SIXTEENTH ANNUAL

WILLEM C. VIS (East)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 7 APRIL, 2019

HONG KONG

MEMORANDUM FOR RESPONDENT

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

CHEN Yuxuan • FAN Rui • FAN Zihao • HE Shijia • LI Qian

LIN Kenian • XIE Yufan • ZHANG Ruimeng • ZHANG Yingxue

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL CITATION
&	And
/	And
§	Section
answer to NoA	answer to Notice of Arbitration
Art. & Arts.	Article & Articles
CE	CLAIMANT's EXHIBIT
Cl. Memo	Memorandum for CLAIMANT
Co.	Company
Corp	Corporation
DDP	Delivered Duty Paid (named place of destination)
et al.	et alia (and others)
ed.	Edition
GATT	The General Agreement on Tariffs and Trade
HKIAC	Hong Kong International Arbitration Centre

IBA	International Bar Association
ICC	International Chamber of Commerce
id.	Idem (the same)
i.e.	id est (that is)
Incoterms	International Chamber of Commerce Terms
LCIA	The London Court of International Arbitration
Ltd.	Limited
Mr.	Mister
Ms.	Miss
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
para./paras.	Paragraph/paragraphs
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RE	RESPONDENT's EXHIBIT

SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
USD	United States Dollar
v.	versus
Vol.	Volume
WTO	World Trade Organization

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STATEMENT OF FACTS

The parties to this arbitration proceeding are Black Beauty Equestrian (*hereinafter* "RESPONDENT"), which is a famous broodmare company incorporated in Equatoriana, and Phar Lap Allevamento (*hereinafter* "CLAIMANT", *together* "the Parties") which is a most renown company covering all areas of the equestrian sport located in Mediterraneo.

24 Mar. 2017 CLAIMANT made an offer to RESPONDENT for the sale of 100 doses frozen semen at the price of 99,500 USD per dose.

28 Mar. 2017 RESPONDENT accepted most terms and conditions in the offer but insisted on a DDP delivery and objected to the law and forum selection clause.

31 Mar. 2017 CLAIMANT accepted the DDP term and asked to be relieved from certain risks by a hardship clause; CLAIMANT also proposed arbitration in Mediterraneo.

10 Apr. 2017 RESPONDENT proposed that the arbitration agreement should be governed by the law of the place of the arbitration instead of the law of the contract.

11 Apr. 2017 CLAIMANT opted for Danubia as arbitral seat and suggested reliance on the ICC-Hardship Clause.

6 May 2017 the FROZEN SEMEN SALES AGREEMENT (*hereinafter* "Sales Agreement") was concluded by successive negotiators since the prime negotiators were involved in a car accident.

19 Dec. 2017 Before CLAIMANT initiated the third shipment, Equatoriana government imposed 30 per cent tariff on agricultural products from Mediterraneo.

21 Jan. 2018 Mr. Shoemaker told Ms. Napravnik that only if the Sales Agreement provides for adaptation with such a tariff, an increased price could be accepted.

3 Jan. 2018 CLAIMANT authorized the last shipment and paid the increased tariff.

12 Feb. 2018 the Parties tried to solve the issue of adaptation but failed.

31 Jul. 2018 CLAIMANT submitted the Notice of Arbitration (*hereinafter* "NoA") to Hong Kong International Arbitration Centre (*hereinafter* "HKIAC").

2 Oct. 2018 CLAIMANT applied to submit the evidence from another arbitration administered also by HKIAC under the Administered Arbitration Rules 2013 of Hong Kong International Arbitration Centre (*hereinafter* "HKIAC Rules 2013").

SUMMARY OF ARGUMENTS

In 2017 RESPONDENT inquired CLAIMANT about the availability of frozen semen from Nijinsky III. The Parties contracted for the Sales Agreement and agreed on DDP delivery in three shipments. In December 2017, the government of Equatoriana announced 30 per cent retaliatory tariff on selected products including frozen semen from Mediterraneo, which took effect several days before the last shipment. RESPONDENT has fulfilled its obligation to pay for the contractual price, however, CLAIMANT invoked hardship and asked for an increased remuneration regarding the newly imposed tariff on the last shipment, also requested the tribunal to adapt the contract. The Parties have agreed the arbitration should be conducted under the Administered Arbitration Rules 2018 of Hong Kong International Arbitration Centre (*hereinafter* "HKIAC Rules 2018"). On 2 October 2018, CLAIMANT applied to submit the evidence illegally obtained from another arbitration administered also by HKIAC under HKIAC Rules 2013.

ISSUE A: The Tribunal has no jurisdiction or power to adapt the contract with the law of Danubia governing the arbitration agreement. It should be the law of Danubia governing the arbitration agreement and its interpretation pursuant to either the Parties' implied choice or the closest connection principle. Under the law of Danubia which provides a narrower interpretation and four corners rule, the Tribunal has no jurisdiction or power to adapt the contract.

ISSUE B: CLAIMANT is not entitled to submit the evidence from the other arbitration. The evidence is not relevant or material and was obtained through breach of confidentiality. Also the illegal obtained evidence infringes RESPONDENT's rights and is less influential on establishing the truth, the submission of which will derogate principles of procedural fairness and good faith.

ISSUE C: CLAIMANT is not entitled to the payment of 1,250,000 USD resulting from an adaptation of price under clause 12 and the CISG. In light of the agreement on DDP delivery, CLAIMANT should bear all costs and risks of import duties, including the retaliatory tariff. Under clause 12, the additional tariff is neither comparable to health and safety requirement nor making the contract more onerous, which does not constitute hardship. Adaptation is not provided by clause 12 either. Besides, since CLAIMANT has borne the cost of tariff, Art. 79 CISG is not applicable. Even if applying UNIDROIT Principles to the present case as CLAIMANT alleges, hardship does not exist under Art. 6.2.2 UNIDROIT Principles of International Commercial Contracts (*hereinafter* "UNIDROIT Principles") thereby an adaptation of the price should not be warranted.

ISSUE A: THE TRIBUNAL HAS NO JURISDICTION OR POWER TO ADAPT THE CONTRACT WITH THE LAW OF DANUBIA GOVERNING THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

1. Under Danubian Arbitration Law, the *lex arbitri*, arbitral tribunals' exceptional powers such as contract adaptation require express authorization [*PO2*, *p. 60*]. Whether the Parties expressly empowered the Tribunal to adapt the contract should be determined by the interpretation of the arbitration agreement under its applicable law. Thus, the Tribunal should first determine the applicable law of the arbitration agreement and then interpret the arbitration agreement under that law to see if the Parties expressly conferred the power of adaptation.

2. CLAIMANT alleges that the Tribunal has the jurisdiction and power to adapt the contract with the law of Mediterraneo governing the arbitration agreement [*NoA*, *pp. 6-7*; *Cl. Memo*, *para. 19*]. When ascertaining the governing law of the arbitration agreement, the Parties' express or implied intention should be considered before the choice of law rules [*Arsanovia case*; *Sulamérica case*]. However, CLAIMANT disregards the Parties' intention to choose the law of Danubia [*Cl. Memo*, *paras. 19-26*]. Taking the Parties' intention into account, RESPONDENT submits that the law of Danubia shall govern the arbitration agreement rather than the law of Mediterraneo [**A**]. Under Danubian Law, contrary conclusion will be drawn that the Tribunal is not expressly empowered to adapt the contract [**B**].

A. Danubian Law shall govern the arbitration agreement rather than Mediterranean Law

3. CLAIMANT alleges that the application of the law of the underlying contract does not contradict the separability doctrine, meanwhile choice of law rules provide that the law of the arbitration agreement should be the law of Mediterraneo [*Cl. Memo*, *paras. 19-26*]. However, when determining the governing law, CLAIMANT ignored the negotiation history of the Parties, only referring to international commercial arbitration doctrines and practice [*ibid.*]. Taking both the separability doctrine and the Parties' intention into consideration, RESPONDENT submits that the governing law of the arbitration agreement should be severed from that of the main contract [**1**]. As a result, no express consent has been reached for the governing law of the arbitration agreement, but the Parties have impliedly chosen Danubian law to govern the arbitration agreement [**2**]. Even if the Tribunal decides there is no implied choice of the governing law for arbitration agreement, the law of Danubia should govern the arbitration agreement because

Danubian law as the law of the arbitral seat has the closest connection to the arbitration agreement [**3**]. Furthermore, international and regional legislations favor the law of the arbitral seat, *i.e.* Danubian law to govern the arbitration agreement [**4**].

1. The governing law of the arbitration agreement should be different from that of the Sales Agreement

4. CLAIMANT alleges that the application of the law of the underlying contract does not contradict the separability doctrine in the present case [*Cl. Memo*, *paras. 24-25*]. However, CLAIMANT's allegation is not consistent either with the separability doctrine or with the Parties' intention. Applying the law of the underlying contract is in significant tension with the basic premises of the separability presumption, which treated the parties' underlying contract as distinct from the arbitration agreement [*Born*, *p. 517*; *Redfern*/*Hunter*, *p. 104*]. Under the separability doctrine, an arbitration agreement is considered separate from the underlying contract [***i***]. Moreover, it is evidenced in the negotiation history that the Parties intended the arbitration agreement and the container contract to be governed by different laws [***ii***]. Thus, the governing law of the arbitration agreement should be different from the governing law of the Sales Agreement, which is the law of Mediterraneo.

i. Under the separability doctrine, an arbitration agreement is considered separate from the underlying contract

5. The arbitration agreement is considered to be a legally separate agreement from the Sales Agreement according to the chosen arbitration rules and Danubia Arbitration law, a verbatim adoption of UNCITRAL Model Law on International Commercial Arbitration (*hereinafter* "Model Law") [*PO1*, *p. 53*]. Pursuant to Art. 19.2 HKIAC Rules 2018 and Art. 16 Model Law, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Additionally, the principle of separability enjoys broad acceptance and has been characterized as a general principle of international arbitration law [*Moser 2008*, *p. 69*; *Sparka*, *p. 94*].

