SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR
31ST MARCH TO 7TH APRIL 2019

MEMORANDUM FOR RESPONDENT

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

COUNSEL FOR RESPONDENT:

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LIST OF ABBREVIATIONS

$	Dollar (USD)
%	Percent
AC	Advisory Council
Art(s).	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Ex.	Claimant's Exhibit
Cl. Mem.	Claimant's Memorial
Cl. Notice	Claimant's Notice of Arbitration
Cmmt(s).	Comment(s)
DDP	Delivered Duty Paid
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
JAMS	Judicial Arbitration and Mediation Services
NAFTA	North American Free Trade Agreement
New York Convention	United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).
No.	Number
p.	Page
para(s).	Paragraph(s)
PECL	Principles of European Contract Law
PO 1/2	Procedural Order 1/2
Res. Ex.	Respondent's Exhibit
Res. Answer	Respondent's Answer to the Notice of Arbitration
UCC	Uniform Commercial Code
ULIS	Uniform Law on International Sales

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Law
v.	Versus
VAT	Value Added Tax

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INCOTERMS 2010	Incoterms Rules 2010	107
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STATEMENT OF FACTS

1. Black Beauty [RESPONDENT] desires to become one of the world's leading breeders of racehorses. In pursuit of this goal, RESPONDENT, based in Equatoriana, entered into negotiations with Phar Lap Allevamento [CLAIMANT], a renowned breeder headquartered and registered in Mediterraneo.

2. On **21 March 2017**, RESPONDENT contacted CLAIMANT by email requesting a price quotation for 100 doses of frozen semen from Nijinsky III, the star among CLAIMANT's stallions. The temporary lift on the ban previously instituted by the government of Equatoriana on artificial insemination for race horses provided the opening for negotiations.

3. Between **March and May 2017**, the parties' negotiations centered on two issues: the hardship and arbitration provisions, which are the subject matter of clauses 12 and 15 of the Contract, respectively.

4. First, the parties' negotiations addressed the allocation of risks arising from unforeseen circumstances. RESPONDENT insisted on delivery on the basis of DDP, according to which the seller would assume all the responsibility, risk and cost associated with delivering the good. CLAIMANT accepted delivery DDP in return for an increase in the price by $1.000 USD per dose. [CL. EX. C4].

5. In addition, CLAIMANT wished to include a hardship clause in the Contract to address changes in customs regulation or import restrictions. Specifically, CLAIMANT proposed adopting the ICC hardship clause. RESPONDENT, however, made clear that the ICC hardship clause suggested by CLAIMANT was too broad. [RES. EX. R3]. In the end, a very narrow hardship reference was included in the force majeure clause. This clause notably excludes any reference to tariffs.

6. Second, throughout the negotiations over the law governing the Arbitration Agreement, neither party suggested that the Arbitration Agreement would be governed by any law other than that of the seat of arbitration. In a draft Arbitration Agreement sent from RESPONDENT to CLAIMANT on **10 April 2017,** RESPONDENT distinguished between the law governing the Sales Agreement and that governing the Arbitration Agreement. RESPONDENT also proposed that the Arbitration Agreement be governed by the law of the seat of arbitration. [RES. EX. R1]. Besides a suggested change to the seat of arbitration, CLAIMANT's response on **11 April 2017** otherwise accepted the

original proposal. Importantly, CLAIMANT did not comment on the law governing the Arbitration Agreement. [RES. EX. R2].

7. In the end, the Parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on **12 April 2017**. They had to be replaced for the finalization of the contract.

8. On **6 May 2017**, the parties signed the Frozen Semen Sales Agreement [Contract] whereby CLAIMANT would ship 3 installments of Nijinsky III's frozen semen, 100 doses each, for the purchase price of US $100.000, which RESPONDENT would pay in two installments.

9. RESPONDENT sent the first shipment of 25 doses on **20 May 2017** and the second shipment of 25 doses on **3 October 2017**. Two months before the last shipment of 50 doses was due, Mediterraneo's newly elected President, Ian Bouckaert, announced 25% tariffs on agricultural products from Equatoriana.

10. The Equatorianian government retaliated on **19 December 2017** by imposing 30% tariffs on selected products from Mediterraneo, including on animal semen, effective **15 January 2018**.

11. It did not cross the parties' minds that frozen racehorse semen was listed in the schedule released by the Equatorianian Ministry of Agriculture of the products that fell under the new tariffs-regime. CLAIMANT discovered the tariff would apply to the third shipment of Nijinsky III's semen when Ms. Napravnik asked for customs clearance on 19 January 2018. [PO 2, P. 58, PARA 26].

12. On **21 January 2018**, Ms. Napravnik contacted Mr. Shoemaker to ask for a renegotiation of prices. Mr. Shoemaker made clear in the telephone conversation that his understanding of the Contract was that CLAIMANT had to bear the costs but that he would verify that with the company's legal department and management. He also pointed out that he had no authority to agree on an adaptation [RES. EX. R4]. CLAIMANT sent the third shipment of 25 doses as contracted on **22 January 2018**.

13. On **12 September 2018**, RESPONDENT's computer systems suffered a large-scale hack, in which information regarding Black Beauty's confidential participation in separate arbitrations, as well as Black Beauty's submissions in these arbitrations, became compromised. [FASTTRACK LETTER, PO 2, P. 50].

SUMMARY OF ARGUMENT

14. The Arbitration Agreement does not give the tribunal jurisdiction to adapt the Contract. The Agreement is governed by Danubian law, under which a tribunal cannot adapt a contract without express contractual authorization. Although the Sales Agreement is governed by Mediterranean law, international arbitration agreements are treated as independent contracts that may be governed by a different body of law than that governing the underlying agreement. Here, the parties chose to situate this arbitration in Danubia, subject to Danubian arbitration law. This decision implies the choice to subject the Arbitration Agreement as a whole to Danubian law. And if there were no implied choice of law in the Arbitration Agreement, the New York Convention would require the tribunal to apply the law of the arbitral seat—Danubia—by default. CLAIMANT's contention that RESPONDENT should have known CLAIMANT was unable to sign a contract subject to foreign law should be rejected. It presupposes what it seeks to prove, since Danubian law rejects the use of extracontractual evidence to interpret contractual language. Moreover, it ignores evidence from the negotiation of the Contract that CLAIMANT was aware the Arbitration Agreement would not be governed by the same law as the Sales Agreement. [**I**].

15. The Tribunal lacks powers under the Arbitration Agreement to adapt the Contract under both Danubian and Mediterranean law. Without an explicit adaptation clause, the Tribunal cannot adapt a contract under Danubian Law. [PO 2, P. 61, PARA 45]. Under Mediterranean law, parties must agree on contractual terms. Here, there was never any agreement by the parties to allow for adaptation of the contract. Should the Tribunal grant itself powers to adapt, the substantive remedies it can provide are nonetheless very limited. Even when parties experience heavy losses instead of the expected profits, the contract must still be respected. Also, if a court allows for adaptation, the adaptation will not necessarily reflect in full the loss entailed by the change in

circumstances. This is consistent with interpretations in various jurisdictions, who rarely adapt contracts for hardship. [**II**].

16. The Tribunal must not admit confidential evidence from a separate arbitral proceeding, regardless of how CLAIMANT obtained it. Even if CLAIMANT did not itself take any legal action, CLAIMANT is necessarily aware that this evidence is not publicly available and was not obtained by legal means. CLAIMANT's insistence on nonetheless obtaining this evidence is a violation of the foundational principles of good faith and procedural fairness. Arbitral tribunals as a general matter are highly skeptical of evidence that may have been obtained illegally, and this Tribunal should make no exception to this general rule. [**III**].

17. The CLAIMANT is not entitled to any adaptation of the Contract. Clause 12 of the Contract does not entitle the CLAIMANT to an adaptation because the parties did not intend for changes in customs and import conditions to be included in clause 12, and the RESPONDENT did not commit to any adaptation of price following the institution of the tariffs. The hardship provision of UNIDROIT also does not entitle the CLAIMANT to any adaptation. Further, clause 12 of the Contract constitutes a derogation of Article 79 of the CISG, which is inapplicable to this case because the parties have adopted solutions different from those in the CISG. Even if the arbitral tribunal decides that clause 12 does not derogate from the CISG, Article 79 does not entitle the CLAIMANT to an adaptation because an increase in tariffs does not constitute an insurmountable obstacle or an impediment within the meaning of the Article. [**IV**].

18. CLAIMANT, the seller, bears the burden of paying all duties under DPP. Parties must explicitly contract to shift the risk burden. Otherwise, the burden is assigned to the seller. Even if this tribunal accepted CLAIMANT's interpretation of DDP contrary to all accepted understandings of Incoterms, CLAIMANT still should bear the burden as the cheaper insurer and superior risk bearer, due to its control over the delivery process. Additionally, CLAIMANT is not entitled to the full $1.250.000 as it did not fulfill the duty to mitigate the losses incurred. Moreover, if CLAIMANT is to receive some amount to counteract the tariff costs, the adaptation should only cover the excessive portion of the costs and not the entire amount. [**V**].

