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WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG

MARCH 31 – APRIL 7, 2019

XIANGTAN UNIVERSITY LAW SCHOOL TEAM

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:

PHAR LAP Allevamento
Rue Frankel 1
Capital City
Mediterraneo

CLAIMANT

AGAINST:

BLACK BEAUTY Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

RESPONDENT

KUANG JINGDAN, WANG LEI, CHEN YAZHENG, LI XIN

AN SHUTING, LIU RUIXIN, CHEN XI, ZHONG HUIYU

TABLE OF CONTENTS

NOTE ON REFERENCING

References to books or articles in the **ARGUMENTS** of this Memorandum will appear in alphabetical order and are comprised of the surname of the author(s), followed by the year of publication and the relevant paragraph or page number, where applicable. References to cases and arbitral awards in the **ARGUMENTS** of this Memorandum will also appear in alphabetical order and will include, where possible, the name of the case, the year of judgment or award, the relevant court or tribunal and the relevant paragraph or page number. References to the Moot Problem will include the name of the relevant document, followed by the page number and paragraph, if possible. In cases of multiple references shown in square brackets immediately after a quote, it is the first reference that refers to the quote. The subsequent references in the same square brackets will appear in alphabetical order.

The full citations to references are listed in the **INDEX OF AUTHORITIES, INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS**. The **INDEX OF AUTHORITIES** will appear in alphabetical order based on the surname of the author(s). The **INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS** will appear in alphabetical order based on the name of the country or arbitral institution. In accordance with Rule 38 of the Moot Rules, the **INDEX OF AUTHORITIES**, **INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS** will make reference "to each paragraph in the memorandum where the case or doctrinal authority is cited".

INDEX OF ABBREVIATIONS

AAA Rules	International Arbitration Rules of the American Arbitration Association Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
Co.	Company
Commentary on the IBA Rules	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration
HKIAC	Hong Kong international arbitration centre
HKIAC Rules	Hong Kong international arbitration centre administered arbitration rules, 2018
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC	International Chamber of Commerce
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006 Revision
New York Convention	United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Para.	Paragraph
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

CITED AS	REFERENCE
AMERICAN LAW INSTITUTE	Restatement of the law of contracts, Section 454 (1923) **Cited in**: PARA. 98
BLACKABY, NIGEL PARTASIDES	"Constantine REDFERN, Alan HUNTER, Martin J. Redfern and Hunter on International Arbitration" , Oxford University Press (2009) **Cited in:** Para.36
BORN, GARY B.	"International Commercial Arbitration, Kluwer Law International, The Hague" (2009) **Cited in:** Para.35
CINDY G. BUYS	"The Tensions Between Confidentiality and Transparency in International Arbitration"［J］(2003)Vol.14. **Cited in:** Para.51, 52, 54, 62
CISG ADVIORY COUNCIL OPINION NO. 7	CISG ADVIORY COUNCIL OPINION NO. 7, Exemption of Liability for Damages under Article 79 of the CISG, **Cited in:** Para.86
DORA MARTA GRUNER.	"Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform"［J］,(2003) Vol.41. **Cited in:** Para.52
Digest of Model Law	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration **Cited in:** Para.21
Feng and Han	Feng Xiaoqing and Han Pin, "Research on the Issue of Public Domain

	in the Protection of Private Rights.", 2018. **Cited in**: Para.44
HUANG, H.	"On public domain in copyright law", (2009) Frontiers of Law in China, 4 (2):178-195 **Cited in:** Para.39
KÜHNER, DETLEV	"The Revised IBA Rules on the Taking of Evidence in International Arbitration, Journal of International Arbitration", Volume 27,Issue 6, Kluwer Law International,The Hague (2010) URL:http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1050105-n **Cited in:** Para.36
Kröll	Stefan Michael Kröll, Julian D. M. Lew, Loukas A. Mistelis. Comparative International Commercial Arbitration. Kluwer Law International 2003 **Cited in:** Para.13
LIN QIMIN	"Transparency in International Commercial Arbitration", Hebei Law Science,(2015),33(06):112-113 **Cited in:** Para.47, 54
LIU TIANQI	"The Balance of Confidentiality and Transparency in Internationl Commercial Arbitration", LEGAL ECONOMY(2016)(11):103-107 **Cited in:** Para. 46, 47, 51
MAURIZIO GOTTI.	"The influence of legal tradition on Italian arbitration discourse[J].", (2017) Semiotica, 2017(216). Page1,para1. **Cited in:** Para. 68
QIFAN CUI	"Study on the Problem of Evidence of International Commercial Arbitration. [D]", (2011) East China University of Political Science and

	Law, page 1,para1. **Cited in:** Para.69
QM/WC	International Arbitration Survey:Current and Preferred Practices in the Arbitral Process (2012) **Cited in:** Para.36
SCHLECHTRIEM, P.	PETER SCHLECHTRIEM, Transcript of a Workshop on the Sales Convention, (1998), 237 URL: http://www.cisg.law.pace.edu/cisg/biblio/workshop.html#* **Cited in:** Para.103
SCHLECHTRIEM, P./ SCHWENZER, I.	PETER SCHLECHTRIEM, INGEBORG SCHWENZER, Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd ed., Oxford University Press, (2010),426, 771 **Cited in:** Para.95,104
SCHWARZ, FRANZ T.KONRAD CHRISTIAN W.	"The Vienna Rules: A Commentary on International Arbitration in Austria, Kluwer Law International" The Hague (2009) **Cited in:** Para.32
SCHWENZER, I.	INGEBORG SCHWENZER, Force majeure and hardship in international sales contracts, Victoria University of Wellington Law Review, (2009), 39. PP. 709-725,716 **Cited in**: Para.91,95,104
TRACKMAN	Trakman, Leon E "Confidentiality in International Commercial Arbitration", 18(1) Arbitration International 1, 2002 **Cited in:** Para.66

WEIXIA GU	Weixia Gu, "Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?" 15(1) The American Review of International Arbitration 607, 2004 **Cited in:** Para.66

INDEX OF ARBITRAL AWARDS

CITED AS	REFERENCE
FRANCE	Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc. No. 7365, 5 May 1997, ICC International Court of Arbitration, Paris 7365/FMS **URL:** http://www.unilex.info/case.cfm?id=653 **Cited in**: Para.88
GENEVA	No. 9333, October 1998, ICC International Court of Arbitration, Geneva **URL:** http://www.unilex.info/case.cfm?id=665 **Cited in**: Para.84
RUSSIA	No. 229/1996, 6 May 1997, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation **URL:** http://www.unilex.info/case.cfm?id=669 **Cited in**: Para.90

INDEX OF CASES

CITED AS	REFERENCE
AMTSGERICHT CHARLOTTENBURG CASE, GERMAN,1994	Italian shoes case, GERMANY Amtsgericht Charlottenburg, 4 May 1994 **Cited in**: Para. 87
BCY V. BCZ (2016)	BCY v. BCZ, THE Singapore High Court, August 2016 **Cited in**: Para. 22
CALZATURIFICIO CLAUDIA (1998)	Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd., No. 96-8058 of 1998, S.D.N.Y, Apr. 6, 1998 **Cited in**: Para. 25
CASE MINERAL PARK LAND	Mineral Park land Co. v. Howand 156. pp. 459 - 460. (1916) **Cited in:** Para.86
CASE SCAFOM INTERNATIONAL BV	Scafom International BV v. Lorraine Tubes S.A.S, C.07.0289.N, the Supreme Court of Belgium,19 June 2009 URL: http://www.unilex.info/case.cfm?id=1456 **Cited in**: Para.87,106
ENGLAND FERREL	Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd, [2002] 1 All ER 627, (Comm) (English High Ct.) **Cited in**: Para.12;16
INDIA ARS CRA	Arsanovia Ltd v. Craz City, the India court of Appeal, 2012 **Cited in**: Para. 16
MIAMI VALLEY	Miami Valley Paper, LLC v. Lebbing Eng'g & Consulting GmbH, No.

