# MEMORANDUM FOR RESPONDENT

| ON BEHALF OF | AGAINST |
| --- | --- |
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| Equatoriana | Mediterraneo |


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# CONTENT

INDEX OF ABBREVIATIONS ........................................................................ 1

INDEX OF AUTHORITIES ........................................................................ 2

INDEX OF CASES AND AWARDS ........................................................................ 4

STATEMENT OF FACTS ........................................................................ 6

SUMMARY OF ARGUMENTS ........................................................................ 9

ISSUE 1: THE LAW OF DANUBIA SHALL GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION AND THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT ........................................ 11

A. THE ARBITRATION AGREEMENT AND ITS INTERPRETATION SHALL BE GOVERNED BY THE LAW OF DANUBIA ........................................ 11

I. Implied Choice Of The Law Of Mediterraneo Was Absent In The Drafting History, While An Implicit Choice of Danubia Law Existed ........................................ 11

II. Even If The Aforementioned Implied Choice Cannot Be Recognized, The Law of Danubia Still Prevails Over The Underlying Contract Law to Be Applied ........................ 13

III. Choosing The Law Of Danubia As The Governing Law of Arbitration Clause Is In Line With The Principle of Party Autonomy ........................................ 14

B. THE ARBITRAL TRIBUNAL LACKS THE JURISDICTION AND THE NECESSARY POWER TO ADAPT THE CONTRACT ........................................ 15

I. There Is No Express Authorization For The Arbitral Tribunal to Adapt The Contract ... 15

II. RESPONDENT Had Expressed The Intent to Exclude Adaptation From The Scope of Arbitration ........................................ 17

III. The Pursuit of Good Faith Does Not Qualify Enough to Call For Adaptation ............ 18

ISSUE 2: THE TRIBUNAL SHALL NOT COMPEL RESPONDENT TO SUBMIT THE EVIDENCE AND CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR AN ILLEGAL HACK OF

**RESPONDENT'S COMPUTER SYSTEM ........................................................ 20**

**A. ACCORDING TO DANUBIAN CONTRACT LAW, EXTRANEOUS EVIDENCE SHOULD BE EXCLUDED ........................................................ 20**

**B. THE TRIBUNAL SHALL NOT COMPEL RESPONDENT TO SUBMIT THE EVIDENCE BECAUSE IT IS IRRELEVANT AND IMMATERIAL ........................................................ 21**

**C. THE TRIBUNAL SHALL NOT ALLOW CLAIMANT TO SUBMIT THE EVIDENCE ...... 22**

I.The Tribunal Shall Not Allow CLAIMANT to Submit The Evidence Which Was Obtained Through A Breach of Confidentiality Agreement ........................................................ 22

II. The Tribunal Shall Not Allow CLAIMANT to Submit The Evidence Which Was Procured Through An Illegal Hack. ........................................................ 23

**ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT ........................... 25**

**A. RESPONDENT Shall Not Pay Based On Either The Contract or the Contract Law Of Mediterraneo ........................................................ 25**

I. Narrowed Hardship Clause Agreed By Parties of The Contract Prevails Over Mediterraneo's Contract Law ........................................................ 25

II. The Present Impediment Does Not Constitute Hardship Under Clause 12 .................. 26

III. Even If the Present Impediment Fell On Clause 12, There Are No Merits For CLAIMANT to Adaptation of The Contract ........................................................ 29

**B. DDP Delivery Term Agreed By Parties Was Not Affected By Clause 12. ... 30**

**ISSUE 4: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1.250.000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CISG ........................................................ 31**

**A.THE PARTIES AGREED TO DEROGATE FROM ART. 79 CISG WHEN RELYING ON ICC-HARDSHIP CLAUSE ........................................................ 31**

I. The Parties Have Modified The Provision of CISG ........................................................ 31

II. The Parties Implied Their Consensus To Derogate From Art. 79 Of CISG When Relying On ICC Hardship Clause ........................................................ 32

**B.EVEN IF CLAUSE 12 IS NOT A DEROGATION OF ART.79 CISG, THE PRESENT IS NOT A SITUATION COVERED BY ART.79 CISG ........................................................ 33**

I. The Increased Tariffs Is Not Reasonably Unforeseeable ........................................................ 33

II.The Increased Tariffs Has Not Made The Performance of Contract Excessively Onerous

.......................................................................................................................... 34

C.EVEN IF THE PRESENT TARIFFS INCREASE IS SUITABLE FOR ART.79, CISG IS NOT ENTITLED TO ADAPT THE PRICE........................................................................ 35

D.UNDROIT CAN NOT FILL THE CISG'S INTERNAL GAP REGARDING CONTRACT ADAPTATION ........................................................................................................ 35

E.RESPONDENT NEVER ASSURED TO COMPENSATE FOR THE ADDITIONAL TARIFFS AND CLAIMANT DID NOT SHIP THE LAST SHIPMENT WITH GOOD FAITH...................................................................................................................... 36

**REQUEST FOR RELIEF** ........................................................................ **38**

# INDEX OF ABBREVIATIONS

| | |
|---|---|
| Art. | Article |
| CISG | United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 |
| Cl. Ex. | CLAIMANT's Exhibit |
| DDP | Delivered Duty Paid |
| Exhibit C | CLAIMANT'S Exhibit |
| Exhibit R | RESPONDENT's Exhibit |
| HKIAC | Hong Kong International Arbitration Centre |
| ICC | International Chamber of Commerce |
| *lex arbitri* | law of the seat of arbitration |
| Ltd | Limited |
| para. | Paragraph |
| p./ pp. | Paragraph/ Paragraphs |
| PO2 | Procedure Order |
| Re. Ex. | RESPONDENT's Exhibit |
| UNIDROIT Principles | UNIDROIT Principles of International Commercial Contracts (2010) |
| US | United States |
| USD | United States Dollar |
| v. | Versus |
| & | and |
| % | percent |

## INDEX OF AUTHORITIES

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| International Law Association | Confidentiality in International Commercial Arbitration 12 (2010).<br>The Hague Conference<br>(cited as: ILA, The Hague Conference, Confidentiality in International Commercial Arbitration 12 (2010))<br>(cited at: para.60) |
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| Lisa Beisteiner | Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective<br>Christian Klausegger , Peter Klein , et al. (eds), Austrian Yearbook on International Arbitration 2014<br>(cited as: Beisteiner)<br>(cited at: para.45) |
| UNCITRAL | Digest of case law on the United Nations Convention on the International Sale of Goods, 2012ced<br>Digest of Article 9 case law<br>(cited as: CISG Digest)<br>(cited at: para.98) |
| William P. Johnson | Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent, 59 Buff. L. Rev. 213 (2011)<br>(cited as: JOHNSON I)<br>(cited at: para.44) |
| K.M. Sharma | From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts?, 18 N.Y.L. Sch. J. Int'l & Comp. L. 95 (1999)<br>(cited as: Sharma)<br>(cited at: para.57) |

