HKIAC Case No. A18128

IN THE MATTER OF AN ARBITRATION UNDER HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018

- between -

PHAR LAP ALLEVAMENTO (MEDITERRANEO)

(CLAIMANT)

- and -

BLACK BEAUTY EQUESTRIAN (EQUATORIANA)

(RESPONDENT)

MEMORANDUM OF RESPONDENT

January 24, 2019

Chanboromey PON
Sakda SAU
Somphospheak HENG
Teng LY
Watanak CHHOUN

NATIONAL UNIVERSITY OF MANAGEMENT
St.96 Christopher Howes, Khan Daun Penh,
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On behalf of
RESPONDENT Black Beauty Equestrian

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

…	Ellipsis
%	Percent
AG	Aktiengesellschaft (Joint Stock Corporation under German law)
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG Advisory Council
Cl.	Clause
CM	CLAIMANT Memorandum
Co.	Company
Ed./Eds.	Editor/Editors
edn.	Edition
eds.	Editors
et al.	*et alii* (and others)
Exhibit C.	Exhibit of CLAIMANT
Exhibit R.	Exhibit of RESPONDENT

GmbH	*Gesellschaft mit beschränkter Haftung* (German Private Limited Liability Company)
HKIAC	Hong International Arbitration Centre
i.e.	*id est* (that is)
IBA	International Bar Association
Ibid	In the same source
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Inc.	Incorporated
Int'l.	International
Ltd.	Limited
Mr./Mrs./Ms.	Mister/Misses/Miss
New York Convention	Convention on the Recognition and Enforcement of Arbitral Award
No.	Number
NoA	Notice of Arbitration
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration

PO	Procedural Order
Response to NoA	Response to the Notice of Arbitration
S.A.	*Société Anonyme* (Stock Corporation under French Law)
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	*Institut International pour l'Unification du Droit Privé* (International Institute for the Unification of Private Law)
US	United States of America
USD	United States Dollar
v.	versus
VCLT	Vienna Convention on Law of Treaties
Vol(s).	Volume(s)
WTO	World Trade Organization
The Tariff	The 30% imposed tariff by the government of Equatoriana
The Tribunal	The composition of the three arbitrators in the present arbitration

The Evidence	Partial Interim Award rendered in another arbitration that RESPONDENT had with one of its customers
The Agreement	Frozen Semen Sales Agreement
Parties	Phar Lap Allevamento (CLAIMANT) and Black Beauty Equestrain (RESPONDENT)

RULES, SOFT-LAWS, TREATIES, LEGISLATIONS

AIAC Rules (2018)	Asian International Arbitration Rules, 2018
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 11 April 1980
Danubian Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law with the 2006 amendments
Hague Principles	Principles on Choice of Law in International Commercial Contracts
HKIAC Rules	Hong Kong International Arbitration Center, Administered arbitration rules, 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
LAC Rules (2014)	Ljubljana Arbitration Rules
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules on International Commercial Arbitration (as revised in 2010), with new article 1, paragraph 4, as adopted in 2013

UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts as adopted, 2016

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EDF Services Ltd v Romania	ICSID *EDF (Services) Ltd v Romania* Case No. ARB/05/13	41
ICC Award No. 10329	ICC International Court of Arbitration *Switzerland v. Italy* Available at: http://cisgw3.law.pace.edu/cases/000329i1.html	18
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	2010 Available at: http://www.unilex.info/case.cfm?pid=2&do=case&id=1533&step=FullText	
Kılıç v Turkmenistan	ICSID *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* Case No.ARB/10/1. 2003	55
Libananco Holdings v. Turkey	ICSID *Libananco holdings co. limited v Republic of Turkey* Case No. ARB/06/8 2008	42, 43, 66
Medicaments Case	Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *Medicaments Case* T-8/08 28 January 2009 Available at: http://cisgw3.law.pace.edu/cases/090128sb.html	125

Methanex v USA	*Methanex Corporation v United States of America* 2005	43, 55, 66
Milk Packaging Equipment Case	Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *Milk Packaging Equipment Case* T-4/05 15 July 2008 Available at: http://cisgw3.law.pace.edu/cases/080715sb.html	118
Opic Karimum Corporation v Venezuela	ICSID *Opic Karimum Corporation v the Bolivarian Republic of Venezuela* Case No. ARB/10/14 2011	55
Paper Handkerchiefs Production Line Case	Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce *Paper Handkerchiefs Production Line Case* T-5/08 5 January 2009	125

	Available at: http://cisgw3.law.pace.edu/cases/090105sb.html	
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US — COOL	WTO *Canada v. United States* DS384 21 December 2015 Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm	93

US — Washing Machines	WTO	93

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Available at:

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds464_e.htm

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STATEMENT OF FACTS

1. **Phar Lap Allevamento** – **CLAIMANT** is an oldest and most renown stud farm in Mediterraneo, especially for its breeding success in racehorses. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality. **Black Beauty Equestrian** – **RESPONDENT** is a company based in Equatoriana that newly operates in racehorse stable.

2. On 21 March 2017 RESPONDENT made an invitation to offer to CLAIMANT. Then CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Standard Frozen Semen Sales Agreement. Upon receipt of the email, RESPONDENT objected to the choice of law and the forum selection clause both in favor of Mediterraneo and insisted on a delivery on the basis of DDP. Consequently, *CLAIMANT accepted the delivery DDP* and charged RESPONDENT 1000 USD per dose as additional costs. CLAIMANT would like to include a hardship clause to address risks associated with changes in delivery terms, in particular those associated with changes in customs regulation or import restrictions. Regarding arbitration, RESPONDENT prepared a first draft of arbitration agreement in light of the fact that "*Sales Agreement is governed by the law of Mediterraneo*" and a narrowed Model HKIAC Clause. It also offers the seat of arbitration and law governing the arbitration agreement as stated:

> "[…] *The seat of arbitration shall be Equatoriana.*
> *The law of this arbitration clause shall be the law of Equatoriana*."

3. CLAIMANT largely accepted the proposal; however, it would like to change the place of arbitration for *the purpose of neutrality* to Danubia and remove the choice-of-law governing arbitration agreement. It also affirmed that the "*offer is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediteerraneo*". On the matter of ICC hardship clause, it is, however, not finalized.

4. Unfortunately, both main negotiators are substituted due to an accident occurred on 12 April 2017. CLAIMANT newly replaced negotiator, John Ferguson, was informed by the main negotiator that RESPONDENT considers the ICC hardship clause '*too broad*'. In order to accommodate RESPONDENT's requests, CLAIMANT then decided to deviate from ICC hardship clause and merely customized a few wordings of the force majeure clause.

5. The Frozen Sales Agreement is finally concluded on 6 May 2017. Three elements need to be highlighted. First, "*Seller shall not be responsible for […] neither for hardship, caused by*

additional health and safety requirements or comparable unforeseen events making the contract more onerous." is the finalized version of force majeure clause departing from ICC Hardship clause 2003. Second, the arbitration agreement is a deviation from Model HKIAC Clause stating "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination"* which clearly limits its broad wording. Third, the seat of arbitration remains Danubia, however no choice-of-law governing arbitration clause is mentioned in the Sales Agreement.

6. As provided in the agreement, three shipments will be sent respectively. After the first and second shipments, Mediterraneo's newly elected President announced 25% tariffs on agricultural products from Equatoriana on 15 November 2017. In retaliation to this, RESPONDENT imposed in return 30% tariffs on selected agricultural products, including the frozen semen. As a result, this made the third shipment 30% more expensive. Upon the arrival of third shipment, in need of RESPONDENT's authorization to deliver, CLAIMANT contacted Mr. Shoemaker who is the RESPONDENT's veterinary responsible for the development of racehorse breeding program. In regards to this, Mr. Shoemaker insisted that he needs to confirm with his superiors for any decisions to be made. Furthermore, he will try to find possible solutions to this problem. Afterward, the third shipment was delivered.

7. CLAIMANT requested for the payment of the additional payment on The Tariff. In light of the inclusion of DDP Clause in addition to narrowly worded hardship clause, RESPONDENT considers the request unjustified since it is supposed to be covered by CLAIMANT. The former initiated the proceedings, asking for an additional amount of 1,250,000 USD for parts of 30% tariff of third delivery of semen.

8. On 2 October 2018 CLAIMANT received information about a partial interim award at the annual breeder conference in another arbitration between RESPONDENT and one of its customers on the sale of mare to Mediterraneo that is affected by 25% tariff. Few elements differ from the previous arbitration: law of Mediterraneo as law governing arbitration agreement, ICC Hardship Clause 2003 and Model HKIAC-Arbitration Clause 2003. Furthermore, this information can only be obtained through either breach of confidentiality by RESPONDENT's former employees and illegal hacking of RESPONDENT's computer system.

SUMARY OF ARGUMENTS

9. **First Issue**: The Tribunal has no power to adapt the contract. First, Mediterranean Contract Law was not implicitly chosen by the parties to govern the arbitration agreement because the negotiating history indicates that no agreement on choice of law had been reached. Thus, the arbitration agreement must be interpreted according to Danubian Contract Law because it is the most appropriate for and closest to the present arbitration. Under this law, the Tribunal has no power to adapt the contract because of absence of express conferral of power in arbitration agreement.
10. **Second Issue**: The Tribunal shall dismiss the Evidence submitted because of the illegal means through which it is obtained, and the confidentiality veil affixed turn it to be inadmissible in the present arbitration. In regards to the illegal means, CLAIMANT persistently arranged to buy the Evidence from the company who originated the illegal acts. In light of confidentiality, RESPONDENT took reasonable actions to ensure the absolute confidentiality. More importantly, the such dismissal does not unjustifiably prejudice CLAIMANT's right to present the case because the evidence concerned is neither relevant nor material to the outcome of the case.
11. **Third Issue**: CLAIMANT is not entitled to the payment of 1,250,000 USD or any other amount under Clause 12 SA because Clause 12 does not include the Tariff as hardship. That is because RESPONDENT wanted it to be as narrow as possible, and CLAIMANT had knowledge of it. Alternatively, the situation of Tariff is not fulfilled the three elements under Clause 12 SA. The Tariff is not a comparable event to additional health and safety requirements and it is also foreseeable. The Tariff also does not make performance of the contract more onerous. Furthermore, Parties agreed to use DDP Incoterms, which means all the customs clearance must be bear be the seller.
12. **Forth Issue**: Under the CISG, CLAIMANT is not entitled to the payment of 1,250,000 USD or any other amount. Although the CISG does not explicitly provide whether hardship shall be considered as an impediment, however, based on VCLT, which can be considered to represent customary international, Art. 79 CISG does not govern hardship. Also, neither Art. 79 CISG nor any provisions in Convention impose duty the renegotiate nor the Court can adapt the contract. Moreover, by reselling the semen, RESPONDENT does not violate any provisions under SA, since there was no single term in SA mentions about resell prohibited. Thus, CLAIMANT is also not entitled to any other amount.