PAPER (2009)	05-702 of 2009, S.D. Ohio, Mar. 26, 2009 **Cited in**: Para. 25
MINERAL PARK LAND CO. V. HOWAND CASE, US,1916	Mineral Park land Co. v. Howand In the US.156.pp. 459 - 460. (Cal,1916). **Cited in:** Para. 88
Nuova Fucinati v. Fondmetall International case, Italy, 1993	Nuova Fucinati v. Fondmetall International, Italy, 14 January 1993 District Court Monza **Cited in**: Para. 85
SCAFORN INTERNATIONAL BV AND ORION METAL BVBA V. EXMA, BELGIUM,2005	Scaforn International BV and Orion Metal BVBA v. Exma, Belgium decided 25 January 2005, DISTRICT Court of Tongeren **Cited in**: Para. 86
Sulamérica CIA Nacional de Seguros SA v Enesa Engenharia SA	Sulamérica CIA Nacional de Seguros SA v Enesa Engenharia SA, [2012] EWCA Civ **Cited in**: Para. 14;18;22
TEEVEE TOONS (2006)	TeeVee Toons, Inc. v. Gerhard Schubert GmbH, No. 00-5189 of 2006, S.D.N.Y, Aug. 22, 2006 **Cited in**: Para. 25

LIST OF CHARACTERS

1. BLACKBEAUTYEquestrian……..……Respondent
2. Dr. Francesca Dattorie …….…… Arbitrator nominated by Respondent
3. Greg Shoemaker ……...……Veterinary of respondent
4. Ian Bouckaert …….……...……. Mediterraneo's newly elected President
5. John Ferguson …….…….…… Seller of the contract
6. Joseph Langweiler …….…….……..…… Attorney of claimant
7. Julia Clara Fasttrack …….……..…Attorney of Respondent
8. Julian Krone…….……. Buyer of the contract
9. Kayal Espinoza ……...……... RESPONDENT's CEO
10. Mr. Chris Antley. ……...……..…. Respondent's negotiator
11. Ms. Julie Napravnik …….…….……. Claimant's negotiator
12. Ms. Wantha Davis…...……..... Arbitrator nominated by claimant
13. PHAR LAP Allevamento …….…….…….…….Claimant
14. Prof. Calvin de Souza ……...……The presiding arbitrator

STATEMENT OF FACTS

1. CLAIMANT, PHAR LAP Allevamento (PHAR LAP), is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. Mediterraneo's horse-shoeing or farrier school is also based at PHAR LAP *[NOTICE OF ARBITRATION, 4, Para.1]*. The RESPONDENT, BLACK BEAUTY EQUESTRIAN (BLACK BEAUTY), located in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. *[NOTICE OF ARBITRATION, 5, Para.4]*

2. On 21 March 2017, BLACK BEAUTY contacted PHAR LAP, inquiring about the availability of Nijinsky III for its newly started breeding programme *[CLAIMANT'S EXHIBIT C 1, 9]*. On 24 March 2017, PHAR LAP replied by e-mail to BLACK BEAUTY that it would like to offer 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards *[CLAIMANT'S EXHIBIT C 2, 10]*. BLACK BEAUTY had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP *[CLAIMANT'S EXHIBIT C 3, 11]*. Due to past experiences with extremely expensive tests due to changes in customs health requirements, PHAR LAP was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to BLACK BEAUTY and the inclusion of a hardship clause to temper some of the additional risks assumed *[CLAIMANT'S EXHIBIT C 4, 12]*.

3. In the end, the Parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12 April 2017. They had to be replaced for the finalization of the contract which was signed on 6 May 2017 *[CLAIMANT'S EXHIBIT C 5, 13]*.

4. The Parties also had agreed on three shipments *[CLAIMANT'S EXHIBIT C 5, 13]*. RESPONDENT sent the first shipment of 25 doses on 20 May 2017; the second shipment of

25 doses on 3 October 2017. Two months before the last shipment of 50 doses was due, Mediterraneo's newly elected President, Ian Bouckaert, announced the imposition of 25% tariffs on agricultural products from Equatoriana. This sudden measure came as a complete surprise. While Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, a 25% tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto.

5. Even more surprising was the reaction of the Equatorianian government, which has always been an ardent supporter of free trade. Consequently, the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries *[CLAIMANT'S EXHIBIT C 6, 15]*. In the present case, however, to the big surprise of everyone, the Equatorianian government after a very short period of unsuccessful discussions retaliated by imposing 30% tariffs on selected products from Mediterraneo including on animal semen *[CLAIMANT'S EXHIBIT C 6, 15]*.

6. CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen. Generally, racehorse breeding is categorized differently from pigs, sheep, or cattle.

7. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen *[CLAIMANT'S EXHIBIT C 7, 16]*. RESPONDENT had made clear already during the contract negotiation that for its planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase *[CLAIMANT'S EXHIBIT C 8, 17]*.

8. In light of the above facts and taking into account that RESPONDENT had created the impression of accepting the general need for a price adaptation, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

ARGUMENTS

I. THE TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

9. In its Procedural Order No. 1, the Arbitral Tribunal has requested the parties to address "the issue as to whether the tribunal has the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation" [*PROCEDURAL ORDER NO. 1, 51, PARA. 11*]. In this context, PHAR LAP argues that (A) In our case, there is no doubt that the arbitral tribunal has the jurisdiction to hear this case, and Black Beauty did not challenge the jurisdiction of the arbitral tribunal; (B)the law of the main contract, namely the law of Mediterraneo, governs the arbitration agreement and its interpretation; (C) the Tribunal has the powers to adapt the contract under the arbitration agreement.

(A) IN OUR CASE, THERE IS NO DOUBT THAT THE ARBITRAL TRIBUNAL HAS THE JURISDICTION TO HEAR THIS CASE, AND BLACK BEAUTY DID NOT CHALLENGE THE JURISDICTION OF THE ARBITRAL TRIBUNAL

(B) THE LAW OF THE MAIN CONTRACT, NAMELY THE LAW OF MEDITERRANEO, GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

10. PHAR LAP argues that (1) in the absence of the choice of law, the law governing the main contract should apply to the arbitration agreement, and (2) the law of Mediterraneo has the closest connection with the arbitration agreement, and (3) the doctrine of separability does not apply in the present case.

(1) In the absence of the choice of law, the law governing the main contract should apply to the arbitration agreement.

11. IN the clause 14 of the Sales Agreement, it was clearly written that this Sales Agreement shall be governed by the law of Mediterraneo while in clause 15 thereof there were no

specific words to stipulate which law governs the arbitration clause. Claimant argues that even if there is no express choice of law in the arbitration clause, the law of the main contract governs the arbitration agreement.

12. As stated in Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd: "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."*[SONATRACH PETROLEUM CORP. (BVI) V. FERRELL INT'L LTD,]*, in our case, we share the similar situation that the main contract stipulated clearly the law of Mediterraneo, while there was no express choice in arbitration clauses.

13. Such an inference also makes sense"whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat". *[KRÖLL]* Therefore, whether there is an express choice of arbitration clauses or not, it's persuasive for tribunal to regard the law of the Sales Agreement as a whole, which is the law of Mediterraneo.

14. Contrary to RESPONDENT's allegations that there is no express choice of law nor is there any implied choice, the Parties impliedly chose the applicable law in the emails where Claimant made a deliberate deletion, rejecting the choice of law proposed by RESPONDENT. Claimant added one sentence, which indicated that the law of the arbitration agreement remains the law of Mediterraneo. *[RESPONDANT'S EXHIBIT R 1, 33, PARA.3; RESPONDANT'S EXHIBIT R 2，34, PARA.5]* RESPONDENT also accepted Claimant's proposal, which was reflected in the clause 15 of the sales agreement, just as the same formulation as what was stated in the emails. Relevantly the judge in Sulamérica CIA Nacional de Seguros SA v. Enesa Engenharia SA states: "In the absence of any indication to the contract, the parties intended the whole relationship to be governed by the same system of law." *[SULAMÉRICA CIA NACIONAL DE SEGUROS SA V ENESA ENGENHARIA SA]*

15. In the case at hand, since the arbitration clause is only part of the underlying contract, and the acceptance of the contract entails the acceptance of the arbitration clause, where the law of contract should be governed as a whole, including the arbitration clause, which is the law of Mediterraneo.

(2) The law of Mediterraneo has the closest connection with the arbitration agreement

16. Contrary to RESPONDENT's allegations that the law of Danubia will apply, CLAIMANT argues that even if there is no implied choice between the Parties to apply the law of Mediterraneo governing the arbitration agreement, the law of Mediterraneo still governs the arbitration agreement and its interpretation because of its closest and most real connection with the arbitration agreement.