6. The separability doctrine means that an arbitration agreement can be governed by a national law different from that applicable to the parties' underlying contract [*Born*, *p. 464*]. Under HKIAC Rules 2018, the law governing the arbitration agreement may be distinct from the law governing the underlying contract [*Moser/Bao*, *para. 4.19*].

7. In the present case, clause 15, the arbitration agreement of the contract, should be regarded as a legally independent agreement from other terms in the underlying contract. Thus, the arbitration agreement and the main contract might be governed by different systems of law. As a result, clause 14, the choice of law clause [*CE5*, *p. 14*], which stipulates the Sales Agreement shall be governed by the law of Mediterraneo, does not lead to the conclusion that the arbitration agreement should necessarily be governed by the law of Mediterraneo. In other words, the arbitration agreement could be governed by a different law other than the law of Mediterraneo.

ii. The Parties intended the arbitration agreement to be governed by a different law

8. It is evidenced in their negotiation history that the Parties have indicated the applicable law of the arbitration agreement should be separately discussed. Since the governing law of the arbitration agreement has not been ascertained, the CISG or any specific rule cannot be applied. However, scholars and cases suggest that when considering parties' intention, all relevant surrounding circumstances should be taken into account [*Lew et al.*, *para. 7-60*; *Tweeddale/Tweeddale*, *para. 7.11*; *Arsanovia case*].

9. CLAIMANT ignored the Parties' intention to apply different laws for arbitration agreement in its reasoning [*Cl. Memo*, *paras. 19-26*]. However, the drafting history of the arbitration agreement should be consulted to determine the Parties' true intention regarding the separability of the arbitration agreement. RESPONDENT initiated the negotiation process on the arbitration agreement and provided a version with specific terms on the applicable law of arbitration agreement, showing its intention to sever the governing law of the arbitration agreement [*RE1*, *p. 33*]. Given that the governing law of the arbitration agreement was separately mentioned, CLAIMANT could not have been unaware of RESPONDENT's intention to separate the arbitration agreement with the underlying contract. If CLAIMANT intended to regard the arbitration agreement as an integral part of the whole contract, it should have explicitly expressed that intention in its reply. However, there is no such declaration of intention in CLAIMANT's response [*RE1*, *p. 34*], and the Parties proceeded to discuss the law governing the Sales Agreement. Thus, it is reasonable for RESPONDENT to believe that CLAIMANT also regarded the arbitration agreement as a separate part.

10. Therefore, the Parties have consented that the arbitration agreement and the underlying contract are separate and should be governed by different laws.

2. Due to the Parties' implied choice, the law of Danubia should govern the arbitration agreement

11. The Parties only agreed on a choice of law for the underlying contract [*CE5*, *p. 14*]. Since the arbitration agreement should be governed by a different law, there is no express choice of law for the arbitration agreement. CLAIMANT alleges that choice of law clause extended impliedly to the law of the separate arbitration agreement [*Cl. Memo*, *paras. 21*]. However, this approach is in great tension with separability doctrine and is difficult to square with the fact that the parties' chosen arbitral seat was often more closely connected to their arbitration agreement than was the law they chose to govern their underlying contract [*Lew et al.*, *para. 6-23*, *Born*, *p. 518*]. In light of the above, RESPONDENT submits the Parties' implied choice of the law governing the arbitration agreement is the law of Danubia.

12. The Parties' choice for the seat of the arbitration creates a strong presumption that they intended for the law of the arbitral seat to govern the arbitration agreement [*Hamlyn v. Talisker*; *ICC No. 7373*]. The arbitral seat is the juridical center of gravity which gives life and effect to an arbitration agreement and has major practical importance [*FirstLink case*; *Belohlavek*, *p. 262*]. Also parties' selection of the neutral seat would invariably come with the implicit acceptance of the *lex arbitri* of that chosen seat to govern their arbitration, as well as their arbitration agreement [*ibid.*]. In the present case, the Parties have consented that the seat of the arbitration shall be Danubia [*CE5*, *p. 14*], so this choice constitutes a strong presumption that they intended the law of Danubia to govern the arbitration agreement.

13. Moreover, the Parties have impliedly chosen the law of Danubia to govern the arbitration in their negotiation history. RESPONDENT proposed in its email on 10 April 2017 that the seat of arbitration is Equatoriana as well that the law governing the arbitration agreement is the law of the seat [*RE1*, *p. 33*]. In CLAIMANT's response, it accepted RESPONDENT's proposal only "with an amendment as to the place of arbitration", changing the arbitral seat to Danubia [*RE1*, *p. 34*]. CLAIMANT showed no objection to the choice of the law of the seat to govern the arbitration agreement. Due to this response, it is reasonable for RESPONDENT to believe that CLAIMANT also agreed to apply the law of Danubia to govern the arbitration agreement.

14. Therefore, the Parties have impliedly agreed the governing law of the arbitration agreement should be the law of the arbitral seat.

3. Following the closest connection rule, the Tribunal should apply the law of Danubia to govern the arbitration agreement

15. Should the Tribunal decide that there is no choice for the governing law, following the closest and most real connection rules, RESPONDENT submits that it should be the law of Danubia, as the law of the arbitral seat, to govern the arbitration agreement. When the parties have not chosen a law to govern the arbitration clause, it is generally considered that arbitration clause should be governed by the legal system with which it has the closest and most real connection [*Gaillard*/*Savage*, *p. 222*]. The law of the arbitral seat normally has a closer and more real connection with the arbitration agreement [*C v. D*; *Compagnie Case*; *XL Ins. v. Owens*]. The arbitration agreement is a "procedural" clause, and therefore almost inevitably subjected to the law of the arbitral seat [*Born*, *p. 513*]. More specifically, if the parties' true intention is unclear, the Tribunal should presume that the parties intended that the law of the arbitral seat will apply, as it is the nature of arbitration agreement to provide for given procedures in a given place [*Japan Educational Corporation v. Kenneth J. Feld*].

16. In the present case, Danubia is chosen as the seat of the arbitration [*CE5*, *p. 14*]. Thus, Danubian Law has the closest and most real connection with the arbitration agreement. Therefore, the Tribunal should apply the law of Danubia to govern the arbitration agreement because Danubia has been chosen as the arbitral seat.

4. International and regional legislations is in favor of applying the law of the arbitral seat to govern the arbitration agreement

17. CLAIMANT's exclusive focus on the law governing the underlying contract is also very difficult to square with international and regional legislations, which prefer the law of the arbitral seat.

18. Art. V(1)(a) New York Convention establishes a choice of law rule providing that, where the parties have not explicitly or impliedly selected a law to govern their arbitration agreement, that provision will be governed by the law of the country where the award was made, *i.e.*, the arbitral seat [*Born*, *p. 478*]. Similarly, Art. 36(1)(a)(i) Model Law also prescribes a default rule, selecting the law of the arbitral seat to govern the arbitration agreement [*Born*, *p. 526*].

19. As for regional legislation, Art. VI (2) of European Convention on International Commercial Arbitration (Geneva 1961) and Section 48 Swedish Arbitration Act of 1999 stipulate that the law applicable to the arbitration agreement shall be the law of the seat without parties' consent, which

is in line with the modern tendency in international arbitration [*Heuman*, *p. 120*].

20. Thus, taking both international and regional legislation into consideration, the Tribunal is highly recommended to apply the law of the arbitral seat, the Danubian law, to govern the arbitration agreement.

21. In conclusion, due to the separability doctrine and the Parties' intention, different law shall be applied to the arbitration agreement. No matter the Tribunal decides it should follow the Parties' implied intention or the closest and most real connection rule to ascertain the governing law for the arbitration agreement, the law of Danubia as *lex arbitri* shall apply.

B. The Tribunal has no jurisdiction and power to adapt the contract

22. CLAIMANT alleges that the Tribunal has both jurisdiction and power to adapt the contract under the valid arbitration agreement [*NoA*, *pp. 6-7*], which states that "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by HKIAC under the HKIAC Rules in force when the Notice of Arbitration is submitted. The seat of arbitration shall be Vindobona, Danubia"[*CE 5*, *p. 14*]. More specifically, CLAIMANT argues that the arbitration agreement should be interpreted liberally, because the law of Mediterraneo governs the arbitration agreement [*Cl. Memo*, *paras. 28-29*], and the "pro-arbitration" approach should apply [*Cl. Memo*, *paras. 30-38*].

23. In light of the above, RESPONDENT submits that the Tribunal needs an express authorization to adapt the contract [**1**]. Since the law of Danubia provides a narrow interpretation [**2**], which contradicts the liberal interpretation provided by "pro-arbitration approach", there is no express empowerment in the arbitration agreement. Also, with the four corners rule of Danubian Law, CLAIMANT cannot rely on the drafting history for an express empowerment [**3**].

1. The Tribunal's power to adapt the contract requires an express authorization

24. Courts in Danubia consider that Art. 28(3) of Danubian Arbitration Law applies to conferral of exceptional powers such as contract adaptation [*PO2*, *p. 60*]. Pursuant to Art. 28(3) Danubian Arbitration Law, the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. Such power cannot be implied and must be expressly conferred by the parties [*Faruque*, *p. 154*; *Berger*, *p. 8*; *Lew et al.*, *para. 8-17*; *ICC No. 7544*]. The parties should provide clarification in the arbitration agreement and specifically

to empower the arbitral tribunal [*Ex. Note*, *p. 34*]. Therefore, an express conferral of powers in the arbitration agreement is required while parties may authorize arbitral tribunals to adapt contracts. Whether the arbitration agreement shall be interpreted to contain an express empowerment should be determined by the law of Danubia. However, in the present case, there is no express empowerment in the arbitration agreement to confer the Tribunal the power to adapt the contract.

2. Interpreted narrowly under Danubian Law, the arbitration agreement does not contain an express empowerment

25. An arbitral tribunal may validly resolve only those disputes that the parties have agreed that it should resolve [*Redfern*/*Hunter*, *p. 335*]. Arbitral tribunals' jurisdiction and power should be determined by the interpretation of the arbitration agreement. In the present case, the jurisdiction shall be determined by whether contract adaptation falls within the scope of the arbitration agreement.