# INDEX OF CASES AND AWARDS

| | |
|---|---|
| *C v D* | C v D [2008] 1 All ER (Comm) 1001<br>(cited at: para.38 ) |
| *XL Insurance case* | XL Insurance Ltd v Owens Corning (2001) Queen's Bench Division (Commercial Court) 1 All E.R. (Comm) 530<br>(cited at: para.37) |
| *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* | Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd[2013] EWHC 4071 (Comm)<br>(cited at: para.39) |
| *Sul América case* | Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors England and wales court of appeal [2012 EWCA] Civ 638 16 May 2012<br>(cited at: para.40) |
| *FirstLink case* | FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others Singapore High Court [2014] SGHCR 12 19 June 2014<br>(cited at: para.42) |
| *Kuwait v. Am. Indep. Oil Co.* | Kuwait v. Am. Indep. Oil Co,21 I.L.M. 976,1016 (1982)<br>Mann, supra note 39, at 259<br>(cited at: para. 49) |
| *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perushahaan Listruik Negara (Indonesia)* | Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perushahaan Listruik Negara (Indonesia) |

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|---|---|
| | Final Award of May 4 1999<br>(cited at: para.53 ) |
| *ICSID Case No. ARB/13/13* | Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan<br>Case No. ARB/13/13<br>(cited at: para.73 ) |

## STATEMENT OF FACTS

### The Parties

1. Phar Lap Allevamento ("CLAIMANT") is a company covered all areas of the equestrian sport including offering frozen semen of its champion stallions in Mediterraneo.
2. Black Beauty Equestrian ("RESPONDENT") is a company that is famous for its broodmare lines and decided to establish a racehorse stable in Equatoriana.

### The Facts

3. On **21 March 2017**, RESPONDENT sent CLAIMANT an email, in which RESPONDENT stated that the ban on artificial insemination for race horses in Equatoriana has been lifted and requested an offer for 100 doses of frozen semen from Nijinsky III.
4. On **24 March 2017**, CLAIMANT agreed to offer 100 doses of frozen semen with basic conditions on price and shipments.
5. On **28 March 2017**, RESPONDENT required a better price and insisted a delivery DDP in the light of the urgency of the delivery and CLAIMANT's experience in the shipment of frozen semen. Additionally, RESPONDENT supposed that the application of the Law of Mediterraneo is acceptable if the courts of Equatoriana have jurisdiction.
6. On **31 March 2017**, CLAIMANT consented to a delivery DDP on the condition of increasing the price by 1000 USD per dose and emphasized a hardship clause should be included into the contract. CLAIMANT disapproved of submitting to the jurisdiction of the courts in Equatoriana and provided an option of arbitration in Mediterraneo.
7. On **10 April 2017**, RESPONDENT proposed a draft for the dispute resolution clause which contended the seat of arbitration shall be Equatoriana and the law

of this arbitration clause shall be the law of Equatoriana.

8. On **11 April 2017**, CLAIMANT accepted the proposal except for changing the place of arbitration from Equatoriana to Danubia. Additionally, CLAIMANT addressed that the applicable law remains the law of Mediterraneo and suggested reliance on the ICC-Hardship clause.
9. On **12 April 2017**, Mr. Antley and Ms. Napravnik, two main negotiators of CLAIMANT and RESPONDENT, were severely injured in a car accident after a further discussion on the agreement. In the "negotiation file" of Mr. Antley, he noted three issues: 1) Clarification of arbitration clause; 2) Narrowing down ICC hardship clause suggested by CLAIMANT; 3) Connection of hardship clause with arbitration clause.
10. On **6 May 2017**, CLAIMANT and RESPONDENT (the "Parties") concluded the Frozen Semen Sales Agreement. In accordance with the agreement, the purchase price has to be paid in two instalments while the 100 doses of frozen semen will be sent in three shipments.
11. CLAIMANT made the first delivery on 20 May 2017 and the second delivery on 3 October 2017.
12. In **November 2017**, Mediterraneo's newly elected President, Ian Bouckart, announced 25 per cent tariffs on agricultural products from Equatoriana. More surprisingly, on 19 December 2017, in response the Equatorianian government imposed 30 per cent tariffs on selected products from Mediterraneo including on animal semen.
13. On **20 January 2018**, CLAIMANT sent RESPONDENT an email to seek a discussion on the solution to the tariffs.
14. On **21 January 2018**, RESPONDENT called CLAIMANT to ensure the remaining 50 doses were actually shipped. Mr. Shoemaker, who is responsible for the RESPONDENT's racehorse breeding program, had neither committed a price adaptation nor had the required authority to do so.
15. On **23 January 2018**, CLAIMANT made the third delivery of the last 50 doses.

16. On **15 June 2018**, Julie Napravnik, CLAIMANT's negotiator issued a witness statement *[Cl. Ex.8, p.17]*.
17. On **31 July 2018**, CLAIMANT submitted its Notice of Arbitration to Hong Kong International Arbitration Centre ("HKIAC") and served it on RESPONDENET. CLAIMANT designated Ms. Watha Davis as its arbitrator. HKIAC accepted to proceed to administer the captioned arbitration and assigned the reference number "HKIAC/A18128" for this arbitration.
18. On **22 August 2018**, Greg Shoemaker issued a witness statement *[Re. Ex.4, p.36]*.
19. On **23 August 2018**, Julian Krone, the legal department director of RESPONDENT issued a witness statement *[Re. Ex.3, p.35]*.
20. On **24 August 2018**, RESPONDENT submitted its Answer to the Notice of Arbitration to HKIAC. RESPONDENT nominated Dr. Francesca Dettorie as the second co-arbitrator in this arbitration.
21. On **28 August 2018**, HKIAC confirmed the Parties' nominations as co-arbitrators and invited them to designate jointly the third and presiding arbitrator.
22. On **18 September 2018**, the Arbitral Tribunal (the "Tribunal") constituted as HKIAC confirmed the designation of Prof. de Souza as the third and presiding arbitrator.
23. On **2 October 2018**, CLAIMANT informed the Tribunal that it received information about the other arbitration under the HKIAC-Rules which RESPONDENT was involved in. CLAIMANT intended to submit the award and relevant submission of the other arbitration.
24. On **3 October 2018**, RESPONDENT objected to CLAIMANT's allegation as well as to the announced submission of materials from the other arbitration in violation of contractual and statutory confidentiality obligations and suggested to exclude evidences obtained by illegal means.

