SIXTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On behalf of	**Against**
Phar Lap Allevamento 1 Rue Frankel Capital City Mediterraneo	Black Beauty Equestrian 2 Seabiscuit Drive Oceanside Equatoriana
CLAIMANT	**RESPONDENT**

NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

ANNA AVDULOVA • MARGARITA ADADUROVA • ADAM NALGIEV
POLINA ROMANOVA • EVGENIYA SAVELYEVA

TABLE OF CONTENTS

INDEX OF AUTHORITIES

COURT DECISIONS

International cases

National cases

Australia

Belgium

England and Wales

	Vol. 2, Issue 2 (2006)	
Ashford	Peter Ashford, Handbook on International Commercial Arbitration, Juris, 2nd edition (2014)	54
Azerdo Da Silveira	Mercedeh Azerdo Da Silveira, Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Kluwer Law International (2014)	169
Bantekas	Ilias Bantekas, The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy, Journal of International Arbitration, Vol. 27, Issue 1 (2010)	27
Beisteiner	Lisa Beisteiner, The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract — The Austrian Perspective, in: Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration (2014)	7, 45
Berger	Klaus Peter Berger, Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, Vanderbilt Journal of Transnational Law, Vol. 36 (2003)	33
Berger II	Klaus Peter Berger, Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense, Arbitration International, Vol. 17, No. 1 (2001)	7, 40
Berger III	Klaus Peter Berger, Re-examining the Arbitration Agreement: Applicable Law — Consensus or Confusion?, in: Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics?, ICCA Congress Series, Vol. 13 (2007)	27
Bernardini	Piero Bernardini, Communications: Adaptation of contracts, in: Pieter Sanders (ed), New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions, ICCA Congress Series, Vol. 1 (1983)	7
Bernardini II	Piero Bernardini, Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause, in: Albert Jan van den Berg (ed), Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, Vol. 9 (1999)	32
Bianca/Bonell	Bianca-Bonell Commentary on the International Sales Law,	178

	Giuffrè: Milan (1987)	
Blair/Gojković	Cherie Blair, Ema Vidak Gojković, WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence, ICSID Review, Vol. 33, Issue 1 (2018)	81
Born	Gary B. Born, International Commercial Arbitration (Second Edition), 2nd edition, Kluwer Law International (2014)	26, 43, 74
Briner	Robert Briner, Special Considerations Which May Affect the Procedure (Interim Measures, Amiable Composition, Adoption of Contracts, Agreed Settlement), in: Albert Jan van den Berg (ed), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, Vol. 7 (1996)	5, 40
Brown	Alexis C. Brown, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration, American University Law Review, Vol. 16 (2001)	72
Brunner	Christoph Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration, International Arbitration Law Library, Vol. 18 (2008)	7, 33, 152, 176
Caemmerer/ Schlechtriem	Ernst von Caemmerer, Peter Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, 2nd edition, München: Beck (1994)	113
Cowen/Carter	Zelman Cowen, Peter Basil Carter, Essays on The Law of Evidence, Oxford (1956)	84
Crucelaegui	Javier San Juan Crucelaegui, Contrato de Compraventa Internacional de Mercaderías. Convención de Viena de 1980, y otros textos complementarios, Cizur Menor, Thomson Civitas (2005)	113
Czernich	Dietmar Czernich, The Arbitration Agreement and Arbitrability, The Law Applicable to the Arbitration Agreement, in: Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration (2015)	17
David	René David, Arbitration in International Trade, Netherlands, Kluwer Law and Taxation Publishers (1985)	33
Dicey/Morris/	Lawrence Collins, et al., Dicey, Morris and Collins on The	27, 30

Collins	Conflict of Laws, 15th Edition, Sweet & Maxwell Limited, London (2012)	
Doudko	Alexei G. Doudko, Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia, Uniform Law Review, Vol. 5 (2000)	176
Eisenberg	Melvin Eisenberg, Impossibility, Impracticability, and Frustration, Journal of Legal Analysis, Vol. 1, No. 1 (2009)	136, 140
Fabian	Klaudia Fabian, Confidentiality in International Commercial Arbitration — to Whom Does the Duty of Confidentiality Extend in Arbitration?, Central European University, LLM Short Thesis (2011)	89
Farnsworth	Allan E. Farnsworth in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987)	36
Ferrari	Franco Ferrari, Uniform Interpretation of the 1980 Uniform Sales Law, Georgia Journal of International & Comparative Law, Vol. 24 (1994), available at: https://digitalcommons.law.uga.edu/gjicl/vol24/iss2/2	113
Ferrario	Pietro Ferrario, The Adaptation of Long-Term Gas Sale Agreements by Arbitrators, International Arbitration Law Library, Vol. 41 (2017)	5, 10, 33, 152
Flechtner	Harry M. Flechtner (ed), Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More, Journal of Law & Commerce, Vol. 18 (1999)	170
Fouchard/Gaillard/ Goldman	Philippe Fouchard, Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International (1999)	3, 10, 30
Girsberger/ Zapolskis	Daniel Girsberger, Paulius Zapolskis, Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption, Jurisprudencija: Mokslo darbu žurnalas, Vol. 19 (2012)	147, 152
Henderson	Alastair Henderson, Lex Arbitri, Procedural Law and the Seat of Arbitration, The Singapore Academy of Law Journal, Vol. 26 (2014)	54

Honnold	John O. Honnold, Uniform Law for International Sales, 3rd edition, Kluwer (1999)	136, 169
Honnold II	John O. Honnold, Documentary History of the Uniform Law for International Sales: The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations, Kluwer Law and Taxation Publishers, Deventer, Netherlands (1989)	158
Ishida	Yasutoshi Ishida, CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness-Full of Sound and Fury, but Signifying Something, Pace International Law Review, Vol. 30 (2018)	140, 147
Japaridze	Nana Japaridze, Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration, Hofstra Law Review, Vol. 36, Issue 4, Art. 13 (2008)	65, 72
Kofod	Rolf Kofod, Hardship in International Sales, CISG and the UNIDROIT Principles, Thesis, University of Copenhagen-Faculty of Law (2011)	123
Koziol/Welser	Helmut Koziol, Rudolf Welser, Grundriss des bürgerlichen Rechts, 13th edition, Manz (2006)	45
Kotuby/Sobota	Charles T. Kotuby, Luke A. Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes, Oxford University Press (2017)	86
Lew	Julian D.M. Lew, The Law Applicable to the Form and Substance of the Arbitration Clause, in: Albert Jan van den Berg (ed), Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, Vol. 9 (1999)	27
Lew/Mistelis/Kröll	Julian D.M. Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration, Kluwer Law International, The Netherlands (2003)	17, 52
Lindstrom	Nicklas Lindstrom, Changed Circumstances and Hardship in the International Sale of Goods, Nordic Journal of Commercial Law, Vol. 1 (2006)	124, 128, 136
Maskow	Dietrich Maskow, Hardship and Force Majeure, The	130

	American Journal of Comparative Law, Vol. 40 (1992)	
Mullis/Huber	Peter Huber, Alastair Mullis, The CISG: A New Textbook for Students and Practitioners (Second Edition), 2nd edition, Sellier European Law Publishers (2007)	128
Ortiz	Ricardo Calvillo Ortiz, Admissibility of Hacked Emails as Evidence in Arbitration, Transnational Notes, available at: https://blogs.law.nyu.edu/transnational/2018/05/admissibility-of-hacked-emails-as-evidence-in-arbitration	56
Pilkov	Konstantin Pilkov, Evidence in International Arbitration: Criteria for Admission and Evaluation. Arbitration, The International Journal of Arbitration, Mediation and Dispute Management (2014)	52
Pooroye/Feehily	Avinash Poorooye, Ronan Feehily, Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance, Harvard Negotiation Law Review, Vol. 22 (2016)	89
Ramberg	Christina Ramberg, The Rules on Standard Terms in the UNIDROIT Principles: Misplaced and Misleading, UNIDROIT; in: Eppur si muove: The Age of Uniform Law, Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday, Vol. 2 (2016)	96
Redfern/Hunter	Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, Oxford University Press (2015)	3, 30
Reisman/Craig/ Park/ Paulsson	Reisman, Craig, Park and Paulsson's International Commercial Arbitration, Cases, Materials, and Notes on the Resolution of International Business Disputes, 2nd edition, Foundation press (2015)	1
Reuben	Richard C. Reuben, Confidentiality in Arbitration: Beyond the Myth, University of Kansas Law Review, Vol. 52 (2005)	88
Rimke	Joern Rimke, Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts, Kluwer (1999–2000)	136
Rogers	Catherine A. Rogers, Transparency in International Commercial Arbitration, University of Kansas Law Review,	89

	Vol. 54 (2006)	
Saleh	Samir A. Saleh, Reflections on Admissibility of Evidence: Interrelation Between Domestic Law and International Arbitration, Arbitration International, Vol. 15, Issue 2 (1999)	59
Schlechtriem/ Schwenzer	Ingeborg Schwenzer, Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd edition, Oxford (2010)	15, 24, 36, 37, 128, 140, 141, 167, 169, 172, 180
Schwenzer	Ingeborg Schwenzer, Force Majeure and Hardship in International Sales Contracts, Victoria University of Wellington Law Review, Vol. 39 (2009)	169
Schwenzer/Jaeger	Ingeborg Schwenzer, Florence Jaeger, The CISG in International Arbitration, in: Patricia Shaughnessy and Sherlin Tung (eds), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer (2017)	30
Shepherd	Robert E. Shepherd Jr, Admissibility of Illegally Obtained Evidence in a Civil Case, Washington and Lee Law Review, Vol. 17 (1960)	59
Sussman	Edna Sussman, The Arbitrator Survey — Practices, Preferences and Changes on the Horizon, The American Review of International Arbitration, Vol. 26, No. 4 (2015)	52
Sussman I	Edna Sussman, Cyber Intrusion as the Guerrilla Tactic: Historical Challenges in an Age of Technology and Big Data, Preliminary draft, ICCA Sydney 2018 Conference (2018)	52
Viscasillas	Pilar Perales Viscasillas, Interpretation and Gap-filling under the CISG: Contrast and Convergence with the UNIDROIT Principles, Uniform Law Review, Vol. 22 (2017)	172
Waincymer	Jeffrey Waincymer, Procedure and Evidence in International Arbitration, Kluwer Law International (2012)	27
Wolfgang	Peter Wolfgang, Arbitration and Renegotiation of International Investment Agreements, Kluwer Law International (1995)	45