17. As is stated in the Partial Award in ICC Case No.6719: "In the practice of international commercial arbitration in recent decades, there are many judges in common law countries judge the validity of arbitration agreement according to the principle of the closest relation or the most important relation". *[ICC CASE NO.6719]*

18. This principle can also be supported by the Sulamérica CIA Nacional de Suguros SA and others v Enesa Engenharia SA decided by the English Court of Appeal in 2012 . The test laid out in this case for deciding the law applicable to an arbitration agreement is as follows: (i) Is there an express choice, if not, (ii) Is there an implied choice, if not, (iii) What is the law under which the arbitration agreement has the closet and most real connection. *[SULAMÉRICA CIA NACIONAL DE SUGUROS SA AND OTHERS V ENESA ENGENHARIA SA]*

19. In the case at hand, CLAIMANT argues that the law of Mediterraneo has the closest and most real connection with the arbitration agreement for three reasons: (i)The final negotiations and the signing of the Agreement took place in Mediterraneo. *[PROCEDURAL ORDER NO 2]* (ii) The main contract is governed by the law of Mediterraneo, which is the only express law stipulated in the contract. *[CLAIMANT'S EXHIBIT NO.5, 14, PARA 14]*

(3) Doctrine of separability does not apply in present case

20. Both Article 16(1) of Model law and Article 19(2) of HKIAC Rules deal only with the validity of the arbitration agreement, having nothing to do with the applicable law.

21. Article 16(1) Model Law acknowledged the doctrine of separability. According to it, "…For that purpose, an arbitration clause which forms part of a contract shall be treated as an

agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." However, this article deals with the validity of the arbitration agreement only, referring to no other aspects of this doctrine. Also, when it comes to the HKIAC Rules, Article 19(2) states that, "…For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement." Similar to Article 16(1) Model Law, this provision relates to nothing more than the validity of an arbitration agreement.

22. The usage of the doctrine of separability is not unlimited. In *BCY v. BCZ*, the judge states that: "arbitration clauses are typically negotiated as part of the main contract,and are unlikely to be negotiated independently from the main contract. Consequently, parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract, unless the consequence of applying the governing law of the main contract to the arbitration agreement would negate the arbitration agreement." [*BCY v BCZ*] Also, in the judgment of the *Sulamerica* case, the judge said: "The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes." *[SULAMÉRICA CIA NACIONAL DE SEGUROS SA V ENESA ENGENHARIA SA]*

23. As is stated in Digest of model law: "Although the separability principle may have other consequences—such as permitting the arbitration clause to be governed by a different law than the law applicable to the contract in which it is contained—, article 16 (1) only deals explicitly with the impact of the principle on jurisdictional issues." *[DIGEST OF MODEL LAW, ART. 16]* And A Guide to the UNCITRAL Model Law expresses a similar opinion. *[HOLTZMANN/NEUHAUS, P.479]*.

24. As a result, since the wording used in both Model law and HKIAC Rules are limited, the doctrine of separability deals only with the validity of the arbitration agreement and has nothing to do with the governing law of the arbitration agreement in our case.

(C) THE TRIBUNAL HAS THE POWERS TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

25. Clause 12 of the contract states that, "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*CLAIMANT'S EXHIBIT NO. 5, 14, PARA 11*]. PHAR LAP and BLACK BEAUTY signed the sales agreement on 6 May 2017. Everything proceded as anticipated until the government of Equatoriana imposed a tariff of 30% upon all agricultural goods from Mediterraneo as a retaliation for the imposition by Mr. Bouckaert, the newly elected President of Mediterraneo on 19 Dec 2017 [*CLAIMANT'S EXHIBIT NO. 6, 15, PARA 1*]. Therefore, when PHAR LAP prepared the final shipment of 50 doses of frozen semen, it was informed by the customs authorities of Equatoriana that it needed to pay the increased tariff, which made the shipment 30% more expensive [*CLAIMANT'S EXHIBIT NO. 7, 16, PARA 1*]. Later, PHAR LAP informed BLACK BEAUTY of this development. Subsequently BLACK BEAUTY promised that a solution would be found and, as it was interested in a long-term relationship, it urged PHAR LAP to authorize the shipment as planned. However, after the final shipment, they did not want to take any responsibility about that. Therefore, Phar Lap resorted to the arbitral tribunal to adapt the contract so as to make the remuneration reality.

26. For that purpose, PHAR LAP argues that (1) Under the law of Mediterraneo, the arbitral tribunal has the powers to adapt the contract and (2) Even if the arbitration agreement is governed by the law of Danubia, the arbitral tribunal still has the powers to adapt the contract.

(1) Under the law of Mediterraneo, the arbitral tribunal has the powers to adapt the contract

27. As argued above, the arbitration agreement is governed by the law of Mediterraneo. The law of Mediterraneo is the UNIDROIT Principles because in the Procedural Order No 1 it states that the general contract law Equateriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [PROCEDURAL ORDER NO 1, 53, PARA 4]. Pursuant to the Art.6.2.3 of the UNIDROIT Principles, it stipulates that "(3) Upon failure to reach agreement within a reasonable time either party mar resort to the court. (4) If the court finds hardship it may terminate the contract at a date and on terms to be fixed or adapt the contract with a view to restoring its equilibrium". Further, Pursuant to Art 1.11 of the UNIDROIT Principles, it states that in the Principles "court" includes an arbitral tribunal. Therefore, the arbitral tribunal has the powers to adapt the contract under the law of Mediterraneo because in this case it meets all the requirements (a) the parties failed to reach an agreement in the renegotiation (b) it is not reasonable for the tribunal to terminate the contract.

(a) The parties failed to reach an agreement in the renegotiation

28. When the PHAR LAP prepared the last shipment the tariffs increased by up to 30% which was really difficult and made the contractual performance more onerous and even would make the PHAR LAP bankruptcy. After knowing that, PHAR LAP informed BLACK Beauty of that and BLACK BEAUTY promised there will be a solution. After the last shipment, both of the parties met together and had a renegotiation. However, unfortunately both of the parties didn't reach an agreement during the renegotiation. The meeting took place in a hotel in Equateriana on 12 February 2018 upon Claimant's initiative who wanted to solve the issue of adaptation at the senior management level. It involved the CEO's of both parties and Ms. Napravnik and Mr. Shoemaker [PROCEDURAL ORDER NO 2, 60, CLARIFICATION 35]. Black Beauty's CEO got very angry, aggressive and refused the requests of Phar Lap [CLAIMANT' S EXHIBIT NO 8, 18, PARA 3]. Apparently, both parties failed to reach an agreement. Therefore, Art 6.2.3(3) is met and, hence, Art 6.2.3(4), which includes the adaptation of the contract, can be invoked.

(b) It is not reasonable for the tribunal to terminate the contract

29. According to the Art.6.2.3(4), the arbitral tribunal may terminate the contract whereas it is unreasonable to terminate the contract because Phar Lap already made all the shipments and Black beauty also resold the semen[NOTICE OF ARBITRATION, 6, PARA 13] [ANSWER TO THE NOTICE OF ARBITRATION, 31, PARA 12]. Therefore, it is impossible to terminate the contract and make everything back to origin.

30. As a result, Under the law of Mediterraneo, and according to Art 6.2.3 and Art 1.11 UNIDROIT Principles, the arbitral tribunal has the powers to adapt the contract.

(2) Even if the arbitration agreement is governed by the law of Danubia, the arbitral tribunal still has the powers to adapt the contract.

31. First, even if the arbitration agreement is governed by the law of Danubia, the arbitral tribunal still has the power to adapt the contract. The Danubian contract law is the verbatim adoption of Unidroit Principles with two exceptions. And one of the exceptions is the Unidroit Principles Art 6.2.3(4)(b) is worded differently granting the power to adapt the contract to the court only if authorized. Also pursuant to Art 1.11 Unidroit Principles, that means the arbitral tribunal has the power to adapt the contract if the parties authorize and in the case at hand both parties agreed upon the adaptation of contract for the tribunal. Mr. Antley who is the lawyer of Black Beauty replied that in his view that it should probably be the task of the arbitrators to adapt the contract it the parties could not agree [CLAIMANT' S EXHIBIT NO 8, 17, PARA 4]. And right now such dispute occurs. Here we can manifestly come to the conclusion that both of the parties agreed that the tribunal has the power to adapt the contract.

32. Second, the circumstances existing at the parties entered into their contract may change over time. In such case, it may become necessary for arbitral tribunal to adapt the contract to suit the new circumstances. For example, the new CEPANI Rules for adaptation of contracts are in force as from January 1st, 2018, according to the article 1, "The Belgian Centre for Arbitration and Mediation ("CEPANI") is an independent body which administers adaptation of contracts proceedings in accordance with its Rules", it will provide for the adaptation of

the contract by arbitrators if the parties agree to the rules. And it mentioned the Parties who wish to refer to the CEPANI Rules of Adaptation of Contracts are advised to insert the following clause in their contracts: "The Parties hereby undertake to apply the CEPANI Rules of Adaptation of Contracts, should either one of them so Request."[http://www.cepani.be/en/other-adr/adaptation-contracts/what-adaptation-contract].