26. CLAIMANT alleges that contract adaptation falls in the scope of "any dispute arising out of this contract" [*Cl. Memo*, *paras. 47-53*]. However, according the law of Danubia, the arbitration agreement shall be interpreted narrowly [*PO1*, *p. 52*]. The concept of adaptation is used to identify the activity of adjusting and amending the contract upon the occurrence of unforeseen events changing the market conditions and affecting the contract's balance [*Ferrario*, *p. 78*]. Hence, following the narrow interpretation of arbitration agreement, contract adaptation is not the dispute arising out of the current contract based on the current contractual relationships but it shapes the future relationship between the parties [*Faruque*, *p. 154*; *AMINOIL case*].

27. In the present case, RESPONDENT had fulfilled the obligation of paying the contractual remuneration [*CE8*, *p. 18*]. Nevertheless, CLAIMANT is seeking a higher amount of remuneration far beyond the originally agreed contractual price and asks for adaptation, which alters the obligations of the Parties [*NoA*, *p. 8*], which is beyond present contractual obligations. Thus, contract adaptation does not fall within the scope of the disputes that the Parties agreed to resolve in the arbitration agreement.

28. Therefore, the Tribunal lacks the jurisdiction and power to adapt the contract because contract adaptation is not included in the scope of dispute settlement which the arbitration agreement provides.

3. With the four corners rule of Danubian Law, CLAIMANT cannot rely on the drafting history for an express empowerment

29. CLAIMANT alleges that RESPONDENT suggested in their negotiation that arbitrators probably could adapt the contract [*Cl. Memo, paras. 39-46*; *CE8, p. 17*]. However, extrinsic evidence could not supplement the contract due to the four corners rule under the law of Danubia. Pursuant to the Danubian Contract Law, the four corners rule shall be applied when interpreting the arbitration agreement with largely the same effects as a merger clause under Art 2.1.17 UNIDROIT Principles [*PO2, p. 60*], which stipulates that the contract cannot be contradicted or supplemented by evidence of prior statements or agreements. The Tribunal's power is to be determined solely by looking within the contract itself without referring to any extraneous evidence. Even the negotiation of the parties or the surrounding of the context could not be considered [*Emanuel, p. C-25*]. Therefore, the Parties' negotiation on 12 April 2017 could not supplement the arbitration agreement. When solely considering the clause 15 of the Sales Agreement, the required express empowerment is missing in the arbitration agreement.

30. Thus, the Tribunal lacks the Parties' empowerment to adapt the contract because the dispute goes beyond the scope of the arbitration agreement and the Parties' negotiation is irrelevant due to the four corners rule.

CONCLUSION OF ISSUE A: RESPONDENT submits that following the separability doctrine and the Parties' intention, the law of Mediterraneo shall not apply to the arbitration agreement. Considering the Parties' implied choice and the closest and most real connection principle, the Tribunal should apply the law of Danubia to the arbitration agreement. Under the law of Danubia, the arbitration agreement cannot be interpreted to contain an express authorization. Thus, the Tribunal lacks the jurisdiction and power to adapt the contract.

ISSUE B: CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

31. CLAIMANT intends to submit a copy of the award and relevant submission of another arbitration obtained either through a breach of confidentiality or an illegal hack [*PO2, p. 61*]. In the other arbitration, RESPONDENT asked for an adaptation of contractual price. CLAIMANT aims to use this evidence to support that RESPONDENT considers the additional tariffs constitute a due

reason for adaptation [*Cl. Memo*, *para. 61*]. However, since there are significant distinctions between these two arbitrations, the evidence would make trivial contribution to the present case. Thus, rejection of the evidence would hardly harm CLAIMANT's right to be heard or the interest to find the truth. But admission of the evidence will jeopardize RESPONDENT's rights and procedural principles. Thus, the Tribunal is strongly advised to reject the evidence.

32. HKIAC Rules 2018 shall apply to the evidentiary issue. Besides, IBA Rules on the Taking of Evidence in International Arbitration (*hereinafter* "IBA Rules") are highly recommended to the Tribunal, because there are no specific stipulations on taking evidence in either HKIAC Rules or Danubian Arbitration Law as *lex arbitri* [*PO2*, *p. 61*], meanwhile IBA Rules are commonly adopted or referred to in HKIAC arbitration and have become particularly influential in the international commercial arbitration practice [*Moser*/*Bao*, *para. 9.155*; *Waincymer*, *p. 757*].

33. CLAIMANT first alleges that the evidence is relevant to the case and material to its outcome [*Cl. Memo*, *paras. 61-62*]. Furthermore, CLAIMANT alleges that it is entitled to submit the evidence notwithstanding being obtained through a breach of confidentiality [*Cl. Memo*, *paras. 63-69*] or illegal hack [*Cl. Memo*, *paras. 70-74*]. In light of that, RESPONDENT submits that CLAIMANT is not entitled to submit the evidence from the other arbitration because it is not relevant or material [**A**]. Furthermore, the Tribunal should not admit evidence obtained through breach of confidentiality [**B**]. Last but not least, the evidence shall not be admitted by the Tribunal because it is illegally obtained [**C**].

A. The evidence from the other arbitration shall not be admitted by the Tribunal because it is not relevant or material

34. Art. 22.3 HKIAC Rules 2018 stipulate that the evidence that a party produces should be relevant to the case and material to its outcome. However, contrary to CLAIMANT's allegation, the evidence from the other arbitration proceeding is not relevant [**1**] or material [**2**] to this case.

1. The evidence from the other arbitration proceedings is not relevant to the present case

35. CLAIMANT is relying on the evidence to show that RESPONDENT accepts adaptation as the remedy for hardship caused by the additional tariffs [*Cl. Memo*, *para. 61*]. However, it ignores the crucial distinctions between the two cases, which makes the evidence irrelevant to the present case. Relevancy suggests that the document must be useful for the line of evidence to establish

the truth of the party's factual allegations, on which its legal conclusions are based [*Moser*/*Bao*, *para*. *9.161*].

36. The contract in the other arbitration contained the ICC-Hardship Clause [*PO2*, *p*. *60*], which is broader than clause 12 in the Sales Agreement [*RE 3*, *p*. *35*; *PO2*, *p*. *56*]. Thus, it might be easier to trigger hardship in that case. Besides, the arbitration agreement in the other arbitration is governed by the law of Mediterraneo [*PO2*, *p*. *60*] while the arbitration agreement in the present case is governed by Danubian law, which provides a narrower interpretation of the arbitration agreement and refuses extraneous evidence to confer exceptional powers to the Tribunal [*PO1*, *p*. *53*]. Hence, despite CLAIMANT's intention to establish an allegation that RESPONDENT should accept contract adaptation as remedy as it does in the other arbitration [*Cl*. *Memo*, *para*. *61*], it is reasonable for RESPONDENT to have different understandings of different contracts and accept contract adaptation in that case while rejecting in the case at hand. Therefore, the evidence lacks relevancy as it is not useful to establish CLAIMANT's factual allegations.

2. The evidence from the other arbitration proceedings is not material to the outcome of the present case

37. CLAIMANT alleges that the evidence can justify its request for an adaptation of contractual price, thus it is material [*Cl*. *Memo*, *para*. *62*]. Considering the differences between the two cases which CLAIMANT again disregards, RESPONDENT submits that the evidence is not material. Materiality refers to relation to the outcome of the case, which suggests a focus on how the evidence fits into the resolution of the dispute [*Davies*, *p*. *178*]. This means that the evidence "likely contributes to the clarification of the case" [*UNCITRAL Draft Guidelines*, *p*. *17*; *Ceccon*, *p*. *73*].

38. In the case at hand, the decisive factor when considering the power of arbitral tribunals, the governing law of the arbitration agreement, is different in two cases [*supra*, *para*. *36*]. And the hardship clause which determines whether the additional tariffs can trigger hardship is different as well [*ibid*.]. Thus, even if contract adaptation in that arbitration is justified, it does not mean that the CLAIMANT's request for contract adaptation in the present case would be granted. Therefore, the "Partial Interim Award" could hardly contribute to the clarification of the present case because of the significant distinctions of the two cases.

39. Besides, the Tribunal can exclude evidence where the evidence is adduced to establish a fact which has already been established by other evidence [*Moser*/*Bao*, *para*. *9.163*]. The Parties have adequate evidence including the Parties' negotiation files [*CE 1* - *CE 4*, *CE 7*, *RE 1*, *RE 2*], the final contract [*CE5*, *p*. *14*], witness statements [*CE 8*, *RE 3*, *RE 4*] and the news providing the background of the tariffs [*CE6*, *p*. *15*]. These exhibits are sufficient to allow complete consideration of whether the tariff can justify an adaptation. The evidence from the other arbitration proceedings is redundant and unnecessary. Therefore, the evidence should be excluded.

40. In conclusion, the Tribunal should not admit the evidence from the other arbitration proceedings because it is not relevant or material.

B. The Tribunal should not admit evidence obtained through breach of confidentiality

41. CLAIMANT alleges that the evidence obtained through a breach of confidentiality should still be admitted [*Cl*. *Memo*, *paras*. *63-68*]. CLAIMANT first states that the evidence at hand is in no relation to the purpose of confidentiality [*Cl*. *Memo*, *para*. *65*]. Furthermore, CLAIMANT argues that since it is not bound by the confidentiality obligation in the other arbitration, it is entitled to submit the evidence [*Cl*. *Memo*, *paras*. *66-68*]. Moreover, CLAIMANT submits that the evidence fits one of the exceptions of confidentiality [*Cl*. *Memo*, *para*. *69*]. In light of CLAIMANT's arguments, RESPONDENT submits that the admission of the evidence is inconsistent with the purpose of confidentiality, which will undermine the integrity of international commercial arbitration [**1**]. Evidence protected by confidentiality should be rejected under HKIAC Rules and IBA Rules [**2**]. Furthermore, the evidence does not fit the exception of confidentiality [**3**].