## SUMMARY OF ARGUMENTS

25. The Tribunal lacks the jurisdiction to adapt the contract and the law of Danubia should govern the contract. In the negotiation and drafting history of arbitration agreement, CLAIMANT did not indicate an intension of applying the Meditterneo law as proper law of arbitration agreement. According to the closest and most real connection rule and doctrine of party autonomy, the arbitration agreement and its interpretation shall be governed by the law of Danubia. Adaptation of the contract is beyond the tribunal's normal dispute adjudication. In addition, the arbitration agreement did not confer the jurisdiction on the tribunal, RESPONDENT did not give express consent nor demonstrate implied consent to vest the arbitral tribunal such power, on the contrary, RESPONDENT had expressed the intent to exclude adaptation from the scope of arbitration. Good faith doctrine should not be used in this case whereas the exceptional circumstances do not necessarily lead to an adaptation of the contract. **(Issue 1)**
26. Firstly, the tribunal shall not compel RESPONDENT to submit the evidence because it lacks the relevance and materiality. Secondly, CLAIMANT was not entitled to invoke the exceptions to the confidentiality provision as confidentiality is a general obligation and such exceptions' applicable conditions are highly limited. Similarly, only under very restricted circumstance can evidence procured illegally be accepted by the tribunal. Therefore, RESPONDENT respectfully request that the evidence in question should not be submitted. **(Issue 2)**
27. There are no grounds for RESPONDENT to burden the additional price according to the Clause 12 of the Contract. Hardship clause has been narrowed on purpose by the parties, and the additional tariffs is excluded from the existing contract term. The present impediment did not accord with

the requirement to trigger Clause 12 of the Contract. Clause 12 also does not provide any adaptation rights to parties. **(Issue 3)**

28. CLAIMANT is not entitled to the payment under the CISG either. Art.79 CISG deals with exemption of performances, which is different from the present case. The parties agreed to derogate from Art. 79 CISG when relying on ICC-Hardship Clause. Besides, the present is not a situation covered by Art.79 CISG. UNDROIT can not fill the CISG's internal gap regarding Contract Adaptation. **(Issue 4)**

# ISSUE 1: THE LAW OF DANUBIA SHALL GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION AND THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT

29. RESPONDENT insists that the arbitration agreement and its interpretation shall be governed by the law of Danubia. **(A)** The tribunal lacks the jurisdiction or power to adapt the contract under the arbitral agreement. **(B)**

## A. THE ARBITRATION AGREEMENT AND ITS INTERPRETATION SHALL BE GOVERNED BY THE LAW OF DANUBIA

### I. Implied Choice Of The Law Of Mediterraneo Was Absent In The Drafting History, While An Implicit Choice of Danubia Law Existed

30. Contrary to CLAIMANT's allegation, RESPONDENT never knew or never have been aware of CLAIMANT's intention to choose the law of Mediterraneo as governing law. Considering the drafting process of the arbitration clause, there was no express choice of the law of Mediterraneo in the arbitration agreement nor is there any implied choice. Regardless of the first draft or the second draft of arbitration clause, CLAIMANT did not directly suggest to choosing the law of Mediterraneo as applicable law.
31. During the CONTRACT formation, CLAIMANT always clearly maintained that *"This Sales Agreement shall be governed by the law of Mediterraneo" [Cl.Ex. 5, p.14]* which emphasizes that the "sales" part should be governed by the law of Mediterraneo, but the arbitration agreement does not. And the well-recognized separability doctrine provides that the Arbitration Clause can be governed by law different from the main contract.
32. Admittedly, RESPONDENT cannot ignore the relationship between the matrix

CONTRACT and arbitration agreement. However, as shown in the negotiation process and drafting history, parties respectively negotiated the sale agreement and arbitration agreement, and the clauses about choosing the applicable law for each part were written separately. Concerning this fact, RESPONDENT hereby reasonably insisted that the applicable law of matrix CONTRACT was separate from the arbitration agreement.

33. *"If the parties were not aware that the general choice of law would fail to reach the arbitration clause contained in the underlying contract, they would have presumably assumed and intended that their choice would apply to the arbitration agreement" [Choi, p. 108, para. 1]* CLAIMANT has replied an email sent by RESPONDENT, in which there was an express choice of law clause *"The law of this arbitration clause shall be the law of Equatoriana." [Re.Ex.1, p.33]*. In its reply, CLAIMANT held an ambiguous attitude towards this clause, whereas it can clearly presume that CLAIMANT knew that the proper law of arbitration agreement needed to be chosen deliberately, and under this circumstance, the underlying contract law cannot extend to reach the arbitration clause. Therefore, the intention which CLAIMANT would apply the underlying contract law to arbitration agreement could not be found, and choosing the law of Mediterraneo to govern the matrix CONTRACT could not constitute the implied choice of Mediterranneo law for the arbitration clause either.

34. However, an implied choice of the law of Danubia as governing law of the arbitration agreement was shown in the negotiation process and drafting history. Both Mediterraneo and Danubia acknowledge the doctrine of separability, which the Arbitration Clause is considered to be a legally separate part from the container contract. In the process of negotiation, CLAIMANT has suggested to submit the disputes to the Mediterraneo court and applying the law of Mediterraneo, it was of no relevance to the choice of law on the Arbitration Clause as the Parties did not even reach the stage on

negotiating the choice of law of arbitration agreement. In the draft of arbitration agreement between parties, there was an express choice of law of the seat of arbitration to govern the arbitration clause, which was *"The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana." [Re.Ex.1, p.33]*

35. Considering the aforementioned negotiations, it is reasonable for RESPONDENT to presume that a drafting practice or tradition was formed, which is applying the law of the seat of arbitration or litigation to procedural issues. In addition, the arrangement satisfied CLAIMANT's requirements of not submitting the Sales Agreement to a foreign law and not conducting the arbitration proceeding in the country of the counterparty. That was so clear that CLAIMANT could not have been unaware. Under those circumstances, as the intention of RESPONDENT was already determinable enough and without opposition, it shall be recognized that the Parties have reached an implied consent on the Arbitration Clause governing law.

36. Hence, in the final version of arbitration agreement, RESPONDENT believed that the omission of the clause of choice of law would not affect the drafting habit about choosing the law of the seat as proper law.

### II. Even If The Aforementioned Implied Choice Cannot Be Recognized, The Law of Danubia Still Prevails Over The Underlying Contract Law to Be Applied

37. When no explicit or implicit choice of law can be recognized, a choice-of-law rule, choosing the law which arbitration agreement would have the closest and most real connection with, should be applied to the present case. *"In Sulamérica, which is now the leading English authority on the point, the Court of Appeal confirmed that the same choice-of-law rule applies to arbitration agreements: so the court must first ask whether the parties expressly or impliedly chose a law to govern the arbitration agreement (not*

*the matrix contract) and, if not, apply the closest connection test."* *[Glick;Venkatesan, p. 133, para. 4]*. The choice of seat, which means the choice of law governing the arbitration proceeding, may presumably indicate the Parties' intention to extend it to govern more related issues of arbitration. *[XL Insurance Case, para.24]*.

