SIXTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT
31 MARCH – 7 APRIL 2019
HONG KONG

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF INTERNATIONAL BUSINESS AND ECONOMICS
SCHOOL OF LAW

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

RUITING LI • CHAO ZHAO • BEN LIU

ZIBO LIU • ZHUANG GAO • JIARUI HAO

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UPICC	¶¶ *30-33,43,49-53,80-83,86,90,93, 97-101, 103,106, 108,110,115-118,133*	UNIDROIT Principles of International Commercial Contracts, 2010

LIST OF ABBREVIATIONS

&	and
¶(¶)	paragraph(s)
A.N.A	Response to the Notice of Arbitration
Art.	Article
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	United Nations Convention in the International Sale of Goods Advisory Council
Co.	Company
DDP	Delivered Duty Paid
e.g.	example given (for instance)
ed.	edition
et al.	et alii (and others)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
ibid.	ibidem (the same)
IBA	International Bar Association
ICC	International Chamber of Commerce
INCOTERMS	International Commercial Terms
ICSID	International Centre for Settlement of Investment Disputes
Ltd.	Limited
Mr.	Mister
N.A.	Notice of Arbitration
No.	Number

OLG	Oberlandesgericht
P(P).	page(s)
PO	Procedural Order
Sales Agreement	Frozen Semen Sales Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
v.	versus

STATEMENT OF FACTS

The parties to these arbitration proceedings are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**", collectively the "**Parties**"). **CLAIMANT** is a company known for its breeding success regarding racehorses seated in Mediterraneo. **RESPONDENT** is a cooperation famous for the broodmare line incorporated in Equatoriana.

21 March 2017	RESPONDENT contacted CLAIMANT and inquired about racehorse semen for its breeding program.
24 March 2017	CLAIMANT submitted a Standard Contract to RESPONDENT.
28 March 2014	RESPONDENT replied with changes to the delivery terms, applicable law and forum selection clause.
31 March 2014	CLAIMANT accepted the delivery terms but requested to include a hardship clause in the contract.
10 April 2017	RESPONDENT submitted the arbitration clause to CLAIMANT.
11 April 2017	CLAIMANT replied with changes to the place of arbitration.
12 April 2017	A car accident happened to the Parties' two main negotiators.
6 May 2017	The Sales Agreement was signed by the Parties.
19 December 2017	Equatoriana announced to impose a 30% retaliatory tariff on agricultural products including racehorse semen from Mediterraneo.
20 January 2018	CLAIMANT authorized the shipment under the impression that RESPONDENT promised to bear the additional costs from the tariffs.
23 January 2018	CLAIMANT made the third shipment.
12 February 2018	RESPONDENT withdrew from the renegotiation.

SUMMARY OF ARGUMENTS

1. The Tribunal has both the jurisdiction over the adaptation issue and the power to adapt the contract. First, the Arbitration Clause shall be governed by the governing law of main contract, the law of Mediterraneo, based on which the arbitration clause shall be interpreted to include the adaptation claim into the jurisdiction of the Tribunal. Second, the Tribunal has the power to adapt the contract, which is authorized by Mediterranean Contract Law, a verbatim adoption of UPICC. **(Issue I)**.
2. The contested evidence is admissible. This evidence is relevant to this case and *prima facie* authentic. To obtain this evidence, CLAIMANT is in no violation of confidentiality obligation and in any event it could be justified. Even illegally obtained, the evidence is still admissible. CLAIMANT obtained the evidence on clean hand, the evidence is not privileged for public interest and essential for the interest of justice **(Issue II).**
3. Under Clause 12 of the Sales Agreement, CLAIMANT is entitled to the price adaptation because the tariff in the present case satisfies the requirements for hardship as stipulated in Clause 12 and the remedy of price adaptation is applicable under Clause 12. Furthermore, CLAIMANT submits that the amount of adaptation shall be 25% **[Issue III (i)].**
4. Even if the Tribunal concludes that CLAIMANT is not entitled to the price adaptation under Clause 12, according to CISG, CLAIMANT is still entitled to the payment of the same amount. Because firstly Clause 12 is not a derogation from CISG. Besides, Art.79 CISG is not applicable and UPICC shall be used to fill the gap, which entitles CLAIMANT to the remedy of price adaptation. Even if Art.79 CISG applies in this case, CLAIMANT is still entitled to the remedy of price adaptation **[Issue III (ii)]**.

ARGUMENTS

I. THE TRIBUNAL HAS THE JURISDICTION UNDER THE ARBITRATION CLAUSE AND THE POWER TO ADAPT THE CONTRACT

1. In the Answer to the Notice of Arbitration (**"A.N.A."**), RESPONDENT challenged the jurisdiction and power of the Arbitral Tribunal (**"Tribunal"**) to adapt the contract based on interpretation of the Arbitration Clause. RESPONDENT contended that the Arbitration Clause failed to provide the Tribunal with the jurisdiction to adapt the contract. Also, the power to adapt the contract is exclusively exercised by the Court.
2. However, contrary to RESPONDENT's allegation, CLAIMANT contends that the Tribunal has the jurisdiction to adapt the contract, as firstly the Arbitration Clause shall be interpreted to empower the Tribunal with the jurisdiction of adaptation (**A**); secondly the Tribunal's power to adapt the contract has been authorized by UPICC (**B**).

A. The Arbitration Clause Shall Be Interpreted to Empower the Tribunal with the Jurisdiction of Adaptation

3. RESPONDENT contended that the Arbitration Clause shall be governed by Danubian law and therefore "four corners rule" for interpretation. RESPONDENT asserted that based on the strict interpretation of the wording, the Arbitration Clause failed to provide the Tribunal with the jurisdiction to adapt the contract. However, contrary to RESPONDENT's allegation, after long time negotiation, the Parties have agreed to submit the contract, including Arbitration Clause contained therein to the law of Mediterraneo (**1**). The Arbitration Clause shall be interpreted to include the jurisdiction of adaptation both under broad interpretation and "four corners rule" (**2**).

1. <u>The Arbitration Clause Shall Be Governed by the Law of Mediterraneo</u>

4. The principle of party autonomy is well recognized in issue of governing law of Arbitration Clause *[New York Convention Article 5; Model Law, Article 34(2) (a) (i) & Article 36 (1) (a) (i)]*. The parties are permitted to expressly or impliedly choose the governing law of Arbitration Clause *[Sul América case,*

¶*9; BCY case,* ¶*32]*. In case the parties fail to reach such consent, the law of "closest and most real connection" shall govern the Arbitration Clause *[Sul América case,* ¶*25; Habas Sinai case,* ¶*101]*. RESPONDENT might contend that the extension of governing law of main contract to the Arbitration Clause is not consistent with the separability doctrine. Nonetheless, separability doctrine is only applicable in deciding the validity of Arbitration Clause independently *[Model Law Article 16 (1); HKIAC Rule Article 19 (2)]*, not in interpreting the scope of arbitration clause.

5. In the present case, CLAIMANT submits that both Parties have agreed on the law of Mediterraneo as governing law of the whole contract, including Arbitration Clause. Firstly, the Parties have reached express choice on law governing arbitration clause in FROZEN SEMEN SALES AGREEMENT (**"the Sales Agreement"**) (**a**). Alternatively, the Parties have reached implied choice (**b**). The separability doctrine is not relevant in deciding the choice of law governing Arbitration Clause (**c**).

(a) The Parties Have Reached Express Choice on Law Governing Arbitration Clause in the Sales Agreement

6. Parties' express choice on the arbitration clause has been well founded in the Sales Agreement. Clause 14, which functions as the choice of law clause in the Sales Agreement, stipulates that "This Sales Agreement shall be governed by the law of Mediterraneo" *[the Sales Agreement Clause 14]*. Interpreted by the ordinary meaning, "This Sales Agreement" refers to "The Frozen Semen Sales Agreement", which covers all clauses of this contract *[Arsanovia case,* ¶*22]*. Therefore, the Parties have expressly chosen the law of Mediterraneo as governing law on arbitration clause.

(b) The Parties Have Reached an Implied Choice on Law Governing Arbitration Clause

7. The Parties' choice on governing law of the Arbitration Clause can be express or implied *[Sul América case,* ¶*9]*. In this case, even the Tribunal finds there is no express stipulation in the text of the Sales Agreement about governing law on the Arbitration Clause, such implied intention can be identified though both the text of the Sales Agreement (**i**) and negotiation process of the Sales Agreement (**ii**).

i) Such Implied Choice Can Be Identified from Text of the Sales Agreement

8. In case the Tribunal find that Clause 14 only covers main contract governing law, CLAIMANT alternatively submits that the Parties have impliedly chosen the law governing on the arbitration clause. The express choice of law governing the substantive contract is a strong indication of the

parties' intention in relation to the agreement to arbitrate *[Sul América case, ¶26]*. Starting with the main contract presumption, if no indication to the contrary exists, the main contract law shall govern the Arbitration Clause *[FirstLink case, ¶12]*. The main contract presumption is widely supported in common law system *[Sonatrach case, ¶32; Sumitomo case, ¶¶57-59]*, civil law system *[Owerri case]* and international arbitral institutions *[ICC case 6379; ICC case 3572]*.