33. Third, it is a well-established principle that a third party, including courts or arbitrators, can adapt and supplement the contract by filling in the gaps in the contract or by clarifying and interpreting 'open terms' of the contract in accordance with the intention of the parties expressed in the contract, and commercial usages.

34. The idea of allowing an arbitrator to render an equitable award without strict observance of the law or contractual terms has an old tradition. It is found in medieval Roman law with its distinction between the arbiter, bound by the law like a judge, and the arbitrator, called to render an equitable decision as an amiable compositeur. The need for such a more flexible arbitration procedure is widely felt in international commerce. International conventions on arbitration as well as other (unofficial) international arbitration rules accordingly provide for the possibility that arbitrators may decide ex aequo et bono, if the parties expressly so agree. We find such provisions in the European Convention of 1961 as well as in the arbitration rules of ICSID (1965), UN ECE (1966), ICC (1975) and UNCITRAL (1976). All rules - with the exception of the ICC rules - contain the caveat that such possibility must be allowed by the applicable law. Article 33.2 of the UNCITRAL rules reads: "the arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration."

35. There can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to modify a contract unless that right is conferred upon it by law, or by the express consent of the parties; arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal — constituted on the basis of a 'compromissory' clause contained in relevant agreements between the parties to the case could not, by way of modifying or completing a contract, prescribe how a provision (for

the determination of the economic equilibrium) must be applied. For that, the consent of both parties would be necessary.

36. From the above statement, it can be argued that express consent is needed for the giving of power to the arbitrator to adapt the contract by way of changing its terms. Under the ICC Rules for Adaptation of Contracts, the power of a third party to re-write the contract or adapt the existing terms of contract will depend, firstly, on the express power given by the parties and, secondly, on whether it is allowed by the applicable law. Similarly, art 6.2.3 of the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles') dealing with effects of hardship, provides that the disadvantaged party is entitled to request renegotiation of contract and, in case of failure to reach agreement within a reasonable time, either party may resort to the court. If the court finds hardship, it may terminate the contract or adapt the contract with a view to restoring its equilibrium. Under the UNIDROIT Principles, the term 'court' also includes an 'arbitral tribunal'.

37. Therefore, in this present case, as mentioned above, the Mr. Antley and Ms. Napravnik had expressed their consent for the giving of power to the arbitrator to adapt the contract by way of changing its terms. Thus, with the consent of parties, the Arbitral Tribunal has the power to adapt the contract.

CONCLUSION: The arbitration agreement is governed by the law of Mediterraneo. The Arbitral Tribunal has the powers to adapt the contract under the arbitration agreement

II. THE CLAIMANT SHOULD BE 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 A CONFIDENTIALITY OR THROUGH AN ILLEGAL HACK OF RESPONDENT' S COMPUTER SYSTEM

38. On 5 October 2018, in its Procedural Order No. 1, the President of the Arbitral Tribunal requested Counsel to address the following issue: "Should CLAIMANT be 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 a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system *[PROCEDURAL ORDER NO. 1, 52, PARA. 1]*." In order to accede to the Presidents request, PHAR LAP argues that it should be entitled to submit the evidence from the other arbitration proceedings even if the evidence had been obtained either through a breach of confidentiality or illegal hack because (A) PHAR LAP is not bound by the confidentiality obligation; (B) Submitting the evidence does not influence the confidentiality of the information in the other arbitration; (C) Considering the relativity of the evidence, it shall be submitted to the Arbitral Tribunal; (D) There is no provision prohibiting the submission of the information in HKIAC Rules and PHAR LAP should be allowed to submit the evidence to protect or pursue its legal rights or interest; (E)Adopting evidence from the other arbitration proceedings can reduce unnecessary spending and improve the work efficiency of the Arbitral Tribunal.

(A) PHAR LAP IS NOT BOUND BY THE CONFIDENTIALITY OBLIGATION

39. Even if the evidence had been obtained through a breach of the confidentiality agreement, it does not necessarily mean that it should not be submitted to the Arbitral Tribunal because (1) PHAR LAP is not a party in the other arbitration; (2) The information has been in the public domain; (3) While the importance of confidentiality has diminished, the importance of transparency has increased.

(1) PHAR LAP is not a party in the other arbitration

40. According to Art.45 HKIAC Rules and Art.42 HKIAC Rules 2013,PHAR LAP is not a party and therefore has no obligation of confidentiality.

41. Art.42.1 HKIAC Rules 2013 provides that, "Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreemen(s); or (b) an award made in the arbitration. Art.45.2 also provides that Art45.1 also applies to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, witness, secretary of the arbitral tribunal and HKIAC. Subjects beyond those prescribed do not bear the legal obligations. In our case ,

PHAR LAP is obviously not covered by the confidentiality agreement because it does not come within any of the covered parties.

42. Therefore, PHAR LAP is not bound by the confidentiality obligation.

(2) The information has been in the public domain

43. In the case at hand, the information in the other arbitration has been in the public domain. In other word, it is impossible and unreasonable for PHAR LAP to keep the public information confidential. Accordingly, PHAR LAP is able to submit the evidence from the other arbitration proceedings.

44. "Public" means things or information that unspecific people can have an opportunity to get access to *[FENG AND HAN, 2]*. In this case, the information in the other arbitration was already open to unspecific people. PHAR LAP has in the meantime arranged an opportunity to acquire the "Partial Interim Award" *[PO2, P60, Q40]*. In addition, there is possibility to obtain the information for unspecific people, not only for PHAR LAP. At the annual breeder conference Claimant's CEO heard about that arbitration from Mr. Kieron Velazquez *[PO2, P60, Q40]*. This indicates that many unspecific people may have access to the information, for example, a person who had communication with Mr. Kieron Velazquez.Moreover, Mr. Kieron has not been involved in the arbitration as such but knew the main issues in dispute *[PO2, P60, Q40]*. In such situation, Mr Kieron does not have confidentiality obligation either. That is to say, someone who has no relationship with the arbitration has already obtained the information. In addition, BLACK BEAUTY had used an outdated firewall to protect is computer system which had made it easy for the hackers to enter the system*[PO2, P60, Q42]*. This indicates that due to BLACK BEAUTY's negligence, the information has been put in a rather open area, which is accessible to unspecific people.

45. Therefore, the information from the other arbitration proceedings has been in the public domain.

(3) While the importance of confidentiality has diminished, the importance of transparency has increased

(a). The importance of confidentiality has diminished

46. With the rapid development of globalization, the trend is that confidentiality is not as important as before, which means that there is a greater tendency to share information. At the same time, it is not difficult to see that the value of confidentiality in judicial practice is increasingly weakened *[LIU TQ, 107]*.

47. First, at present, although confidentiality is the basic attribute of international arbitration, more and more international arbitration cases involving some act or omission of the multinational companies bring public concerns, such as company crime. It is necessary to disclose this information in the arbitration proceedings to supervise the whole case effectively*[LIU TQ, 106]*. Due to the problem of multinational crime, the interests of the public have been damaged *[LIN QM, 113]*. In other words, people cannot get the information about this kind of international cases if the information is kept confidential.

48. In our case, PHAR LAP, a company registered and located in Capital City, Mediterraneo, "operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport *[NOTICE OF ARBITRATION, 4, PARA1]*", and "is particularly known for its breeding success regarding racehorses *[NOTICE OF ARBITRATION, 4, PARA3]*" , and BLACK BEAUTY is " famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions *[STATEMENT OF FACTS, 5, PARA.4]*" . It is obvious that as leaders in their field, the two companies have a good reputation in public. Therefore, all of their acts will be watched closely by the public and people desire to acquire information related to them. Under such particular circumstances, it seems that confidentiality is not as important as usual, and it is necessary to disclose the information to alleviate public concerns.

49. Secondly, only countries like the United Kingdom, France and Philippines have recognized confidentiality as a general rule of international arbitration. Other countries like

the US, Australia and New Zealand do not accept the notion of international confidentiality unless it is subjected to the applicable law or arbitration or the consent of both parties *[LIU TQ, 104]*. Moreover, even in those countries where confidentiality has been recognized, this obligation is not absolute. Some states in the USA also have passed laws that limit confidentiality. For example, in 1990 Florida passed a "Sunshine in Litigation" law that limits confidentiality from concealing public hazards. Washington state, Texas, Arkansas, and Louisiana have laws limiting confidentiality as well. While the obligation of confidentiality is generally accepted in a country, its exceptional circumstances and restrictive conditions are also commonly accepted. Therefore, there is an international trend that the importance of confidentiality has diminished. In this case, if confidentiality were to be maintained, it may prevent the globalization of law. However, as PHAR LAP and BLACK BEAUTY belong to different legal traditions, it is useful for them to adopt the international trend away from confidentiality in order to maintain procedural and substantive standards.

