *[HK arbitration FAQs]*.

B. This kind of discretion is also confirmed by other relevant evidence rules and commentaries.

42. Besides the HKIAC 2018 Rules, other prevailing evidence rules and commentaries also share the same attitude. IBA Rules, the most frequently used and highly rated chosen rules *[Queen Mary Survey]* among international arbitrations, also provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence *[Art.9.1 IBA Rules]*. Commentators also agree that "in international law there are no general rules requiring the exclusion of categories of evidence…the tendency has always been to give tribunals the widest discretion in the admission and assessment of evidence", and "international tribunals usually allow the parties the greatest freedom in presenting evidence" *[J. Ralston; J. Simpson & H. Fox]*, this is one of traditional practices in international arbitration *[Reisman & Freedman]*.

II. Even on the assumption that the evidence had been obtained illegally, there are still reasonable grounds for CLAIMANT to submit it.

43. The fact that the evidence was previously obtained illegally does not necessarily nullify CLAIMANT's right to submit, because CLAIMANT has never involved in the illegal conduct of collecting the evidence **(A)**; and the evidence CLAIMANT requesting to submit is of great relevance and materiality to the case and will be helpful in finding the truth **(B)**.

A. CLAIMANT was never involved in the illegal conduct of collecting the evidence.

44. As is alleged by RESPONDENT, the only source of the evidence CLAIMANT requesting to submit is either from two former employees of RESPONDENT, the contracts of which had

been terminated three months ago for cause with immediate effect, or from a hack of RESPONDENT's computer system *[Letter by Fasttrack (3 October 2018)]*. It may be true that both the breach of the confidentiality agreement and the hack of the computer system are illegal means, however there is no fact showing that CLAIMANT has involved in any of these conducts. Instead, CLAIMANT just received the information at the annual breeder conference. Even though CLAIMANT arranged to acquire them through an intelligence company, it is also not clear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT *[Procedural Order NO. 2]*.

45. In a match-fixing case named Ahongalu Fusimalohi v. FIFA, the applicant stated that the recordings that FIFA obtained from the Sunday Times must be considered as illegally obtained evidence and thus is procedurally inadmissible. However, the tribunal of Court of Arbitration for Sport (CAS) found that FIFA did not perform any illegal activity and did not cheat the applicant in order to obtain the recordings. There was no evidence on file, and the appellant did not contend that the Sunday Times' investigation was prompted or supported by FIFA or by anybody close to it. In tribunal's view, FIFA transparently solicited and received such evidentiary material from the Sunday Times immediately after the publication of the article on 17 October 2010 and the disclosure of important portions of the recordings' content. As a consequence, the tribunal endorsed the admissibility of such evidence *[Ahongalu Fusimalohi]*. CAS took the same approach in the similar match-fixing case named Amos Adamu v. FIFA *[Amos Adamu]*. This also applies to the case at hand, in which no solid evidence was found to indicate that CLAIMANT is related to the breach of the confidentiality agreement between RESPONDENT and its employees or is involved in the illegal hack of RESPONDENT's computer system.

B. The evidence CLAIMANT requesting to submit is of great relevance and materiality to the case and will be helpful in finding the truth.

46. As HKIAC 2018 Rules provides, "the tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant

[emphasis added] to the case and material to its outcome" *[Art. 22.3 HKIAC 2018 Rules]*, which indicates that the relevance and materiality of the evidence play a key role for the tribunal to decide its admissibility.

47. In the case at hand, the evidence CLAIMANT requesting to submit is about another arbitration where the RESPONDENT, who was negatively affected by an unforeseen increase of tariff by 25% increase of tariff, asked for an adaptation of the price due to an unforeseeable change of circumstances. The present case is highly similar to the previous one. Firstly, from the procedural aspect, the governing law of the main contract is Mediterranean law and the parties has chosen to settle disputes under HKIAC rules. Secondly, from the substantive aspect, the previous case shares similar issue and background. Specifically, in these two cases parties both face with a sudden tariff increase imposed by the government and one party brought forward a price adaptation request due to the unforeseeable situation.

48. Furthermore, one of the most controversial issues in this case is whether the 30% increase of tariff imposed by the Equatoriana government has constituted the hardship and whether CLAIMANT is entitled to adapt the contract under such hardship. Since there is no exact rule specifying to what extent does the increase of tariff constitute an economic hardship and to what extent the seller is entitled to the price adaptation, CLAIMANT suggests that this evidence can provide valuable reference based on similar facts. If the evidence was taken into account, it will better help the Tribunal to set the criteria for the judgment of economic hardship, and make a fairer award.

49. This argument can also be evidenced and confirmed in some ICSID cases, where the balancing of an arbitral tribunal tipped in favor of admitting the documents because the tribunals considered these documents were material and relevant to the dispute and ignoring their existence and relevance would lead to a travesty of justice *[ConocoPhillips case; Caratube case]*. As Prof. Georges Abi-Saab has firmly insisted, he did not believe "any self-respecting tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence

and the relevance of such glaring evidence" *[Abi-Saab]*. Absolutely, what he stated applies to the present case, too.

III. Though the evidence is related to another arbitration, CLAIMANT's submission will never violate any confidentiality obligations.

50. The fact that the evidence is related to another confidential arbitral proceeding did not prohibit CLAIMANT's right to submit, because CLAIMANT is not bound by the confidentiality obligation under HKIAC 2013 Rules **(A)**; and the CLAIMANT's submission is in line with the prevailing transparency principles **(B)**. Even if the Tribunal considers CLAIMANT and itself shall respect the confidential nature of the arbitral proceeding, the submission of the evidence will not further destroy the confidentiality, since the present arbitration is conducted confidentially as well **(C)**; and it is also available for the Tribunal to allow the submission of the evidence while providing several alternative methods to protect the confidentiality **(D)**.