38. Considering the closest connection test, the law of the seat is commonly thought to be with closer and more real connection rather than the law of the main contract. As Gary Born holds, application of the law of the arbitral seat as the law governing the arbitration agreement is a common choice-of-law approach applied in recent decades (without an express choice of law by parties). *"In the words of the English Court of Appeal (C v D)*: [I] *t would be rare for the proper law to be different from the law of the seat because an arbitration agreement has a closer and more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract.*" *[Born, p. 829, paras. 38,39]*

39. *Similarly, in Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd ("Habas Sinai"), Hamblen J had held that in the absence of parties' choice, the significance of the choice of seat of the arbitration would be "overwhelming" because the seat's system of law shares the closest and most real connection with that of the arbitration agreement [Leong;Tan, p. 10, para. 18].*

**III. Choosing The Law Of Danubia As The Governing Law of Arbitration Clause Is In Line With The Principle of Party Autonomy**

40. The Parties are permitted to expressly or impliedly choose the governing law of Arbitration Clause *[Sul América case, para.9]*. During the negotiation, a requirement and preference of neutrality was always shown by both CLAIMANT and RESPONDENT, for which a neutral county, Danubia, was chosen as the seat of arbitration. In order to meet the common desire of

neutrality, the law of Danubia should take the priority to be applied as the proper law of arbitration agreement, since it is the law of the neutral country.

41. Admittedly, in general, applying the underlying contract law can also equally meet the demand of neutrality. However, in the present case, it is neutrality of a prominent reason considered by both parties to choose Danubia as the seat of arbitration, which indicated that neutrality of Danubia played an important role in parties' mind.

42. The arbitration clause will arise only when relationship in main contract breaks down, which means the law of main contract is of substantive controversy. Under such circumstances, based on the parties' desire for neutrality, the choice of seat is an indication to submit the arbitration clause to be governed by the law of seat. *[Firstlink case, para13*]. The law of Danubia is the law of the place where the parties chose to conclude arbitration, which can play better roles to ensure due process and fairness of the arbitration proceedings comparing with underlying contract law. Hence, the desire of neutrality can be a strong enough reason for favoring the law of Danubia to be applied.

## B. THE ARBITRAL TRIBUNAL LACKS THE JURISDICTION AND THE NECESSARY POWER TO ADAPT THE CONTRACT

### I. There Is No Express Authorization For The Arbitral Tribunal to Adapt The Contract

43. First of all, it is still disputable whether the adaptation of the contract is within the arbitral tribunal's power. CLAIMANT's request about CONTRACT revision is about "re-writing" the CONTRACT for the parties, which destroys the sanctity of contracts that the PARTY must adhere to the contractual terms on which they agreed.

44. The law of Danubia adheres for the interpretation of contracts including arbitration agreement to the "four corners rule", thus the interpretation of the arbitration agreement is limited to its wording and no external evidence can be drawn on, especially the extra-contractual context like drafting history and preceding communication is excluded. Rather, the signed written agreement offers what is arguably the best evidence of the intent of the parties. *[Johnson I, P. 272, para. 2]*
45. The adaptation of the contract surpasses the scope of disputes arising out of the contract. It is not in line with the common jurisdiction referring to "dispute(s) arising out of this CONTRACT" in terms of the narrow wording that the arbitral agreement demonstrates. "Out of a contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. The resolution of a legal dispute, however, has traditionally been held to be the adjudication of pre-existing rights in a "*yes-or-no decision" [Beisteiner, p.84, para.3].*
46. Being contrasted with the judicial act, the creative task of contract revision would not qualify as the object of arbitration. The CLAIMANT failed to justify arbitral revision is within the arbitral tribunal's jurisdiction. Whether a "dispute" existed between the parties would directly affect the validity of the arbitration agreement between the parties and hence the jurisdiction of the arbitral tribunal.
47. Whilst it is true that such decisions can be regarded as being covered by the parties' intentions and the applicable underlying contract law permits an adjustment by third parties in light of the currently dominant principle of a broad interpretation of international arbitration agreements, the question remains whether arbitration agreement here confer the authorization to revise a contract.
48. Undeniably, the parties are free to determine the object of their arbitration clause within the scope of those matters which are arbitrable, while the

negotiations finally resulted in a very narrowly worded clause, which did not provide for any adaptation by the arbitral tribunal as presented by the finalized CONTRACT.

49. As the arbitrators vigorously declared in the AMINOIL case, "*A tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or by the express consent of parties.*" *[Kuwait v. Am. Indep. Oil Co. para. 259.]*

50. However, a possible method of third-party adjustment requires that the parties make clear that their willingness to transfer to the tribunal this "creative competence" which goes beyond normal dispute adjudication. However, the arbitral tribunal is not vested with such power, and the applicable underlying contract provides no concrete basis for contract revision.

51. The law applicable to the contract determines the conditions under which and to what extent a party is entitled to change the contract. Because the law of Danubia applies as *lex arbitri*, it recognizes that arbitrators may adapt contracts *but requires an express empowerment* for that. Such an express conferral of powers is, however, missing in the present CONTRACT.

### II. RESPONDENT Had Expressed The Intent to Exclude Adaptation From The Scope of Arbitration

52. When the signed agreement is negotiated and entered into by merchants or other sophisticated parties. As the case file *[PO2 p.55, Para.4]* pointed out, "they used the preexisting file and merely made the necessary changes and additions to clauses 6-15 to reflect their agreement", the addresser was aware of the previous negotiations and communications, still they concluded the CONTRACT in a narrowly wording fashion, the parties' intentions must be

discerned *from the four corners of the document*, and extrinsic evidence may not be considered.

53. In view of the Himpurna case of 1999, for instance, the arbitrators refused to adapt the contract *[Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perushahaan Listruik Negara (Indonesia)].* The panel, pointed to the "inherent limitations of [their] role". It was for the tribunal to "assess [the parties'] rights and obligations in light of their legally significant acts or omissions. … To go beyond this role would be to betray the legitimate expectations reflected in the Parties' agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism." Importantly, the arbitral tribunal had "no right to presume to impose their personal view of what might be an appropriate negotiated solution."

54. Despite CLAIMANT's allegations to the contrary, RESPONDENT, when suggesting the arbitration clause explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation. It can be clearly observed that, through the omission of those terms, the intent of RESPONDENT is to restrict the scope of arbitration. In particular, by omitting "non-contractual claim" from the model clause, RESPONDENT clearly expressed the intent to exclude adaptation of the from the scope of arbitration, since adaptation of the contract has never been specified, hence it is obviously a non-contractual claim which has been excluded by such omission.

55. To summarize, RESPONDENT's literal reading of the CONTRACT is consistent with the law of Danubia, and general principles of CONTRACT interpretation. For reasons to be articulated below, CLAIMANT would have been unable to establish its argument.

**III. The Pursuit of Good Faith Does Not Qualify Enough to Call For Adaptation**

56. Based on the text of the finalized CONTRACT, it does not include any express reference in the arbitration agreement for the arbitral tribunal to adapt the CONTRACT. Yet only in exceptional circumstances and under strict conditions may changes in the contractual environment lead to an adaptation of the CONTRACT or excuse of non-performance. The additional tariffs levied due to the policy divert does not agree with the exceptional circumstances that overturn the original equilibrium stroke by the CONTRACT.