ARGUMENT

I. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA.

19. Because the parties decided to seat this arbitration in Danubia, the Arbitration Agreement is governed by Danubian law. Like any arbitration agreement, the one at issue here must be "*considered to be a separate and autonomous agreement from the contract in which it is contained.*" [REDFERN/HUNTER 338]. This means that the Arbitration Agreement "*must be treated separately when determining the applicable law.*" [FOUCHARD/GAILLARD/GOLDMAN 222]. Scholarly authority and international practice both hold that, absent a choice to the contrary, the selection of an arbitral seat also implies a decision to govern an arbitration agreement by the law of the seat. The fact that the parties chose Mediterranean law to govern the rest of the contract tells us nothing about the choice they made for the Arbitration Agreement. Their decision to seat this arbitration in Danubia shows that the Arbitration Agreement is governed by Danubian law.

A. The Tribunal should determine the law governing the Arbitration Agreement separately from the Sales Agreement.

20. "*[A]n arbitration clause is considered to be a separate and autonomous agreement from the contract in which it is contained.*" [REDFERN/HUNTER 338]. This "*doctrine of separability*," [REDFERN/HUNTER 338], or "*autonomy*," [FOUCHARD/GAILLARD/GOLDMAN 222], ensures that the arbitration agreement survives a challenge to the validity of the main contract and so authorizes an arbitral tribunal to hear disputes about a contract whose existence is in question. "*[O]ne of the most direct consequences of th[is] separability presumption is the possibility that the parties' arbitration agreement may be governed by a different law than the one governing their underlying contract.*" [BORN 475]. So even though the parties agreed that the main sales agreement would be governed by Mediterranean law, when the tribunal undertakes a "*traditional choice of law*" analysis, "*the principle of the autonomy of the arbitration agreement from the main contract requires each to be treated separately when determining the applicable law.*" [FOUCHARD/GOLDMAN/GAILLARD 222].

21. CLAIMANT departs from these widely recognized principles when it urges the tribunal to mechanically apply the law of the main Contract to the Arbitration Agreement. CLAIMANT conjures

up a rule according to which the Arbitration Agreement only becomes independent of the main Contract when a "*total challenge*" to the jurisdiction of the arbitral tribunal is made. [CL. MEM. PARA 13]. Until then, the Arbitration Agreement is supposedly an absolute creature of the main Contract and is thus governed by the main Contract's choice of law clause.

22. Not only is this notion contradicted by the leading authorities, it also leads to clearly absurd results. CLAIMANT cites Redfern for their claim that there is no separation between main contract and arbitration agreement when there is only a "*partial challenge*" to arbitral jurisdiction. [CL. MEM. PARA 13]. But this claim appears nowhere in Redfern, which in fact says just the opposite: the "*doctrine of separability"* means precisely that *"an arbitration clause is considered to be a separate and autonomous agreement from the contract in which it is contained.*" [REDFERN/HUNTER 338, *CONTRA* CL. MEM. PARA 12 (arguing that "*separability is not synonymous with 'independence' or 'autonomy.'*")].

23. It is true that the separability doctrine is only a "*presumption*" of separability, but "*[o]ne of the most direct consequences of the separability presumption is the possibility that the parties' arbitration agreement may be governed by a different law than the one governing their underlying contract.*" [BORN 475]. This is true whether or not the tribunal's jurisdiction is challenged. For example, an arbitration agreement may need to be interpreted, and "*the interpretation of an international arbitration agreement should generally be subject to the law applicable to the existence and substantive validity of that agreement.*" [BORN 1398]. That applicable law is not necessarily the same as that governing the underlying contract.

24. The contrary position, which CLAIMANT adopts, leads to absurd results. Two parties arbitrating a contract governed by Brazilian law in England would apply Brazilian law to their arbitration agreement—but if one party raised a "total" jurisdictional challenge to the arbitration agreement, the arbitration agreement would now break off from the main contract and might be governed by English law. The law governing the agreement would change in the midst of arbitration: not because of something the parties agreed to when they signed the arbitration agreement, but because of one party's unilateral decision to raise a particular kind of claim in arbitration. Not merely inconsistent, such a rule would invite parties to raise frivolous arguments in order to trigger this post-hoc "separation."

25. The reality is much simpler and more sensible: an arbitration agreement's autonomy precedes any challenge to the arbitral tribunal's authority. Whether that autonomy is total, or partial, or better described as "separability," is irrelevant here. What matters in the present dispute is that the Arbitration Agreement is sufficiently distinct from the Sales Agreement that it "*may be governed by a different law*" than that provided for in the Sales Agreement's choice-of-law clause. [BORN 475]. This, in turn, requires that the Arbitration Agreement "*be treated separately when determining the applicable law.*" [FOUCHARD/GOLDMAN/GAILLARD 222].

B. The Arbitration Agreement is governed by Danubian Law.

26. Because the parties chose to locate this arbitration in Danubia, they implicitly chose to govern the Arbitration Agreement by Danubian law. Moreover, if there were any doubt about the parties' choices, applying the law of the seat to the Agreement is consistent with the prevailing practices of international arbitration.

27. There is no dispute that the parties expressly chose to situate this arbitration in Danubia, [CL. EX. C5], and this is compelling evidence that they intended Danubian law to govern the Arbitration Agreement. Tribunals frequently apply the law of the seat to arbitration agreements even when the parties have not chosen the seat. And "*the value of the seat as an indicator of the choice of law is at its strongest where the parties themselves . . . have made the choice.*" [FOUCHARD/GOLDMAN/GAILLARD 227-28]. The English Court of Appeal agrees that parties' choice of an arbitral seat is strong evidence that they intended their arbitration agreement to be governed by the law of the seat. Contracting parties are usually aware that "*the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. . . . This tends to suggest that the parties intended [the law of the seat] to govern all aspects of the arbitration agreement.*" [SULAMÉRICA PARA 29].

28. In *Sulamérica*, the court held that the arbitration agreement was governed by the law of the seat even though other portions of the parties' dispute resolution procedures were expressly governed by Brazilian law. The situation in this arbitration is much more straightforward: the

Sales Agreement is governed by Mediterranean law, and the Arbitration Agreement is governed by Danubian law. The sections of the Contract discussing dispute resolution never mention Mediterranean law, consistent with the parties' intent to submit their disputes to neutral procedures. [*See* RES. EX. R2].

29. Even where "*the parties have not chosen a law governing the arbitration, the seat of the arbitration is undoubtedly considered to be the most significant factor in the determination of the applicable law.*" [FOUCHARD/GAILLARD/GOLDMAN 225]. This is because the arbitration agreement "*will normally have a closer and more real connection*" with the seat of the arbitration than with the nation whose law governs the underlying contract. [C V. D PARA 28]. An arbitration agreement "*has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.*" [SULAMÉRICA PARA 32].

30. Danubia has the "closest and most real connection" with the parties' Agreement to resolve their disputes in Danubia, and thus subject to Danubian arbitration law. This Agreement has no "*close juridical connection with the system of law governing"* the parties' Agreement to sell horse semen*, "whose purpose is unrelated to that of dispute resolution.*" [SULAMÉRICA PARA 32]. Thus, it is most appropriate to govern the Agreement by Danubian law.

31. Moreover, applying the law of the seat to the Arbitration Agreement is consistent with international practice under the New York Convention, which all states involved have signed. "*Given the generally recognized principle of the autonomy of the arbitration clause on the one hand, and the fact that the law applicable to the arbitration clause is rarely the subject of a specific stipulation, on the other, most national courts' decisions under the New York Convention have applied the law of the country where the award was rendered*"—that is, the law of the seat. [ICC CASE NO. 14046 (holding that, where "*arbitration clause d[id] not contain any reference to the law applicable to it,*" it was proper to apply "*the law of the seat of the arbitration*")].

C. Evidence from the negotiation of the Contract should not be considered, nor does it favor the CLAIMANT.

32. CLAIMANT insists that, although there is no evidence in the Arbitration Agreement itself, evidence from the negotiation of the Contract suggests that the parties intended Mediterranean law to apply. Even if it were convincing on the facts, this argument should be rejected because it begs the question. The "four corners rule" of Danubian contract law regards contractual language as the best evidence of contracting parties' intent and excludes "*extraneous evidence*" from consideration. [PO 1, P. 51]. Thus, CLAIMANT's evidence that Mediterranean law applies to the Arbitration Agreement is admissible only if we have already decided that Mediterranean law applies. Because that is precisely what is in dispute, the tribunal should reject this evidence. Instead, it should examine the language of the Arbitration Agreement to determine what the parties intended.