9. Although the choice of seat can also serve as an indication of the Parties' implied choice of law to the arbitration clause, it is now recognized that the choice of a different country as law of the seat is not sufficient as a contrary indication to cause main contract presumption invalid *[Habas Sinai case, ¶101; BCY case, ¶65]*.
10. In this case, while the Parties choose Danubia as seat of arbitration, the choice of a different country as law of the seat is not sufficient as a contrary indication to cause main contract presumption invalid as CLAIMANT established above.
11. Furthermore, there are other positive indications in the wording and context of the Sales Agreement confirming the intention of both Parties.
12. First, the context of the Sales Agreement indicates this point. If the Arbitration Clause is immediately after the choice of law clause, implying the relationship between the two *[ICC case 11869 ¶51-52]*. In this Sales Agreement, the Arbitration Clause, Clause 15, directly follow the Choice of law clause, Clause 14, indicating a strong indication between the two. Therefore, it serves as indication that the arbitration clause will be governed by the the same law as the main contract.
13. Second, the together negotiation process indicates this point. Arbitration Clause negotiated together with the main contract, different from the independent Arbitration Agreement, is more likely to be governed by the law same with the main contract *[BCY case, ¶61]*. In this case, the Arbitration Clause is negotiated together with the main contract *[Exh. C3; Exh. C4]* Therefore, it serves as indication that the arbitration clause will be governed by the same law as main contract.

ii) Such Implied Choice Can Be Identified from the Negotiation Process

14. When seeking out the implied consent of the Parties on Choice of Law of Arbitration Clause, by evaluating the negotiation process, the Tribunal could find RESPONDENT knew and could not have been unaware of the choice of law. From the view of a reasonable person the Tribunal could draw the same conclusion as well.

15. First, the Parties' negotiation process shall be considered in determining the intention. CISG can be applied to interpret the Sales Agreement as the choice of law clause has established its governing force. When the Parties retrieve to find that they have reached an implied consent regarding choice of law on Arbitration Clause, negotiation process shall be considered *[Schlechtriem/Schwenzer, P.6; Office furniture case, ¶3.2.1; Construction materials case]*. Statements made by a party as well as its conduct are to be interpreted according to its intent *[CISG, Art. 8(1)]*and in determining the intent of a party, due consideration should be given to all relevant circumstances of the case including the negotiation *[CISG, Art.8(3)]*.
16. The Sales Agreement is comprised of two parts, one is the main contract while the other arbitration clause. Art. 14 of the Sales Agreement is a choice of law clause and art. 15 is the Arbitration Clause *[Exh. C5]*. Art. 14 expressly states that "*this Sales Agreement shall be governed by the law of Mediterraneo, including CISG*". Although Arbitration Clause is an independent part from the Sales Agreement, CISG can be used to interpret clauses of the Sales Agreement apart from Arbitration Clause. Consequently, before making clear that which law and thus which principles shall govern the Arbitration Clause, negotiation process, as indicated in art. 8(3) CISG, shall still be considered.
17. In this case, during the formation of the Sales Agreement, the Parties have held bilateral discussions and exchanged written documents back and forth, which constitute the whole negotiation process lead to final consent. They are pieces of decisive evidence when digging out intention of the Parties. Thus, negotiation between the Parties shall be seriously considered for the determination of joint intention.
18. Second, during the negotiation process, CLAIMANT consistently insisted on the choice of Mediterraneo law, which RESPONDENT knew and could not have been unaware of. Art. 8 CISG governs the interpretation of statements made by and other conduct of the parties. It is practically undisputed that the provision also regulates the interpretation of contracts *[Schlechtriem/Schwenzer, P.3]*. The intent of the party is made the primary criterion in Article 8(1), known as "subjective standard", which means the interpretation of a party's conduct should be according to "his" intent *[Schlechtriem/Schwenzer, P.5]*.
19. CLAIMANT's intention on choice of Mediterraneo law is determinable, which RESPONDENT could easily recognize and consequently equivalent to common intention of both sides. If the intent

of one party is determinable, according to the second alternative of Article 8(1) it is enough that the other party could not have been unaware what the intent was, and thus, the unequivocal intent of a single party is equivalent to common intention *[Art 5:101(2) PECL; Chemical products case,* ¶4*]*.

20. In the negotiation process, CLAIMANT clearly expressed a strong intention of and their preference for applying Mediterraneo law several times. At the very beginning of the negotiation, CLAIMANT stated that the law of Mediterraneo would apply and courts of Mediterraneo would have jurisdiction *[Exh. C3]*. Later, CLAIMANT rejected jurisdiction of the court of Equatoriana but suggested to arbitrate in Mediterraneo with its law *[Exh. C4]*. On 11st April 2017, in a reply to a drafted Arbitration Clause proposed by RESPONDENT, CLAIMANT clearly rejected the proposal of RESPONDENT by explaining that due to internal policy, CLAIMANT could not accept the contract to be submitted to a foreign law *[Exh. R2]*. Consequently, CLAIMANT drafted a revised Arbitration Clause, which expressly deleted Equatorianian law as Arbitration Clause governing law and changed the seat of arbitration to a neutral third country *[ibid.]*. Further, CLAIMANT once more emphasized that the revised Arbitration Clause is on the condition that the law applicable to the Frozen Semen Sales Agreement remains the law of Mediterraneo *[ibid.]*, which reinforces the intention to apply Mediterraneo law to the whole Sales Agreement and not any foreign law. CLAIMANT's intention was consistently determinable while RESPONDENT's feedback was ever-changing. Thus, taking the entire negotiation process into consideration, although there is not an express clause for Arbitration Clause governing law, it does not hurt that an implied choice has been established.

21. Third, even the Tribunal could not find any subjective intent, a reasonable person of the same kind in the same circumstances would recognize that the law of Mediterraneo is finally chosen by the Parties. Statements are to be interpreted according to the understanding that a reasonable person in the shoes of the other party would have had *[Art. 8(2) CISG]*. The "objective standard" established is thus the hypothetical understanding of a reasonable person of the same kind as the other party *[Schlechtriem/Schwenzer, P.7]*.

22. A reasonable person in the shoes of CLAIMANT would draw the conclusion that the Parties has finally chosen Mediterraneo law to govern Arbitration Clause. CISG is governed by the principle of reliance and is applied not only to the expressed declarations and communications, but also to the

persuasive conduct exhibited before or after the conclusion of a contract *[Schlechtriem/Schwenzer, P.7; Furniture case, ¶3.2; Chemical products case, ¶3.5]*. Article8(2) CISG as an objective test also protects the reliance principle.

23. RESPONDENT acknowledges that before the car accident, the Parties agreed on a draft of the Sales Agreement including a choice of law provision in favor of Mediterraneo law *[Exh. R3]*. During the short discussion on the day of car accident, although there was no sufficient time to make amendment, the two negotiators exchanged views on clauses needing to be finalized *[Exh. C8]*. The clauses discussed at that time were for the adaptation of the Sales Agreement and hardship clause, not to question the Arbitration Clause governing law *[Ibid.]*. Namely, they were of no intention to change the Arbitration Clause governing law. Although the "negotiation file" left by Mr. Antley may indicate that there are still doubts on the applicable law of Arbitration Clause *[Exh. R3]*, uncommunicated unilateral view cannot impact on the other party *[Textiles case, ¶20; Office furniture case, ¶3.3.1]*. As a result, that file cannot impair the implied consent and hurt the reliance already established by CLAIMANT. Thus, it falls out of the scope for a reasonable person to consider. Consequently, a reasonable person will have reliance that the law of Mediterraneo is finally chosen as Arbitration Clause governing law.

(c) The Effect of Separability Doctrine Cannot Be Extended to the Choice of Law Governing Arbitration Clause

24. RESPONDENT alleges that the choice of main contract governing law is in violation of separability doctrine *[A.N.A, ¶14]*. Nonetheless, it is a misunderstanding of this widely recognized doctrine in commercial arbitration.

25. The purpose of separability doctrine is to make the Arbitration Clause still valid when the validity of the main contract is challenged *[BCY case ¶60]*. Both Model law and HKIAC rules use the wording "that purpose" to restrain the consequence of separability doctrine to the validity of the Arbitration Clause *[Model Law Article 16 (1); HKIAC Rule Article 19 (2)]*. For that purpose, the Arbitration Clause may, but not necessarily be governed by law different from the main contract *[Redfern and Hunter, P.159; Born, P.476; ICC case 4131, ¶32]*. The validation principle will therefore be considered by the Tribunal in determining the governing law of the Arbitration Clause *[ICC case 6162, ¶¶160-162]*.

26. In the present case, there is no controversy about validity of this Arbitration Clause. It is only the

scope of Arbitration Clause which varies under different governing laws. Therefore, the separability is not itself a barrier to apply the main contract governing law on the arbitration clause.

2. The Arbitration Agreement Shall Be Interpreted to Extend Claim of Adaptation

27. Once the applicable law of the Arbitration Clause is chosen, the next step is to interpret the clause with corresponding interpretive rules settled in that applicable law. As established above *[Cl. Memo ¶¶3-18],* the applicable law here shall be the law of Mediterraneo, a law which adopts a much broader interpretation method than Danubian law, taking all external evidence into account *[PO2, ¶45]*. Therefore, the "four corners rule" submitted by RESPONDENT is of no relevance here *[A.N.A, ¶16]*. Instead, the Arbitration Clause shall be interpreted in accordance with the broad way provided in the law of Mediterraneo. Thus, based on Mediterranean law, the clause shall be interpreted as authorizing the Tribunal to adapt the contract when disputes arise, though it is not explicitly stipulated in the contract (**a**).