OTHER SOURCES AND MATERIALS

LIST OF ABBREVIATIONS

§	Paragraph
AC	Advisory Council
ANoA	Answer to the Notice of Arbitration
Arbitration Clause	Exhibit C5, Frozen Semen Sales Agreement, Clause 15
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	Phar Lap Allevamento
Contract	Exhibit C5, Frozen Semen Sales Agreement between Phar Lap Allevamento and Black Beauty Equestrian
Exhibit Cx	CLAIMANT's Exhibit number x
Exhibit Rx	RESPONDENT's Exhibit number x
Hardship Clause	Exhibit C5, Frozen Semen Sales Agreement, Clause 12
i.e.	Id est (that is)
Ibid	Ibidem (in the same place)
ICA	International commercial arbitration
ICC	International Chamber of Commerce
MfC	Memorandum for CLAIMANT
NoA	Notice of Arbitration
p.	Page
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Record	The 26th Annual Willem C. Vis Moot Problem
RESPONDENT	Black Beauty Equestrian
UNCITRAL	United Nations Commission for International Trade Law
UNIDROIT Principles, UNIDROIT	UNIDROIT Principles of International Commercial Contracts (2010)
Rules	HKIAC 2018 Arbitration Rules
WTO	World Trade Organization

STATEMENT OF FACTS

21 March 2017	RESPONDENT asked CLAIMANT for delivery of frozen semen from CLAIMANT's stallions Nijinsky III.
24 March 2017	CLAIMANT offered 100 doses of Nijinsky III's frozen semen for US$ 99.500 per dose and warned RESPONDENT about a prohibition to resell the semen to the third parties.
28 March 2017	RESPONDENT accepted most of the proposed terms though insisting on a delivery DDP.
31 March 2017	CLAIMANT expressed its consent on delivery DDP against a price increase up to US$ 1000 per dose and the inclusion of an adaptation clause to temper risks connected with changes in customs regulation or import restrictions.
12 April 2017	CLAIMANT's Ms. Napravnik and RESPONDENT's Mr. Antley, who were the main negotiators of the Contract, got involved into the car accident.
6 May 2017	CLAIMANT and RESPONDENT concluded the Contract.
November 2018	Government of Mediterraneo imposed a tariff of 25 % on agricultural products from Equatoriana.
December 2018	Government of Equatoriana imposed a tariff of 30 % upon all agricultural goods from Mediterraneo.
19 January 2018	CLAIMANT asked RESPONDENT for adjustment the price after finding that the newly imposed tariffs also applied to racehorse semen.
20 January 2018	RESPONDENT informed CLAIMANT asked to make the shipment urgently, proposing further negotiations on the adaptation of the Contract.
21 January 2018	CLAIMANT made the shipment and paid a 30 % tariff.
12 February 2018	RESPONDENT terminated negotiations on adaptation of the Contract.
31 July 2018	CLAIMANT initiated these arbitral proceedings asking the Arbitral Tribunal for adaptation of the Contract.
2 October 2018	CLAIMANT informed the Tribunal that RESPONDENT was involved in another arbitration under HKIAC Rules, where he was asking for adaptation of the Contract for sale of mare due to the tariffs imposed in Mediterraneo.
3 October 2018	RESPONDENT objected to the CLAIMANT's information, stating that it was inadmissible in the present proceedings.

SUMMARY OF ARGUMENTS

ISSUE A. First, the Arbitral Tribunal can decide on the issue of adaptation of the Contract, since it has the power to adapt the Contract under the *lex arbitri* and can enjoy this power without Parties' express authorization. Second, interpreted under the CISG, the Arbitration Clause clearly indicates the Parties' subjective intention to empower the Arbitral Tribunal, and a reasonable person considering all circumstances of the case would not conclude otherwise. Alternatively, interpreted under the "pro-arbitration" interpretive rule, the Arbitration Clause definitely covers the contract adaptation. In any event, the Arbitral Tribunal has jurisdiction over the dispute, as the present case regards the issue of supplementary contract interpretation and the Parties agreed to submit this issue to the Arbitral Tribunal.

ISSUE B. First of all, the evidence from the other arbitration is admissible since both HKIAC Rules and *lex arbitri* do not provide for express restrictions on admissibility of evidence obtained in breach of confidentiality or by illegal hack. Then, there are no impediments to admission of the evidence, because actions of CLAIMANT do not constitute breach of confidentiality. Moreover, it was not proved that CLAIMANT committed illegal hack or ordered the third party to do so. In any event, the evidence is admissible in order to guarantee the integrity of arbitral proceedings, since the evidence is relevant and material to the outcome of the case and reveals bad faith and inconsistent conduct of RESPONDENT. Finally, UNCITRAL Transparency Rules guide the Arbitral Tribunal to admit the evidence.

ISSUE C. CLAIMANT is entitled to increase of the purchase price of at least US$ 1,250,000 due to the higher costs following the imposition of the new tariffs. *First,* the Parties agreed that the contract would be adapted in case of change of customs' tariffs, which comes from interpretation of both Art. 12 of the Contract and the conduct of the Parties. *Second*, the applicable law provides for adaptation of the Contract due to the imposition of tariffs, since the latter constitutes hardship under the Art. 79 CISG. Imposition of tariffs constitutes hardship because it was impossible to foresee and avoid the imposition of tariffs. Moreover, the hardship is evidenced by the fact that as a result of tariffs imposition the contractual equilibrium was drastically changed (the price of the CLAIMANT's performance has increased and the price it received has diminished). The remedy of adaptation in case of hardship derives from the general principles underlying the CISG. Moreover, applicable Mediterranean law provides for adaptation in case of hardship. Thus, CLAIMANT is entitled to ask for adaptation of the Contract under the applicable law.

JURISDICTION OF THE ARBITRAL TRIBUNAL AND APPLICABLE LAW

1. According to the avowed principle of Kompetenz-Kompetenz, an arbitral tribunal, as an initial matter, has the authority to determine its own jurisdiction [*Reisman/Craig/Park/Paulsson, p. 646*]. The seat of arbitration, Danubia, has adopted the UNCITRAL Model Law with the 2006 amendments (*lex arbitri*) [*PO1, §4*] and the UNCITRAL Model Law, therefore, governs the arbitration. In Art. 7 Danubian Arbitration Law provides that to be valid parties' arbitration agreement shall be in writing and in the form a separate agreement or, like in our case, an arbitration clause incorporated to a contract.
2. In May 2017, the Parties concluded the Contract [*NoA, §5*], which included an Arbitration Clause giving the Arbitral Tribunal the power to settle the disputes arising out of the Contract [*Exhibit C5, §15*]. The law of Mediterraneo, governing the Contract, equally applies to the Arbitration Clause and its interpretation [*MfC, §§14–29*]. Neither of the Parties questions the jurisdiction of the Arbitral Tribunal in general [*PO2, §48*]. The HKIAC Arbitration Rules [*Exhibit C5*], in conjunction with the UNCITRAL Model Law [*PO1, §4*], govern the procedure in present arbitration.

CLAIMANT'S ARGUMENTS

ISSUE A. THE ARBITRAL TRIBUNAL CAN DECIDE ON THE ISSUE OF ADAPTATION OF THE CONTRACT

3. The arbitral tribunal's jurisdiction is the power to resolve a dispute which the parties agreed to submit to it [*Fouchard/Gaillard/Goldman, §648, p. 394*]. Arbitrator's jurisdiction is derived from the arbitration agreement — and the arbitration agreement, in turn, can confer only those powers that are permitted by *lex arbitri* [*Redfern/Hunter, §5.110, p. 342*].
4. *Lex arbitri* empowers the Arbitral Tribunal to adapt the Contract [**I**]. The Arbitral Tribunal has jurisdiction to adapt the Contract, as the Arbitration Clause covers the issue of adaptation [**II**]. Alternatively, the Arbitral Tribunal can decide on the issue as CLAIMANT in fact asks for contract interpretation [**III**].

I. DANUBIAN LAW ALLOWS THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

5. Arbitral tribunals, resolving disputes regarding the power to adapt a contract, usually do not consider the applicable procedural law and just rely on the contractual provisions [*Ferrario, p. 170; Briner, p. 370; Atlantic case; ICC 10351*]. However, contrary to RESPONDENT's potential

allegations, CLAIMANT will demonstrate that the Arbitral Tribunal is procedurally authorized to decide on the contract adaptation [**1**], and it can enjoy the power to adapt the Contract without the Parties' express authorization [**2**].

1. *Lex arbitri* recognizes the power of the Arbitral Tribunal to adapt the Contract

6. The UNCITRAL Model Law does not expressly provide the power of arbitrators to adapt a contract. However, its *travaux préparatoires* supports the idea that there is a need for contract adaptation in arbitration [*A/CN.9/233, §16, p. 5*]. The Secretariat at 14th session suggested inclusion of express empowerment of arbitrators to undertake "filling of gaps" in contracts [*A/CN.9/207, §57, p. 84*], and there was considerable support within the working group for spelling out this power [*A/CN.9/245, §19, p. 6*].
7. Despite the fact that such provision was not included into the UNCITRAL Model Law, a number of jurisdictions, which adopted the UNCITRAL Model Law, recognize the power of arbitrators to adapt contracts, when the courts of this jurisdiction are empowered to do so or when the substantial law provides instruments for contract revision [*Berger II, p. 10–11; Brunner, p. 494*]. Particularly, this is true for Egypt, Hungary, Germany and Austria [*Beisteiner, p. 83; Bernardini, p. 214*].
8. The Danubian Contract Law states that "the court may adapt the contract" [*UNIDROIT, Art. 6.2.3(4(b)); PO2, §45*], and the reference to the "court" here also includes arbitral tribunals [*UNIDROIT, Art. 1.11*]. Thus, the arbitrators in principle may adapt contracts under Danubian law [*ANoA, §13; PO2, §36*].
9. Accordingly, the Arbitral Tribunal is procedurally authorized for contract adaptation.