33. Even if the tribunal does consider the drafting history of the contract, however, this evidence does not support CLAIMANT's position. RESPONDENT had no reason to be aware of CLAIMANT's unexpressed desire to subject the Arbitration Agreement to Mediterranean law. On **10 April 2017**, RESPONDENT's representative Mr. Antley specifically distinguished between the law governing the Sales Agreements and the law governing the Arbitration Agreement. He proposed a clause that specified that both the seat of the arbitration and the law of the arbitration clause would be Equatorianian; this was considered appropriate "*in light of the fact that the Sales Agreement is governed by the law of Mediterraneo.*" [RES. EX. R1]. Mr. Antley's proposal emphasized the difference between the Sales Agreement and the Arbitration Agreement, and in particular made clear that they might be governed by different laws. It also reflected the widespread practice of submitting arbitration agreements to the law of their seat, rather than to the law of the underlying contract. CLAIMANT's representative, Ms. Napravnik, responded on **11 April** by proposing arbitration in a neutral country, Danubia, and noting that "the Sales Agreements" would still be governed by Mediterranean law. [RES. EX. R2]. She said nothing about which law would govern the Arbitration Agreement.

34. CLAIMANT now insists that Ms. Napravnik meant to say that the Arbitration Agreement would also be governed by Mediterranean law, and argues that RESPONDENT must have known this because

CLAIMANT's representative mentioned company policy requiring special approval for "*contract[s] submitted to a foreign law.*" [RES. EX. R2; CL. MEM. PARA 18]. But this imputes far too much knowledge of CLAIMANT's internal policies to RESPONDENT. Does a forbidden "*contract submitted to a foreign law*" refer only to substantive agreements, or does it include a dispute resolution agreement governed by non-Mediterranean law? After all, every arbitration is at least partly governed by the arbitration law of the forum jurisdiction; does this make every agreement to arbitrate in a foreign country an agreement "*submitted to foreign law*"? [REX. EX. R2]. When CLAIMANT's representative said that "*[i]t would . . . be possible to agree on arbitration in a neutral country,*" was this because this would not violate CLAIMANT's policies or (given that Danubian law is still a "foreign" law) because approval for an arbitration agreement seated in and governed by Danubian law would be easy to obtain? The answers are hardly obvious from the email of **11 April**. The parties did not agree that, when Ms. Napravnik said Mediterranean law would govern the "Sales Agreements," she also meant it would govern the Arbitration Agreement. It is much more likely that the parties assumed the law of the seat would be the law of the Arbitration Agreement, just as was the case in Mr. Antley's **10 April** email. And even if there was no common assumption and no common agreement, Danubian law must still apply to the Arbitration Agreement, since the New York Convention applies the law of the seat in the absence of agreement by the parties. [BORN 499 ("*Commentary and court decisions are unanimous that [the New York Convention's] Article V(1)(a)'s default rule in the absence of choice-of-law by the parties, is the law of the arbitral seat.*")].

II. THE TRIBUNAL LACKS POWERS UNDER THE ARBITRATION AGREEMENT AND SALES AGREEMENT TO ADAPT THE CONTRACT TO MEET CLAIMS FOR ADDITIONAL REMUNERATION.

35. To adapt a contract, the tribunal must have the (1) procedural power and the (2) substantive power to do so. Procedural power refers to whether the Tribunal has jurisdiction to reach the adaptation question under the law governing the arbitration (*lex arbitri*). After establishing jurisdiction, substantive power refers to the substantive remedies a Tribunal is allowed to provide when adapting a contract according to its choice of substantive law and customs (*lex causae*). The Tribunal here has neither of these powers and should decline to adapt.

A. The Tribunal lacks power under the Arbitration Agreement to adapt the Contract.

36. Because the HKIAC rules do not explicitly address the Tribunal's jurisdiction to adapt, the Tribunal must interpret the contract under the applicable law and determine whether the law grants the tribunal jurisdiction and the ability to adapt the Contract.

37. The Tribunal should find that it lacks jurisdiction to adapt the Agreement. The parties have agreed that HKIAC rules should govern the arbitral proceedings. Article 19.1 of the Rules grants the Tribunal the power to rule on its own jurisdiction. [HKIAC ART. 19.1]. This deference to the Tribunal to determine its own jurisdiction is consistent with the near-universally accepted "*kompetenz-kompetenz*" doctrine, which states that arbitrators have the power to consider and decide the existence and extent of their own jurisdiction. [BORN 1048].

38. Under Danubian law, the Tribunal does not have jurisdiction to adapt the Sales Agreement because the Arbitration Agreement lacks an explicit adaptation clause. In Danubia, contracts should be interpreted according to the "Four Corners Rule." [PO 2, P. 61, PARA 45]. The Four Corners Rule means exactly that: contracts are to be interpreted only on the terms contained within their four corners. Evidence is not allowed to contradict, vary, add to, or subtract from the terms of a written contract. [ROSENGREN 6]. This means no extrinsic evidence, such as drafting history, should be considered by the tribunal. [ROSENGREN 6].

39. In practice, arbitrators applying the Four Corners Rule to contract interpretation have excluded extrinsic evidence. For example, in *Azpetrol Oil Services Group v. Azerbaijan*, an ICSID tribunal applying English law stated that the Four Corners Rule prevented it from relying on the parties' pre-contractual negotiations and subsequent conduct when interpreting the contract. [ICSID CASE NO. ARB/06/15]. In *Pangea Capital Management v. Lakian*, a JAMS tribunal applying Delaware law found that "*the intent of the parties is to be gleaned from the four corners of the document*" since the relevant contractual provisions were unambiguous. [JAMS CASE NO. 1425012628].

40. Here, the Sales and Arbitration Agreements do not mention the power to adapt, and the Tribunal may not use extrinsic evidence when interpreting the Contract. The Arbitration Agreement specifically grants the Tribunal power to handle disputes "*arising out of this contract*." [CL. EX.

C5]. Yet the dispute in question does not arise out of the Contract itself; CLAIMANT seeks adaptation in order to receive *additional remuneration outside of what is contained in the contract*. Neither the relief sought nor the type of dispute here is mentioned anywhere in the Agreement. RESPONDENT would never have agreed to a Contract of which the financial dimension is left to the discretion of the arbitrators. [RES. ANSWER, PO 2, P. 32, PARA 19]. Prayer for increased remuneration beyond the terms of the Contract takes this dispute outside the Contract, so it should not be heard by the Tribunal.

41. Moreover, CLAIMANT cannot rely on Clause 12 of the Sales Agreement to assert that the Tribunal has power to adapt. In its entirety, Clause 12 reads:

> "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*"

CLAIMANT only cites to the last phrase of Clause 12, without accounting for the clause's meaning when read as a whole. [CL. MEM., PARA 29]. The clause is meant to protect the CLAIMANT when unforeseen events prevent CLAIMANT from fulfilling its Contract obligations, and it clearly stipulates situations such as lost shipments or delivery delays. "*Comparable unforeseen events*" would similarly need to affect CLAIMANT's ability to fulfill the contract, which this tariff hike did not. Here, the third semen shipment was neither lost nor delayed, and CLAIMANT had no problem fulfilling its contractual obligations. CLAIMANT has already shipped the semen, and RESPONDENT has already received it. So, CLAIMANT cannot rely on Clause 12 to adapt since the conditions triggering the clause were not met. Because the Sales and Arbitration Agreements do not explicitly empower the Tribunal to adapt, the Tribunal cannot grant CLAIMANT's adaptation claim.

42. Even if the Tribunal accepts CLAIMANT's erroneous assertion that the Arbitration Agreement Is governed by Mediterranean Law, the Tribunal lacks jurisdiction to adapt the Arbitration Agreement. CLAIMANT argues that a broad understanding of the phrase "*arising out of*" grants the Tribunal jurisdiction to adapt under Mediterranean Law. [CL. MEM., PARA 24]. Although Mediterranean Law confers broader jurisdiction than Danubian Law and may permit

consideration of drafting history, it still does not mean that any and all disputes between the parties are subject to adaptation.

43. The parties intended and agreed upon a narrowly-worded arbitration agreement. Unlike the Model Clause for arbitration under the HKIAC Administered Arbitration Rules, the Arbitration Agreement purposefully does not grant the Tribunal power to rule on "*any dispute regarding non-contractual obligations arising out of or relating to [the contract].*" Leaving out the second clause indicates a mutual understanding that broader disputes regarding non-contractual obligations will not be heard by the Tribunal. In fact, in an email from RESPONDENT to CLAIMANT dated **10 April 2017**, RESPONDENT explicitly states they are trying to "*narrow[] down and streamline[]*" the "*fairly broad wording*" of the HKIAC Model Clause. [RES. EX. R1]. In response, CLAIMANT "*largely accept[ed]*" the proposal and only specified the place of arbitration. [RES. EX. R2].