A. CLAIMANT is not bound by the confidentiality obligation under HKIAC 2013 Rules.

51. The confidentiality obligation is not regulated as a compulsory duty in any hard laws. Moreover, it is a general rule that an arbitral award has binding effect only for the parties to the arbitral agreement *[Nataliya]*, and the confidentiality obligation under the HKIAC 2013 Rules is bilateral and cannot extend to any other third parties. Therefore, Art. 42.1 of HKIAC 2013 Rules takes effect only between RESPONDENT and its opponent who are involved in another arbitral proceeding. The CLAIMANT, as a separate party who did not take part in the former arbitration, is definitely not bound by the confidentiality obligation required by the arbitration rules.

52. This is even more clear when taking into account some court decisions where the reliance on the previous arbitral awards was denied only for the reason that the submitters, as one of the parties involved in the former arbitration, were obligated to keep confidentiality *[Hassneh Insurance Case; Ali Shipping Case]*. However, in the case at hand, CLAIMANT, who requested to submit evidence is not as one involved party as the submitters thereof. According to the general rules of party autonomy, the confidentiality obligation was only

imposed to the party who attended the arbitration and has agreed to the application of confidentiality provisions.

B. The CLAIMANT's submission is in line with the prevailing transparency principles.

53. It is true that arbitration is praised for its confidentiality, however, nowadays the transparency and openness has been increasingly concerned. Arbitration users' suggestions for improving arbitration all require more transparency *[Queen Mary Survey]* and there have been several attempts to provide more transparency in arbitration *[the Transparency Rules of UNCITRAL; the Mauritius Convention on Transparency; the UNCITRAL Transparency Registry; the ICSID Rules on Confidentiality and Transparency]*. Therefore, CLAIMANT's submission of the award is in line with such prevailing tendency and should be allowed. After all, just as Professor Rogers has said, "... Having opted for a system that aims to bring a rule of law to international commercial disputes, parties and those providing legal services cannot pull the curtains around the system and turn out the lights. Transparency is an inherent feature of the rule of law. If international commercial arbitration's users want the benefits of a rule- based system, they cannot reject the transparency that comes with it" *[Rogers]*.

C. The submission of the award by CLAIMANT will not further destroy the confidentiality of another arbitration since the present arbitration is conducted confidentially as well.

54. As HKIAC 2013 Rules provides, "unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration" *[Art. 42.1 HKIAC 2013 Rules]*. In this article, "disclose" means to make (something) known or public *[Black's Law Dictionary]* and "publish" means to distribute copies (of a work) to the public *[Black's Law Dictionary]*, both of them indicated the same meaning that making the information available to most people.

55. However, in the case at hand, CLAIMANT and RESPONDENT have reached a consensus to conduct the arbitration on the basis of the newest version of the HKIAC 2018 Rules which also regulate the confidentiality clause in Art. 45.1. Since both CLAIMANT and RESPONDENT have the obligation to keep the arbitration confidential under aforesaid rules, all evidences and documents submitted to the Tribunal will available only to the two parties and other related parties. Therefore, the submission of the evidence by CLAIMANT will not constitute the prohibited disclosure or publication regulated in HKIAC 2013 Rules.

D. It is available for the Tribunal to allow the submission of the evidence while providing several alternative methods to protect the confidentiality.

56. After all, both the parties are here to settle the dispute. If RESPONDENT yet insists the submission may destroy the confidentiality of another arbitral proceeding which it was involved in, for the Tribunal's concern, CLAIMANT could submit the evidence while providing several alternative methods to protect the confidentiality. For instance, appointing an independent and impartial expert who is bound to confidentiality, to review any documents and to report on the objection or the Tribunal can review the evidence in a specified location where any third party is not allowed *[Art. 52. C WIPO Arbitration Rules; Art. 3. 8 IBA Rules]*. Thus, the confidentiality of another arbitration can be protected and the relevant and material evidence can also be reviewed by the Tribunal.

57. To conclude, though the evidence is related to another arbitration and was previously obtained by illegal means, it still should be admitted by the Tribunal.

PART III: CLAIMANT IS ENTITLED TO ADAPT THE PRICE.

58. Since tribunal has jurisdiction over this case, the contract suggests that CLAIMANT is entitled for a price adaptation. As, firstly, the governing law of merits in the Sales Agreement is Mediterraneo law **(I)**; the hardship written in Art.12 is satisfied by the tariff increase **(II)**; alternatively, the hardship governed by CISG, in line with UNIDROIT principles is also triggered **(III)**; Then adaptation is available for CLAIMANT as a remedy **(IV)**.

I. The governing law of the merits of the Sales Agreement is Mediterraneo law and CISG.

59. As a result of parties' autonomy, it is clearly stipulated in Art.14 of the Agreement that the law of Mediterraneo and CISG shall govern the substantive issues, and it is evidenced that the law of Mediterraneo is mainly in accordance with the UNIDROIT Principles. Also, based on Art.1(1)(a), CISG also automatically binds the substantive matters in this contract.、

60. The *Uniformity* is a general principle in Art.7(1) CISG. "the Convention must be applied and interpreted exclusively on its own terms[..] Recourse to domestic case law is to be avoided." Thus, when resolving the case, the tribunal shall invoke CISG prior to domestic law.