50. Hence, as the significance of confidentiality has diminished to some extent, it is not reasonable for the Arbitral Tribunal to maintain absolute confidentiality.

(b). The importance of transparency has increased

51. With the increasing application of international arbitration and deepening of the WTO transparency rules, the rule of transparency has become increasingly prominent in international commercial arbitration *[LIU TQ, 103]*. Cindy G Buys contends that the values of transparency hold true whether the arbitration is public or private because greater transparency would likely increase knowledge and understanding of the arbitral process *[BUYS CG, 137]*. Accordingly, the scope of application of the Rules of Transparency should not just be limited to investor-state problems.

52. First, international research reveals a trend towards greater transparency in international business matters. For example, Dora Marta Gruner contends that an international international institution should be established to request and supervise the publication of arbitral awards *[GUNER, 960]*. Cindy G. Buys argues that mandatory publication of arbitral awards is justified even despite the parties' opposition *[BUYS CG, 121]*. Thus, the trend is for

broader application of transparency in international arbitration. Cindy G. Buys also contends that publication of awards may assist parties in avoiding future disputes because they will be able to learn from mistakes of other parties. In our case, "The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs *[LETTER BY LANGWEILER (2 OCTOBER 2018), 49, PARA.3]*." Considering the fact that the two cases share many similarities, it is convenient and efficient to maintain the principle of transparency and collect the evidence from that arbitration to facilitate the resolution of this dispute between PHAR LAP and BLACK BEAUTY.

53. Secondly, from a practical perspective, it is also not difficult to see that there is a trend to apply transparency to arbitration. For example, Article 27.8 of the AAA Rules provides that, "the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise." Referring to the HKIAC Administered Arbitration Rules, "Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article45.1 by a party or party representative...", Article 45 HKIAC Rules also states the circumstances of publication and disclosure. It is obvious that the international arbitration practice has realized the importance of the essential nature of the promotion of transparency. Therefore, it is rational and justified to adopt transparency in our case.

54. Thirdly, it is beneficial to adopt the principle of transparency. Increased transparency has enhanced the predictability of international commercial arbitration, made the system more reliable for its direct users, and enhanced understanding of the arbitration for the general public *[LIN QM, 112]*. Increasing transparency will improve and perfect the arbitration system as well. "Greater transparency promotes democratic principles because the affected public, such as the shareholders of a publicly held corporation and consumers, has an opportunity to observe and evaluate the outcome *[BUYS CG,136]*." If the information from that second arbitration cannot be considered, it will prevent corporations and consumers to observe and evaluate the outcome.

55. Hence, transparency has been playing a more important role in practice.

(B) SUBMITTING THE EVIDENCE DOES NOT INFLUENCE THE CONFIDENTIALITY OF THE INFORMATION IN THE OTHER ARBITRATION

56. Even if PHAR LAP should be bound by a general confidentiality obligation, the evidence can be submitted because it remains confidential in this arbitration.

57. Art.45.1 HKIAC Rules provides "unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration." According to this Article, PHAR LAP should keep the evidence confidential in this arbitration. Art.45.2 also stipulates that, "Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC." Hence, not only the parties, but also the Arbitral Tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC all have obligation to keep the information related confidential, including the evidence from the other arbitration.

58. Therefore, even if the information had been obtained through a breach of confidentiality, it does not mean that this information cannot be submitted.

(C) CONSIDERING THE RELATIVITY OF THE EVIDENCE, IT SHALL BE SUBMITTED TO THE ARBITRAL TRIBUNAL

59. Relevance is the tendency of a given item of evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not.

60. Pursuant to Art.22.2 HKIAC Rules, the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. Hence, considering the relativity of the evidence from the other arbitration proceedings, it should be submitted to the Arbitral Tribunal.

61. "The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs *[LETTER BY LANGWEILER (2 OCTOBER 2018), 49, PARA.3]."* The other arbitration also provides a choice of law clause in favor of Mediterranean law and the Model HKIAC-Arbitration Clause with all additions and provided for arbitration in front of three arbitrators under the HKIAC Arbitration Rules*[PO2, 60, CL39]*. Accordingly, the two different cases which involve the same issues of tariff increases share the same circumstance and even one of the same parties. There is a striking and material similarity between the two arbitrations. It is reasonable for the Arbitral Tribunal to take the evidence from the other arbitration proceedings into consideration.

62. In addition, it is necessary for the Arbitral Tribunal to use similar and material information in other arbitration for reference. This is supported by some practice. For example, Cindy G. Buys contends that publication of awards also allows future arbitrating parties to assess how a particular arbitrator has handled past arbitrations and whether that person would be an appropriate person to select as an arbitrator of a current dispute *[BUYS CG,137]*. Thus, it is important for the Arbitral Tribunal to access the evidence from the other arbitration because it will enhance the work efficiency of the Tribunal.

(D) THERE IS NO PROVISION PROHIBITING SUBMISSION OF THE INFORMATION IN HKIAC RULES AND PHAR LAP SHOULD BE ALLOWED TO SUBMIT THE EVIDENCE TO PROTECT OR PURSUE ITS LEGAL RIGHTS OR INTEREST

63. Even if the evidence had been obtained either through a breach of confidentiality or through an illegal hack of BLACK BEAUTY's computer system, there is no particular provision both in HKIAC Rules and Model Law that prohibits this information to be submitted. Hence, BLACK BEAUTY's objection to the submission is baseless at law.

64. On the contrary, PHAR LAP is entitled to submit the evidence to protect or pursue its legal rights or interest.

65. It is reasonable to disclose information to protect or pursue party's legal rights or interest. Art.45 HKIAC Rules allows disclosure of information related to arbitral proceedings where

disclosure is necessary to protect a party's rights. To protect PHAR LAP's legal rights, PHAR LAP should be allowed to submit the evidence to the Arbitral Tribunal.

66. Legal rights or interest include private rights *[WEIXIA, 621]*, especially to prevent economic ruin of a party *[TRAKMAN, 5]*. In the case at hand, PHAR LAP is in a dilemma since it has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. "The restructuring plan which Claimant had agreed with its creditors in 2014 provided that Claimant would be profitable again from 2017 onwards. The automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively. With the additional revenues from the sale of the frozen semen Claimant had planned to make a profit in 2018 of 300.000 USD after 180.000 USD in 2017. That plan would be seriously endangered if Claimant had to bear the 1.250.000 USD." It is obvious that PHAR LAP is facing with financial difficulties and bearing the 1.250.000 USD will add insult to injury. As Weixia Gu argues, prohibiting the disclosure is unrealistic and undesirable because when a party's legitimate interests demand disclosure *[WEIXIA, 618]*. Hence, in our case, prohibiting the disclosure of the relative and material information by PHAR LAP is unrealistic and unreasonable since PHAR LAP aims to protect its legal rights or interest.

67. Therefore, in order to protect its own legal rights or interests, PHAR LAP should be entitled to submit the evidence from the other arbitration proceedings.

(E) ADOPTING EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS CAN REDUCE UNNECESSARY SPENDING AND IMPROVE THE WORK EFFICIENCY OF THE ARBITRAL TRIBUNAL.

68. Gotti has argued that, "...arbitration has been increasingly adopted in trade and commerce to resolve conflicts" because "this method of settling commercial disputes is commonly considered an efficient, economical and effective alternative to litigation *[MAURIZIO GOTTI, (2017), 1, PARA.1]"*. Accordingly, an increasing number of people choose to resolve disputes by arbitration instead of litigation, which is time-consuming and has some other disadvantages like regional protectionism. The evidence from the other arbitration is likely to make this arbitration more efficient for a number of reasons.

69. First, adopting the evidence can reduce unnecessary spending of physical and financial resources as well as the manpower. "The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs"The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs *[LETTER BY LANGWEILER (2 OCTOBER 2018), 49, PARA.3]."* The two different cases even share the same circumstance and one of the same parties. Hence, it is obvious that there is a striking similarity between the two arbitrations. Therefore, it is reasonable for the Arbitral Tribunal to take the evidence from the other arbitration proceedings into consideration. "Flexibility is the most essential feature of international commercial arbitration *[QIFAN CUI, (2011), 1, PARA.1]."* Through adopting the evidence smartly, the flexibility of arbitration can be enhanced.