57. Neither the hardship nor the force majeure clause can offer adequate protection against every unfavourable change in the contractual equilibrium. Unless parties have agreed on something more specific, such as a renegotiation clause, the *pacta sunt serv* and a principle cannot be set aside. *[Zeyad, p. 299, para.1]* In other words, no hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse the parties from doing what they have expressly agreed to do. *[Sharma, p. 11, para. 1]*. Also, the change of circumstances here does not qualify enough to call for the adaptation of the CONTRACT. Rather, when it comes to a change in the contractual foundation**,** contract termination is more often than not preferred over contract adaptation.

58. The tribunal should find, on the facts of the case, that an application of the *rebus sic stantibus* principle was not justified and that it was not entitled to revise the terms of the CONTRACT. Rather, the CONTRACT contained a clear risk allocation which the tribunal was not entitled to alter. Accordingly, RESPONDENT respectfully requests that the tribunal has no power to adapt the CONTRACT, lacking the necessary express authorization and the circumstances required to restore the equilibrium of the original CONTRACT.

# ISSUE 2: THE TRIBUNAL SHALL NOT COMPEL RESPONDENT TO SUBMIT THE EVIDENCE AND CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

## A. ACCORDING TO DANUBIAN CONTRACT LAW, EXTRANEOUS EVIDENCE SHOULD BE EXCLUDED

59. Considering that Danubia is the seat of arbitration, the law of Danubia should be taken into consideration when it comes to procedural issues *"since this law governs most aspects relating to the conduct of the arbitration and the duties of the parties and the rights and duties of the arbitrators"*.
60. In addition, without specific stipulations relating to extraneous evidence in HKIAC rules, *"The law of the seat is arguably the first source of the rules dictating the extent to which the parties, and where relevant the arbitral institution, are free to lay down specific rules on the subject". [ILA, The Hague Conference, Confidentiality in International Commercial Arbitration 12 (2010)]* In conclusion, the tribunal shall respect the regulations in Danubian Contract Law.
61. CLAIMANT argued that the tribunal has wide discretion on the admissibility of evidence and is free from strict rules of evidence. However, now that Danubian Contract Law has explicitly stipulated that extraneous evidence should be excluded, the arbitral tribunal should take this important factor into consideration.

## B. THE TRIBUNAL SHALL NOT COMPEL RESPONDENT TO SUBMIT THE EVIDENCE BECAUSE IT IS IRRELEVANT AND IMMATERIAL

62. As CLAIMANT alleged that according to HKIAC rules, article 22.3 "*At 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*."
63. Additionally, according to 2018 Prague Rules，Art.4.3 "*A party may, however, request the Arbitral Tribunal to order another Party to produce specific document(s) which：a. Is/are relevant and material to the outcome of the case;"*
64. Apparently, only if the evidence is relevant to the case and material to its outcome, can the tribunal require a party to present the evidence. However, the evidence was irrelevant and immaterial to the present case.
65. According to Black's Law Dictionary, relevant means "*logically connected and tending to prove or disprove a matter in issue; having appreciable probative value--- that is , rationally tending to persuade people of the probability or possibility of some alleged fact*."
66. In the present case, the contested evidence is about RESPONDENT's positions in the other arbitration proceedings. RESPONDENT's different positions are based on different legal relationships in two contracts.

67. In the other arbitration proceeding, the contract contained an ICC Hardship Clause 2003, a choice of law clause in favor of Mediterranean law and the Model HKIAC-Arbitration Clause with all additions.

68. However, in the present case, RESPONDENT considered the originally suggested ICC-hardship clause to be too broad. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing *force majeure* clause.

## C. THE TRIBUNAL SHALL NOT ALLOW CLAIMANT TO SUBMIT THE EVIDENCE

### I. The Tribunal Shall Not Allow CLAIMANT to Submit The Evidence Which Was Obtained Through A Breach of Confidentiality Agreement

#### a. Confidentiality provision is a general obligation of arbitrations in HKIAC.

69. Article 45.1 of the HKIAC Rules expressly states that "*Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration.*"

70. Apparently, Article 45.1 regulates the requirement of confidentiality for the whole arbitration, it shall be seen as the confidentiality provision incorporated into the Arbitration Clause, and it turns out to be a general obligation of arbitrations in HKIAC, strongly opposing to the assertion that the duty does not extend to CLAIMANT. Thus, the statutory

confidentiality obligation of the HKIAC Rules shall be legal impediment which the Tribunal shall exclude from the evidence submitted by CLAIMANT.

**b. Merging these two arbitration proceedings is not appropriate.**

71. To avoid being refused to submit the confidential award, CLAIMANT had offered a so-called elegant solution: to merge the two proceedings. According to HKIAC Rules art.28, however, only when " *a. the parties agree to consolidate; or b. all of the claims in the arbitrations are made under the same arbitration agreement or c. the claims are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions*", and HKIAC finds "*the arbitration agreements to be compatible*" can two or more arbitration proceedings be consolidated. It is without dispute that the first two conditions are not satisfied in the two proceedings. In addition, since the rights to relief claimed are neither in respect of the same transaction nor series of transactions, the last condition is also not satisfied. In short, the two proceedings cannot be consolidated under HKIAC Rules.

**II. The Tribunal Shall Not Allow CLAIMANT to Submit The Evidence Which Was Procured Through An Illegal Hack.**

72. Assuming but not conceding that CLAIMANT did not involve in the hack behavior, the evidence still cannot be submitted because only under very limited circumstance can evidence procured illegally be accepted

73. CLAIMANT referred *the Kazakhstan case [ICSID Case No. ARB/13/13]* to allege that evidence procured from illegal hack can be accepted; however, the arbitral tribunal in that case, accepted the evidence for several reasons. One of the most important reasons is that the information obtained through illegal hack can be procured legally now. Nevertheless, the present case is far different from the Kazakhstan case. The document leaked from RESPONDENT's computer system remains inaccessible to public, which means it cannot be procured legally now. Considering the huge difference between these two cases, the Kazakhstan case cannot be referred to the present case.

74. In addition, the exceptions of "*fruit of the poisonous tree*" principle are quite narrow. The doctrine is subject to four main exceptions. The tainted evidence is admissible if: (1) it was discovered in part as a result of an independent, untainted source; or (2) it would inevitably have been discovered despite the tainted source; or (3) the chain of causation between the illegal action and the tainted evidence is too attenuated; or (4) the search warrant was not found to be valid based on probable cause, but was executed by government agents in good faith.