II. The hardship under Art. 12 is triggered by the increased tariff.

61. Although delivery term DDP was chosen by parties in Art.6, Art.12 of the contract still provides the seller with certain remedy, facing the huge risks involved in such delivery term. CLAIMANT believes that it is indisputable that a hardship clause has been incorporated into the contract with Art.12 **(A)**; and the tariff increase had triggered such hardship. **(B)**

A. The hardship clause is paralleled with the force majeure rule in Art.12.

62. The word “hardship” is written down in Art.12 following a force majeure rule **(1)**; parties’ intent in using a hardship clause to relief the seller from certain risks regulated in DDP is clearly evident in their negotiation process **(2);** a most favorable price term for the buyer, also reveal the ardent need for a hardship clause **(3).**

(1) The wording of Art.12 in the contract clearly includes a hardship.

63. Admitted by negotiators of RESPONDENT *[Re.Ex.3]*, Art.12 is a mixed clause, which includes a force majeure and a hardship clause. This special mechanism shall apply prior to any other principles, as acknowledged by one commentator that it is up to the parties to define their respective spheres of risk in the contract.” *[Avery Katz]*.

64. The first part of Art. 12 serves as a force majeure rule. By stating that *"Seller shall not be responsible for […] Acts of God"*, it releases the disadvantaged party from further contractual liability when confront severe impediment, and those words are widely and consistently used in international shipment *[Toepfer v. Cremer]*. In this case, seller has duly performed its

obligation as RESPONDENT's request, so the tariff issue shall not be deemed as force majeure.

65. In the second part of Art.12, there is a paralleled hardship clause, starting with the word *"neither of"*. It designates that events including *"health and safety test"* and other *"comparable unforeseen events making the contract more onerous"* shall be deemed as a hardship. Bearing this formula in mind, the requirement of *"non-performance"* is only concerning the force majeure rule, which shall not impact the hardship clause.

66. Such separate nature can be observed by the differences in typo, the latter part of Art.12 is written in italics, added by new negotiators with a clear intention to include hardship into this contract *[PO2 para3]*. Also, the wording of force majeure rule came from a template, which is a standard term, so the mechanism of hardship is incorporated in the contract, in separation from the force majeure rule.

(2) The negotiation process reveals parties' intent to incorporate hardship into their contract.

67. It is admitted by CLAIMANT that a delivery term as DDP had been incorporated into the contract, however, it doesn't necessary mean that any risks involving importing tariff shall be bear by CLAIMANT, especially when the tariff fee surges to such a unbearable level.

68. The true sphere of such delivery term must follow common intent of using a special DDP. In another word, parties' true designation of DDP shall prevail the ordinary meaning of DDP *[Incoterm 2010]*. According to *CISG Digest*, "the substantial intent of parties must be manifested in some fashion". Also, when a common intent of the parties can be discerned, that common intent is to be taken into account, even if the objective meaning attributable to the statements of the parties differs. *[GERMANY Oberlandesgericht]"* Thus, the common intent revealed from corresponding letters can prevail the meaning of final contract itself.

69. In the initial offer made by CLAIMANT *[Cl. Ex. 2]*, CLAIMANT chose EXW as delivery term, which showed their willing not to bare risk during delivery. It was RESPONDENT who first brought up the use of DDP in its acceptance letter *[Cl. Ex. 3]*. However, it is most notable that along with the suggestion of DDP, RESPONDENT made it very clear that the

use of DDP was mainly to harness the frozen semen storage technique from our client. RESPODENT even made a promise that such delivery term could be changed whenever the circumstance changed in future contract.

70. CLAIMANT immediately wrote back *[Cl. Ex. 4]* and compromised to the use of DDP, in such good intent that it would help RESPONDENT with timely and high-quality semen transportation. However, CLAIMANT used distinctive word that *"we are* not *willing to take over any further risks associated with such a change...in particular not those associated with changes in customs regulation or import restrictions."* From this letter, CLAIMANT had clearly exempted itself from any additional risks involved in the transportation under DDP, which is, indeed a heavy burden comparing with EXW, which was originally suggested by CLAIMANT.

71. In the following letters from RESPONDENT, it never raised any objection to the risk-allocation suggested by CLAIMANT. Therefore, the final risk-allocation was settled in accordance with CLAIMANT's proposal *[CISG Digest-article in offer and acceptance]*. Although there is not clear acceptance by RESPONDENT, any terms and conditions brought up by one party and not explicitly rejected by the other party shall be included into the final contract. Also, according to Art.11 CISG, a contract of sale needs not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. Thus, the "informality" principle requires the tribunal to merge every genuine consent reached by parties.

72. In conclusion, combining the wording of Art. 12, as well as corresponding letters from contracting parties, the real intent of using DDP is simply to harness CLAIMANT's experience in the transportation of frozen semen and parties' subjective intent had successfully exempted CLAIMANT from tariff risk.

(3) It is not reasonable to burden seller with all potential risks with such a favorable price term.

73. According to Art. 8(2), tribunal shall put a reasonable person at party's exact position to assume the objective intent when concluding the contract, which is the intent that the other

party would not have been unaware of. In this case, the objective intent was shown in the moderate price increase under DDP.

74. Regardless of the risk-allocation under DDP, the sphere of risk in Incoterm is limited within the sphere of control of the relevant party. *[Perillo Chapter 4: Force Majeure Excuse, Section 8]* As provided by the evidence, it is notable that the duty of clearing tariff is based on the amount of tariff assumed by parties at the conclusion of the contract, but not includes any unforeseeable and sudden change of political environment during the performance.