ARGUMENTS

1. THE TRIBUNAL LACKS POWER TO ADAPT THE CONTRACT

13. CLAIMANT argues that Mediterraneo Contract Law governs arbitration agreement because it is the implicit choice of law, and alternatively the most appropriate law [*CM, p. 11, paras. 17-19*]. Based on broad interpretation rules of Mediterraneo Contract Law, CLAIMANT interprets arbitration agreement in light of negotiation history as it expressly empowers the Tribunal to adapt contract [*CM, p. 11, para.5*]. CLAIMANT also argues that, although four corners rule of Danubian Contract Law applies, the Tribunal still has power to adapt contract by interpreting arbitration agreement with hardship clause [*CM, pp. 21-22, paras.72-78*].

14. In fact, Mediterranoe Contract Law was not the implicit choice because neither RESPONDENT was aware nor reasonable person understood CLAIMANT's intention to have this law govern arbitration agreement (**1.1**). With the absent of implicit choice, Danubian Contract Law is the most appropriate law because it has closest connection to arbitration and achieves the Parties' objective for neutrality (**1.2**). Under Danubian Contract Law, CLAIMANT' allegation is inconsistent with Danubian jurisprudence that recognizes the separability doctrine which isolates the procedural part from substantive part in its entirety (**1.3**).

1.1 No implicit choice of Mediterranean Contract Law

15. CLAIMANT claims that it is "*entitled to expect that as the only law explicitly chosen by both Parties to govern the sales agreement, this law implicitly governs an attaching arbitration clause*" [*CM, p. 13, para. 18*], by relying on *Born 2014* that "*businesses are entitled to expect that the law they select to govern a contract shall also govern a dispute…*" and *Arsanovia et al.* and *BCY v. BCZ* that "*governing law of the overall contract is the strongest indicator of Parties' intentions regarding law governing arbitration agreements*" [*CM, p. 13, para. 19*].

16. CLAIMANT's reasoning is false for two reasons. First, a party's intention is valid when the other party is aware of that intention was only [*CISG, Art. 8*], thus CLAIMANT's expectation is not required because it supplied the modified arbitration agreement to RESPONDENT [*Exhibit R2, p. 34*], therefore only RESPONDENT's expectation is required. Second, CLAIMANT fails to emphasize the complete reasonings of *Aranovia Ltd* and *BCY v BCZ* "that law governing the underlying contract is the strongest indication unless there is contrary

indication [*Sul America v Enesa Engenharia, paras. 11, 27; Channel Tunnel v Balfour Beauty, pp. 357-358; Sonatrach v Ferrell, para. 32; Sumitomo v Oil & Natural Gas; Leibinger v Stryker*]." This indicates that parties' autonomy prevails over any presumed indication [*Margaret, p. 55; DAL, Arts. 34(2)(a)(i), 36(1)(a)(i); Born (SAcLJ 2014), pp. 825-826, paras. 30-3; Sul America v Enesa Engenharia, para. 9*]. In the present case, there is no implicit choice for Mediterraneo Contract Law because neither RESPONDENT was aware (**1.1.1**) nor reasonable person understood CLAIMANT's intention (**1.1.2**).

1.1.1 RESPONDENT was not aware of CLAIMANT's intention

17. CLAIMANT claims that "*it is reasonable to assume that RESPONDENT could not have been unaware of Ms. Napravnik's intent in altering the drafted version of this clause*" based the "*deleting reference to the law of Equatoriana and changing the seat of arbitration to Danubia,*" and the different expression of term "*agreements*" in plural instead of singular in Ms. Napravnik's email to RESPONDENT [*CM, p. 16, paras. 36-37*].

18. The heart of subjective interpretation is the knowledge of the party to whom the intention of the other party is presented [*CISG Digest, p. 55, para. 6; CSS Antenna, Inc. v. Amphenol-Tuchel Electronics; ICC Award No. 10329*]. To achieve this, one must consider all surrounding circumstances [*CISG, Art. 8(3); CISG Digest, pp. 57-58; paras. 21-30; ICC Award No. 9117*]. CLAIMANT's allegations are not sufficient to prove RESPONDENT's knowledge because RESPONDENT's choice for HKIAC Model Clause and its complete doubt expressed in Mr. Antley's hand written note.

19. RESPONDENT proposed HKIAC Model Clause to CLAIMANT that contains express choice of law governing arbitration agreement [*Exhibit R1, p. 33*]. CLAIMANT replied to RESPONDENT's proposal by deleting this express governing law of arbitration but instead states that "*…law applicable to the Sales Agreements remains the law of Mediterraneo*" [*Exhibit R1, p. 33*]. CLAIMANT alleges that this plural form expression of "*Sales Agreements*" is sufficiently clear to RESPONDENT [*CM, p. 16 para 37*]. This is not true because Sale Agreement and Arbitration Agreement are different.

20. Doubt of RESPONDENT's negotiators prove that CLAIMANT's reply was not clear to them [R 3]. Both of RESPONDENT's negotiators were in complete doubt of CLAIMANT's intention to choose Mediterranean Contract Law to govern arbitration agreement as Mr. Antley's hand-

written note states "*clarify in arbitration clause that neutral venue and applicable law*" and Mr. Krone also expresses in witness statement that "*it was … completely clear to me what Mr. Antley meant with points 1 and 3*" [*Exhibit R3, p. 35*]. He further emphasized that "*[h]ad I known at the time that Mr. Antley was referring to the law applicable to the arbitration instead of the law applicable to the contract I would have definitively included an express reference to the law of Danubia into the arbitration agreement*" [*Ibid*].

1.1.2 Reasonable Person in RESPONDENT's Position Would Have Not Understand CLAIMANT's Intention

21. CLAIMANT provides claims that "*it is reasonable to assume that the inclusion of Ms. Napravnik's draft clause is also an acceptance that law of Mediterraneo govern the Sales Agreement in its entirety*" under CISG Article 8.2 [*CM, p. 12, para. 41*].

22. Article 8(2) of CISG provides the statement in question shall be "*interpreted according to the understanding that a reasonable person"* in the same circumstances as the party to whom the statement is presented [*CISG, Arts. 8.1, 8.2; ICC Award No. 9875; ICC Award No. 9797; Joseph Charles Lemire v Ukraine*]. Given that the parties may have different understandings over the statement made, this approach permits the Tribunal to presume the intention of both parties based a reasonable person's understanding in the same circumstances as the parties in question [*CISG Digest, p. 56, para. 11; Fruit and vegetables case; Metal ceiling materials case; Alpha Prime v Holland Loader Company*].

23. Indeed, when the arbitration agreement does not expressly contain its governing law, it is presumed that the law governing the main contract also governs the arbitration agreement because a reasonable person would understand that arbitration agreement and their main contract are governed by the same legal system, unless there is contradictory indication [*Sul America v Enesa Engenharia, paras. 11, 27; Channel Tunnel v Balfour Beauty, pp. 357-358; Sonatrach v Ferrell, para. 32; Sumitomo v Oil & Natural Gas; Leibinger v Stryker*].

24. The practical contradictory indication is the fact that the parties agree to arbitrate in the "*country other than that whose law governs their underlying contract*" because the fact that they choose the neutral seat clearly indicates their intention to seek for neutrality in process of dispute resolution [*Sul America v Enesa Engenharia, para. 15; Channel Tunnel v Balfour Beauty, pp. 357-358*]. Thus, it isolates the arbitration from the presumed same legal system

with the law underlying the main contract [*Ibid*]. For purpose of neutrality, it couples the arbitration agreement with the neutral legal system–including, inter alia, the curial law and contract law of the seat [*FirstLink v GT Payment, para. 13; Premium Nafta v Fili Shipping*].

25. The arbitration agreement between the Parties has no governing law [*Exhibit C5, p. 14, para. 15*]. But the Frozen Semen Sales Agreement of which the arbitration agreement is a part–expressly provides its governing law in favor of the law of Mediterraneo [*Ibid, para. 14*]. However, after the long negotiation over the forum of dispute resolution, the parties agreed to arbitrate in the neutral country, which is Danubia [*Exhibit C3, p. 11; Exhibit C4, p. 12; Exhibit C5, p. 14; Exhibit R3, p. 34*]. The proposal to move the place for arbitration to the Danubia was made after both parties had expressed the unwillingness to have the disputes settled in their counter-party respectively [*Ibid*; *PO No. 2, pp. 56-57, para. 14*].

26. The absence of definite manifestation of intent to retain arbitration agreement in the preceding presumed-legal system, which is the same legal system as the law the of the main contract, does not negate the above-mentioned contradictory indication [*CISG Art. 8(2); Sul America v Enesa Engenharia, para. 15; Channel Tunnel v Balfour Beauty, pp. 357-358*]. Therefore, a reasonable person in the same circumstances as RESPONDENT would not have understood that Mediterraneo Contract Law extends to govern the arbitration agreement in the case of arbitration is conducted in Danubia as the neutral country.

1.2 Danubian Contract Law Is the Most Appropriate Law

27. CLAIMANT argues that Mediterraneo Contract Law is the most appropriate law provided that "*the state [Mediterraneo] with the closest and most significant relationship to the dispute*" and "*the law of Mediterraneo will better promote the principle of good faith*" [*CM, p. 18, para 50*]. These allegations are false because the appropriate law here shall be determined in light of the parties' objective [*SulAmerica vs Enesa; FirstLink v GT Payment; C v D; CISG Art. 8.3*]. CLAIMANT's allegations do not meet the parties' objectives to have their dispute resolved in the neutral state as CLAIMANT in fact acknowledged that "*to accommodate your wish not to be submitted to the jurisdiction of the courts in Mediterraneo…the clause would read…the seat of arbitration shall be Danubia*" [*Exhibit R2, p. 34*]. On the Danubian Contract Law is the most appropriate law because it has most

real and closest connection to the present arbitration (**1.2.1**) and it achieves the parties' objective for procedural neutrality (**1.2.2**).