2. The Arbitral Tribunal is empowered to adapt the Contract in the absence of an express authorization by the Parties

10. RESPONDENT may allege that the Arbitral Tribunal can adapt the Contract only if it is explicitly authorized by the Parties, because Art. 28(3) of the UNCITRAL Model Law contains a general standard requiring the express authorization to decide cases *ex aequo et bono*. However, this provision does not apply by analogy to the arbitral tribunal's power to adapt the contract [*Methania case, §aaa*]. Instead, absent a provision dealing with the power to adapt in arbitration law the arbitral tribunal should pay attention to general contract law of *lex arbitri* [*Ibid*], since it usually provides for the power to adapt a contract even if it has a procedural nature [*Ferrario, p. 76*]. In case when the applicable law does not require express authorization, it would be the issue of contract interpretation [*Fouchard/Gaillard/Goldman, §41, p. 28; A/CN.9/263, §15, p.*

58].

11. Danubian Arbitration Law (*lex arbitri*) does not contain specific provisions prohibiting arbitral tribunals to adapt contracts without express consent of the parties. Danubian Contract Law, in turn, grants arbitral tribunals the power to adapt only "if authorized", and "there is no consistent case law as to the meaning of that addition" [*PO2, §45*]. Given that the Danubian Contract Law does not contain requirement for express authorization, the authorization can be found in the Parties' intention.
12. Therefore, under Danubian law the Arbitral Tribunal is empowered to adapt the Contract if the Parties' agreement is interpreted as authorizing the Arbitral Tribunal to do so.

II. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO ADAPT THE CONTRACT DERIVED FROM THE ARBITRATION CLAUSE

13. The Arbitration Clause is governed by the law of Mediterraneo [**1**]. Interpreted under the law of Mediterraneo, the Arbitration Clause confers the power to adapt the Contract on the Arbitral Tribunal [**2**]. Alternatively, interpreted under the "pro-arbitration" interpretive rule, irrespective of any national law, the Arbitration Clause still covers adaptation of the Contract [**3**].

1. The Arbitration Clause is governed by the law of Mediterraneo

14. In the absence of the Parties' express choice of the law governing the Arbitration Clause, the law of Mediterraneo should be applied, as it was chosen by the Parties impliedly [**a**], or, alternatively, as it has the closest and most real connection to the Arbitration Clause [**b**].

a) The Parties impliedly chose the law of Mediterraneo to govern the Arbitration Clause

15. Interpretation of statements made by the parties leading to the formation of the contract, including choice-of-law clauses and arbitration clauses, is governed by the CISG [*Schlechtriem/Schwenzer, Art. 8, §§1, 5; B.V.B.A. Vergo Kwekerijen v. Defendant; Tissue machine case*].
16. Interpreted under the CISG, communication of the Parties clearly reveals the choice of the law governing the Contract to govern the Arbitration Clause [**i**]. RESPONDENT may allege that it had the intention to apply the law of Danubia to the Arbitration Clause. However, CLAIMANT did not know about this intention and could not have been aware of it [**ii**].

(i) CLAIMANT had the intention to subject the Arbitration Clause to the law of Mediterraneo and RESPONDENT knew it

17. Under Art. 8(1) CISG, "statements made by [...] a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was". In determining the intent, due consideration is to be given to all relevant circumstances of the case [*CISG, Art. 8(3)*]. These circumstances must demonstrate the parties' choice of law governing the arbitration agreement with reasonable certainty [*Lew/Mistelis/Kröll, §17-13, p. 415; Czernich, p. 80*].
18. According to the circumstances of the present case, CLAIMANT included a choice-of-law clause in favour of Mediterranean law in the first draft of the Contract [*NoA, §7*]. In the second round of negotiations RESPONDENT included the choice-of-law clause in favour of the law of Equatoriana into the Arbitration Clause, however, CLAIMANT deleted it and clearly stipulated that "[the] offer is naturally on the condition that the law applicable to the Sales Agreement *remains* the law of Mediterraneo" (emphasis added) [*Exhibit R2*].
19. Moreover, CLAIMANT told RESPONDENT that it has "an internal policy according to which consent to a contract submitted to a foreign law requires special approval by the creditor's committee" [*Exhibit R2*]. However, CLAIMANT did not seek approval for the consent to the Arbitration Clause [*PO2, §14*] and, thus, CLAIMANT never intended to submit the Arbitration Clause to the law other than the Mediterranean.
20. RESPONDENT was told about the CLAIMANT's intent [*Exhibit R2*] and after that never raised a question of the law applicable to the Arbitration Clause. Mr. Krone who took over the negotiations after the car accident had access to the prior emails chain [*PO2, §5*], "used the pre-existing file and made the necessary changes and additions to clauses 6–15 to reflect [an agreement]" [*PO2, §4*]. No "necessary changes" to the Arbitration Clause were obviously required.
21. In such a situation, CLAIMANT's intent to subject the Arbitration Clause to the law selected in the Contract is binding for RESPONDENT as the latter knew what the intent was.

(ii) CLAIMANT was not aware or could not have been aware of the RESPONDENT's intent to subject the Arbitration Clause to the law of Danubia

22. Even if RESPONDENT held an intention to choose the law of Danubia as applicable to the Arbitration Clause, this intention does not bind the Parties unless CLAIMANT was aware or could not have been unaware of it [*CISG, Art. 8(1)*]. A party cannot be aware of an

unexpressed intention [*Textiles case*].

23. The only communication regarding the law applicable to the Arbitration Clause RESPONDENT made was that "the law of [the Arbitration Clause] shall be the law of Equatoriana" in conjunction with the seat of arbitration in Equatoriana [*ANoA, ∫5; Exhibit R1*]. As RESPONDENT has never explicitly stated its intention to subject the Arbitration Clause to the law of Danubia [*Exhibit C3; Exhibit R1*], CLAIMANT could not have been aware of such intention. RESPONDENT's statements were not indicative in this regard.
24. Further, it cannot be said that CLAIMANT should have known RESPONDENT's intention. The standard for constructive knowledge under Art. 8(1) CISG is gross negligence [*Schlechtriem/Schwenzer, Art. 8, ∫17*]. CLAIMANT's lack of knowledge was not grossly negligent because RESPONDENT never communicated its purported intention [*Exhibit C3; Exhibit R1*].
25. Therefore, the Parties did not hold the intention to subject the Arbitration Clause to the law of Danubia.

b) The law of Mediterraneo has the closest and most real connection to the Arbitration Clause

26. While determining the law applicable to the arbitration agreement, arbitral tribunals and courts in a number of jurisdictions employed the "closest connection" criteria [*see, for example, BCY v. BCZ; ICC 4367; ICC 6719; Sulamerica case*]. One of the factors that is used to determine this "closest connection" is the parties' choice of law governing the main contract [*Born, p. 517*].
27. The purpose of the choice-of-law clause is to fix the law for the whole contract [*Berger III, p. 318–319*]. Thus, in case it was included in the contract there is a strong tendency to regard this choice of the law as equally applicable to the arbitration clause unless there is an evident agreement to the contrary [*Lew, p. 143; Dicey/Morris/Collins, ∫16-017; ICC 2626; ICC 6379; ICC 6840; Sonatrach v. Ferrell, ∫32; NTPC v. Singer, ∫8*]. Contrary to RESPONDENT, the mere selection of the seat of arbitration is no longer considered to be evidence of the choice of law [*Waincymer, p. 991; Bantekas, p. 8*].
28. The Parties have chosen "the law of Mediterraneo, including the CISG" to govern "the Sales Agreement" [*Exhibit C5, ∫14*] and did not agree that the Arbitration Clause is governed by any other law. Although the HKIAC Model Clause contains an explicit reference to the law governing the arbitration agreement [*Guide to HKIAC Rules, ∫4.21, p. 48*], the Parties did not articulate a separate choice-of-law clause in the final version of the Arbitration Clause.
29. Therefore, the law of Mediterraneo governing the Contract has the most real and closest

connection to the Arbitration Clause and should equally apply to it.

2. The Arbitration Clause authorizes the Arbitral Tribunal to adapt the Contract under the law of Mediterraneo

30. The interpretation of arbitration agreements is governed by the law applicable to the arbitration agreement [*Redfern/Hunter, §3.12; Dicey/Morris/Collins, §16R-001; Fouchard/Gaillard/Goldman, §475, p. 255*]. When the law governing the main contract also governs the arbitration agreement, CISG is generally applicable to the interpretation of arbitration clauses [*Schwenzer/Jaeger, p. 324–325*]. This is especially true for Mediterranean law, where "there is consistent jurisprudence that in sales contracts governed by the CISG, the latter also applies to the conclusion and interpretation of arbitration clauses" [*PO1, §4*].
31. Interpreted under Art. 8 CISG, the Arbitration Clause authorizes the Arbitral Tribunal to adapt the Contract since there is intention of the Parties [**a**]. If the Arbitral Tribunal decides that the common intention of the Parties cannot be established, a reasonable person considering all the circumstances would conclude that the Parties empowered arbitrators to adapt the Contract [**b**].

a) The Parties intended to authorize the Arbitral Tribunal to adapt the Contract

32. In case of doubts regarding the scope of the arbitration agreement the answer will depend upon the approach adopted by the applicable law [*Bernardini II, p. 198*]. Arbitration law of Mediterraneo provides for a liberal approach and "broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording" [*NoA, §16*].
33. The Arbitration Clause states that "any dispute arising out of this contract […] shall be referred to and finally resolved by arbitration". Under the liberal approach, the term "dispute" is to be understood broadly, including also "differences of opinion" or "a disagreement on a point of law or fact" [*David, p. 409; Brunner, p. 496; English Arbitration Act, Art. 82(1); Mavrommatis Concessions case*]. This understanding supports the power of arbitral tribunals to adapt the contract [*Brunner, p. 496; Ferrario, p. 146*], even in situations when the arbitrators are called upon to undertake the adjustment at the request of one of the parties [*Berger, p. 1373*].
34. Moreover, while interpreting the contract due consideration is to be given to the negotiations between the parties [*CISG, Art. 8(3)*]. In the present case, during the negotiations Ms. Napravnik on behalf of CLAIMANT said to RESPONDENT's negotiator Mr. Antley that "for us it was important to have a mechanism in place which would ensure an adaptation of the Contract" [*Exhibit C8, p. 17*]. Mr. Antley, in turn, expressly stated that "it should be

probably the task of the arbitrators to adapt the Contract if the Parties could not agree" [*Ibid*].

35. Therefore, the Parties intended to refer contract adaptation issues to the Arbitral Tribunal.

b) A reasonable person in RESPONDENT's place would conclude that the Parties empowered the Arbitral Tribunal to adapt the Contract

36. If no subjective intention can be established, the arbitral tribunal employs the hypothetical understanding of a reasonable person of the same kind as the other party in the same external circumstances [*CISG, Art. 8(2); Schlechtriem/Schwenzer, Art. 8, §20; Farnsworth, §2.4*]. In the case at hand, a reasonable person, considering inclusion of the adaptation clause in the Contract [**i**] and choice of the substantive law providing the Parties with the adaptation instruments [**ii**], would conclude that the Arbitration Clause also covers contract adaptation.