28. In alternative, even Danubian law still applies, excluding all extrinsic evidence, there are still specific terms contained in the Arbitration Clause itself which are supposed to be interpreted as including the adaptation claim (**b**).

(a) Under Broad Interpretation Provided by the Law of Mediterraneo, the Arbitration Agreement Covers the Claim of Adaptation

29. A broad way of interpretation is provided by the law of Mediterraneo, under which it shall be interpreted that the Tribunal shall have the power to adapt the contract. There are mainly two approaches to reach this conclusion: the approach discovering the intentions of the Parties under CISG in line with UPICC (**i**) and the "pro-arbitration' rule prevailing in most jurisdictions (**ii**).

i) Under CISG and UPICC, It Shall Be Interpreted That the Parties Had Reached a Common Intent on Authorizing the Tribunal to Adapt the Contract

30. Mediterraneo, Equatoriana and Danubia are all Contracting States of CISG *[PO1, ¶III.4]*. Also, CISG governs the interpretation of the Arbitration Clause. Thus, in the issue at hand, CISG is applicable *[Schlechtriem/Schwenzer P.147]*. Meanwhile, when the law of Mediterraneo is chosen to be the governing law of the Arbitration Clause, the consistent jurisprudence in Mediterraneo, which allows CISG to govern the interpretation of the Arbitration Clause, shall be considered *[PO1, ¶III.4]*.

Furthermore, UPICC, which is identical to the Mediterranean contract law,, shall be considered to offer some guidance in line with CISG.

31. Under CISG and UPICC, the contract shall be, in the first place, interpreted according to the intentions shown by the Parties *[CISG, Art.8(1); UPICC, Art.4.1]*. When determining the parties' intentions, relevant circumstances, including previous negotiations, shall be considered *[CISG, Art.8(3); UPICC, Art.4.3]*.

32. In the previous negotiation, it was Mr. Antley, RESPONDENT's main negotiator, who stated that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree", with Ms. Napravnik, CLAIMANT's prime negotiator, agreeing *[Exh. C8 ¶4]*. Both Parties clearly understood the intention of each other. This part of the negotiation apparently reveals the common intention of both parties to authorize the Tribunal to adapt the contract when disputes arises. As with any contract, the Parties' intentions control *[Stolt-Nielsen case]*. When this genuine intention is ascertained, it shall be interpreted that the adaptation of the contract falls within the scope of arbitration.

33. When the intention has already been identified by the aforementioned subjective test, there is no need to further apply the objective test, which is supplementary and only applicable when the subjective test is not effective *[CISG, Art.8(3); UPICC, Art.4.3; Swiss case 2008]*.

34. RESPONDENT may submit that the intention of the Parties signing the contract were not the same as that of the Parties negotiating previously. RESPONDENT may also claim that it has already shown its intent to exclude adaptation of the contract from the scope of the arbitration, by omitting several formulae from the HKIAC model clause and not including an explicit adaptation clause. However, this claim shall not be accepted by the Tribunal. First, the previous intention reached by the Parties was not inserting an adaptation clause. In fact, it was a direct authorization to the Tribunal by stating that "it is the task of the arbitrators" *[Exh. C8 ¶4]*. Second, restricting the model clause indeed narrowed down the scope of the arbitration, but did not explicitly exclude the power to adapt the contract from the Tribunal, which, therefore, has no contradictory effect to the previously established intention. Thus, the change of the intention has no supporting evidence, and a secret intention alleged by RESPONDENT without evidence is irrelevant to the interpretation of the Arbitration Clause *[Digest of Case Law P.54 ¶8; CLOUT case No.911; Zivilgericht case; CLOUT case No.5]*.

ii) The "Pro-Arbitration" Rule Is Applicable Generally to Arbitration Agreements

35. Here, under the broad way of interpretation in Mediterranean law, CLAIMANT submits that the Arbitration Clause shall be interpreted broadly under the current prevailing "pro-arbitration" rule, and thus include the adaptation of the contract into the scope of the arbitration, in order to achieve efficiency.

36. In today's arbitration-friendly climate, the view of "pro-arbitration" prevails *[Lew, P.150]*. The "pro-arbitration" rule provides that a valid Arbitration Clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims *[Born, P.1326]*. This rule is now being applied worldwide to promote the efficiency of arbitration and lighten the burden of the parties, since ordinary businessmen are willing to settle all the disputes relating to the contract within a single arbitration *[Fiona Trust case ¶26]*. Even in U.K., where traditional restrictive methods of interpretation are dominant, cases adopting "pro-arbitration' rule begin to emerge, marking a "fresh new start" *[Fiona Trust case ¶12; Barclays case ¶27; Enercon case ¶63; Sul América case case ¶40]*.

37. This doctrine has been confirmed by numerous decisions worldwide in civil law as well as common law countries, including U.S., Germany, Switzerland. All those decisions ruled in common that any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration. If an arbitration clause exists, there is no reason to interpret it restrictively *[Mitsubishi case; Swiss case 2003; Hamburg case; Onex case; Austrian case 2009; Tjong case ¶24; Klöckner case ¶17]*.

38. In the present case, the interpretation of the arbitration clause shall follow this "pro-arbitration" doctrine as well. Whether the contract shall be adapted or not is the core substantive dispute between the Parties. If the Tribunal declares that it lacks the jurisdiction on this issue, both the Parties will invest more unnecessary time and money in seeking other solutions for dispute settlement, heavying their burden. This is especially difficult for CLAIMANT which is suffering from financial problems and struggling to survive *[Exh. C8]*. Here, the Tribunal shall consider to apply the "pro-arbitration" rule in order to ease the Parties' burden and stay in step with the international trend.

39. Under the "pro-arbitration" trend, it shall be interpreted in the present case that the Tribunal has the power to adapt the contract in order to help both CLAIMANT and RESPONDENT to settle all the disputes in a single arbitration for efficiency.

(b) Alternatively, under "Four Corners Rule", the Claim of Adaptation Is also Covered by

Arbitration Agreement According to Certain Terms

40. RESPONDENT has submitted that, under the "four corners rule" in Danubian law, the interpretation of the contract shall be limited only to its wording without relying on any external evidence *[A.N.A, ¶16]*. Thus, when narrowly interpreted, the Tribunal has no power to change the contract. CLAIMANT disagrees with this submission, because even the "four corners rule" is applicable here, there are terms within the four corners of the contract which cover the adaptation claim, allowing the Tribunal to adapt the contract.
41. Judicial interpretation of particular terms in previous cases were frequently referred to and relied on. *[Astro case]* The Arbitration Clause is a modified version of HKIAC Model Clause, with some words omitted by RESPONDENT, who claims that by such omission the adaptation claim is excluded from the scope of arbitration. *[Exh. C5 ¶15]*. However, there are still three terms in the clause which shall be interpreted to contain the adaptation claim: "performance" (**i**), "all" (**ii**) and "arising out of" (**iii**).

i) The Term "Performance" Includes the Adaptation Claim

42. In the Arbitration Clause, it is stipulated that "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to arbitration" *[Exh. C5 ¶15]*. The adaptation claim which CLAIMANT submits is actually included in the word "performance".
43. In UPICC, adaptation, as a remedy for hardship, is expressly stipulated in Art. 6.2.3*[UPICC, Art.6.2.3]*. This article is included in Chapter 6 of UNIDROIT Principles, which is headed "Performance" *[UPICC, Chapter 6]*. Therefore, the adaptation claim shall be seen as part of the performance claim, which is apparently included in the arbitration clause.

ii) The Term "All" Shall Be Interpreted Broadly to include the Adaptation Claim

44. Various authorities have interpreted the "all disputes" or "any disputes" formulae broadly, usually concluding that they extend to all disputes having any plausible factual or legal relation to the parties' agreement or dealings *[Born, P.1347]*. An agreement to arbitrate "any dispute" without strong limiting or excepting language immediately following it logically includes not only the dispute, but the consequences naturally flowing from it *[Mgt case; In re case]*.

45. In the present case, following this rule, if the adaptation of the contract is excluded from the scope of contract, there shall be explicit language saying so. However, such expression does not appear in the arbitration clause. Furthermore, adaptation of the contract is, without any doubt, a consequence flowing from the contract. Adaptation is an approach for the tribunals to "fill the gaps" in the contract left by the parties, if no agreement is reached *[Holtzmann/Neuhaus P.1116]*. This mechanism can only be triggered when disputes arise, hence adaptation of the contract is a "natural consequence" flowing from the contract. Thus, the term "all" indicates a broad interpretation to bring the adaptation of the contract into the scope of arbitration.

iii) The Term "Arising Out of" Shall Be Interpreted Broadly to Include the Adaptation Claim

46. Viewed broadly, the clear trend in contemporary national court decisions is in favor of liberal interpretations of the "arising out of" formula, namely, any dispute between contracting parties that is in any way connected with their contract could be said to "arise out of" their agreement and thus be subject to arbitration *[Kuklachev case; Sweet Dreams case]*.
47. According to this rule, adaptation is obviously, in any way, connected to the contract, since adaptation directly supplements or changes the wording as well as the meaning of a contract. Furthermore, it shall be noticed that in the case at hand, the adaptation is on the price of the goods, which is an essential element of the contract, making the connection more concrete.
48. In summary, containing the three terms above, the Arbitration Clause itself, even without any external evidence, shall be interpreted as authorizing the Tribunal to adapt the contract.
49. In conclusion, it shall be interpreted that the Tribunal has the jurisdiction to adapt the contract, according to the broad interpretation methods offered by the Mediterranean law, including discovering the parties' intent under CISG and UPICC, applying the current prevailing "pro-arbitration" rule, and the terms in the Arbitration Clause containing the adaptation claim.