44. Additionally, Mediterranean contract law is a verbatim adoption of the UNDROIT Principles, of which Article 3.1.2 states that: "*A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.*" The purpose of Article 3.1.2 is to make clear that "*the mere agreement of the parties is sufficient for the valid conclusion, modification or termination by agreement of a contract.*" [UNIDROIT PRINCIPLES, ART. 3.1.2, CMMT.]. Here, there was never any agreement by the parties to allow for adaptation of the contract. Phone conversations between Mr. Shoemaker and Ms. Napravnik in **January 2018** do not change this fact, since Mr. Shoemaker neither committed to any price adaptation nor did he have authority to do so. [RES. EX. R4]. Therefore, the Tribunal does not have the power to adapt the Contract under either Danubian or Mediterranean law.

B. <u>Should the Tribunal grant itself powers to adapt, the substantive remedies it can provide are nonetheless very limited.</u>

45. Even if the Tribunal decides it has jurisdiction to adapt the Contract, the substantive remedies it can provide are limited. CLAIMANT asserts that tribunals can adapt the contract when hardship clauses are present. [CL. MEM., PARA 31]. CLAIMANT further argues that tribunals can take the lead

in adapting the contract if the parties fail to agree during renegotiations. [CL. MEM., PARA 34-35]. CLAIMANT does not, however, address the scope of remedy that the Tribunal is allowed to provide via adaptation.

46. Commentary on the UNIDROIT Principles points to a limited remedial power. Article 6.2.1 of the UNIDROIT principles states that "[w]*here the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship*." The Commentary, however, clarifies this obligation: "*even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected*." [UNIDROIT PRINCIPLES, ART. 6.2.1, CMMT. 1]. This distinguishes between more onerous and excessively onerous unforeseen changes, and means that price adaptations should "*be limited to what is necessary to make performance bearable for the aggrieved party*." [BRUNNER 499].

47. This limitation is further clarified in other comments on the UNIDROIT Principles. Comment 7 to Article 6.2.3 states: "*the court will seek to make a fair distribution of the losses between the parties. This may or may not… involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will… have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.*" [UNIDROIT PRINCIPLES, ART. 6.23, CMMT. 7]. Taken together, commentary on the UNIDROIT hardship principle recognizes that the purpose of adaptation should not strictly be to restore the equilibrium of the contract, and should be limited in scope. [BRUNNER 499].

48. This approach to remedies under hardship is present in other jurisdictions as well. Article 6.111 of the Principles of European Contract Law (PECL) and its commentary are completely consistent with UNIDROIT. Even in Germany, a jurisdiction known for its broad "*Wegfall der Geschäftsgrundlage*" adaptation principle, remedies are reasonably limited. Rather than making full contract adjustments based on the cost of performance, many German courts will instead equally apportion changes in costs to both parties. [BRUNNER 500]. Here, CLAIMANT's request for additional remuneration due to loss of profit still requires that the contractual terms be

respected. Remedies should be limited to what makes performance bearable for the aggrieved party, and should aim towards reasonableness instead of true equilibrium.

49. In practice, arbitral tribunals are also hesitant to adapt contracts for hardship. For example, in *Switzerland v. Kosovo*, *Cessna Finance Corporation v. Gulf Jet LLC*, and *Enron Nigeria Power Holding v. Lagos State Government*, arbitral tribunals entertained questions about the interpretation and application of contractual hardship provisions. [ICC AWARD NO. 16369; ICC AWARD NO. 18769; ICC AWARD NO. 14417]. None of those tribunals, however, decided to adapt the relevant contracts under hardship. Even in *Switzerland*, where the ICC tribunal found that a collapsing commodity price rose to the level of hardship, the tribunal ultimately did not adapt since the contract already fairly apportioned the risk for price fluctuations between the parties. Here, the Sales Agreement fairly apportions price fluctuation risks, which is discussed more fully below. [INFRA SECTION V].

50. In sum, the Tribunal lacks power to adapt the Agreement under both Danubian Law and Mediterranean Law. If the Tribunal nevertheless grants itself adaptation powers, the substantive remedies it can provide are limited to achieving fairness for both sides, not contract equilibrium.

III. THE TRIBUNAL SHOULD NOT ADMIT EVIDENCE FROM A SEPARATE ARBITRAL PROCEEDING.

51. The Tribunal should refuse to sanction CLAIMANT's acquisition and submission of evidence from a separate arbitral proceeding. [CL. MEM. PARA 37]. Admitting such evidence would contravene public policy by undermining the norm of confidentiality that serves as a bedrock of international commercial arbitration, and would reward CLAIMANT's payment for and participation in potentially illegal conduct. Moreover, CLAIMANT has mischaracterized the state of its acquisition of this evidence and glossed over crucial differences between the instant proceeding and the cases and awards it cites.

A. The Tribunal should uphold the principle of confidentiality in arbitral proceedings.

52. While the CLAIMANT correctly notes that the Tribunal has discretion whether to admit this evidence [IBA EVIDENCE RULES ART. 9(1); HKIAC RULES ART. 22.2], CLAIMANT does not fully

acknowledge considerations that the Tribunal ought to make in making this decision. In assessing whether a legal impediment or privilege bars the admission of evidence, the Tribunal may take into account "*the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen*." [IBA EVIDENCE RULES ART. 9(3)(C)]. Both RESPONDENT and its opposing party in the alternate arbitral proceeding fully expected confidentiality throughout these proceedings, and continue to expect so. "*[I]t is well-settled in virtually all developed legal systems that the parties' autonomy with regard to the confidentiality of international arbitral proceedings will generally be recognized*." [BORN 2787]. This is consistent with the general view that confidentiality is *inherent* in arbitration. [WAINCYMER 798]. Compelling and intermingling the details of this other proceeding into the instant proceeding would thus violate the legitimate expectations of both RESPONDENT, and of the third party, and must not be permitted.

53. Incident to the basic principle of confidentiality is basic procedural fairness. Once confidentiality has been breached, allowing the products of that breach to be admitted as evidence in an arbitral proceeding renders the principle void and provides one party with an unjust gain from a wrongful act. This was affirmed and delineated in *Libananco v. Republic of Turkey*, in which the mere fact that Turkey was potentially privy to Libananco's confidential information sufficed to exclude Turkey's submissions that could have been consciously or unwittingly shaped by access to the information. [ICSID CASE NO. ARB/06/8]. In conducting an investigation into potential crime, Turkey had begun surveillance over Libananco, and thus became privy to confidential documents, negotiations, and strategies regarding Libananco's legal proceedings against it. While Turkish officials insisted that they neither looked at nor acted upon this confidential information, the tribunal nonetheless took a strong stand, recalling the lofty and fundamental tenets of international arbitration. The tribunal noted "*the right of parties both to seek advice and to advance their respective cases freely and without interference.*" [ICSID CASE NO. ARB/06/8 PARA 78]. The tribunal went even further, invoking "*the well-known saying, very frequently repeated in legal discussion, that it is not enough that justice should be done, it must also manifestly be seen to be done."* [ICSID CASE NO. ARB/06/8 PARA 79]. The import of these statements in the present matter must not be discounted. RESPONDENT retains the right to advance its respective case in the separate arbitral proceeding "*freely and without interference*." Justice cannot be done

as CLAIMANT seeks to undermine this right. Separate proceedings must be kept separate. Confidential information from another proceeding must remain outside the bounds of this confidential proceeding.

B. Despite CLAIMANT's assertions that documents from the alternate proceeding are in the public domain, CLAIMANT has acted in bad faith seeking to acquire the evidence.

54. CLAIMANT wrongly asserts that this evidence is "*in the public domain*." [CL. MEM. PARA 58]. This statement is misleading at best and intentionally false at worst. CLAIMANT has not yet even acquired this evidence, acknowledging that it "*is to be purchased from a company which provides information on the horse racing industry*." [CL. MEM. PARA 44]. Moreover, the Tribunal in the alternate proceeding has not yet issued an Award, and neither RESPONDENT nor its opposing party in the alternate proceedings has made public its submissions. As such, the only potential sources of this evidence are former employees of Black Beauty violating their post-employment non-disclosure agreements, or a hacking of RESPONDENT's internal databases. [FASTTRACK LETTER, PO 2, P. 50]. Either way, any knowledge of RESPONDENT's submissions in the alternate proceeding is the direct result of an illegal act. CLAIMANT has acknowledged it has agreed to purchase this information from "*a company that provides intelligence to the horse racing industry*." [CL. MEM. PARA 67]. CLAIMANT is necessarily aware, as Ms. Fasttrack's letter establishes, however, that the only way this company could have acquired this "intelligence" is by illegal means. As such, CLAIMANT's ability to purchase this information is evidence not of its existence in the public domain, but rather of CLAIMANT's participation in a black market.

55. Admitting this evidence would sanction CLAIMANT's payment for illegally acquired information and would reward CLAIMANT for acting in bad faith. CLAIMANT is either a participant in or is complicit in the violation of a legal privilege. Both as a matter of law and as a matter of policy, the Tribunal should not encourage these acts by treating this evidence as legitimate. Rather, the Tribunal should "*refuse to admit evidence that either results in procedural unfairness or was obtained in bad faith, thus violating the parties' obligation to act in good faith*." [SICARD-MIRABAL & DERAINS 208].