1.2.1 Danubian Contract Law Has Most Real and Closest Connection to the Present Arbitration

28. CLAIMANT argues that the law that has the most real and closest connection to the arbitration is Mediterraneo Contract Law because of two reasons. First, the *Frozen Semen Sales Agreement* is governed by Mediterraneo Contract Law [*CM, p.18, para. 53*]. And second, the payment itself is made to the state bank of Mediterraneo [*Ibid*]. This is not true because these two factors have the closest connection to only the main contract, not the arbitration [*Fouchard/Gaillard/Goldman, p. 223*].

29. Contrary to CLAIMANT's argument, in *SulAmerica v Enesa*, English Court of Appeal held that the law that has the most real and closest connection is undeniably the law of the arbitral seat [*CM, p. 15, para. 32*]. Therefore, Danubian Contract Law governs the arbitration agreement because it has the most real and closest connection to the present arbitration.

1.2.2 Danubian Contract Law Achieve the Parties' Procedural Neutrality

30. CLAIMANT argues that application of Mediterraneo Contract Law "*will better promote the principle of good faith*" as it is the verbatim adoption of UNIDROIT Principles [*CM, p. 18, paras. 54-55*]. This allegation is a misuse of good faith principle.

31. During the negotiation, the parties expressed their objectives to ensure the procedural neutrality between them in respect of the dispute resolution through arbitration [*Exhibit C 3, p. 11; Exhibit C 4, p. 12; Exhibit R 2, p. 33; Exhibit R 3, p. 34*]. Fundamental rationale of principle neutrality is the matter of judicial connection rather than geographical connection [*Lalive, p. 30*]. It means that if the Tribunal applies Mediterranean Contract Law to govern the arbitration agreement, the neutrality between the parties would simply be undermined because Mediterraneo Contract Law is the law of country where CLAIMANT is located [*NoA, pp. 4, para. 1*]. On the contrary, the application of Danubian Contract Law would indeed be in line with the parties' objective for procedural neutrality because it is not the law of the countries where CLAIMANT and RESPONDENT are located; instead, Danubian Contract Law is the law of the neutral state [*NoA, pp. 4-5, para. 1, 4; Exhibit R 2, p. 34*]. Therefore,

Danubian Contract Law is the most appropriate law for the present arbitration.

1.3 Under Danubian Contract Law, Separability Doctrine and Four Corners Rule Justify the Absent of Express Empowerment to the Tribunal

32. CLAIMANT argues that there is express conferral of power to the Tribunal to adapt contract based the choice of substantive law that provide adaptation as remedy in the event of hardship [*CM, pp. 19-20, paras. 56-62*], and inclusion of hardship clause in addition to arbitration agreement [*CM, p. 20, para. 63*]. However, this is not the case in Danubia because there is consistent jurisprudence that isolate procedural matter from substantive matter [*PO No. 2, p. 60, para. 46*]. In addition, Parties' agreed to include narrow hardship clause, narrow arbitration agreement and chose seat that provide narrow interpretation rules and *lex arbitri* that strictly limit court power in contract adaptation [*PO No. 2, p. 60, para. 46; Exhibit C5, p. 14, paras. 12-15; Response to NoA, p. 30, para. 4*].

33. Even if only literal meaning is focus, interpretation of the arbitration agreement does not provide express conferral of power to the Tribunal to adapt contract. The arbitration agreement between the parties reads "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration*" [*Exhibit C5, p. 14, para. 15*].

34. The language of "*Any dispute arising out of this contract*" in the arbitration agreement cannot be ground to justify the conferral of the power on the Tribunal to adapt the contract because the arbitration agreement must be interpreted as the whole [*DCL, Art. 4.4; ICC Award No. 15956; Sandvik v Vardhman; Distribuidora v Nestlé*]. The whole language of the agreement itself reflects that the parties refer to the arbitration certain types of disputes arose out of their *Frozen Semen Sales Agreement* [*Exhibit C5, p.14, para. 15*]. They referred to arbitration only the disputes that are pertinent to "*existence, validity, interpretation, performance, breach or termination*" of the *Frozen Semen Sales Agreement* [*Ibid*].

35. HKIAC Model Arbitration Clause consists two main parts, which the first covers the contractual disputes while the second covers the non-contractual disputes. Compare the present arbitration agreement to the Model Clause, the present arbitration agreement covers only the first part of the Model Clause "*existence, validity, interpretation, performance, breach or termination [of their contract]*" concern only contractual obligations of the parties.

36. Precisely, adaptation does not fall within the scope of arbitration agreement because it is a non-contractual dispute [*Fouchard/Gaillard/Goldman, p. 28, para. 40*]. One of the factors that classifies the contract adaptation as the non-contractual matter, instead of contractual one, is that the adaptation is the disrespect of the principle of *pacta sunt servanda*; meanwhile, the contractual matter is the respect of the foregoing principle [*Fouchard/Gaillard/Goldman, p. 28, para. 35; DCL, Arts. 1.3, 6.2.3; DCL, commentary on Art. 1.3, p. 10*]. It simply means that the contract adaptation is not about the determination of contractual rights and obligations, but instead, it is the modification of the two in order to accommodate the change of circumstances, therefore, falls outside of the scope of the present arbitration agreement [*DCL, Arts. 1.3, 6.2.3; DCL, commentary on Art. 1.3, p. 10*].

37. CLAIMANT argues that reading the arbitration agreement in conjunction with the clause hardship clause would suffice the conferral of power on the Tribunal to adapt the contract [*CM, pp. 21-22, paras. 72-78*]. This argument is implausible because reading the arbitration agreement in conjunction with clause hardship clause would instead indicate the Tribunal's power to interpret whether or not the Tariff falls within clause 12, not the power to adapt the contract [*Exhibit C5, p. 14, paras. 12 & 15*].

38. In conclusion, the interpretation of the arbitration agreement under Danubian Contract Law does not result in the Tribunal's power to adapt the contract because the adaptation of the contract does not fall within the scope of arbitration agreement.

2. CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS BECAUSE IT HAD BEEN OBTAINED ILLEGALLY

39. CLAIMANT fails to address the admission of this Evidence would prejudice against RESPONDENT because it had been obtained illegally. CLAIMANT merely argues only that its right to present the evidence is the paramount because that evidence is highly relevant and material to the outcome of the case [*CM, pp. 21-30, paras. 81-117*].

40. In fact, the Evidence is neither relevant nor material to the outcome of the present arbitration, and the its admission would prejudice RESPONDENT. Therefore, throughout the power to determine the "*relevance, materiality and admissibility*" of the Evidence recognized under both Danubian Arbitration Law and HKIAC Rules [*DAL, Art. 19(2); HKIAC Rules, Art. 1.2*], CLAIMANT is not entitled to submit the Evidence based on the following grounds: the illegal

manners through which the Evidence is obtained (**2.1**); the confidentiality veil affixed to the Evidence (**2.2**); irrelevance and immateriality of the Evidence to the outcome of the case (**2.3**). More importantly, the dismissal of the evidence in question does not impair due process in the present case (**2.4**).

2.1 The Evidence Is Inadmissible Because CLAIMANT Acted in Bad Faith to Obtained the Evidence Illegally

41. The tribunal has power to dismiss a particular evidence if the parties submitting it had undermined the principle of fairness and equality by conducting themselves in bad faith while obtaining the Evidence in question [*DAL, Art. 18; HKIAC Rules, Art. 13(1); EDF Services Ltd v Romania; O'Malley, p. 321, para. 9.118; IBA Rules, Arts. 9(2)(g), 9(7); IBA Rules Commentary, p. 25; Aceris Law*]. Bad faith has been known as acting in the way which viably offends or harms the other party unjustifiably [*O'Malley, p. 222, para. 7.45*; *Translex, Principle No. I.1.1*].

42. CLAIMANT's bad faith can be proven by the fact that CLAIMANT is not arbitrating fairly in the present arbitration because it capitalizes on illegal tactics to reap unfair advantages of RESPONDENT [*Libananco Holdings V Turkey, para. 78; Sussman, p. 5*]. In addition, CLAIMANT has the full knowledge that the Evidence had been acquired through illegal means, either by hacking RESPONDENT's computer or soliciting RESPONDENT's former employees to breach the existing confidentiality obligation, though it still persistently arranges to have possession of that evidence [*PO No. 2, p. 60, paras. 40 & 41*]. This indicates that CLAIMANT is now conducting itself in bad faith because adducing such evidences would excessively and unjustifiably prejudice against RESPONDENT's privacy and confidentiality. If it was the case, RESPONDENT would endure the prejudice twice; precisely, it endures the prejudice of illegal acts at the first place, and legal prejudice at the second place.

43. In *Methanex* and *Libananco*, such unfair acts sufficiently warrant the dismissal of the evidence [*Libananco Holdings v Turkey, para. 78; Sussman, p. 5; Methanex v USA, p. 26 & 28, paras. 54 & 55& 58*]. The tribunals in these two cases held that the parties who submitted the evidenced conducted themselves in bad faith provided that they adduced the evidence that they had obtained from third parties who originated illegal acts to acquire the evidence in question [*Ibid*]. Consequently, the tribunal dismissed those evidences, and stated that it

would be an unjust prejudice against the party who endures the illegal acts [*Ibid*]. That was because the other party did not arbitrate fairly which was very inconsistent with the arbitration rules which they must abide [*Ibid*].

44. Similarly, CLAIMANT is now trying to adduce the Evidence obtained from the illegal acts of a third party [*PO No.2, p. 60, paras. 40 & 41*]. Not different from the above cases, CLAIMANT indirectly took part in those illegal acts by remunerating for the possession over the Evidence obtained evidence therefrom [*PO No. 2, p. 60, paras. 40 & 41*]. The Tribunal may concern that in *Yukos*, the illegally obtained evidence was admitted [*PCA Case No. AA 227 (Yukos case), paras. 1189, paras. 1189, 1213, 1223*]. It is noteworthy that *Yukos* case is not practical in our case because the parties in the former did not contest the admissibility of that evidence [*Ibid*]. Unlike the latter, RESPONDENT firmly contests the admissibility of the Evidence on the bases of its illegality, compelling confidentiality, and irrelevance and immaterial to the case; thus, the Tribunal should render the decision accordingly [*Letter by Fasttrack (03 October 2018), p. 51; IBA Rules, Art. 9.2; DAL, Arts. 19.2, 28(1); HKIAC Rules, Art. 22.2*].