70. Therefore, it is reasonable and economical to access that evidence because it will reduce all unnecessary spending of physical, financial resources and manpower and advance the conduct of this arbitration.

71. Secondly, adopting the evidence can improve the work efficiency of the Arbitral Tribunal.

72. Whether there is an inherent duty of efficiency or not, in practice, arbitrators will typically be bound by an obligation of efficiency. This has been supported by some authorities. For example, Article 17 of UNCITRAL Rules imposes a duty of efficiency on arbitrators: "The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute." When arbitrators breach their duty of efficiency, they may be penalized in a number of ways. For example, Article11 HKIAC Rules provides that, "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay." Thus, if the arbitrator ignores the expectation of efficiency and fails to act without undue delay, he or she may be challenged according to this Article.

73. In our case, "that sale had been affected by the unforeseen tariff of 25% imposed by the president of Mediterraneo ... change of circumstances. The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs *[LETTER BY LANGWEILER (2 OCTOBER 2018), 49, PARA.3]."* In this particular case, if the Arbitral Tribunal adopt the information from the other arbitration, it will help to assess how a particular arbitrator has handled past arbitrations and advance this arbitration.

74. Hence, adopting the evidence from that arbitration can improve the work efficiency of the Arbitral Tribunal.

CONCLUSION: PHAR LAP is entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either by a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

III. PHAR LAP IS ENTITLED TO THE PAYMENT OF US $ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT AND UNDER THE CISG

75. In its Procedural Order No. 1, the Arbitral Tribunal has requested the parties to address "the issue as to whether PHAR LAP is entitled to the payment of US $ 1,250,000 or any other amount resulting from an adaptation of the price: i. under Clause 12 of the contract; ii. or under the CISG" *[PROCEDURAL ORDER NO. 1, 51, PARA. 11]*. In this context, PHAR LAP argues that (A) under Clause 12 of the contract, PHAR LAP is entitled to the additional payment caused by increased tariffs; (B) PHAR LAP is entitled to the payment from an adaptation of the price under the CISG; (C) PHAR LAP is entitled to the payment from an adaptation of the price under the UNIDROIT Principles.

(A)UNDER CLAUSE 12 OF THE CONTRACT, PHAR LAP IS ENTITLED TO THE ADDITIONAL PAYMENT CAUSED BY INCREASED TARIFFS

(1) The additional tariff constitute hardship under clause 12

76. According to Clause 12 of the Sales Agreement, CLAIMANT shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous. In the present case, the increased tariff should be included in circumstances of Clause 12 because it fulfils the three elements required: (i) the tariff imposed is comparable with additional health and safety requirements; (ii) the tariff imposed is an unforeseen event; (iii) the tariffs imposed make the contract more onerous.

(a)The increased tariff is comparable with additional health and safety requirements

77. In the past, PHAR LAP met strict new health and safety requirements involving additional tests required and the long quarantine amounted to 40 % of the
sales price and thereby destroyed the commercial basis of the deal *[PROCEDURAL ORDER NO.2, 58, CLARIFICATION 21]*. Therefore, PHAR LAP added the additional health and safety requirements wording into clause 12 of the contract.

78. The tariff imposed is comparable with additional health and safety requirements for the following reasons. First, tariffs and health and safety requirements both belong to acts of authority and import restrictions.Under the definition of the import restrictions, the first primary import restriction listed is tariff and the last are prohibitions that prevents entry of illegal or harmful items which includes items the importation of which requires the adoption of health and safety requirements. Such acts of authority were compulsory and could not be violated or overcome. Secondly, the tariff imposed caused PHAR LAP a loss of 30% of the last shipment which is a huge burden to PHAR LAP and destroyed the commercial basis of the deal. Hence, the increased tariff is comparable with additional health and safety requirements.

(b) Imposition of the tariffs is an unforeseen event

79. Unforeseen and unforeseeable are different extent to which an event can be seen or known beforehand. As adjectives the difference between unforeseen and unforeseeable is that unforeseen is not foreseen while unforeseeable is incapable of being foreseen or anticipated. The increased tariff is an unforeseen event for the three following arguments.

(i) The government of Equatoriana has always been an ardent supporter of free trade

80. Until 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo *[PROCEDURAL ORDER NO.2, 58, CLARIFICATION 25]*. Equatoriana has always been one of the biggest supporters of the existing system of free trade and previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in direct retaliatory measures [*CLAIMANT'S EXHIBITION 6, 15, PARA.2*]. Even though the Government of Equatoriana imposed a retaliatory tariff of 30% upon all agricultural goods for the previous restriction imposed by Mediterraneo *[CLAIMANT'S EXHIBITION 6,15, PARA.1]*, it is obvious that not only PHAR LAP, but also BLACK BEAUTY, could not foresee the 30% tariff in Equatoriana.

(ii) Racehorse breeding generally is categorized differently from other animals

81. In commercial trade, racehorse breeding is generally categorized differently from pigs, sheep, or cattle *[NOTICE OF ARBITRATION, 6, PARA.11]*. It does not cross the paties' mind that the frozen semen could be considered to be an "agricultural good" so that the tariffs would apply to it *[PROCEDURAL ORDER NO.2, 58, CLARIFICATION 26]*. PHAR LAP and BLACK BEAUTY could not foresee that frozen semen was listed in the schedule of the products that fell under the new tariffs-regime and that this also applied to racehorse semen.

(iii) Mediterraneo and Equatoriana should not increase the tariff

82. Mediterraneo and Equatoriana are members of the World Trade Organization which will be referred to as WTO *[PROCEDURAL ORDER NO 2, 61, CLARIFICATION 47]*. As a member of WTO, it should not increase the tariff to another member of WTO. Member countries'

commitments are to cut tariffs and to "bind" their customs duty rates to levels which are difficult to raise. Mediterraneo and Equatoriana violated promise they have made to the World Trade Organization members and has ignored and vandalized the rules and regulations

(c) Imposition of the tariff makes the contract more onerous

83. International Accounting Standard 37 states that, "An onerous contract is a contract in which the unavoidable costs of meeting the obligations under the contract exceed the economic benefits expected to be received under it". PHAR LAP had a profit margin of 5% for the transaction and now makes a loss of 25% of the last shipment due to the imposition of the 30% new tariff on the semen by the Equatorianian authorities *[NOTICE OF ARBITRATION, 7, PARA.18]*. The additional tariff made the contract more onerous for PHAR LAP to perform.

(2) Intention to conclude Clause 12 in the contract was to ensure fairness

(a) Clause 12 of the contract was meant to transfer risks to Black Beauty under the DDP delivery term

84. Under general conditions, PHAR LAP usually did not accept a delivery DDP, due to past experience with extremely expensive tests due to changes in customs health requirements *[NOTICE OF ARBIRATION,5, PARA.7]*. During negotiation to conclude the contract, BLACK BEAUTY insisted on a delivery of DDP, given the urgency of the delivery and PHAR LAP's much greater experience in the shipment of frozen semen including the necessary export and import documentation *[CLAIMANT'S EXHIBIT C 3,11, PARA.2]*. Then, considering the sincere request of BLACK BEAUTY, PHAR LAP indicated that it could accept delivery DDP, but that it was not willing to take over any further risks associated with such a change in the delivery terms and asked for the inclusion of a hardship clause to temper some of the additional risks taken *[CLAIMANT'S EXHIBIT C 4, 12, PARA.4]*. In the end, the Parties agreed on the hardship clause and included it into the contract. This measure was to achieve maximum fairness between PHAR LAP and BLACK BEAUTY. Now that the unforeseen events about imposed tariffs happened, which made PHAR LAP loss of 25% on the third delivery, it was sure that BLACK BEAUTY should take the responsibility to pay for it.

(b) The payment was used to pay for the tariff, not for Phar Lap's own benefits.

85. Due to the imposition of the new tariff of 30%, PHAR LAP lost 25% except loss of a profit margin of 5% for the transaction. The cost of US $ 1,250,000, which PHAR LAP asked for from BLACK BEAUTY, was used to pay for the new tariff imposed on the third delivery. PHAR LAP's proposal was not for its own benefit. However, BLACK BEAUTY was trying to evade its obligation to take the responsibility of the payment of the new tariff on horse semen from Mediterraneo to Equatoriana.

86. Hence, under Clause 12 of the contract, PHAR LAP is not responsible for the additional payment caused by increased tariffs.