B. The Tribunal Has the Power to Adapt the Contract

50. The contract law of Equatoriana, Mediterraneo and Danubia are all UNIDROIT Principles on International Commercial Contracts (**"UPICC"**) *[PO.1 3.4; PO.2 45]*. Article 6.2.3 of UPICC states that the Court may adapt the contract in view of restoring the equilibrium of the contract if it finds hardship. In UPICC, "Court" includes both Court and Tribunal. *[UPICC 1.11]* Therefore, the

Tribunal is authorized with the power to adapt the contract. In other words, under this article, the Tribunal can directly come to decide the merit issue of whether there is a hardship for CLAIMANT or not, without further elaborating the procedural issue of whether the Tribunal itself has the power to adapt the contract or not, since the Tribunal obviously has that power directly conferred by this article.

51. RESPONDENT may contend that under Danubian Contract Law, such power has to be expressly authorized by the Parties *[PO.2 45]*. CLAIMANT disagrees with this point. In the contract between the Parties, the hardship clause is Clause 12, a clause of the main contract, and the governing law of the main contract is Mediterranean Law. Article 6.2.3 deals with the hardship issue, which governs the main contract. Therefore, it is the Mediterranean version of Article 6.2.3 that shall be applied here, which is a verbatim adoption of UPICC *[PO.1 3.4]*. The express conferral required in Danubian Contract Law is of no relevance here.
52. To conclude, the Tribunal has the power to adapt the contract, which is authorized by Article 6.2.3 of Mediterranean Contract Law, a verbatim adoption of UPICC.

Conclusion to the First Issue

53. The Tribunal has the jurisdiction to adapt the contract because the governing law on interpretation of arbitration clause is the law of Mediterraneo and based on the broad interpretation under the law of Mediterraneo, adaptation claim is covered by the arbitration clause. Further, the Tribunal has the power to adapt the contract because it has been confirmed by UPICC, which is general contract law for Equatoriana, Mediterraneo and Danubia.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

54. In the interest of justice and fairness of the decision, CLAIMANT kindly submits contested evidence to inform the Tribunal of contradictory positions of RESPONDENT in different arbitrations. Nonetheless, RESPONDENT asserts the inadmissibility of this evidence based on the alleged breach of confidentiality and legality.
55. Procedural rule of international arbitration and other judicial bodies grant wide discretion to arbitrators to decide the admissibility of evidence *[HKIAC Rules Article 22(2); Model Law Article 19(1);*

ICSID Rules Article 34(1); ICJ Statute 48]. Generally, all evidence that the parties consider as relevant may be submitted *[ICJ Rule 50; IBA Rule 3(11)]*. In response to RESPONDENT's challenge, CLAIMANT submits that the evidence is admissible because the contested evidence satisfies the requirement of being relevant and *prima facie* authentic (**A**). The evidence concerning the obligations of confidentiality is admissible (**B**). The evidence is admissible even it is illegally obtained (**C**).

A. The Contested Evidence Satisfies the Requirements of Relevance and Materiality

56. The requirement of relevance for evidence has been specified without ambiguity *[IBA Rule 3(9), 8(5), 9(1)]*. Evidence will be relevant if it has any tendency to make a fact, which is of consequence in final decision, more or less probable *[Rules of Evidence, Rule 401]*.

57. In this case, the evidence contested is relevant in two aspects. First, the case of the other arbitration has similar context and rationale with this case. Both of them are under the context of the two relevant tariffs. *[Email Oct.2]* Both of them are related to Tribunal's jurisdiction or power to adapt the contract. In Both case, the Parties choose DDP delivery term and ICC Hardship Clause to allocate the risk. *[PO.2 39]* Therefore, the Award and submissions in that arbitration is relevant in this case.

58. Further, the contested evidence is the only source available to ascertain RESPONDENT's self-controversial positions in two arbitrations with the similar factual basis. Therefore, this evidence is relevant.

B. The Evidence Concerning Confidentiality Issue Is Admissible

59. So far, there has not been a uniform answer internationally as to the extent to which participants in an arbitration are under a duty to observe the confidentiality *[UNCITRAL Notes]*. National legislations have made widely different answers on the existence and the extent of an obligation of confidentiality *[Filip]*.

60. RESPONDENT alleges that the evidence submitted by CLAIMANT, demonstrating RESPONDENT's intent to, due to the surprising tariff, adapt a contract signed with a third party in another arbitration, *[Email Oct.3]* is inadmissible, since it arose from a breach of confidentiality obligation However, this is not the case. CLAIMANT did not breach any confidentiality obligation (**1**). Even it did, CLAIMANT is entitled to submit the evidence for "interests of justice" and

according to prevailing principles on transparency (**2**).

1. CLAIMANT Does Not Breach the Obligation of Confidentiality

61. The obligation to keep an arbitration confidential is only binding upon the participants of that arbitration, not to any outsider *[Born, P.2788; Esso case]*.

62. Since the obligation of confidentiality is only a relative obligation binding upon the parties involved without extending to any third parties, CLAIMANT, as a third party in the other arbitration, here submits that it does not breach either the confidentiality defined by HKIAC Rules (**a**) or the essence and the purpose of confidentiality (**b**).

(a) CLAIMANT Does Not Breach the Confidentiality Defined Under the HKIAC Rule

63. RESPONDENT argues that under HKIAC Rules, which contain express confidentiality provisions, CLAIMANT is forbidden from submitting evidence concerning RESPONDENT's intent in that arbitration. However, the confidentiality obligation clearly does not extend to CLAIMANT.

64. Art. 45.1 in HKIAC Rules states that "unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to……" *[HKIAC Rules, Art.45.1]*. The word "party" literally means "one who takes part in a transaction" *[Black's Law Dictionary, "Party"]*. Here, CLAIMANT apparently never gets involved in the transaction between RESPONDENT and the third party. Therefore, this provision has no binding effect to CLAIMANT.

(b) CLAIMANT Does Not Infringe the Essence and the Purpose of the Obligation of Confidentiality

65. CLAIMANT also does not infringe the obligation of confidentiality in a broader sense, including its essence as well as its purpose. The confidentiality of arbitration is a term that "arises as the nature of the contract itself implicitly requires" *[Ali case]*, which conveys that the source of the confidentiality obligation is based on a contractual relationship. Also, the benefit of confidentiality is creating a private space for both parties to discuss their financial circumstances, their proprietary 'know-how', and so forth, without exposure to the gaze of the public and the reporting of the media *[Nigel Blackaby et al.; Boog/Menz, P.111; Denton/Heaton, P.120]*. In the case at bar, CLAIMANT only obtained the information in the other arbitration relating to the intent of RESPONDENT without touching any business privilege or "know-how". Furthermore, CLAIMANT does not disclose the

information to the public. Therefore, CLAIMANT does not breach the essence and purpose of confidentiality.

66. To sum up, since in the other arbitration, the obligation of confidentiality is only binding upon its participants, CLAIMANT neither breaches the confidentiality defined under HKIAC Rules nor the general purpose of confidentiality and the benefit brought to the parties in the other arbitration.

2. Even the Submission of Evidence were in Breach of Confidentiality Obligation, CLAIMANT Is Entitled to Submit

67. Confidentiality in arbitration is not absolute. Practices around the world have established exception of confidentiality for "interest of justice" (**a**). In addition, the Tribunal shall kindly consider the prevailing principles of transparency, which is the new trend in international commercial arbitrations (**b**).

(a) Practices Have Established Exception of Confidentiality and Disclosure of Confidential Materials for "Interests of Justice"

68. Even if the materials are confidential, CLAIMANT can submit to the Tribunal because it is for "interests of justice". When wrongdoing is being cloaked in confidentiality or where inconsistent arguments are being run in different forums, "interests of justice" empowers a party to disclose as exception to confidentiality *[Teekay case; Westwood case]*. Specifically, it is acknowledged that the obtaining of certain expert witness proofs used in previous arbitrations can be admitted in order to demonstrate the prior inconsistent views expressed by the expert in the arbitrations *[Leeds case]*. If a more accurate assessment of the case can be achieved by the disclosure of confidential information, then the confidentiality of arbitral proceedings should not be an impediment *[Ali Shipping case]*.

69. In this case, the actual reason why RESPONDENT opposes to CLAIMANT's evidence is that the materials reveal the wrongdoing and inconsistent conduct of RESPONDENT. RESPONDENT in this case, as a buyer, firmly denied any need to adapt the contract under an unforeseen change of 30% tariff increase while they, as a seller, vigorously asked for an adaptation of price when facing 25% tariff increase in another case *[Email Oct.2, P.49]*. It is highly contradictory that an additional tariff of 25% is sufficient to adapt the price while a higher 30% insufficient. Considering the essentially similar circumstances in the two arbitrations, namely the similar tariff imposition,

arbitration clause, arbitration institution, hardship clause, DDP delivery terms as well as RESPONDENT is represented by the same counsel *[PO2, ¶¶38,39]*. It stands out that RESPONDENT's inconsistent arguments are for the purpose of gaining unethical and unjustified interests by exploitation of the weak in the Sales Agreement. The conduct is injustice and therefore constitutes exception for "interests of justice", so CLAIMANT is justified to submit the evidence.