45. In the context of public interest and arbitration in its entirety, admitting this illegally obtained evidence would bring about two critical drawbacks [*Sussman, p. 7; Blair/Gojkovic*]. First, because the tribunal is not bound by the domestic evidentiary rules, it would disincline the parties from resorting to arbitration as the whole because they are not safeguarded against unjust prejudice underlying the illegal acts like the one in this case [*O'Malley, pp. 267, 274,275, para. 9.01; 9.18*]. Secondly, it also inspires not only the disputing party–but also third party like our case–to commit illegal acts accordingly [*Wee Shuo Woon v HT S.R.L.; Sussman, p. 14; Allen & Gledhill*].

46. In conclusion, taking into consideration the means through which CLAIMANT obtained the Evidence that clearly indicates its bad faith, and the best practice in arbitration, the Tribunal should dismiss the Evidence from the present arbitration.

2.2 The Confidentiality Veil Affixed to the Evidence Renders the Evidence Inadmissible

47. Although the Evidence had been made available publicly by illegal means originated by the third-party, that Evidence does not lose its confidentiality veil [*Ibid; Caratube v*

Kazakhstan]. The confidentiality veil in question warrants the dismissal of the Evidence from the present arbitration on two main bases. First, the confidentiality provision under Art. 42 of HKIAC Rules 2013 bars CLAIMANT from relying upon the award from the previous arbitration to which RESPONDENT was a party to go against RESPONDENT in the present arbitration (**2.2.1**). Secondly, confidentiality veil affixed to the Evidence renders the evidence inadmissible under IBA Rules on the Taking of Evidence (the "IBA Rules") because of its compelling nature (**2.2.2**).

2.2.1 Art. 42 Of HKIAC Rules 2013 Bars CLAIMANT from Relying Upon Award from Previous Arbitration That RESPONDENT Was A Disputing Party

48. Art. 42 of HKIAC Rules 2013 prohibits the "*publication, disclosure or communication*" of any materials produced in the course of a particular arbitration proceeding, unless there is consent from the disputing parties [*HKIAC Rules 2013, Art. 42*]. The language of this Art. 42 insinuates its underlying purpose as to protect the confidentiality of those materials from the access of third parties [*HKIAC Rules 2013, Art. 42*].

49. RESPONDENT had another previous arbitration with one of its customers conducted under HKIAC Rules 2013 [*Letter by Fasttrack, p. 51*; *PO No. 2, p. 60, para. 39*]. Thus, the award rendered in that arbitration is undeniably under confidentiality protection set forth in Art. 42 of HKIAC Rules 2013 [*HKIAC Rules 2013, Art. 42*]. This prevents outside third parties from relying upon that award to go against either RESPONDENT or its customers [*Noussia, pp. 79-80; Hassneh v Stuart; Robb (2004)*]. Moreover, in practice of confidentiality in the arbitration is still secured although it falls within the access of the third party [*Wee Shuo Woon v HT S.R.L.; Sussman, p. 14; Allen & Gledhill*].

50. Thus, CLAIMANT as the third party to that previous arbitration cannot rely upon the award to go against RESPONDENT because the legal effects of Art. 42 of HKIAC Rules prevent CLAIMANT from doing so [*Letter by Fasttrack, p. 51*; *PO No. 2, p. 60, para. 39*].

2.2.2 Alternatively, the evidence is inadmissible under IBA Rules on the Taking of Evidence because of its compelling nature

51. When the right application of IBA Rules results in the decision to dismiss or admit a particular evidence, it is widely recognized that such decision is complying with the principle

of due process [*O'Malley p. 197, para. 7.10; IBA Rules Commentary, p. 3*]. In absent of Parties' agreement on evidentiary rule, the Tribunal should apply IBA Rules because it reflects the due process principles [*O'Malley, p. 9*]. This is also consistent with the Tribunal's duty to treat the parties with equality and fairness under Art. 18 of Danubian Arbitration Law [*DAL, Arts. 18, 19; Explanatory Note of DAL, p. 32*].

52. Art. 9(2)(e) of IBA Rules stipulates that the evidence shall be excluded from the arbitration if the confidentiality affixed thereto is compelling [*IBA Rules, Art. 9(2)(e)*]. To determine whether the such confidentiality is compelling enough to justify the exclusion, it is important that the Tribunal considers the reasonable actions to protect the confidentiality [*Commentary on Art. 9 of IBA Rules, p. 25, para. 3; Noussia, p. 99, para. 2; Group Health v BJC Health*].

53. In the previous arbitration, RESPONDENT took reasonable actions to keep the proceeding absolutely confidential. This is evidenced by the fact that RESPONDENT had the confidentiality agreement in addition to the existing confidentiality provision set forth in Art. 42 of HKIAC Rules [*HKIAC Rules (2013), Art. 42; PO No. 2, pp. 60-61, para. 41*]. This shows that RESPONDENT already tried its best to keep its arbitration in the utmost confidentiality. The confidentiality in question is widely respected taking into consideration of the confidentiality as the fundamental nature of arbitration, and the arbitrating party's reasonable effort to protect their confidentiality, otherwise it would bring about the "*unacceptable privacy invasion*" [*Rajoo, p. 56; O'Malley, p. 301, para. 9.84*].

54. This protection cannot be impaired by the fact that RESPONDENT used the outdated anti-hacking system [*PO No. 2, p. 61, para. 42*]. This is because it is general that the purpose of using of anti-hacking system is not solely to protect the confidential award alone, but also other confidential information and secret of related to the business of the company, etc. Thus, the outdated system is irrelevant here. On the contrary, the fact that RESPONDENT sought additional protection by having confidentiality agreement specifically toward the previous arbitration sufficiently indicates its reasonable actions for absolute confidentiality which must be respected [*Noussia, p. 99, para. 2; Group Health v BJC Health*].

2.3 The Lacks Of Relevance and Materiality to The Outcome of The Case Warrants the Dismissal

55. Theoretically and practically, "*relevance*" is different from "*materiality*" [*O'Malley, pp. 269-273, paras. 9.09-9.17*]. Relevant evidences refer to the evidences whose probative value relates to the "*burden of the proof*" of the parties [*O'Malley, pp. 269-270, para. 9.09*]. To be precise, it is the question of "*whether the proffered information is likely to be necessary for a party to prove an allegation*" [*Ibid*]. Meanwhile, material evidences refer to the evidences whose probative value is determinative for the tribunal to reach the decision of the case [*O'Malley, pp. 271-272, para. 9.13-9.14*]. Thus, it should be noted that the relevant evidences are not necessarily material to the outcome of the case [*Opic Karimum Corporation v Venezuela; Kılıç v Turkmenistan; Methanex v USA; John*]. Accordingly, the Tribunal may dismiss the evidence upon any of these two grounds. In this case, the Evidence is neither relevant (**2.3.1**) nor material to the outcome of this case (**2.3.2**).

2.3.1 The Evidence Is Not Relevant Because It Is Not Supportive of CLAIMANT's Allegation for Contract Adaptation

56. Regarding the matter of relevance, CLAIMANT argues that the Evidence is supportive of its allegation for justifying the adaptation of contract as it reflects that RESPONDENT is in bad faith as RESPONDENT had inconsistent behaviors in the two cases [*CM, pp. 26-27, paras. 94-100*]. To that end, CLAIMANT argues RESPONDENT is in bad faith because in the previous arbitration RESPONDENT successfully asked for the contract adaptation when it is RESPONDENT's favor [*Ibid; Letter by Langweiler (02 October 2018), p. 50; PO No. 2, p. 60, para. 39*]. But in this case, RESPONDENT denies contract adaptation when it is RESPONDENT's detriment although the previous arbitration and the present arbitration share similar storylines [*Ibid*].

57. In fact, RESPONDENT is not in bad faith as CLAIMANT alleges. The overall facts of these two cases are similar, but the determinative factors in each case are totally different [*Letter by Langweiler (02 October 2018), p. 50; PO No. 2, p. 60, para. 39*]. In the previous arbitration, RESPONDENT was the seller [*PO No. 2, p. 60, para. 39*]. Meanwhile, in the present arbitration, RESPONDENT is the buyer [*NoA, p. 5, para. 4; Exhibit C5, p. 13*].

58. It is not necessary of being a seller or a buyer; intrinsically, RESPONDENT wants to protect itself from being liable for unexpected risks associated in the two transactions. That was the reason why in the previous transaction RESPONDENT agreed to insert full HKIAC Model Clause whose language is broad enough to empower the Tribunal to adapt the contract; and ICC Hardship Clause 2003 whose broad language would protect RESPONDENT from unexpected risk [*PO No. 2, p. 60, para. 39*]. On the contrary, in the present transaction, RESPONDENT agreed to the narrowed HKIAC Model Clause whose language does not empower the Tribunal to adapt the contract; and listed several risks to be liable by RESPONDENT, instead of ICC Hardship Clause 2003 [*Response to NoA, p. 30, para. 4; Exhibit C5, p. 14, paras. 9-12 & 15; Exhibit R1, p. 33*].

59. Succinctly, it is self-evident that RESPONDENT was not in bad faith as alleged by CLAIMANT, but mere practice of risk allocation through negotiation in international trade. In conclusion, this signifies that the Evidence that CLAIMANT submitted is irrelevant because it is not supportive of CLAIMANT's allegation.

2.3.2 The evidence is immaterial because it is not determinative for the Tribunal to adapt the contract

60. In an event that the Evidence had the probative value in support of CLAIMANT's allegation that RESPONDENT is in bad faith, CLAIMANT failed to mention how being in bad faith or good faith is determinative for the outcome of the case. The disputes between Parties in the present arbitration concerns whether the Tribunal has the power to adapt the contract; and if the Tribunal had such power, whether the adaptation of the contract can be justified either under clause 12 of the Agreement, CISG or UNIDROIT Principles [*PO No. 1, pp. 52-53*].