75. Apparently, none of exceptions of "*fruit of the poisonous tree*" principle shall apply in the present case.

# ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT

## A. RESPONDENT SHALL NOT PAY BASED ON EITHER THE CONTRACT OR THE CONTRACT LAW OF MEDITERRANEO

### I. Narrowed Hardship Clause Agreed By Parties of The Contract Prevails Over Mediterraneo's Contract Law

76. When CLAIMANT proposed to include an ICC hardship clause into the CONTRACT, RESPONDENT expressly held that it was too broad to reach consensus at that time *[Po2, Q12, p56]*. Moreover, while renegotiating the overall price, CLAIMANT agreed to solely remove some certain risks associated with health or safety requirements in Clause 12 associated normally with a DDP delivery obligation in the final Contract *[Pro.2, p56, para8]*. Furthermore, Clause 12 in the final Contract is substantively different from ICC hardship clause suggested originally by CLAIMANT *[ICC Hardship Clause]*. If the hardship clause was not narrowed, this negotiation would be meaningless. Therefore, the Parties' intention on narrowed hardship clause is apparent from their pre-contractual negotiation. According to *pacta sunt servanda* principle, agreements which are legally binding must be performed *[Black's law]*.The principle reflects natural justice and economic requirements because it binds a person to their promises and protects the interests of the other party. Since effective economic activity is not possible without reliable promises, the importance of this principle has to be emphasized *[Maskow, 1992]*.
77. Although Article 6.2.2 of the UNIDROIT Principles, which Mediterraneo adopted verbatim as its contract law *[PO1, para4]* characterizes hardship *[UNIDROIT PRINCIPLES ART. 6.2.2]* , Article 1.5 stipulates that parties may

be excluded from the adaptation of these Principles or derogate from or vary the effect of any of their provisions *[UNIDROIT PRINCIPLES ART. 1.5]*. In the case at hand, both Parties have already derogated the effect of Article.6.2.2 by narrowing the hardship clause into Clause 12 on purpose. Since Clause 12 constitutes no invalid situation, the provisions in the contract shall prevail, which also shows respect to party's autonomy.

### II. The Present Impediment Does Not Constitute Hardship Under Clause 12

78. Clause 12 stipulated as "*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [Exhibit C5, p14, para12]*." RESPONDENT could be exempted from responsibilities only when events satisfy three demands at once: comparable, unforeseen and making the contract more onerous. However, the increased tariffs herein was neither comparable (a) nor unforeseen (b) nor making contract more onerous (c), which prevents CLAIMANT to require any remedies.

#### a.The increased tariffs were not comparable to what were listed ahead

79. While RESPONDENT thought ICC hardship clause was too broad [Exhibit. *R3, P35, para3]*, both parties agreed to include a narrow hardship into the force majeure clause *[Exhibit. R3, P35, para5]*, which meant the hardship events shall be comparable to force majeure events. Force majeure includes both acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes, and wars) that make performance impossible or impracticable *[Black's Law]*. Admittedly, increased tariffs herein by Equatoriana was a typical act of government, which did not aim at foot and mouth disease but actually retaliatory against Mediterraneo *[Exhibit. C6, P15, para2]*. However, the rising extent of 30% did not result in the improbability of CLAIMANT's

contractual performance. In consequence, the increased tariffs was still in the range of normal business risks in international sales of good, not comparable to the health and safety requirements *[Exhibit. C4, P12, para4]* as assumed by both parties when concluded the Contract.

**b. The loss caused by the tariffs was not unforeseen due to the situation when signed the Contract**

80. Firstly, the Contract was concluded under a special situation when the ban on artificial insemination for racehorses had been temporarily lifted and CLAIMANT knew clearly that restrictions might be imposed again at any time because of foot and mouth disease. Thus, the whole business dealing was speculative. It is convinced to all that a party who enters into a speculative transaction is deemed to accept relative higher degree of risk along with its higher profits, even though it may not have been fully aware of the specific risk of it when entered into the contract *[Perillo, p111-113]*.
81. Secondly, Mediterraneo had the protectionism history and it tried to protect their farmers by tariffs on foreign agricultural products *[PO2, Q23, p58]*. The possibility of tariffs rising was risen even higher when a protectionist minister of agriculture was appointed by the president *[PO2, Q23, p58]*. Hence, with clear hints above, it was confusing when CLAIMANT argued that the tariffs increase in Mediterraneo was totally out of expectation. And Equatoriana used to perform retaliation measure too. Fairly speaking, no matter how supportive a country may be of free trade, national interests shall always be the priority. Taking Sino-US trade war for example, even though China had been always advocating the significance of being open, when America increased tariffs by 109.95% on Chinese products, China still responded with 106.09% tariffs increased in order to protect national interests. Thus, the tariffs increase in both countries could not be considered as unforeseeable.
82. Thirdly, it should not be unforeseeable that horse semen was included in

agricultural products, either. As a member of WTO *[Exhibit. C6, P15, para2]*, CLAIMANT could not be unheard of the *Agreement on Agriculture*. According to that document, the scope of agriculture products is HS Code Chapters 1 to 24, and the Harmonization System Code (HS-Code) number 05119910 is horse semen. As a businessman in international transactions, CLAIMANT should have been aware of it. CLAIMANT's argument that racehorse breeding is generally categorized differently from pigs, ship, or cattle could not exempt its obligations of reasonably foreseeing it.

**c. The loss caused by the tariffs rising did not make the Contract excessively onerous for CLAIMANT**

83. For the reason that the criterion of "onerous" was not expressly listed in the Contract, the Contract Law of Mediterraneo can serve as the reference to define onerousness. Article 6.2.1 of the UNIDROIT Principles stipulates that "*where performance of a contract becomes more onerous for one of the parties, that party is bound to perform its obligations subject to following provisions on hardship" [UNIDROIT PRINCIPLES ART. 6.2.2]*. Performance must be rendered as long as it is possible, regardless of burden it may impose on the performing party. In other words, even if a party will suffer a heavy loss instead of the expected profits or the performance has become meaningless for that party, the terms of the contract must nevertheless be respected *[Official Comments]*. Article 6.2.2 characterizes hardship as the "*occurrence of events [that] fundamentally alters the equilibrium of the contract.*"*[UNIDROIT PRINCIPLES ART. 6.2.2]*. The performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration.*[Perillo, p111-113]*In the case at hand, however, 30% is too far from the standard to be deemed as "fundamental" alteration that makes the Contract onerous.

84. Although the tariffs imposed by Equatoriana made CLAIMANT suffered a loss of 25%, if CLAIMANT did not deliver the last 50 doses, it would suffer a total loss of US$4,750,000 (95 000×50＝4 750 000), which would be far more than US$1,250, 000 caused by the increased tariffs. Therefore, selling the 50 dose to RESPONDENT would be much wiser. Moreover, if it were so excessively onerous as alleged by CLAIMANT, it would not be able to perform the last shipment at all. In general, the parities of a contract should spare no efforts to perform its contractual obligations and the application of onerousness freeing one party of such obligation should be restricted to the extreme circumstance which one party loses 100% likelihood of performance.

### III. Even If the Present Impediment Fell On Clause 12, There Are No Merits For CLAIMANT to Adaptation of The Contract

#### a.The hardship clause did not provide any adaptation right of the Parties.

85. The Parities did not conclude any adaptation clause. According to the wording of the Sales Agreement, there is no adaptation clause in the contract *[Exhibit. C5, P13-14]*. During the whole trade, RESPONDENT does not breach the contract, and perform all its contractual obligations. Even though the increased tariffs made CLAIMANT burden more, it was the contract rather than RESPONDENT that made CLAIMANT pay. If RESPONDENT must pay the additional tariffs, the price would far beyond the value of the goods RESPONDENT bought. Since whoever undertake the price will make the whole contract a burden for them, whatever stipulated in contract should be respected.