1. The evidence is in conflict with the overall confidentiality of arbitrations

42. The evidence obtained from another arbitration is in conflict with the overall confidentiality for it deviates from the purpose of confidentiality [***i***], which would in turn undermine the integrity of international commercial arbitration [***ii***].

i. The evidence is in conflict with the purpose of confidentiality of arbitrations

43. Contrary to CLAIMANT's allegation, the admission of the evidence is inconsistent with the purpose of confidentiality [*Cl*. *Memo*, *para*. *65*]. The confidentiality of the arbitral proceedings serves to centralize the parties' dispute in a single forum and to facilitate an objective, efficient and commercially-sensible resolution of the dispute [*Born*, *p*. *2782*]. Introducing unnecessary evidence from another arbitration is the opposite of a centralized, efficient and commercially-

sensible arbitration. Besides, confidentiality enables parties to present the relevant evidence and argument without concern that competitors or others will obtain information and use it in damaging ways against them [*Born*, *p. 2861*]. RESPONDENT entered that arbitration with the expectation that its arguments would not be disclosed against its own interest. However, CLAIMANT now intends to disclose RESPONDENT's submission in the other arbitration to harm RESPONDENT's right and interest, exceeding RESPONDENT's reasonable expectation. Therefore, admission of the evidence derogates from the objective of confidentiality of arbitrations.

ii. Admission of the evidence would undermine the confidential nature of international commercial arbitration

44. CLAIMANT states that confidentiality is not inherent in arbitration proceedings [*Cl. Memo*, *para. 63*]. However, there is a general view that confidentiality is inherent in arbitration [*Waincymer*, *p. 798*]. What's more, confidentiality is a paramount advantage of international commercial arbitration [*Born*, *p. 2780*]. Actually, one of the reasons why international commercial arbitration is much more preferred than litigation is because of its confidentiality, which will safeguard the parties' commercial secret [*Ritz*, *p. 221*]. The arbitration process would prove illusory if communications made in that process were readily subject to discovery and admissibility in other formal proceedings [*Reuben*, *p. 1281*]. Indulging CLAIMANT's malicious disclosure of RESPONDENT's confidential information would encourage similar behaviors of obtaining confidential information from other arbitrations, and in turn undermine the integrity of arbitration system.

2. The Tribunal should reject the evidence under HKIAC Rules and IBA Rules

45. The other arbitration is conducted under HKIAC Rules 2013 [*PO2*, *p. 60*], and HKIAC Rules stipulate strict standards of confidentiality [***i***]. Besides, the prevailing IBA Rules should be taken into account [***ii***].

i. HKIAC Rules stipulate strict standards of confidentiality

46. CLAIMANT alleges that the confidentiality obligation in another arbitration does not bind third parties [*Cl. Memo*, *para. 66*]. CLAIMANT bases its argument on Professor Born' s book, International Commercial Arbitration, without referring to any specific arbitration rule [*ibid.*]. However, Art. 45 HKIAC Rules 2018 and Art. 42 HKIAC Rules 2013 both contain express

obligation to keep the submission and the award made in the arbitration confidential. In fact, what Professor Born means by "third parties" includes witnesses [*Born*, *p. 2789*]. Nonetheless, Art. 42.2 HKIAC Rules 2013 extends the duty of confidentiality to cover expert witnesses and witnesses of fact [*Moser/Bao*, *para. 12.31*].

47. Admittedly, Art. 42.2 HKIAC Rules 2013 does not bind a party in CLAIMANT's position who is not involved in the other arbitration, but it does not mean the Tribunal could disregard the confidentiality of that arbitration and admit the evidence. On the one hand, HKIAC Rules attach great importance to confidentiality as they contain some of the strictest requirements for disclosure of arbitral awards in comparison to other arbitral institutional rules [*SIAC Rules 2016*, *Art. 39*; *LCIA Rules 2014*, *Art. 30.3*; *ICC Rules 2017*, *Appendix I*, *Art. 6*]. On the other hand, strict standard of confidentiality is one of the intriguing benefits of HKIAC Rules to parties involving sensitive commercial information and trade secrets [*Moser/Bao*, *para. 12.29*]. As the present arbitration is also administered under HKIAC Rules, the Tribunal should understand the emphasis HKIAC Rules put on the matter of confidentiality and respect the confidentiality of the other arbitration. Admitting the evidence would jeopardize the value of confidentiality appreciated by HKIAC Rules, thus the Tribunal should reject the evidence.

ii. The prevailing IBA Rules exclude evidence protected by confidentiality

48. Art. 9(2)(e) of IBA Rules provide that the Tribunal shall exclude evidence for grounds of commercial or technical confidentiality that the Tribunal determines to be compelling. Commercial confidentiality includes documents covered by confidentiality agreements with third parties [*Ahrens*, *§ 383 para. 71*; *Marghitola*, *p. 93*]. As a rule, arbitral tribunals should respect confidentiality agreements with third parties [*O'Malley*, *para. 9.86*; *Marghitola*, *p. 97*; *Merrill & Ring Forestry v. Canada*; *Jardine Lloyd Thompson v Western Oil Sands*].

49. In the present case, the other arbitration has been conducted also under HKIAC Rules [*Letter by Fasttrack*, p. *50*]. By agreeing to conduct their arbitration under HKIAC Rules, RESPONDENT and the other party in that arbitration consent to a confidentiality agreement, which precludes disclosure of submissions and awards without parties' consent. However, the evidence CLAIMANT intends to submit includes a copy of the award and the relevant submission [*Letter by Langweiler*, *p. 49*]. Such materials are covered by the confidentiality agreement between RESPONDENT and third parties, and hence fall into the scope of commercial confidentiality.

Thus, the evidence shall also be excluded for grounds of commercial confidentiality.

3. The evidence does not fit the exceptions of confidentiality

50. CLAIMANT listed three exceptions of confidentiality and argues that this evidence fits the exception of enforcing a right [*Cl. Memo*, *para. 69*]. On the one hand, CLAIMANT is eagerly trying to establish that it is not the parties in the other arbitration so that it should not bear the obligation of confidentiality [*Cl. Memo*, *paras. 66-68*]. On the other hand, CLAIMANT wants to enjoy the exception of confidentiality to enforce its right [*Cl. Memo*, *para. 69*]. Art. 42.3 HKIAC Rules 2013 stipulates that disclosure of confidential information to protect or pursue a legal right only extends to the parties in the arbitration. Thus, CLAIMANT who is not a party to the other arbitration is not entitled to the exceptions of confidentiality.

51. Should the Tribunal decide that exceptions to the duty of confidentiality could cover CLAIMANT, CLAIMANT is not entitled to disclose the evidence for lack of reasonable necessity. In relation to disclosure of awards for protection of a party's legal rights, case law developed a standard of "reasonable necessity" [*City of Moscow v. Bankers Trust Co.*; *Ali Shipping case*; *Hassneh case*; *Dolling-Baker v. Merrett*]. It was not enough that such a disclosure is "merely helpful" as distinct from "necessary" for the protection of rights [*Ali Shipping case*]. A plea of *res judicata* preventing a determination of matters already decided in an earlier arbitration could be a good reason for a desired disclosure [*ibid.*; *AEGIS v. European Re*; *Moser/Bao*, *para. 12.33*]. However, the case at hand is in no relation to *res judicata*. What's more, the evidence is not even relevant to the present case, not to mention its "reasonable necessity" [*supra*, *paras. 35-36*]. Therefore, the evidence does not fit the exceptions of confidentiality.

C. The evidence shall not be admitted for its illegality

52. CLAIMANT is not entitled to submit the evidence from the other arbitration proceedings due to the illegal means through which it was obtained. Admittedly, HKIAC Rules and Model Law prescribe no precise rule that prevents the admission of illegally obtained evidence and international tribunals take a liberal approach to the admissibility of evidence [*Cl. Memo*, *para. 56*]. However, such discretion is not absolute [*EDF v. Romania*]. CLAIMANT alleges that the evidence should not be rejected because it does not breach international public policy [*Cl. Memo*, *paras. 71-72*], but international public policy is not the only reason to reject evidence. The decision whether or not to admit the evidence should be taken through a careful balancing of the

interests involved [*Alejandro Valverde Belmonte v. CONI et al.*] and in the present case, the rights infringed outweigh the interest of establishing the truth [**1**]. Arbitral tribunals will likely refuse to admit evidence that either results in procedural unfairness or was obtained in bad faith [*Mirabal/Derains*, *p. 208*]. The evidence was obtained illegally either through a breach of confidentiality agreement or through an illegal hack, which is inconsistent with the principle of good faith [**2**]. Moreover, the evidence shall also be refused because it will undermine the basic rules of procedural fairness and equality [**3**].

1. The interest in protecting the right infringed by collecting the evidence outweighs the interest in establishing the truth

53. As correctly stated by CLAIMANT, the Tribunal should weigh the relevance of the evidence against its illegal source [*Cl. Memo*, *para. 73*]. To be precise, arbitral tribunals should weigh the interest in protecting the rights infringed by obtaining the evidence against the interest in establishing the truth [*Berger/Kellerhals, para. 1207*].

54. CLAIMANT alleges that the evidence can help the Tribunal make a more convincing award [*Cl. Memo*, *para. 73*]. However, each tribunal should make its own finding of fact and interpretation of law [*Hunter*, *p. 33-34*; *Waincymer*, *p. 695*]. Moreover, the evidence at hand could hardly help the fact finding or influence the outcome of the present case and sufficient evidence has been provided to solve this dispute [*supra*, *paras. 31-40*]. Thus, exclusion of the evidence would barely harm CLAIMANT's right to be heard or the interest to find the truth. On the contrary, the admission of the illegally obtained evidence derogates RESPONDENT's right to keep its own information confidential and may cause the Tribunal's prejudice towards RESPONDENT. Comparing the possible damage to RESPONDENT and the minute effect of the evidence on the present case, the Tribunal should reject the evidence.

2. Admission of illegally obtained evidence is inconsistent with the principle of good faith

55. The Parties shall conduct the arbitration proceedings in line with the good faith principle. The concept of good faith implies the duty to employ honest, loyal and fair behavior [*Henriques*, *p. 517*]. In general, the principle of good faith prevents the arbitral tribunal from admitting evidence that a party collected by unlawful means [*Berger/Kellerhals*, *para. 1320*]. If a party presenting the evidence can be said to be in breach of its good faith obligations, there may be justification for exclusion of evidence [*Waincymer*, *p. 797*; *Libananco Holdings v. Turkey*; *EDF v. Romania*;

Methanex v. U.S.].