61. Thus, being bad or good faith is not the determinative for contract adaptation. Factually, what determinative for such would be the information that provides that Parties had in fact empowered the Tribunal to adapt the contract, or provides that the elements under clause 12 of the Agreement, CISG or UNIDROIT Principles are satisfied [*Exhibit C5, p. 14, para. 12; CISG, Art. 79; MCL, Art. 6.2.3*]. Regrettably, the Evidence proffered by CLAIMANT does not contain such determinative information because it merely describes what happened in the previous arbitration, not this present arbitration [*PO No. 2, p. 60, para. 39*].

62. The Tribunal may concern about using the Evidence as the precedent. However, this is not the case here provided that the determinative factors of the two cases are totally different [*PO No. 2, p. 60, para. 39; Woolhouse; Noussia, pp. 104 & 112-113; Sacor v Repsol*].

2.4 The Exclusion of Evidence Does Not Undermine Fairness and Equality

63. Fairness and equality between the parties are the fundamental principle in international commercial arbitration from which the Tribunal cannot derogate, otherwise the imminent award is in danger of being set aside [*DAL, Art. 18; DAL, Explanatory Notes, p. 32, para. 32*]. Indeed, this principle is closely associated with the right to submit the evidence to support the claims [*Trustees of Rotoaira Forest v Attorney-Genera; DAL, Digest Case, p. 98, para. 6*]. In this case, however, the Tribunal can exercise the power–without any concerns to exclude the evidence submitted by CLAIMANT because such exclusion does not undermine the fairness between the Parties (**2.4.1**). On the contrary, the admission of that Evidence would irrefutably cause inequality against RESPONDENT (**2.4.2**).

2.4.1 Dismissing the Evidence Does Not Undermine Fairness Because CLAIMANT's Right to be Heard Is Not Unjustifiably Prejudiced

64. The postulate of fairness in legal proceedings is "*each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*" [*Dombo v Netherland; DAL, Art. 18; HKIAC Rules, Art. 13; O' Malley, pp. 321-322, para. 9.116*].

65. From this legal aspect, the term "*reasonable opportunity*" clearly insinuates that right to present the "*evidence*" is not inalienable in all cases. Both HKIAC Rules and Danubian Arbitration Law permit the exclusion of the evidence without unjustifiably prejudicing the right to present the evidence if that particular evidence is inadmissible and/or immaterial to the outcome of the case [*DAL, Art. 18; HKIAC Rules, Art. 13; IBA Rules, Art. 9; ICC Case No. 5082; O' Malley, p. 325, para. 9.127*].

66. Without any doubt as above-proven, the Evidence that CLAIMANT submitted is not merely inadmissible because of illegal nature and confidentiality veil affixed thereto; but also irrelevant and immaterial to the result of the present arbitration. Thus, the exclusion of the Evidence in question does not amount to the violation of the principle of fairness [*O'*

Malley, p. 269, para. 9.07; Libananco Holdings v Turkey, para. 78; Sussman, p. 5; Methanex v USA, p. 26 & 28, paras. 54 & 55 & 58]. Accordingly, CLAIMANT's right to present its Evidence is not unjustifiably prejudiced under both Danubian Arbitration Law, HKIAC, IBA Rules and international arbitration practice.

2.4.2 The Admission of the Evidence Causes the Inequality Because Both Parties Are Not Subject to the Same Standard

67. In light of evidentiary matters, the midpoint of equal treatment between Parties is "*the application of the same standard to the parties, not the same result*" [*ICC Case No. 5082; O'Malley, p. 325, para. 9.127*]. It is irrefutable in this case that the exclusion of the Evidence submitted by CLAIMANT does not undermine the equality between the parties in the proceedings. On the contrary, the inclusion of the evidence definitely results in inequality against RESPONDENT, to say the least.

68. In the previous arbitration that RESPONDENT had with one of its customers which was conducted under HKIAC Rules (2013), RESPONDENT is bound by Art. 42 of that Rules to keep all materials originated in that previous arbitration confidential [*HKIAC Rules (2013), Art. 42*]. To be exact, RESPONDENT cannot use those materials in any proceedings other than those associated with that previous arbitration [*Ibid; Noussia, p. 112; Lincoln v Sun Life; Sacor v Repsol*].

69. In light of this case, it basically means that RESPONDENT cannot use any materials obtained from the previous arbitration to support its defense against CLAIMANT in this case, although the situation really fits [*HKIAC Rules (2013), Art. 42; Noussia, p. 112; Lincoln v Sun Life; Sacor v Repsol*]. By virtue of this, it is imperative to ensure "*the application of the same standard to the parties*" accordingly. Succinctly, it is not the "*the same standard*" if CLAIMANT is allowed to rely upon the Evidence; meanwhile, RESPONDENT is not, although the evidence is exactly the same.

70. Therefore, in order to effectively comply with its duty to treat the parties equally, the Tribunal shall not admit the Evidence submitted by CLAIMANT because the admission of the Evidence in question would result in the unequal treatment between Parties.

3. UNDER CLAUSE 12 OF THE CONTRACT, CLAIMANT IS NOT ENTITLED TO ANY PAYMENT

71. CLAIMANT argues that the Tariff is a hardship under Clause 12 of the Agreement because it was unforeseeable and would result in CLAIMANT's financial ruin [*CM, pp. 31-32, paras. 119-126*]. Hence, CLAIMANT is entitled to an adaption of contract of an additional 1,250,000 USD payment [*CM, p. 32, paras. 127-128*]. CLAIMANT also argues that, under Clause 12, the Tariff is a form of hardship under the UNIDROIT Principles thereby allowing to claim for an adaptation of contract of 1,250,000 USD [*CM, p. 32-34, para. 129-139*]. Finally, CLAIMANT maintains that DDP Incoterms has been derogated in the Agreement [*CM, pp. 36-37, paras. 152-156*].

72. However, by basing its claim on the UNIDROIT Principles, CLAIMANT discusses the issue outside the scope of PO No. 1 Para. III(1)(c)(i) as PO No. 1 Para. III(1)(c)(i) deals with only Clause 12. Hence, any arguments relying on the UNIDROIT Principles are irrelevant and would not be worthy of discussion regarding adaptation of price under Clause 12. In the present case, the Tariff is outside Clause 12 because it is not comparable to health and safety requirement (**3.1**), nor unforeseeable (**3.2**) and does not make contract more onerous (**3.2**).

3.1 The Tariff Is Not Comparable to Additional Health and Safety Requirements

73. CLAIMANT argues only that the Tariff is not comparable to health and safety requirement because "*it needs to be interpreted in light of Ms. Napravnik's statement to RESPONDENT…that CLAIMANT was not willing to take over any further risks associated with DDP, in particular not those associated with changes in customs regulation or import restrictions*" [CM, p. 35, para. 141). This interpretation is insufficient and disregards many determinative facts. This issue concerns the clashing of broad term "*comparable*" and narrow term "*additional health and safety requirements*" in a single hardship clause, the Clause 12.

74. Art. 8 CISG and Art. 4.1 UNIDROIT provide rules to interpret statements, including the term of the contract [*Huber/Mulis, p. 12; Ferrari/Flechtner/Brand, p. 175; Schlechtriem/Schwenzer, Art. 8 para. 3; Textile Machine Case*]. First, such term shall be interpreted according to the party intent where the other party knew or could not have been unaware what that intent was [*CISG, Art. 8(1); UNIDROIT Principle, Art.4.1(1)*]. In case it

is not applicable, the standard of interpretation is the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Huber/Mullis, pp. 12-13; Ferrari/Flechtner/Brand, p. 181; CISG Digest, Art. 8*]. In the present case, its drafting history expounds on Parties' intent for the narrow interpretation of Clause 12 **(3.1.1)**. Furthermore, any reasonable person in CLAIMANT's position, specifically Mr. Ferguson's, would understand that the Tariff is not comparable to the health and safety requirements **(3.1.2)**.

3.1.1 The Drafting History of Clause 12 Expounds on Parties' Intent for the Narrow Interpretation of Clause 12

75. Under Art. 8(1) CISG, a contract, akin to statements and conduct by Parties, is to be interpreted according with the intent of the Parties where the other party knew or could not have been unaware what that intent was [*CISG, Art. 8(1); Huber/Mullis, p. 12; UNIDROIT Art. 4.2.1; Schlechtriem/Schwenzer, Art. 8(3); Marzipan Case; Crudex Chemicals Oy v. Landmark Chemicals S.A.*].

76. The wording which was finally added to the force majeure clause in Clause 12 was suggested by Mr. Krone (RESPONDENT's negotiator) with reference to the risks mentioned by Ms. Napravnik (CLAIMANT's negotiator) [*PO No. 2, p.56, para. 12*]. Hence, the interpretation of Clause 12 is based on RESPONDENT's intention and CLAIMANT's awareness of the former.

3.1.1.1 RESPONDENT **I**ntended **N**arrow **H**ardship **C**lause

77. RESPONDENT's intention for narrow hardship clause is evidenced by its experience in international trade, inclusion of DDP (Incoterms 2010), its negotiation with CLAIMANT, and finally the deviation from the CLAIMANT's proposed standard ICC Hardship Clause.

78. RESPONDENT's experience illustrates its understanding of risk allocation in cross-border business involving international trade as importing frozen semen from world class foreign stallions from all over the world, or submitting their mares or the stallions for natural coverage [*Exhibit C1, p.9*]. Plus, in other arbitration which the dispute concerned the sale of a mare by RESPONDENT to a buyer in Mediterraneo, "*the contract, negotiated also by Mr. Antley, provided for delivery DDP Mediterraneo (Incoterms 2010), contained an ICC Hardship Clause 2003…*" [*PO No. 2, p.39*]. In that arbitration, the "*Partial Interim Award*"

provides adaptation by arbitrator and allocated risk to the buyer should there is hardship [*PO No. 2, p. 56, para.39*].

79. Demand for inclusion of DDP (Incoterms 2010) illustrates RESPONDENT's intention to avoid risk associated with changes of delivery term for being the buyer. Rational behind this DDP inclusion is not just because of "*CLAIMANT's much greater experience in the shipment of frozen semen including the necessary export and import document*" but also RESPONDENT's knowledge to avoid risk in international trade above as specifically how Mr. Krone and Mr. Antley "*discussed the main strategy, i.e. the need for DDP delivery…*" [*Exhibit R3, p.35*].

