SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG, MARCH 31ST – APRIL 7TH 2019

ARIZONA STATE UNIVERSITY

MEMORANDUM FOR CLAIMANT

PHAR LAP ALLEVAMENTO v. BLACK BEAUTY EQUESTRIAN

Phar Lap Allevamento	*v.*	**Black Beauty Equestrian**
CLAIMANT		RESPONDENT
Rue Frankel 1		2 Seabiscuit Drive
Capital City		Oceanside
Mediterranean		Equatoriana

COUNSEL FOR CLAIMANT
ANDREW SOUKHOME * YOONHO JI * JAMES CROMLEY * NATASHA CAMPBELL

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TABLE OF ABBREVIATIONS AND DEFINITIONS

&	and
A.N.Arb.	Answer to Notice of Arbitration
Art.	Article
ASA	Swiss Arbitration Association
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale International Sale of Goods
CLAIMANT	Phar Lap Allevamento
DDP	Delivered Duty Paid
et al.	*et alii* (and others)
Ex.	Exhibit
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
HKIAC Rules	Hong Kong International Arbitration Centre Rules
i.e.	*id est* (that is)
IBA	International Bar Association
ICC	International Court of Arbitration
Id.	*Idem*/Same
Inc.	Incorporated
infra	below
Int'l	International
ipso jure	by the law itself
Ltd	Limited
Model Law	UNCITRAL Model Law
N.Arb.	Notice of Arbitration
No./Nos.	Number/Numbers
¶/¶¶	Paragraph/Paragraphs
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PO-1	Procedural Order 1
PO-2	Procedural Order 2
RESPONDENT	Black Beauty Equestrian
SIAC	Singapore International Arbitration Centre
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	versus (against)

STATEMENT OF FACTS

1. **Phar Lap Allevamento** (**"CLAIMANT"**) and **Black Beauty Equestrian** (**"RESPONDENT"**) are PARTIES to this arbitration. [*N.Arb., p. 4*]. CLAIMANT is Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport. RESPONDENT is a company in Equatoriana looking to establish a racehorse stable. [*N.Arb., pp. 4–5*].

2. On March 21, 2017, Mr. Antley of Black Beauty Equestrian contacted Ms. Napravnik of Phar Lap in order to inquire about the availability of frozen semen from Phar Lap's star horse, for Black Beauty's new racehorse breeding program. [*N.Arb., pp. 4–5*].

3. On March 24, 2017, Ms. Napravnik of Phar Lap made an initial offer to Black Beauty of 100 doses of frozen semen. [*N.Arb., p. 5*].

4. On April 12, 2017 the two principal negotiators, Ms. Napravnik and Mr. Antley, were severely injured in a car accident. This accident hindered negotiations. [*N.Arb., p. 5*].

5. On May 6, 2017, the two parties signed the final contract. Phar Lap agreed to sell 100 insemination doses in three shipments for $100,000 (USD) per dose. [*N.Arb., pp. 5–6*].

6. In November 2017, after first two shipments were made, the new president of Mediterraneo announced a 25% tariff on agricultural products, including horse semen. Equatorianian government responded with their own 30% tariff on products coming from Mediterraneo. [*N.Arb., p. 6*].

7. On January 20, 2018, Phar Lap sent a letter to Black Beauty to discuss the new tariff, which made the shipment 30% more expensive. [*Ex. C 7, p. 16*].

8. On January 21, 2018, Mr. Shoemaker and Ms. Napravnik spoke on the phone about the outstanding doses and payment of the additional 30% tariff. According to Ms. Napravnik, Mr. Shoemaker was certain that a solution would be found through negotiation. He urged her

to authorize the shipment as planned since Black Beauty needed the doses and had already initiated the payment. [*Ex. C 8, p. 17*].

9. On January 23, 2018 CLAIMANT made the last shipment before an agreement on the new price had been reached. [*N.Arb., p. 6*].

ARGUMENT

ISSUE 1: THIS TRIBUNAL HAS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT FOR CLAIMS OF INCREASED RENUMERATION

1. RESPONDENT alleges that this Tribunal lacks jurisdiction and the necessary powers under the arbitration agreement to adapt the contract for claims of increased remuneration. [*A.N.Arb., p. 29, ¶ 2*]. However, this Tribunal has authority to adapt the contract because Mediterraneo law governs the arbitration agreement, and under its interpretation, claims for increased remuneration fall within the scope of the agreement. First, this Tribunal is competent to rule on the issue of its own jurisdiction **(I)**. Second, Mediterraneo law governs the arbitration agreement and its interpretation **(II)**. Lastly, under the interpretation of Mediterraneo law, the arbitration agreement extends to claims for increased remuneration **(III)**.

I. THIS TRIBUNAL IS COMPETENT TO RULE ON THE ISSUE OF ITS OWN JURISDICTION

2. According to the *Kompetenz-Kompetenz* doctrine, international arbitral tribunals have the authority to consider and decide disputes concerning their own jurisdiction. [*Born 2009, p. 853* (2009)]. In addition, the Parties to this arbitral proceeding are bound by agreement to arbitrate any dispute before this Tribunal under the 2018 Hong Kong International Arbitration Centre Rules ("2018 HKIAC Rules"). [*Ex. C 5, p. 14 (Clause 15); PO-1, p. 51 § II*]. HKIAC Rule 19.1 states, "[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement". [*HKIAC Rule 19.1* (2018)]. Therefore, pursuant to the *Kompetenz-Kompetenz* doctrine and HKIAC Rule 19.1, this Tribunal is competent to rule on the issue of its own jurisdiction.

II. MEDITERRANEO LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

3. This Tribunal's power to adapt the contract turns on the choice of law that will govern the arbitration agreement and its interpretation. Mediterraneo law is the operative law of the arbitration agreement for the following reasons and will be addressed in the subheadings below. First, Mediterraneo law is the rule of law agreed upon by the parties to govern the

Sales Agreement and the arbitration agreement **(A)**. Second, the separability doctrine does not apply to the arbitration clause for the purposes of identifying the choice of law the parties intended to govern the arbitration agreement and its interpretation **(B)**. Even if the arbitration clause is separable from the Sales Agreement, Mediterraneo law is the most appropriate law to govern the arbitration agreement because it has the closest connection to the dispute and gives effect to the Parties' intent to arbitrate disputes before the Tribunal **(C)**. Because Mediterraneo law governs the arbitration agreement and its interpretation, claims for increased remuneration fall within the scope of the arbitration agreement and this Tribunal shall have the authority to adapt the contract.

A. Mediterraneo law is the rule of law agreed upon by the parties to govern the Sales Agreement and the arbitration agreement

4. A party's agreement to arbitrate is the foundation stone of modern international arbitration. [*Redfern et al., p. 12*]. The Parties to this arbitral proceeding agreed to arbitrate disputes before this Tribunal under the 2018 HKIAC Rules. [*Ex. C 5, p. 14 (Clause 15); PO-1, p. 51, § II*]. HKIAC Rule 36.1 instructs this Tribunal to "decide the substance of the dispute in accordance with the *rules* of law agreed upon by the parties" (emphasis added). [*HKIAC Rule 36.1* (2018)]. Given the presence of the Parties before this Tribunal, a prima facie dispute exists for this Tribunal to resolve. Accordingly, it shall be resolved by the rules of law agreed upon by the Parties.