75. The final contract price was USD 100,000 per dose. Comparing with the original proposal under EXW, the price increased from EXW to DDP was only 500 USD. A 0.5% increase was by no means reasonable for the seller to shoulder all the severe changes and risks involved in DDP. Under INCOTERM 2000, DDP includes thirteen more obligation requirements than EXW,including the Block & Brace, Export Clearance, Freight Forwarder Document Fess and so on *[Incoterm 2000]*. Whilst the EXW term represents the minimum obligation for the seller, DDP represents the maximum obligation. All these obligations had cost more than 500 USD, and there was no room for CLAIMANT to bare any further risk involving changing in tariff.

76. Besides, there is a bargain process of price term. It is reported that the initial and basic price increase for a DDP shall be 1,000 USD, *[PO2 para8],* but CLAIMANT took the step back and reduce it into 200USD, in such good faith that it would only shoulder basic tariff fees but not potential increase.

77. Moreover, it is notable that the increase of tariff was actually imposed by Equatoriana. "Allocate to the seller the responsibility for those foreign trade formalities and tariffs existing in his home country and to the buyer those to be respected in the import country."*[Schwenzer, Commentary(2016), Art. 31 para 80]* The tariff that caused the obstacle came from the home country of RESPONDENT.

B. Tariff increase had successfully triggered such hardship in regulated in Art.12.

78. A tariff surge as severe as what CLAIMANT has confronted with in this case, shall, by all means, be deemed as a hardship agreed upon by both parties under Art. 12.

79. According to Art. 8 CISG, contract terms must be fully interpreted in view of: subjective intent of the party under Art.8(1); Objective interpretation by a reasonable person test under Art. 8(2). Moreover, according to Art. 8(3), when examine both the subjective intent and objective intent, tribunal must make thorough observation of all relevant circumstances.

80. Also, the parties' real intent shall be interpreted in a broad way. In another case, the tribunal interpreted the wording “Or of any other cause whatsoever beyond the control of Seller or Buyer or receiving end customer " in a broad version, as "the last part of this clause, on which Seller relied, pointed rather to causes equal or similar to the enumerated events."*[ICC Case No. 16369]*

81. Taking every elements into account, the requirement for hardship under Art.12 is met by this tariff increase, as it is “comparable” to the health and safety test**(1)**; it is unforeseen to both parties at the time the contract is concluded**(2)**; finally and most importantly, it makes the contract more onerous for the CLAIMANT**(3).**

(1)The imposition tariff is “comparable” to the health and safety test.

82. Art. 12's second part lists out some of the exemption circumstances, and makes room for more potential "comparable risks". To give meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect *[Muzak]*. As the plain meaning of Art. 12 has an expanding nature, and CLAIMANT insists on a broad interpretation on such hardship

83. The plain wording of "comparative risks" means literally “akin to ”. In this particular scenario, the similarity can be observed in that, both health and safety requirements are issued by custom department, which is a typical governmental measure. Moreover, the aim of using such importation measure is to restrict importing products. They are both targeting at foreign goods, and the direct results are the same—increase costs on the seller’s part when clearing the importing proceedings.

(2) The 30%increasing tariff is “unforeseeable” to both parties.

84. Another criterion asserted in Art. 12 is unforeseeability. It's clearly revealed that the sudden and sharp change in tariff went beyond everyone's wildest imagination.

85. Firstly, the nature of such tariff retaliation used by government in Equatoriana is unforeseeable. It is, according to Peak Business News, only the second time in history that Equatoriana government ever used tariff retaliation against other nation, for Equatoriana has always been trying to solve trade issues amicably under WTO mechanism. Moreover, even with such sudden change in tariff, it went beyond common understanding that semen shall be included into "agricultural goods". Although there was a list given by Equatoriana specifying all selected product, racehorse semen is by no mean at the same category with pigs, sheep, and other normally understood agricultural goods.

86. Secondly, According to Art. 8(1) CISG, the real intent can be revealed by subsequent conduct. The reacts of CLAIMANT and RESPONDENT indicated that the tariff increase came as a huge surprise to both parties. Also, as for RESPONDENT, who is also an expertise in racehorse area, it showed total ignorance about the tariff issue in its own country until CLAIMANT informed it through e-mail on 20, January, 2018.

87. In examining such foreseeability, the time point is set at the time that contract is concluded, which is at the date of 6 May, 2017. At that time point, the ardent critics of free trade, the new governmental official was just elected one day before on 5 May 2017 *[PO 2 para 23]*. Thus, there is no way that the parties could have any knowledge that the friendly trading environment would shift in such an astonishing way.

88. In conclusion, the unforeseeability of tariff change is substantially shown by the reaction of society and the reaction of contraction parties.

(3) The tariff increase has dramatically made the contract more onerous.

89. The increase of 30% percentage has clearly made the contract more onerous for seller.

90. To begin with, the percentage itself tells the difficulty. It is reported *[Cl. Ex. 4]* that the "health test" once raised the cost on seller by 40%, and "destroy the commercial basis of the deal". Thus, comparable events shall include events where the sudden tariff change raised the cost on CLAIMANT by 30%. By changing the position of CLAIMANT from wining 5% profit

to losing 25%, such obstacle had evidently destroyed the commercial basis that CLAIMANT relied on when entering into the contract.

91. Secondly, merely percentage cannot tell the true loss, as it must be considered with the contractual amount. As it is the first time that CLAIMANT made contract on as much as 100 doses *[Cl. Ex. 2]*, the total sum of loss is, therefore, more significant than what once cost by the "health test".