56. In the present case, the award and the relevant submission of the other arbitration are under the confidential obligation of HKIAC Rules and protected by the confidential agreement signed by the former employees [*Letter by Langweile*r, *p. 50*]. However, CLAIMANT arranged the opportunity to acquire the confidential information against payment of 1000 USD from a company which has a doubtful reputation as to its source of information and refuses to disclose the source [*PO2*, *p. 61*]. Although CLAIMANT is not the perpetrator of the illegal conduct, it should be prohibited to profit from such conduct, since CLAIMANT proactively arranged the acquisition of the evidence knowing the source was probably contaminated, infringing RESPONDENT's legal interest of confidentiality. Further, by introducing the documents into another arbitration, CLAIMANT is expanding the scope of RESPONDENT's damage from the leak of confidential information because it will provide the supposedly confidential information to more people, such as witnesses in this arbitration. Thus, CLAIMANT's submission of the evidence is in bad faith. Therefore, the evidence shall also be refused for the inconsistency with the principle of good faith.

3. Admission of illegally obtained evidence derogates procedural fairness and equality of the Parties

57. RESPONDENT submits that, on account of basic principle of fairness and equality, the Tribunal should not admit the evidence. CLAIMANT alleges that if not breaching the international public policy, evidence obtained through illegal means should be admitted [*Cl. Memo*, *para. 71-72*], totally ignoring the procedural fairness principle stipulated in Danubian Arbitration Law as *lex arbitri* [*Ex. Notes*, *para. 23*]. Also, Art. 9(2)(g) of IBA Rules provide that the arbitral tribunal shall exclude evidence for considerations of fairness and equality of the Parties that the arbitral tribunal determines to be compelling. International arbitration awards suggest that the illegally obtained documents should not be introduced, for that parties owe each other and arbitral tribunals a general duty to respect the equality of arms between them, and the illegal method offended basic principles of justice and fairness [*Methanex v. U.S.*; *Caratube v. Kazakhstan*; *EDF v. Romania*].

58. Equality of arms means that each party must be afforded a reasonable opportunity to present his case and should not be placed at a substantial disadvantage vis-à-vis his opponent [*Dombo Beheer*

BV v. The Netherlands]. In the case at hand, the evidence was obtained either through a breach of confidentiality agreement or by illegal hack [*Letter by Langweile*r, *p. 50*]. In either way, CLAIMANT obtains the evidence through illegal means to harm RESPONDENT, while RESPONDENT adheres to due process when collecting evidence. Admission of CLAIMANT's unlawful evidence would put the law-abiding RESPONDENT in a disadvantaged position regarding evidentiary issues. Thus, the Tribunal shall reject the evidence for considerations of procedural fairness and equality of the Parties.

CONCLUSION OF ISSUE B: CLAIMANT is not entitled to submit the evidence because it is not relevant or material. Moreover, the award of that arbitration shall not be disclosed for breach of confidentiality agreement. Last but not least, the illegally obtained evidence shall not be admitted by the Tribunal because it is inconsistent with the principle of procedural fairness and good faith.

ISSUE C: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1,250,000 USD UNDER CLAUSE 12 OF THE CONTRACT AND THE CISG

59. Regardless of the outcome of CLAIMANT's procedural issues, the Tribunal should find for RESPONDENT on the substantive issue. CLAIMANT and RESPONDENT contracted the Sales Agreement for frozen semen and agreed on DDP delivery in three shipments [*CE5*, *p. 13*]. A month before the third shipment was due, the Equatorianian government imposed 30 per cent tariff on agricultural products from Mediterraneo including racehorse semen [*CE6*, *p. 15*]. CLAIMANT invoked hardship and sought for an increased remuneration through adaptation relying on clause 12 of the contract and the CISG. Under clause 12, the additional tariff is neither comparable to health and safety requirement nor making the contract more onerous and adaptation is not stipulated as a remedy. Since clause 12 is a special regulation of the problem of changed circumstances based on party autonomy, it constitutes a derogation and excludes the application of Art. 79 CISG. Even if relying on Art. 79 CISG, it is not applicable since the contract has been performed and it does not provide for the remedy of adaptation. Further, even referring to UNIDROIT Principles, the Tribunal cannot adapt the contract because the requirements of hardship under Art. 6.2.2 are not satisfied. Therefore, CLAIMANT is not entitled to the payment under clause 12 of the contract [**A**] or under Art. 79 CISG [**B**].

A. CLAIMANT is not entitled to the payment of 1,250,000 USD under clause 12 of the contract

60. CLAIMANT alleges that the additional tariff is covered by clause 12, even though both Parties have reached a consensus on DDP delivery [*Cl. Memo*, *paras. 77-78*]. The sudden increase of tariff here is a comparable unforeseen event and makes the contract more onerous [*Cl. Memo*, *paras. 79-82*]. CLAIMANT further contends that CLAIMANT has the right to adapt the contract regarding price payment because there is a mutual consent on contract adaptation between the Parties [*Cl. Memo*, *paras*. *87-88*]. In light of that, RESPONDENT submits that under the DDP-delivery obligation, CLAIMANT is responsible for the sudden increase in tariff. The retaliatory tariff of 30 per cent does not fall within the realm of hardship regulated under clause 12, thus CLAIMANT cannot be exempt from the payment [**1**]. Even if it is determined that the retaliatory tariff is a hardship under clause 12, the adaptation of the contract is not available as a remedy in the Sales Agreement [**2**].

1. The retaliatory tariff of 30 per cent does not fall within the realm of hardship regulated under clause 12

61. The DDP-delivery requirement poses the risk of import clearance on CLAIMANT. Thus, CLAIMANT has the obligation to pay for the increased tariff [***i***]. Although a narrow hardship wording has been included into the force majeure clause, *i.e*. clause 12, the retaliatory tariff of 30 per cent does not meet all the requirements of hardship [***ii***]. Therefore, CLAIMANT is responsible for the cost resulting from the retaliatory tariff.

i. Under a DDP-delivery obligation, CLAIMANT should bear the risk of the increased tariff

62. As correctly stated by CLAIMANT, both Parties have reached a consensus on DDP delivery and CLAIMANT has the obligation to shoulder the risks and pay the costs before delivering goods to the named destination [*Cl. Memo, para*. *77*]. However, CLAIMANT fails to notice that no modification concerning CLAIMANT's obligation of import clearance has been made and CLAIMANT should bear the payment of additional tariffs.

63. Under a DDP delivery, the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities [*Ramberg*, *p*. *149*]. This means the seller must bear the risks and costs incurred by an import prohibition, additional taxes, and other similar government-imposed requirements. In the case at

hand, the Parties reached a consensus on the application of the DDP delivery. RESPONDENT had asked for DDP delivery in its email of 28 March 2017 [*CE3*, *p. 11*]. CLAIMANT accepted on 31 March 2017 and accordingly asked to increase the price by 1000 USD per dose associated with the additional costs of the DDP delivery [*CE4*, *p. 12*]. Consequently, the Parties included the DDP term into clause 8 of the contract [*CE5*, *p. 14*]. Thus, CLAIMANT is responsible for the tariff imposed by the Equatorianian government which is a "duty necessary for import" under DDP term.

64. Furthermore, although CLAIMANT stated that it did not want to bear any risks associated with DDP delivery [*CE4*, *p. 12*], the Parties did not reach an agreement on modifying a DDP delivery term to the extent that CLAIMANT did not need to bear any risks associated with import restrictions. To modify a DDP delivery term and make some changes regarding the obligations between the parties, it needs to be expressly stated in the contract [*Ramberg*, *p. 149*]. For instance, the Parties expressly stipulate that "buyer is responsible for all tank rental and handling fees associated with delivery of the semen" in clause 10 of the contract [*CE5*, *p. 14*], which transferred the obligation of undertaking the transportation fees from CLAIMANT to RESPONDENT. Apart from this specific variation, no provision suggests that CLAIMANT's obligation to bear the risk and cost of tariffs has been modified. Therefore, the modification is not applicable here and CLAIMANT is still responsible for the payment of the increased tariff under a DDP-delivery obligation.

ii. The retaliatory tariff does not meet all the requirements of hardship

65. Under clause 12, seller shall not be responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*CE5*, *p. 14*]. Contrary to CLAIMANT's allegation that the sudden increase of tariff is a comparable unforeseen event and makes the contract more onerous [*Cl. Memo*, *paras. 79-82*], the retaliatory tariff is not a comparable unforeseen event [**a**], and it is insufficient to make the contract more onerous [**b**].

a. The retaliatory tariff is not a comparable unforeseen event

66. The retaliatory tariff is not an event comparable to additional health and safety requirement. Pursuant to Arts. 8(1) and (3) CISG, clause 12 should be interpreted under the subjective test with due consideration given to prior negotiations. In the case at hand, "comparable event" should

be interpreted according to RESPONDENT's intent that CLAIMANT knew. RESPONDENT has compromised on the inclusion of a hardship term but intended to narrow the scope of hardship situation to particular events and used the "health and safety requirement" as the reference point when deciding whether the event is comparable or not.

67. RESPONDENT's intent to limit the hardship situation within specific types of event could be deduced from the prior negotiations between the Parties, in particular, RESPONDENT's response to the proposal of ICC-Hardship Clause. The inclusion of ICC-Hardship Clause proposed by CLAIMANT was considered "too broad" by RESPONDENT [*RE3*, *p. 35*]. According to the ICC-Hardship Clause, hardship occurs when "the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract". It generally defines the circumstance that might trigger a hardship instead of listing any specific events. RESPONDENT found it too broad for the purposes of this contract [*PO2*, *p. 56*] and insisted on expressly stipulating the types of event. Thus, RESPONDENT intends to limit the hardship exemption to specific types of event.