(B)PHAR LAP IS ENTITLED TO THE PAYMENT FROM AN ADAPTATION OF THE PRICE UNDER THE CISG.

(1) CISG is applicable to this case.

87. According to clause 14 of the sales agreement *[CLAIMANT'S EXHIBIT C 5, CLAUSE 14]*, the law applies to the sales contract is the law of Mediterraneo including the CISG and the general contract law of Mediterraneo is a verbatim adoption of UNIDROIT Principles, so both of the CISG and the UNIDROIT Principles apply to the sales agreement.

(2) Phar Lap is entitled to the payment from an adaptation of the price under the CISG Article 79.

88. CISG Art.79 (1) states 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." There are five requirements: (a) Failure to perform; (b)The events constitute an impediment; (c) The impediment is beyond the injured party's control; (d) The impediment is not reasonably to be expected to have been taken into account; (e) The injured party could not reasonably be expected to have avoided or overcome the event or its consequences.

(a) The requirement of failure to perform is satisfied by an analogy.

89. The first requirement requires a party failed to perform its obligation. Admittedly, Article 79 is typically used by a party who seeks to be exempted from liability of performance, while in the case PHAR LAP has already performed all of its contractual obligations. Although PHAR LAP has already performed the delivery of the last shipment, however, there are some particularities in this case so that an alternative interpretation of Article 79 is suitable for this circumstance so they can still rely on Article 79.

90. When the tariff increased, Phar Lap immediately informed BLACK BEAUTY by telephone and mail, that the third shipment of goods specified in the contract is included in the increased tariff *[CLAIMANT'S EXHIBIT C 7,16]*. On the second day after the mail was sent, BLACK BEAUTY contacted Phar Lap *[RESPONDENT'S EXHIBIT R 4,36, PARA.3]* and left Phar Lap with the impression that the contract price would be adjusted after the goods were shipped *[CLAIMANT'S EXHIBIT C 8,18, PARA.2]*.

91. Mr. Shoemaker said that he would not make any binding commitments, but in order to ensure that the shipment would be delivered, he asked his lawyer wife for wording in negotiation *[RESPONDENT'S EXHIBIT R4,36 PARA 4; PROCEDURAL ORDER 2, 59, CLARIFICATION34]*. Then they designed such a strategy which made PHAR LAP rely on his promise to deliver the last shipment. The representation of Mr. shoemaker was only based on the consideration of the future interest of Black Beauty and somehow misled the judgement of Ms. Napravnik, and was relied upon by her, the representative of PHAR LAP.

92. Pursuant to UNIDROIT Principle ARTICLE 1.8, BLACK BEAUTY should not make an inconsistency with PHAR LAP's understanding. It states that: "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment." The responsibility imposed by the Article is to avoid detriment being occasioned in consequence of reasonable reliance. Out of the trust to Mr. Shoemaker's promise, Phar Lap authorized the shipment of 50 doses of semen. The understanding of Phar Lap is that BLACK BEAUTY would adapt the price of the contract after the shipment of 50 doses.

93. BLACK BEAUTY's witness Greg Shoemaker stated that he repeatedly stressed that he has no right to promise to adapt the price of the contract. However, he took the initiative to call Julie Napravnik and he had been introduced to Ms. Napravnik in November 2017 as the person responsible for the racehorse breeding program including all questions concerning the Frozen Semen Sales Agreement. *[PROCEDURAL ORDER 2, 59, CLARIFICATION 32]*. And during the call, Mr. Shoemaker agreed to adapt the contract price if the contract provides for an increased price in the case of present *[RESPONDENT's EXHIBIT R4 ,36, PARA.4]*. It is reasonably believed that his attitude can represent the attitude of BLACK BEAUTY. In the circumstance, any reasonable people will get the impression like Julie Napravnik in the same circumstance that they had sufficient reasons to trust that there was a consent between two parties of adapting price of goods of the last shipment.

94. So, but for the representations and promises of the employee of BLACK BEAUTY the situation would have come within the CISG article 79. Therefore, the first requirement, failure to perform, is satisfied by an analogy.

(b) The events in the case constitute an impediment.

95. For the second requirement, we hold that "hardship" falls into the scope of 'impediment' stipulated by Article 79, so that the events in the case constitute an impediment.

96. First, Article 79, in referring to "impediment", does not exclude hardship. As stated, "the court has a right of avoidance of the contract in case of hardship since hardship is not a matter expressly excluded in Article 4 CISG from the scope of the Convention." *[NUOVA FUCINATI V. FONDMETALL INTERNATIONAL CASE, ITALY, 1993]*

97. Second, CISG Advisory Council Opinion No.7 Para.3.1 recognizes 'hardship' as an "impediment" under Article 79(1). "A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1). Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79." Hence, the hardship that is expressly stipulated by the frozen semen sales agreement in clause 12 constitutes an impediment. For a leading case discussing hardship

[SCAFOM INTERNATIONAL BV VS LORRAINE TUBES, BELGIUM,2009], the judge found that the unforeseen increases (price of 70%) gave rise to a serious imbalance which rendered the further performance of the contract under unchanged conditions exponentially detrimental for seller.The judge found for the party who suffered the economic hardship.

98. Thirdly, some hold that Article 79 only address cases of impossibility, while the impossibility described not only means impossibility in the strict extent, but also means impossibility with regard to extremely unreasonable difficulties, expenses, damage and loss [*American Law Institute, the Section 454*]. There are also some cases supporting that impediment does not mean that the events make performance absolutely impossible. See a German case *[AMTSGERICHT CHARLOTTENBURG CASE, GERMAN,1994]* where the court implied that the standard for claiming exemption under Article 79 is more lenient than "impossibility": it held that the buyer was exempt from interest for a delayed payment of the price, even though timely payment was clearly possible——although not reasonably to be expected in the circumstances, according to the court.

99. Although the performance of delivery of the third shipment and the purpose of the sales agreement is still possible, if PHAR LAP's continued performance of the contractual obligation becomes economically meaningless due to the increased tariffs, it can also be exempted from its perfornance. "If one thing can only be done at an excessively unreasonable cost, then this is not practicable. When one thing is not practicable, it is impossible to consider it legally." *[MINERAL PARK LAND CO. V. HOWAND CASE, US, 1916]*

(c) The impediment is beyond PHAR LAP's control.

100. The increase or decrease of the tariff rate is the official behaviour of a government, and PHAR LAP does not have the ability to control the tariff rates. "The announcement of the Government of Equatoriana to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo*." [CLAIMANT's EXHIBIT 6,15, PARA.1]* Therefore, the requirement is satisfied.

(d) The impediment is not reasonably to be expected to have been taken into account.

101. Impediments must be caused by events that the injured party could not reasonably anticipate at the time of contracting. Although the fluctuation of tariffs should be a normal market change in the process of international trade, the parties have a reasonable positive pre-judgment on the expectations of tariffs that the tariff rate will not change significantly. Previously, the trading environment of both parties has been in existence for many years, "AFTER YEARS of continuing growth the system of free trade"*[CLAIMANT's EXHIBIT 6,15, Para.1]*.At the same time, we can also judge from the consistent style of the leaders of the Equatoriana, "Equatoriana has always been one of the biggest supporters of the existing system of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have - with one exception - never resulted in direct retaliatory measures *[CLAIMANT's EXHIBIT 6,15, Para.2]*." Under such a background, the president's sudden action is completely beyond the reasonable expectations of the parties. "CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the Schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen." *[NOTICE OF ARBITRATION,6, Para.11]* Even if the increase of tariffs could be taken into account, it is also hard to anticipate that te frozen semen is included in the scope of imposition of the tariffs, because racehorse breeding generally is categorized differently from other animals. Meanwhile, both Mediterraneo and Equatoriana are members of the World Trade Organization which will be referred to as WTO *[PROCEDURAL ORDER NO 2, 61, CLARIFICATION 47]*. As a member of WTO, it should not increase the tariff to another member of WTO.

102. These evidences point out that the occurrence of the incident does not exist within the expectations of both parties. Therefore, the condition is satisfied.

(e) Phar Lap could not reasonably be expected to have avoided or overcome the event or its consequences.

103. The formulation and implementation of the tariff is a national policy of a country. It cannot be avoided or overcome by PHAR LAP. There is no reasonable and legal way for them

to avoid the sharp increase in the customs clearance cost of the seller due to the greatly increased tariff. Therefore, this condition is also met.