92. Thirdly, The most notable onerous result can be evidenced by the fact that CLAIMANT is not able to recover from such tariff increase. According to *[PO 2 para 29]*, it is not possible that CLAIMANT can borrow more money from creditor, and without any price reimbursement from RESPONDENT, CLAIMANT is designed to bankruptcy.

93. To sum up, there is a relatively wide scope for hardship under Art. 12. The spectrum agreed explicitly and implicitly by the parties clearly includes the unforeseeable and onerous event like sudden tariff retaliation.

III. The hardship under CISG, in line with the UNIDROIT Principles is met.

94. Even if the tribunals find that parties have not reached enforceable risk-exemption agreement, CLAIMANT can seek remedy for hardship, under Art. 79 CISG. It is undisputable that Art. 79 CISG is applicable in the case at hand **(A)**, including hardship circumstances **(B)**; and then the elements constituting a hardship are met **(C)**.

A. Art. 79 CISG is applicable in this case and has not been derogated by contract.

95. Though Art. 6 CISG allows the parties to derogate from certain provisions of CISG, in this case, Art. 12 is actually a risk-allocation clause, which functions substantially different from hardship in Art. 79; Even if Art. 12 overlaps with hardship, it doesn't directly result in *derogation from* Art. 79 CISG**.**

96. In the present case, it is evident that Art. 12 serves as a mixture of force majeure rule and risk-*exemption*, which functions fundamentally different from the impediment rule set in Art. 79. According to CISG Digest, the tribunal wouldn't directly exclude the application of Art. 79 even with an explicitly force majeure rule, but to "construed article 79 in tandem with

force majeure clauses in the parties' contract"*[CISG Digest]*. One decision found that a seller *was* not exempt for failing to deliver the goods under either article 79 or under a contractual force majeure clause, thus suggesting that the parties had not pre-empted article 79 by agreeing to the contractual provision *[CLOUT case No. 277]*.

B. Art. 79 CISG includes hardship circumstances.

97. Lacing a clear wording about remedy mechanism, Art. 79 CSIG shall be deemed as, nevertheless, a legally enforceable authority for price-adaptation under hardship, in that "*Impediment*" under Art. 79 includes Hardship

98. In comparison with the wording "force majeure" or "hardship", "impediment" is a rather inclusive concept and obviously incorporates the economic hardship scenario, as it is necessary for such incorporation.

99. Viewing from the legislative structure, hardship must have been included and governed under CISG. The specific regulation of hardship could be found in PICC, PECL, DCFR. In 2003, furthermore, ICC issued the model clause for hardship. If hardship is considered not included in Art. 79 CISG, rule to regulate the scenario of hardship is totally missed in the whole Convention, leaving a most unwanted legal loophole. Therefore, it is imperative for the international commercial tribunal to treat radically changed circumstances as "impediments" under Art. 79 in exceptional cases, in order to avoid the danger that courts might find a gap in the Convention and invoke domestic laws, using their widely divergent solutions *[Peter Schlechtriem]*.

100. It is clearly stated in the CISG Advisory Council Opinion that, a change of circumstance that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("Hardship"), may qualify as an "impediment" under Art. 79(1). The language of Art. 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible *[CISG-AC Opinion No.7]*, leaving space for the incorporation of a hardship. It can be inferred that there is clearly an internal ("praeterlegem") gap in the Convention with respect to situations of loss of value and, more generally, with respect to the remedies available to a party facing hardship.

101. The opinion that the economic hardship shall be regulated under Article 79 is a prevailing standpoint among scholars. *[Schlechtriem&Schwenzer, 1081 ¶ 31]* Chinese court had managed to adopt CISG in regulating hardship under Art. 79(1) *[Shiyuan Han]*. Also, in a Belgian case *[Scafom International BV]*, the Supreme Court stated that Art. 79 of the CISG applies not only in the case of force majeure, but also in the case of hardship and thusto fill the internal gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade.

C. Alternatively, even if the impediment under CISG only refers to non-performance, such internal gap can be filled by UNIDROIT principles.

102. According to Advisory Council Opinion, "In a situation of hardship under Art.79, the court or the tribunal may provide further relief consistent with the CISG and the general principles on which it is based. That is where UNIDROIT principles begin to function." *[AC-OP No.7]*

103. Although the explicit expression of remedies under hardship failed to be incorporated in the Convention tracing back to the legislative history of the drafting of Article 79, which created a gap in the Convention, the gap could be and should be positively filled with gap-filling rules under Article 7(2): "It can be argued therefore that it would be advantageous if *the* Principle were read before the counterpart provision of the CISG is applied. It would allow the court or arbitral tribunal to get a 'feeling' of what CISG attempts to achieve."*[CISG Digest, 46 ¶36]*. Thus, for contract governed by CISG, tribunal can resort for provisions in UNIDROIT Principles. To fill the gap, thus, parties can adapt the price in line with the hardship provisions in Art. 6.2.3 UNIDROIT Principles.

104. The threshold of hardship is settled under the UNIDROIT principles, and widely discussed by scholars, extending to the interpretation of Art. 79(1). "CISG provides that a party is exempted from liability for damage only if the failure to perform is due, first, to an impediment beyond its control and, second, that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or, third, to have avoided or overcome it or its consequences." *[Ingeborg Schwenzer]*

105. Accordingly, CLAIMANT insists that a tariff increase as severe as what CLAIMANT had encountered with, shall be deemed as a hardship which fundamentally disrupted the contractual equilibrium in the following aspects: the tariff change rendered CLAIMANT's performance extremely onerous**(1)**; the equilibrium between contractual parties was disproportioned **(2)**the impediment that happened after conclusion of contract was unforeseeable and unavoidable by the disadvantaged part**(3)** bad faith also prevented the obligee from seeking performance under the original terms **(4).**

(1) Tariff increase rendered CLAIMANT's performance extremely onerous.