5. However, there is only *one rule* of law agreed upon by the Parties relevant to the substance of the dispute—Mediterraneo law. In fact, it was RESPONDENT who first suggested the "Law of Mediterraneo" as the "Applicable Law and Dispute Resolution" provision. [*Ex. C 3, p. 11*]. Throughout all stages of the negotiation process and until the final agreement, neither party contested that Mediterraneo law governed the Sales Agreement. [*Ex. R 1, p. 33; Ex. R 2, p. 34; Ex. C 5, p. 14 (Clause 14)*].

6. Neither does the Sales Agreement end at Clause 14. Rather, the Sales Agreement appears on its face to include all clauses, 1 through 15. Therefore, because Clause 15 functions as the arbitration agreement between the Parties, the arbitration agreement is contained within the

Sales Agreement. Because Mediterraneo law is the *only rule* of law agreed upon by the Parties that shall help this Tribunal decide the substance of the dispute, Mediterraneo law should govern both the Sales Agreement and arbitration agreement.

7. Although the arbitration agreement lacks an explicit choice of law provision, the Parties agreement for Mediterraneo law to govern the Sales Agreement is sufficient to find that it shall also govern the arbitration agreement. When an arbitration clause is contained within a substantive agreement, "[t]here is a very strong presumption in favour of the law governing the substantive agreement . . . also governing the arbitration agreement". [*Redfern et al., p. 158*]. This presumption applies to cases such as here "[w]here the substantive contract contains an express choice of law, but the agreement to arbitrate contains no express choice of law". [*Sonatrach*].

8. RESPONDENT fails to overcome this presumption by alleging that the law of Danubia should govern the arbitration agreement. [*A.N.Arb., p. 29, ¶ 13*]. Unlike Mediterraneo law, the Parties did not agree to submit any part of the contract under the law of Danubia. In CLAIMANT's last email negotiating the contract dated 11 April 2017, CLAIMANT informed RESPONDENT of its internal policy of not entering into contracts submitted to a foreign law without special approval by a creditors' committee. [*Ex. R 2, p. 34*]. Additionally, CLAIMANT stated that the offer to not submit the Parties to the jurisdiction of the courts in Mediterraneo and to arbitrate disputes under the HKIAC was contingent on Mediterraneo law remaining the governing law of the Sales Agreement. [*Id.*]. Despite knowing that CLAIMANT never received special approval by a creditors' committee to submit to arbitration under the law of Danubia, and that the law of Mediterraneo would remain the governing law of the Sales Agreement, RESPONDENT accepted CLAIMANT's final offer by entering into the Sales Agreement on 6 May 2017. [*PO-2, pp. 56–57, § 14; Ex. C 5, p. 14*]. RESPONDENT's "acceptance of the contract entails acceptance of the [arbitration] clause". [*Redfern et al., p. 158*]. Therefore, where both Parties agreed that the Sales Agreement should be governed by the law of Mediterraneo, there is a strong presumption that their express agreement indicates that the arbitration should also be governed by the law of Mediterraneo as well. RESPONDENT

fails to overcome the presumption because the Parties never agreed to submit any part of the contract under the law of Danubia.

B. The separability doctrine does not apply to the arbitration clause for the purposes of identifying the choice of law that the parties intended to govern the arbitration agreement and its interpretation

9. In addition to the presumption that the Parties agreed upon the law of Mediterraneo to govern both the Sales Agreement and arbitration agreement, the arbitration clause should not be separated from the Sales Agreement for the purposes of identifying the choice of law. HKIAC Rule 19.2 provides that "arbitration agreement[s] which forms part of a contract . . . shall be treated as an agreement independent of the other terms of the contract". [*HKIAC Rule 19.2* (2018)]. This is the separability doctrine. However, the "autonomy of the arbitration clause and of the principal contract does not mean that they are entirely independent of one from another". [*Redfern et al., p. 159*]. Separability may place a hinderance in judicial efforts to identify the choice of law that the parties intended to govern the arbitration agreement and its interpretation [*Choi, p. 122*]. Rather, the purpose of the separability doctrine is illuminated in the subsequent provision of the Rule: "[a] decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement". [*HKIAC Rule 19.2* (2018)]. In its entirety, Rule 19.2's primary function is to "prevent the underlying contract's invalidity from rendering *ipso jure* the embedded arbitration agreement invalid, in order to preserve the tribunal's jurisdiction over the question of whether it has jurisdiction by virtue of a valid arbitration agreement". [*Choi, p. 122*]. In this case, the validity of the underlying contract is not in dispute. Rather, the scope of the contract is at issue. Therefore, the separability doctrine should not be invoked and the arbitration clause should not be treated as independent from the other terms of the contract for the purposes of identifying the choice of law.

C. Even if the arbitration clause is separable from the Sales Agreement, Mediterraneo law is the most appropriate law to govern the arbitration agreement because it has the closest connection to the dispute and gives effect to the parties' intent to arbitrate disputes before the Tribunal

10. Even if the arbitration clause were treated as independent from the other terms of the contract, Mediterraneo law shall still govern the arbitration agreement and its interpretation. HKIAC Rule 36.1 states, "[f]ailing such designation by the parties [to provide an express choice of law clause for arbitration], the arbitral tribunal shall apply the rules of law which it determines to be appropriate". [*HKIAC Rule 36.1* (2018)]. Concurrently, "[i]n all matters not expressly provided for in these Rules . . . the arbitral tribunal shall . . . act in the spirit of these Rules". [*HKIAC Rule 13.9* (2018)]. Considering these two Rules, Mediterraneo law governs the arbitration agreement because it is the most appropriate law to apply and is its application is consistent with the spirit of the Rules for the following reasons.

11. First, although it is vague which rule of law is "appropriate", the HKIAC Rules are inspired by the 2006 Swiss Rules of International Arbitration and should guide this Tribunal's determination on which rule is "appropriate". [*HKIAC Website*]. Swiss Rule 33 is analogous to HKIAC Rule 36.1 and provides, "[t]he arbitral tribunal shall . . . in absence of a choice of law . . . apply[] the rules of law with which the dispute has the closest connection". [*Swiss Rules Art. 33*]. Thus, because the HKIAC Rules are derived from the Swiss Rules, it is likely that the "appropriate rule" to apply should be the rule with which the dispute has the "closest connection".

12. In this case, Mediterraneo law has the closest connection to the substance of the dispute and should govern the arbitration agreement. As discussed *supra*, the law of Mediterraneo was agreed upon early in negotiations by the Parties as the choice of law for the Sales Agreement and was never contested. [*Ex. R 1, p. 33; Ex. R 2, p. 34; Ex. C 5, p. 14 (Clause 14)*]. The arbitration agreement's integral inclusion within the Sales Agreement highlights the "intimate connection (both textual and functional) between the arbitration agreement and the underlying contract". [*Born 2014, p. 831* (2014)]. Because the substance of the dispute—the

Sales Agreement—is governed by Mediterraneo law, it is natural that Mediterraneo law is the most appropriate law to govern the arbitration agreement.