C. The decisions and rules that CLAIMANT cites in which tribunals have admitted illegally obtained evidence do not appropriately parallel the instant proceeding.

56. First, CLAIMANT asserts that Article 42 of the 2013 HKIAC Rules (now Article 45 in the 2018 Rules) carves out an exception to confidentiality, under which the instant proceeding falls. [CL. MEM. PARA 59]. CLAIMANT misinterprets the rule. Article 45.3 of the 2018 HKIAC Rules, the updated version of the particular provision CLAIMANT refers to, states that "*Article 45.1 does not prevent the publication, disclosure, or communication of information referred to in Article 45.1 by a party or party representative to protect or pursue a legal right or interest of the party.*" [HKIAC RULES ART. 45.3(A)(I)]. Thus, this "exception" CLAIMANT mentions refers solely to voluntary disclosures by a party to a proceeding in order to vindicate a right or interest. This refers not to CLAIMANT, but to the parties in the proceeding from which information is to be disclosed. The text of Article 45.1 makes this plain: "*[u]nless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration*." [HKIAC RULES ART. 45(1)]. CLAIMANT's reliance on this provision is thus misplaced.

57. More importantly, however, the fact that CLAIMANT referred to Article 45 as an "*exception to confidentiality*" is telling. It reveals that CLAIMANT does regard confidentiality as a bedrock principle of international arbitration that can only be overcome in limited circumstances. Given that CLAIMANT has misinterpreted Article 45, invalidating the relevance of this exception, the Tribunal should honor the confidentiality of the alternate arbitral proceeding.

58. Finally, CLAIMANT's citation of the *Caratube* award obscures an important difference in the instant proceedings. CLAIMANT notes that the *Caratube* Tribunal accepted leaked information as evidence, treating it as public knowledge. [CL. MEM. PARA 68]. In that case, however, the Tribunal admitted evidence that was hacked from the Government of Kazakhstan and published on a public website. [ICSID CASE NO. ARB/08/12]. There is a world of difference between information being freely accessible to all on a public website, already in the public domain, and the instant case. Here, as mentioned, CLAIMANT does not even possess this information and would need to pay someone who acquired it illegally in order to get it. Money cannot transmute something into the public domain. As such, *Caratube* should not be persuasive to this Tribunal.

59. In sum, the Tribunal must not allow CLAIMANT to acquire illegally obtained evidence and submit it in these proceedings. Doing so would violate RESPONDENT's legitimate expectations of confidentiality in international arbitration and would cast a pall over international public policy by rewarding actions that CLAIMANT took in bad faith.

D. While CLAIMANT has cited a small number of cases in which tribunals or courts have admitted illegally obtained evidence, CLAIMANT has cherry-picked these out of a larger universe in which other tribunals and courts have refused to do so.

60. Aside from obscuring ambivalent facts in cases they do cite, such as in *Caratube* discussed in the previous sub-section, CLAIMANT has misleadingly portrayed the legal landscape of international arbitrations and judicial proceedings as tending toward the admission of relevant or material evidence, regardless of how the evidence may have been obtained. However, Tribunals are largely reticent to admit evidence that may have emanated from a compromised source, especially when the Party seeking admission of that evidence knew or had reason to know of that compromise. [REISMAN 1088]. Examples of this are manifold. For instance, in *Methanex v. United States*, a NAFTA Chapter 11 claim brought to enjoin California's phase-out of a gasoline additive chemical manufactured in Canada, the Tribunal refused to admit evidence that was potentially obtained as a result of trespass by agents or employees of Methanex. Though such trespass could not be conclusively established, the Tribunal found that Methanex exhibited at least a reckless indifference as to whether its agents procured the documents illegally, and thus decided not to admit the documents as evidence. [METHANEX PARAS 53-55]. *Methanex* provides an instructive parallel. Even if CLAIMANT did not itself directly acquire evidence of Black Beauty's alternate arbitral proceeding, it has more than expressed indifference at the illegal acquisition by a third party. Indeed, CLAIMANT actively condones and encourages such illegality by seeking to purchase a copy of what has been acquired. The Tribunal must not let this stand.

IV. THE Claimant IS NOT ENTITLED TO THE PAYMENT OF $1.250.000 USD OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF PRICE.

A. Clause 12 of the Contract does not entitle CLAIMANT to adaptation of the Contract.

1) The parties did not intend for changes in customs and import conditions to be included under clause 12.

61. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. [PO 1, P. 52, PARA 4]. As such, the interpretation of clause 12 of the Contract is governed by Article 4.1 of the UNIDROIT Principles. Specifically, Article 4.1.1 states that "*[a] contract shall be governed according to the common intention of the parties.*"

62. CLAIMANT fails to demonstrate that it was the "*common intention*" of the parties to include changes in customs and import conditions under clause 12 (the "*hardship clause*"). In determining the presence of a "*common intention,*" Article 4.3.1 directs the Tribunal to examine "*preliminary negotiations between the parties.*"

63. A common intention to include changes in tariffs is manifestly absent in the preliminary negotiations leading up to the Contract. First, RESPONDENT insisted on delivery on the basis of DDP whereby the seller assumes all the risks associated with delivering goods to the buyer. [CL. EX. C3]. CLAIMANT accepted DDP in a subsequent communication by Ms. Napravnik. [CL. EX. C4].

64. Changes in tariffs also do not fall under any of the explicit provisions of hardship in clause 12 of the contract: tariffs do not constitute, for example, missed flights, weather delays, acts of God, or health and safety requirements. In particular, the additional tariffs imposed are a matter of *trade dispute* and *not* a matter of quarantine or inspection laws.

65. CLAIMANT may counter that in the same communication it disavowed risks associated with changes in customs regulation or import restrictions. However, to establish that it was the common intention of the parties to include changes in customs regulations or import restrictions on the hardship clause, CLAIMANT must show that RESPONDENT agreed to such an inclusion.

66. RESPONDENT's agreement is exactly what is missing here. RESPONDENT made no statement agreeing to an inclusion of customs regulations or import restrictions under the hardship clause. To the

contrary, RESPONDENT understands DDP to mean "all risks," including changes in customs regulations or import restrictions, had to be borne by CLAIMANT. [RES. EX. R4]. Moreover, RESPONDENT's statements throughout contract negotiations regarding the scope of the hardship clause indicate RESPONDENT's intent not to release CLAIMANT from obligation to assume the costs of newly imposed tariffs.

67. Representing RESPONDENT, Mr. Antley indicated that the ICC hardship clause suggested by CLAIMANT was too broad. [RES. EX. R3]. Mr. Krone, Mr. Antley's successor, likewise told CLAIMANT that the ICC hardship clause was too broad for the purposes of this contract. [PO 1, P. 56, PARA 12]. Ultimately, the parties agreed on the inclusion of a "*narrow hardship reference,*" which now appears as Clause 12 in the Contract. [RES. EX. R3].

68. CLAIMANT asserts that the ICC hardship clause and clause 12 of the Contract use "*similar wording*" [CL. MEM. PARA 92]. This is a mischaracterization. Clause 12 is distinguishable from the ICC hardship clause in that it specifically mentions "*additional health and safety requirements*" as an example of hardship. Under the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other) in contract interpretation, if a general category is limited by specific examples, then anything not specified is excluded from the application of the general rule. [MUREINIK 264; FRIDMAN 15]. In this case, the hardship provision in clause 12 only applies to additional health and safety requirements, and since tariff changes are a matter of trade dispute rather than health or inspection law, they do not fall under clause 12. Indeed, CLAIMANT brought up this matter in Ms. Shoemaker's communication. [CL. EX. C4].

69. In that same communication, CLAIMANT also demanded that the hardship clause address risks associated with "*changes in customs regulation or import restrictions.*" The absence of this latter phrase in clause 12 is conspicuous. The issue of tariffs did not make it into the wording of the hardship clause, even though CLAIMANT made it an issue of salience during the preliminary negotiations. The silence of the hardship clause on the issue of customs regulation suggests two possibilities, neither of which helps CLAIMANT's case. One possibility is that the issue of customs regulation dropped from the negotiating agenda when Mr. Ferguson took over Ms. Napravnik's position as lawyer for CLAIMANT. Another possibility is that RESPONDENT disagrees with CLAIMANT on the issue of customs regulation.

70. CLAIMANT may counter that whatever RESPONDENT's views on customs regulation specifically, RESPONDENT agreed to a hardship clause where hardship was an event caused by healthy and safety requirements or by "*comparable unforeseen events.*" On this view the tariffs imposed by Equatoriana qualify as "*comparable unforeseen events.*"

71. This counterargument, however, misses the mark. Under UNIDROIT Principles, interpretation of the word "*comparable*" is likewise governed by the common intention of the parties. While CLAIMANT may think the two are comparable, RESPONDENT made no statement indicating that it viewed customs regulation as comparable to health and safety requirements. Even if RESPONDENT agreed with CLAIMANT that the proper standard for comparability was expensiveness, the tariff imposed by Equatoriana did not raise the cost by the same percentage specifically benchmarked by RESPONDENT (40%). [CL. EX. C4].