106. As a *consequence* of tariff increase, my client was deprived of its all benefit but suffered a great loss instead. The cost on CLAIMANT's performance had increased by 30%--changing the commercial position of CLAIMANT from wining 5% to losing 25%. To make things worse, RESPONDENT had ordered such a huge amount of semen: 100 doses, and the final shipment involved 50 of them. Thus, 30% increase reflected on 50 doses is as much as 1,500,000 USD, which can certainly be considered as a great fortune for any company.

107. Secondly, the natural and profit margin of racehorse business sector also suggest that such impediment grants the contract unreasonably onerous. According to Schwenzer "*when the profit is highly speculative, the threshold shall be raised accordingly.*" It's well established that the *price* of some star horses' semen can reach Millions dollars, no mention for the worldwide renown that Nijinsky III enjoyed. Thus, although semen business is a high-profit industry, the price of 100,000 USD was not overwhelming, and the profit margin was strictly fixed. The benefit that semen's seller can obtain from certain transaction is not speculative but well-expected.

(2) The equilibrium between contracting parties was ultimately disproportioned.

108. The status of RESPONDENT also affects the hardship standard. A situation where the impediment brings about a gross disproportion between the obligor's increased effort and the unaffected obligee's interest in receiving specific performance, it can be deemed as hardship. Thus, the unaffected financial position of RESPONDENT makes the balance between *parties*

more disproportioned, because RESPONDENT had received full performance without sharing any of risks.

109. Moreover, the benefit made from resale made RESPONDENT at a even more favorable commercial status. “Court have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance” *[UNIDROIT Art. 6.2.3]*. Reliable information demonstrated that, in breaching of contract, RESPONDENT has successfully resold 15 doses on a 20% of profit, which unreasonably benefited *RESPONDENT*.

110. On the contrary, the imminent financial dilemma faced by CLAIMANT shall also lower the threshold of hardship, “in cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered”*[Schwenzer]*. CLAIMANT hadn't been making profit for years and was in bad need for the profits promised in this business with RESPONDENT. Unfortunately, this deal not only used up a huge quantity of CLAIMANT's semen storage, but also cornered CLAIMANT into *imminent* bankruptcy. Now that only the price reimbursement could save my client, we insist the invocation of hardship to rebalance the ultimate disproportioned interest status between CLAIMANT and RESPONDENT.

(3) The impediment was both unforeseeable and unavoidable by CLAIMANT.

111. For one, it is undisputable that CLAIMANT has nothing to blame for such sudden increase in the cost. Tariff is always charged by the government and totally controlled by the government, and tariff-risk is, by all means, beyond CLAIMANT's control.

112. For another, the hardship only arose after the conclusion of contract, as there is no official documents planning on a tariff change or any measures already undertaken by the government to carry out trade war.

113. Most importantly, the unforeseeability criteria is perfectly satisfied in this case. The boundary of unforeseeability goes that, as Perillo argues, an event that is “so outside the bounds of probability that reasonable parties would not provide for it” may lead to hardship. *[Perillo]* In this case, it had been overly discussed that the tariff-retaliation triggered by the trade war, which went totally against the internationalization trend, shocked everyone inside

or out of the informed circle. It's not probable to any reasonable merchant that the trade war would occur out of blue. Also, the specific inclusion of racehorse semen into the agricultural products was unusual and against common practice.

114. Finally, parties had never assumed such overwhelming change, neither at the time contract was signed nor during their performance. If a change of circumstances results in an excessive disproportion between performance and counter-performance, the insistence of a party on the performance by the aggrieved party strictly in accordance with the terms of the contract may be contrary to the principle of good faith and amount to an abuse of right *[Perillo]*. The risk terms under DDP is, nevertheless, governed by hardship as well. It was never assumed by parties that a trade war would break out during their performance and the tariff would peak to such a astonishing level. Thus, the sudden increase in tariff was not taken into account at the conclusion of contract.

(4) RESPONDENT's breaching of resale prohibition suggested its bad faith, which prevented them from seeking performance under the original terms.

115. The legal basis for the hardship exemption is widely considered to lie in the principle of good faith *[Chapter 5: Hardship]*. Both PICC and CISG asked for good faith as the principle when parties enter into and carry out a contract.

116. RESPONDENT's breaching of resale prohibition suggested its bad faith during the negotiation. After the final shipment had been made, CLAIMANT discovered that RESPONDENT was actually breaching the resale prohibition under the contract, and shipped part of the doses to third parties *[Cl. Ex. 8]*. Considering the huge amount RESPONDENT ordered and obvious interests from resale, it is reasonable to inference that RESPONDENT planned from the beginning to resell a considerable amount of the 100 doses to other breeders. However, CLAIMANT had clearly warned that the frozen semen "*may not be re-sold to third parties without our express written consent*" in the very first place *[Cl. Ex. 2]*, which RESPONDENT had raised no objection.

117. Secondly, the singularity nature of racehorse semen makes the damages caused by resale even more immense. It is needless to say that for a renowned racehorse to keep its fame, the

semen must not be wide spread. And that is exactly what CLAIMANT pointed at when it said that "Normally, we would not sell frozen semen of our racehorse stallions and definitely not such an amount of semen to a single breeder for obvious reason"*[Cl. Ex. 4]*. Expressly exposed to such concern, RESPONDENT still deliberately ordered and resold those semen, which would in turn lowered the singularity of Nijinsky III, and caused immeasurable damage to the business of CLAIMANT.