13. Second, Mediterraneo law should govern the arbitration agreement because its application would be consistent with the spirit of the Rules. Recognizing that a party's agreement to arbitrate is the foundation stone of modern international arbitration [*Redfern et al., p. 12*], the 2018 HKIAC Rules manifest a "spirit" to validate agreements and facilitate arbitration by giving effect to the parties' intent to arbitrate disputes before the Tribunal. For example, Rule 4.6 allows a CLAIMANT to remedy a defective Notice of Arbitration and continue to commence arbitration. [*HKIAC Rule 4.6* (2018)]. Even if the CLAIMANT does not comply, the Tribunal will only dismiss without prejudice and allow the CLAIMANT to submit the same claim at a later date. [*Id.*]. Similarly, "the arbitral tribunal may, even in circumstances where the relevant time limit has expired, extend time limits where it concludes than an extension is justified". [*HKIAC Rule 21.1* (2018)]. Or, "[i]f the parties fail to designate the sole arbitrator within the applicable time limit, HKIAC shall appoint the sole arbitrator". [*HKIAC Rule 7.2* (2018)]. In addition to Rule 19.2, which limits separability to preserve the validity of the arbitration agreement, these Rules reveal a spirit of facilitating arbitration by giving effect to the parties' agreement to arbitrate, even in the face of defects or other obstacles.

14. Applying Mediterraneo law as the choice of law for the arbitration agreement is consistent with this spirit. If Mediterraneo law governs the arbitration agreement, under its interpretation, this Tribunal will have the authority to adapt the contract because claims for increased remuneration would fall within the scope of the arbitration agreement. [*See infra* **III**]. In other words, choosing Mediterraneo law as the governing law validates the arbitration agreement and gives effect to the Parties' agreement to arbitrate before this Tribunal.

15. In comparison, applying the law of Danubia to govern the arbitration agreement and its interpretation violates the spirit of these Rules. Both Parties recognize that "there is a high likelihood that [under Danubian law] the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal". [*PO-1, p. 51, § II*]. If the Tribunal

applies a law that renders a claim unresolvable, it would invalidate the arbitration agreement and frustrate the Parties' intent to arbitrate before the Tribunal. The Parties are before the Tribunal for a reason—a dispute exists, and the Parties have agreed to arbitrate. And where the Parties have "evinced a clear intention to be bound to arbitrate their disputes", the governing law of the arbitration agreement should not "negate" or be "of a character that fundamentally undercuts the entire arbitration agreement altogether". [*BCY case, p. 33*]. Instead, this Tribunal "should apply the law that validates the arbitration agreement, rather than the law that invalidates it". [*Born 2014, p. 835* (2014)].

16. Therefore, even if the arbitration clause is separable, the law of Mediterraneo should govern the arbitration agreement and its interpretation because it has the closest connection to the dispute and gives effect to the Parties' intent to arbitrate disputes before the Tribunal.

III. UNDER THE INTERPRETATION OF MEDITERRANEO LAW, THE ARBITRATION AGREEMENT EXTENDS TO CLAIMS FOR INCREASED REMUNERATION

17. Once it is established that the law of Mediterraneo governs the arbitration agreement and its interpretation, this Tribunal "may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement". [*HKIAC Rule 19.1* (2018)]. Under the interpretation of Mediterraneo law, claims of increased remuneration fall within the scope of the arbitration agreement, granting this Tribunal the jurisdiction to adapt the contract.

18. First, Mediterraneo is a Contracting State of the CISG. [*PO-1, p. 52, § III(4)*]. There is consistent jurisprudence in Mediterraneo that the CISG applies to the conclusion and interpretation of the arbitration clause contained in sales contracts. [*Id.*]. Accordingly, the question of whether claims of increased remuneration fall within the scope of "any dispute arising out of this contract" is subject to the CISG. Article 8 of the CISG that provides, "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or reasonably could not have been unaware what that intent was". [*CISG, Art. 8*].

19. In this case, CLAIMANT raised the concern that "it was important to have a mechanism in place which would ensure an adaptation of the contract", even though it was an "unlikely event" and was not legally "necessary". [*Ex. C 8, p. 17*]. Here, RESPONDENT reasonably could not have been unaware of CLAIMANT's intent to include adaptation claims within the scope of the arbitration agreement. RESPONDENT then replied that it was also in their view that the arbitrators should adapt the contract if the Parties could not agree. [*Id.*]. Both Parties were of the same mind that if a dispute were to arise, the arbitration agreement would have in place a mechanism for the arbitrators to adapt the contract. Specifically, that the arbitration agreement's over-inclusive language—"any disputes arising out of this contract"—shall include adaptation claims. Based on these statements made by the Parties, "any dispute arising out of this contract" should be interpreted under Article 8 of the CISG to include claims for increased remuneration.

20. Therefore, because the law of Mediterraneo incorporates the CISG to interpret arbitration clauses, and based on the statements made by both Parties, this Tribunal has jurisdiction under the arbitration agreement to adapt the contract because claims for increased remuneration fall within the scope of "any dispute arising out of this contract".

ISSUE 2: THE TRIBUNAL SHOULD ADMIT AS EVIDENCE RESPONDENT'S PREVIOUS ARBITRATION

21. The Tribunal should admit as evidence RESPONDENT's previous arbitration because it deals with the particular issue of price adaptation after a governmental change in the import/export tax scheme causes one party to bear a higher burden than was expected in the initial price determination. It provides an example for how a price adaptation request in a similar field, i.e. the equine field, has been handled and provides insight into how this Tribunal may deal with the issue as between CLAIMANT and RESPONDENT.

22. The evidence CLAIMANT seeks to admit includes RESPONDENT's submission in the previous arbitration as well as the interim award. [*PO-1, p. 50; PO-2, pp. 60–61, ¶¶ 39, 41*]. This evidence shows that RESPONDENT, in the previous arbitration, requested an adaptation of the price of exporting a mare because of an unforeseen change that increased the cost of exporting horses. [*PO-2, p. 60, ¶ 39*]. The interim award given by the previous tribunal

confirmed the tribunal's power to adapt the contract. [*Id*.]. This is evidence that the tribunal does have the power to adapt a contract as a result of a tariff that causes hardship and is persuasive in this arbitration because not only does it regard price adaptation in the equine field, but also because RESPONDENT was involved in the other arbitration as the party asking for the price adaptation. [*Id*.]. It goes to show that RESPONDENT has made contradictory assertions.

I. THE TRIBUNAL HAS BROAD DISCRETION TO ADMIT EVIDENCE UNDER THE 2018 HONG KONG ADMINISTERED ARBITRATION RULES

23. Hong Kong Rule 22.3 states, "[a]t any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence." [*HKIAC Rule 22.3* (2018)*; UNCITRAL Model Law, Art. 19(2)*]. Also, "[i]n general terms, the Arbitral Tribunal enjoys a very broad power to determine the appropriate procedure." [*Redfern et al. p. 309*]. Furthermore, "[t]he history of international arbitration shows that whatever may be the merits of the strict Common Law rules regulating the admissibility of evidence and of burden of proof, it is not practicable to follow them in international litigation." [*Lauterpacht, pp. 31,41*]. Additionally, "…evidence offered within time limits established by the tribunal will normally be admitted unless the individual challenging its acceptance can show specific grounds for nonadmissibility." [*Reisman et al.*]. Thus, the tribunal has the authority to admit this evidence and it should.