80. Prior negotiation further demonstrates RESPONDENT's intention to avoid risk in broad term as a buyer. CLAIMANT's proposal to include standard ICC Hardship Clause 2003 to counter inclusion of DDP (Incoterms 2010) was not accepted by RESPONDENT's negotiators [*Exhibit R3, p.35*]. Mr. Krone and Mr. Antley shared the same understanding that "*ICC hardship clause suggested by CLAIMANT too broad*" [*Exhibit R3, p.35*].

81. Finally, the agreement on hardship clause reads "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" suggested by RESPONDENT demonstrates its intention to have narrow interpretation of hardship clause because it lists the specific hardship event which is "*additional health and safety requirements*" and deviates from the standard ICC Hardship Clause "*events have rendered performance more onerous than could have reasonably anticipated at the time of the conclusion of the contract*" whose scope is much broader [*ICC Hardship Clause 2003, p. 15*].

3.1.1.2 CLAIMANT Was Aware of RESPONDENT's Intention for Narrow Hardship Clause

82. CLAIMANT's awareness is evidenced by its knowledge of RESPONDENT's business, prior negotiation, and acceptance of proposed hardship clause by RESPONDENT. Any reasonable person in Mr. Ferguson's position would understand that the Tariff is not comparable to the health and safety requirements. Art. 8(2) CISG provides for the contract to be interpreted in accordance to a more objective analysis to determine a "*presumptive*" or "*normative*" intent [*Fruit and Vegetables Case*] by the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*CISG, Art 8(2); UNIDROIT*

4.2.2; Stencil Master case; Health Care Products Case; Huber/Mullis, pp. 12-13; Ferrari/Flechtner/Brand; UNCITRAL Digest of Case Law, Art. 8].

83. In 2014, CLAIMANT had an unfortunate and costly experience with additional health and safety requirements when it sold three mares DDP Danubia to farms in Danubia [*Exhibit C4, p. 12; PO No. 2, p.58, para. 21*]. The sudden imposition of very strict new health and safety requirements by Danubia due to a rare aggressive type of foot and mouth disease resulted in highly expensive tests and long quarantine which increased the cost of performance up to 40% of the overall price and this amounts to approximately 3,200,000 USD [*PO No. 2, p. 58, para. 21; Exhibit C4, p. 12*].

84. In his challenge to the ICC Hardship Clause, Mr. Krone reasoned to Mr. Ferguson that the ICC Hardship Clause is too broad for the objectives pursued which are to relieve CLAIMANT from the liability in the event of additional health and safety requirement or similar events of roughly the same scale and nature [*PO No. 2, p. 56, para. 12*]. Therefore, having access to the prior emails chain and informed of the risks mentioned [*PO No.2, p.55, para. 5*], Mr. Krone suggested the specific reference to the health and safety requirements and addition of the phrase "*comparable events*" as the wording of the hardship clause that was eventually agreed on by Parties in the contract [*PO No. 2, p. 56, para. 12; Exhibit C5, p. 14, para. 12*].

85. Any reasonable person in Mr. Ferguson's shoes would understand that for any event to fall within the scope of "*comparable events*" in the hardship clause, its nature and scale must similar to those of the health and safety requirements. In other words, in order to invoke hardship in the Agreement on the basis of "*comparable events"*, the CLAIMANT must prove the nature or the cause of the newly imposed Tariff is similar to that the health and safety requirements, and that its cost of performance has increased by a roughly equal amount to that past experience.

86. To begin, the nature of imposed Tariff and CLAIMANT's previous experience of health and safety requirements are clearly different. The previous situation which CLAIMANT encountered was mainly a direct result of an aggressive type of foot and mouth disease which left the government of Danubia with no choice but to impose strict regulations involving long quarantine time and additional tests [*PO No. 2, p. 58, para. 21*]. The case at hand, however, has nothing to do with any health and safety requirements. In actuality, the tariff

imposed is a politically motivated move induced by the hardliners in the Ministry of Economics of the Equatoriana as a strong reaction to the highly controversial measures by the newly elected president of Mediterraneo [*Exhibit C6, p. 15*]. Hence, the nature of both events is far from comparable.

87. In regards to its scale, the present Tariff is not comparable to CLAIMANT's past experience either. In fact, the third shipment taking place after the 30% tariff imposed by Equatorianian authorities on agricultural goods from Mediterraneo consists of 50 doses of frozen semen whose overall price is 5,000,000 USD [*Exhibit C6, p. 15; Exhibit C5, pp. 13-14*]. Therefore, the 30% tariff amounts to only 1,500,000 USD. Comparatively speaking, the present cost of the additional tariff is not even half as much as the cost of the health and safety requirements (i.e. 3,200,000 USD) experienced by CLAIMANT back in 2014.

88. As there is quite a disproportionate gap with regards to the CLAIMANT's cost of performance in our present case and in its previous experience, any reasonable person would understand that the Tariff is not comparable to the health and safety requirements mentioned in Clause 12.

3.1.2 The Tariff Imposition Was Foreseeable

89. CLAIMANT only argues that because the Agreement was concluded before the imposition, thus tariff was unforeseeable to CLAIMANT [*CM, p.31, paras. 120-123*]. However, the determination of foreseeability is in direct dependence on the party's knowledge at the time of the conclusion of the agreement as one can only foresee a certain result if it has or ought to have had actual or the presumed knowledge of relevant facts [*Saidov, p.105*]. Additionally, when a party insists on incorporating a specific agreement clause to deal with the problem, it can also be interpreted that the event is taken into account by that party as well [*Schwenzer, p.719*].

90. In the present case, the Tariff was foreseeable by CLAIMANT because its knowledge of protectionist policy of politician during election campaign, Equatoriana's history of imposing retaliating Tariff, both states' membership in the WTO and CLAIMANT request to include custom regulations in hardship clause in its email to RESPONDENT [*Exhibit C4, p. 12*].

91. Firstly, President Bouckaert had already in his election program in January 2017 announced a certain preference for a more protectionist approach to international trade, in particular in relation to agricultural products and the analysts to a certain degree also expected some protectionist policy from this government as well [*Exhibit C6, p. 15*]. Furthermore, on 5 May 2017, he also appointed an outspoken protectionist in advocation of limiting the access of foreign agricultural products to Mediterranean markets for years as his "*superminister*" for agriculture, trade and economics [*PO No.2, p. 58, para. 23*]. As one could expect the foreign policy of the country to be shaped by its high-ranking decision-makers [*Alden, p. 11*], there is definitely possibility of impositions of trade barrier against the free market economy which CLAIMANT as a businessperson in the industry could have reasonably foreseen.

92. Secondly, in regards to the 30% retaliatory Tariff imposed by Equatoriana, CLAIMANT contends that Equatoriana has always been an ardent supporter of free trade, so the imposed Tariff is clearly not foreseeable. However, it is important to mention that Equatoriana also had a history of employing a direct retaliatory measure towards restrictions imposed by other countries affecting imports from it as well [*Exhibit C6, p.15*].

93. Furthermore, as both Mediterraneo are Equatoriana are member states of the WTO [*PO No. 2, p. 61, para. 47*], a look at the WTO dispute settlement process unravels the foreseeability of the retaliatory Tariff from Equatoriana to Mediterraneo. While members states are obligated to commit itself to multilateral dispute settlement mechanism rather than taking unilateral actions [*WTO, p. 55*], they are entitled to right to request for an authorized retaliation from the Dispute Settlement Body of the WTO as well [*WTO Agreement, Annex 2, Art. 22.2*]. Therefore, just because the two states can seek WTO dispute settlement mechanism, it does not mean that an amicable solution to the dispute is guaranteed to be reached. Various cases corroborate that the possibility of a retaliation despite the fact that states utilized WTO dispute settlement mechanisms [*US — COOL; US — Anti-Dumping Methodologies (China); US — Washing Machines*]. Hence, the claim that the retaliatory Tariff from Equatoriana is unforeseeable is unreasonably slanted towards the CLAIMANT.

94. Lastly, CLAIMANT demanded for a hardship clause to be added in the agreement [*Exhibit C4, p. 12*]. Its suggestion to incorporate a hardship clause that deal with change in customs and

regulation demonstrates that CLAIMANT have foreseen the possibility of such event or regulation taking place already. Consequently, the Tariff is not unforeseeable.

3.1.3 The Tariff Does Not Make The Contract More Onerous

95. CLAIMANT argues that the Tariff makes the contract more onerous on the grounds it loses profit, in risk of bankruptcy [*CM, paras. 124-126*], and the cost of performance has increased [*CM, paras. 130-133*]. However, CLAIMANT fails to explain the concept of onerousness threshold.

96. The requirement of onerous performance is established in the ICC Hardship Clause 2003 and although it was not explicitly stated in the definition of hardship under the UNIDROIT Principles, the commentators suggested that the requirement of '*excessively onerous*' performance is implicitly incorporated within the requirement of '*fundamental alteration*' in its Art. 6.2.2 already [*McKendrick, pp.719−720*]. It follows that in determining whether an event makes the performance of the contract more onerous or not, the court needs to evaluate if the event fundamentally alters the equilibrium of the contract.

97. In view of the goal of legal security, the main criterion for a disequilibrium to be considered as '*fundamental*' or '*onerous*' should be as objective as possible, ideally expressed in a percentage or other measurable figures although in some cases subjective standards may be employed [*Girsberger, p.125*]. In the case at hand, the imposed tariff neither objectively **(3.1.3.1)** nor subjectively **(3.1.3.1)** makes the performance of the contract more onerous.

3.1.3.1 **The Tariff Does Not Pass the Threshold of Objective Onerousness.**

98. CLAIMANT wrongly calculates the price has increased to 15,000% by relying on only delivery cost of $200 [*CM, p. 33, para. 131*]. This calculation is wrong because $200 is not the total cost of contractual performance. CLAIMANT urges the Tribunal to consider its financial situation as it could bankrupt to bear this Tariff in proving that performance of the contract was onerous [*CM, p. 32, para. 125*]. Nevertheless, when the court examines factors which are external to the contract itself, such as the economic situation of the promisor, its relative position on the market or the like, it poses to serious obstacles to consistency in the application of the doctrine in the sense that it entails enormous processing costs in litigation

and it only has an *ad hoc* value which is limited to the particular facts of each case [*Halpern, p. 1137*]. Therefore, the Tribunal's employment of the objective standards in its assessment of justice better safeguards the consistency in the application the concept of hardship [*Girsberger, p.125*].