(C) ALTERNATIVELY, CLAIMANT IS ENTITLED TO THE PAYMENT FROM AN ADAPTATION OF THE PRICE UNDER THE UNIDROIT PRINCIPLES

104. Even if all the arguments above are not acceptable to the Arbitral Tribunal, alternatively CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under the UNIDROIT Principles, and CLAIMANT argues that (1) UNIDROIT Principles apply in our case, and (2) pursuant to Art 6.2.2 and Art 6.2.3 of the UNIDROIT Principles, CLAIMANT is entitled to the payment.

(1) The UNIDROIT Principles apply in our case

105. Clause 14 of FROZEN SEMEN SALES AGREEMENT stipulates that The Sales Agreement shall be governed by the law of Mediterraneo *[CLAIMANT SEMEN SALES AGREEMENT, 14, PARA14]*. The law of Mediterraneo includes UNIDROIT Principles because Procedural Order No 1 states that the general contract law of Equateriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts *[PROCEDURAL ORDER NO 1, 53, PARA 4]*.

106. What's more the UNIDROIT Principles reflect international trade usages. According to Art. 9(2) CISG, the parties are considered to have impliedly made applicable to their contract or its formation 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.

107. It has been found that the UNIDROIT Principles on hardship are the expression of trade usages. "[A]n accurate representation, although incomplete, of the usages of international trade." In *Islamic Republic of Iran v. Cubic Defense Systems, Inc*, the Arbitral Tribunal declared that it would be guided by the UNIDROIT Principles on hardship in a case in which although the disputed contract contained a choice-of-law clause designating Iranian law, the parties had "eventually agreed to the complementary and supplementary application of

general principles of international law and trade usages." *[ISLAMIC REPUBLIC OF IRAN V. CUBIC DEFENSE SYSTEMS, INC. (1997) ICC INTERNATIONAL COURT OF ARBITRATION, PARIS 7365]*. In a 2000 ICC Award, the Arbitral Tribunal (relying on Article 17 of the 1998 ICC Rules of Arbitration) also referred to the UNIDROIT Principles on hardship as "codified trade usages" in the context of a dispute regarding an agreement governed by Lithuanian law *[10021 CASE (2000) UNKNOWN]*. A court has held that the UNIDROIT Principles of International Commercial Contracts constitute usages of the kind referred to in Article 9(2) CISG *[GENEVA 9333 CASE (1997) UNKNOWN]*. Similarly, an arbitral tribunal agreed that the UNIDROIT Principles reflect international trade usages [*RUSSIAN 229 CASE (1997) UNKNOWN*].

108. Therefore, we conclude that the UNIDROIT Principles are gap fillers of CISG and, if it is deemed that the above arguments on Art. 79 does not apply, the UNIDROIT Principles may be used in this case

(2)Pursuant to Art 6.2.2 of UNIDROIT Principles, CLAIMANT is entitled to the payment.

109. Pursuant to Art 6.2.2 of the UNIDROIT Principles, there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

110. CLAIMANT had a profit margin of 5% for the transaction and now makes a loss of 25% due to the unforeseen imposition of the new tariff of 30% on the product by the Equatorianian authoritie. It has been financially difficult for CLAIMANT due to several reasons and only through extensive restructuring measures and a considerable cut in the workforce CLAIMANT has been able to stay in business *[CLAIMANT'S EXHIBIT C8, 17]*. It was impossible for CLAIMANT to shoulder this additional 30% tariff which had to be paid

immediately upon delivery of the semen. And PHAR LAP argues that in the case at hand it meets all the requirements of Art 6.2.2 (a) the increased tariffs alter the equilibrium; (b) the tariff impositions occur or become known to the disadvantaged party after the conclusion of the contract; (c) the tariff impositions could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (d) the tariff impositions are beyond the control of the disadvantaged party; (e) the risk of the events was not assumed by the disadvantaged party.

(a) The increased tariffs alter the equilibrium

111. The particularities of each case are critical to decide whether the requirement is met. This can only be determined on a case-by-case basis *[SCHLECHTRIEM/SCHWENZER (2010),426]*. The performance has increased the cost of performance because of an additional 30% tariff of US$ 1,250,000 on the third delivery of semen, with the profit margin is only 5% due to the promised long-term relationship. CLAIMANT insists that it has altered the equilibrium of the contract as Schwenzer points out that "The profit margin in the respective trade sector may also play an important role" *[SCHWENZER (2009),716]*.

112. Most importantly, even if an increase in the costs of performance that would otherwise not be considered beyond the limit of sacrifice may be considered reasonably insurmountable if performance would cause the obligor's ruin. As suggested by Schwenzer, "in cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered". It has been financially difficult for CLAIMANT due to several reasons and only through extensive restructuring measures and a considerable cut in the work force CLAIMANT has been able to stay in business *[CLAIMANT'S EXHIBIT C8, 17, PARA. 6]*. This 30% threshold is reasonable in international commercial contracts in which the value is normally high so that any small currency fluctuation could result in a huge loss.

(b) The tariff impositions occur or become known to the disadvantaged party after the conclusion of the contract

113. The FROZEN SEMEN SALES AGREEMENT was signed on 6 May 2017 *[CLAIMANT'S EXHIBIT C5, 15, PARA.1]*. According to Peak Business News, the

government of Equatoriana, on 19 December 2017, imposed a tariff of 30% upon all agricultural goods from Mediterraneo as retaliation after the conclusion of the contract. *[CLAIMANT'S EXHIBIT C6, 15, PARA.1]*.

(c) The tariff impositions could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract

114. The tariff impositions could not reasonably have been taken into account by both of parties. Equatoriana has always been one of the biggest supporters of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in direct retaliatory measures only with one exception *[CLAIMANT'S EXHIBIT NO 6, 15, PARA 3]*. Further this exception occurred when the Equatorianan Government was under a Prime Minister from the National Party which is more PROTECTIONIST *[NOTICE OF ARBITRATION, 7, PARA 19]*. The Government of Equatoriana has always been an ardent supporter of free trade, in particular in times like present when the Prime Minister came from the Progressive Liberals; no one could see such tariffs coming.

115. Mediterraneo and Equatoriana are members of the World Trade Organization which will be referred to as WTO *[PROCEDURAL ORDER NO 2, 61, CLARIFICATION 47]*. And as a member of WTO, it should not increase the tariff to another member of WTO. Therefore, the tariff impositions could not have been taken into account by PHAR LAP.

(d) The tariff impositions are beyond the control of the disadvantaged party

116. The tariff impositions were a regulation which were made by the government. Apparently the tariff impositions are beyond the control of the disadvantaged party

(e) Risks must not have been assumed by disadvantaged party

117. Parties agreed on a DDP delivery primarily to ensure better transportation terms and swifter delivery due to CLAIMANT 's experience in the shipment of frozen semen, stated in email as 'given the urgency of the delivery and your much greater experience in the shipment

of frozen semen including the necessary export and import documentation we would insist for this contract on a delivery on the basis of DDP' *[CLAIMANT'S EXHIBIT C3, 11, PARA.3]*

118. According to what have argued above, we can draw the conclusion that the increased tariffs constitute hardship

119. Pursuant to Article 6.2.3(4) UNIDROIT Principles, a court which finds that a hardship situation exists may react in a number of different ways. A first possibility is for it to terminate the contract, which both CLAIMANT and RESPONDENT do not want. Then the possibility would be to adapt the contract with a view to restore its equilibrium, which, in our case, is the price adaptation. And also pursuant to Art. 1.11 of the UNIDROIT Principles, the court includes the arbitral tribunal

120. To conclude, the CLAIMANT is entitled to the payment of US$ 1,250,000 under the UNIDROIT Principles.

CONCLUSION: CLAIMANT IS ENTITLED TO THE PAYMENT OF US $ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT; ALTERNATIVELY, CLAIMANT IS ENTITLED TO THE PAYMENT OF US $ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG AND THE UNIDROIT PRINCIPLES.

CONCLUSION

I. The Arbitral Tribunal has the jurisdiction and the powers under the arbitration agreement to adapt the contract, which includes the law of Mediterraneo as the law applicable to the arbitration agreement.

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

III. CLAIMANT is entitled to the payment of US $ 1,250,000 under clause 12 of the contract and under CISG.

REQUEST FOR RELIEF

For the reasons provided in this Memorandum, PHAR LAP Allevamento respectfully requests this Arbitral Tribunal to declare that:

1. BLACK BEAUTY Equestrian is ordered to pay to PHAR LAP Allevamento an additional amount of US $ 1,250,000 which is 25% of the price for the third delivery of semen;

2. BLACK BEAUTY Equestrian bears the costs of the Arbitration.