24. There are no strict rules of evidence that apply here. The Hong Kong Rules give discretion to the arbitrators to determine admissibility of evidence. [*HKIAC Rule 22.2* (2018)]. The Tribunal is not governed by and indeed does not need the guidance provided by strict rules of evidence. The Hong Kong rules were created to guide jurors who are not as competent as arbitrators in determining weight and relevance of evidence. And because "[t]his is not a court case, as such, the rules of evidence traditionally governing national courts do not apply." [*John*; *see Sandifer*]. The flexibility built into arbitrations allows tribunals to consider evidence that otherwise might have been excluded, all in the interest of fairness and equity.

[*Id.*] As Dr. J. Waincymer contends, rules of evidence were mainly created to help jurors deal with materiality and weight of the evidence submitted. [*Waincymer, Ch.10, 10.16*]. The Tribunal is composed of competent professionals who can weigh the evidence and determine its materiality without the necessity of strict rules of evidence to guide it. [*Letter by HKIAC, 23*; *Davis, 24; Letter by HKIAC, 37; Letter by HKIAC, 42*]. There is no need to adopt strict rules when the Tribunal has the competency necessary to combat the problems that may impact a jury inexperienced in handling such matters. Because arbitrators have the expertise necessary to appropriately measure the weight, relevance, and materiality of evidence, strict rules of evidence are unnecessary. [*Waincymer, Ch. 10, 10.16*]

25. The broad discretion given to arbitrators is meant to promote the fairness and efficiency of the arbitration and arbitrators rarely exclude evidence as inadmissible. [*Blair et al., pp. 235-59*]. According to Mr. G. M. von Mehren, a leading international arbitration lawyer, "The tribunal admits most or all of the evidence offered by the parties and then determines what weight, if any, should be given to particular pieces of evidence." [*von Mehren et al., pp. 285–94*]. Part of this broad discretion is the arbitrator's ability to determine admission of illegally obtained evidence. [*Waincymer, Ch. 10, 10.16.6*]

A. There is no legal impediment preventing the Tribunal from admitting RESPONDENT's previous arbitration submission and the interim award into evidence

26. There are no strict rules of evidence and no legal impediment to the admission of this evidence, meaning there is no law that strictly prohibits this evidence from being admitted. Because there are not a set of strict rules regarding evidence, this admittance of this evidence is at the discretion of the tribunal. [*HKIAC Rule 22.2* (2018)]. Any illegal activity regarding how the evidence was obtained is not an impediment when there is no law that would hold CLAIMANT responsible. CLAIMANT's clean hands are derived from that fact that it did not violate any laws in obtaining the evidence. Any legal consequences that may be observed would fall on others' shoulders. While confidentiality of this evidence may be a concern, it does not impede its admission as that confidence can be protected by this tribunal in admitting the evidence. There is no law that explicitly denying admittance of evidence of RESPONDENT's submission and the interim award in the previous arbitration.

27. There is no institutional sensitivity to prevent the admission of this evidence. The institution that decided the previous arbitration from which CLAIMANT would like to draw evidence was based out of the same institution that is handling the current arbitration, the Hong Kong International Arbitration Centre.

B. The Clean Hands Doctrine does not prevent admission of RESPONDENT's previous arbitration into evidence

28. The Clean Hands Doctrine, as defined by Nikki O'Sullivan, an attorney at an international arbitration firm who writes for Thomson Reuters, states that a party should not benefit from its own wrongdoing. [*O'Sullivan*]. CLAIMANT was presented with this evidence. [*PO-2, p. 60, ¶ 40*]. It did not perform any illegal acts in obtaining it. [*Id*.]. Simply said, CLAIMANT has clean hands. [*Id*.]. While the doctrine of clean hands is not settled as controlling international law in the admission of evidence, it is a widespread common law doctrine in domestic law. Furthermore, Patrick Dumberry, Director of General Law Review at the University of Ottowa, and Gabrielle Dumas-Aubin, professor at the University of Ottowa, argue that it has great potential in investor-state arbitrations. [*Dumberry et al., 10(1)*]. How this evidence was obtained does not deter from its admissibility, especially considering that CLAIMANT has not performed any illegal actions and as of yet has not obtained the evidence in question. [*PO-2, p. 60, ¶ 40*]. CLAIMANT did not learn of the arbitration through nefarious means nor has it participated in illegal action in obtaining further information. [*Id*.].

29. An argument against admittance would prove less than convincing. That CLAIMANT here has clean hands serves to further the good faith principle that parties act in accordance with governing legal standards. While not primarily an argument for admittance, it does show that exclusion on grounds contrary to good faith is lacking. CLAIMANT has abided by good faith standards and this evidence, which shows RESPONDENT's contradictory position, is on point with prevalent issues and persuasive enough that this Tribunal should consider it in its determinations.

II. THE EVIDENCE OF THE AWARD FROM THE PREVIOUS ARBITRATION IS ADMISSIBLE EVEN IF THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION APPLY

30. The IBA Rules on the Taking of Evidence in International Arbitration has not been formally adopted by this arbitral agreement. However, even following the precepts detailed in this guideline, Article 9(4) allows the Tribunal to arrange for evidence to be presented, subject to appropriate confidentiality protection. [*IBA Rules on Taking of Evidence, Art. 9(4)* (2010)]. Thus, the Tribunal still has the discretion to determine admissibility, even following the IBA Rules. The IBA Rules on the Taking of Evidence dictate that "[t]he taking of evidence shall be conducted on the principles that each Party shall act in good faith". [*IBA Rules on Taking of Evidence, Preamble (3)* (2010)]. Acting in good faith logically requires that parties do not act in bad faith and do not reap benefits from those bad faith actions. [*Henriques, p. 516*]. Additionally, the IBA Rules in Article 9 state that evidence shall be excluded if there is a. . .

> "(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; . . .
>
> (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
>
> (g) considerations of procedural economic, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

[*IBA Rules on Taking of Evidence, Article 9* (2010)].

There are other subsections, but for the purpose of this brief, these three will be addressed as they are the ones cited in scholarly analysis. There is no legal impediment and no institutional sensitivity that prevents the evidence from being admitted. Furthermore, the interests of equality and fairness work towards admissibility of the evidence and not against it. The ethical obligations of confidentiality to do not impede the use of RESPONDENT's submission or the interim award as evidence in this arbitration.

31. The confidentiality risks are mitigated by the fact that the same arbitral institution conducted both this arbitration and the previous arbitration, the RESPONDENT was involved in both, and CLAIMANT is already aware of the other proceedings. [*Letter Fasttrack, p. 50; PO-2, pp. 60–61, ¶¶ 40–41*]. CLAIMANT was made aware through a third party. [*PO-2, p. 60, ¶ 40*]. As a

result, there is no institutional sensitivity. The privilege of this information can be adequately protected by the current tribunal.