(b) UNCITRAL Transparency Rules Shall Be as A Reference For Transparency In International Commercial Arbitration

70. Transparency in international commercial arbitration is becoming a new trend and supported by many scholars and courts, disclosure against confidentiality conforms with the development of commercial arbitration. The UNCITRAL Rules on Transparency represents an important starting point and inspiration for greater transparency in international commercial arbitration *[Rogers, P.41]*. Arbitral institutions have moved away from nonpublication of arbitral decisions and have started to publish redacted versions of arbitral awards or even complete versions where the parties have consented *[Born, P.2807]*. In order to achieve procedural fairness and transparency, it is not enough that arbitrators work to ensure that justice is achieved; the parties and the public must see and believe that justice is being sought *[Blavi]*. Transparency in international commercial arbitration has been advocated for quite long time, for the purpose of a substantive justice award the Tribunal may kindly evaluate it. Thus, in this case, it should be positively recognized that the disclosure is ethically justified and reasonable.

C. The Evidence Is Admissible Even It Is Illegally Obtained

71. An international tribunal is not required to stick to domestic evidentiary rules, to be particular, to doctrine of Fruit of the Poisonous Tree *[Born, P.1017]*. International arbitrators and judges will rely on illegal evidence to make final decisions under wide discretion *[Corfu Channel case; Yukos case; Persia case; Al Matri case; Caratube case]*. In this case, even if the evidence is considered to be illegally obtained, it is still admissible, because it is obtained on clean hand by CLAIMANT (**1**), the contested evidence is not confidential for public interest (**2**), and the contested evidence is essential for the fair decision of the present case (**3**).

1. <u>The Evidence Is Obtained on Clean Hand by CLAIMANT</u>

72. Allowing one party relying on evidence illegally obtained by itself is not in line with procedural fairness and *ex turpi causa non oritur action* principle *[Blair, P.256]*. The clean hand doctrine was impliedly followed in many international cases *[Iranian Hostages case, P.45; Persia case, ¶95; Methanex case, ¶54]*.

73. In this case, CLAIMANT was informed from the third party about the other arbitration and promised of contested evidence *[Email Oct.2]*. Regardless of from the leak of former employee or hack, there is no factual basis showing that CLAIMANT has got involved in any illegal activity obtaining such evidence. Thus, the contested evidence is admissible.

2. <u>The Documents Are Essential for the Fair Decision of the Present Case</u>

74. Evidence shall be admissible especially when it is of material value *[Methanex case, ¶56]*. The exclusion of such evidence, even illegally obtained, will constitute "travesty of justice" *[Dissent opinion George case, ¶67]*.

75. Merits of the other arbitration which is evidenced by contested documents is virtually the same with the presenting case *[Email Oct.2]*. The contested evidence, indicating inconsistent positions by the same party in the two arbitrations, is essential for interest of justice, therefore necessary to be admissible *[Westwood, ¶14]*.

3. <u>The Documents Are Not Confidential for Public Interest</u>

76. Under wide discretion of arbitral tribunal to determine the admissibility of illegal evidence, it is common to exclude confidential documents of "grounds of special political or institutional sensitivity" *[IBA Rule, 9 (2) (f)]*. Tribunals might exclude illegal evidence when it is related to state secret *[Libananco case, ¶82]*.

77. In the present case, the documents contested are not privileged for any policy or institution. The argument of confidentiality for commercial arbitration has been well reserved in the part above. Hence, there is no further ground making the contested documents inadmissible.

Conclusion to the Second Issue

78. Evidence submitted by CLAIMANT shall be admissible because it is relevant and *prima facie* authentic. Moreover, according to international arbitral and judicial practices, both the arguments concerning confidentiality and illegality from RESPONDENT fail to exclude this evidence.

III. (i) UNDER CLAUSE 12 OF THE SALES AGREEMENT, CLAIMANT IS ENTITLED TO THE 25% PRICE ADAPTATION

79. CLAIMANT submits that we are entitled to the 25% price adaptation because the tariff in the present case satisfies the requirements for hardship set forth in Clause 12 (**A**) and the remedy of price adaptation is applicable under Clause 12 (**B**). We further submit that the amount of adaptation shall be 25% (**C**).

A. The Tariff Has Satisfied the Requirements for Hardship under Clause 12

80. To prove the existence of hardship, express requirements and implicit requirements shall both be satisfied. Even if not directly written in the contract, some general requirements for hardship shall also be met. We submit that the requirements in UPICC about hardship shall apply in this case (**1**) and tariff in this case has satisfied the requirements in UPICC and also the special requirements in the Sales Agreement (**2**).

1. Requirements of Hardship under UPICC Shall Apply in this Case

81. We submit that the hardship requirements in UPICC Art. 6.2.2, instead of the ICC-Hardship Clause shall apply in this case. Although CLAIMANT indeed once proposed reliance on ICC-Hardship Clause *[Exh. R2, ¶5]*, this proposal was rejected by RESPONDENT. A note is left by RESPONDENT's previous negotiator, stating that "ICC-Hardship Clause suggested by Claimant too broad" *[Exh. R3, ¶2]*. Also, ICC-Hardship Clause is not mentioned in the Sales Agreement, and the final wording of Clause 12 in no way resembles the ICC-Hardship Clause. Moreover, CLAIMANT itself has given up the reliance on ICC-Hardship Clause. Julie Napravnik, CLAIMANT's previous negotiator, mentioned to RESPONDENT that in his view it is not necessary to include an adaptation clause into the contract legally *[Exh. C8, ¶4]*. However, the most distinctive feature of an ICC-Hardship Clause is that it does not provide the remedy of price adaptation in case of hardship. Therefore, we can conclude that even though CLAIMANT once suggested reliance on ICC-Hardship Clause, the Parties in fact did not rely on ICC-Hardship Clause and drafted another narrowly-worded hardship clause.

82. The applicable law of the Sales Agreement, as is set forth in Clause 14, is the law of Mediterraneo including CISG. As there are no provisions about hardship under CISG, the general contract law of

Mediterraneo, which is a verbatim adoption of UPICC, shall be referred to.

2. The Tariff Has Satisfied the Requirement for Hardship Under UPICC and the Special Requirements in Clause 12

83. Under UPICC Art. 6.2.2, there are five requirements for hardship: fundamental change of the equilibrium of the contract, an event after the conclusion of the contract, an unforeseeable event, an event that is not expected to be overcome or avoided and an event whose risk has not been assumed by the disadvantaged party. Also, Clause 12 prescribes three additional requirements: an unforeseen event, an event comparable to health and safety requirements and an event making the contract more onerous.

84. Some of the abovementioned requirements are clearly satisfied and require no further elaboration. The event undisputedly took place after the conclusion of the contract, as the Sales Agreement was entered into in May 6 2017, and the retaliatory tariff was imposed on Dec. 19 2017. Also, the tariff shall not be expected to be overcome or avoided by CLAIMANT, as State interventions generally lie outside of the parties' sphere of control *[Schlechtriem/Schwenzer, P827]* and CLAIMANT can in no way prevent the occurrence of the tariff.

85. Also, some of the abovementioned requirements overlap, for instance, "unforeseeable" and "unforeseen" are both requirements associated with the predictability of the event and "more onerous" is included in the requirement of "fundamental change of equilibrium". Hence, the following requirements will be addressed in details: the fundamental change of equilibrium of the contract (**a**), an unforeseen events (**b**), an event comparable to health and safety requirements (**c**) and an event whose risk has not been assumed by the disadvantaged party (**d**).

(a) Fundamental Change of the Equilibrium of the Contract

86. The primary requirement for hardship is the fundamental change of the equilibrium of the contract. And the whether the change is fundamental requires a case-by-case analysis considering the cost increase in percentage, the financial situation as well as the specifics of a possible explicit or implicit risk allocation by the parties *[UPICC Commentary, P219; Silveira, ¶491]*. The tariff in this case has fundamentally changed the equilibrium of the contract, because the profit margin in this transaction is only 5% (**i**), and CLAIMANT is faced with an imminent risk of financial ruins (**ii**).

i) The Profit Margin of this Transaction is Only 5%

87. One important factor that should be considered when defining hardship is the profit margin of the transaction and the stability of the price *[Schwenzer, P716]*. The higher the profit, and the more speculative the transaction is, the more difficult it is to establish hardship. In the present case, the profit margin of the sale is only 5% *[Exh. C8, ¶6]*, which is significantly lower than the 15% profit margin of the natural coverage *[P.O. 2, ¶19]*. The 30% tariff is six times the profit margin of the sales, which has already made the contract excessively onerous to perform. Besides, the present transaction is the very opposite of speculation, as CLAIMANT is the sole provider of frozen semen of Nijinsky III *[N.A., ¶3]*, implying that the price is highly stable and is rarely subject to market competition and market price fluctuation. Therefore, the standard for hardship shall also be lower in this present case.

ii) CLAIMANT is Faced with Imminent Risk of Financial Ruins

88. When a party is faced with imminent risk of financial ruins, the threshold for hardship shall also be lowered *[Schwenzer, P716]*. Also, the financial situation of the obligator is one factor that should be given weight in the determination of hardship *[Silveira, P317]*. And the consideration of the financial status of the obligator is a subjective standard, depending on the actual situation of the disadvantaged party, regardless of what has caused the financial struggle.