(i) Inclusion of the adaptation clause indicates the Parties' desire to enforce this instrument in arbitration

37. CISG demands the interpretation of the contract as a whole [*Schlechtriem/Schwenzer, Art. 8, §30*]. A party agreement on contract adaptation by arbitrators may be derived from the significance and purpose of the contract [*A/CN.9/263, §15, p. 56*]. Specifically, arbitration clause may be interpreted as covering the adaptation of contracts if the clause is contained in a long-term contract that contains "provisions which may require adjustment over the period of that contract" [*ICC 5754*].

38. Having concluded the Contract, both Parties wanted to enter "into a long-term mutually beneficial relationship" [*Exhibit C2*], "going clearly beyond this single purchase" [*Exhibit C3*]. That is why, the Parties thoroughly discussed the terms of the Contract [*for illustration see Exhibit C3*]. Particularly, after long discussion the Parties included Hardship Clause into the Contract [*Exhibit C5, §12*] and treated it as "an adaptation clause" [*NoA, §19*]. Agreed Hardship Clause provides for an adaptation under the applicable substantive law [*MfC, §§92–93, 118*].

39. Therefore, a reasonable person would expect that the instrument for contract revision included in the Contract will be enforced in arbitration.

(ii) Choice of law providing Parties with the adaptation instruments indicates the desire to enforce them in arbitration

40. Contract revision will be within the scope of the arbitration agreement, if a contract includes a choice-of-law clause in favour of an adaptation-friendly jurisdiction and an arbitration clause [*Beinsteiner, p. 111*]. In such situation there will be no reason for arbitrators not to enforce the

provisions of the selected law regarding the adaptation of contracts [*Ibid*]. In practice, to determine the basis of the power to adapt, arbitrators focus more on the law applicable to the substance [*Briner, p. 370–371; Berger II, p. 12; ICC 2508*].

41. The Parties agreed that "the Sales Agreement shall be governed by the law of Mediterraneo, including the CISG" [*Exhibit C5, §14*]. Both CISG and Mediterranean Contract Law provide an instrument for contract adaptation [*MfC, §§121, 158–182*].

42. Therefore, a reasonable person, considering that the agreed applicable law provides the instruments for contract revision, would conclude that the Arbitration Clause covers the issue of contract adaptation.

3. Alternatively, the Arbitration Clause covers the contract adaptation under the "pro-arbitration" interpretive rule, irrespective of applicable national law

43. A substantial number of jurisdictions adopted a "pro-arbitration" rule of construction of arbitration agreements, including both common and civil law countries as well as all UNCITRAL Model Law jurisdictions [*see, for example, Mitsubishi Motors case; Belcourt v. Grivel; Swiss Federal Tribunal 2011; Appellate Court Hamburg 1989; Walter Rau Neusser v. Cross Pac. Trad.; Tjong v. Antig, §24; ICC 14046*]. This rule requires that arbitration agreements, even those narrowly worded, be interpreted so as to resolve any doubts in favour of arbitration [*Born, p. 1326*]. The general and increasing international acceptance of the rule renders it applicable regardless of any national substantive laws [*Ibid, p. 1399*].

44. CLAIMANT asks the Arbitral Tribunal to apply this rule, irrespective of any national law, and interpret the Arbitration Clause in favour of arbitration. Considering that adaptation is the very essence of the present dispute and the Parties included the Arbitration Clause in the Contract providing for the price revision and agreed that adaptation should be the task of arbitrators [*MfC, §§33–34, 38, 41*], the Arbitration Clause definitely covers the issue of contract adaptation.

III. IN ANY EVENT, THE ARBITRAL TRIBUNAL HAS JURISDICTION AS CONTRACT ADAPTATION IS MERELY A SUPPLEMENTARY INTERPRETATION OF THE CONTRACT

45. Arbitrators can adapt and supplement a contract by clarifying and interpreting its "open terms" [*Al Faruque, p. 154; Wolfgang, p. 254*]. If situations arise which have not been contractually regulated by the parties, lacunae in the contract may be closed on the basis of the "hypothetical intent of the parties" [*Koziol/Welser, p. 108*]. Thus, supplementary contract interpretation will

be not a creative act, but merely the adjudication of pre-existing rights [*Beisteiner, p. 80*]. The arbitrators generally enjoy the power to interpret the contract, including by means of supplementary interpretation [*Ibid, p. 111*].

46. In the present case, CLAIMANT seeks performance based on the "interpreted" Contract. The case arose out of the additional tariffs imposed by the Equatorianian government [*NoA, §10*]. The Parties did not expressly regulate the price revision in case of changes in custom regulations [*Exhibit C5, §12*]. However, the interpretation of the Parties' hypothetical intent clearly indicates that they agreed on the price change [*MfC, §98–112*].
47. The Parties expressly agreed that "the interpretation of the Contract [...] shall be referred to and finally resolved by arbitration" [*Exhibit C5*]. RESPONDENT does not object to the Tribunal's jurisdiction on contract interpretation [*PO2, §48*].
48. Therefore, the Arbitral Tribunal has jurisdiction, as the present dispute regards the issue of contract interpretation and is covered by the Arbitration Clause.

ISSUE B. THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS IS ADMISSIBLE

49. Evidence from another arbitration proceedings is admissible given that there is no express prohibition of its admissibility in the law governing the procedure [**I**]. Further, the evidence shall be admitted, since there was no breach of confidentiality agreement or illegal hack on the part of CLAIMANT [**II**]. In any event, the evidence should be admitted as it is important to ensure the integrity of the proceedings [**III**].

I. THE EVIDENCE IS ADMISIBLE IN THE ABSENCE OF EXPRESS PROHIBITION OF ITS ADMISSIBILITY IN THE RULES GOVERNING THE PROCEDURE

50. The evidence from the other arbitration proceedings is admissible regardless of its origin as there is no binding rule to the contrary either in HKIAC Rules [**1**], or *lex arbitri* [**2**].

1. The evidence is admissible pursuant to HKIAC Rules

51. In accordance with Art. 22 of the HKIAC Rules, "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence".
52. In line with the generally recognized approach all relevant evidence is admissible in arbitration, unless otherwise provided by mandatory rules, or by agreement of the parties

[*Lew/Mistelis/Kröll, p. 561*; *Pilkov, p. 148*]. In order to guarantee a full and fair opportunity to present the case the tribunal will admit all the evidence so that any possible impediments to admissibility will be reflected in weight of such evidence [*Sussman, p. 521; Sussman I, p. 3*]

53. In the present case, the Parties did not specify any restrictions or limitations regarding the admissibility of evidence in the Arbitration Clause or in any other way. HKIAC Rules also do not set out prohibitions on submission of particular types of evidence or the circumstances in which such evidence was obtained. Therefore, in absence of any specific restrictions, stipulated either in HKIAC Rules or by the Parties with regard to the admissibility of evidence, the present evidence shall be admitted by the Arbitral Tribunal.

2. The evidence is admissible under *lex arbitri*

54. Whether evidence is admissible or not, is also determined by *lex arbitri* [*Ashford, p. 36*]. It should be considered since institutional rules only substitute *lex arbitri* and "have the effect of displacing the default provisions in the applicable law, to the extent that the law and rules are inconsistent and in so far as the law is not of mandatory application" [*Henderson, p. 888*].

55. Since Danubian law does not contain applicable prohibitions on admissibility [**a**] and practice of common law countries supports admissibility of evidence regardless its origin [**b**], the evidence in the case at hand is admissible.

a) *Lex arbitri* does not contain restrictions on admissibility

56. Art. 19(2) of the UNCITRAL Model Law provides: "[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." As follows from the wording of Art. 19(2), the UNCITRAL Model Law embraces broad admissibility requirements [*Ortiz, p. 2*].

57. Thus, given that *lex arbitri* does not contain any prohibition on the admissibility of evidence in case of breach of confidentiality or illegal hack, the evidence shall be admitted in the present case.

b) Practice of common law countries supports admissibility of evidence regardless of its origin

58. In accordance with widely recognized approach in common law countries relevant and material evidence shall be admitted even if it was obtained by somehow unlawful means.

59. In the UK a judge has no discretion to exclude evidence obtained illegally or unfairly [*Saleh, p. 145*]. In the landmark case *Helliwell v. Piggott-Sims* it was also noted that "so far as civil cases are

concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning" [*Helliwell v. Piggott-Sims*]. The view supported in the USA is that "the court would not interrupt the progress of a trial to consider the collateral issue of the illegality of the means by which the evidence was obtained" [*Shepherd, p. 156*].

60. Since Danubia is a common law jurisdiction as well [*PO2, §44*], in line with the general principles of admissibility in such countries, the evidence shall be admitted.

II. THE EVIDENCE IS ADMISSIBLE SINCE THERE WAS NO BREACH OF CONFIDENTIALITY OR ILLEGAL HACK ON THE PART OF CLAIMANT

61. Since actions of CLAIMANT do not form the breach of confidentiality agreement [**1**] and it was not shown that CLAIMANT committed computer hack [**2**], there are no impediments to the admission of evidence.

1. Actions of CLAIMANT do not constitute the breach of confidentiality agreement

62. For a breach of confidentiality covering any item of information to occur, a breaching party should be bound by such confidentiality in the first place, e.g. by an agreement. In particular, in the landmark case *Coco v A. N. Clark* Judge Megarry J identified three elements that should be proved in the case of breach of confidentiality: "the information itself…must have the necessary quality of confidentiality about it" [**a**]. Secondly, that information must have been imparted in circumstances importing an obligation of confidentiality [**b**]. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it [**c**] [*Coco v. A. N. Clark*].

a) The evidence does not constitute confidential information

63. The disclosed information should be confidential in its nature in order for a breach of confidentiality to occur. RESPONDENT may argue that Art. 45(1) of HKIAC Rules provides that the arbitration under the arbitration agreement and an award made in the arbitration is considered confidential [*Record, p. 50–51*]. Nevertheless, in case at hand, the evidence from the other arbitration does not essentially consist of confidential information.