32. Even if the Tribunal applies the IBA Rules on the Taking of Evidence in International Arbitration, the arbitrators still have the broad discretion to admit evidence. Article 9(1) states that "[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence." [*IBA Rules on Taking of Evidence, Art. 9(1)* (2010)]. Thus, the Tribunal still has the discretion to determine whether it will admit the evidence of the previous arbitration's award.

III. THE EVIDENCE OF THE PREVIOUS ARBITRATION INVOLVING RESPONDENT IS ADMISSIBLE BECAUSE IT INVOLVES A COMPARABLE ISSUE THAT WILL PROVIDE GUIDANCE IN ADMITTING EVIDENCE

33. The evidence CLAIMANT wants to admit for the tribunal's consideration is admissible because it bears on an issue of substance that is integral to the outcome of the arbitration. Evidence, such as this, from other arbitrations may be used to "show that the opposing party has made contradictory assertions in different fora or has been selective in evidence submission in one or both." [*Waincymer, 10.11*]. RESPONDENT, in the other arbitration, was only willing to deliver the mare when the price was increased to reflect the newly imposed 25% tariff. [*Letter Fasttrack, p. 50; PO-2, p. 60, ¶ 39*]. RESPONDENT's assertion that it should obtain a price adaptation when an additional tariff of 25% is imposed, and that CLAIMANT here should not receive a similar adaptation when an additional 30% tariff is imposed, is contradictory. [*Id.*].

34. Additionally, the UNCITRAL Rules on Transparency, while not controlling, show a trend in the international arbitration community towards further transparency in arbitrations in the interest of fairness and justice. [*Martinez-Fraga, p. 429*]. These rules generally govern treaty-based investor state arbitration, but they are indicative of the international community's interests in equality and furthering justice.

35. In *Hulley Enterprises Ltd. v. Russian Federation*, the tribunal allowed information that was illegally hacked from the government and posted online in a public forum to be used as evidence in the arbitration. [*Hulley v. Russian, pp.1185–1185*]. The tribunal allowed cables and other information that were illegally obtained from the Russian government to be submitted as evidence and even cited to them in creating their award. [*Id*.]. While the tribunal in *Hulley* did not analyze whether or not such information should be allowed into evidence, that the tribunal relied on evidence that was illegally obtained and put into a public forum shows that this Tribunal can rely on illegally obtained evidence. [*Id*.].

36. The Tribunal has the authority to order RESPONDENT to produce these documents as per Article 22 of the HKIAC Rules. [*HKIAC Rule 22.3* (2018)]. This Article allows the arbitral tribunal to require a party to produce documents relevant and material to this case and its outcome. [*Id.*]. The Tribunal may order RESPONDENT to produce the evidence requested. Should RESPONDENT refuse to produce these documents, CLAIMANT can gain access to the documents through a company that provides intelligence regarding the horse racing industry. [*PO-2, pp. 60–61, ¶ 41*].

IV. THE TRIBUNAL SHOULD ADMIT RESPONDENT'S SUBMISSION IN THE PREVIOUS ARBITRATION AND THE INTERIM AWARD INTO EVIDENCE IN THIS ARBITRATION

37. In conclusion, the Tribunal should admit the evidence of the price adaptation that occurred in the previous arbitration. It is in the discretion of the Tribunal to admit such evidence. Strict rules of evidence do not apply because the Arbitral has the competency necessary to determine the weight and materiality of the evidence once admitted. The evidence that CLAIMANT puts forth was not gained through illegal means by CLAIMANT. CLAIMANT had clean hands and there is no legal impediment to the introduction of such evidence. The institution that decided the previous arbitration is the same as the one here, resulting in no institutional sensitivity. Finally, in the interest of equality and justice, the information presented should be admitted.

ISSUE 3: PHAR LAP IS ENTITLED TO $1,250,000 (USD) RESULTING FROM ADAPTATION UNDER CLAUSE 12 OF THE SALES AGREEMENT

38. The Tribunal should require the RESPONDENT to pay $1,250,000 (USD) to CLAIMANT as a result of adaptation under Clause 12 of the Sales Agreement. This amount is 25% of the sales price of the third shipment of semen; this is equivalent to the loss suffered by CLAIMANT as a result of the tariff imposed by the Government of Equatoriana. [*N.Arb., p. 7,* ¶ 18]. The Tribunal should adapt the contract to reach this conclusion because the RESPONDENT bore the risk of such event, as evidenced by the Sales Agreement between the parties **(I)**. Additionally, and alternatively, the Tribunal should apply the UNIDROIT Principles—which also support the CLAIMANT's request for payment—to reach an equitable adaptation of the contract **(II)**.

I. THE RESPONDENT SHOULD PAY $1,250,000 (USD) BECAUSE CLAUSE 12 OF THE SALES AGREEMENT PLACES THE RISK OF THE TARIFF ON THE RESPONDENT

39. The Tribunal is not limited to interpreting the hardship clause [*Sales Agreement, p. 14, ¶ 12*] so narrowly as to mean that CLAIMANT may only avoid performance. Mr. Gary Born, a leading scholar and practitioner, has written that "[t]he better view, adopted by a majority of commentators and other authorities, is that the arbitrators may depart from the terms of the parties' contract in fashioning a fair and equitable result, provided that they do not rewrite the structure of the agreement". [*Born 2009, p. 2242*].

40. In Clause 12 of the Sales Agreement, both parties agreed that the "Seller shall not be responsible . . . for hardship caused by additional health and safety requirements or *comparable unforeseen events making the contract more onerous*" (emphasis added). [*Ex. C 5, p. 14 (Clause 12)*]. Risk flowing from an unforeseen tariff, however, must fall upon one or both of the Parties. Here, the Sales Agreement expressly disclaims any assumption by CLAIMANT of risk associated with **(A)** "unforeseen events" which **(B)** make "the contract more onerous" and are **(C)** "comparable" to "additional health and safety requirements". [*Id.*]. The interpretation of these three phrases will be addressed in sections **(A)**, **(B)**, and **(C)** below. Because the Parties agreed that CLAIMANT disclaimed this risk, it follows that RESPONDENT agreed to assume it.

A. The tariff was an "unforeseen event"

41. The first tariff, imposed by Mediterraneo just two months before the final shipment was to be sent, was followed—without warning—by the 30% tariff imposed by Equatoriana at issue in this arbitration [*N.Arb, p. 6,* ¶ 9*; Ex. C 6, p. 15*]. Although the newly-elected president of Mediterraneo campaigned on a protectionist platform, the initial tariff on imports from Equatoriana "surprised most analysts [and] went beyond the worst expectations". [*Id.*]. The PEAK BUSINESS NEWS, in an article published December 20, 2017, suggested that the perceived mockery of the use of a national security justification by the President of Mediterraneo for its recent tariff triggered the "prompt and severe retaliation" in the form of Equatoriana's 30% tariff. [*Id.*]. According to the article, both "the retaliation as well as the size of the tariffs came as a big surprise even to informed circles" due to the fact that "Equatoriana has always been one of the biggest supporters of the existing system of free trade". [*Id.*]. The tariff was unforeseen especially because "[p]revious restrictions imposed by other countries affecting imports from Equatoriana have [almost] never resulted in direct retaliatory measures". [*Id.*]. Therefore, Equitoriana's retaliatory 30% tariff was an unforeseen event.