2) RESPONDENT did not commit to any adaptation of the price following the institution of the tariff.

72. CLAIMANT 's phone conversation with Mr. Shoemaker on **21 January 2018** does not constitute any binding commitments on RESPONDENT. RESPONDENT was only asking CLAIMANT to fulfill its obligations for the Contract and nothing was affirmatively renegotiated. Although CLAIMANT may have requested renegotiations, there had been no concomitant entering of renegotiations by RESPONDENT. [CL. MEM. PARA 78]. Nor did CLAIMANT accept any duty to pay an increased price due to the tariffs.

73. In his discussion with Ms. Napravnik, Mr. Shoemaker merely stated a conditional assertion: 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.*" [RES. EX. R4 (emphasis added)]. Such a conditional statement merely states the obvious: that *if* the Contract places a specific duty on RESPONDENT, *then* of course they will comply with that duty. But in uttering this statement, Mr. Shoemaker never agreed to enter in negotiations, nor did he accept the duty of paying an increased price due to tariffs.

74. Rather, he made clear that he was a non-lawyer who was not involved in the negotiations and had no familiarity with the Contract. He explicitly stated he would have to confer with his

superiors to verify the Contract terms and the scope of any contractual obligations because he lacked the authority to make any commitments. [RES. EX. R4]. And he reiterated his preliminary understanding of the Contract that CLAIMANT had to bear the costs: the complete opposite of what CLAIMANT argues. [PO 1, P. 56, PARA 10].

75. Julie Napravnik, by contrast, was an experienced attorney chiefly responsible for all of CLAIMANT's client contractual relations who was intimately involved in the negotiation of the original Contract [CL. EX. C8]. She admits that Mr. Shoemaker stated "*he had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment.*" [CL. EX. C8]. She did know, or should have known, that Mr. Shoemaker neither intended nor had the actual or apparent authority to enter in any agreements, as he made clear several times. [RES. EX. R4]. CLAIMANT's *ex post* assertion that Mr. Shoemaker was "*officially in charge of the matter*" is neither accurate nor a reasonable assumption. [CL. MEM. PARA 82]. Ms. Napravnik readily admitted that Mr. Shoemaker was not authorized to agree to renegotiate the terms of the Contract or bear the costs of the additional tariff, and so it was impossible for any renegotiation to have happened.

76. Ms. Napravnik asserts that Mr. Shoemaker "*was certain that a solution would be found through negotiation given the good relationship between the Parties and their interest in future business.*" [CL. EX. C8]. However, even by Ms. Napravnik's account, Mr. Shoemaker never gave any written or oral confirmation that RESPONDENT agreed to the price change, despite her "*impression*" to the contrary. [CL. EX. C8].

77. Expressing a desire for constructive future trade relations, without any commitment to negotiate or accept the price change, is not a "*choice*" to accept the "*burden of unanticipated risks*" as CLAIMANT asserts. The ambition to have future relations does not in any event represent any implied or express commitment to accept all tariff costs that are contractually borne by the seller CLAIMANT, contrary to CLAIMANT'S understanding. [CL. MEM. PARA 81].

78. In fact, Mr. Shoemaker rigorously stuck to a set of talking points that explicitly were not intended to be a promise to enter into negotiations or agree to bear the bulk of additional costs. [RES. EX. R4]. At no point did RESPONDENT agree that the hardship clause in the Contract caused RESPONDENT

to bear the costs of the tariff, despite the unsupported assertions of CLAIMANT. [CL. MEM. PARA 82]. Thus, in this case, we have an instance where the parties did not intend the same outcome. Under Article 4.1(2) of UNIDROIT Principles, when conflicting intentions, based on a mistaken assumption, lack a meeting of the minds, the final outcome is dictated by what a reasonable person would have thought.

79. CLAIMANT did not act reasonably in this case. According to Ms. Napravnik, she acted based on her belief that Mr. Shoemaker provided a legally binding promise to find a solution, which presumably in her mind would be to bear the bulk of the additional costs. [CL. EX. C8]. This mistaken belief was unreasonable, compared to what any merchant in a similar situation would assume.

80. As explained above, Mr. Shoemaker reiterated he did not have the authority to make any promises nor did he intend to do so. He merely made a conditional statement that required verifying any contractual obligations with his superior. Such a conditional statement would be clear to any negotiator, much less one of Ms. Napravnik's expertise and sophistication, to function as a preliminary qualifier, not a foray into negotiation. A binding commitment or agreement it most certainly was not, despite CLAIMANT'S faulty understanding [CL. MEM. PARA 82]. Ms. Napravnik does not have the excuse of inexperience to counteract her mistaken and baseless assumption, and CLAIMANT should not enjoy the benefit of the doubt.

81. CLAIMANT admits that its interpretation of Mr. Shoemaker's conditional statement was the sole reason that it delivered the horse semen. [CL. MEM. PARA 79]. Because CLAIMANT'S interpretation of this statement is unreasonable as discussed above, CLAIMANT should be held accountable for its business decision to deliver the semen and accept the costs of the tariff. CLAIMANT made the choice to rely on an unreasonable interpretation of a conditional statement, despite all countervailing indicators.

3) The hardship provision of the UNIDROIT Principles does not entitle CLAIMANT to adaptation of the Contract.

82. CLAIMANT is wrong to suggest that Article 6 of the UNIDROIT Principles provides another basis for adaptation based on hardship. [CL. MEM. PARA 94]. In particular, CLAIMANT'S argument that the

tariff adopted by Equatoriana satisfies all the conditions enumerated in Article 6.2.2 of the UNIDROIT Principles does not hold.

83. In order to qualify as hardship within the meaning of Article 6, the event must first have occurred or become known to the disadvantaged party after the conclusion of the contract. Second, the disadvantaged party could not have reasonably taken the event into account at the time of the conclusion of the contract. Third, the event must have been beyond the control of the disadvantaged party. Fourth, the disadvantaged party must not have assumed the risk of the events. [UNIDROIT PRINCIPLES ART. 6.2.2].

84. The imposition of the tariff by Equatoriana does not satisfy the second and fourth requirements of the hardship provision. The fourth requirement is addressed in Section V below, where it is shown that CLAIMANT assumed the risk associated with the imposition of tariffs by agreeing to DDP. The present section focuses on the second requirement and shows that CLAIMANT could have reasonably taken the hardship into account.

85. While the institution of the tariff by the government of Mediterraneo and the retaliatory tariff by the government of Equatoriana were instituted after the conclusion of the Contract, CLAIMANT could have reasonably foreseen this sequence of events during the negotiating phase. That President Bouckaert subscribed to protectionism was public knowledge when the parties entered into negotiation. In **January 2017**, he committed to a protectionist approach during his election campaign. In **April 2017**, as negotiations between the parties were underway, President Bouckaert took measures consistent with his campaign promise. In particular, President Bouckaert raised the stakes by framing the issue of reliance on agricultural goods produced by other countries as a national security threat. [CL. EX. C6]. Moreover, in **5 May 2017**, he appointed a staunch protectionist as his "*superminister*" for agriculture, trade and economics. [PO 1, P. 56, PARA 23].

86. CLAIMANT may counter that Equatoriana's retaliatory measure was unexpected, because Equatoriana has historically avoided direct retaliatory measures. Given the extremity of President Bouckaert's policy, however, it was not reasonable for CLAIMANT to discount the possibility. In **April 2017**, analysts were "*surprised*" by the measures taken by President Bouckaert as they went

beyond the "*worst expectations.*" [PO 2, P. 56, PARA 23]. Given the atmosphere of shock and surprise, it was incumbent on CLAIMANT to keep abreast of the news for any changes in Equatoriana's trade policy as it was negotiating the terms of the contract. Hence, expecting Equatoriana to act as it had done before was unreasonable.

87. Alternatively, CLAIMANT may point out that inclusion of frozen semen goods in the schedule of tariffs imposed by the government of Equatoriana was unforeseeable because semen is not typically considered an "*agricultural good*." Whether or not CLAIMANT believed horse semen was an agricultural good during the negotiation is immaterial, however, because the standard articulated in Article 6.2.2 of the UNIDROIT Principles is what it was reasonable for CLAIMANT to believe. U.S. commercial law, for example, defines "*agricultural goods*" so as to include products of livestock, not just plant-related goods. [7 U.S. CODE § 451]. Hence, CLAIMANT should have reasonably expected horse semen to be included in the schedule of tariffs.

B. Clause 12 of the Contract constitutes a specific derogation of Article 79 of the CISG.

88. CLAIMANT does not address at all the possibility that Clause 12 of the contract may constitute a derogation of Article 79 of the CISG, rendering the CISG inapplicable to this case.