99. In view of the objective standards, a cost increase by 13%, 30%, 44% or 25-50% was considered insufficient to qualify as hardship in international commercial arbitration cases [*Brunner, p. 427*]. Similarly, the commentary on the 1994 edition of the UNIDROIT Principles also indicated that precise measurement in monetary terms recognizes fundamental alteration as amounting to 50% or more of the cost or the value of the performance [*UNIDROIT, p. 147*]. While there is a scholar suggested a threshold of 100% should be favored [*Brunner, pp. 428*-435], Professor Schwenzer, suggests an even higher margin of 150-200% with respect to international contracts [*Schwenzer, p. 717*]. Hence, there are unlikely any awards where arbitrators would have granted relief merely because the costs of performance have increased by 50% or less compared to what had been agreed in the contract [*Zaccaria, p. 169; Brunner, pp. 428−431; Houtte van, p. 190*].

100. Contrary to the CLAIMANT's allegation that the additional 1,250,000 USD exceeded the '*limit of sacrifice*' beyond which one can consider an economic impossibility to perform [*CL, Memo, para 125*], the imposed tariff in the present case is far from passing the numeric expression of hardship alteration threshold as it amounts to only 30% of the price which is agreed in the Agreement. As a result, the Tariff does not make CLAIMANT's performance of the contract more onerous.

3.1.3.2 Alternatively Considering the Subjective Standards, The Tariff Does Not Make CLAIMANT the Contract More Onerous Either

101. Relying on its financial situation, CLAIMANT insists the Tribunal to lower its standards for considering a situation of hardship by postulating that performance of the contract would result in CLAIMANT's financial ruin [*CM, pp. 31-32, paras. 124-125*]. Nonetheless, it is important to note that while *financial ruin* could be possible ground which under certain circumstances may allow the invocation of hardship, *financial difficulties* of the debtor will not normally be considered a fundamental alteration of the contractual equilibrium

[*Girsberger, p.132*]. Therefore, CLAIMANT must prove that the Tariff not only gives rise to financial difficulties but also likely causes CLAIMANT to go bankrupt or become insolvent.

102. Hence, in determining if the financial difficulties will lead to bankruptcy, it is very important to evaluate the CLAIMANT ability to absorb the losses in our current case [*Girsberger, p. 131*]. Be that as it may, in order to prevent the debtor from being unjustly favored, financial ruin which is due to a lack of managerial skills should not entitle that party to a lower alteration threshold [*Brunner, p. 437*].

103. CLAIMANT argues that bearing the 1,250,000 USD alone would mean the end of its operations [*CM, Memo, para.126*]. Yet, this is untrue. CLAIMANT not only runs Mediterraneo's oldest and most renown stud farm which covers all areas of the equestrian sport such as horse-racing and dressage but its business is also extended to breeding, research, demonstration and teaching particularly its provision of training and professional development courses on horse race, breeding and riding/driving. [*NoA, p. 4, paras. 1-2*]. Thus, it is clear that CLAIMANT is not just merely a small company.

104. CLAIMANT's racehorse section has been making losses since 2014, so it hopes for this section to generate profit from 2017 onward to satisfy its creditors [*PO No. 2, p. 57 & 59, para. 15 & 29*]. In the best-case scenario, albeit the fact that CLAIMANT's plan to make profit from its racehorse section would be endanger [*PO No. 2, p. 59, para. 29*], it can still rely on its other sectors to continue its operation. For instance, in all other sections of horse sports, CLAIMANT also additionally offers frozen semen of its champion stallions for artificial insemination, allowing it to earn more profit [*NoA, p. 4, para. 2*]. Even in the worst-case scenario, CLAIMANT would only need to make the sale of its dressage part as a precondition of entry into a new credit [*PO-2, p. 59, para. 29*]. As CLAIMANT is particularly famous for its breeding success and not dressage [*NoA, p. 4, para. 2*], it is not reasonable for CLAIMANT itself to automatically hypothesize an end to its own operation after losing just a small part of its business.

105. Lastly, CLAIMANT had carried out the performance and paid for the costs of the newly imposed tariff already without any imminent financial ruin as it claims [*Exhibit C8, p. 18*]. Plus, its current financial situation which is used as a basis of proving its imminent financial ruin is attributed to the high interest payments for the loan taken on due to CLAIMANT's

desire to finance the new stables in 2013 [*PO No. 2, p. 59, para. 29*]. In order to ensure that no party is unjustly favored out of its own managerial decision, even with regard to its financial situation, CLAIMANT should not be entitled to a lower alteration threshold as decision to take on loan is one that must be decided at the managerial level. Hence, the deterioration of CLAIMANT financial capacity falls within its sphere of control and thus does not authorize this party to invoke the hardship exemption [*Girsberger, p. 131*].

106. In conclusion, since the Tariff is outside the ambit of the hardship clause, CLAIMANT is not entitled to the payment USD 1,250,00 resulting adaptation of price under the Agreement.

4. UNDER CISG, CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000

107. CLAIMANT argues that it was not seeking to have tariff imposition as an exempting impediment in the strict textual sense of Art. 79 CISG, and there is no derogation of Art.79 because Art. 6 does not apply [*CM, pp. 37-38, paras. 164 & 168*]. CLAIMANT, then, made a submission insists the Tariff to fall under Art. 79 CISG by claiming that Art. 79 governs both force majeure and hardship [*CM, pp.37-38, paras.164-166*]. CLAIMANT also argues that Art. 79(5) does provide adaptation, and that RESPONDENT neglected its duty to renegotiate [*CM, pp. 38-40, paras. 167-174*]. Therefore, CLAIMANT is entitled to resort to the Tribunal for an adaptation to the contract based purely on the UNIDROIT Principle [*CM, p. 40, para. 175*]. CLAIMANT further argues that RESPONDENT breached the Clause 8 by reselling the frozen semen and also claims the additional payment of 250,000 USD on top of USD 1,250,000 based on Art. 61 CISG [*CM, pp. 41-43, paras. 183-162*].

108. In contrary to CLAIMANT's allegations, Art. 79 CISG is derogated by application Art. 6 CISG (**4.1**). Art. 79 CISG covers force majeure only (**4.2**). Further, RESPONDENT acted in good faith (**4.3**) In addition, CLAIMANT is not entitled to the additional USD 250,000 on top of USD 1,250,000 (**4.4**).

4.1 Under Art. 6 CISG, Art. 79 CISG Is Derogated

109. Principle of party autonomy applies unless the contracting Parties have otherwise provided pursuant to Art. 6 CISG [*Miettinen, p. 38; Flechtner, p. 43*]. Art. 6 CISG allows Parties to derogate from the Convention's rules on liability by agreement or any offer, acceptance or other indication of intention [*CISG, Art. 6 & 12; Cian, para. 1467*]. Parties can do so by a

simple sentence in a contract containing an exhaustive list of exempting circumstances [*Miettinen, p. 38; Equipment Case; Flechtner, p. 393*]. If this the case, Art. 79 CISG will wholly or partially be excluded [*Flambouras, p. 283; Arbitral award No. 48*]. This is because, in international trade, Parties are normally very experienced and aware of the risks involved [*Flambouras, p.283*]. Therefore, they are likely to include special clauses in their contract such as hardship or *force majeure* clause [*Flambouras, p. 283; Contract No. 100*].

110. Indistinguishably, because of the past experiences of both Parties, a very exhaustive hardship clause was included in the contract by adding hardship wording into the existing force majeure clause, clause 12 [*Exhibit R3, p. 35; PO No. 2, p. 56, para. 12*]. Clause 12 has listed all the situation that CLAIMANT is not responsible only in the case of missed flights, weather delays, failure of third-party service, additional health and safety requirements [*Exhibit C5, p. 14, Cl. 12*]. Accordingly, Art. 79(1) is derogated, thus, shall be excluded.

4.2 Art. 79 CISG Governs Only Force Majeure

111. CLAIMANT argued that Art. 79 CISG includes the situation of hardship by interpreting it in a broad sense [*CM, pp. 37-38, paras. 164 & 166*]. Yet, there is neither clear explanation nor credible sources to substantiate the claim that Art. 79 includes hardship [*CM, p. 37, para. 164*]. In fact, in both strict or broad sense Art. 79 CISG will govern only the situation of force majeure. That is because, based on the general rules of treaty interpretation, Art. 79 CISG governs only force majeure **(4.2.1)**, Furthermore, in light supplementary means of interpretation of Art. 32 VCLT, the drafting history of Art. 79 CISG covers only force majeure **(4.2.2)**.

4.2.1 Based on The General Rules of Interpretation, Art. 79 CISG Governs Only Force Majeure

112. Art. 79 provides that "*a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.*" [*CISG, Art. 79(1)*]. However, the meaning of '*impediment*' is uncertain as it was never specified in the Convention. Thus, in light of the legal nature of the CISG, the relevant rules of

interpretation are those laid down in VCLT, that codified as customary international law, should be taken into consideration [*Petsche, p. 155; Gardiner, at p. 12-7*].

113. The general rule of interpretation under Art. 31 VCLT states that "*[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." [*VCLT, Art. 31*]. The supplementary interpretation under Art. 32 VCLT such as the *travaux préparatoires* and the circumstances of the conclusion of the treaty should also take into consideration in the event that the general rule of interpretation "eaves the meaning ambiguous or obscure' or '[l]eads to a result which is manifestly absurd or unreasonable." [VCLT, Art. 32].

114. Under the general rules of treaty interpretation of Art. 31 VCLT, the ordinary meaning of '*impediment*' under Art. 79 CISG covers only force majeure **(4.2.1.1)**, identically, the meaning of Art. 79 CISG in its context covers only force majeure **(4.2.1.2)**, and the meaning of Art. 79 CISG in light of its object and purpose covers only force majeure **(4.2.1.3)**.

4.2.1.1 The Ordinary Meaning of 'Impediment' Under Art. 79 CISG Covers Only Force Majeure

115. The Oxford Dictionary defines an impediment as a "*hindrance or obstruction in doing something*" [*Petsche, p. 157; Oxford, Impediment*]. Both '*hindrance*' and '*obstruction*' suggest the presence of an obstacle that affects the ability of someone from doing something [*Petsche, p. 157*]. Same conclusion has been resulted in the analysis of the verb "to impede" [*Petsche, p. 157*]. Oxford Dictionary also provides an example: "*the sap causes swelling which can impede breathing*", which means a swelling which can make breathing impossible [*Oxford, Impede*]. '*To impede*' is used in the sense of making something impossible [*Petsche, p. 157*]. Therefore, the ordinary meaning of '*impediment*' under Art. 79 CISG is meant only to force majeure.