B. The tariff made "the contract more onerous"

42. The imposition of the tariff by Equatoriana not only wiped out the 5% profit margin CLAIMANT stood to make on the final shipment, it also caused the final shipment to result in a 25% loss for CLAIMANT [*Ex.C 8, p. 18*]. Tribunals have found that an unforeseen tariff or tax—as we have established in this case, above—meets the onerous requirement under the doctrine of change of circumstance. [*ICC No. 6515 and 6516*].

43. In ICC Case Nos. 6515 and 6516, claimant was subjected to Greek taxation, without warning, when the government deemed claimant had acquired a permanent establishment there. [*Id.*]. Claimant was already subject to Italian taxes, so the imposition of the new Greek tax subjected it to double-taxation [*Id.*]. Claimant paid the extra taxes and requested renegotiation with respondent under the change of circumstance [*Id.*]. When respondent declined to renegotiate in good faith, the tribunal held that respondent's failure to renegotiate

under the change of circumstance damaged claimant, and ordered respondent to pay 65% of the new tax incurred. [*Id.*].

44. In our current case, the tariff imposed by Equatoriana is similar to the tax imposed by Greece in ICC Case Nos. 6515 and 6516. In both cases: the additional cost was imposed by the country in which the respondent resided, the claimant incurred all of the loss, and the claimant paid the tax or tariff and performed fully before requesting renegotiation. Furthermore, CLAIMANT would be financially endangered if it had to pay the tariff, while RESPONDENT would not. [*PO-2, p. 59, ¶¶ 29, 30*]. Therefore, the tariff made the contract more onerous by negating the profit of CLAIMANT and altering the fundamental fairness of the deal.

C. The tariff was "comparable" to "additional health and safety requirements"

45. Unforeseen tariffs, like additional health and safety requirements, affect a supplier's profit margins substantially and with little warning. Although health and safety requirements are imposed by countries for non-monetary reasons, both tariffs and health and safety requirements intend to protect consumers, and both result in increased compliance costs. [*see World Trade Organization*]. Compliance with an unforeseen tariff parallels the challenge of compliance with a new sanitary requirement for international food sales. When a country imposes a new health or safety requirement, "[g]etting the right product to market on time, in good condition, and at competitive cost is no longer enough" due to the increased costs. [*Lamb et al., p. 1*]. In fact, a World Bank article notes that "observers argue that emerging [health and safety] standards have become de facto non-tariff trade barriers" because of the inescapable and unpredictable effects imposed on international trade. [*Id. at 2*].

46. CLAIMANT has even experienced the tariff-like effect of additional health and safety concerns before. In an event unrelated to the current case, Danubia "immediately imposed very strict new health and safety requirements involving long quarantine time" following an unforeseen disease outbreak which cost CLAIMANT 40% of the sales price because of "the additional tests . . . and the long quarantine" required. [*PO-2, p. 58, ¶ 21*]. Much like Danubia's health and safety requirement, the tariff in the current case was immediately

imposed without warning and wiped out CLAIMANT's profit margin. In conclusion, unforeseen tariffs are comparable to additional health and safety concerns because of their detriment to supplier profits, often unpredictable nature, and increased cost of compliance.

II. THE TRIBUNAL SHOULD ADAPT THE CONTRACT WITH A VIEW TO RESTORING ITS EQUILIBRIUM BY REQUIRING RESPONDENT TO PAY $1,250,000 (USD)

47. The UNIDROIT Principles permit the Tribunal to "adapt the contract with a view to restoring its equilibrium" under such circumstances as are present in this case. [*UNIDROIT Art. 6.2.3(4)(b)*]. The "Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)". [*Ex. C 6, p. 15*]. First, because the contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles and because the CISG is silent on cases of hardship, the UNIDROIT Principles should govern this dispute **(A)**. Second, the CLAIMANT's circumstances meet the requirements for hardship under Article 6.2.2 of UNIDROIT **(B)**. Finally, since CLAIMANT has established a case of hardship under Article 6.2.2, the Tribunal should follow Article 6.2.3 in order to "adapt the contract with a view to restoring its equilibrium" by requiring RESPONDENT to pay the difference incurred, and paid, by CLAIMANT **(C)**.

A. The UNIDROIT Principles should govern this dispute because the contract law of Mediterraneo is governed by the UNIDROIT Principles and the UNIDROIT Principles should be used to supplement the CISG in cases of hardships

48. Because the Sales Agreement is governed by the law of Mediterraneo and because "[t]he general contract law [of] Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts", the UNIDROIT Principles should govern this dispute. [*PO-1, p. 53, ¶ III.4.*].

49. Additionally, the CISG also looks to the UNIDROIT Principles to govern this dispute. The CISG states that "matters governed by [the CISG] which are not expressly settled in it" should be "settled in conformity with the general principles on which it is based". [*CISG, Art. 7(2)*]. It could be argued that the UNIDROIT Principles should not govern because the CISG

is not based on the UNIDROIT Principles; however, this is unpersuasive because the UNIDROIT Principles "vastly correspond both to the respective provisions of the CISG as well as to the general principles which have been derived from the CISG," so they are to be "considered as additional general principles in the context of the CISG". [*Magnus*; *Bonell pp. 33–37*; *Kotrusz, pp.142–43*]. Neither party disputes the fact that "[t]he [CISG] is silent on the question of hardship. Therefore the UNIDROIT Principles can be used to supplement the Convention". [*Perillo, pp. 8–9*].

B. The CLAIMANT's circumstances meet the requirement for hardship under Article 6.2.2 of UNIDROIT

50. Article 6.2.2 states:

> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) The events occur or become known to the disadvantaged party after the conclusion of the contract; (b) The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) The events are beyond the control of the disadvantaged party; and (d) The risk of the events was not assumed by the disadvantaged party.

[*UNIDROIT Art. 6.2.2*].

51. In the present case, each requirement is satisfied. First, the equilibrium of the contract was fundamentally altered because the cost of CLAIMANT's performance increased to the extent that it incurred a 25% loss on the price of the final shipment. Second, the event of the tariff occurred after the conclusion of the contract because the tariff was imposed on December 19, 2017 and the Sales Agreement was executed on May 6, 2017. [*Ex. C 5, 6, p. 14*]. Third, given Equatoriana's usual support of open trade, the tariff could not reasonably be taken into account by CLAIMANT at the time of the conclusion of the contract. [*Ex. C 6, p. 15*]. Fourth, this tariff was beyond the control of CLAIMANT because the tariff was unforeseen—as shown above—and because CLAIMANT has no authority to set tariffs on behalf of the Government

of Equatoriana. [*Id.*]. Finally, the risk of the tariff was not assumed by CLAIMANT because **(1)** CLAIMANT made clear during negotiations that it disclaimed such a risk, and **(2)** RESPONDENT fully understood that CLAIMANT intended to broadly disclaim such risks.