IV. Based both on the risk-allocation agreement and applicable law, CLAIMANT is entitled for price adaptation as reimbursement.

118. After established the rule of risk-exemption, parties had explicitly and implicitly agreed on the incorporation of an adaptation-clause **(A)**; Even if the contract be deem as silence in such remedy, the applicable law provide legal ground for adaptation **(B)**.

A. Parties had explicitly and implicitly agreed on the incorporation of an adaptation-clause

119. Parties expressly agreed on including such an adaptation clause in previous negotiation which reflected their true intent **(1)**; alternatively, an implied adaptation remedy is also granted by applicable law, therefore, adaptation of price is available for CLAIMANT as a remedy**(2);**Besides, RESPONDENT acted in bad faith to create the wrong impression that there is an adaptation agreement and that explained why CLAIMANT performed the third shipment and paid the additional tariff **(3).**

(1)Parties expressly agreed on including such an adaptation clause in previous negotiation which reflected their true intent.

120. According to Mr. Napravnik*[Cl.Ex.8]*, Mr.Antley and he had directly discussed about a "*mechanism in place which would ensure an adaptation of the contract*". Mr. Antley expressly agreed on including such a clause and even promised to re-draft the contract on the request of Mr. Napravnik. Unfortunately, it was the car accident that prevented such agreement from written down in the formal contract, because the new-negotiator was not informed by Mr. Antley of such plan. According to Art. 8(3) CISG that when interpreting

contract, shall take the whole process of negotiation into account. Therefore, the initial intent of previous negotiators counts.

(2)Also, an implied adaptation remedy is also granted by applicable law.

121. Alternatively, even if the aforementioned oral agreement be considered not clear enough to constitute a distinctive adaptation-clause, the tribunal might deduce an implied one and grant adaptation of price. In a dispute concerning the events following the 1979 Revolution and the consequences on the political relationship between Iran and the US, the tribunal found that each party was entitled to unilaterally request, at least an adaptation of their terms, even without a express adaptation-clause*[Iranian Air Force]*.

122. Meanwhile, both parties domestic contract law is the mirror rule of UNIDROIT Principles. It is reasonable to assume parties are familiar with the rule in UNIDROIT Principles, which allows the disadvantaged party is entitled to adaptation as a remedy for hardship in Art. 6.2.3. Therefore, as both experienced businessmen, the parties shall deem the adaptation as an automatic remedy when hardship situation occurred, even without an independent adaptation clause in the contract.

(3)RESPONDENT acted in bad faith to create the impression that they were willing to burden the tariff during the telephone call.

123. Art.7 CISG require the contracting parties to act in accordance with *good faith* principle, which is broken by RESPONDENT in that it created the convincing impression that adaptation was available whenever certain risk occurs and**(a)**; the price had been adapted during the telephone call.**(b)**

(a) CLAIMANT reasonably relied on the possibility of adaptation in their long-term relationship.

124. The impression of long-term relationship and the flexibility to change the delivery term created by RESPONDENT, rendered adaptation clause naturally included in the contract. “In any long-term relations, the original conditions on which basis this kind of agreement was concluded, is by no means likely to remain the same for its entire duration.” *[Pietro Ferrario]* Thus, it is necessary to characterize such contracts with a certain degree of

flexibility in order to adapt their terms in accordance with the changes and evolutions of the relevant market conditions during the contract's life. From the letter *[Cl. Ex. 3]* sent by RESPONDENT, it had, more than once, emphasized the willingness to establish long-term business relationship with my client. Thus, with the definition of risk-exemption in Art. 12, the remedy mechanism of adaptation was naturally included.

125. Further, RESPONDENT's bad faith was revealed from the award from another tribunal. Using Art.8(3) CISG, the tribunal shall also pay attention to the additional evidence of the award granted by another court *[Case Bundle P49]*. That evidence further suggests that RESPONDENT itself also regards it necessary to change the price term when tariff changed.

(b) CLAIMANT had reasonably believed that RESPENDENT was willing to adapt the price and paid extra reimbursement after the third shipment.

126. In the telephone call on 21 January 2018*[Resp. Ex. 4]*, RESPONDENT deliberately chose vague expression as commercial tactics, seducing CLAIMANT into a strong impression that RESPONDENT would paid off the additional fee, and making CLAIMANT into releasing the shipment. The representative of RESPONDENT, Mr. Shoemaker, admitted in his statement that he could not "reject their request outright" so he chose vague expression on purpose, which means that Mr. Shoemaker had, indeed, created the impression that he accepted the proposal from CLAIMANT. Though Mr. Shoemaker claimed that he was not a law profession, he was actually speaking for the company, acting as a representative.

127. According to UNIDROIT Principles, "*It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party*" *[Art.2.1.15 (3)UNIDROIT Principles]*.As CLAIMANT would never have released the goods, knowing that RESPONDENT would not going to pay the additional tariff, CLAIMANT's performance is not a voluntarily waive of their contractual right, instead, is an outcome of reliance on RESPONDENT's promise.

B. Even if the contract be deem as silence in such remedy, the applicable law provide legal ground for adaptation.

128. *UNIDROIT* Principles set the rule for the disadvantaged party to seek for an adaptation: the disadvantaged party must firstly renegotiate in time**(1)**,and should still fulfill the performance under the contract **(2)**; Unfortunately, RESPONDENT acted with bad faith, resulting in the failure in renegotiation**(3)**. In this case, adaptation is more desirable than termination, and the price alleged by CLAIMANT is reasonable**(4)**.

(1) CLAIMANT had brought up a duly request for renegotiation.