4.2.1.2 The Meaning of Art. 79 CISG In Its Context Covers Only Force Majeure

116. Like RESPONDENT has mentioned earlier, CLAIMANT argues that in a broader context of interpretation, Art. 79 does include the situation of hardship [*CM, p. 37, para. 163-165*]. However, meaning of Art. 79 CISG in its broader textual context governs only force majeure.

117. Art. 79 CISG is contained in Part III, Chapter 5, Section IV entitled '*Exemptions*' [*CISG, Art. 79*]. Section IV is not entitled as '*Force Majeure*' since such a heading would suggest the other availability types of exemptions is not addressed in the CISG. However, Section IV is rather an exhaustively regulation governs the question of available exemptions of force majeure [*Lookofsky, p. 442*]. If an interpretation of Section IV as merely illustrative, it would, therefore, be contrary to the basic requirement of legal certainty [*CISG, Art. 7; Schlechtriem, p. 37*]. No clear answers or guidance will be given if the availability of other exemptions is recognized [*Petsche, p. 159*]. The decision from one case to the other will be different, which is contrary to the CISG's basic objective of uniform interpretation [*Petsche, p.159; Felemegas, p.6; Bazinas, p. 19*]. Therefore, the meaning of Art. 79 CISG in its broader textual context governs only force majeure.

4.2.1.3 The Meaning of Art. 79 In Light of Its Object and Purpose

118. The main objective of CISG is to uniform the sales law around the world [*CISG, Art. 7(1)*]. The achievement of legal uniformity is not understood as referring only to textual uniformity but also to actual uniformity, such as the uniform application by the courts [*Milk packaging equipment case; Brassiere cups case; Cherubino Valsangiacomo v. American Juice Import*]

119. In case of hardship in relation to contracts governed by the CISG, most courts that have found those claims unavailable on the grounds that CISG recognizes only force majeure exemption [*Cherubino Valsangiacomo v. American Juice Import; Vital Berry Marketing v. Dira-Frost; Iron molybdenum case*]. Many commentators also share the same view, both before and after the Scafom case ruling. [*Petsche, p.155; Scafom Case; Jenkins, p.2025; Flambouras, p.278; Kessedjian, p.417; Rimke, p,226; Veneziano, p.143*; Zeller, *p.153*].

4.2.2 Drafting History of Art. 79 CISG Covers Only Force Majeure

120. To understanding the motivation of the drafters of Art. 79 CISG, a closer examination of its "*predecessor*" provision, namely Art. 74 of the Uniform Law on the International Sale of Goods ('ULIS') is required [*Nicholas, pp.231-245*].

121. It has been argued that the general legislative intent of the CISG's drafters is to exclude hardship in this Article. That is because the same concern has been rose by the representative of Norway to consider a radical change of circumstances as a reason for exemption from

liability, as well as UNCITRAL Working Group to include a hardship provision in the text of CISG were rejected during the drafting of CISG, which means Art. 79 CISG cannot be interpreted as including hardship [*Petsche, p.163-166*]. Moreover, there were a lot of support for the argument that Art. 79 CISG contains very strict rules, including the *pacta sunt servanda* principle, about the exemption from liability and does not easily excuse the non-performing party [*CISG AC-Opinion No. 7, para. 27; Honnold, p.* 185]. In light with the interpretive rules contained in 32 VCLT, the express rejection of a hardship exception proposed by the representative of Norway and the UNCITRAL Working Group can only be construed as meaning that hardship is not available under Art. 79 CISG.

4.3 RESPONDENT Did Not Violate Any Principles of Art. 7(1) CISG

122. CLAIMANT also argues that RESPONDENT violated the principle of good faith under Art. 7(1) CISG by saying RESPONDENT neglected its duty to renegotiate [*CM, p. 38, paras. 169-177*]. CLAIMANT also mentions that adaptation is available under Art. 79(5) CISG, but later based on Art. 61 CISG [*CM, pp. 38 & 42-43, paras. 167 & 187-162*]. However, Art. 79 CISG does not impose any duty of renegotiation **(i)**, adaptation of price is not available under Art. 79(5) or Art. 62 CISG **(ii)**, and the absence of a specific hardship remedy is appropriated **(iii)**.

4.3.1 Art. 79 CISG Does Not Impose Any Duty of Renegotiation

123. A very criticizing case identical to the claim by CLAIMANT has once been decided by the Belgian Supreme Court [*Scafom Case*]. The court ruled that hardship is felt within the meaning of Art. 79 CISG, but the convention does not provide any remedy, thus the duty to renegotiation need to be retrieved from the UNIDROIT Principle based on the principle of good faith is required. However, the decision of the Court has been heavily criticized for importing domestic principles of hardship by extracting a gap in the CISG and implementing civil law remedies instead of making an autonomous interpretation as required under Art. 7 CISG principles of the need to consider the international character of the CISG and the importance of uniformity of application. [*Dai, p. 131; DiMatteo, p. 283*]. In contrary, no common law countries recognize the exemption of hardship nor the duty to renegotiate [*DiMatteo, p. 284; Flechtner I*]. Therefore, the principle of good faith must not be construed of having duty of renegotiation under Art. 79 CISG, and the Tribunal must not consider the remedies available under the UNIDROIT Principle.

4.3.2 Adaptation of Price Is Not Available Under Art. 79(5) or Art. 62 CISG

124. Article 79(5) CISG only provides that "*nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.*" [*CISG, Art. 74(5)*]. That means Art. 79(5) CISG does not prevent either party any remedies that are available under the Convention, except for claiming damages [*CISG, Art. 79(5); Schwenzer, p. 720; Rheinland Versicherungen v. Atlarex; Powdered Milk Case*]. However, no any provision under CISG provides that the court the adapt the contract. It is therefore must be concluded that the adaptation of the contract by the court is impossible in that context. [*Tallon, p. 592*].

125. Moreover, Art. 62 CISG provides that "*the seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.*" [*CISG, Art. 62*]. Art. 62 only governs when a party does not make any payment of goods to the other party, not the adaptation of contract [*5Cb/114/2006; Medicaments Case; Paper handkerchiefs production line case*].

126. Accordingly, adaptation of price is not available under Art. 79(5) or Art. 62 CISG, therefore, CLAIMANT is not entitled to additional payment of USD 1,250,000 by court adaptation.

4.3.3 The Absence of A Specific Hardship Remedy Is Appropriated

127. It is also worth mentioning that remedies that are typically available in cases of hardship is different from the remedy provided in Art. 79 CISG. For example, under the UNIDROIT Principles, the disadvantaged party may request the renegotiation of the contract [*UNIDROIT Principles, Art. 6.2.3(1)*]. Where renegotiations cannot be reached, either party may bring the case before a court which may either terminate the contract or modify its terms [*UNIDROIT Principles Art. 6.2.3(1) & 6.2.3(2)*].

128. The remedies available under Art. 79 CISG and those instruments is scientifically different is because these two sets of norms are an entirely different nature [*Petsche, p. 161*]. Art. 79 addresses only in the case of force majeure or impossibility to perform given that performance is no longer possible, as a consequence, the non-performing party can only exempt from its liability [*Rimke, p. 199; Draetta*]. On the other hand, hardship deal with cases where performance is still possible which their purpose is to restore the contractual

equilibrium [*Rimke, p. 200*]. Accordingly, it must be construed that situations of hardship cannot be dealt with within the framework of Art. 79.

4.4 IN ADDITION, CLAIMANT Is Not Also Entitled to Any Other Additional Payments

129. CLAIMANT argues that RESPONDENT breached the Agreement under Clause 8 by reselling the frozen semen to the third party [*CM, p. 41, para. 184*]. However, Clause 8 is merely a shipment installments clause provides that "*seller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen. The first shipment of 25 doses DDP will be on 20 May 2017; the second shipment of 25 doses will be DDP on 3 October 2017; the third and last shipment of 50 doses will be DDP on 23 January 2018.*" [*Exhibit C5, p. 14, Clause 8*]. No words in Clause 8 mentions about resale prohibition. Moreover, it is irrelevant to the issues at hand for the Tribunal to consider. Therefore, RESPONDENT did not breach any provision under the Agreement by reselling the frozen semen to the third party.

130. On the other hand, even if the Tribunal found that RESPONDENT did breach the SA, under CISG, CLAIMANT is still not entitled to disgorgement damage. Under the convention, only Art. 74 governs the issue of damage [*CISG, Art. 74*]. However, Art. 74 does not cover the issue of disgorgement of profit because disgorgement of profits is not compatible with the wording of Art. 74 CISG [*Nils, p. 97; Katy, p. 5*].

131. Art. 74 CISG provides that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profits, suffered by the other party as a consequence of the breach." [*CISG, Art. 74*]. This wording signifies that a loss by the aggrieved party is a pre-requisite for a damage claim under the CISG [*CISG AC-Opinion No. 6, para. 2.9; Chengwei, para.13.5*]. Nonetheless, disgorgement of profits requires the surrender of profits earned by the breaching party to the aggrieved party [*Jaffey, p. 431; Ewoud/André, p. 5*]. It is not required that the aggrieved party has suffered any loss [*Nils, p. 97; Katy, p. 5*]. Thus, the wording of Art. 74 shows that disgorgement of profits is not within its scope.

132. In conclusion, CLAIMANT is not entitled to USD 125,000,000 and any other amount resulting from an adaption of price under the Agreement and CISG.

REQUEST FOR RELIEF

For the reasons stated herewith, RESPONDENT, Black Beauty Equestrian, kindly requests the Arbitral Tribunal to declare that:

1. The Tribunal lacks jurisdictional power under arbitration agreement to adapt the contract;

2. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT's computer system; and

3. CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount resulting from adaptation of the price:
   a. Under clause 12 of the contract
   b. or under the CISG.

Respectfully submitted,

/ Signed /

On behalf of RESPONDENT
Black Beauty Equestrian

Chanboromey PON
Sakda SAU
Somphospheak HENG
Teng LY
Watanak CHHOUN

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Phnom Penh, Cambodia

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Signed
CHHUON Watanak

Signed
HENG Somphospheak

Signed
LY Teng

Signed
PON Chanbormey

Signed
SAU Sakda