#### b. Mr. Greg Shoemaker had no authority to adaptation of price and additional Payment.

86. After the tariffs rising, CLAIMANT contacted RESPONDENT and

RESPONDENT expressed clearly its willing merely to renegotiate about the price but the talker, Mr. Shoemaker did not have any authority to adaptation of the price *[Exhibit R4, P36, para4]*. Thus, CLAIMANT delivered the last doses out of its own misunderstanding that RESPONDENT had agreed to bear the additional costs. Moreover, CLAIMANT even failed to verify whether Mr. Shoemaker was entitled or not before delivering the goods. Therefore, it was CLAIMANT's impulse and negligence that lead to their loss instead of RESPONDENT's fault.

## B. DDP DELIVERY TERM AGREED BY PARTIES WAS NOT AFFECTED BY CLAUSE 12.

87. CLAIMANT argued that CLAIMANT was not willing to bear the risks associated with DDP delivery *[N.A, P7, para 18]*. That allegation has no merit and is unfair to RESPONDENT. DDP means that all the costs and risks shall be borne by the seller *[INCOTERMS 2010]*. RESPONDENT never agreed to bear the risk of tariffs neither under the contract nor negotiation, which thus should be borne by CLAIMANT. There are no words in the Sales Agreement referred that the risk shall be borne by RESPONDENT *[Exhibit. C5, P13]*. On the contrary, Clause 8 of the Sales Agreement clearly stipulates that seller shall ship the frozen semen in the DDP delivery *[Exhibit. C5, P14, para6]*. Furthermore, RESPONDENT paid 50 000 USD in total for the change of delivery terms of DDP *[Exhibit. C2, P10, para4; Exhibit. C5, P13, para3]*. If DDP means that the risks associated with it shall be borne by RESPONDNENT, it's very unreasonable and unfair for a business man to pay such a high price but receive nothing. All of the evidence shows that the risk of tariffs shall be borne by CLAIMANT.

# ISSUE 4: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1.250.000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CISG

## A.THE PARTIES AGREED TO DEROGATE FROM ART. 79 CISG WHEN RELYING ON ICC-HARDSHIP CLAUSE

88. RESPONDENT submits that Clause 12 of the Sales Agreement is a derogation from Art. 79 CISG because the Parties have modified the provision of CISG (I) and they implied their consensus to derogate from Art. 79 of CISG during the negotiation process (II).

### I. The Parties Have Modified The Provision of CISG

89. Parties derogate from provisions of CISG when they modify provisions of CISG by terms and clauses of their contract *[Schlechtriem/Schwenzer, p88]*. CLAIMANT argued that: "*Clause 12 of the Sales Agreement is not directly contrary to CISG Article 79 nor is it so substantially different from CISG Article 79*." However, there are two distinctive differences between Clause 12 of the Sales Agreement and Art.79 in CISG.
90. Firstly, Art.79 is applied to all force majeure without specific restrictions while Clause 12 intentionally narrows the range of hardship cited as "*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*." The expressly limitations in Clause 12 should not be ignored. Furthermore, the citation CLAIMANT quotes in case ICC No.11333 refers that the contractual modification of one provision of CISG will not exclude the application of the CISG in general, instead of that specific provision which has already been modified. Moreover, when the circumstance that one party argues to constitute force majeure is not found in

the exhaustive list of force majeure situations in the contract, the court should deny the party's claim *[CLOUT case No. 142; Russia Information Letter No. 29]*. Therefore, the restrictions listed in Clause 12 indicate the derogation from Art.79 in CISG.

91. Secondly, Art.79 entitled the disadvantaged party to exempt its contractual obligations while Clause 12 enables CLAIMANT to transform responsibility when facing the situations listed herein. Owing to the urgent needing of racehorse semen in RESPONDENT's 2018 breeding season, the Parities modified Art.79 into Clause 12, deleting the exemption section to ensure that the deal would continue whatever hardships occur and the 50 doses in the third shipment would be delivered smoothly to RESPONDENT. The two differences above prove that CLAIMANT's allegation is groundless.

**II. The Parties Implied Their Consensus To Derogate From Art. 79 Of CISG When Relying On ICC Hardship Clause**

92. Art. 8 of CISG stipulates the significance of the Parties' intent to the interpretation of the contract. The applicable law to interpret whether a clause in the contract derogates from CISG is CISG's provisions on the interpretation of contract *[Schlechtriem/Schwenzer, p835]*. Meanwhile, Helge Rognlien from Norway said on the 4th meeting of CISG that he was in favor of adopting Art.6 that the derogation of CISG might be express or tacit, "*[i]f one or other of the additions to article 5 proposed by the United Kingdom or Belgium were adopted, it might be deduced a contrario that other provisions of the Convention were to be interpreted in a restrictive sense. The determining factor must always be the intention of the parties at the moment of concluding the contract.*"*[CISG Official Record, p249, para11]* . The ICC Case No.11333 CLAIMANT mentioned also supports that: "even though Art. 6 of the CISG does not specifically state it, such exclusion can also be tacit." *[ICC Case NO. 11333]* In light of the special situation when drafting the Contract in present

case when the unexpected car accident prevented Mr. Antley, the representative of RESPONDENT, from continuing finalization of the Contract, the successor of him failed to demonstrate its intention clearly and completely in the Sales Agreement *[Exhibit C8, p17, para3]*. Therefore, although the Parties did not add expressly derogation provision from Art.79, it is necessary to take the intent to derogate from it into consideration.

93. For example, CLAIMANT suggested to use the ICC Hardship Clause *[Exhibit R2, p34, para6]*. ICC Hardship Clause offers the party suffering hardship the right to terminate the contract when the renegotiation did not reach satisfactory results *[ICC Hardship Clause]*. Such remedy is clearly distinguished from the remedy in CISG which is merely removal of the contractual obligations. Although the Parities narrowed the scope of hardship, Clause 12 was on the base of ICC Hardship Clause. Hence, the agreement to apply ICC Hardship Clause as the foundation of Clause 12 implied a clear modification of Art. 79 of CISG, thus indicating the Parties' intent to derogate from Art. 79 of CISG.

## B.EVEN IF CLAUSE 12 IS NOT A DEROGATION OF ART.79 CISG, THE PRESENT IS NOT A SITUATION COVERED BY ART.79 CISG

### I. The Increased Tariffs Is Not Reasonably Unforeseeable

94. Firstly, under the circumstance that Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe foot and mouth disease which lasted for two years*[N.A, No, P5, para5]*, the parties concluded their contract taking advantage of temporary lift of the ban on the artificial insemination*[N.A., P5, para6]*. The parties knew clearly that they were taking risks to transact since the ban could be conducted again at any time or the government might take more serious measures like imposing tariffs.