89. In the case at hand, CLAIMANT is faced with imminent risk of financial ruins. CLAIMANT is faced with the risk of going bankruptcy since 2014, and the condition on which our creditors agreed to prolong our debt was that we could meet certain profit requirements. And the requirements in 2018 is USD300,000 *[P.O.2, P59, ¶29]*. However, if CLAIMANT bears the 30% tariff, specifically USD1,500,000, it is clearly impossible to meet the required profit requirement. Failing to meet such requirement, CLAIMANT has no choice but to be merged or go bankruptcy. Hence, considering such imminent risk of going financial ruins, CLAIMANT shall be entitled to a lowered threshold of hardship.

(b) The Tariff is an Unforeseen Event

90. The requirement in Clause 12 is "unforeseen event", which is different from the requirement of "unforeseeable" under UPICC Art. 6.2.2. There is a difference between "unforeseen" and

"unforeseeable". "Unforeseen" is defined as "not anticipated or expected" while "unforeseeable" is defined as "not able to be reasonably anticipated or expected" *[Webster Dictionary]*. "Unforeseen" is a subjective standard, referring to an event that is *de facto* not predicated by CLAIMANT. As long as CLAIMANT is acting in compliance with the principle of good faith, an event that has not been foreseen by CLAIMANT meets such a requirement. On the other hand, "unforeseeable" is an objective standard, which requires an assessment that whether a reasonable person in the shoe of CLAIMANT could foresee such event. We submit that by using the word "unforeseen", the Parties agree to adopt a standard that is more favorable for CLAIMANT. In the present case, since CLAIMANT has indeed not foreseen the coming of such a high tariff, nor that the retaliatory tariff includes frozen semen of racehorse, the tariff is an unforeseen event.

(c) An Event Comparable to Health and Safety Requirements

91. As is written in Clause 12, only events that are comparable to health and safety requirements may qualify as hardship. According to Art. 8 CISG, the first step in contract interpretation is the subjective intent of the Parties. Hence, in interpreting what is "comparable", the initial intent of the Parties to draft this clause should be resorted to. According to the previous negotiation process, the objective of Clause 12 is to tackle the change of custom regulation and import requirements to RESPONDENT *[Exh. C4, ¶4]*, and health and safety requirement is listed as an example of custom regulation and import requirements *[ibid.]*. Since tariff is clearly a form of import restriction, it is an event that the Parties have intended to incorporate into Clause 12, thus satisfying the requirement of "comparable".
92. RESPONDENT may still argue that the word of "custom regulation and import requirements" is not expressly written into the contract, and thus shall not be referred to. If so, the second step of contract interpretation shall apply, which is the understanding that a reasonable person would have in the same circumstances. We submit that a reasonable person in the same shoe will also regard tariff and health and safety requirements as comparable event. First, on the WTO official website, tariff and health and safety requirement are both categorized under the title "import restriction". Second, the result of tariff and health and safety requirements are both the increase of performance cost. Generally speaking, under both the subjective and objective standards, tariff satisfies the requirement of comparability.

(d) An Event Whose Risk Has Not Been Assumed by CLAIMANT

93. Under UPICC Art. 6.2.2, if the risk of an event has been assumed by the disadvantaged party, no hardship can be found. And "assuming" does not require an express take-over of the risk. In the present case, RESPONDENT may submit that since the Parties have chosen the DDP trade term, CLAIMANT have assumed the risk of any increase of performance cost before the delivery of the goods. However, we submit that the DDP in this particular contract does not allocate all the risk of increased performance cost to CLAIMANT.

94. The DDP in the Sales Agreement is a modified DDP trade term. The modification of DDP can be evidenced in other clauses of the Sales Agreement. For instance, Clause 10 prescribes that the buyer shall be responsible for all tank rental and handling fees, which is usually the obligation of seller under DDP *[ICC Rules]*. These changes imply that the Parties have agreed to shift certain risk under DDP to RESPONDENT.

95. As stipulated in Clause 12, seller shall not be responsible for unforeseen event comparable to health and safety requirement making the contract more onerous. Since the contract uses the broad wording of "not responsible", it should be understood that seller in this case shall not bear the obligation for the abovementioned event, and also shall not bear the risk of such events. Therefore, since the tariff satisfies the requirement under Clause 12, as has been previously submitted, CLAIMANT has not assumed such risk.

96. Hence, the retaliatory tariff in this case is a qualified hardship under Clause 12.

B. The Remedy of Price Adaptation is Applicable Under Clause 12

97. Clause 12 of the Sales Agreement only sets forth the requirements for hardship, without mentioning the applicable remedy in case of hardship. Therefore, the applicable law, UPICC, shall serve to supplement the contract. We submit that the remedy of price adaptation is applicable under Clause 12, because there has been a failure to renegotiate (**1**) and there is no undue delay of notice (**2**). Further, we submit that CLAIMANT's performance of the contract does not mean we give up our right to seek remedy (**3**).

1. <u>There Has Been a Failure to Renegotiate</u>

98. Under UPICC Art. 6.2.3, in case of hardship, the disadvantaged party is entitled to request

renegotiation. When such renegotiation fails, it may request the court to adapt the price. In this case, when CLAIMANT notified RESPONDENT of the tariff situation, RESPONDENT created the impression that they were willing to further renegotiate. However, after the performance of the contract, the opposing party refused to renegotiate and refused any additional payment. Since the renegotiation has clearly failed, CLAIMANT shall request the court to adapt the contract.

99. Even though Art.6.2.3 only mentions "court" instead of arbitral tribunal, according to the definition clause of UPICC, Art 1.11, all the "court" in UPICC includes arbitral tribunal. Hence, CLAIMANT may also request the Tribunal to adapt the price.

2. <u>There is No Undue Delay of Notice</u>

100. The notice of renegotiation shall be made as quickly as possible after the alleged hardship occurs *[UPICC Commentary, P224]*. In this case, RESPONDENT may argue that while the retaliatory tariff took place in Dec. 19 2017, CLAIMANT notified RESPONDENT of the situation one month after the event, on Jan. 20 2018, which implies an undue delay of notice. However, CLAIMANT has not intentionally delayed the notice. The reason for the late notice is that CLAIMANT has not foreseen that the retaliatory tariff also includes racehorse semen. Since under the contract, CLAIMANT has no obligation to foresee the event *[Memorandum of CLAIMANT, ¶90]*, our obligation is only to inform the opposing party as quick as possible after we are aware of the hardship. In this case, after we are aware of the fact that the tariff also includes frozen semen on Jan. 20th 2018, we immediately informed RESPONDENT on the same day. Hence, there is no undue delay of notice.

3. <u>CLAIMANT Shall Not Be Deprived of the Right to Seek Remedy Because of the Performance of the Contract</u>

101. Hardship only applies to part of performance that has not been yet rendered *[UPICC Commentary, P221]*. RESPONDENT may argue that since the contract has been fully performed, CLAIMANT can not establish hardship any longer. However, the detailed requirement is that the disadvantaged party can only "invoke hardship" for the party of contract that has not been rendered. CLAIMANT has invoked hardship when we informed RESPONDENT of the tariff situation on Jan. 20th 2018, which is before the performance of the contract. Also, under Art.6.2.3 (2) UPICC, the request for

renegotiation does not in itself entitled the disadvantaged party to withhold performance. Therefore, CLAIMANT's performance of the third shipment is an act in accordance with the contract and also UPICC, which shall not deprive us from the remedy associated with hardship.

C. The Amount of the Price Adaptation Shall Be 25%

102. CLAIMANT submits that the amount of price adaptation shall be 25%, because the risk of tariff increase is supposed to be undertaken by RESPONDENT as stipulated in Clause 12 of the Sales Agreement (**1**). Besides, RESPONDENT has benefited from the performance and the losses would be mitigated by its resale (**2**). Moreover, RESPONDENT has breached the good faith principle and is supposed to bear more burden of risk (**3**).

1. The Risk of Tariff Increase Should Be Borne by RESPONDENT

103. When adapting the contract, the Tribunal would have to consider the extent to which one of the parties has taken a risk *[UPICC Commentary, Art.6.2.3, P226]*. Pursuant to Clause 12 of the Sales Agreement, the tariff is a qualified hardship under Clause 12 and CLAMANT shall not bear such risk *[Memorandum of CLAIMANT, ¶92]*. Therefore, the risk of tariff increase shall be assumed by RESPONDENT.

104. The retaliatory tariff imposed by Equatoriana has made the shipment 30% more expensive and destroying CLAIMANT's profit margin of 5% *[Exh. C8, P17]*. Given the fact that the risk shall be assumed by RESPONDENT, CLAIMANT is entitled to a 25% price adaptation except its 5% profit margin.

2. RESPONDENT Has Benefited from the Performance and Could Mitigate the Loss by Its Resale

105. To adapt the contract, the Tribunal would also have to consider the extent to which the party entitled to receive a performance may still benefit from the performance *[UPICC Commentary, Art.6.2.3, P226]*. RESPONDENT itself, after the imposition of tariff and in breach of its contractual requirements not to resell the semen, has already gained an extra 20% profit above the price charged by CLAIMANT from reselling *[N.A., P8]*. RESPONDENT, as the buyer, is less prone to face hardship because the value of the goods purchased has risen as a result of the imposition of tariff *[Silveira, P9,10, ¶526]*, so RESPONDENT could mitigate the loss by reselling to other parties. It is

more reasonable for RESPONDENT to shoulder the 25% additional costs arising from price adaptation.