89. According to Article 6 of the CISG, "*parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*" [CISG ART. 6]. With respect to derogation of particular provisions, the Secretariat Commentary on the 1978 draft of the CISG states that parties "*may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention*" [SECRETARIAT COMMENTARY, ART. 6]. Therefore, contractual provisions different from or contrary to provisions of the CISG on the same subject matter constitute derogations from those CISG provisions.

90. Since the commentary emphasizes the "*non-mandatory character of the Convention,*" parties who have derogated from a specific CISG provision should be considered to be governed by the contractual provision that they have adopted for their agreement. [SECRETARIAT COMMENTARY, ART. 6]. If the standard for derogation is met (i.e., if the contract provides for a solution different from

that of the CISG), the parties are no longer subject to the CISG provisions but are instead subject to the provisions of the contract. The Secretariat Commentary's emphasis on the non-mandatory nature of the CISG serves to promote party autonomy, and therefore the standard for derogation set out in Article 6 of the CISG (i.e., contract providing for different solutions) should not be read strictly. Any contract provision that is on the same subject matter as a CISG provision, and which provides for different solutions from the CISG, should be ruled a derogation of that CISG provision.

91. Case law points in the same direction. The Court of Arbitration of the International Chamber of Commerce has stated that "*[w]hen a contractual clause governing a particular matter is in contradiction with the CISG, the presumption is that the parties intended to derogate from the CISG on that particular question.*" [ICC CASE NO. 11333 OF 2002]. In that case, the Arbitral Tribunal ruled that the parties can derogate the CISG's provision on warranty and enter into binding agreement that the seller guarantees only 12 months of warranty (as opposed to 24 months under the CISG Art. 39). Another Tribunal has decided that CISG provision on liability can also be derogated under Art. 6. [UKRAINE 2005 CASE NO. 48]. Further, the Civil Court of Basel, Switzerland has decided that, under Art. 6 of the CISG, parties can "*derogate from or vary the effect of any of its provisions… [and] may therefore reach agreements on additional remedies which are not expressly contained in the CISG.*" [PACKAGING MACHINE CASE].

92. The only mandatory provision of the CISG that parties may not derogate is Article 12 (as explicitly provided in Article 6). The other provisions are default rules that may be derogated and contracted around when parties adopt contrary or alternative provisions in their written agreements.

93. In this case, Article 79(1) of the CISG states that a "*party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.*" This is an extremely broad hardship clause that exempts a party from liability for breach of contract when the impediment to performance is unexpected and beyond the party's control. In contrast, Clause 12 of the present Contract only exempts a party from "*hardship, caused by additional*

health and safety requirements or comparable unforeseen events making the contract more onerous." This contractual clause is much narrower than the CISG provision and limits exemption to health and safety requirements. Therefore, clause 12 of the Contract constitutes a derogation of Article 79 of the CISG, and, as IV.A has already explained, does not entitle the CLAIMANT to adaptation.

C. Even if Clause 12 of the Contract does not constitute a derogation, Article 79 of the CISG does not entitle the CLAIMANT to an adaptation.

94. Since Clause 12 of the Contract constitutes a derogation of the CISG, Article 79 should not apply in this case. But even if the tribunal determines that Clause 12 does not derogate the CISG, Article 79 does not entitle CLAIMANT to an adaptation because the tariff increase does not meet the requirement of an "*impediment*."

1) The legislative history of Article 79 of the CISG implies an extremely narrow scope to the term "impediment."

95. CLAIMANT explicitly acknowledges that under the CISG, the term "*impediment*" requires "*an objectively identifiable barrier to promisor's performance,*" and that the CISG "*provides a limited scope*" and a "*narrow definition*" of impediment. [CL. MEM. PARAS 100-101]. RESPONDENT agrees that under the CISG, a party wishing to be exempt from performance is subject to an extremely narrow definition of impediment.

96. Article 79 of the CISG was drafted in response to Article 74 of the 1964 Uniform Law on International Sales (ULIS), which exempts a party from performance of contractual duties if "*he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome.*" [ULIS ART. 74]. Article 74 of the ULIS was subject to widespread criticism because it was "*insufficiently clear and subjective,*" leading to easy exemption from performance. [CISG-AC OPINION NO. 7 N. 33]. As a result, Article 79 of the CISG substitutes the term "*circumstances*" for "*impediment,*" "*so that the conditions for exemption are more narrowly and objectively identified.*" [CISG-AC OPINION NO. 7 N. 33].

97. Further, the working group revising the ULIS explicitly explained that the substituting "*impediment*" for "*circumstances*" was intended to exclude the scenario where "*the obligor could escape liability when performance had become unexpectedly difficult for reasons beyond his control.*" [CISG-AC OPINION NO. 7 N. 33]. Therefore, the legislative history of the CISG implies an extremely narrow scope of "*impediment*" within the meaning of Article 79, and the fact that performance is unexpectedly difficult cannot excuse a party from performance.

98. The CISG Advisory Council adopts the following standard for determining whether an event constitutes an impediment within the meaning of Article 79: "*the notion of 'impediment' under Article 79 points to an* insurmountable *obstacle that is unrelated to the more flexible notions of hardship, impracticability, frustration, or the like*." [CISG-AC OPINION NO. 7 CMMT. 28 (emphasis added)]. The Advisory Council further observes that under this notion of "*impediment*," "*the Convention does not favor an easy exemption from nonperformance*" [CISG-AC OPINION NO. 7 CMMT. 28]. Under this standard, only an insurmountable obstacle will exempt a party from performance of his or her contractual duties, and the term impediment cannot be interpreted according to more flexible contract law concepts of hardship, impracticability, or frustration.

2) A 30% tariff increase does not constitute an impediment under Article 79 of the CISG.

99. Under the notion of impediment adopted by the CISG Advisory Council, a mere increase in tariffs does not constitute an insurmountable obstacle and therefore cannot be considered an "*impediment*" within the meaning of Article 79 of the CISG. A 30% increase in tariffs may strain a party's profitability in carrying out his or her contractual obligations and may even make performance unexpectedly difficult, thereby exempting the party from performance under Article 74 of the 1964 ULIS. Article 79 of the CISG, however, was intended precisely to exclude this type of scenario from constituting an impediment: tariff increases do not present an insurmountable obstacle to performance (unless the tariff is so high that performance is practically impossible, e.g., 1000%). Scholars have also commented that exemption from liability on the ground of *any* economic or financial hardship is beyond the scope of sales law. [B. NICHOLAS 66]. Since the term "*impediment*" should be interpreted extremely narrowly, a 30% increase in tariffs does not constitute an insurmountable obstacle or an impediment.

100. The best evidence that Equatoriana's retaliatory tariffs do not impose an impediment or insurmountable obstacle to CLAIMANT'S performance comes from CLAIMANT'S behavior itself. On **23 January 2018**, CLAIMANT "*complied with its delivery obligation and delivered the remaining 50 doses...before an agreement on the new price had been reached.*" [CL. NOTICE, PO 2, P. 6, PARA 13]. Since CLAIMANT in fact fulfilled its contractual duties without obtaining a higher price, the 30% tariff clearly did not impose an insurmountable obstacle to performance. Whatever difficulties the tariff created, CLAIMANT was in fact able to overcome them and perform.

101. CLAIMANT does not address how the tariff increase meets the insurmountable obstacle standard of "*impediment*" adopted by the CISG Advisory Council, nor does CLAIMANT provide sufficient evidence that the tariff increase goes beyond the unexpectedly difficult standard that Article 79 of the CISG was intended to replace. Instead, CLAIMANT resorts to conclusory statements: for example, CLAIMANT states that "*CLAIMANT'S situation will prevail even under this narrow definition due to the circumstances CLAIMANT is faced with*" [CL. MEM. PARA 101]. CLAIMANT also argues that "*the circumstances of the contract have substantially changed so that fulfilling the agreement would be economically detrimental taking also into account the CLAIMANT'S current financial situation.*" [CL. MEM. PARA 104]. The mere fact that performance would be "*economically detrimental*" is insufficient to entitle CLAIMANT to an adaptation under Article 79: financial detriment does not by itself constitute an insurmountable obstacle.

102. Since the 30% tariff does not constitute an insurmountable obstacle and an impediment within the meaning of Article 79, the CISG does not entitle CLAIMANT to an adaptation of the contract.

V. THE AMOUNT OF $1.250.000 IS NOT REASONABLE COMPENSATION FOR THE Claimant'S HARDSHIP.

103. CLAIMANT, the seller, bears the burden of paying all duties under DDP. Even when sellers use DDP terms without necessarily intending to adopt the burden of paying duties, arbitral tribunals assign the burden to sellers under standard Incoterms 2010 rules.

104. Parties must explicitly contract to shift the risk burden. Arbitral tribunals have assigned the burden to the seller if parties do not make their intent explicit, as is the case here.

105. Even if this tribunal accepted CLAIMANT'S interpretation of DDP contrary to all accepted understandings of Incoterms, CLAIMANT still should bear the burden as the cheaper insurer and superior risk bearer, due to its control over the delivery process.