68. Further, RESPONDENT's intent to interpret the "comparable" standard with reference to "health and safety requirement" could be deduced from the final wording of the contract. When drafting clause 12, RESPONDENT referred to the risks mentioned by Ms. Napravnik in her email of 31 March 2017 [*PO2*, *p. 56*]. In that email, CLAIMANT mentioned risks caused by "import restrictions", "customs regulation" and "health and safety requirements" [*CE4*, *p. 12*]. However, in the final version of clause 12, the Parties used "additional health and safety requirements" instead of "customs regulations" or "import restrictions" [*CE5*, *p. 14*]. Since it has been agreed by the Parties to regulate certain risks directly in the contract [*RE3*, *p. 35*], the choice of words accurately reflects the risk reference. The "health and safety requirement" is a particular type of import restrictions and customs regulations, and is narrower in scope. Thus, when interpreting the "comparable" standard, "health and safety requirement" should be the object to refer to, instead of "customs regulation" or "import restrictions".

69. Since RESPONDENT told CLAIMANT that the ICC-Hardship Clause suggested by CLAIMANT was considered to be too broad for the purposes of this contract and the objectives pursued [*PO2*, *p. 56*], and CLAIMANT agreed on the inclusion of a narrow hardship reference

into the force majeure clause [*RE3*, *p. 35*], CLAIMANT knew about RESPONDENT's intent to narrowly stipulate the types of event that could constitute a hardship.

70. Finally, the retaliatory tariff is not comparable to "additional health and safety requirements". "The health and safety requirements" involved measures such as additional tests and long quarantine time, and were imposed to deal with a rare aggressive type of foot and mouth disease [*PO2*, *p. 58*]. Its purpose is to protect the health and safety of the people and animals, and its methods are regulatory requirements. An event comparable to "health and safety requirement" should has similar purpose and similar methods. However, in the case at hand, the method taken by Equatoriana was an economic retaliatory tariff with political motives that might start a trade war, which is not similar to regulatory method that protected itself from disease and ensured safety and health. What's more, since both Mediterraneo and Equatoriana are members of the World Trade Organization [*PO2*, *p. 61*], the provisions of the General Agreement on Tariffs and Trade 1994 (*hereinafter* "GATT 1994") could be taken into consideration when comparing the nature of retaliatory tariffs with health and safety requirements. The latter corresponds to the General Exceptions in GATT 1994 as a necessary policy to protect human, animal or plant life or health [*GATT1994*, *Art. XX*]. The former, on the contrary, causes trade barriers, goes directly against the overall purpose of GATT 1994 and lacks justification. Hence, the retaliatory tariff is not comparable to health and safety requirement in every respect.

b. The retaliatory tariff does not make the contract more onerous

71. CLAIMANT alleges that the 30 percent increase in tariff has resulted in considerable hardship [*Cl. Memo*, *para*. 82]. RESPONDENT submits that the retaliatory tariff is not sufficient to make the contract more onerous even under the interpretation of clause 12 according to CLAIMANT's own intent that a reasonable person could have been aware. Should the Tribunal find that the Parties' intention is not subjectively determinable, pursuant to Arts. 8(2) and (3) CISG, CLAIMANT's intent should be interpreted according to a reasonable person standard. Due consideration should be given to Parties' negotiation.

72. In the case at hand, when determining the triggering standard, due consideration should be given to prior negotiation, especially the email of 31 March 2017 [*CE4*, *p. 12*]. The Parties referred to that email when deciding the final wording of the Sales Agreement [*PO2*, *p. 56*]. According to that email, the reference standard of destroying the commercial basis and triggering the hardship

is a price increase of 40%, for CLAIMANT has defined unforeseeable requirements as "which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal" [*CE4*, *p. 12*]. The word "thereby" indicates a link between a price increase of 40% and the destruction of contract basis. Under the pattern of prudence proportionate to the circumstances at hand [*Kröll et al*., *p. 155*], a reasonable person would have been aware that a price increase of 40% should be considered when deciding whether a hardship has been triggered or not.

73. The retaliatory additional tariff imposed by Equatorianian authorities against Mediterraneo is insufficient to trigger hardship. This is because the additional tariff in the case at hand is only 30% [*CE6*, *p. 15*], which is 10% lower than the reference standard that CLAIMANT has set up. What is more, the additional tariff only targets at the last shipment of frozen semen, the price of the first two shipments remain unchanged [*NoA*, *p. 6*]. The last shipment is of 50 doses, which accounts for half of total shipments [*CE5*, *p. 14*]. Considering the entire transaction, the actual increase of the price is merely 15%. A 15% increase of total price is far less than the 40% standard suggested by CLAIMANT and therefore does not result in a destruction of commercial basis of the contract. Thus, the retaliatory tariff does not constitute hardship under the interpretation of clause 12 according to CLAIMANT's own intent.

74. Further, contrary to CLAIMANT's allegation [*Cl. Memo*, *para*. 82], CLAIMANT's financial difficulty was not fully known by RESPONDENT. It is true that RESPONDENT was aware of rumors in the market that CLAIMANT was still in financial difficulties, but the rumors were unspecific [*PO2*, *p. 58*]. No further details or reliable factual basis suggested that the rumors were reliable. Besides, CLAIMANT operates the most renown stud farm in its country, and is particular known for its breeding success regarding racehorse [*NoA*, *p. 4*]. Considering CLAIMANT's high reputation, it is reasonable that RESPONDENT dismissed the rumors.

75. In addition, CLAIMANT's fragile financial situation should not be taken into consideration under the objective interpretation. CLAIMANT had never mentioned its fragile financial situation when signing the contract and RESPONDENT wasn't aware of the details of its financial situation until the renegotiation of the price adaptation [*PO2*, *pp. 58-59*]. Given CLAIMANT's high reputation in the field of stud horses, reasonable person would not consider CLAIMANT's financial situation as difficult before the disclosure of its actual economic status. That undisclosed fact influences the objective interpretation of clause 12 and the understanding of "more onerous". A

reasonable person in RESPONDENT's position would not interpret "more onerous" as easily-triggered as CLAIMANT has suggested and no reasonable person would have taken "more onerous" as a broadly interpreted requirement in which merely 15% increase can fit.

76. Finally, even if the fragile financial situation is taken into consideration, the increase of tariff does not necessarily endanger CLAIMANT's restructuring plan or cause bankruptcy. CLAIMANT intended to gain additional revenues from the sale of the frozen semen and achieve the commitment to its creditors. Only when CLAIMANT fails to be profitable in 2017 and 2018 respectively can the prolongation program be affected [*PO2*, *p. 59*]. Although the 15% increase of tariff has caused a net loss of 10%, it has not eliminated the possibility that CLAIMANT might still make a profit through other transactions in the following months. As a matter of fact, the retaliatory tariff does not make the contract more onerous inevitably.

2. Under the Sales Agreement, the adaptation of the contract is not available as a remedy

77. CLAIMANT contends that it has the right to adapt the contract regarding the price payment under the Sales Agreement since there is a mutual consent on contract adaptation [*Cl. Memo*, *para*. *87-88*]. Contrary to CLAIMANT's allegation, adaptation of the contract is not available under the Sales Agreement. Adaptation is not provided for in the text of the agreement in the first place [***i***], and the Parties have not reached a consensus on price adaptation in the following renegotiation process [***ii***].

i. Adaptation of the contract is not provided for in the text of the agreement

78. Adaptation of the contract is not provided as a remedy neither in the force majeure clause nor in the arbitration clause. Clause 12, the force majeure clause with a narrow hardship wording, stipulates nothing related to adaptation. Clause 15, the arbitration clause, does not offer price adaptation as a remedy either [*CE5*, *p. 14*]. Thus, the wording of the contract shows no sign that adaptation should be an available remedy.

79. Moreover, the drafting history shows a deliberate omission of price adaptation. Pursuant to Arts. 8(1) and (3) CISG, clause 12 should be interpreted under the subjective test with due consideration given to prior negotiations. In the present case, CLAIMANT suggested the inclusion of a hardship clause relying on ICC-Hardship Clause [*RE2*, *p. 34*]. ICC-Hardship Clause states that the parties can renegotiate the alternative contractual terms with the other party in case of hardship, providing adaptation between the parties as a remedy [*ICC-Hardship Clause*].

However, the proposal was rejected by RESPONDENT by expressly stating to CLAIMANT that it was too broad, and RESPONDENT's intent to exclude the mechanism of renegotiation was aware by CLAIMANT [*PO2*, *p. 56*]. The Parties finally agreed on a narrow hardship reference into the existing force majeure clause, which lacks the mechanism of renegotiation or adaptation compared with the ICC-Hardship Clause. Since both Parties are experienced professionals in this field and went into every detail in the negotiation, it is reasonable to assume that the absent remedy of adaptation was a deliberate omission instead of a negligence. At the very least, the Parties did not provide adaptation as a remedy when drafting the contract.

ii. The Parties have not reached a consensus on adaptation in the renegotiation process

80. Contrary to CLAIMANT's allegation [*Cl. Memo*, *para*. 87], no mutual consent on contract adaptation has been made in the telephone discussion. After the Parties knew that the increased tariff covered frozen horse semen, they discussed the issue of remaining shipments on the phone. In answer to CLAIMANT's suggestion of adaptation, RESPONDENT merely stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*RE4*, *p. 36*]. The alleged agreement to adaptation was based on the premise that the Sales Agreement between the Parties has provided for an increased price on this occasion. However, the Sales Agreement does not stipulate price adaptation. Since the precondition has not been satisfied, RESPONDENT did not agree to renegotiate or adapt the price.

81. Further, should the Tribunal find that the contract provides for an increased price in the case of such a high additional tariff, the Parties have not authorized the Tribunal to adapt the contract. The wording that "we will certainly find an agreement on the price" merely indicated RESPONDENT's willingness to renegotiate about the price between the Parties themselves, but not authorize a neutral party to decide on the price adaptation.

82. Either way, there is no guarantee that the final outcome of the renegotiation would be in CLAIMANT's favor. CLAIMANT, who bears the costs and risks of the tariff under the DDP obligation, failed to find out that the increased tariff covered frozen horse semen in time. The tariff was announced on 19 December 2017 by executive order, however, CLAIMANT did not ask for clarification about whether frozen horse semen could be considered as an "agricultural good" until one month later [*PO2*, *p. 58*]. On account of CLAIMANT's negligence,

RESPONDENT was not left enough time to make a decision, and merely expressed its welcome to further discussions between the Parties regarding the issue of increased tariff. The problem of distribution remained unsettled, let alone agreeing to increase the payment of the third installment by 25%. Therefore, no mutual consent on contract adaptation was made in the renegotiation process.