3. RESPONDENT Is in Breach of the Good Faith Principle and Should Bear More Burden of Risk

106. Even though Art.6.2.2 UPICC does not impose any duty on the other party to participate in the renegotiations, such a duty emanates from the duty to act in good faith *[UPICC, Art.1.7]* and the duty to cooperate *[UPICC, Art.5.3; Silveira, ¶492]*.Both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith and fair dealing *[UPICC Commentary, Art.6.2.3, P225; UPICC Art.1.7]*. Once the request has been made, both parties must conduct the renegotiations in a constructive manner *[UPICC Commentary, Art.6.2.3, P225.]*. And when assessing the respective liabilities of the parties, the Tribunal must consider whether the Parties have entered into renegotiation in good faith *[ICC case No. 6515, ¶62]*.

107. Before the third shipment, CLAIMANT had entered into renegotiation with RESPONDENT. The subsequent behavior of RESPONDENT misled CLAIMANT into believing that a "reasonable adjustment" would take place. And relying on RESPONDENT's promise that a solution would be found through negotiation and the interest in long-term relationship, CLAIMANT authorized the shipment under the impression that RESPONDENT accepted to bear the additional costs *[Exh. C8, P18]*. However, after the final shipment had been made and in a meeting between the Parties, RESPONDENT stopped the negotiations, ended further cooperation and refused to pay any additional amount for the tariffs *[ibid.]*, which is clearly in breach of the good faith principle. Since RESPONDENT fails to renegotiate in good faith, it should bear more burden of risk and shoulder the 25% additional costs resulting from price adaptation.

108. In conclusion, CLAIMANT should be granted the remedy of a 25% price adaptation because of the risk allocation between the Parties stipulated in Clause 12 of the Sales Agreement, and RESPONDENT has benefited and could mitigate the loss by its resale. Besides, RESPONDENT has breached the good faith principle under UPICC and shall bear more burden of risk.

Conclusion to the Third Issue

109. CLAIMANT is entitled to the 25% price adaptation because the tariff in the present case is a qualified hardship in Clause 12 of the Sales Agreement and the remedy of price adaptation is applicable under Clause 12. Furthermore, the amount of adaptation shall be 25%.

III. (ii) CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM THE ADAPTATION OF THE PRICE UNDER CISG

110. Even if the Tribunal decides that CLAIMANT is not entitled to the payment of US$ 1,250,000 under Clause 12 of the Sales Agreement, CLAIMANT is still entitled to the payment of the same amount under CISG, because firstly Art.79 CISG shall not apply in this case and under Art.7(2) CISG and UPICC CLAIMANT is entitled to the price adaptation (**A**). Even if Art.79 CISG applies in this case, CLAIMANT is still entitled to the remedy of price adaptation (**B**).

A. Art.79 CISG Shall Not Apply and under Art.7(2) CISG and UPICC CLAIMANT Is Entitled to the Price Adaptation

111. CLAIMANT submits that in the present case, Art.79 CISG is not applicable since CLAIMANT has fully performed the contract and there is a gap needed to be filled (**1**). Further, UPICC shall be resorted to fill the gap, which grants CLAIMANT the remedy of price adaptation (**2**).

1. Art.79 CISG Is Not Applicable in the Present Case Since CLAIMANT Has Fully Performed the Contract and There Is A Gap Needed to Be Filled

112. Art.79 CISG governs the extent to which a party is exempted from liability for non-performance of his obligation because of an impediment beyond his control *[CISG Secretariat Commentary on Article 65]*. Hence, it does not deal with the situation that a party has fully performed its obligation. According to some legal commentators, the situation of hardship has been excluded from the scope of Art.79 from its drafting history *[Honnold, P472-495]*. When the hardship event arises, the parties may renegotiate the terms of the contract in good faith. In case negotiations fails, there are no guidelines under CISG for a court or arbitrator to adapt the contract *[CISG-AC-op7]*. Thus, the parties could rely on general principles or domestic laws in Art.7(2) CISG to fill the gap *[CISG-AC-op7; Scafom I.B.V. case]*.

113. In the present case, after informed by an email on the morning of 20 January 2018 that the tariff applied to semen, Ms Napravnik immediately sent an email to RESPONDENT to hold the third delivery and to renegotiate with RESPONDENT about the price adaptation of the contract by using the words of "find a solution" *[PO2, P58, ¶26; Exh. C7, P16, ¶2]*. RESPONDENT replied that "we will certainly find an agreement on the price" which looked like accepting the price adaptation in *prima facie*, although its actual intention was to avoid any concession but persuade CLAIMANT to deliver the shipment *[Exh. R4, P36, ¶4]*. Finally, owing to the long-term relationship between the parties and RESPONDENT's urgent request and the promise to find a solution, CLAIMANT delivered the third shipment before 23 January 2018 *[Exh. C8, P18, ¶3]*.

114. For CLAIMANT, it has fully performed its obligations of delivery, notice and renegotiation. Thus, it was not possible for CLAIMANT to have remedies under Art.79 CISG, which only provided a remedy for parties of non-performance of the contract. In this situation, according to Art.7(2) CISG, the Tribunal shall settle this problem in conformity with the general principles or in conformity with the applicable law.

2. UPICC Can Be Used to Fill the Gap, Which Grants CLAIMANT the Remedy of Price Adaptation

115. CLAIMANT submits that UPICC can be used to fill the gap in CISG, and it grants the remedy of price adaptation, because UPICC can be used to fill the gap as the general principles under Art.7(2) CISG (**a**), and as the gap-filling law and UPICC grants the remedy of price adaptation (**b**). CLAIMANT further submits that even if UPICC is not regarded as general principles, it may still apply as the applicable law of the contract (**c**).

(a) UPICC Can Be Used to Fill the Gap as the General Principles under Art.7(2) CISG

116. According to the Preamble of UPICC, there are six functions of UPICC, and one of them is to interpret or supplement international uniform law instruments. At the comment of the Preamble, it specifically mentioned CISG as the international uniform law instrument. Pursuant to Art.7 CISG, when the questions concerning matters not governed by CISG, it shall be settled in conformity with the general principles. But the general principles under CISG was not expressed directly, UPICC could be resorted to as expressions of general principles underlying the CISG *[Magnus, P492-49]*.

Except for clarifying unclear language, the UPICC may also be used to fill veritable gaps found in CISG *[Bonell, PP26-39]*. Hence Courts or Tribunals could apply general principles of law in the form of UPICC *[ICC case No.12097; Gaec case; Scafom I.B.V. case]*.

(b) As the Gap-Filling Law, UPICC Grants CLAIMANT the Remedy of Price Adaptation

117. While using UPICC to fill the gap, Art.6.2.1-6.2.3 UPICC shall be used to determine whether tariff is a qualified hardship *[Memorandum of CLAIMANT, ¶81]*. And the present case satisfied all of the five requirements of hardship, that (1) the tariff fundamentally change the equilibrium of the contract; (2) the tariff happened after the conclusion of the contract; (3) the tariff is unforeseen by the parties; (4) the tariff cannot be expected to be overcome by CLAIMANT; (5) the tariff has not been assumed by CLAIMANT. As the tariff constitutes a qualified hardship under UPICC, the remedy of price adaptation is available according to Art.6.2.3 UPICC, because there has been a failure to renegotiate between the Parties and there is no undue delay of notice. Further, CLAIMANT's performance of the contract does not imply a waiver of the right to seek remedy. In conclusion, while using UPICC to fill the gap, it entitles CLAIMANT to the remedy of price adaptation.

(c) Even If the Tribunal Refuses to Use Art.6.2.1-6.2.3 UPICC as the General Principles, UPICC Shall Also Be Used to Fill the Gap as the Applicable Law

118. According to Art.7 CISG, in the absence of general principles, matters not governed by CISG shall be settled in conformity with the applicable law, which shall be determined under the rules of international private law of the forum. Hong Kong's choice-of-contract-law rules allow the parties to choose the applicable law *[Lutz-Christian Wolff, P465-498; Newmark case]*, and the Parties made the choice by stipulating that "this Sales Agreement shall be governed by the law of Mediterraneo" *[Exh. C5, P15, ¶14]*, which includes UPICC *[PO1, P52, ¶4]*. By applying UPICC as the applicable law, the Tribunal also can conclude that CLAIMANT is entitled to the payment.

B. Even If Art.79 CISG Applies in This Case, CLAIMANT Is Entitled to the Remedy of Price Adaptation

119. Even though it is our submission that Art.79 shall not apply in this case, some scholars do hold that there is no gap concerning the post-contract developments rendering the performance more

onerous in CISG, which means Art.79 shall apply *[Flechtner, P90]*. Even if the Tribunal concludes that Art.79 should apply in this case, CLAIMANT is still entitled to the remedy of price adaptation under Art.79. Because Clause 12 is not a derogation from Art. 79 CISG (**1**), hardship may qualify as "impediment" under Art.79 CISG (**2**) and the 30% tariff increase constitutes "impediment" under Art.79 CISG (**3**). CLAIMANT further submits that the remedy of price adaptation is applicable under Art.79 CISG (**4**).