(1) CLAIMANT expressly disclaimed the acceptance of such a risk

52. When RESPONDENT requested a change in delivery terms to DDP due to CLAIMANT's expertise in delivery of frozen semen, CLAIMANT made clear to RESPONDENT that it was "not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions". [*Ex. C 4, p. 12*]. Although it could be argued that CLAIMANT's actions show otherwise, the language of the Sales Agreement most clearly manifests CLAIMANT's intentions. While CLAIMANT was not considering tariffs when it made the quoted statement, because such a tariff was unforeseen at the time, CLAIMANT ensured that the hardship clause inserted into the Sales Agreement was broad enough to cover "comparable unforeseen events". [*Ex. C 5, p. 14 (Clause 12)*].

(2) RESPONDENT fully understood that CLAIMANT intended to broadly disclaim such a risk and tailored Clause 12 to meet CLAIMANT's needs

53. Notes kept by Mr. Antley, and introduced into the arbitration record by RESPONDENT, evidence his understanding that CLAIMANT sought a very broad disclaimer of risk. Mr. Antley's note that the "ICC hardship clause suggested by CLAIMANT [was] too broad" shows that RESPONDENT knew and understood the broad waiver of risk that CLAIMANT was seeking. [*Ex. R 3, p. 35*]. While RESPONDENT felt that CLAIMANT's initial disclaimer sought was too broad, RESPONDENT ultimately "suggested the wording which was finally added to the force majeure clause in [C]lause 12" [*PO -2, p. 56, ¶ 12*]. The decision to insert Clause 12 was done "[w]ith reference to the risks mentioned by Ms. Napravnik in her email," [*Id.*], which specifically mentioned a desire to disclaim risk of "changes in customs regulation or import restrictions". [*Ex. C 4, p. 12*]. Because RESPONDENT crafted Clause 12 to appease CLAIMANT's concerns over customs regulation and import restrictions, RESPONDENT fully understood CLAIMANT to have disclaimed such a risk.

C. Since CLAIMANT's circumstances meet the UNIDROIT requirements for hardship, the Tribunal should "adapt the contract with a view to restoring its equilibrium" by requiring RESPONDENT to pay the difference incurred and paid by CLAIMANT

54. Article 6.2.3 states:

> In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.

[*UNIDROIT Art. 6.2.3*].

55. Because **(1)** CLAIMANT requested renegotiations indicating the grounds on which the request was made without undue delay, and because **(2)** the parties failed to reach an agreement necessitating CLAIMANT to resort to the court, **(3)** the Tribunal should adapt the contract

under UNIDROIT Article 6.2.3. Article 6.2.3(2) need not be addressed since CLAIMANT does not seek to withhold performance; CLAIMANT has already completely performed under the contract notwithstanding the additional costs imposed upon it. Furthermore, even though the Sales Agreement does not expressly contemplate adaptation of the contract in the event of a hardship, RESPONDENT's counsel indicated to CLAIMANT that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree", as is the case here. [*Ex. C 8, pp. 17–18*].

(1) CLAIMANT made a request for renegotiations indicating the grounds on which it was based and without undue delay

56. Just one month after the imposition of the tariff, CLAIMANT contacted RESPONDENT to request renegotiations. [*Ex. C 7, 8, pp. 16–18; Ex. R 4, p. 36*]. In both its email to and in phone call from RESPONDENT, CLAIMANT made clear that due to new tariff's application to frozen horse semen the shipment had become 30% more expensive for CLAIMANT to conduct. [*Ex. C 7, 8, pp. 16–18*]. Based on the length of the contract between the Parties and the initial confusion among both Parties regarding whether the tariff applied to animal products for the breeding of racehorses, there was no undue delay present in CLAIMANT's request.

(2) The Parties failed to reach an agreement allowing CLAIMANT to resort to the court

57. CLAIMANT brought this arbitration after RESPONDENT mislead CLAIMANT into delivering the semen under the guise of continued negotiations. Though it is true that RESPONDENT's representative (Mr. Shoemaker) had no actual authority to bind the company, he did have apparent authority because he held himself out to CLAIMANT as speaking for the company. In fact, "Mr. Shoemaker had been introduced to Ms. Napravnik . . . as the person responsible for the racehorse breeding program including all questions concerning the Frozen Semen Sales Agreement". [*PO-2, p. 59, ¶ 32*]. Mr. Shoemaker never told Ms. Napravik that he had no actual authority—he only told her that he "was not a lawyer and had not been involved in the negotiations of the contract"—and based on their introduction, it was reasonable for her to assume that his apparent authority was the equivalent of actual authority. [*Ex. R 4, p. 36*].

Through Mr. Shoemaker, RESPONDENT responded to CLAIMANT's request for renegotiation by agreeing that "if the contract provides for an increased price in the case of such a high additional tariff [the parties] will certainly find an agreement on the price". [*Id.*]. After this statement was made on January 21, 2017, no agreement was reached between the parties and this arbitration was brought by CLAIMANT on July 31, 2018. [*Id.; N.Arb. pp. 4–8*].

(3) The Tribunal should adapt the contract to restore its equilibrium by requiring RESPONDENT to pay $1,250,000 (USD)

58. Since CLAIMANT has satisfied the requirements for hardship under Article 6.2.2, it would be reasonable and proper for the Tribunal to "adapt the contract with a view to restoring its equilibrium". [*UNIDROIT Art. 6.2.3(4)(b)*]. While Article 6.2.3 gives the Tribunal the choice between terminating the contract and adapting the contract once hardship has been established, here there is only one option.

59. Because CLAIMANT fully performed its obligations under the contract notwithstanding the inequity of the contract under the new tariff, the Tribunal may not terminate the contract. Termination of the contract would not restore equilibrium; termination would make permanent the current inequity of the agreement. Instead, since CLAIMANT has suffered hardship and performed its obligations fully in the face of such hardship, the Tribunal should exercise its option under UNIDROIT Article 6.2.3(4)(b) and "depart from the terms of the parties' contract in fashioning a fair and equitable result" by adapting the contract to award CLAIMANT $1,250,000 (USD). [*Born 2009, p. 2242; see Aluminum Case*].

ISSUE 4: PHAR LAP IS ENTITLED TO $1,250,000 (USD) UNDER CISG ARTICLES ABOUT CONTRACT MODIFICATION AND ADAPTATION OF PRICE

I. UNITED NATIONS CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS ("CISG") APPLIES TO THIS CASE

60. Even though the original contract protects CLAIMANT from tariff costs, if the tribunal finds that the contract does not address the question of price adjustment, CISG should apply to this

case. Clause 14 of the Frozen Semen Sales Agreement specified that the Agreement shall be governed by Mediterraneo law, including the CISG. [*Sales Agreement, p. 14, ¶ 14*].