B. Under the CISG, CLAIMANT is not entitled to the payment resulting from an adaptation of the price

83. CLAIMANT contends that an adaptation of the price is warranted under the CISG, even if the additional tariff is not covered by clause 12 of the contract [*Cl. Memo*, *para. 84*]. However, it is in RESPONDENT's position that Art. 79 does not apply to the case at hand [**1**]. Also, CLAIMANT is not entitled to price adaptation under the UNIDROIT Principles [**2**]. Lastly, CLAIMANT cannot claim damage based on the alleged resale prohibition [**3**].

1. Art. 79 CISG does not apply to the case at hand

84. Art. 79 CISG only comes into question when a party fails to perform [***i***]. Even if the tariff amounts to an "impediment" which hinders CLAIMANT's performance, Art. 79 CISG does not provide for an adaptation of the price, which is the remedy requested by CLAIMANT [***ii***].

i. Art. 79 CISG only comes into question when a party fails to perform

85. CLAIMANT has successfully delivered the goods and it cannot rely on Art. 79 CISG, which only applies to cases of non-performance. Art. 79 CISG stipulates 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 unforeseeable, unavoidable and unsurmountable impediment. The excuse for performance applies regardless of whether the failure to perform is due to a partial, complete, temporary or final impediment that already existed at the time of contracting or occurred only later [*Brunner*, *p. 111*]. The non-performance resulting from an "impediment" is one of the requirements for exemption under Art. 79 CISG [*ibid*., *p. 112*]. Case law also suggests that Art. 79 CISG is only relevant where a party fails to perform and is already in breach of its contractual obligations [*Stolen car case*; *Depuradora Servimar*, *S.L. v. G. Alexandridis & CO.O.E.SC*, *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*; *Macromex Srl. v. Globex International*, *Inc.*; *CLOUT case No. 1564*].

86. Under the Sales Agreement, CLAIMANT will deliver the goods in three instalments to

Equatoriana [*CE5*, *p. 14*]. CLAIMANT sent the first two shipments in May, 2017 and October, 2017 respectively; it delivered the remaining goods on 23 January, 2018 following the negotiations between the Parties [*NoA*, *p. 6*]. At this point, CLAIMANT had successfully performed its contractual obligations despite the "impediment" it alleges. Although CLAIMANT requests for a price increase to cover its losses from the last delivery, the additional tariff did not result in CLAIMANT's non-performance and CLAIMANT is not in breach of its contractual duties. Therefore, CLAIMANT cannot rely on Art. 79 CISG, because the contact has been performed.

ii. Art. 79 CISG does not provide for an adaptation of the price

87. Art. 79 CISG only provides for exemption from damages, and an adaptation of the price is not contemplated [***a***]. Also, CLAIMANT is precluded from resorting to the UNIDROIT Principles for price adaptation [***b***].

a. Art. 79 CISG only provides for exemption as remedy

88. As correctly stated by CLAIMANT, Art. 79 CISG does cover issues relating to hardship [*Cl. Memo*, *para*. *85*]. The language of Art. 79 CISG does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Art. 79 CISG [*CISG-AC No.7*, *Opinion 3.1*]. In the case at hand, CLAIMANT is relying on Art. 79 CISG for an adaptation of the price by the Tribunal. However, Art. 79 CISG only exempts a party from non-performance due to an impediment, and it does not provide for any other remedy in cases of hardship. Therefore, even if the additional tariff qualifies as an "impediment" under Art. 79 CISG, an adaptation of the contract should not be warranted.

b. CLAIMANT is precluded from resorting to the UNIDROIT Principles for price adaptation

89. CLAIMANT is precluded from resorting to the UNIDROIT Principles under both alternatives of Art. 7(2) CISG. CLAIMANT contends that the UNIDROIT Principles apply to the case at hand to warrant price adaptation [*Cl. Memo*, *paras*. *89-90*]. However, the CISG does not leave room for domestic concepts of hardship, in this case, the UNIDROIT Principles; also, the UNIDROIT Principles do not apply as the general principles of the CISG.

90. The prevailing view suggests that the CISG does govern issues relating to hardship [*Brunner*, *p.*

392; *CISG-AC Opinion No. 7*, *Opinion 3.1 and Comments 26-39*; *Kröll*/Mistelis/*Viscasillas*, *Art. 79 para. 78*; *Schlechtriem*/*Butler*, *p. 203*; *Schlechtriem*/*Schwenzer*, *Art. 79 para. 31*; *Schwenzer et al*., *para. 45.95*]. Accordingly, there is no room to resort to domestic concepts of hardship as there is no gap in the CISG regarding the debtor's invocation of economic impossibility and the adaptation of the contract to changed circumstances [*Schwenzer*, *p. 713*]; if one were to hold otherwise, unification of the law of sales would be undermined in a very important area [*ibid*.]. Similarly, it is submitted that the interpreter who takes seriously the CISG's confessed purpose of unifying the law of sales, as articulated in Article 7(1), will probably exhaust all technically available means to respond to the hardship problem within the "four corners" of the Convention, rather than resorting to the application of potentially disparate domestic legal rules and doctrines [*CISG-AC Opinion No.7*, *Comment 35*].

91. Although it has been suggested that the UNIDROIT Principles should be used to interpret the CISG, they are not the "general principles on which [CISG] is based." The CISG was drafted in 1980, while the UNIDROIT Principles was first published in 1994, which were largely based on the CISG [*Schwenzer et al*., *para. 3.53 et seq*.]. In addition, Art. 7(1) CISG requires an autonomous interpretation of the CISG; hence, all solutions developed must first be based on the Convention itself. Simply resorting to the UNIDROIT Principles would fundamentally violate the autonomy of the Convention [*ibid*.].

92. Therefore, CLAIMANT cannot rely on Art. 7(2) CISG to resort to the UNIDROIT Principles to define hardship's scope and consequences.

2. CLAIMANT is not entitled to price adaptation under the UNIDROIT Principles

93. Even if the hardship provisions of the UNIDROIT Principles apply to the case at hand, there is no hardship and an adaptation of the price should not be warranted. Hardship is only relevant in exceptional case and CLAIMANT fails to prove that the tariff fundamentally altered the equilibrium of the contract [***i***]. Although unexpected, CLAIMANT can reasonably foresee the tariff when concluding the contract [***ii***]. Also, the risk of the tariff is assumed by CLAIMANT according to the contract [***iii***]. Even if the Tribunal finds hardship in the case at hand, it should not warrant the adaptation of the contract as requested by CLAIMANT [***iv***].

i. CLAIMANT fails to prove that the tariff fundamentally altered the equilibrium of the contract

94. CLAIMANT is relying on Art. 6.2.3 UNIDROIT Principles without justifying why hardship has occurred in the case at hand [*Cl. Memo*, *paras. 89-92*]. Under the UNIDROIT Principles, hardship or changed circumstances are only relevant in exceptional cases [***a***]. In the case at hand, the additional tariff did not lead to a fundamental alteration of the equilibrium of the contract [***b***].

a. Hardship or changed circumstances are only relevant in exceptional cases

95. Under Art. 6.2.1 UNIDROIT Principles, where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations. The purpose of this Article is to make clear that performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party [*Art. 6.2.1 UNIDROIT Principles*, *Comment 1*]. Only when supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to as "hardship" and dealt with under Arts. 6.2.2, 6.2.3 UNIDROIT Principles [*ibid*., *Comment 2*]. In other words, if CLAIMANT wishes to invoke Arts. 6.2.2, 6.2.3 UNIDROIT Principles as protection against hardship, it must prove that the additional tariff results in a fundamental change of balance in the contract.

b. The additional tariff did not lead to a fundamental alteration of the equilibrium of the contract

96. As illustrated in paras., hardship is only relevant in exceptional cases; consequently, it is suggested that hardship can only be found if the performance of the contract has become excessively onerous [*Schwenzer*, *p. 714*; *Kröll/Mistelis/Viscasillas*, *Art. 79 para. 81*; *Grupo Santa Monica Sports v. Real Club Deportivo de la Coruña*; *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino v. Granbanco S.A.*]. Contrary to CLAIMANT's allegation [*Cl. Memo*, *p. 82*], the additional tariff did not render CLAIMANT's performance excessively more onerous and thereby alter the equilibrium of the contract.

97. Under Art. 6.2.2 UNIDROIT Principles, whether an event amounts to a "fundamental alteration" of the contract is subject to a case-by-case analysis [*Art. 6.2.2 UNIDROIT Principles*, *Comment 2*]. Despite of this, legal certainty clearly calls for some benchmark in ascertaining whether any alteration amounts to hardship [*Schwenzer*, *p. 716*]. Although the UNIDROIT Principles does not provide for such benchmark, scholars have suggested relevant threshold for the hardship test. Relying on extensive comparative study of domestic legal doctrines, it has been submitted that

an alteration amounting to at least 100 per cent or more of the cost of the performance should be likely to amount to a "fundamental" alteration [*Brunner*, *p. 428*]. Another scholar noted that a 150 to 200 per cent alteration seems to be advisable, when considering the greater fluctuations of price in international markets [*Schwenzer*, *p. 717*]. One can refer to case law for relevant percentage which is deemed to have triggered hardship by the court or arbitral tribunal. In a case where the Belgian court finds hardship in favour of the seller under the CISG, the price of the goods unexpectedly rose by about 70 per cent after the conclusion of the contract [*Scafom International case*]. In another case where the Spanish court adapted the contract to the changed circumstances, there was an unforeseeable decrease in marketing investment of 70 per cent [*Rent case*].