1. Clause 12 Is Not A Derogation From Art.79 CISG

120. Contrary to RESPONDENT's allegation *[A.N.A., ¶20]*, CLAIMANT submits that the wording of Clause 12 in the Sales Agreement is not a derogation from CISG, because modifying the clauses under INCOTERMS does not constitute a derogation from CISG (**a**) and the Tribunal may apply CISG in tandem with hardship and force majeure clause (**b**).

(a) Modifying the Clauses under INCOTERMS Does Not Constitute A Derogation from CISG

121. The applicable law to interpret whether a clause in the contract derogates from CISG is CISG's provisions on the interpretation of contract *[Schlechtriem/Schwenzer, P835]*. Art.8 CISG prescribes that the primary concern when interpreting a contract is the Parties' intent that has been communicated to the other party.

122. The purpose of the inclusion of Clause 12 is CLAIMANT's unwillingness to take over all the risk associated with DDP, which has been clearly communicated to RESPONDENT *[Exh. C4, ¶4]*. Therefore, the hardship clause is in fact modifying the provisions under DDP. Referring to INCOTERMS is not considered as a derogation from CISG but merely supplementing CISG *[Schlechtriem/Schwenzer, P89]*. Similarly, modifying the clauses under INCOTERMS shall not be considered as derogating from CISG, but merely supplementing it. Clause 12 should be construed as: besides the risk that CLAIMANT is usually immune from under the applicable law, CLAIMANT is further not responsible for the risk provided in Clause 12. The purpose of Clause 12 is to expand the scope of protection for CLAIMANT, instead of narrowing it.

(b) The Tribunal May Apply CISG in Tandem with Hardship and Force Majeure Clause

123. CLAIMANT submits that the fact that there exists an excuse clause in the contract does not *per se* blocks Tribunal from referring to CISG. The Parties derogate from provisions of CISG only when

they modify provisions of CISG by terms and clauses of their contract *[Schlechtriem/Schwenzer, P88]*. When deciding on whether a party is exempted from force majeure, a court may look into both CISG and the force majeure clause in the contract, thus suggesting that the parties had not pre-empted CISG by agreeing to the contractual provision, which has the same effect as CISG *[Iron Molybdenum case]*. Similarly, Clause 12 does not alter the requirements for force majeure or hardship. Applying CISG will not be in conflict with the Parties' consent. Hence, Tribunal may look into both Clause 12 and CISG.

2. Hardship May Qualify as "Impediment" under Art.79 CISG

124. The traditional view of Art.79 applies a rather strict interpretation of "impediment". It is held that the intent of Art.79 is to prevent the obligator from being able to escape his obligation from invoking economic difficulties *[Keil, P186]*. However, nowadays it is more or less unanimously accepted in court and arbitral decisions, as well as in scholarly writing that a change in economic surroundings leading to a dramatic increase in the costs of performance may constitute an impediment to performance justifying an exemption from liability for non-performance under Art.79 CISG *[Scafom I.B.V. case; Silveira, ¶493]*. And Art.79 does indeed cover issues related to hardship *[Scafom I.B.V. case; Schwenzer, P713]*. The language of Art.79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible *[CISG-AC-op7, 3.1]*. Hence, hardship may qualify as an impediment under Art.79 CISG.

3. The 30% Rise in Tariff Constitutes "Impediment" Under Art.79 CISG

125. CLAIMANT submits that the 30% tariff increase in the present case is covered under the "impediment" under Art.79 CISG, as the tariff increase satisfies the requirements under Art. 79: the tariff rise is due to an impediment beyond CLAIMANT's control (**a**), CLAIMANT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract (**b**) and CLAIMANT could not be expected to have avoided or overcome it (**c**).

(a) The Tariff Rise Is Beyond the Control of CLAIMANT

126. It is apparent that the imposition of tariff is beyond the control of CLAIMANT. State interventions preventing performance generally lie outside of the parties' sphere of control *[Schlechtriem/Schwenzer, P827]*. By no means can CLAIMANT takes measures to avoid the tariff imposition.

(b) CLAIMANT Could Not Be Reasonably Expected to Have Taken the Impediment into Account at the Time of the Conclusion of the Contract

127. The determination of the foreseeability of the alleged impediment should be carried out on a case-by-case basis *[CISG Secretarial Commentary, ¶6]*. At the time of the conclusion of the contract, tariff imposition is clearly beyond the foreseeability of CLAIMANT. The tariff rise in the case at hand is the result of a series of unforeseeable events. Mr. Bouckaert, the newly elected president of Mediterraneo, imposed a tariff that never been part of any plan released to the public *[N.A., ¶9]*. Subsequently, Equatoriana, who has been one of the biggest supporters of free trade, imposed a retaliatory tariff on the agricultural goods from Mediterraneo, which only imposed one retaliatory tariff in the history and none by the present party in power *[Exh. C6, ¶2]*. Besides, until 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo *[PO2, P58, ¶25]*. Even most professional analysts specialized in this area are surprised as this went beyond the worst expectations *[Exh.C6, P15]*.

128. It is reasonable for CLAIMANT to fail to foresee the coming of a sudden tariff imposed by a government which is supportive of free trade. It will be placing too much burden on CLAIMANT for it to foresee such an unexpected event.

(c) CLAIMANT Could Not Be Expected to Have Avoided or Overcome It

129. Generally, racehorse breeding is categorized differently from other agricultural products *[N.A., ¶11]*. Therefore, the Parties are astonished to hear that frozen semen was listed in the schedule that fell under the new tariffs-regime and this also applies to racehorse semen *[ibid.]*. It was only after Ms Napravnik asked for customs clearance on 19 January 2018 that CLAIMANT is informed the tariff applied to semen as well *[PO2, P58, ¶26]*. However, at that time the tariff has already taken effect from 15 January 2018 onwards *[PO2, P58, ¶25]*. By no means could CLAIMANT be exempted from or obtained reduction in the additional tariffs charged in the last shipping *[P.O.2, P58, ¶27]*.

130. In conclusion, the 30% tariff increase is covered in the "impediment" under Art.79 CISG, because it is due to an impediment beyond CLAIMANT's control and CLAIMANT could not reasonably be expected to have taken the impediment into account when the contract was concluded, nor could CLAIMANT be expected to have avoided or overcome it.

4. The Remedy of Price Adaptation Is Applicable Under Art.79 CISG

131. Art.79(5) does not preclude other remedies besides damages. And there is a *praeter legem* gap in CISG with respect to remedies available in case of hardship *[Silveira, ¶508]*. First and foremost, one must look for a possible agreement, either express or implied, between the parties *[CISG Art.8; ibid.]*. The Parties had already reached an oral agreement that if they could not agree on the amendment, then it is the task of the arbitrators to adapt the price *[Exh. C8, P17]*. Therefore, the remedy of price adaptation has been agreed by the Parties.

132. Even if the Tribunal concludes that there is no agreement between the Parties, in the absence of agreement or established usage, one must examine whether there is "a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" *[CISG Art.9(2); Silveira, ¶508]*. Only in the absence of an applicable usage, is one compelled to rely on gap-filling mechanisms laid down in Art.7(2) CISG *[Honnold, P175; Silveira, ¶508]*.

133. UPICC provisions on hardship could be deemed as the expression of trade usages *[ICC case No. 7365; ICC case No. 10021]*. And thus Art. 6.2.3 UPICC entitles CLAIMANT to the remedy of price adaptation *[Memorandum of CLAIMANT, ¶97]*. Even if UPICC should not be considered as trade usages, in the absence of applicable trade usage, the CISG's gap with respect to remedies available in situations of hardship must be filled according to the prescriptions of Art.7(2) CISG by resorting to general principles under CISG *[Silveira, ¶511]*. And many scholars suggested to interpret and supplement CISG by the recourse to the provisions of UPICC in particular those dealing with hardship *[Basedow, P136; Brunner, P218; Bund, P392; Garro, PP1151, 1184; Perillo, P114]*. Therefore, relying on Art.6.2.3 UPICC, CLAIMANT shall be entitled to the remedy of price adaptation.

Conclusion to the Fourth Issue

134. Even if the Tribunal concludes that CLAIMANT is not entitled to the payment of US$ 1,250,000 under Clause 12, according to CISG, CLAIMANT is still entitled to the payment of the same amount. Because first, Clause 12 is not a derogation from CISG Second, Art.79 CISG does not cover the present case since CLAIMANT has fully performed the contract and UPICC can be used to fill the gap, which entitles CLAIMANT to the remedy of price adaptation. Even if Art.79 CISG applies in this case, CLAIMANT is still entitled to the remedy of price adaptation.

REQUEST FOR RELIEF

In light of the submissions above, CLAIMANT respectfully requests the Tribunal:

1) the Tribunal has the jurisdiction and the powers under the arbitration agreement to adapt the contract.

2) CLAIMANT is entitled to submit evidence from the other arbitration proceedings.

3) CLAIMANT is entitled to the payment of US $ 1,250,000 resulting from an adaptation of the price both under Clause 12 of the contract and CISG.

Respectfully signed and submitted by counsel on 6 December 2018

Ruiting Li | Chao Zhao | Zhuang Gao

Ben Liu | Zibo Liu | Jiarui Hao

On behalf of CLAIMANT,

Phar Lap Allevamento