II. CISG ARTICLE 79 DOES NOT APPLY TO THIS CASE

61. Although the exemptions in CSIG Article 79 may seem applicable to Article 79 does not apply because it relates to a party's "failure to perform any of his obligation." [*CISG, Art. 79(1)*]. The sphere of application of Article 79 is limited to any case where one of the parties to the contract has not properly performed contractual duties. [*Schlechtriem et al., p. 1065*]. Here, CLAIMANT delivered the goods and RESPONDENT has not alleged that they are non-conforming. It is undisputed that CLAIMANT performed its obligations, and the issue is whether RESPONDENT should pay an increased price for that performance.

III. THE COMMUNICATION BETWEEN MR. SHOEMAKER AND MS. NAPRAVNIK WAS AN AGREEMENT TO A MODIFICATION OF PRICE

62. The telephone conversation between Mr. Shoemaker and Ms. Napravnik on January 21, 2018 was an oral agreement to a modification of the price. CLAIMANT made an offer to modify the contract to change the price, and RESPONDENT accepted that offer through his conduct.

63. CSIG Article 29(1) states that "[a] contract may be modified or terminated by the mere agreement of the parties." [*CISG Art. 29(1)*].

64. In *Plastic chips case*, the court held that the notification of a price increase is an offer to modify the original contract. [*Plastic chips case*].

65. According to CISG Art. 18(1), "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance." [*CISG Art. 18(1)*]. And CISG Art. 18(2) states that "[a]n acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." [*CISG Art. 18(2)*].

66. Scholars have noted that the buyer's insistence on the delivery of the goods is acceptance by conduct. [*Schlechtriem et al., p. 320*]. Whether conduct should be interpreted as acceptance is determined by CISG Article 8. [*Schlechtriem*].

67. Under Article 8 of the CISG, ". . . statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances". [*CISG Art. 8(2)*]. The standard is that of a reasonable business person in the same type of business. [*Schlechtriem et al., p.157*].

68. In this case, CLAIMANT made an offer to modify the contract to change the price after the tariff and RESPONDENT accepted this offer by conduct. On January 20, 2018, Ms. Napravik sent Mr. Shoemaker an email stating that the two Parties will have to "find a solution" to the 30% increase in shipment cost before Phar Lap could start the shipment. The "solution" as understood by both Parties was a modification of the contract to increase the price.

69. On January 21, 2018, Mr. Shoemaker accepted this offer to modify the contract by urging Ms. Napravnik to continue with the shipment. While Mr. Shoemaker claimed that he "never committed to any adaptation of the price," his insistence on the shipment is a "conduct of the offeree indicating assent to an offer." Mr. Shoemaker urged Ms. Napravnik to authorize the shipment while emphasizing Black Beauty's interest in a long-term relationship with Phar Lap. This conversation occurred after the discussion about the tariff, so the insistence on the shipment should not be interpreted as asking for performance of the original, unrevised contract. As Schlechtriem and Schwenzer noted, the buyer's insistence on the delivery of the goods is acceptance by conduct.

70. In this case, Phar Lap and Black Beauty Equestrian are both engaged in horse breeding programs and commercial transactions in mares and horse semen. Both Parties are engaged in the same type of business, so their interaction should be interpreted according to the understanding of a reasonable business person in this industry.

71. CLAIMANT's email on January 20 communicating that they will "have to find a solution" before Phar Lap could start the shipment was an offer to modify the contract. And RESPONDENT's insistence on the shipment during the January 21 call was an acceptance to that offer. In Witness Statement of Julie Napravnik, Ms. Napravnik stated that "[Mr. Shoemaker] was certain that a solution would be found through negotiation" and "urged [Ms. Napravnik] to authorize the shipment as planned." [*Ex. C 8, p. 17*]. The two Parties agreeing to "find a solution" was an agreement on a general modification to protect CLAIMANT from cost increase, with details needing to be worked out later. This was an agreement by both parties, and CSIG allows contracts to be modified by mere agreement of the Parties.

72. CLAIMANT relied on RESPONDENT's conduct and acted in reliance on the modification of the contract. Without Mr. Shoemaker's insistence on the shipment, Ms. Napravnik would not have approved the shipment with the 30% increase in price. Ms. Napravnik further stated that she thought Mr. Shoemaker accepted her position that they should bear the bulk of the additional costs due to the tariff and relied on his promise to reach an agreement. [*Ex. C 8, p. 17*]. This reliance is an agreement by the two parties. [*Schlechtriem et al., p. 486*].

73. The email and telephone communication between CLAIMANT and RESPONDENT was an oral agreement to the modification of the contract. RESPONDENT's insistence on the shipment of the semen and assurance of a solution were conduct that CLAIMANT relied on. CLAIMANT is entitled to the payment of $1,250,000 (USD) or any other amount resulting from an adaptation of the price.

PRAYER FOR RELIEF

In light of the above, CLAIMANT respectfully request the Tribunal to:

1) Adapt the contract for claims of increased renumeration;

2) Admit as evidence respondent's previous arbitration;

3) Award Phar Lap $1,250,000 (USD) resulting from Adaptation Clause 12 of the Sales Agreement;

4) Or to award Phar Lap $1,250,000 (USD) under the CISG Articles concerning contract modification and price, if the tribunal finds that Adaptation Clause 12 of the Sales Agreement does not address the question of price adjustment.

CLAIMANT reserves the right to amend its prayer for relief as may be required.

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ICC 6515 and 6156	ICC Final Award in Cases No. 6516 and 6516 Yearbook Commercial Arbitration (1999)	¶ 42, 43
Sonatrach	EWHC 481 (Comm) *Sonatrach Petroleum Corporation (BVI) v. Ferrell International Ltd* (October 4, 2001)	¶ 7

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Switzerland		
Plastic chips case	Commercial Court Zurich 10 July 1996 http://cisgw3.law.pace.edu/cases/960710s1.html *Plastic chips case*	¶ 64
United States		
Aluminum Case	Western District of Pennsylvania 499 F. Supp. 53, 78–79, 93–94 (W.D. Penn. 1980). *Aluminum Co. of America v. Essex Grp., Inc.*,	¶ 59

STATUTES, RULES, TREATISES AND OTHER SOURCES

Abbreviation	**Citation**	**Cited in ¶**
CISG Art.	Convention on International Sales of Goods	¶ 63, 65, 67
HKIAC Rule 13	2018 Hong Kong International Centre Rules, http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf	¶ 2, 4, 9, 10, 17, 23, 24, 26 36
HKIAC Website	Hong Kong International Arbitration Centre, Rules and Practice Notes, 2013Administered Arbitration Rules, http://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2013.	¶ 11
IBA Rules	IBA Guidelines on Conflicts of Interest in International Arbitration (2014).	¶ 30, 32
Swiss Rules	Swiss Chambers'Arbitration Institute, Swiss Rules of International Arbitration (2006).	¶ 11
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985).	¶ 23
UNIDROIT Art. 54	UNIDROIT Principles of International Law of Commercial Contracts (2010).	¶ 47, 49, 50, 55, 58, 59

CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed below and who signed this certificate:

6 December 2018,

ANDREW SOUKHOME

YOONHO JI

JAMES CROMLEY

NATASHA CAMPBELL