64. First, disclosure of awards, especially interim awards, is permissible, since they only set out the request of the party and the decision of the tribunal. In *Hassbeh case* it was found that "an award should be disclosed to a third party against whom a party in the arbitration was litigating on related matters, as the arbitration award would explain how it was that liability was asserted

against that third party" [*Hassheh case*]. As reasoned in *Trade Finance Inc. v. Bulbank,* "information touching on the operations of the parties […] may normally be regarded as more worthy of protection than information that an arbitration between the parties is in progress or information that concerns purely procedural issues of a general nature" [*Trade Finance Inc. v. Bulbank*].

65. What is more, "information that is already in the public domain cannot be rendered confidential by arbitration" [*Japaridze, p. 1420*]. Equally, it is recognized in case law that evidence obtained by unlawful means is admissible when information forming such evidence had been already made public [*Caratube v. the Republic of Kazakhstan*].
66. Finally, as follows from Art. 45(3)(a)(i) of HKIAC Rules, an award may be disclosed if it is necessary for protection of rights and interests of the party.
67. In the present proceeding, the evidence consists of Partial Interim Award, which itself does not contain any sensitive commercial information, deserving special protection, but only defines the request of RESPONDENT [*PO2, §42*]. The same refers to the statement of claim of RESPONDENT. That should be clearly distinguished from other information in arbitration, such as privileged documents.
68. Secondly, the claim of RESPONDENT was also based on the publicly available information — tariffs imposed by the President of Mediterraneo [*PO2, §39*]. By disclosure of the evidence in the present proceedings, CLAIMANT will not get access to any information that was unknown to him before.
69. Thirdly, in the case at hand, RESPONDENT from the other arbitration agreed to join the proceedings [*Record, p. 50*], since the outcome of the present dispute may influence the decision of the tribunal in that arbitration. Therefore, such disclosure of evidence falls within the exclusion stipulated in Art. 45(3)(a)(i) of HKIAC Rules.
70. Finally, RESPONDENT by his conduct showed that he was not interested in protection of such information. Instantly it was voluntarily disclosed by a disinterested person — the former employee of RESPONDENT`s buyer — Mr. Kieron Velazquez, with whom RESPONDENT did not sign the separate confidentiality agreement. Mr. Kieron Velasquez was also the person who first promised to obtain the Partial Interim Award and then suggested the company that can provide CLAIMANT with such materials [*PO2, §42*]. Moreover, information was not protected by any special technical means — RESPONDENT had used an outdated firewall to protect is computer system which had made it easy for the hackers to enter the system [*PO2, §42*].
71. Since in fact the evidence does not contain any inherently confidential information, there is

no impediment to admission of the latter.

b) CLAIMANT did not have the obligation to maintain confidentiality of other proceedings

72. Violation of confidentiality agreement cannot occur if there is no such contractual obligation of the breaching party. It is widely recognized in doctrine that "no blanket requirement of confidentiality can […] exist in international commercial arbitration and that such requirement is not implied or clearly mandated by any law or principle" [*Japaridze, p. 1420*]. Moreover, "it is generally accepted that third parties are not bound by any duty of confidentiality, absent specific contractual arrangements" [*Brown, p. 969, 973*].
73. Art. 42(1) of HKIAC Rules provides that unless otherwise agreed by the parties, *no party* (emphasis added) may publish, disclose or communicate any information relating to either the arbitration under the arbitration agreement(s) or an award made in the arbitration. Confidentiality obligation, as follows from Art. 42(1) and 42(2) of HKIAC rules is imposed on the parties, arbitral tribunal, any Emergency Arbitrator, expert, witness, secretary of the arbitral tribunal and HKIAC.
74. Therefore, bearing in mind the agreement-based nature of international arbitration [*Born, p. 2*] and, thus, narrow range of subjects having the obligation to maintain confidentiality, a third party cannot obviously commit a breach of any confidentiality agreement to which it is not a signatory.
75. Confidentiality agreements between ex-employees and RESPONDENT [*Record, p. 51*] also do not impose any obligations on CLAIMANT. CLAIMANT was not a party to the previous arbitration or to any other confidentiality agreement, therefore CLAIMANT could not breach the confidentiality obligation.

c) There were no willful actions of CLAIMANT constituting breach of confidentiality agreement

76. CLAIMANT could not have breached the confidentiality agreement, as there was no intention to obtain the information unlawfully.
77. There are no grounds to state that CLAIMANT obtained evidence in breach of confidentiality agreement since there is no information whether the company that promised to provide CLAIMANT with the evidence committed computer hack or contacted one of the former employees of RESPONDENT [*PO2, §41*]. CLAIMANT did not order obtaining the evidence by any unlawful means, and neither he approached the employees of RESPONDENT. What

is more, since the evidence appeared to be non-confidential in its nature because of the reasons stated above [*MfC, §§63–71*], CLAIMANT could not even anticipate that obtaining of such information can be made by improper means and in breach of confidentiality. Moreover, there are no facts showing that CLAIMANT could have known about confidentiality agreement with ex-employees of RESPONDENT.

78. Since there are no elements forming the breach of confidentiality obligation by CLAIMANT, the evidence is admissible.

2. It was not shown that CLAIMANT committed illegal hack to get the evidence

79. CLAIMANT strongly objects that the evidence shall be excluded "irrespective of whether or not CLAIMANT had any involvement in obtaining the document or whether they have been made available elsewhere in the worldwide web" [*Record, p. 51*].

80. The evidence may be considered inadmissible in case of illegal hack only if such wrongful actions were undertaken by CLAIMANT itself as it was reasoned in landmark cases such as *Methanex v. USA*, *Libananco Holdings v Turkey*. In both cases the party relied on evidence obtained either through court-ordered intercepts in favor of such party or illegal investigation conducted by such party [*Methanex v. USA; Libananco Holdings v. Turkey*].

81. Oppositely, as it is widely recognized in doctrine [*Blair/Gojkovic, p. 256*] and case law, when the evidence was initially obtained by illegal actions of third parties or made public prior to the submission of evidence, it is admissible. For example, in *Caratube v. the Republic of Kazakhstan* the tribunal admitted the evidence consisting of WikiLeaks files initially protected by privilege, since such documents were not obtained by party itself but were publicly available [*Caratube v. the Republic of Kazakhstan*].

82. In the case at hand, it was not proved that the evidence was obtained by direct illegal actions of CLAIMANT, or even that CLAIMANT requested the evidence to be obtained by illegal hack [*MfC, §77*], therefore, the evidence is admissible.

III. IN ANY EVENT, THE EVIDENCE SHOULD BE ADMITTED AS IT IS IMPORTANT TO ENSURE THE INTEGRITY OF THE PROCEEDINGS

83. In any event, the evidence shall be admitted in order to guarantee the integrity of the proceedings since it is relevant and material to the outcome of the case [**1**] and reveals bad faith conduct of RESPONDENT [**2**]. What is more, the Arbitral Tribunal should admit the evidence as the UNCITRAL Transparency Rules guide so [**3**].

1. The evidence is admissible since it is relevant and material

84. As it was noted by prominent researchers, "evidence produced through an illegal search or seizure is nevertheless admissible in evidence if relevant" [*Cowen/Carter, p. 82*]. In *Ali Shipping Corp. v. Shipyard Trogir* the English Court of Appeal as well came to the conclusion that this "broad rule of confidentiality — prohibiting use of arbitral materials "outside the four walls of the arbitration" — could be qualified for the protection […] of the interests of justice" [*Ali Shipping Corp. v. Shipyard Trogir*].

85. The evidence is relevant and material to the outcome of the case since it reveals the contradictory behavior of RESPONDENT. In the other proceeding RESPONDENT requested for adaptation of contract price resulting from imposition of tariffs by the government of Mediterraneo on the basis of hardship clause and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles) [*PO2, ∫39*]. Oppositely, in the present dispute RESPONDENT objects to price adaptation on the basis of Hardship Clause stating that "RESPONDENT would have never entered into such a Contract the financial dimension of which would be dependent on the discretion of the arbitrators" [*ANoA, ∫19*]. This interferes with objections of RESPONDENT that the latter did not have the intent to include the Hardship Clause in order to provide for the price adaptation mechanism.

2. The evidence is admissible because it reveals bad faith conduct of RESPONDENT

86. In accordance with Art. 9(3)(e) of IBA Rules on the Taking of Evidence, in considering issues of legal impediment or privilege under Art. 9(2)(b), the Arbitral Tribunal may take into account the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules. Because arbitration agreements are a type of contract, good faith requires that parties undertake the "obligation to act with fairness, reasonableness, and decency in the formation and performance" [*Kotuby/Sobota, p. 91*] of agreements to arbitrate disputes.

87. In the present case, good faith obligation was obviously breached by RESPONDENT by taking completely different positions in analogous proceedings only and trying to hide this information from any observation, especially, in light of the fact that RESPONDENT is represented by the same counsel [*PO2, ∫38*]. What is more, fairness and equality between the Parties is infringed because RESPONDENT gets undue advantage by taking different sides in almost the same proceedings. By doing so, RESPONDENT in other proceedings can use the arguments presented by CLAIMANT in the dispute at hand.

88. Thus, given that evidence proves the bad faith and contradictory conduct of RESPONDENT and influences the outcome of the case, the evidence is admissible. Otherwise, application of strict rules of evidence may lead to use of arbitration proceedings "as safe havens in which to hide evidence that might be helpful or necessary for litigants and courts" [*Reuben, p. 1257*].

3. UNCITRAL Transparency Rules guide the Arbitral Tribunal to admit the evidence

89. Though UNCITRAL Transparency Rules commonly apply to investor-state arbitration, "the need for predictability in international commercial arbitration will naturally lead parties toward greater transparency, because transparency is integral to the rule of law" [*Rogers, p. 1320*]. Equally, "[t]he duty of confidentiality should not be an absolute one; it must be nuanced and allow for important exceptions" [*Poorooye/Feehily, p. 311*]. Limited publication of awards is one of the most important exceptions from confidentiality in order to guarantee the consistency and efficiency of the proceedings [*Ibid, p. 313; Fabian, p. 11*]
90. Therefore, the widespread tendency of transparency in arbitration should be considered when deciding on admissibility of the evidence.