129. CLAIMANT requested the renegotiation "without undue delay" and "indicate the grounds on which it is based", in accordance with the requirement under UNIDROIT Principles*[UNIDROIT Art. 6.2.3 (1)]*. Also, CLAIMANT acted with duty of co-operation and performed in good faith.

130. Firstly, CLAIMANT had actively requested for renegotiation, as quickly as possible after realizing that a hardship occurred. After CLAIMANT was informed by the customs authorities that 30 per cent more tariffs on racehorse semen, Mr. Naptravnik immediately started renegotiation about the price on frozen semen with RESPONDENT by the email on 20 January 2018*[Cl. Ex. 7]*. At the meantime, CLAIMANT also "*tried to call and left a message*" to RESPONDENT at the very first time and pointed out emphatically the urgency both in the title and in the content.

131. Besides, CLAIMANT indicated the grounds on which the request for renegotiations was based, so as to prove their request for renegotiations was justified. The email had clearly stated that the urgent need for a price adaptation was caused by "*imposed tariffs of 30%*" *which*"*makes this shipment 30% more expensive*"*[Cl. Ex. 7]*. Consequently, Mr. Shoemaker called Mr. Napravnik on the 21 January in the morning to discuss the further details*[Cl. Ex. 8]*. The request CLAIMANT made was unambiguous and complete enough for any experienced businessman, like RESPONDENT, to assess whether or not the request for renegotiations was justified.

132. In the first place, renegotiation has to be based on willingness and trust. Constructive and cooperative renegotiation cannot be forced upon the parties by coercion *[CH Beck,*

Munich].Unlike what was claimed by RESPONDENT, CLAIMANT acted with the duty of co-operationand performed in good faith, which is required by UNIDROIT principles.

133. RESPONDENT wrongly alleged that CLAIMANT "threats to stop delivery". The anxious expression given by CLAIMANT during the telephone was nothing more than normal reaction when seller facing the urgent obstacle. The wording CLAIMANT used, "*we will have to find a solution in that regard before we can start the shipment"* was mild and indicated nothing like potential threat*[Cl. Ex. 7]*. Thus, the claim asserted by RESPONDENT that *"Mr. Shoemaker could not reject CLAIMANT's request outright"* was unreasonable and groundless.

(2)CLAIMANT had duly performed its contractual obligations since reasonable reliance on RESPONDENT's promise.

134. CLAIMANT reasonably relied on RESPONDENT' promise in the *telephone* conversation and for the sake of maintaining a long-term relationship, performed its obligations duly. Moreover, in comply with UNIDROIT principles, CLAIMANT shall not withhold the third delivery. Thus, after carrying out its contractual obligation, CLAIMANT is entitle for the invocation of hardship.

(3)Failing a renegotiation, the disadvantaged party is entitled to request a court-ordered adaptation.

135. In the meeting on 12 February 2018, RESPONDENT claimed that it would "*stopped the negotiations and refused to pay any additional amount for the tariffs*", which indicated the *parties'* negotiation was officially broken and failed to reach agreement to relocate the increased price *[Cl. Ex. 8]*."Upon failure to reach agreement within a reasonable time either party may resort to the court, be it domestic or arbitral." *[Perillop. 130]*. Also, the arbitral tribunal shall enjoy no less power than court does, under UNIDROIT Principles. Therefore, CLAIMANT has the legal ground to resort to the arbitral tribunal for adaptation as remedy.

(4)An adaptation is more desirable than termination, and the price alleged by CLAIMANT is reasonable.

136. When dealing with hardship, the tribunal shall manage to adapt the contract and restore the *balance* firstly. "Avoidance is allowed only as a remedy of last resort if an adaptation of the contractual terms is either not possible or not just and reasonable having regard to the respective interests of the parties." *[§ 313(1) BGB]* In case of hardship, the most appropriate way to restore the equilibrium, “the court will seek to make a fair distribution of the losses between the parties” *[UNIDROIT Art. 6.2.3 comment P226]*. In this case, CLAIMANT had fully performed the delivery obligation under contract though the hardship occurred, paid for the increased 30% fees. It would be extremely unfair to CLAIMANT if the contract was regarded as terminated now.

137. As for the claimed amount, we believe that $1,250,000 is recoverable and fair enough as an adaptation. To adapt the contract, the ruling court must rely on the equilibrium decided by the parties at the time of the conclusion of the contract*[Maskow, p. 663; Bund,p. 392]*.The amount alleged by CLAIMANT is, exactly intended to restore its financial status at the time that contract was concluded. The amount $1,250,000 is calculated from the net losses, which is 25% of third shipment’s total price. Taking the additional tariff as an unavoidable event for either party, CLAIMANT is, acting in such a good intent, not asking RESPONDENT to bear full loss, but to share a reasonable amount, helping CLAIMANT to restart its business and such intent is known to RESPONDENT when the contract is concluded.

138. To conclude, the sever tariff increase has triggered hardship both in the contract and in the applicable law; thus, a price adaptaion is fair and well-legal-grounded for CLAIMANT.

PRAYER FOR RELIEF

CLAIMANT respectfully requests the Tribunal to decide that:

1. The tribunal has the jurisdiction to rule this case based on a arbitration agreement that is governed by the Law in Mediterraneo;
2. The evidence from another arbitration is admissible, and the tribunal shall take such contradicting behaviors of RESPONDENT into account;
3. CLAIMANT is entitled for a price adaptation of 1,250,000USD because of the tariff increase which has amounted to a hardship.

Hong Kong International Arbitration Center

30, November 2018

Respectfully submitted,

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