A. CLAIMANT bears the burden of paying all duties under DDP.

106. CLAIMANT argues that DDP was adopted merely to expedite delivery to RESPONDENT, "*not in any circumstance to burden the CLAIMANT*." [CL. MEM. PARA 87]. This assertion defies the accepted understanding of the DDP under Incoterms.

107. Delivered duty paid is a term explicitly defined in the Incoterms 2010 rules by the International Chamber of Commerce. It states that "*[t]he 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*." [INCOTERMS 2010]. Commentators have agreed that the official definition of DDP puts the burden on the seller to obtain customs import licenses and pay any export taxes. [BRUNNER 131-132].

108. The Incoterms 2010 themselves caution that "*[i]f the parties wish the buyer to bear all risks and costs of import clearance, the [separate] DAP rule should be used*." [MALFLIET 167-168]. Commenters have reiterated that terms other than DDP should be used if the buyer is to assume all risks and costs of the import. [GABRIEL].

109. "*When parties adopt[] an Incoterm abbreviation, parties include in the contract the detailed rules outlined in the Incoterms.*" [WINSOR 90]. Thus, the usage of Incoterms such as DDP are a default rule that can only be modified through explicit contractual terms. "*Any VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sales contract*." [BERGAMI 7].

110. When Incoterms are used even when parties have not specifically provided for the inclusion of Incoterms, arbitral tribunals have still relied on the Incoterms definition as part of the international trade lexicon. [CASE 7903].

111. When parties use Incoterms in a way contradictory to the definition of the term and intent is unclear, arbitral tribunals have relied on the Incoterms rule, rather than the altering rule. For example, one ICC tribunal interpreted the term "*delivered duty paid but excluding taxes and import duties*" according to the Incoterms definition of delivered duty paid, and thus placed the full tax and import duty burden on the seller. [CASE 7903].

112. Here, the parties used DDP without explicitly contracting to change the DDP definition. In paragraph 8 of the final Sales Agreement, the term DDP is used without any modification at all. [CL. EX. C5].

113. There are no indicators anywhere of the parties' mutual intent regarding who should pay import duties, other than in the usage of the term DDP. CLAIMANT accepted DDP and asked to be relieved from all risks associated with DDP delivery. However, this option was not acceptable for RESPONDENT, who would pay a higher price for receiving nothing. [RES. ANSWER, PO 2, P. 30, PARA 4].

114. Thus, CLAIMANT instead negotiated to add a hardship clause, separately from accepting the DDP terms in exchange for a higher price. [CL. EX. C4]. The parties' inclusion of the hardship clause did not explicitly alter the DDP rules.

115. This tribunal should abide by the generally accepted understanding of the Incoterms definition of DDP to place the burden of paying duties on CLAIMANT, the seller. There was no explicit alteration of the Incoterms DDP definition nor any intent to modify the default distribution of the risks associated with delivery.

116. Even if the accepted usage of the Incoterms definition of DDP is not used, this arbitral tribunal should still place the burden of paying duties on CLAIMANT, the superior risk bearer.

117. From a rational cost-calculation standpoint, "*[u]nder the* rule of superior risk bearer, *non-performance should be excused if the obligee is better able to bear the risk, and non-performance should not be excused if the obligor is the superior risk bearer. . . . The factors relevant to determining which party to the contract is the* cheaper insurer *are (1) risk-appraisal costs and (2) transaction costs*." [BRUNNER 143-144].

118. Because CLAIMANT, the seller, had full control over the delivery means, it was the superior risk bearer. It was the cheaper insurer because it had much greater experience dealing with delivery and export and import documentation. [CL. EX. C3]. Thus, CLAIMANT was the party best placed to avoid the risks of delivery. For policy reasons, the arbitral tribunal should place the burden for paying duties on CLAIMANT.

119. Finally, CLAIMANT'S burden to pay customs duties is reinforced by Article 6.1.14(b) UPICC, which "*basically corresponds to the general principle that each party is obliged to procure those public authorizations which are necessary for the performance of its contractual obligations.*" [BRUNNER 127].

B. CLAIMANT is not entitled to the full $1.250.000.

120. CLAIMANT also did not fulfill its duty to mitigate the losses. CLAIMANT could have acted in several ways to mitigate or avoid the tariffs. For instance, it could have discussed its predicament with tariff officials to contest their imposition. Tellingly, CLAIMANT did not exhaust its administrative remedies in appealing the tariff costs. CLAIMANT failed to exercise legitimate arguments to attempt to prevent the imposition of the tariffs in the first place. CLAIMANT could have argued that agricultural tariffs should not have applied to horse semen, or that preexisting sales agreements should have been grandfathered due to the previous lack of tariff regime, to pick just a few arguments. But CLAIMANT never acted in any way to mitigate or avoid these tariff losses. Its knowledge *ex post* that these arguments may not have been successful does not excuse CLAIMANT from failing to even attempt to avoid its losses. [PO 2, P. 58, PARA 27].

121. CLAIMANT could have also acted to mitigate its losses by clarifying the extent of the tariffs with customs officials or RESPONDENT sooner. CLAIMANT never took any action to ascertain whether the scope of the tariffs covered horse semen, though the tariffs were announced on **19 December 2017** and publicized shortly thereafter. The sale of products derived from horses, an unequivocal form of livestock, should have at least raised the specter whether agricultural good tariffs applied. [SUPRA, PARA 88]. This duty is underscored for a seller who has accepted the risks of DDP delivery, as CLAIMANT did. CLAIMANT unquestionably had full knowledge of the tariffs but failed in

its duty to attempt to mitigate or avoid the losses beforehand by discussing these tariffs with customs officials or RESPONDENT [PO 2, P. 58, PARA 26].

122. CLAIMANT could have also worked harder to clarify the position of both parties before making the choice to deliver the semen if it had been concerned with the relative cost distribution. If neither party is proven to be at fault for the loss, then concepts of justice and fairness have been used to impose liability on the party who should have been more punctilious and demanding. [SAIDOV 205]. Here, where neither party was involved in the imposition of tariffs, CLAIMANT should have been more punctilious in its obligations as the guarantor of DDP delivery.

123. Finally, even assuming *arguendo* that CLAIMANT should receive some amount to counteract the tariffs costs, the amount that CLAIMANT is asking for unreasonable. The adaptation should only cover the excessive portion of the costs, not the entire costs, reflecting at least to some extent the basic principle laid down in Articles 6.2.1 of the UNIDROIT Principles. Article 7.4.3 paragraph 3 of the UNIDROIT Principles indicates that "*[w]here the amount of damages cannot be established with a sufficient degree of certainty the assessment is at the discretion of the court*." In cases with fixed prices, the disadvantaged party generally may only claim an increase of the price covering excessive costs which makes performance bearable. [Brunner at 492-502]. Though some arbitrators require "*rigorous best evidence proof*" of how much to adapt prices, others use reasonable estimates. [WAINCYMER 1119-1120].

124. CLAIMANT asks for $1.250.000—the full amount of the tariffs, minus a 5% profit. [CL. NOTICE, PO 2, P. 8; CL. EX. C8]. CLAIMANT fails the "*rigorous best evidence proof*" standard in its argument for receiving the full $1.250.00. It has not provided enough evidence to show that the full $1.250.000 is required in order to avoid financial endangerment. Although it is true that some of CLAIMANT 's plans to make an increased profit in 2018 are jeopardized by bearing the full $1.250.000, it retains other options for securing additional sources of funding such as selling an unrelated part of its business. [PO 2, P. 59, PARA 29]. Under the best evidence standard, CLAIMANT should be barred from receiving any sum *in toto* due to its insufficient evidence presentation.

125. Furthermore, even under the laxer reasonable estimate standard, CLAIMANT should still not be awarded the full requested $1.250.000. CLAIMANT has been enduring financial losses since 2014

due to its past poor business judgments. [PO 2, P. 59, PARA 29]. The fact that it made another unreasonable business judgment in this case should not mean that it is essentially off the hook, while its trading partner RESPONDENT suffers the huge bulk of costs from the tariffs. CLAIMANT forecasted a total profit over 2017 and 2018 of $480.000 USD. [PO 2, P. 59, PARA 29]. At the least, it should bear $480.000 of the total $1.500.000 tariff cost, which it can easily afford as lost profit. Thus, at most, RESPONDENT should be responsible for only $1.020.000 of the costs.

REQUEST FOR RELIEF

126. For the above reasons, RESPONDENT respectfully requests the Tribunal to find that:

1. Danubian Law governs the Arbitration Agreement.
2. The Tribunal does not have power to adapt the Arbitration Agreement.
3. CLAIMANT is not entitled to submit illegally obtained evidence from a separate HKIAC proceeding.
4. CLAIMANT is not entitled to an additional payment of US $1.250.000 from the RESPONDENT, nor to any other amount resulting from an adaptation of the price.