ISSUE C. CLAIMANT IS ENTITLED TO PAYMENT OF US$ 1,250,000 FROM ADAPTATION OF CONTRACT

91. CLAIMANT argues that it is entitled to an increase of the purchase price of at least 25 % [US$ 1,250,000] due to the higher costs following the imposition of the new tariffs [*NoA, §18*]. In this case adaptation of price is possible as the Parties themselves agreed on adaptation of the Contract in case of changes in tariffs regulation [**I**]. Even if the Arbitral Tribunal finds that Parties failed to agree on the adaptation clause, the Contract should be adapted under the applicable law, which provides for the adaptation due to the imposition of tariffs [**II**].

I. THE PARTIES AGREED THAT THE CONTRACT WOULD BE ADAPTED IN CASE OF CHANGE OF CUSTOMS' TARIFFS

92. Under Art. 12 of the Contract, "seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third-party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the Contract more onerous" [*Exhibit C5, §12*].
93. Based on this wording, CLAIMANT argues that Art. 12 of the Contract is an "adaptation

clause", which entails increase of contract price in case of any "change of the delivery terms", including "additional tariffs" [*NoA, §19*]. Although price adjustment or hardship clause can be included even if it is unnecessary as all the criteria to adapt the price are met, [*Scaforn International BV & Orion Metal BVBA v. Exma CPI SA*] the Parties still included such a clause into the Contract.

94. However, RESPONDENT believes that Art. 12 of the Contract "does not provide for the requested remedy" of adaptation and does not cover the "present impediment" of changed tariffs [*NoA, §19*].

95. RESPONDENT's position is ill-founded as interpretation of the Contract under Art. 8 CISG confirms the Parties' agreement to adapt the Contract in case of changed customs tariffs [**1**]. In any case, RESPONDENT is estopped from referring to the lack of agreement due to its contradictory behaviour [**2**].

1. Interpretation of the Contract under Art. 8 CISG confirm the Parties' agreement to adapt the Contract in case of changed customs regulations

96. Under Art. 8 CISG, to determine the parties' intent, "all relevant circumstances of the case including the negotiations" and "any subsequent conduct of the parties" should be considered [*CISG, Art. 8(3); Ramberg; Roser Techs case*]. While determining the intent of the parties, "the exact wording chosen by the parties as well as the systematic context are of particular relevance" [*Building materials case*].

97. In the present case, the possibility of adaptation of the contract price due to changed customs tariffs pursuant to Art. 12 of the Contract is proven by the relevant circumstances at the time of the conclusion of the Contract [**a**], the Parties' negotiating history [**b**] and their subsequent conduct [**c**].

a) The relevant circumstances at the time of the conclusion of the Contract confirms the Parties' agreement to adapt the Contract

98. The Swiss court ruled that "the actual intent can be construed on the basis of the parties' interests, the purpose of the contract and the objective circumstances at the time of the conclusion of the contract" [*Building materials case*].

99. Likewise, in the present case during pre-contractual negotiations CLAIMANT informed RESPONDENT that CLAIMANT would like to avoid any risks associated with potential change in delivery terms. This was due to CLAIMANT's previous negative experience with "unforeseeable" legislative "requirements" which increased delivery costs "by up to 40 % and

thereby destroy[ed] the commercial basis of the deal" [*Exhibit C4; PO2, §21*]. RESPONDENT was aware of the mentioned facts given the wide publications in press, as it nearly resulted in the insolvency of CLAIMANT [*PO2, §22*].

100. For this reason, CLAIMANT emphasized that CLAIMANT is 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" [*Exhibit C4*]. This is precisely why CLAIMANT insisted on an adaptation clause to "address such subsequent changes" [*Exhibit C4*].

101. Therefore, the Parties were aware of objective external circumstances such as CLAIMANT's relevant negative experience and its poor financial condition, along with CLAIMANT's unwillingness to take extra risks, which indicates the Parties agreement to include the adaptation clause into the Contract.

b) The Parties' negotiating history confirms the Parties' agreement to adapt the Contract in case of changed customs regulations

102. Under the CISG, duly communicated intent of one of the parties is binding for the other party "where [the other party] knew or could not have been unaware what that intent was" [*CISG, Art. 8(1); BRI Production "Bonaventure" v. Pan African Export case*]. For instance, in *Mussels case* the court ruled that requirements for the goods communicated by facsimile shall be considered binding for the parties despite the fact that this was not expressly mentioned in the written contract [*Mussels case*].

103. After the unambiguous declaration of CLAIMANT's intention described above [*MfC, §§99–100*], the Parties held in-person negotiations, where CLAIMANT's employee Julia Napravnik once again stated that "it was important to have a mechanism in place which would ensure an adaptation of the Contract for the unlikely event that the Parties could not agree on an amendment" [*Exhibit C8*]. In turn, RESPONDENT's employee Chris Antley also confirmed that "that in his view that it should probably be the task of the arbitrators to adapt the Contract if the Parties could not agree" to price changes and suggested to provide a "proposal" for an "express reference" to the remedy of adaptation "into the hardship Clause" [*Exhibit C8*].

104. However, RESPONDENT's employee Mr. Antley "never managed" to provide this proposal, as negotiators of both Parties "were involved in a severe car accident" because of which they were hospitalized and did not finalize negotiations [*Exhibit C8*].

105. Afterwards, as RESPONDENT itself admits [*Exhibit R3*], two other negotiators of the Parties merely "finalize[d]" the agreements reached by RESPONDENT's employee Mr. Antley and

CLAIMANT's employee Ms. Napravnik. They proceeded the negotiations based on Mr. Antley's note in his "negotiating file" which stated a "Hardship Clause" should be included and "connected with Arbitration Clause" [*Exhibit R3*]. These negotiators also had direct access to the emails of Mr. Antley and Ms. Napravnik [*PO2, ∫5*]. As a result, it shall be presumed that the Parties maintained the intent on adaptation of the Contract regardless the change of negotiators.

106. Therefore, RESPONDENT was aware of CLAIMANT's intention to adapt the price in case of changed customs regulations, and not only failed to object to this intention, but in fact acted in furtherance of the same. Consequently, RESPONDENT shared CLAIMANT's interpretation of Art. 12 of the Contract as an adaptation clause.

c) Subsequent conduct of the Parties in negotiations proves intent on adaptation

107. Art. 8(2) of the CISG provides that "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" (reasonable person test). Following this rationale, in *Smith v. Hughes case* the court ruled that if a party through its behaviour would make a reasonable person believe that it agrees "to the terms proposed by the other party" this party "would be equally bound as if he had intended to agree to the other party's terms" [*Smith v. Hughes case*].

108. In the present case, after the Contract was concluded and after the customs tariffs were increased, CLAIMANT informed RESPONDENT about the changed tariffs and told that this would "make this shipment 30 % more expensive" and "destroy [CLAIMANT's] profit margin" [*Exhibit C7*]. Accordingly, CLAIMANT told RESPONDENT that "CLAIMANT should not bear all risks" associated with such a change as the Parties agreed to include an adaptation clause into the Contract, and that "additional payment" would have to be provided [*Exhibit C8*].

109. In response, RESPONDENT still "urge[d] CLAIMANT to authorize the shipment as planned since [RESPONDENT] needed the [goods]," being "certain that a solution would be found through negotiations" [*Exhibit C8*]. As RESPONDENT itself admits, RESPONDENT knew that CLAIMANT "would not deliver if [RESPONDENT] were to reject [CLAIMANT's] request [for price adaptation] outright," but still decided to proceed with shipment [*Exhibit R4*].

110. Therefore, RESPONDENT's insistence on delivery of goods and its acceptance of the goods [*Exhibit C8, p. 18*] in the new customs framework and against the background of

CLAIMANT's insistence on price increase based on Art. 12 of the Contract, would lead a reasonable person to believe that RESPONDENT had in the first place agreed on a price adaptation mechanism.

111. Although RESPONDENT may argue that ambiguous contractual clauses shall be interpreted *contra proferentem*, CLAIMANT believes that all additions to the template of the Contract are mutual agreement of the Parties [*PO2, § 3*].

112. For all the aforesaid, Art. 12 of the Contract has to be interpreted in light of the Parties' prior negotiations and their subsequent conduct as embodying an adaptation clause applicable to changed tariffs. Consequently, the Contract price has to be adjusted by the Arbitral Tribunal.

2. RESPONDENT is estopped from referring to the lack of agreement due to its contradictory behaviour

113. Promissory estoppel concept is a general principle of CISG [*Ferrari, p. 225; Crucelaegui, p. 73–74; Caemmerer/Schlechtriem, Art. 7, §37*], which provides that "a party may be precluded by his conduct from asserting to the extent that the other party has relied on that conduct" [*Rolled metal sheets case*].

114. Estoppel arises when there is (1) a clear and definite promise, (2) the promise is made with the expectation that the promisee will rely on it, (3) the promisee in fact reasonably relied on the promise; (4) and the promisee suffered a definite and substantial detriment as a result of the reliance [*Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc. case; Royal Assoc. v. Concannon; R.J. Longo Constr. Co. v. Transit America Inc*].

115. For instance, in *Rolled metal sheets case* the arbitral tribunal found that "the [seller] repeatedly [...] made statements to the [buyer] from which the latter could reasonably infer that the [seller] would not set up the defence of late notice with reference to the complaint" and therefore was estopped from raising this defence afterwards [*Rolled metal sheets case*]. Likewise, in another case the court stated that "by accepting explicitly the furniture, the buyer had recognized the conformity of such furniture and had renounced to its right to rely on a lack of conformity" [*Ice-cream parlor furnishing case*].

116. Likewise, in the present case, RESPONDENT urged CLAIMANT to deliver the goods and accepted CLAIMANT's shipment despite the changed customs tariffs and CLAIMANT's insistence on subsequent price adaptation [*MfC, §109*]. Such a need of the goods was due to beginning of the new breeding season for racehorses on 15th of February [*PO2, §11*]. RESPONDENT's employee Mr. Shoemaker explicitly asked CLAIMANT's employee Ms. Napravnik "to authorize the shipment as planned since Black Beauty needed the doses and

had already initiated the payment of the second instalment" [*Exhibit C8*]. Moreover, RESPONDENT was aware that CLAIMANT "would not deliver if [RESPONDENT] were to reject [CLAIMANT's] request [for price adaptation] outright" [*Exhibit R4*]. Accordingly, CLAIMANT only supplied the goods as it relied on the impression that RESPONDENT agreed to adapt the contract price. As a result, CLAIMANT suffered a definite and substantial detriment as CLAIMANT paid additional 30 % of the shipment price regardless its financial difficulties [*PO2, ∫29*].