98. Additionally, the point of reference for hardship determination must be the entire undertaking of the relevant party under the particular contract. In other words, the increase in cost of performance or decrease in the value of the goods received must be compared with the entire contract, taking into account the party's performance as a whole [*Brunner*, *p. 461-462*]. CLAIMANT's performance was only partially affected by the additional tariff. More specifically, only the third shipment incurred an additional cost for CLAIMANT, which is 30 per cent of the contract price. In itself, the 30 per cent increase in the cost of performance is already much lower than the suggested threshold, considering the nature of international markets; if one takes into account the first two instalments, the additional cost merely amounts to a 15 per cent increase. The fact that CLAIMANT has performed also suggests that the tariff did not render the performance excessively more onerous for CLAIMANT. Therefore, although the tariff made the third shipment more expensive than contemplated, it does not amount to a fundamental alteration of contract equilibrium, and CLAIMANT is bound to its contractual obligations.

ii. CLAIMANT can reasonably foresee the tariff when concluding the contract

99. Although the additional tariff was unexpected, CLAIMANT could and should reasonably take it into account when concluding the contract. Under Art. 6.2.2(b) UNIDROIT Principles, the event that triggers hardship ought not to have been reasonably taken into account by the disadvantaged party when concluding the contract; in other words, there is no hardship if the event was foreseeable at the time of the conclusion of the contract [*Churchill Falls* (*Labrador*) *Corporation Ltd. c. Hydro-Québec*, *District of Montreal*; *PETROBRAS case*]. The UNIDROIT Principles

applies a subjective standard to determine whether an unforeseen event has triggered hardship. The aggrieved party cannot allege hardship if it could reasonably foresee the event when concluding the contract, irrespective of whether it had indeed foreseen its occurrence or not.

100. Contrary to CLAIMANT's allegation, it could and should have foreseen the possibility of retaliatory measures from Equatoriana. Although Mediterraneo announced 25 per cent tariff on Equatorianian agricultural products six months after the conclusion of the contract, its newly elected President, Mr. Bouckaert, had made clear that he wanted to protect the agricultural sector of the state [*NoA*, *p. 6*]. After President Bouckaert's election on 25 April, 2017, he appointed Ms. Cecil Frankel as his "superminister" for agriculture, trade and economics on 5 May, 2017 [*PO2*, *p. 58*]. Ms Cecil is one of the most ardent critics of free trade and has been vocal in condemning the fact that the Mediterranean farmers were treated unfairly in other markets [*ibid*.]. In addition, Equatoriana's retaliatory measure is not unprecedented and should be reasonably expected. Despite being supportive of free trade, the Equatorianian government had taken retaliatory measures against trade restrictions imposed by a third state [*NoA*, *pp. 7-8*]. Also, as a professional experienced in market practice, CLAIMANT should have taken into account all the surrounding circumstances when concluding the contract; if it fails to do so, it must bear the risk associated with such negligence [*Société Romay AG v. SARL Behr France*]. Thus, although unexpected, CLAIMANT should have foreseen the additional tariff when concluding the contract.

iii. The risk of the tariff is assumed by CLAIMANT according to the contract

101. CLAIMANT is precluded from relying on the UNIDRPOIT Principles for hardship, because it has assumed the risk of the additional tariff. Under Art. 6.2.2(d) there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. The word "assumption" denotes that the risk does not have to be taken over expressly [*Art. 6.2.2 UNIDROIT Principles*, *Comment 3*(*d*)]. The hardship provisions of the UNIDROIT Principles do not alter the allocation of risks between the parties and the aggrieved party cannot claim hardship when it has assumed the risk of the event [*ICC No. 9029*; *Squash case*; G.*Brencius v*. "*Ukio investicine grupe*"].

102. CLAIMANT has assumed the risk of the additional tariff according to the contract. Under clause 8 of the contract, CLAIMANT will ship the goods under DDP term to Equatoriana [*C5*, *p. 14*]; in other words, CLAIMANT has to bear the risk of import clearance, which includes the additional tariff [*INCOTERMS* (*2010*)]. Although clause 12 was included into the contract to

alleviate CLAIMANT from certain risks [*C5*, *p. 14*], the wording of the clause is narrow and does not cover the present impediment. Therefore, CLAIMANT has assumed the risk of the tariff under the contract.

103. Contrary to CLAIMANT's allegation [*Cl. Memo*, *para. 82*], its financial difficulty falls within its own sphere of risks and does not lower the threshold for hardship. Financial constraints are generally regarded as surmountable and needs to be taken into account at the time of the conclusion of the contract [*Schlechtriem/Butler*, *p. 202*]. In a case where a Chinese manufacturer could not deliver the ordered goods to the seller owing to financial difficulties, the Tribunal held that the seller cannot rely on hardship for exemption from non-performance, since the financial difficulties of the seller's manufacturer were within the sphere of its own responsibility [*Chinese goods case*]. In the case at hand, CLAIMANT alleges hardship based on its own financial constraints, which reasonably falls into CLAIMANT's own sphere of risk, because CLAIMANT should have taken it into account when concluding the contract.

iv. The Tribunal should not warrant the adaptation of the contract as requested by CLAIMANT

104. CLAIMANT fails to prove that all the requirements under Art. 6.2.2 UNIDRPOIT Principles are met [*supra*, *para. 95-108*]; therefore, there is no hardship in the present case which would allow CLAIMANT to the remedies under Art. 6.2.3 UNIDROIT Principles, including the adaptation of the contract. Even if the Tribunal finds hardship in the case at hand, it should not warrant the adaptation of the contract as requested by CLAIMANT, because it does not reflect "a fair distribution of the losses between the parties."

105. Under Art. 6.2.3(1) UNIDROIT Principles, in cases of hardship the disadvantaged party is entitled to request renegotiation and the request should be made without undue delay. The delay in making the request may affect the finding as to whether hardship actually existed and, if so, its consequences for the contract [*Art. 6.2.3 UNIDROIT Principles*, *Comment 2*]. Although the retaliatory tariff was announced on 20 December, 2017 and took effect from 15 January, 2018 onwards [*CE 6*, *p. 15*; *PO2*, *p. 58*], CLAIMANT only requested for renegotiation of the sales price three days before the third shipment was due [*CE 7*, *p. 16*]. CLAIMANT alleges that it only found out that the tariff also applied to the goods when preparing for the third shipment [*CE 8*, *p. 17*]; however, it did read the newspaper article about the retaliatory tariff [*PO2*, *p. 58*], and

therefore should have considered its possible impact on CLAIMANT's performance.

106. In addition, the Tribunal should seek to make a fair distribution of the losses between the parties when adapting the contract to restore its equilibrium under Art. 6.2.3 UNIDROIT Principles [*Art. 6.2.3 UNIDROIT Principles*, *Comment 7*]. The adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the Tribunal will have to consider the extent to which one of the parties has taken a risk [*ibid*.]. CLAIMANT contends that it is entitled to 25 per cent of the price for the third delivery to restore the equilibrium of the contract [*Cl. Memo*, *para. 76*]. CLAIMANT has assumed the risk of the additional tariff according to the contract, and its financial constraints falls within its own sphere of risk [*supra*, *paras. 101-103*]. Therefore, RESPONDENT submits that granting CLAIMANT 25 per cent of the price of the third shipment does not reflect a "fair distribution of the losses".

3. CLAIMANT cannot claim damage based on the alleged resale prohibition

107. CLAIMANT argues that RESPONDENT breached the resale prohibition agreed by the parties, and claims for damage resulting from it [*Cl. Memo*, *paras. 98-109*]. In contrary, CLAIMANT's allegation about RESPONDENT's breach of contract and its claim for damage is irrelevant to its request in its Notice of Arbitration submitted to the Tribunal [***i***]. Even if the Tribunal decides to resolve the dispute about resale, CLAIMANT is not entitled to the damage [***ii***].

i. CLAIMANT's allegation is irrelevant to its claim in this arbitration

108. CLAIMANT's request is to gain the remuneration through contract adaptation by the Tribunal [*NoA*, *p. 8*]. The dispute in this arbitration is about whether the tariff constitutes hardship and whether the Tribunal should adapt the contract. Nevertheless, seeking for the damage is a different remedy from contract adaptation. Therefore, it is another dispute which is irrelevant to CLAIMANT's request in this arbitration.

109. If CLAIMANT insists on claiming for the damage, it should amend its claim pursuant to Art. 18 HKIAC Rules 2018.

ii. Even if the Tribunal decides to resolve the dispute about resale, CLAIMANT is not entitled to the damage

110. CLAIMANT alleges that it is entitled to the damage for the loss of profit resulting from RESPONDENT's breach of contract [*Cl. Memo*, *paras. 98-109*]. According to Art. 74 CISG, a

party may be liable for damage if it breaches the contractual obligation. Contrary to CLAIMANT's allegation, neither contractual terms nor oral agreement imposes obligation of resale prohibition on RESPONDENT.

111. In the present case, the Sales Agreement does not contain any provisions of resale prohibition thereby not imposing the obligation on RESPONDENT [*CE5*, *p. 13*]. Moreover, contrary to CLAIMANT's allegation [*Cl. Memo*, *para. 101*], RESPONDENT's silence could not constitute acceptance to CLAIMANT's written condition in the email [*CE2*, *p. 10*]. According to Art.18 CISG, silence itself does not amount to acceptance. Silence or inactivity of one of the Parties may constitute a clear indication of the will when related to usage or practices developed by the Parties [*Kröll et al.*, *p. 152*; *Schlechtriem/Schwenzer*, *p. 339*]. Since it is the first time that the Parties went into business with each other [*CE1*, *p. 9*; *CE2, p. 10*], no usage of the business has been established by the Parties. Therefore, RESPONDENT's silence cannot be deemed as an acceptance thereby no agreement has been reached about resale among the Parties. To sum up, there is no contractual obligation of resale prohibition for RESPONDENT. CLAIMANT cannot claim damage based on the alleged resale prohibition.

CONCLUSION OF ISSUE C: CLAIMANT's request for an increase in purchase price is unjustified, that is, apparently, it is not entitled to the payment of 1,250,000 USD either under clause 12 of the Sales Agreement or under the CISG.

PRAYER OF RELIEF

Therefore, based upon the foregoing arguments and the evidence in this case, it is requested with all due respect that this Tribunal finds in RESPONDENT's favor that:

1. The Tribunal has no jurisdiction or power to adapt the contract;
2. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings;
3. CLAIMANT is not entitled to the payment of 1,250,000 USD.

Respectfully signed and submitted by counsel on 24 January 2019.

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