95. Secondly, the newly elected President of Mediterraneo in January 2017 had already in its election program announced a certain preference for a

protectionist approach to international trade, in particular in relation to agricultural products *[Exhibit. Cl6, P15, para2]*. Shortly after the election on 25 April 2017, the protectionist measures then were taken*[Exhibit. Cl6, P15, para2]*. On 5 May 2017, President of Mediterraneo appointed one of the most ardent critics of free trade as his "superminister" for agriculture, trade and economics, while the minister had been an outspoken protectionist for years, lamenting that the farmers of Mediterraneo were badly treated in other markets and advocation limiting the access of foreign agricultural products to the Mediterranean market*[PO2, P58, para23]*. Based on those situations, CLAIMANT, as a reasonable businessman, should have foreseen that these measures may triggered the prompt and severe retaliation by the Government of Equatoriana. Moreover, in past experience, the restrictions imposed by other countries have once resulted in retaliatory measures of Equatoriana *[Exhibit. C6, P15, para2]*. However, due to its own negligence, CLAIMANT signed the SALES AGREEMENT on 6 May 2017.

**II.The Increased Tariffs Has Not Made The Performance of Contract Excessively Onerous**

96. Even though "impediment" in Art.79 of CISG enjoyed a flexible interpretation, not all hardship constitutes an "impediment". "*[t]he majority of academic opinion supports that a disturbance which does not fully exclude performance, but makes it considerably more difficult / onerous (e.g, change of circumstances, hardship, economic impossibility, commercial impracticability, etc.) cannot be considered as an impediment[Tallon, p. 592].*" Also, only hardship that makes the performance of the contract excessively onerous can be considered as impediment *[Flechtner, P5; CISG-AC-op17;]*. Contrary to the submission of CLAIMANT that 30% increased tariffs have fundamentally alters the equilibrium of the contract. To the standard of fundamental alternation, it is recognized as a general rule is that a 100% price fluctuation

does not yet constitute a ground for impediment *[Schlechtriem/Schwenzer P822; Schwenzer, P716; FeMo alloy case; CISG-online 436]*. In international sales, a higher standard of 150%-200% may apply *[Schwenzer, P717]*. Thus, as the amount of tariffs increase is only 30% which is much less than 50%, the tariffs event in this case would not be considered as a fundamental alteration of the contract, neither be identified as "impediment".

## C.EVEN IF THE PRESENT TARIFFS INCREASE IS SUITABLE FOR ART.79, CISG IS NOT ENTITLED TO ADAPT THE PRICE

97. According to the legislative process, CISG does not in favor of the remedy of adaptation of price. Owing to unexpected events the right to adapt the price was proposed, a version of Art.79 that permits the party facing excessive damages. However, such proposal basing on the idea that the non-performing party granted too much remedy was rejected *[Slater, P258]*. The repudiation of the remedy of price adaptation indicates CISG's objection to this problem.
98. According to CISG, only Art.50 regulates remedies relevant to price adaptation. However, Art.50 provides for the remedy of price reduction when the seller has delivered goods that do not conform with the contract *[CISG DIGEST 2016 p237]*. Apparently, the present impediment does not comply with Art.50, the adaptation of the contract by the judge, however, is not expressly allowed by the CISG, and must therefore be regarded as impossible *[Rimke, p127]*. There is no ground for CLAIMANT to ask for price adaptation under CISG.

## D.UNDROIT CAN NOT FILL THE CISG'S INTERNAL GAP REGARDING CONTRACT ADAPTATION

99. Firstly, such solution would appear to disrespect the intentions of the contracting parties, which could have provided in their contracts for

renegotiation or adaptation in the cases of hardship, economic impossibility, etc *[Flambouras, P287-P289]*.

100. Secondly, CISG Article 7(2) only requires settlement with reference to the general principles on which the CISG is based. Neither the legislative history nor the language of the CISG indicates the existence of any general principle allowing renegotiation or judicial adaptation in the case of changed circumstances or economic impossibility. In the ICC award of 4 May 1998, the arbitral "*[t]ribunal pointed out that the theory of changed circumstances does not form part of the widely recognized and accepted legal principles….*" Only if a general principle exists within the CISG's system (e.g. full compensation), may the UNIDROIT provisions be used in order to specify one of the possible meanings of that principle (e.g. the mode of calculation of the rate of interest) *[Flambouras, P287-P289]*.

## E.RESPONDENT NEVER ASSURED TO COMPENSATE FOR THE ADDITIONAL TARIFFS AND CLAIMANT DID NOT SHIP THE LAST SHIPMENT WITH GOOD FAITH

101. CLAIMANT holds that "the oral agreement over the phone on 21 January 2018 to modify the contract and compensate CLAIMANT for the tariffs is enforceable". However, RESPONDENT never agreed to adapt the price and compensate CLAIMANT but the misunderstanding of CLAIMANT. In the oral agreement over the phone on 21 January 2018, Mr. Shoemaker just stated that they would "find an agreement on the price" *[Exhibit R4, p36, para4]* whose intention was just to keep the trade going on and tried his best to perform the responsibilities as the manager of the racehorse breeding program *[PO2, p59, para32]*. Moreover, Mr. Shoemaker emphasized several times that he had not been involved in the negotiations of the Contract which meant that he should asked his superiors and the legal department or the drafters of the

Sales Agreement. According to the Article 18(1) of CISG, "*A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.*" As cited above, Mr. Shoemaker did not make such statement or other conduct that consented to adapt the price. Instead, he used such language artists just to prohibit the termination of performance from CLAIMANT and keep the trade going on. In this circumstance, CLAIMANT did not deliver the last shipment until the final agreement was made but hurriedly delivered it. It is not proper to use "reliance on the RESPONDENT's promise" as an excuse to cover the false that CLAIMANT did not perform its obligation to be considerable. Thus, neither RESPONDENT agreed to compensate CLAIMANT for the additional tariffs, nor CLAIMANT was acted in good faith.

102. Furthermore, the reception of the last shipment from CLAIMANT did not mean that RESPONDENT accepted to modify the Sales Agreement and adapted the price. RESPONDENT received it just pursuant to the original Sales Agreement due to the implicit refusal by Mr. Shoemaker. When the increased tariffs occurred, CLAIMANT could request to delay the last shipment to renegotiate the price with RESPONDENT. It did not have to follow the date of shipment in the Contract. However, before the price consensus had concluded between the two Parties, CLAIMANT shipped the last 50 doses to RESPONDENT which meant that CLAIMANT gave up continuing to modify the contract and performed its obligations according to the original Sales Agreement.

# REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel make the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully request the honorable Tribunal to declare that:

a. This tribunal has no jurisdiction or power over the adaptation of the contract;

b. The evidence from CLAIMANT's submission on 2 October 2018 should be excluded;

c. The claim for an additional remuneration of US$ 1,250,000 raised by CLAIMANT should be rejected;

d. CLAIMANT bears RESPONDENT's costs incurred in this arbitration.