117. Therefore, RESPONDENT should be estopped from arguing that no adaptation mechanism was in place in the Contract.

118. Since parties agreed to adapt the price and such agreement follows from the Contract and is supported by the applicable law, CLAIMANT is entitled to increase of the purchase price of at least 25 % [US$ 1,250,000].

II. APPLICABLE LAW PROVIDES FOR ADAPTATION OF THE CONTRACT DUE TO THE IMPOSITION OF TARIFFS

119. Even if the Arbitral Tribunal finds that Parties failed to agree on possible adaptation of the Contract in case of change in custom regulations, the possibility to adapt the Contract still stems from the statutory rules which govern the Contract [*Exhibit C5, ∫14*].

120. CLAIMANT is entitled to ask for adaptation of the Contract as Art. 79 CISG is applicable to the imposition of tariffs [**1**] and the CISG general principles provide for the remedy of adaptation in case of hardship [**2**]. In any event, in case the Arbitral Tribunal rules that the issue of hardship is not settled by the CISG, otherwise applicable Mediterranean law provides for adaptation of Contract on grounds of hardship [**3**].

1. Art. 79 CISG is applicable to the imposition of tariffs

121. CLAIMANT is entitled to ask for adaptation of the Contract under the CISG as the occurrence of hardship can be constituted under the Art. 79 CISG [**a**]. Contrary to RESPONDENT's possible arguments, the CISG legislative history does not render hardship as being outside of the sphere of regulation of Art. 79 CISG [**b**]. Finally, notwithstanding RESPONDENT's allegation, Parties did not derogate from provisions of Art. 79 CISG by inserting force majeure clause into the Contract [**c**].

a) Imposition of tariffs constituted hardship under the Art. 79 CISG

122. The situation when performance of obligations becomes too onerous due to the changed

circumstances ("hardship") can qualify as being "impediment" under the Art. 79 CISG. Therefore, the further relief or adaptation consistent with the CISG can be provided by the Arbitral Tribunal [*CISG AC Opinion No. 7, §3.1,3.2*].

123. The occurrence of hardship under the Art. 79 CISG can be stated as CLAIMANT will show that the adaptation of price is based on the impediment [**i**]; the price increase was beyond control of CLAIMANT [**ii**]; CLAIMANT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Contract [**iii**] or CLAIMANT could not have avoided or overcome consequences of the impediment [**iv**]. Therefore, the cost of the Party's performance has increased [**v**] and the price the Party receives has diminished [**vi**] [*CISG, Art. 79(1); UNIDROIT, Art. 6.2.2; Kofod, §3.1.2*].

(i) The adaptation of price is based on the impediment

124. The impediment is a situation where the performance of a contract due to changed circumstances has become significantly more difficult or burdensome, i.e. "when a significant rise in costs create an economic impediment for performance" [*Lindstrom, §4.1*]
125. In the case *Scafom International BV v. Lorraine Tubes S.A.S.* the court found that issues raised between two States concerning international commercial relations which can "increase the burden of performance of the contract in a disproportionate manner" can be seen as the impediment [*Scafom International BV v. Lorraine Tubes S.A.S.; Russia Arbitration proceeding 1997*].
126. In the case concerned the imposition of new tariffs was based on difficulties that arose between States concerning international commercial relations [*Exhibit C6*]. As a result, CLAIMANT not only lost the profit margin, but as well carried additional payments for newly imposed tariffs regulation [*Exhibit C8, p. 2*]. Thus, the burden of performance was changed in a "disproportionate manner".
127. Therefore, CLAIMANT suffered economic losses due to the impediment.

(ii) The price increase was beyond control of the CLAIMANT's control

128. Only an impediment which lies outside of the promisor's sphere of control can lead to exemption under Art. 79 CISG. Governing measures affecting trade falls into the aforementioned category [*Schlechtriem/Schwenzer, Art. 79, §§10, 11; Mullis/Huber, p. 259*]. For example, in the *National Oil Corp. v. Libyan Sun Oil Co.* the court found that regulatory measure like ban of oil export were "acts of Government and thus clearly beyond the control of the Parties" [*Lindstrom, §4.2; Vine wax case; National Oil Corp. v. Libyan Sun Oil Co*].
129. In the case concerned, the Government of Mediterraneo imposed tariffs as they were

"triggered by the prompt and severe retaliation by the Government of Equatoriana" [*Exhibit C6*]. CLAIMANT could not directly or indirectly impact the decision made by the governmental officials about the imposition of tariffs. Therefore, the impediment was beyond the control of CLAIMANT.

(iii) CLAIMANT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Contract

130. Events that lie far beyond the normal economic development of the country can affect the performance of the Contract and be acknowledged as unforeseeable for the party [*Maskow, p. 662*].
131. Countries that are parties to WTO should follow the policy of "substantial reduction of tariffs and other barriers to trade" to eliminate "discriminatory treatment in international commerce" [*GATT, Preamble*]. Thus, under the GATT the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject to internal taxes of any kind [*GATT, Art. III(2)*]. The imposition of excessive internal taxes contradicts provisions of WTO as "makes it more difficult" for imported product "to enter the market" [*Japan — Alcoholic Beverages, §6.33*].
132. CLAIMANT could not reasonably be expected to have taken the imposition of taxation and price raise into the account at the time of the conclusion of the Contract as both States were contracting parties to WTO and did follow its policy for international trading and amicable dispute resolution [*Exhibit C6*; *PO2, §47*].
133. Therefore, CLAIMANT could not reasonably be expected to predict actions of RESPONDENT's State which behavior contradicted the core purposes of the GATT and lay beyond reasonable economic development and predictable market forecast of the country.

(iv) CLAIMANT could not have avoided or overcome the consequences of the impediment

134. CLAIMANT made the third installment based on the assumption that the price relief would be provided by RESPONDENT as CLAIMANT could not avoid the consequences of imposition of tariffs [**a**] without the price adaptation CLAIMANT could not overcome the consequences of imposition of tariffs [**b**].

(a) CLAIMANT could not avoid the consequences of imposition of tariffs

135. RESPONDENT may argue that CLAIMANT could make the last installment before tariffs

came into force. However, CLAIMANT clarifies that it was not able not to make any precautions, including the performance of the last installment before the imposition of tariffs.

136. To avoid the impediment CLAIMANT is required to conduct "measures" only if impediment is "generally looming" for it [*Rimke, §4*]. If the impediment is impossible to foresee a party should not make any additional preparation to avoid the occurrence of hardship [*Honnold, p. 260; Eisenberg, p. 213; Lindstrom, §4.4*].

137. CLAIMANT received a knowledge about an impediment only on 20th of January when it was notified that frozen racehorse semen is covered by the "animal products" [*PO2, §25; Exhibit R4*]. Before imposition of the tariffs concerned there were no trade issues between the countries and especially no protecting measures of trade were involved [*PO2, §23; Exhibit C6*]. CLAIMANT neither carries the risk of changing custom regulation, nor could foresee the possibility of imposition of tariffs [*PO2, §9; Exhibit C4*].

138. Thus, it was impossible for CLAIMANT to predict an impediment before 20th of January and avoid the consequences of the imposition of tariffs.

(b) CLAIMANT could not overcome the consequences of imposition of tariffs

139. RESPONDENT can argue that if it was too onerous for CLAIMANT to overcome the consequences of customs tariffs, CLAIMANT should not have performed the obligations under the Contract before the adaptation. However, CLAIMANT did perform the last installment based on the assumption that it could overcome the consequences if the Contract is adapted.

140. To state what intention a reasonable person would have about the distribution of risks the Arbitral Tribunal can refer to all relevant circumstances of the case including the negotiations [*Ishida, p. 359; CISG, Art. 8(2)*]. Such interpretation should include the provision about what kind of distribution of risks parties have agreed on [*Schlechtriem/Schwenzer, Art. 8, §§3, 4, 5; CISG, Art. 8(3); Eisenberg, p. 213–218*].

141. To overcome the consequences of the impediment it is only reasonable for the Seller to pay "the current market" or "the minimal" price, which is above the original contract price [*Schlechtriem/Schwenzer, Art. 79, §14; Brauer & Co v. James Clark*].

142. During the negotiations of the Contract CLAIMANT stated that it does not want to carry any future risks associated with changes in custom regulations [*Exhibit C4*]. As a result, the Parties agreed that terms of DDP would be amended to make the performance less onerous in terms of risks for CLAIMANT and less expensive for RESPONDENT [*Exhibit C8; PO2, §8*]. The

aforementioned decision was reasonable for CLAIMANT as it experienced financial difficulties about which RESPONDENT was aware of [*PO2, §§21, 28, 29*].

143. As the time was of the essence for RESPONDENT due to the looming breeding season and exclusivity of goods CLAIMANT did manage to make the last installment [*Exhibit C8; Exhibit R4; Exhibit C8; PO2, §§11, 19, 33*].
144. As RESPONDENT shares the bounded risk with CLAIMANT, it could not expect CLAIMANT to carry all the possible risks including economic impediment and exercise the performance at a loss, especially knowing that such extra payments would force CLAIMANT to open a new credit line [*PO2, §§22, 29*]. Moreover, no similar tariffs were adopted prior to the impediment to constitute that it is reasonable to pay the "minimal" or "current market" price [*PO2, §23*].
145. Therefore, CLAIMANT did not receive the payment for the performance of DDP terms in full and therefore should not carry risks of imposition of new tariffs.
146. Thus, it should be concluded that CLAIMANT could not have avoided or overcome the consequences of the impediment.

(v) Cost of CLAIMANT's performance has increased

147. To state that the performance became too onerous for the reasonable party not only the percentage of increased price, but all the circumstances surrounding the contract should be taken into consideration [*Girsberger, p. 125; Ishida, p. 364*].
148. In the light of the above, including that CLAIMANT did not carry risks related to import and export restrictions, the financial statement of CLAIMANT and the impossibility to avoid and foresee the imposition of tariffs, the price increase of US$ 1,250,000 became an impossible burden for CLAIMANT [*PO2, §29*].
149. Thus, the performance of the Contract became too onerous.

(vi) The price CLAIMANT receives has diminished

150. RESPONDENT may argue that the price increase by US$ 1,250,000 is not enough to constitute the occurrence of hardship. However, as a consequence of the impediment RESPONDENT breached its contractual obligation not to resell and CLAIMANT lost US$ 1,250,000 of opportunity costs.
151. The basis for the adaptation of Contract is frustration of the equilibrium [*UNIDROIT, Art. 6.2.2; CISG AC Opinion No. 7, §26*]. The same approach is in the case law, for example in *Switzerland v. Kosovo* the equilibrium of the contract was fundamentally altered "because the

value of the performance Seller was to receive was drastically diminished" [*ICC 16369, p. 203*].

152. The price and its calculation are important for maintaining equilibrium. The price review provisions serve as a guarantee for the seller that buyer will not exclusively benefit from increased values at end-user market [*Ferrario, p. 80*]. Further, the opportunity costs may be considered as "an indirect expression of a fundamental alteration of the contractual equilibrium" [*Girsberger, p. 133; Brunner, p. 435*].
153. In the case concerned the Contract terms prohibit the availability of resale, which makes the price per dose drastically lower [*Exhibit C2; PO2, §20*].
154. RESPONDENT may argue that prohibition to resell was never explicitly agreed by the Parties. Negotiations of the Parties prove the contrary. CLAIMANT made it clear to RESPONDENT that this prohibition exits "the frozen semen […] may not be re-sold to third parties without our express written consent" [*Exhibit C2*]. This CLAIMANT's statement is therefore binding for RESPONDENT pursuant to the aforementioned rule that "all relevant circumstances of the case including the negotiations should be considered" [*MfC, §96*].
155. After the occurrence of the impediment, RESPONDENT "breached its contractual requirements not to resell the semen" and made it "at a price which is 20 % above the price charged by CLAIMANT" [*Exhibit C2; PO2, §§16, 20*]. Therefore, after the occurrence of the impediment the price for the CLAIMANT's goods in Equatoriana would be 30 % higher due to the imposed tariffs.
156. However, as RESPONDENT made the price only 20 % higher than the original, the potential customers of CLAIMANT bought the semen from RESPONDENT, which amounted to US$ 1,250,000 of opportunity costs losses [*PO2, §20*]. Therefore, after the occurrence of the impediment CLAIMANT not only carried additional tariff costs, but as well RESPONDENT made a profit based on the tax increase.
157. Thus, the price CLAIMANT receives has diminished.

b) Art. 79 CISG is applicable to situations of economic hardship

158. RESPONDENT may argue that scope of Art. 79 CISG does not include adaptation of contract in case of hardship by reference to the CISG *travaux preparatoires*, i.e. to rejection of the proposal to insert provisions on hardship in the CISG offered by Norwegian delegation [*Honnold II, p. 602*].
159. However, thorough analysis of the discussions would not allow to reach such inference as they were not conclusive in respect to the proposal and "the report simply stated that it was not adopted, not reappearing in subsequent discussions" [*CISG AC Opinion No. 7, §30*].

160. Such argument would be based on a rather wide interpretation of the facts accompanying CISG *travaux preparatoires* and could not be deemed sufficient to speak for inapplicability of Art. 79 CISG to economic hardship.

161. Therefore, CLAIMANT can rely on Art. 79 CISG in its claim for adaptation of the Contract.

c) There is no derogation in the sense of Art. 6 CISG as Parties did not exclude an application of Art. 79 CISG

162. In its ANoA, RESPONDENT argues that insertion of Art. 12 into the Contract provided for special regulation of force majeure situations thus constituting derogation from Art. 79 CISG [*ANoA, §20*].

163. However, considering the CISG's "international character" and "the need to promote uniformity in its application" [*CISG, Art. 7(1)*], "the uniform requirement of clear intent to exclude […] should be used to determine intent to exclude" [*CISG AC Opinion No. 16, §3.6.*]. Absent evidences of such intent the doubts should be resolved "in favour of non-exclusion" [*CISG Advisory Council Opinion No. 16, §3.7.*].

164. Mere inclusion of the force majeure clause in the contract does not pre-empt resort to Art. 79 CISG [*UNCITRAL CISG case law digest, §23*]. In its decision of 28 February 1997, the Hamburg Appellate Court rejected the seller to grant exception from liability neither under Art. 79 CISG, nor under contractual force majeure clause, thus supporting that the parties did not derogate from Art. 79 CISG [*Appellate Court Hamburg 1997*].

165. As it follows from the wording of Art. 12 of the Contract [*MfC, §92; Exhibit C5, §12*], it does not contain clear indications to the exclusion of an application of Art. 79 CISG in case of force majeure or hardship. Neither are there any facts supporting Parties' intent to derogate from Art. 79 CISG, deriving from their previous conduct. On the contrary, it is explicitly stated that Contract is governed by the CISG [*Exhibit C5, §14*].

166. Consequently, due to the absence of clear and unambiguous indications to the opposite, Art. 79 can be applied along with Art. 12 of the Contract.

2. The remedy of adaptation can be derived from the general principles underlying the CISG

167. Under Art. 7(2) CISG, issues not "expressly settled" by the CISG are to be "settled in conformity with the general principles on which it is based" [*CISG, Art. 7(2); Schlechtriem/Schwenzer, Art. 79, §55*].

168. Based on this rule, CLAIMANT submits that even if the Arbitral Tribunal finds that Art. 79

CISG expressly does not provide for contract adaptation, the same result follows from the general principles of the CISG. The content of these general principles is evidenced by the rationale behind various provisions of the CISG [**a**], and by the UNIDROIT principles, which can be applied to establish the general principles underlying the CISG [**b**]. Considering that termination is also available in case of hardship, CLAIMANT submits that adaptation is the only remedy applicable to the given circumstances [**c**].

a) The CISG general principles deriving directly from its provisions support the possibility of adapting the Contract

169. Some of the CISG general principles are spelt out in its specific provisions [*Azerdo Da Silveira, p. 339*]. Such principles can serve as a source of parties' mutual obligations in case of hardship. For instance, the CISG good faith principle [*CISG, Art. 7(1)*] is deemed imply the parties' duty to negotiate and adapt the contract following occurrence of economic hardship [*Schwenzer, p. 721; Honnold, p. 146–147*].
170. Moreover, the CISG contains provisions explicitly entitling a judge or an arbitrator with a power to adjust the contract price. In particular, the principle of adaptation is reflected in the CISG provisions allowing price reduction in case of defects or nonconformities on the goods [*CISG, Art. 50; Flechtner, p. 191*].
171. Therefore, the remedy of adaptation is available under the CISG general principles and can be used in case of hardship [*CISG AC Opinion No. 7, §40*].

b) UNIDROIT principles should be applied as they reflect general principles underlying the CISG

172. UNIDROIT Principles embody the CISG general principles and are used as a supplementary source in matters not expressly settled by the CISG [*Schlechtriem/Schwenzer, Art. 7, §36*]. This position gained considerable support in judicial and arbitral practice [*Viscasillas, p. 20*]. Accordingly, UNIDROIT principles can provide guidance and supplement relevant provisions of the CISG with more specific regulatory tools [*ICC 8128; ICC 12460*].
173. Art. 6.2.3(4)(b) UNIDROIT Principles explicitly recognizes that contract has to be adapted in case of changed circumstances making its performance more onerous (hardship) [*UNIDROIT, Art. 6.2.3(4)(b)*]. Since the UNIDROIT Principles are seen as a reflection of the CISG general principles, contract adaptation on the ground of hardship is also accepted under the CISG. For instance, in the *Scafom International BV v. Lorraine Tubes SAS* the court upheld the party's claim for renegotiation under Art. 6.2.2 UNIDROIT Principles by reference to the CISG

general principles "as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts" [*Scafom International BV v. Lorraine Tubes S.A.S.*].

174. Thus, the right of an aggrieved Party to ask for adaptation of the contract is supported by the general principles of the CISG, including the UNIDROIT principles.

c) CLAIMANT is entitled to request adaptation of the Contract rather than its termination

175. RESPONDENT may allege that CLAIMANT could only use hardship to terminate the Contract but cannot seek its adaptation. However, CLAIMANT submits that the claim for adaptation is justified, as neither termination nor adaptation have priority under the CISG [**i**], and the *favor contractus* principle, inherent in the CISG, prevents termination of the contract in the presence of other possible solutions [**ii**].

(i) Neither termination nor adaptation take precedence

176. Unlike in some of the national legal systems, remedies available in case of hardship under uniform law instruments (termination or adaptation), including the CISG, do not have precedence to each other [*Brunner, p.509*]. The party is free to choose appropriate remedy, whereas the court or tribunal decides on whether relief sought suitable to the circumstances of the particular case [*Doudko, p. 505–506*].

177. Therefore, CLAIMANT may at its discretion choose adaptation as the remedy under the CISG, as it lawfully did in the present case.

(ii) The principle of *favor contractus* prevents termination of the Contract

178. Moreover, according to the CISG *favor contractus* principle, "whenever possible, a solution should be adopted in favor of the valid existence of the contract and against its premature termination on the initiative of one of the parties" [*Bianca/Bonell, p. 65–94*]. Consequently, as long as there are any means to restore contractual balance infringed by hardship, other than termination of the valid agreement, resort must be made to such means.

179. Thus, as termination is an undesirable measure under the CISG, CLAIMANT is entitled to claim for adaptation of the Contract.

3. In any event, otherwise applicable Mediterraneo law provides for adaptation of Contract on grounds of hardship

180. Even if the Arbitral Tribunal rules that economic hardship is not regulated by the CISG, there

is considerable authority that the issue of hardship must be resolved according to the applicable domestic law [*Schlechtriem/Schwenzer, Art. 79, §39*].

181. Mediterranean Contract Law is a verbatim adoption of the UNIDROIT Principles [*PO1, §4*]. In turn, Art. 6.2.3 UNIDROIT Principles explicitly provides for adaptation of the contract by request of an aggrieved party in case of hardship [*MfC, §173; UNIDROIT, Art. 6.2.3(4)(b)*].

182. Thus, considering the aforementioned, in case the Arbitral Tribunal finds that adaptation of the Contract is not available under the CISG, CLAIMANT asks for adaptation of the Contract under applicable Mediterranean law.

PRAYER FOR RELIEF

For the reasons stated above, CLAIMANT respectfully requests the Arbitral Tribunal to find that:

A. The Arbitral Tribunal has jurisdiction and the powers under the Arbitration Clause to adapt the Contract;

B. CLAIMANT is entitled to submit evidence from the other arbitration proceedings notwithstanding that this evidence had been obtained through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system;

C. CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under both Art. 12 of the Contract and the CISG.

6 December 2018

Respectfully submitted,

Anna Avdulova, Margarita Adadurova, Adam Nalgiev, Polina Romanova, Evgeniya Savelyeva